THE SUPREME COURT
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FOREWORD:
A JUDGE ON JUDGING: THE ROLE OF A SUPREME COURT IN A DEMOCRACY

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I. INTRODUCTION

I am not a philosopher. I am not a political scientist. I am a judge — a judge in the highest court of my country's legal system. So I ask myself a question that many supreme court judges — and, in fact, all judges on all courts in modern democracies[1] — ask themselves: what is my role as a judge? Certainly it is my role — and the role of every judge — to decide the dispute before me. Certainly it is my role, as a member of my nation's highest court, to determine the law by which the dispute before me should be decided. Certainly it is my role to decide cases according to the law of my legal system. But is that all that can be said about my role? Are there criteria for assessing the quality of my work as a judge? Certainly no such assessment should be based on the aesthetic quality of my writing.[2] Nor should the criterion be the number of sources I cite in my decisions. But then what would be a meaningful criterion? What is my role, and do I even have a "role"

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[1] *See generally* Michael Kirby, *Judging: Reflections on the Moment of Decision*, 18 AUSTL. B. REV. 4 (1999); Beverley M. McLachlin, *The Charter: A New Role for the Judiciary?*, 29 ALTA. L. REV. 540 (1991) [hereinafter McLachlin, *The Charter*]; Beverley M. McLachlin, *The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?*, 39 U. N.B. L.J. 43 (1990) [hereinafter McLachlin, *The Role of the Court*]; Georghios M. Pikis, *The Constitutional Position and Role of the Judge in a Civil Society*, COMMONWEALTH JUD. J., Dec. 2000, at 7.

[2] Although aesthetics are important, as Richard Posner's discussion of Justice Cardozo indicates. *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 10, 42, 143 (1990).

beyond merely deciding the dispute before me according to the law? These questions occupy me daily as I enter the courtroom and take my seat on the bench. In my twenty-four years of service on the Supreme Court of Israel, I have written thousands of opinions. But am I a "good" judge?

I am opening the issue of the *Harvard Law Review* analyzing last Term's United States Supreme Court decisions. What are the criteria for judging the Justices who wrote those opinions? This question is important not merely to judges who want to assess their performance, but to the system as a whole. The answer determines the criteria for developing the law and provides a basis for formulating a system of interpretation of all legal texts. Establishing criteria for judging judges is particularly important in view of the frequent attempts to dress up political problems in legal garb and place them before the court. De Tocqueville characterized this tendency to legalize political questions 170 years ago as a quirk of the United States.[3] Today, however, this phenomenon is common in modern democracies.[4] How are we judges to deal with political problems that have taken on a legal character?

The questions I wish to consider are not new. They are as old as judging itself and they have accompanied various legal systems in their progressions throughout history. Sometimes they can be found at the center of public debate. Sometimes they are marginalized. The time has come to reconsider these questions. There are four main reasons for their timeliness.

First, democracy is celebrating its victories over Nazism and Fascism in the Second World War and over Communism at the end of the twentieth century. New countries have joined the community of democracies. Many of them wish to reexamine the nature of modern democracy,[5] which is not based solely on the rule of people through their representatives (formal democracy), but also on human rights (substantive democracy). A key historical lesson of the Holocaust is that the people, through their representatives, can destroy democracy and human rights. Since the Holocaust, all of us have learned that human rights are the core of substantive democracy. The last few decades have been revolutionary, as we have learned the hard way

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[3] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 97 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835).

[4] *See, e.g.*, McLachlin, *The Role of the Court*, *supra* note 1, at 49–50 (applying de Tocqueville's observation to Canada).

[5] *See generally* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin P. Totsky ed., 1993).

that without protection for human rights, there can be no democracy and no justification for democracy. The protection of human rights — the rights of every individual and every minority group — cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion. Consequently, the question of the judicial branch's role in a democracy arises.

Second, in present times democracy faces the emergent threat of terrorism. Passive democracy has transformed into defensive democracy. All of us are concerned that it not become uncontrollable democracy. As judges, we are aware of the tension between the need to protect the state and the rights of the individual. This ever-present tension intensifies and becomes more pronounced in times of national emergency. What is the role of the judge in these special situations?[6]

Third, since the Second World War there has been a better understanding of the nature of judging.[7] Legal realism, positivism, the natural law movement, the legal process movement, critical legal studies, and the movements to integrate other intellectual disciplines into law have provided new tools for understanding the complexity of the judicial role. I find much truth in all of these approaches. Nonetheless, like the human condition, legal reality is too complex to be adequately captured by any one of these schools of thought. In my opinion, it is time for what I call an "eclectic" reexamination of the various theories about the judicial role. This reexamination is timely now, as globalization exposes us to ideals and thoughts that transcend national boundaries and legal systems.[8]

Finally, a survey of the de facto status of the judicial branches in the various democracies shows that since the end of the Second World War, the importance of the judiciary relative to the other branches of the state has increased. People increasingly turn to the judiciary, hoping it can solve pressing social problems. Several questions therefore arise: Is this enhanced judicial status appropriate? Have judges taken on too much power? Has the separation of powers become blurred? Indeed, some claim that, in recent years, the gap has widened between the practices and public expectations of democratic supreme courts, on the one hand, and the intellectual-normative principles that are supposed to guide the courts, on the other. This gap is dangerous, because, over time, it will likely undermine public confidence in judges. Some now argue that judges are too active, while others argue that they are too self-restrained. These criticisms come from all corners of society. In recent years, for example, accusations that the U.S. Su-

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[6] *See infra* Part VI.

[7] *See generally* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (2d ed. 1999).

[8] *See generally* WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000).

preme Court is too activist have swelled.[9] Such allegations should be evaluated within the framework of a supreme court's role in a democracy. A reexamination is therefore needed, and conclusions must be drawn — both about what can be demanded of judges and what can be expected from the normative frameworks within which they operate.

These questions do not arise in the "easy cases"[10] in which there is only one answer to the legal problem, and the judge has no choice but to choose it. Such cases do not generally reach the highest court at all. But how am I to decide the "hard cases," the cases in which the legal problem has more than one legal answer? These are the cases that find their way to the highest court, and I have discretion in resolving them.[11] My decision may be legitimate, but how do I know if it is the proper one? What must I do in order to fulfill my role? What *is* my role?

One might try to dismiss my question with the philosophical argument that there are no "hard cases" and that judicial discretion in this sense does not exist. That answer is far from satisfactory. Even Professor Ronald Dworkin — proponent of the theory that every legal problem has only one correct answer[12] — merely says that there are better and worse judicial decisions.[13] He propounds a complete theory describing how the judge Hercules should make the better decision in "hard cases." Is Hercules the proper model by which we should judge?[14] Whatever the philosophical answer may be, the reality is that the large majority of judges on supreme courts think, as I do, that in some cases they do have a choice.[15] In such cases, it is not that their decisions legitimate their rulings, but rather that their decisions are based on a legitimacy that precedes the rulings. Their judicial discretion is an expression of this legitimacy. How, then, should judicial discretion be exercised? When does exercising judicial discretion advance the role of a judge, and when does it depart from the proper path? What is the proper path?

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[9] *See, e.g.*, Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 130–58 (2001).

[10] With respect to the easy cases, see AHARON BARAK, JUDICIAL DISCRETION 36–39 (Yadin Kaufmann trans., 1989) (1987).

[11] *See generally* MARISA IGLESIAS VILA, FACING JUDICIAL DISCRETION: LEGAL KNOWLEDGE AND RIGHT ANSWERS REVISITED (2001).

[12] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977); Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 624–25 (1963).

[13] Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY 359, 367 (Michael Brint & William Weaver eds., 1991); *see also* TOM BINGHAM, THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES 25 (2000).

[14] On Dworkin's Hercules, see RONALD DWORKIN, LAW'S EMPIRE 239–40 (1986).

[15] *See* ALAN PATERSON, THE LAW LORDS 190–95 (1982).

I reject the contention that the judge merely states the law and does not create it. It is a fictitious and even a childish approach.[16] Montesquieu's theory that the judge is "no more[] than the mouth that produces the words of the law"[17] is similarly discredited. I suspect that most supreme court judges believe that, in addition to stating the law, they sometimes create law. Regarding the common law, this is certainly true: no common law system is the same today as it was fifty years ago, and judges are responsible for these changes. This change involves creation. The same is true of the interpretation of a legal text. The meaning of the law before and after a judicial decision is not the same. Before the ruling, there were, in the hard cases, several possible solutions. After the ruling, the law is what the ruling says it is. The meaning of the law has changed. New law has been created. What is my role, as a judge, in this creative process?

When I refer to the "role" of the judge, I do not mean to suggest that the judge has a political agenda. As a judge, I have no political agenda. I do not engage in party politics or politics of any other kind. My concern is with judicial policy; that is, with formulating a systematic and principled approach to exercising my discretion. I ask whether judges in supreme courts, who set precedent for other courts, have (or should have) a judicial policy with regard to the way we exercise our discretion. I wish to examine the judicial philosophy underlying our role as judges in the highest courts of our democracies.[18]

Different judges have varying answers to the question that I am posing. These differences stem from variances in education, personalities, responses to the world around us, and outlooks on the world in which we live. This is only natural. Each judge is a distinct world unto himself or herself, and we would not wish it otherwise. Ideological pluralism, not ideological uniformity, is the hallmark of judges in democratic legal systems. Diverse judges reflect — but do not represent — the different opinions that exist in their societies. But I think many of us agree that the question I have posed is central to our function as judges, even if we disagree about its answer. Our judicial pol-

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[16] *See* Bora Laskin, *The Role and Functions of Final Appellate Courts: The Supreme Court of Canada*, 53 CAN. B. REV. 469, 477–80 (1975); Anthony Lester, *English Judges as Law Makers*, 1993 PUB. L. 269, 269 (quoting Reid, *infra*, at 22); Lord Reid, *The Judge as Law Maker*, 12 J. SOC'Y PUB. TCHRS. L. 22 (1973).

[17] MONTESQUIEU, THE SPIRIT OF LAWS 209 (Thomas Nugent trans., Univ. Cal. Press 1977) (1750).

[18] Justice Cardozo performed similar examinations — with great success — in his books, particularly in BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). *See* POSNER, *supra* note 2, at 32 (noting that Cardozo's nonjudicial writings are a contribution to jurisprudence, but adding that "they are not only that. They are also a judge's effort to articulate his methods of judging."). *The Nature of the Judicial Process* is the first systemic effort by a judge to explain how judges reason and to articulate a judicial philosophy.

icy and our judicial philosophy are fundamental to us, since they guide us in our most difficult hours. Every supreme court judge has difficult hours. They mold us and give us self-confidence. They inform us that our strength as judges is in understanding our limitations. They teach us that, more than we have answers to the difficult legal problems that confront us, we have questions regarding the path we should take. They make us understand that, like all human beings, we err, and we must have the courage to admit our mistakes. And they lead us to the judicial philosophy that is proper for us, for there is nothing more practical than good judicial philosophy.

My purpose in this Foreword is to suggest answers to the questions I have posed. I wish to present my views on the role of a supreme court and its judges in a democracy. My aim is to describe the judicial policy and judicial philosophy that guide me. I do not naïvely claim that my position reflects an absolute truth. Democratic countries differ from one another, and what is good and proper for one may not be good and proper for another.[19] I claim only that it is a legitimate approach, and, in my opinion, the most appropriate one for the Israeli legal system of which I am a part.[20]

The Israeli legal system is a young system, albeit one with deep historical roots that reflect its Jewish values. It is a legal system that guards its democratic nature despite the existential struggle it has faced since its founding. It is a system composed of immigrants and the descendants of immigrants from countries that, for the most part, had no democratic tradition. It is also part of the Middle East, whose democratic tradition is weak. Although it is certainly a unique legal system, I hope that many supreme court judges in other democratic countries view their work in their own legal systems similarly. I hope that even those who do not fully accept my outlook and conclusions are prepared to walk with me part-way, because they agree with my general direction, if not with the speed of travel or the final destination.

My proposed judicial philosophy applies only to the supreme court judge in a democracy. I do not address societies that are not democratic.[21] The democratic nature of a regime shapes the role of all

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[19] *See* Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216 (1999).

[20] For a discussion of the different situation in England, see Lord Hoffman, *Human Rights and the House of Lords*, 62 MOD. L. REV. 159 (1999).

[21] For discussions of this topic, see INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., 1991) (1987); and MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES IN LEGAL HISTORY IN NAZI GERMANY (Thomas Dunlap trans., 1998) (1994). South Africa is an additional example. For a discussion of the functioning of its judges during apartheid, their behavior, and the way they should have behaved, see DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991); DAVID DYZENHAUS, JUDGING THE

branches of the state. It also directly affects the judiciary. For example, a central precondition for understanding the judicial role is the independence of the judiciary. This condition usually does not exist in regimes that are not democratic. Furthermore, the character of the regime affects the interpretive system that the judge should adopt. A judge should not advance the intent of an undemocratic legislator. He must avoid giving expression to undemocratic fundamental values. Indeed, my entire theory about the role of the judge and the means he employs is grounded in the character of a democratic regime. With a regime change, the view of the judge's role and the way it is exercised also change. Moreover, I am examining my role as a judge in a modern democracy — that is, as a judge at the beginning of the twenty-first century. I do not think that it would have been possible to formulate a judicial philosophy like my own a hundred years ago or more.[22] And my philosophy will inevitably no longer be valid in a hundred years' time. Indeed, any perspective on the judicial role is a function of place and time. It is influenced by its environment. It is relative and incomplete. It changes periodically. Therefore, recognition and realization of the judicial role will vary with different democracies at different times.

While I focus mainly on supreme courts of legal systems that belong to the common law family, such as the United States, England, Canada, Australia, and a number of mixed jurisdictions, such as South Africa, Scotland, Cyprus, and Israel, I think that what I have to say also applies substantially to other legal systems, such as the Roman-Germanic family, including France, Italy, Germany, Austria, and the family of Scandinavian systems. I believe that my approach is also valid for legal systems that have emerged from the family of socialist systems, such as Russia, Hungary,[23] Poland, and the Czech Republic.[24]

After this Introduction, in Part II of this Foreword, I will lay the foundation for the two central elements of the judicial role beyond actually deciding the dispute, as I see them. One element is bridging the gap between law and society. I regard the judge as a partner in creating law. As a partner, the judge must maintain the coherence of the legal system as a whole. Each particular creation of laws has general implications. The development of a specific common-law doctrine ra-

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JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (1998) [hereinafter DYZENHAUS, JUDGING THE JUDGES].

[22] Of course, many aspects of my approach are not unique to contemporary life. The need to bridge the gap between law and society, for example, is not unique to the present. In the past, too, this was understood to be central to the role of judging.

[23] *See generally* LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (2000) (anthologizing selected decisions of the Constitutional Court of the Republic of Hungary).

[24] *See generally* SCHWARTZ, *supra* note 5; TEITEL, *supra* note 5.

diates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked. The judge is a partner in creating this system of law. The extent of this partnership varies with the type of law being created. In creating common law, the judge is a senior partner. In creating enacted law, the judge is a junior partner. Nonetheless, he is a partner and not merely an agent who carries out the orders of his principal. The second major task of the judge is to protect the constitution and democracy. In my opinion, every branch of government, including the judiciary, must use the power granted it to protect the constitution and democracy. The judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy, and substantive democracy, as expressed in basic values and human rights. I will conclude Part II by considering a critique of this view and the responses to it.

In Part III, I will discuss the preconditions for carrying out the complex role of the judge. I will consider the needs for judicial independence (personal and institutional), judicial objectivity, and the maintenance of public confidence in the judiciary.

In Part IV, I will explore the means by which the court can fulfill its role. These means are bounded. Judges have only a few basic materials with which to build legal structures. I will focus on constitutional and statutory interpretation as instruments for realizing the judicial role by presenting purposive interpretation as the proper system of interpretation. I will then discuss the fundamental principles of the legal system as an instrument for realizing the role of the judge and will analyze the theory of balancing as a complex and sensitive judicial tool. I will also discuss a number of tools and concepts that help the judge fulfill his role, including justiciability, standing, comparative law, and a good philosophy.

In Part V, I will discuss the reciprocal relationship between the supreme court and other branches of the state in a democracy. I will elaborate, in this context, my perspective on the concepts of separation of powers and the rule of law. I will consider the relationships among the judiciary, the legislature, and the executive. This relationship is perpetually tense because each branch comprises a separate but interconnected part of the state. This tension should be based on each branch's respect for the other branches and a recognition of their centrality. The court must engage in a dialogue with the legislature and executive. In this context, I will analyze the principle of separation of powers and its implications for judicial review of legislative decisions (as expressed in statutes and elsewhere). I will also examine the scope of judicial review of administrative actions.

In Part VI, I will focus on terrorism, one of the most important problems that supreme courts in democracies face today. In this con-

text, I will develop the concept of defensive democracy — with the supreme court at its center — as a response to the phenomenon of modern terrorism. In this area, regrettably, the Israeli Supreme Court has acquired a certain expertise. Numerous legal problems related to a defensive democracy's battle with terrorism reach the doors of the Israeli Supreme Court. We evaluate them ex ante, as the court of first and last instance.

It goes without saying that the opinions expressed in this Foreword are my personal opinions. They do not reflect the opinions of the Supreme Court of Israel. As is evident from the decisions I cite, in some cases my view reflects Israeli case law, while in other cases I write a minority opinion.

In this Foreword, I cite many opinions that I have written — perhaps more than is customary. I have done so in order to indicate that I have put my theoretical viewpoints to the test of judicial reality by applying them in actual opinions. In some instances, my views have become binding caselaw. In others, they were merely obiter dicta. In still others, they were in minority opinions.

Finally, I must confess that, as I write this Foreword, I feel a certain unease. United States public law in general, and United States Supreme Court decisions in particular, have always been, to me and to many other judges in modern democracies, shining examples of constitutional thought and constitutional action. The United States is the richest and deepest source of constitutionalism in general and of judicial review in particular. We foreign jurists all look to developments in the United States as a source of inspiration. I therefore asked myself whether it was appropriate for a foreign judge to express an opinion, in an American forum, about issues on which most of the experts are American. I nevertheless accepted the task, out of deep appreciation for the impressive accomplishments of United States constitutional law and of its Supreme Court in particular. If I am occasionally critical of the American Supreme Court, it is because I regret that it is losing the central role it once had among courts in modern democracies.[25]

II. THE ROLE OF A SUPREME COURT

The primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's primary concern is broader,

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[25] *See generally* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization, the Rehnquist Court, and Human Rights*, *in* THE REHNQUIST COURT: A RETROSPECTIVE 234 (Martin H. Belsky ed., 2002) (reviewing the Rehnquist Court's international impact and critiquing its provincialness).

systemwide corrective action.[26] This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy.[27] The judge is charged with both jobs simultaneously, and in most cases, they are complementary.[28] But during various periods of history, one of them has taken precedence over the other. I think that in light of the increasing recognition of judicial review of the constitutionality of statutes since the Second World War and of the inclusion of human rights provisions in new constitutions, the second role, preserving democracy, has grown in importance. This is certainly the case in the current age of defensive democracy, although the second role has always existed, particularly in the field of private law. Of course, these two roles are not unique to the judiciary. Every branch of government in a constitutional democracy must protect that institution and work to bridge the gap between law and society. The individual branches of government are partners in fulfilling these roles.[29] I emphasize the role of the judiciary to point out that the judiciary shares responsibility for these tasks, and I wish to examine the methods that the judiciary employs to carry them out.

A. Bridging the Gap Between Law and Society

The law regulates relationships between people. It prescribes patterns of behavior. 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.[30] It is based on a given factual and social reality that is constantly changing.[31] Sometimes the change is drastic, sudden, and easily identifiable. Sometimes the change is minor and gradual, and cannot be noticed without the proper distance and perspective. Law's

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[26] *See* Laskin, *supra* note 16, at 475; William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 9–10 (1986).

[27] Of course, courts have other roles. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1852–76 (2001) (surveying U.S. state court practices such as issuing advisory opinions, deciding political questions, and engaging in judicial administration).

[28] It can be argued that there is a discrepancy between these two roles. According to this view, bridging the gap between law and society requires the judge to give expression to modern developments, whereas in protecting the constitution and democracy, the judge must protect *against* modern developments. *See* Antonin Scalia, *Modernity and the Constitution*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313, 315 (Eivind Smith ed., 1995). This outlook is unacceptable. The two roles require a recognition of modern developments, while giving expression to principles and fundamentals, and not to passing vogues.

[29] *See* Lorraine E. Weinrib, *Canada's* Charter of Rights*: Paradigm Lost?*, 6 REV. CONST. STUD. 119, 124 (2002).

[30] *See* Brian Dickson, *A Life in the Law: The Process of Judging*, 63 SASK. L. REV. 373, 388 (2000).

[31] *See* BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 10–11 (Greenwood Press 1970) (1928).

connection to this fluid reality implies that it too is always changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in 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,[32] responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs.[33] A thousand years of common law are a thousand years of changes in the law in order to adapt it to the needs of a changing reality.[34] The judge is the primary actor in effecting this change.[35] He is the senior partner in making common law. The legislature is the junior partner. Its role is to correct mistakes in case law or in the margins of case law, and not to try to replace the judge in his primary role as developer of the common law. Similarly, the history of legislation is the history of adapting law to society's changing needs. Here the main role lies, of course, with the legislature. It is the senior partner. The judge acts as a faithful interpreter of legislation. He is the junior partner.

1. *Change with Stability.* — 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 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.[36]

Stability without change is degeneration. Change without stability is anarchy. The role of a judge in a supreme court is to help bridge the gap between the needs of society and 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 that 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

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[32] *See* Rehnquist, *supra* note 26, at 1.

[33] *See, e.g.*, C.A. 207/79, Raviv Moshe Partners Ltd. v. Beit Yulis Ltd., 37(1) P.D. 533, 556 (Isr.) ("Life is in constant motion. So too is the judge. The judge must balance between stability and movement.").

[34] *See* JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 209–98 (Stanford Univ. Press 1968) (1964); JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 149–204 (1961).

[35] On the role of the common-law judge, see generally MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988).

[36] ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

mere experience.[37] 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 supreme court 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.

2. Considerations of System. — The development of law, be it common law or enacted law, must maintain normative coherence within the legal system.[38] It must reflect the fundamental values of the legal system. Every ruling must integrate into the framework of that system. As Professor Lon Fuller explains:

> 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.[39]

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.[40] Change generally should occur by evolution, not revolution.[41] We are mostly concerned with continuity, not discontinuity. Judicial activity — according to the attractive analogy of Professor Dworkin — is like several coauthors writing a book, one after another.[42] 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 ensuring historical continuity. The

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[37] *But see* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1990) (1881) ("The life of the law has not been logic: it has been experience.").

[38] *See* BARAK, *supra* note 10, at 152; NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1993).

[39] LON L. FULLER, ANATOMY OF THE LAW 94 (1968).

[40] *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).

[41] *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.").

[42] *See* DWORKIN, *supra* note 14, at 229 (likening judges to collaborators in a vast "chain novel").

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.[43] 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;[44] that it reflects reason and not fiat;[45] and that it is done for proper reasons of legal policy,[46] 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.[47] Indeed, deviation from supreme court precedent is a serious matter and must be undertaken responsibly. Precedent is not immutable, but bucking established case law is not a goal in itself. Departures from precedent should be the exception, not the rule. And when a judge does depart from precedent, he should be explicit about it, taking personal responsibility for making the change. The judiciary must be transparent. Justice Douglas of the United States Supreme Court correctly noted that "[a] judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe."[48] The "burden of proof" ought to rest with whoever wishes to depart from precedent. Therefore, when the scales are balanced, we should stick with precedent.[49]

Considerations of system must also recognize the fact that, in supreme courts (and in some appellate courts, for that matter), a judge hears cases as part of a panel. A supreme court justice often asks himself whether he should write a separate opinion. My position is that I do not dissociate myself from my colleagues' positions just because I don't like the way they articulate them, or because I think I can do it better. Stylistic differences should not be grounds for writing a separate opinion.[50] Of course, if the difference of opinion is over the law, I

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43 *See* BARAK, *supra* note 10, at 166–67.

44 *See generally* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW (4th ed. 1991) (describing the extent of English judges' adherence to precedent); INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997) (comparing the extent of judicial adherence across several countries' judicial systems).

45 *See generally* Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

46 *See generally* JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983) (examining different paradigms of the judicial role in light of the value judgments inherent in policy decisions).

47 *See* Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12 (1966).

48 William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949).

49 *See* BARAK, *supra* note 10, at 259.

50 *See* Schaefer, *supra* note 47, at 10.

will express my opinion, even if it is a dissent.[51] Having said that, when the issue arises again, I will not necessarily restate my dissent. For issues in which stability is actually more important than the substance of the solution — and there are many such cases — I will join the majority, without restating my dissent each time. Only when my dissenting opinion reflects an issue that is central for me — that goes to the core of my role as a judge — will I not capitulate, and will I continue to restate my dissenting opinion: "Truth or stability — truth is preferable."[52]

Beyond regard for systemwide concerns, a judge must consider his own case law. Over the years, a supreme court judge who presides for a long period of time creates a "system" of his own that reflects his judicial and legal policy. These are the "footprints"[53] judges leave in the field of law. As a rule, they must follow their own footprints, unless there is a proper reason for departing from them. The "burden" in this regard rests with those who wish to diverge from their own previously chosen paths.

3. Institutional Considerations. — In bridging the gap between law and society, the judge must take into account the institutional limitations of the judiciary.[54] Admittedly, judicial lawmaking, mostly through interpretation, is central to the role of a supreme 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.[55] By nature, then, judges create law sporadically, not systematically. The changes they make to law are partial, limited, and reactive. The issues brought before a court are, to some extent, selected randomly. 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 or she makes to the law are partial and limited. When a comprehensive and immediate change is needed in an entire

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[51] *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Stanley Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962); Roger Traynor, *Some Open Questions of the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957).

[52] C.A. 376/46 Rosenbaum v. Rosenbaum, 2 P.D. 235.

[53] Justice Breyer has attributed this expression to Justice O'Connor. *See* Stephen Breyer, *Judicial Review: A Practising Judge's Perspective*, 19 OXFORD J. LEGAL STUD. 153, 160 (1999).

[54] *See* BARAK, *supra* note 10, at 172; Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200 (1984).

[55] 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 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).

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." They usually do not look forward (legislative facts), and 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. 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 or she 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 evaluating complex polycentric questions of economic or social policy that require specialized expertise and knowledge and that may rely on assumptions concerning issues with which he or she 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.

4. 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.[56] The power of a judge to bridge the gap between law and society in a society that, like Montesquieu,[57] 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. Judicial activity is not only influenced by it; it also influences that perception.

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[56] *See* BARAK, *supra* note 10, 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).

[57] MONTESQUIEU, *supra* note 17.

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 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*?[58] Certainly the main actor in this bridging is the legislature. Its democratic nature (in the sense of its being chosen 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 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.[59] According to the agency model,[60] the judge is an agent of the legislature. He or she must act according to its instructions, like a junior officer bound to carry out the orders of his or her superior officer.[61] 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.[62] The two are branches of the state with different roles: one is legislator and the other is 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

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[58] On this question, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (proposing that judges be authorized to determine whether a statute has become obsolete).

[59] 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.

[60] *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 n.1 (2001).

[61] For this analogy, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 269 (1990).

[62] *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 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").

be implemented without being interpreted. The task of interpreting belongs to the judge. Through his or her 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.[63]

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, like a new common-law rule, must be integrated into the system. The judge is responsible for all of this. He or she must interpret the individual 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).[64] In both cases, the judge works in the interstices of legislation.[65] Of course, he or she has a different degree of freedom in each situation, but his or her role is primarily the same: to bridge the gap between law and society. A judge must therefore consider the elements discussed above —

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[63] *See* DWORKIN, *supra* note 42, 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.").

[64] *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.

[65] *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 note 46, at 17–20 (1983) (outlining a model of the judge as an "interstitial legislator").

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 impacts 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,[66] giving a statute a meaning compatible with social life in the present and, as far as can be anticipated, in the future, too.

B. Protecting the Constitution and Democracy

1. The Struggle for Democracy. — The second role of the judge in a democracy is to protect the constitution[67] and democracy itself.[68] Legal systems with formal constitutions impose this task on judges, but judges also play this role in legal systems with no formal constitution. Israeli judges have regarded it as their role to protect Israeli democracy since the founding of the state,[69] even before the adoption of a formal constitution.[70] In England, notwithstanding the absence of a written constitution, judges have protected democratic ideals for many years.[71] Indeed, if we wish to preserve democracy, we cannot take its existence for granted. We must fight for it. This is certainly the case for new democracies,[72] but it is also true of the old and well-

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66 *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9 (1994).

67 *See* Hunter v. Southam, [1984] 2 S.C.R. 145, 155 (Can.) ("The judiciary is the guardian of the constitution.").

68 *See generally* THE ROLE OF COURTS IN SOCIETY (Shimon Shetreet ed., 1988).

69 *See* Aharon Barak, *Constitutional Law Without a Constitution: The Role of the Judiciary*, *in* THE ROLE OF COURTS IN SOCIETY, *supra* note 68, at 448; Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1, 3 (1992).

70 In C.A. 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 221, the Israeli Supreme Court unanimously held that the two "Basic Laws" passed in 1992, *Basic Law: Human Dignity* and *Basic Law: Freedom of Occupation*, together with existing Basic Laws on the structure of government, are the supreme law of the land and constitute Israel's constitution. *Mizrahi Bank* subjects any new statute to judicial review under these Basic Laws. I called this development a "constitutional revolution." Some Israeli scholars have criticized my approach. *See, e.g.*, Ruth Gavison, *The Constitutional Revolution: A Reality or a Self-Fulfilling Prophecy?*, 28 MISHPATIM 21 (1997).

71 *See* STANLEY DE SMITH, LORD WOOLF & JEFFREY JOWELL, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 159–62 (1995); Sir John Laws, *The Constitution: Morals and Rights*, PUB. L. 622 (1996); Sir John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?*, PUB. L. 59, 60 (1993); Sir John Laws, *Law and Democracy*, PUB. L. 72, 81 (1995); Lord Woolf, *Droit Public — English Style*, PUB. L. 57, 67 (1995); *see also* R. v. Sec'y of State for Home Affairs *ex parte* Leech, 1994 Q.B. 198 (Eng. C.A.) ("It is a principle of our law that every citizen has a right of unimpeded access to a court. . . . Even in our unwritten constitution it must rank as a constitutional right."); R. v. Sec'y of State for Home Dep't *ex parte* Simms, 3 W.L.R. 328, 340 (A.C. 1999) (Can.).

72 *See* sources cited *supra* note 5.

established ones. The assumption that "it cannot happen to us" can no longer be accepted. Anything can happen. If democracy was perverted 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 supreme court judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that a lesson of the Holocaust and of the Second World War is the need to enact democratic constitutions and ensure that they are put into effect by supreme court judges whose main task is to protect democracy. It was this awareness that, in the post-World War II era, helped promote the idea of judicial review of legislative action[73] and made human rights central. It led to the recognition of defensive democracy[74] and even militant democracy.[75] And it shaped my belief that the main role of the supreme court judge in a democracy is to maintain and protect the constitution and democracy. As I noted in one of my opinions:

> The struggle for the law is unceasing. The need to watch over the rule of law exists at all times. Trees that we have nurtured for many years may be uprooted with one stroke of the axe. We must never relax the protection of the rule of law. All of us — all branches of government, all parties and factions, all institutions — must protect our young democracy. This

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[73] *See generally* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 45 (1971); CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds., 1993); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995); Marina Angel, *Constitutional Judicial Review of Legislation: A Comparative Law Symposium*, 56 TEMP. L.Q. 287 (1983).

[74] *See* E.A. 1/65, Yardor v. Chairman of Central Elections Committee for Sixth Knesset, 19(3) P.D. 365 (Isr.). This case addressed the question whether the court could proscribe a party that denied the existence of the "State of Israel" from participating in the electoral process. This question arose because the relevant legislation did not include any express provision on the matter. The court held that such a party could not participate in the electoral process. For the majority, Justice Sussman wrote:

> The said basic *supra-legal* rules are merely, in this matter, the right of the organized society in the State to protect itself. Whether we call these rules "natural law" to indicate that they are the law of the State by virtue of its nature . . . or whether we call them by another name, I agree with the opinion that the experience of life requires us not to repeat the same mistake to which we were all witness. . . . As for myself, with regard to Israel, I am prepared to satisfy myself with "defensive democracy," and we have tools to protect the existence of the State, even if we do not find them set out in the Elections Law.

Id. at 390. A few years later — after additional case law that restricted this power only to a party that denied the existence of the State but not its democratic nature, E.A. 2/84, Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset, 39(2) P.D. 225 — the Knesset amended its Basic Law, enacting an express provision to this effect.

[75] In contemporary Germany, the militant democracy (*streitbare Demokratie*) is one of the foundations of the constitutional structure. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 213 (1994); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 37 (2d ed. 1997.

> protective role is conferred on the judiciary as a whole, and on the Supreme Court in particular. Once again we, the judges of this generation, are charged with watching over our basic values and protecting them against those who challenge them.[76]

The protection of defensive democracy is, I believe, a priority for many supreme court judges in modern democracies. Judicial protection of democracy in general and of human rights in particular is a characteristic of most developing democracies.[77] This phenomenon, as suggested before, is largely a result of the events of the Second World War and the Holocaust. Legal scholars often explain this phenomenon as an increase in judicial power relative to other powers in society.[78] 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 many factors in the democratic balance.

Each branch of the government must protect the constitution and democracy. The legislature must do so by enacting legislation and exercising its other powers. The executive (the president in a presidential democracy and the government in a parliamentary democracy) must do so by actualizing democracy in all its actions. And every judge in the state, but particularly the judges of the supreme court, must also give effect to democracy. They must educate the people in the democratic spirit, because judges are also educators. To do so judges must educate the public about the law and the role of the judiciary.[79] In this regard, a supreme court should function as a pedagogical institution whose judges are teachers participating, as Eugene Rostow puts it, "in a vital national seminar."[80] The supreme court's judges must give expression to democracy in its richest sense in their rulings, so that the public will understand it.

2. What Is Real Democracy? — (a) Constitutionalism. — Everyone agrees that a democracy requires the rule of the people, which is often effectuated through representatives in a legislative body. Therefore, frequent elections are necessary to keep these representatives ac-

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[76] H.C. 5364/94, Velner v. Chairman of the Israeli Labor Party, 49(1) P.D. 758, 808 (internal citations omitted).

[77] *See* Michael Kirby, *Australian Law — After 11 September 2001*, 21 AUSTL. B. REV. 21 (2001); Sir Anthony Mason, *A Bill of Rights for Australia?*, 5 AUSTL. B. REV. 79, 80 (1989); Beverley McLachlin, The Role of the Supreme Court in the New Democracy 13–15 (2001) (unpublished manuscript, on file with the Harvard Law School Library).

[78] *See* THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 73, at 1–5.

[79] *See* Marna S. Tucker, *The Judge's Role in Educating the Public About the Law*, 31 CATH. U. L. REV. 201, 205 (1981).

[80] Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

countable to their constituents.[81] However, real or substantive democracy, as opposed to formal democracy, is not satisfied merely by these conditions. Democracy has its own internal morality, based on the dignity and equality of all human beings. Thus, in addition to formal requirements, there are also substantive requirements. These are reflected in the supremacy of such underlying democratic values and principles as human dignity, equality, and tolerance.[82] There is no (real) democracy without recognition of basic values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights — rights so essential that they must be insulated from the power of the majority.[83] As Justice Iacobucci of the Canadian Supreme Court observed, "[t]he concept of democracy is broader than the notion of majority rule, fundamental as that may be."[84] Real democracy is not just the law of rules and legislative supremacy; it is a multidimensional concept. It requires recognition of both the power of the majority and the limitations on that power. It is based on legislative supremacy and on the supremacy of values, principles, and human rights.[85] When there is internal conflict, the formal and substantive elements of democracy must be balanced to protect the essence of each of these aspects. In this balance, the system must place limits on both legislative supremacy and on the supremacy of human rights.

To maintain real democracy — and to ensure a delicate balance between its elements[86] — a formal constitution is preferable. To operate effectively, a constitution should enjoy normative supremacy, should not be as easily amendable as a normal statute, and should give judges the power to review the constitutionality of legislation. Without a formal constitution, there is no legal limitation on legislative supremacy, and the supremacy of human rights can exist only by the grace of the majority's self-restraint. A constitution, however, imposes legal limitations on the legislature and guarantees that human rights are protected not only by the self-restraint of the majority, but also by constitutional control over the majority. Hence the need for a formal constitution.

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81 *See* ROBERT A. DAHL, ON DEMOCRACY 95–96 (1998).

82 *See* RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 35–36 (1990).

83 *See* Woolf, *supra* note 71, at 68–69; McLachlin, *supra* note 77, at 6.

84 Vriend v. Alberta, [1998] 1 S.C.R. 493, 566 (Can.).

85 *See* Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429 (1998) (distinguishing between democracy as a substantive value and popular sovereignty as a mechanism for decisionmaking).

86 This is not, of course, the only reason. For other reasons, see Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 73, at 3, 8–12; Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 636–43 (1991).

The need for judicial review is less intense when one can rely on the self-restraint of the majority. This is apparently the situation in the United Kingdom. The Human Rights Act — an ordinary statute — allows judges to hold legislation incompatible with it, without authorizing them to void the incompatible legislation. I hope that this arrangement will work well in the United Kingdom and that it will guarantee the proper combination of parliamentary supremacy and human rights.[87] Personally, however, I am skeptical. In hard situations, like terrorist attacks or other emergencies, this self-restraint is unlikely to suffice. In any event, what is good and proper for the United Kingdom — which, in any case, is subject to the jurisdiction of the European Convention on Human Rights — is not necessarily good and proper for other countries, like Israel. Therefore, while a written constitution and judicial review are not necessary conditions for the existence of democracy, they are important conditions that should be preferred.[88]

I am aware that this brief description of democracy is somewhat imperfect and problematic, but I think that relative to other possible approaches it is the best description of real democracy. In any event, this is my understanding of democracy, and it shapes my views on the role of the judiciary.

(b) Legislative Supremacy. — Democracy means the rule of the people. This rule is, in modern times, effectuated by elected representatives. Therefore, we must determine the rules of elections *ab initio*[89] to create a fair and equal system of elections that allows for the participation of each citizen. Some human rights — such as freedom of political expression — derive from, inter alia, the need to ensure the proper functioning of the systems through which the people choose their representatives. These human rights are so important that the High Court of Australia was prepared to grant them constitutional status, even though they are not mentioned expressly in the Australian Constitution. The Court regarded them as implied constitutional rights.[90] As Justice Brennan of the Australian High Court observed:

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[87] *See* Lord Irvine, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 18–19 (2001). *But see* DWORKIN, *supra* note 82.

[88] *See* Dieter Grimm, *Constitutional Adjudication and Democracy*, 33 ISR. L. REV. 193, 199 (1999).

[89] For an example of the problems that result when the rules are unclear, see *Bush v. Gore*, 531 U.S. 98 (2000).

[90] *See* Kruger v. Commonwealth (1997) 190 CLR 1, 112–21 (Austl.); Levy v. Victoria (1997) 189 CLR 579; Lange v. Austl. Broad. Corp. (1997) 189 CLR 520; Stephens v. W. Austl. Newspapers Ltd. (1994) 182 CLR 211; Theophanous v. Herald & Weekly Times Ltd. (1994) 182 CLR 104; Austl. Capital Television Party Ltd. v. Commonwealth (1992) 177 CLR 106; Nationwide News Party Ltd. v. Wills (1992) 177 CLR 1.

> Once it is recognized that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.[91]

This approach is a proper one. It reflects the role of the judge in giving effect to democracy.

The rule of the people implies legislative supremacy. This conceptualization, however, is imprecise because supremacy belongs to the constitution and not to the legislature. Nonetheless, judges must respect the role of the legislature. Legislative supremacy tends to restrict the legislative power of the executive to those situations in which the primary arrangements are determined by primary legislation.[92] A respect for the legislative role should influence the formulation of a proper system of interpretation, which would recognize the will of the legislature as an important factor in the interpretation of legislation.[93] Indeed, the people create a statute through their representatives in the legislature. The statute is designed to carry out a public policy that the legislature wishes to effect on behalf of its constituents. This policy should be taken seriously and should be given expression in the interpretation of the legislation.

(c) Fundamental Principles. — I have emphasized that it is the role of the judge to give effect to democracy by ruling in accordance with democratic values and foundational principles. In my view, fundamental principles (or values) fill the normative universe of a democracy.[94] They justify legal rules. They are the reason for changing them. They are the spirit (*voluntas*) that encompasses the substance (*verba*). Every norm that is created in a democracy is created against the background of these values. Justice Michael Cheshin of the Supreme Court of Israel expressed this well when he wrote:

> All of these — principles, values and tenets — are prima facie extra-legal, but they serve as an anchor for the law — for every law — and no law can be described without them. A law without that anchor is like a house without foundations; just as the latter will not last, so too a law which has only itself is like a castle in the air.[95]

My position is that every norm — whether expressed in a statute or in case law — lives and breathes within this normative world replete with values and principles. These values create a "normative umbrella" for the operation of the common law and a framework for in-

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[91] *Nationwide News Party*, 177 CLR at 48.

[92] *See infra* p. 66.

[93] *See infra* p. 66.

[94] For a discussion of how values underlie legal principles, see Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983). *See also* DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE 57 (1999).

[95] C.A. 7325/95, Yediot Aharonot Ltd. v. Kraus, 52(3) P.D. 1, 72 (Isr.) (Cheshin, J., dissenting).

terpreting all legal texts. The assumption is that every legal norm seeks to give effect to these values. Below I will consider the nature and operation of these fundamental values.[96]

(d) Human Rights. — We live in an age of human rights.[97] As Justice Pikis, President of the Supreme Court of Cyprus, rightly observed:

> The essence of human rights lies in the existence within the fabric of the law of a code of unalterable rules affecting the rights of the individual. Human rights have a universal dimension, they are perceived as inherent in man, constituting the inborn attribute of human existence to be enjoyed at all times in all circumstances and at every place.[98]

We are experiencing a human rights revolution as a result of the Second World War and the Holocaust.[99] Indeed, a central element of modern democracy is the protection of constitutional, statutory, and common-law human rights. Without these rights, we cannot have true democracy. Take human rights out of democracy and democracy loses its soul; it becomes an empty shell. It is the task of the judge to protect and uphold human rights. Justice McLachlin of the Supreme Court of Canada rightly said that "[t]he courts are the ultimate guardians of the rights of society, in our system of government."[100] These rights are the rights of man as an individual, as well as his rights as a member of a minority group.[101] Judges must protect these rights. Judges must resolve cases of conflict between individual and group rights. Human rights are not absolute; the right of one individual is limited by the right of another. The right of the individual is also limited by the needs of society: every legal system has its own limitation formula for balancing the right of the individual against society's demands.[102] In Canada, the limitation formula operates so that the hu-

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96 *See infra* section IV.B.

97 *See* NORBERTO BOBBIO, THE AGE OF RIGHTS 32 (Allan Cameron trans., 1996) (1990) (discussing "the increasing importance given to the recognition of human rights in international debates, among cultured people and politicians, in working groups and government conferences"); LOUIS HENKIN, THE AGE OF RIGHTS ix (1990) ("Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance.").

98 Pikis, *supra* note 1, at 9.

99 *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); Lorraine E. Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution*, 80 CAN. B. REV. 699, 701 (2002) ("We live in the age of rights. In the aftermath of the Second World War, commitment to the principles embodied in the modern idea of human rights has intensified in the West, although the record of achievement is undeniably blemished.").

100 McLachlin, *The Role of the Court*, *supra* note 1, at 57.

101 *See* Beverley M. McLachlin, Democracy and Rights: A Canadian Perspective 3 (2000) (unpublished manuscript, on file with the Harvard Law School Library).

102 *See* THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 1–112 (Armand de Mestral et al. eds., 1986) (a series of essays considering limitations on human

man rights set out in the Canadian Charter of Rights and Freedoms are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[103] In Israel, the limitation formula provides that "[t]he rights under this basic law may only be infringed by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive."[104]

In Israel, as in Canada, the limitation formula applies across all the rights established by the Constitution. In some other countries and international instruments, particular rights have their own unique limitation formulae.[105] In the absence of limitation formulae prescribed by the constitution — which is the case in the United States with reference to several human rights — the courts develop the limitation formulae through case law. The "levels of scrutiny" developed by United States law can fit into this category. Such limitations, whether in a written constitution or in case law, reflect the idea that human rights are not the rights of a person on a desert island. Robinson Crusoe (*sans* Friday) does not need human rights. Human rights are the rights of a human being as part of society. The rights of the individual must conform to the existence of society, the existence of a government, and the existence of national goals. The power of the state is essential to the existence of the state and the existence of human rights themselves. Therefore, limitations on human rights reflect a national compromise between the needs of the state and the rights of the individual. This compromise is a product of the recognition that human rights should be upheld without disabling the political infrastructure. This balance

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rights in Canada, Europe, and the United States); Alexandre Charles Kiss, *Permissible Limitations on Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290 (Louis Henkin ed., 1981) (examining public interest limitations embedded in various human rights provisions of the International Covenant on Civil and Political Rights).

103 On the Canadian limitation clause (Article 1), see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 864 (4th ed. 1997). The South African Constitution contains a limitation clause that provides as follows:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

S. AFR. CONST. § 36(1).

104 BASIC LAW: HUMAN DIGNITY AND LIBERTY § 8 (1992).

105 *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Nov. 4, 1950, http://conventions.coe.int.Treaty/en/Treaties/Html/005.htm (placing a limitation in Article 5 on the right to liberty and security in the situation of "the lawful detention of a person after conviction by a competent court").

is intended to prevent the sacrifice of the state on the altar of human rights. As I once stated:

> A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction . . . . The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the State, and they should not be made into a spade with which to bury it.[106]

Similarly, human rights should not be sacrificed on the altar of the state. After all, human rights are natural rights that precede the state. Indeed, human rights protections require preservation of the sociopolitical framework, which in turn is based on recognition of the need to protect human rights. Both the needs of the state and human rights are part of one constitutional structure, which simultaneously provides for human rights and allows them to be limited. A unique feature of democracy is this fact that the breadth and limits of human rights derive from a common source. Justice Dickson of the Canadian Supreme Court nicely noted this peculiar underpinning of democracy with the following comment about Canada's limitation formula: "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[107]

This is the constitutional dialectic. Human rights and the limitations on them derive from the same source, and they reflect the same values.[108] Human rights can be limited, but there are limits to the limitations. The role of the judge in a democracy is to preserve both of these limitations. Judges must ensure the security and existence of the state as well as the realization of human rights; judges must determine and protect the integrity of the proper balance.

Most central of all human rights is the right to dignity.[109] It is the source from which all other human rights are derived. Dignity unites

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106 C.A. 2/84, Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset, 39(2) P.D. 225, 310 (citation omitted).

107 The Queen v. Oakes, [1986] S.C.R. 103, 136.

108 *See* Weinrib, *supra* note 29, at 127–28.

109 *See* EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 1 (2002); HUMAN DIGNITY: THIS CENTURY AND THE NEXT 3–97 (Rubin Gotesky & Ervin Laszlo eds., 1970) (a trio of essays discussing human rights and human dignity); Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903 (2000) (discussing historical antecedents to the modern concept of dignity and the centrality of dignity in Israeli law due to Israel's 1992 Basic Law on Human Dignity and Liberty); G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171, 171 (1984) ("No one would question whether the protection of human dignity was a primary task of the contemporary legal culture."); A.I. Melden, *Dignity, Worth, and Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 29,

the other human rights into a whole.[110] It also constitutes a right in itself and is recognized as such in several constitutions.[111] The right of dignity reflects the "recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends."[112] Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity regards a human being as an end, not as a means to achieve the ends of others.

When human dignity is expressly mentioned in a constitution, the scope of its application as a right is determined by its relationship with other rights, in accordance with the structure of rights protection in that particular constitution. Therefore, the same right of dignity may have a different scope in different constitutions. When human dignity is not mentioned expressly in a constitution — as is the case in those of the United States, Canada, and many other countries — the question arises whether human dignity can be recognized as a human right in these legal systems. One way of recognizing a constitutional right to dignity in those systems is through interpretation of specific rights, mainly the right to equality.[113] It can also be recognized through interpretation of the whole bill of rights, whereby either human dignity is implied by the overall structure of the rights, or is derived from their "penumbras."[114] Another method of establishing an unspecified right

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46 (Michael J. Meyer & William A. Parent eds., 1992) ("[A]ttention to human rights is of the first importance for the promotion of the dignity and the worth of human beings."); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 223 (1984) ("[H]uman rights law provides a rich set of general criteria and content for supplementation of past trends in Supreme Court decision[s] about human dignity.").

110 *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("[T]he Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law."); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 745 (1980) ("The basic value in the United States Constitution, broadly conceived, has become a concern for human dignity.").

111 The German Constitution, for example, provides that "[t]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." F.R.G. CONST. art. 1, translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (1991). On dignity in the German Constitution, see CURRIE, *supra* note 75, at 314–16; EBERLE, *supra* note 109, at 41; KOMMERS, *supra* note 75, at 298.

112 H.C. 5688/92, Wechselbaum v. Minister of Def., 47(2) P.D. 812, 827 (Isr.).

113 *See* Law v. Canada [1999] 1 S.C.R. 497, 507 (Can.).

114 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

to dignity is to determine that the absence of the right to dignity constitutes a constitutional "lacuna" that the court may fill.[115]

Implied by human dignity — but existing in its own right — is the right to equality. Except for dignity, it is the most important of all rights:

> [E]quality is a fundamental value of every democratic society. . . . [T]he individual integrates into the overall fabric and plays his part in the building of society, in the knowledge that others too are doing the same. The need to ensure equality is natural to a person. It is based on considerations of justice and fairness. Whoever asks for recognition of his right must recognize the right of others to ask for similar recognition. The need to uphold equality is essential for society and the social consensus on which it is built. Equality protects the government from arbitrariness. Indeed, there is no force more destructive in society than the feeling of its members that they are victims of haphazard treatment. The feeling of the lack of equality is the most difficult of feelings. It undermines the forces that unite society. It undermines a person's independent identity.[116]

Though this Foreword is not the proper forum for examining the complex right of equality, I want to emphasize that a judge cannot realize his or her role without a deep appreciation for this right.

C. Criticism and a Possible Response Thereto

I am aware that my theory of the role of a supreme court judge in a democracy is not universally accepted. It may be said that legislation and adjudication serve wholly different functions and that a judge is neither a senior nor a junior partner of the legislature. It may also be said that my approach to the judicial role departs from the proper outlook on separation of powers and democracy, for democracy — both formal and substantive — is too important to be left to the protection of judges who are not elected by or otherwise accountable to the people. Who will guard the guardians? It may even be argued that my approach is based on judicial "imperialism,"[117] conferring on judges an inappropriately prominent status. These criticisms are important, and I take them seriously. They accompany me always and restrain me always. However, there are proper answers to these criticisms. I do not claim that the court can cure every ill of society, nor

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115 This method is available to those legal systems in which the doctrine of the "lacuna" is well-developed. *See infra* note 185.

116 H.C. 953/87, Poraz v. Mayor of Tel Aviv-Jaffa, 42(2) P.D. 309, 332 (Isr.).

117 *See* Nathan Glazer, *Toward an Imperial Judiciary?*, PUB. INT., Fall 1975, at 104, 122 ("I believe we have a considerably worse [society as a result of judicial imperialism], because a free people feels itself increasingly under the arbitrary rule of unreachable authorities, and that cannot be good for the future of the state.").

do I claim that it can be the primary agent for social change.[118] I do not claim that the court is always the most effective branch for the resolution of disputes. My claim is much more limited: I claim that the court has an important role in bridging the gap between law and society and in protecting the fundamental values of democracy with human rights at the center.

1. The Role of the Judge as Creator of the Common Law. — Within the field of common law, almost a thousand years of history validate my approach. If the common law does not merely declare what has existed since time immemorial — and I do not think that anyone still believes this myth — then it is hard to deny the creative role of the judge in the common law. Judges created and developed the common law.[119] Judges bridged the gap between law and society by giving expression to the fundamental principles of society. And judges are responsible for the common law's provision of fitting solutions to life's changing needs. Naturally, over the years, judges made mistakes. But there were many achievements, too. It is difficult to forget Lord Mansfield's statement, "the black must be discharged,"[120] releasing in 1772 a black slave who fled to England from his American master. Lord Mansfield issued this statement after the court heard from counsel for the slave that "the air of England was too pure for slavery."[121] It was the judge who declared and gave effect to the fundamental values on which the common law is founded. The judge must protect and promote these fundamental values. In these activities, the main responsibility rests with the judge, the senior partner.

2. The Role of the Judge as Interpreter of the Constitution and Statutes. — The role of the judge is to interpret the constitution and statutes, and the system of interpretation is usually determined by the judge himself or herself. This implies that each branch of the state cannot devise its own interpretive system. The rule of law would be undermined if the system of interpretation accepted by judges were not binding on the legislature and the executive.[122] The difficulty, of

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[118] *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 343 (1991) (examining the ability of courts to enact social change and concluding that "[t]o ask [courts] to produce significant social reform is to forget their history and ignore their constraints").

[119] *See* EISENBERG, *supra* note 35, at 1 (1988) ("The common law . . . is that part of the law that is within the province of the courts themselves to establish."); Michael McHugh, *The Law-Making Function of the Judicial Process*, 62 AUSTL. L.J. 15, 16 (1988) ("Historically, then, the judge has made law as he applied an established rule to a novel situation.").

[120] The Case of James Sommersett, 20 How. St. Tr. 1, 82 (K.B. 1772).

[121] *Id.* at 79.

[122] This issue is not free of uncertainty in United States law. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending the "assertion of judicial supremacy without qualification 'against' accepted wisdom"); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HAS-

course, is that there is no single interpretive system.[123] Changes in the law that aim to bridge the gap between law and society alter the systems of interpretation. We do not interpret statutes today in the same way that they were interpreted two hundred or one hundred or even fifty years ago. In any event, I accept the system of interpretation that allows me, in interpreting both the constitution and statutes, to take my status as a junior partner in the legislative enterprise into account and to realize my role as a judge of a supreme court.

Until now, my response to criticism regarding the interpretation of the constitution and statutes has been to demonstrate that my approach is legitimate. But is it proper? In my opinion, the answer is yes. If one can rely on the objectivity, integrity, and balance that judges employ as creators of common law, why can one not rely on them to fulfill that same role as interpreters of the constitution and statutes? If we are trusted as senior partners, why are we not trusted as junior partners? Naturally, in our interpretive approach, we will not depart from the language of the constitution and statutes by giving them a meaning that their language cannot sustain. But within the range of possible linguistic meanings, and taking account — to different degrees — of the intentions of the authors of the constitution and statutes, why do we not recognize that when judges interpret the constitution and statutes — just as when they create the common law — they have a role to play in protecting democracy and in bridging the gap between society and law?

3. The Role of the Judge and Judicial Review of the Constitutionality of Statutes. — Critics of my theory argue that the nonaccountability of judges should deprive them of the power to void statutes. Such power must only be given to the representatives of the people, who are accountable to them. This is the countermajoritarian argument made again and again. In my opinion, this argument is extremely problematic.[124] First, some constitutions contain express pro-

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TINGS CONST. L.Q. 359, 364 (1997) ("[V]iews about the descriptive or normative appropriateness of judicial supremacy are by no means uniform."); Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 519 (1999) ("I am reluctant to subscribe to any theory of constitutional law that downplays the significance of the Court's power over the law of the Constitution."); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336 (2001) ("The structural variances between the courts and Congress can be analyzed profitably to develop a theory of interbranch interpretation."); William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301 (1990) (imtroducing a symposium focusing on statutory interpretation by bodies other than courts, including agencies and Congress).

123 *See infra* pp. 57–59.

124 *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 140, 145 (2002) (noting that "[a]lthough the countermajoritarian difficulty has a core of truth, it has been blown out of proportion"); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L.

visions for judicial review of the constitutionality of statutes. In such circumstances, the legitimacy of judicial review should not be in doubt. The only remaining question in these situations is whether the constitutional arrangement is proper and consistent with the society's perception of democracy.[125] Second, if the countermajoritarian argument is correct, then states ought to refrain from making a constitution. After all, a constitution is not a democratic document, since it negates, in certain circumstances, the power of the current majority.[126] Therefore, if a constitution is desirable, we cannot attribute much weight to countermajoritarian considerations.[127] But if a constitution is democratic, then its implementation by courts is democratic; if democracy is not merely the rule of the majority, but also the protection of human rights, then judicial review for constitutionality that implements substantive democracy — thereby giving expression to the role of the judge — is not antidemocratic.[128] I discussed this in one case, where I said:

> Democracy is a delicate balance between majority rule and the fundamental values of society that rule the majority. . . . [W]hen the majority deprives the minority of human rights, this harms democracy. . . . [W]hen

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REV. 577 (1993); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1924 (1991). Farber and Sherry observe that "[o]ne might call these scholars the anti-counter majoritarianists." FARBER & SHERRY, *supra*, at 199 n.8.

[125] *See In re* B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 497 ("It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.").

[126] *See generally* ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001) (exploring the vital tension between the belief of Americans in the legitimacy of their Constitution and their belief in the principles of democracy).

[127] *Cf.* JOHN RAWLS, POLITICAL LIBERALISM 233 (1993) (observing that "constitutional democracy is dualist," constraining the current majority to protect original democratic guarantees); Grimm, *supra* note 88, at 196.

[128] *See* DWORKIN, *supra* note 82, at 35 ("Would it offend democracy if a British court had the power to strike down the blasphemy law as inconsistent with the [European Convention of Human Rights]? No, because the true democracy is not just *statistical* democracy, in which anything a majority or plurality wants is legitimate for that reason, but *communal* democracy, in which majority decision is legitimate only if it is a majority within a community of equals."); Pikis, *supra* note 1, at 9 ("[H]uman rights require constitutional entrenchment with corresponding power on the part of the judiciary to void or derogate from legislation offensive to or incompatible with human rights."). *See also* Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1211–26 (1984) (arguing that the countermajoritarian difficulty is based on a misdefinition of democracy as majority); Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74–77 (1989) (same).

> judges interpret provisions of the Constitution and void harmful laws, they give expression to the fundamental values of society, as they have evolved throughout the history of that society. Thus they protect constitutional democracy and uphold the delicate balance on which it is based. Take majority rule out of constitutional democracy, and you have harmed its essence. Take the rule of fundamental values out of constitutional democracy, and you have harmed its very existence. Judicial review of the constitutionality of statutes allows society to be honest with itself and to respect its fundamental tenets. This is the basis for the substantive legitimacy of judicial review. . . . [T]hrough judicial review we are faithful to the fundamental values that we imposed on ourselves in the past, that reflect our essence in the present, and that will guide us in our national development as a society in the future.[129]

Indeed, in a constitutional democracy neither the legislature nor the judiciary is supreme. Only the constitution is supreme. When a constitution is adopted, the legislature is obliged to uphold its provisions. The task of the court is to protect the provisions of the constitution and ensure that the legislature fulfills its obligation.[130] This was aptly expressed by Justice McLachlin, when she said:

> The elected legislators are subject to the Constitution and must stay within its bounds, as must the courts. The courts have the duty to rule on whether the elected legislators have done so. Democracy is more than mere populism; it is the lawful exercise of powers conferred by the constitution. . . . When the courts hold a law to be invalid, they are not limiting parliamentary supremacy. They are merely expounding the limits that the Constitution imposes on Parliament. The claim that the Charter has replaced parliamentary supremacy by judicial supremacy is not true; rather, it is a myth.[131]

Third, the countermajoritarian argument does not give sufficient weight to the possibility of changing the constitution. Many constitutions are more easily amended than the U.S. Constitution is. Frequently the legislature itself — by a special supermajority of its members — may amend the constitution.

We are still left with the non-accountability argument, which claims that it is inappropriate for the judge, who is not accountable to the public, to exploit constitutional vagueness and "majestic generali-

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[129] C.A. 6821/93, United Mizrahi Bank Ltd. v. Migdal Coop. Vill., 49(4) P.D. 221, 423–24; *see also* Rosalie Silberman Arbella, *The Judicial Role in a Democratic State*, 26 QUEEN'S L.J. 573, 577 (2001) ("The most basic of the central concepts we need back in the conversation is that democracy is not — and never was — just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, *notwithstanding* the wishes of the majority.").

[130] *See* Brian Dickson, *The* Canadian Charter of Rights and Freedoms*: Dawn of a New Era?*, 2 REV. CONST. STUD. 1, 12 (1994).

[131] Beverley McLachlin, *Charter Myths*, 33 U.B.C. L. REV. 23, 31 (1999) (emphasis omitted).

ties"[132] by giving expression to his or her subjective beliefs. In such circumstances, the opinion of the legislature, which reflects the will of the majority, should receive preference. My answer to the non-accountability argument is twofold. First, it is a mistake to assume that to be a true democracy, every organ of the state must be accountable to the public as the legislature is. Accountability to the people is necessary for the legislature. But such accountability is not required from the judiciary, which has another type of accountability. The question is not whether every organ of the state is accountable as the legislature is. The question is, as Daniel A. Farber and Suzanna Sherry put it, "whether the system as a whole fits our concept of democracy."[133]

Second, it is a myth that judges always give expression to their subjective beliefs. According to my view — both normatively and descriptively — the judge gives expression not to his or her own beliefs but to the deep, underlying beliefs of society. The key concept is judicial objectivity:[134] "Judicial objectivity underlies judicial review of the constitutionality of statutes. In giving weight to the various considerations, the judge aspires, to the best of his ability, to judicial objectivity. He does not reflect his subjective values and his personal considerations."[135] The judge must reflect the beliefs of society, even if these are not his or her own beliefs. The judge gives expression to the values of the constitution as they are understood by the culture and tradition of the populace in its progress through history. The judge reflects the fundamental tenets of the people and the national credo rather than his or her personal beliefs. In this way he or she gives effect to the constitution and to democracy. Thus, the choice is not between the wishes of the people and the wishes of the judge. The choice is between two levels of the wishes of the people. The first, basic level reflects the most profound values of society in its progress through history; the second, ad hoc level reflects passing vogues. As Justice Iacobucci of the Supreme Court of Canada has observed:

> Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. . . . [J]udges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*.[136]

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132 Fay v. New York, 332 U.S. 261, 282 (1947).

133 FARBER & SHERRY, *supra* note 124, at 141.

134 *See infra* section III.B.

135 C.A. 6821/93, United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) P.D. 221, 426 (Isr.).

136 Vriend v. Alberta, [1998] 1 S.C.R. 493, 566–67.

It is the judge — who enjoys independence and does not need to stand for reelection every few years[137] — who is best equipped for succeeding in the difficult task of choosing between these two levels. It is the legislator — who must stand for reelection, and who needs the approval of the voters — who is ill-suited to make this choice.[138] According to this line of thinking, only the judge, who has nothing to hamper his independence, is capable of, and suited for, reflecting the fundamental wishes of society. It is only the judge who can give effect to real democracy. Indeed, I contend that the most important asset a judge has in fulfilling his or her role is the lack of direct accountability to the public.[139] Note that when I say the judge is not accountable I am saying only that he or she is not accountable in the same way that the legislature is accountable. A judge is not a politician,[140] and his or her accountability differs from that of the politician. A judge's accountability is not expressed in regular elections by the people. It is expressed in other terms. It is expressed in accountability to the legislature, which can respond to a court's ruling with legislation.[141] It is expressed in accountability to the legal community, by the need to give reasons for every judgment — reasons that are accountable on appeal and stand open to public scrutiny. It is expressed in accountability for judicial misconduct.

Naturally, not everyone believes that judges act objectively, without imposing their subjective views on their societies. But if one assumes judicial objectivity within the framework of the common law, why should one not assume it within the framework of interpreting the constitution and statutes? Admittedly, the activity of a judge in the field of common law differs from the activity of a judge in interpreting a legal text. Nonetheless, both activities are replete with values and principles. If we trust judges to be objective when balancing among various values and principles in the common law, why should we not trust them to be objective when balancing among values and principles in interpreting the constitution and statutes? They are the very same judges. I am aware of the claim that, while the legislature may pass a statute overriding judicial development of the common law, it has no such power over judicial interpretation of a constitution. That does not, however, explain the lack of faith in judicial objectivity in

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137 Of course, in a number of states in the United States, judges are elected by the people. This phenomenon is regrettable. *See* Republican Party of Minn. v. White, 122 S. Ct. 2528, 2542–44 (2002) (O'Connor, J., concurring).

138 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 24–25 (1962); Rosalie Silberman Abella, *Public Policy and the Judicial Role*, 34 MCGILL L.J. 1021, 1033 (1989).

139 *See* P. S. Atiyah, *Judges and Policy*, 15 ISR. L. REV. 346, 369 (1988).

140 *See Republican Party*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting).

141 *See Vriend*, [1998] 1 S.C.R. at 566.

statutory interpretation. After all, the legislature can change the effects of judicial interpretation of a statute by amending the statute, just as it can pass a statute overriding a common law rule. It is also not clear to me why the mere fact that the constitution is difficult to amend should undermine the faith in judicial objectivity apparently present in the common law context. Of course, mistakes have been made in the past. Some were very serious. But judges do not have a monopoly on mistakes. Judges come and go, and most mistakes are corrected by the judges themselves. Those that are not may be corrected by constitutional changes, and in most modern democracies — except for the United States — a special majority of the legislature may make those constitutional changes.[142] Personally, I would encourage this possibility.

It is possible that, in the final analysis, the question is about finding ways to prevent mistakes in the future. The twentieth century has taught me that the best way is to form a partnership between the constitution and judges. That is, of course, my subjective approach. But is the approach of my critics not their subjective approach? And if the life of the law is, as Holmes said, not logic but experience, should we not make use of the experience that we accumulated during the twentieth century?[143] Did all the democracies established after the Second World War and after the fall of the Soviet bloc err in explicitly writing into their constitutions provisions for judicial review of the constitutionality of statutes? Why should we not be allowed to continue this multinational experiment?

III. PRECONDITIONS FOR REALIZING THE JUDICIAL ROLE

What are the preconditions that must exist in a legal system to realize the proper judicial role? I have already discussed one essential condition — that the legal system operate in a democracy — but are there other necessary preconditions? My answer is yes. Some of these conditions vary from system to system, while others are common to all democratic systems of law. I will discuss three of these common preconditions: (1) independence of the judiciary, (2) judicial objectivity, and (3) public confidence in the judiciary. These are not the only general preconditions, but they seem to me the most important and the most problematic. For all three, we must ensure not only that they are upheld — which is the main point — but also that the public recognizes that they are upheld.

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142 This type of change may include, at some point, the use of popular referenda. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 666 (2000).

143 HOLMES, supra note 37, at 1 ("The life of the law has not been logic: it has been experience.").

A. Independence of the Judiciary

An essential precondition for the protection of the constitution within the framework of a democracy is that the judge and the judiciary enjoy independence:[144] "the judiciary can effectively fulfill its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently."[145] Many undemocratic countries also have impressive constitutions that purport to protect human rights and values, but these constitutions are empty shells, because there is no independent judiciary to give them content.[146] Independence of the judiciary means, first and foremost, that in judging, the judge is subject to nothing other than the law. The law is the sole master of the judge. From the moment that a person is appointed judge, he or she must act independently of everything else. Sometimes this independence is expressly provided in the constitution. But even in the absence of an express provision, it is a constitutional principle implied by every democratic constitution.[147] The other branches of the state must be incapable of influencing judicial decisions. Other branches of the state cannot be allowed to threaten the security of the judge's income, even if there is no express provision in the constitution addressing the issue.[148] Judicial behavior must be governed by rules of judicial ethics (whether case law or enacted). All of these safeguards together will ensure the personal independence of the judge.

But the independence of the individual judge, while of central importance, is itself insufficient.[149] Personal independence must be accompanied — as it is in the United States — by institutional independence.[150] The judiciary, not merely the individual judge, must be independent. It must be managed by judges. Its budget must be ap-

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144 *See generally* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet & Jules Deschenes eds., 1985) (analyzing the concept of judicial independence from an international and comparative perspective).

145 Johan Steyn, *The Case for a Supreme Court*, 118 LAW. Q. REV. 382, 388 (2002).

146 *See* McLachlin, *The Role of the Court*, *supra* note 1, at 57 (claiming that the "elaborate guarantees" in the constitutions of nondemocratic countries are never realized because there is no independent judiciary to uphold them).

147 *See* Reference re Remuneration of Judges of the Provincial Court, [1997] 3 S.C.R. 3 (Can.); The Queen v. Beauregard, [1986] 2 S.C.R. 56, 71–74 (pointing to Canada's constitutional separation of powers and the court's role as a defender of basic liberties as the fundamental sources of judicial independence).

148 *See* Valente v. The Queen, [1985] 2 S.C.R. 673, 704 (Can.) (describing financial security as an "essential condition" of judicial independence).

149 *See* Patricia Hughes, *Judicial Independence: Contemporary Pressures and Appropriate Responses*, 80 CAN. B. REV. 181, 186 (2001) (noting the general agreement that "judicial independence is both an individual and a systemic, institutional or 'collective' quality").

150 *See* Aharon Barak, *Independence of the Judicial Branch*, *in* JUDICIAL INDEPENDENCE TODAY: LIBER AMICORUM IN ONORE DI GIOVANNI LONGO 49 (1999); Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996).

proved by the legislature separately from the budget of the executive. Unfortunately, in many modern democracies, the judiciary does not enjoy this full institutional independence.[151] In some countries, the judiciary as an institution is connected to the Department or Ministry of Justice. In my opinion, this linkage is improper. If we want to ensure personal independence, we must also ensure institutional independence. Only if judicial independence is guaranteed in all its aspects can the judge properly carry out his or her role in a democracy. Note that judicial independence is not designed to ensure pecuniary benefits to the judges, nor is it intended to suppress criticism. It has only one purpose: to protect the constitution and democracy.[152]

B. Judicial Impartiality and Objectivity

The judge must realize his or her role in a democracy impartially and objectively. Impartiality means that the judge treats the parties before him equally, providing them with an equal opportunity to make their respective cases, and is seen to treat the parties so. Impartiality means the judge has no personal stake in the outcome.[153] Absence of bias is essential to the judicial process; hence the image of justice as blindfolded. With impartiality comes objectivity.[154] It means making judicial decisions on the basis of considerations that are external to the judge and that may even conflict with his or her personal views.[155] The judge must look for the accepted values of society, even if they are not his or her values. He or she must express what is regarded as moral and just by the society in which he or she operates, even if it is not moral and just in his or her subjective views.[156] As I wrote in one case:

> It is not his own subjective values that the judge imposes on the society in which he operates. He must balance among various interests, according to what appear to him to be the needs of the society in which he lives. He must exercise his discretion according to what seems to him, to the best of

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[151] *See* MARTIN L. FRIEDLAND, A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA 268 (1995) (recommending that Canada make "modest renovations" to ensure the full independence of its judiciary).

[152] *See* Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change*, 45 U. N.B. L.J. 3, 7 (1996) (arguing that judicial independence is a means of maintaining the rule of law).

[153] BARAK, *supra* note 10, at 189.

[154] *See generally* KENT GREENAWALT, LAW AND OBJECTIVITY (1992); NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996).

[155] *See* BARAK, *supra* note 10, at 125; Aharon Barak, *Justice Matthew O. Tobriner Memorial Lecture: The Role of a Supreme Court in a Democracy*, 53 HASTINGS L.J. 1205, 1210–11 (2002).

[156] I noted in one case: "The judge must reflect . . . all the fundamental values of the enlightened public, even if he personally does not accept one or another value. . . . [T]he judge must reflect the long-term beliefs of society. He must refrain from imposing his personal beliefs on society . . . ." H.C. 693/91, Efrat v. Dir. of Population Register, 47(1) P.D. 781, 781–82.

> his objective understanding, to reflect the needs of society. The question is not what the judge wants but what society needs.[157]

Judges with religious or secular outlooks on life ought not impose those outlooks on the society in which they live. When a judge considers the weight of different values, he or she must do so according to the fundamental views of the society in which he or she lives, not according to his or her own personal fundamental views.[158]

This objectivity makes strenuous demands, requiring the judge to take moral stock of herself. The judge must be aware that she may have values that lack general acceptance and that her personal opinions may be exceptional and unusual. I drew this distinction in one opinion:

> This requirement for objectivity imposes a heavy burden on the judge. He must be able to distinguish between his personal desire and what is generally accepted in society. He must erect a clear partition between his beliefs as an individual and his outlooks as a judge. He must be able to recognize that his personal views may not be generally accepted by the public. He must carefully distinguish his own credo from that of the nation. He must be critical of himself and restrained with regard to his beliefs. He must respect the chains that bind him as a judge.[159]

The judge must be capable of looking at himself from the outside and of analyzing, criticizing, and controlling himself. A judge who thinks that he knows all, and that his opinions are right and proper to the exclusion of all else, cannot properly fulfill his role.

The judge is a product of his times — living in, and shaped by, a given society in a given era. The purpose of objectivity is not to sever the judge from his environment. Rather, its purpose is to allow him to ascertain properly the fundamental principles of his time. The purpose of objectivity is not to rid a judge of his past, his education, his experience, his belief, or his values.[160] Its purpose is to encourage the judge to make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible. A person who is appointed as a judge is neither required nor able to change his skin. The judge must develop sensitivity to the dignity of his office

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157 C.A. 243/83, Municipality of Jerusalem v. Gordon, 39(1) P.D. 113, 131 (internal quotation marks omitted).

158 *See* Rochin v. California, 342 U.S. 165, 170–72 (1952) (arguing that Supreme Court justices, when interpreting the Due Process Clause, should not rely merely on personal and private notions of due process); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) ("As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them . . . ."); CARDOZO, *supra* note 18, at 88–89, 108 (1921) (arguing that a judge's personal beliefs and idiosyncrasies should not be imposed upon the community); McLachlin, *The Charter*, *supra* note 1, at 546 (arguing that judges have a "duty to set aside their personal prejudices and views").

159 *Efrat*, 47(1) P.D. at 782.

160 *See* Abella, *supra* note 138, at 1027.

and to the restraints that it imposes. As the ancient Jewish text reminds judges: "Do you imagine that I offer you rulership? It is servitude that I give you."[161] The judge must display the self-criticism and humility that will prevent him from identifying himself with everything good and praiseworthy. A judge must display the self control that will allow him to distinguish between personal feelings and national aspirations. A judge must display intellectual modesty.

The objectivity required of a judge is difficult to attain. Even when we look at ourselves from the outside, we do so with our own eyes.[162] Nonetheless, my judicial experience tells me that objectivity is possible. A judge does not operate in a vacuum. A judge is a part of society, and society influences the judge. The judge is influenced by the intellectual movements and the legal thinking that prevail. A judge is always part of the people.[163] It may be true that the judge sometimes sits in an ivory tower — though my ivory tower is located in the hills of Jerusalem and not on Mount Olympus in Greece. But the judge is nonetheless a contemporary creature. He or she progresses with the history of the people. All of these elements contribute to the judge's objective perspective.

Moreover, the judge acts within the limits of a court. He or she lives within a judicial tradition. The same spark of wisdom passes from one generation of judges to the next. This wisdom is mostly unwritten, but it penetrates little by little into the judge's consciousness and makes his or her thinking more objective. The judge is part of a legal system that establishes a framework for the factors that a judge may and may not consider. The heavier the weight of the system, the greater the objectification of the judicial process.

Having said that, when judges give expression to the fundamental values of the system, they give expression to the values that, in their eyes, seem proper and basic. Some subjectification of this process is inevitable. Complete objectivity is unattainable. The personal aspect of a judge is always present, and his life experience neither disappears nor can disappear. We would not want it to, because in these situations, it is the judge's personality that finds expression — the same personality that underwent, and passed, the judicial nomination process. We need not, however, go from extreme to extreme. Rejecting complete objectivity does not require us to embrace complete subjectivity. There is a third way, reflected in acknowledging the importance and centrality of judicial objectivity while recognizing, unreservedly,

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161 BABYLONIAN TALMUD, *Horayot* 10a–b.

162 *See* CARDOZO, *supra* note 18, at 13.

163 *See* William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768–69 (1986) (explaining that some "currents of public opinion" inevitably influence a judge's decisions, though perhaps in an unconscious way).

that it can never fully be achieved. It is enough for a judge to make an honest attempt to objectify his exercise of discretion, recognizing that it cannot be done in every circumstance.

Furthermore, for some issues, the structure of the system grants the judge discretion ultimately based on a subjective decision, bounded by the range of considerations from which he chooses. Indeed, objectivity is sometimes unattainable. There are numerous methods of developing the common law. The interpretation of a legal text does not always lead to a unique solution. The judge may find himself in a position to exercise judicial discretion. Naturally, this discretion is limited, but it nonetheless exists. In such situations, a judge may act according to his own views. But even in these cases — and they are a tiny minority — the path to full subjectivity is closed.[164] The judge may not resort to his anomalous personal inclinations or to his particular opinions. The judge may not resort to individual values that contradict the values of the system, but must make the best decision within the framework of objective considerations. The judge cannot return to the point of origin, but must march forward. He must try to give the best solution of which he is capable. Indeed, someone who has taken personal stock of himself, and who has succeeded in overcoming his particular inclinations, will not resort to them. The judge must find the best solution within the confines of the objective data available. Were the legal system not to guide, the judge would be faced with several possibilities. But the legal system limits the scope of the judge's considerations. The judge is never permitted simply to do as he pleases. Even when the judge is "with himself," he is within the framework of society, the legal system, and judicial tradition.

Admittedly, there are some cases in which the judge has discretion that allows him to choose among a limited number of options, according to his views. How should the judge choose? All I can say is that the choice is a product of the judge's personal life experience and the balance he must find between certainty and experimentation, between stability and change, between logic and emotion. The judge's choice is influenced by his concept of the judicial role and attitudes towards the other branches of the state. It is derived from the judge's judicial philosophy.[165] It is the product of a delicate balance in the judge's soul between the specific and the general, between the individual and society, and between the individual and the state. Most judges do not feel comfortable in such situations. They are subject to tremendous inter-

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[164] *See* Breyer, *supra* note 53, at 158–60.

[165] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 697 (1976) (acknowledging that a judge's interpretation of the Constitution "will depend to some extent on his own philosophy of constitutional law").

nal pressure. They usually display caution and self-restraint.[166] Their sense of personal responsibility reaches its peak.[167] They feel greatly isolated.[168] In such situations, I try to be guided by my North Star, which is justice. I try to make law and justice converge, so that the Justice will do justice.

C. *Public Confidence*

In my view, another essential condition for realizing the judicial role is public confidence in the judge.[169] This means confidence in judicial independence, fairness, and impartiality.[170] It means public confidence in the ethical standards of the judge. It means public confidence that judges are not interested parties to the legal struggle, and that they are not fighting for their own power, but to protect the constitution and democracy. It means public confidence that the judge does not express his own personal views, but rather the fundamental beliefs of the nation.[171] Indeed, the judge has neither sword nor purse.[172] All he has is the public's confidence in him. This fact means

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166 *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (warning that, in the "treacherous field" of substantive due process, "there is reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court" and that the history of the *Lochner* era "counsels caution and restraint").

167 *See, e.g.*, William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 12 (1988) (explaining that "[n]o matter how much one has studied or thought about the Constitution, the weight of responsibility that comes with the job of Supreme Court Justice cannot be fully anticipated").

168 *See* Brennan, *supra* note 110, at 434 ("[T]he process of deciding can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge.").

169 *See* BARAK, *supra* note 10, at 215–21; OTTO KIRCHHEIMER, POLITICAL JUSTICE 178 (1961) (stating that a court's authority "rests on the community's preparedness to recognize the judge's capacity to lend legitimacy or to withdraw it from an individual's act"); Steyn, *supra* note 145, at 388.

170 For five separate opinions articulating varying notions of judicial impartiality, see *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002).

171 I noted in one case:

> An essential condition for an independent judiciary is public confidence. This means public confidence that the judiciary is dispensing justice according to the law. It means public confidence that judging is being done fairly, impartially, with equal treatment of both parties and without any trace of a personal interest in the outcome. It means public confidence in the high ethical level of judging. Without public confidence the judiciary cannot operate. . . . [P]ublic confidence in the judiciary is the most precious asset that this branch of government has. It is also one of the most precious assets of the nation. As De Balzac noted, lack of confidence in the judiciary is the beginning of the end of society.

H.C. 732/84, Tzaban v. Minister of Religious Affairs, 40(4) P.D. 141, 148.

172 *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction.").

that the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content.

The precondition of "public confidence" runs the risk of being misunderstood.[173] The need to ensure public confidence does not mean the need to ensure popularity. Public confidence does not mean following popular trends or public opinion polls. Public confidence does not mean accountability to the public in the way that the executive and the legislature are accountable. Public confidence does not mean pleasing the public; public confidence does not mean ruling contrary to the law or contrary to the judge's conscience to bring about a result that the public desires. On the contrary, public confidence means ruling according to the law and according to the judge's conscience, whatever the attitude of the public may be. Public confidence means giving expression to history, not to hysteria. Public confidence is ensured by the recognition that the judge is doing justice within the framework of the law and its provisions. Judges must act — inside and outside the court — in a manner that preserves public confidence in them. They must understand that judging is not merely a job but a way of life. It is a way of life that does not include the pursuit of material wealth or publicity; it is a way of life based on spiritual wealth; it is a way of life that includes an objective and impartial search for truth. It is not fiat, but reason; not mastery, but modesty; not strength, but compassion; not riches, but reputation; not an attempt to please everyone, but a firm insistence on values and principles; not surrender to or compromise with interest groups, but insistence on upholding the law; not making decisions according to temporary whims, but progressing consistently on the basis of deeply held beliefs and fundamental values. Admittedly, judging is a way of life that involves some degree of seclusion, abstention from social and political struggles, restriction on the freedom of expression and the freedom to respond, and a large amount of isolation and internalization. But judging is emphatically not a way of life that involves a withdrawal from society. There should be no wall between the judge and the society in which the judge operates. The judge is a part of the people.

If this view of the judicial role is adopted by judges, we can hope that the public will have and maintain confidence in the judiciary. In this respect, I wish to note several judicial traits that can help the public maintain confidence in its judges.

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[173] *See, e.g.*, Elizabeth Handsley, *Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power*, 20 SYDNEY L. REV. 183, 214 (1998) (criticizing the High Court of Australia for shifting back and forth between a perception of public confidence as "an immutable characteristic which can lend legitimacy to an otherwise suspect act" and a perception of public confidence as "fragile" and easily destroyed).

First, the judge ought to be aware of his power and his limits. A judge has great power in a democracy. As with all power, judicial power can be abused. The judge ought to recognize that his power is limited to realizing the proper judicial role. From my experience, I know that it takes considerable time for a new judge to learn his role on a supreme court. Naturally, the judge knows the law and its power, but he must also learn the limits imposed on him as a judge;[174] he must know that power should not be abused, and that a judge cannot obtain everything he wants.

Second, a judge must recognize his mistakes. Like all mortals, judges err. A judge must admit this. According to the well-known statement of Justice Jackson, "[w]e are not final because we are infallible, but we are infallible only because we are final."[175] In one opinion, citing to Justice Jackson's statement, I added that "I think that the learned judge erred. The finality of our decisions is based on our ability to admit our mistakes, and our willingness to do so in appropriate cases."[176] In another case, I wrote an opinion on a matter that was subsequently reargued before an enlarged panel. My decision before the enlarged panel reversed my original ruling. I explained the change as follows:

> This conclusion of mine conflicts with the conclusion that I reached in my ruling, which is the subject of this petition. In other words, I changed my mind. Indeed, since the judgment was given — and against the backdrop of the further hearing itself — I have not ceased to examine whether my approach is correctly grounded in law. I do not count myself among those who believe that the finality of a decision testifies to its correctness. We all err. Our professional integrity requires us to admit our mistakes, if we are convinced that we have indeed erred . . . in our difficult hours, when we evaluate ourselves, our North Star should be uncovering the truth that brings justice within the limits of law. We should not entrench ourselves in our previous decisions. We must be prepared to admit our mistakes.[177]

I hope that if we admit our mistakes as judges, we will strengthen public confidence in the judiciary.[178]

Third, in our writing and our thinking, judges must display modesty and an absence of arrogance. Statements such as those of Chief Justice Hughes that "we are under a Constitution, but the Constitution

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[174] *See, e.g.,* Brian Dickson, *supra* note 30, at 384 (arguing that "the Supreme Court of Canada justice must display sensitivity to the limits of the court's ability to effect major legal change" and that "the legislature is best equipped to set down guiding principles designed to address some of our most complex social problems").

[175] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[176] C.A. 243/83, Municipality of Jerusalem v. Gordon, 39(1) P.D. 113, 136–37.

[177] Cr.A. 7048/97, Anonymous v. Minister of Def. 54(1) P.D. 721, 743.

[178] *See* Beverley McLachlin, *The Charter of Rights and Freedoms: A Judicial Perspective*, 23 U. B.C. L. REV. 579, 589 (1989) (arguing that judges should be flexible and admit their mistakes).

is what the judges say it is"[179] are not merely incorrect but also perniciously arrogant.

Fourth, judges should be honest. If they create new law, they should say so. They should not hide behind the rhetoric that judges declare what the law is but do not make it. Judges make law, and the public should know that they do. The public has the right to know that we make law and how we do it; the public should not be deceived. "The right to know the architect of our obligations," wrote Professor Julius Stone, "may be as much a part of liberty as the right to know our accuser and our judge."[180] Public confidence in the judiciary increases when the public is told the truth.

IV. THE MEANS OF REALIZING THE ROLE

In this Part, I wish to consider several devices through which a supreme court judge in a democracy may realize his or her role. Indeed, it is not enough that we know where we need to go. We must develop means to help us reach that goal. These means 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 we build our structures are limited. Our power to realize our role depends on our ability to design new structures with the same old bricks or to create new bricks.[181] Sometimes there is great similarity between the new structures we build with the old bricks and the old structures we have known in the past. We tend to say that there is nothing new under the sun and that the legal pendulum swings to and fro before returning to its point of origin. But these analogies are inappropriate. The structures are always new. There is no return to the point of origin; the movement is always forward. Law is in constant motion; the question is merely one of the rate of progress, its direction, and the forces propelling it. Moreover, sometimes we succeed in creating new "tools." Here the genius of law is evident. But such "inventions" are few. Usually we return to the old tools, and use them to resolve new situations.

Use of the various legitimate tools — including the wording and style of an opinion — is subject to the judge's discretion. This discretion is exercised on the basis of the judge's understanding of his role. In this respect, Sunstein argues that the proper principle is a minimalist approach, which means "doing and saying as little as necessary to

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[179] Charles Evans Hughes, Speech at Elmira (May 3, 1907), *in* THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (David J. Danelski & Joseph S. Tulchin eds., 1973).

[180] JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 678 (1966).

[181] *See* Moshe Landau, *Case-Law and Discretion in Doing Justice*, 1 MISHPATIM 292 (1965).

justify an outcome."[182] This approach raises a number of questions. First, should a supreme court hold that its adjudication is limited to the case before it? It would seem as though the court cannot take this route to limit the scope of the decision. Every decision of a supreme court on a specific issue creates a change in the system as a whole. Every "movement" of a supreme court on a single issue changes the existing "status quo" of all issues. Every judicial opinion resolves not just a problem from the past, but also affects the resolution of similar problems in the future. No judicial opinion can limit itself to the past alone. Even when we whisper, our voices are heard out loud, transmitted through a thousand amplifiers throughout the system. Thus, for example, the U.S. Supreme Court's decision in *Bush v. Gore*[183] cannot limit itself — even if the Court wishes it — to that case alone. The decision necessarily influences future situations. Indeed, even if the Justices explicitly stress that their decision does not determine any principle of the matter — a determination that itself is subject to criticism[184] — future case law will extract from it principles that may be applied to future cases.

Second, do we want minimalism in judging? There will certainly be cases in which this approach is undesirable and a maximalist approach should be adopted. In my opinion, minimalism is not a constitutional approach that dictates constitutional steps, but rather the result of a balance between constitutional and other considerations. These considerations differ from country to country, from time to time, and from one constitutional issue to another. They sometimes suggest minimalism but at other times do not. Thus, for example, an old and established democracy like the United States is unlike young and fragile democracies, such as many of the new democracies in Eastern Europe. In the former, the main principles of the constitutional framework have already been established, and the judicial corrective — which assumes the existence of democracy — is limited in its role. In those countries, minimalism may often be appropriate. But new democracies need to establish preliminary understandings of the basis of democracy. Minimalism is likely to be unsuitable.

Similarly, constitutional issues that have already been mostly settled differ from constitutional issues that arise for the first time and may require nonminimalist elaboration. Indeed, just as one cannot presume at the outset that a constitutional text should be interpreted

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[182] Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996). *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[183] 531 U.S. 98 (2000).

[184] Guido Calabresi, *In Partial (But Not Partisan) Praise of Principle*, *in* *BUSH V. GORE*: THE QUESTION OF LEGITIMACY 69 (Bruce Ackerman ed., 2002).

broadly or narrowly, one also may not presume that a case requires a minimalist posture. The error costs — to use Sunstein's terminology — of creating this presumption are too great. In bridging the gap between law and society and preserving a constitutional democracy, a judge should use all the tools at his disposal. If this end requires him to be a minimalist, he should be a minimalist; if this end requires him to be a maximalist, he should be a maximalist. The means we employ are diverse. In this Foreword, I will focus on seven such tools: interpretation, fundamental values, balancing theory, justiciability, standing, comparative law, and good philosophy. I will begin with the most important means of fulfilling the judicial role: interpretation.

A. Interpretation

1. The Essence of Interpretation. — Interpretation, by which I mean rational activity giving meaning to a legal text (whether it be a will, contract, statute, or constitution),[185] is both the primary task and the most important tool of a supreme court. Interpretation derives the legal meaning from the text. Put another way, interpretation constitutes a process whereby the legal meaning of a text is "extracted" from its linguistic meaning. The interpreter translates "human" language into "legal" language.[186] He changes "static law" into "dynamic law" by transforming a linguistic text into a legal norm.

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[185] My theory of interpretation draws a sharp distinction between interpreting and filling in a gap (lacuna) in a legal text. Interpretation gives meaning to the text. Gap-filling subtracts from or adds to the text by way of analogy or by applying the system's fundamental values. Continental jurisprudence has developed this distinction. *See* CLAUS-WILHELM CANARIS, DIE FESTSTELLUNG VON LUCKEN IN GESETZ (1983); BERND RUTHERS, RECHTSTHEORIE 456 (1999). A gap in a text exists when its interpretation leads to the conclusion that the absence of a solution to the legal problem conflicts with the purpose of the text. It is as if an essential brick is missing from the wall that the text constructs. A gap may be apparent or hidden. An apparent gap exists when the text does not cover a particular case. A hidden gap exists when the text does cover the case, but lacks an exception necessary to remove a particular incident from the text's coverage. Continental legal tradition authorizes a judge to fill in the gap, whether it be apparent or hidden. An interesting example of an apparent gap is the absence of an express right to privacy in the American Bill of Rights. It may be argued that in *Griswold v. Connecticut*, 381 U.S. 473 (1965), Justice Douglas filled in this gap. Another example of an apparent constitutional gap may be found in the decisions of the High Court of Australia recognizing "implied" constitutional rights. *See supra* section II.B.2.b. A good example of a hidden gap is the case of the murderous heir: the silence of the law of succession on the question of whether he can inherit is a hidden gap that the judge is authorized to fill in. Such a solution is preferable to the one that denies the heir his inheritance by way of interpretation. *See* Dworkin, *supra* note 12, at 23. Using gap-filling overcomes the accusation of "spurious interpretation." *See* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 (1907). Common-law judges would do well to develop the doctrine that deals with these lacunae. With it, and by using analogy from the provisions of similar statutes, a statute — like the common law — projects itself into the system and can be developed beyond its language.

[186] *See generally* BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY (1993).

Many aspire in vain to uncover what the legal meaning of a text "truly" is.[187] This is a fruitless search: a text has no "true" meaning. We do not have the ability to compare the meaning of a text before and after its interpretation, through focus on its "true" meaning. There is no pre-exegetic understanding of a text, for we can only access and understand it through an interpretive process. Only different interpretations of a given text can be compared. The most to which we can aspire is the "proper" meaning, not the "true" meaning.

The key question is, what is the "proper" system of interpretation? There are indeed many systems of interpretation. Legal history is the history of the rise and fall of different systems of legal interpretation. All interpretive systems struggle with the limitations of language and generalizations. All interpretive systems must resolve the relationship between text and context; between the "word" (*verba*) of the text and its "spirit" (*voluntas*). All interpretive systems must adopt a position on the relationship between the real and hypothetical intention of the author; between the author's "declared" intent, which is learned from the text, and his "real" intent, which is learned from the text and from sources outside the text. How can we determine the proper system of interpretation?

The answer to this question is critical, for every individual in the legal system and every branch of the state engages in interpretation and should know how to do it properly. The answer is especially important for the judge, and especially for the supreme court judge, the vast majority of whose work is interpretive. How is he or she to carry it out? Indeed, this question has occupied me since the moment of my appointment to the bench. I discovered — as many better than I discovered before me — that neither common law systems[188] nor civil law systems[189] have satisfactory answers to these questions. This is troubling. Interpretation is the judge's primary tool for realizing his or her role in a democracy. How can we have failed to agree upon a theory of interpretation?

I do not know the answer to this simple question. In any event, it seems to me that the solution lies in answering another simple question: what is the purpose of interpretation? Indeed, you cannot know

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[187] *See* Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 CARDOZO L. REV. 767, 769 (1993).

[188] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

[189] *See* Konrad Zweigert & Hans-Jürgen Puttfarken, *Statutory Interpretation — Civilian Style*, 44 TUL. L. REV. 704, 715 (1970) ("Conspicuously lacking in civil law jurisprudence is a methodology of the judicial development of the law . . . which would analyze, rationalize, and systematize the specific role of the judge in the process of finding and making law.").

how to interpret without knowing why you are interpreting. In my worldview, the answer to the question "for what reason?" is the following: the aim of interpretation in law is to realize the purpose of the law; the aim in interpreting a legal text (such as a constitution or statute) is to realize the purpose for which the text was designed. Law is thus a tool designed to realize a social goal. It is intended to ensure the normal social life of the community on the one hand, and human rights, equality, and justice on the other. The history of law is a search for the proper balance between these goals, and the interpretation of the legal text must express this balance. Indeed, if a statute is a tool for realizing a social objective, then interpretation of the statute must be done in a way that realizes this social objective. Moreover, the individual statute does not stand alone. It exists in the context of society, as part of general social activity. The purpose of the individual statute must therefore also be evaluated against the backdrop of the legal system. This approach underlies the system of interpretation that I think is proper: "purposive interpretation." Let us now turn to a discussion of that system.

2. Purposive Interpretation. — Purposive interpretation is not a new system. Continental law has long recognized teleological interpretation, which is interpretation according to "telos" or objective.[190] Common law systems also accept purposive interpretation,[191] although there is some uncertainty about whether the purpose is subjective, reflecting authorial intent on a high level of abstraction, or objective, or a blend of the two.[192] The purposive interpretation I discuss will attempt to clarify this issue by setting out a comprehensive interpretive system.

Purposive interpretation is based, of course, on the concept of purpose. Purpose is a normative concept that the law constructs. The purpose of a given legislative work contains both subjective and objective elements. The real intent of the author (the subjective purpose) is always relevant. The subjective purpose acts on different levels, for

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[190] *See, e.g.*, KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT (5th ed. 1983); Zweigert & Puttfarken, *supra* note 189.

[191] *See, e.g.*, FRANCIS BENNION, STATUTORY INTERPRETATION 731 (3d ed. 1997); PIERRE-ANDRÉ CÔTÉ, THE INTERPRETATION OF LEGISLATION IN CANADA 381–92 (3d ed. 2000); SIR RUPERT CROSS, STATUTORY INTERPRETATION 92 (3d ed. 1995); WILLIAM N. ESKRIDGE, *supra* note 66, at 24–35; RUTH SULLIVAN, DREIDGER ON THE CONSTRUCTION OF STATUTES 35–77 (3d ed. 1994).

[192] This lack of certainty surfaced in the writings of the American realists and scholars of the legal process. *See, e.g.*, HART & SACKS, *supra* note 188, at 1124–25; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Constructed*, 3 VAND. L. REV. 395, 395 (1950) (arguing that "[o]ne does not progress far in legal life without learning that there is no single right and accurate way of reading [a] case"); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398–99 (1942).

every author usually wishes to realize multiple intentions on various levels of abstraction.

Objective elements also influence purpose (the objective purpose), again operating on various levels of abstraction. On a low level of abstraction, objective purpose is the hypothetical intent that a reasonable author would want to realize through the given legal text or a type of legal text. On a high level of abstraction, the objective purpose of a text is to realize the fundamental values of the legal system. The (ultimate) purpose of every text is determined by the relationship among the various subjective elements (the author's real intent) and the various objective elements (the hypothetical intent of the author or the "intent" of the legal system).

The critical question then becomes, how do we determine the proper relationship between the subjective and the objective? We will not find this answer in linguistics or general hermeneutics. The interpretation of literature or music is interesting by way of comparison, but it does not answer the question. Rather, the answer to this question depends on constitutional considerations.[193] Constitutional law is the appropriate vessel in which to seek an answer to the question of how to balance authorial intent with the fundamental values embedded in the legal system. However, the constitution does not necessarily give a single, unique resolution to the proper balance between objective and subjective elements. Sometimes, constitutional law leaves that resolution to the discretion of the judge;[194] indeed, proponents of purposive interpretation view judicial discretion as an indispensable element of any theory of interpretation. Interpretive theories vary only in the extent of judicial discretion they permit.

I will now briefly consider how purposive interpretation applies to the interpretation of constitutions and statutes. I should point out, however, that, in my view, purposive interpretation applies to the interpretation of all legal texts, including contracts and wills.

3. Purposive Interpretation of a Constitution. — In interpreting a constitution — as in interpreting every other legal text — a judge pinpoints the legal meaning along the range of the text's various semantic meanings. One should not give the constitution a meaning that its ex-

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193 *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (arguing that "[a]ny theory of statutory interpretation is at base a theory about constitutional law").

194 *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (urging interpreters to read words and phrases in a constitution in light of identical words and phrases within the same document); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) (emphasizing the importance of constitutional text). Note, however, that I do not wish to establish a two-step process, the first examining the text and the second examining "doctrine," or according to my theory, purpose. Rather, I am looking for a single step allowing for fluid movement back and forth between the doctrine and the text.

press or implied language cannot sustain. The express language conveys to the reader the dictionary meaning of the text. The implied language conveys to the reader a meaning that is not derived from the dictionary meaning of the language. It is a language written in invisible ink, between the lines, and derived from the structure of the constitution.[195] Any interpretation of the constitution must be grounded in its own language.

From among the range of semantic meanings of the constitution, the interpreter must extract the legal meaning that best realizes the purpose of the constitution. This purpose strikes the proper internal balance between subjective and objective aspects, namely between the intent of the framers of the constitution (on various levels of abstraction) and fundamental contemporary values. The judge gleans these aspects from the text of the constitution, from its history, and from precedent. Comparisons with other national systems and from international law can also assist him. It is constitutional theory, grounded in constitutional law, that determines this balance between subjective and objective purpose.[196]

A constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of the normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the appearance of the state and its 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. Performance of all these tasks by a constitution requires a balance of its subjective and objective elements, because "it is a constitution we are expounding."[197] As Chief Justice Dickson of the Supreme Court of Canada noted:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be

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[195] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-13, at 40 (3d ed. 2000). *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1985) (arguing that there is a close relationship between textual and structural interpretation).

[196] *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 97–117 (1991).

[197] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted).

> repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[198]

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? Naturally, different judges and scholars of constitutional law answer this question differently. My answer is this: one should take both the subjective and objective elements into account when determining the purpose of the constitution. The original intent of the framers at the time of drafting is important. One cannot understand the present without understanding the past. The framers' intent lends historical depth to understanding the text in a way that honors the past. The intent of the constitutional authors, however, exists 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, to protect his or her freedom. It must contend with his or her needs. 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 intention and present principle.

The key question then becomes, what is the proper relationship between the subjective and objective elements in determining the purpose of the constitution when the two elements conflict? To this question there is no "true" answer. But that does not mean that *any* interpretation is appropriate. We must construct a system to evaluate different understandings of the relationship. I accept that there is no absolute proof that one understanding is better than another. Professor Laurence Tribe rightly points out that there are no criteria external to the constitution that determine the proper order of priorities among the different considerations.[199] That does not mean, however, that we cannot construct constitutional arguments showing that one understanding is preferable to another. These arguments may not be based on a "true" revelation that allows no alternative, but they nevertheless help us to arrive at a proper meaning.

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[198] Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 156.

[199] *See* 1 TRIBE, *supra* note 195, § 1-18, at 88 (expressing skepticism about finding definitive interpretive criteria external to the Constitution and quoting Robert Post in agreement); *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 179 (1991) (arguing that "we cannot replace (or supplement) the operation of [forms of legal argument] by reference to an external code, however internally consistent it may be").

We return, then, to the original question: what is the proper (as opposed to "true") 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 purposes. This is particularly true for constitutions like that of the United States, which are very difficult to amend and change, and for which a long time has passed between the creation of the constitution and its interpretation. In my opinion, only by giving preference to the objective elements can the constitution fulfill its purpose. Only thus is it possible to guide human behavior over generations of social change. Only thus is it possible to balance among the past, present, and future; only thus 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. Justice Brennan expressed this idea well in the following remarks:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be their measure to the vision of their time. [200]

The same idea was advanced by Justice Michael Kirby of the High Court of Australia, who said that "[o]ur *Constitution* belongs to the 21st century, not to the 19th." [201]

Various supreme courts have issued opinions in the same spirit, including the Canadian Supreme Court[202] and the German Constitutional Court.[203] This is the purposive interpretation that I espouse. It does not ignore the subjective purpose in constitutional interpretation, but it does not give it controlling precedence either. The weight of the subjective purpose decreases as the constitution becomes "older" and more difficult to change. In interpreting such constitutions, preference

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[200] William J. Brennan, Jr., *Constructing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985).

[201] Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 14 (2000); *see also* Kirby, *supra* note 77, at 9.

[202] *See, e.g.*, HOGG, *supra* note 103, at 1393–94 (discussing the Canadian Supreme Court's interpretation of the phrase "fundamental justice" in the Charter of Rights).

[203] *See* KOMMERS, *supra* note 75, at 42.

should be given to the objective purpose that reflects deeply held modern views in the movement of the legal system through history. The constitution thus becomes a living norm and not a fossil, preventing the enslavement of the present to the past. Indeed, constitutional interpretation is a process by which each generation expresses its fundamental views, as they have been formed against the background of its past. The interpreter honors the past through his or her desire to maintain a link with it. Nonetheless, the ultimate purpose is modern. A very clear expression of this approach was offered by Justice Deane of the Australian High Court. He was asking himself if the Constitution — being silent on the subject of a bill of rights — can be construed to include implied human rights. It had been noted that there was no evidence that the framers of the Australian Constitution intended to preclude the implication of constitutional rights by drafting the constitution without a bill of rights. Here is what Justice Deane observed:

> [E]ven if it could be established that it was the unexpressed intention of the framers of the Constitution that the failure to follow the United States model should preclude or impede the implication of constitutional rights, their intention in that regard would be simply irrelevant to the construction of provisions whose legitimacy lay in their acceptance by the people. Moreover, to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and adaptability to serve succeeding generations.[204]

Some argue that giving a modern meaning to the language of the constitution is inconsistent with regarding the constitution as a source of protection of the individual from society.[205] Under this approach, if the constitution is interpreted in accordance with modern views, it will reflect the views of the majority to the detriment of the minority. My reply to this claim is, inter alia, that a modern conception of human rights is not simply the current majority's conception of human rights. The objective purpose refers to fundamental values that reflect the deeply held beliefs of modern society, not passing trends. These beliefs are not the results of public opinion polls or mere populism; they are fundamental beliefs that have passed the test of time, changing their form but not their substance.

The interpretation of the Constitution is a central issue in United States constitutional law, with a vast literature on the subject.[206] The

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[204] Theophenous v. Herald Weekly Time Ltd., (1995) 182 CLR 104, 106.

[205] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989).

[206] *See, e.g.*, 1 TRIBE, *supra* note 195, § 1-11, at 30–32.

Justices of the United States Supreme Court are divided on how to approach this task.[207] Some Justices give precedence to the subjective element (intentionalism, Framers' intent), while others oppose privileging the subjective element. Among these opponents, some wish to give the Constitution a meaning that does not necessarily accord with the will of its authors, but rather reflects the understanding of the founding fathers at the time the Constitution was written (originalism). Others emphasize contemporary objective elements. This split in American constitutional viewpoints is regrettable. Although it is not my place to make recommendations, it is my view that purposive interpretation provides a proper solution to this interpretive dilemma.

Regardless of the role that intentionalism may play in interpreting legislation, it should not be predominant in interpreting constitutions. As for originalism, it suffers from the twin defects of shutting its eyes to the wishes of the authors (to the limited extent that those wishes should be considered) and rejecting modern constitutional understanding. Originalism chooses the worst of both worlds. If one espouses originalism, why not also take into account the will of the constitutional authors as an expression of the original meaning? But if one succeeds, as do the originalists, in escaping the heavy hand of the subjective will, why become entrenched in the historical past rather than turning an eye towards contemporary needs? Why not take account of fundamental modern principles that encompass the constitution? Why can some enlightened democratic legal systems (such as Canada, Australia, and Germany) extricate themselves from the heavy hands of intentionalism and originalism in interpreting the constitution, while constitutional law in the United States remains mired in these difficulties?[208]

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[207] *See* W. Va. Univ. Hosps. Inc. v. Casey, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting) (noting that the Court vacillates between a "purely literal approach" and one that "seeks guidance from historical context"); *see also* Dorf, supra note 62, at 14–26 (1998) (discussing the Court's struggle between textualism and purposivism).

[208] *See* L'Heureux-Dubé, *supra* note 25, at 242:

> [T]here is generally less debate . . . over whether the intent of the framers of a constitution is what should govern its interpretation. Originalism, an extremely controversial question in the United States, is usually simply not the focus, or even a topic, of debate elsewhere. Not that there are not heated differences of opinion about "judicial activism" or whether judging can be merely the interpretation of words on a page, but this is for the most part not as focused on textualism and originalism as that in the United States. . . . In Canada, there are few judges or commentators who would dispute the notion that the rights and other provisions in our Constitution should be interpreted "as a living tree capable of growth and expansion within its natural limits" in the words of Lord Sankey in a 1930 Privy Council case from Canada about whether the term "persons" in our Constitution included women.

Id. (citations omitted). The judgment referred to above is *Edwards v. A.G. Canada*, [1930] A.C. 114, 136, in which Lord Sankey decided that women were "persons," even if the intention of the framers did not include women.

A constitution is a text that shapes the character of the state. What underlies the constitution is the will of the people. But the will of the people underlying the constitution is different from the will of the people underlying ordinary legislation.[209] The former is the deeply held view that justifies the constitutional nature of the democracy. This view establishes the branches of the state and expresses the fundamental values and principles of the people. Foremost among these values and principles are human rights. These elements of the constitutional structure act as a basis for judicial review of the constitutionality of statutes. The values and principles underlying the constitution are also the basis for constitutional interpretation, in which the judge must give expression to the constitution's fundamental values.[210] They form a normative umbrella that extends over the constitution itself. The constitution does not operate in a normative vacuum; outside and around the constitution there are values and principles that the constitution must realize.[211]

These values are not the personal values of the judge. They are the national values of the state: "it is a well-known axiom that the law of a people must be studied in the light of its national way of life."[212] The "national way of life" constitutes a source for the values and principles that the constitution ought to realize. These principles and values reflect the social consensus that underlies the legal system. They enshrine fundamental social outlooks. They are derived in part from the constitutional text and its history. They are derived in part from the historical experience of the people, their social and religious views, and their tradition and heritage.[213] Naturally, not all the values and principles constituting the normative umbrella over the constitution are mentioned (expressly or even implicitly) in the constitution. If they are not mentioned, they should not be forced into the constitution artificially. Nonetheless, these unmentioned values and principles constitute a point of reference for understanding the values and principles that *are* mentioned in the constitution. Only with the help of these unmentioned values and principles can the constitution realize its purpose.

Purposive interpretation of the constitution is based on the status of the judge as an interpreter of the constitution. A judge who interprets

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[209] For a discussion of this point, see generally Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

[210] *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 24–26 (1995).

[211] *See generally* Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

[212] H.C. 73/53, "Kol Ha'am" Co. Ltd. v. Minister of Interior, 7 P.D. 871, 874 (Isr.).

[213] *See generally* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

the constitution is a partner to the authors of the constitution. The authors establish the text; the judge determines its meaning. The authors formulate a will that they wish to realize; the judge locates this will within the larger picture of the constitution's role in modern life. The judge must ensure the continuity of the constitution. He or she must strike a balance between the will of the authors of the constitution and the fundamental values of those living under it.

4. Purposive Interpretation of Statutes. — Purposive interpretation applies not only to the interpretation of constitutions, but also to the interpretation of all other legal texts, including statutes. Every statute has a purpose, without which it is meaningless. This purpose, or ratio legis, is made up of the objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize. It comprises both subjective and objective elements. The judge must give the statute's language the meaning that best realizes its purpose.

The subjective purpose reflects the actual intention of the legislature, in contrast with the intention of the *reasonable* legislature, which forms a part of the objective purpose. The subjective purpose is not the interpretive intention of the legislature.[214] The subjective purpose consists of the policies the legislature sought to actualize. This aspect of purpose deals with the legislature's "real" intention, which all credible sources — internal and external — help reveal.[215]

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[214] For a description of "interpretive" intention, "concrete" intention, or "result-oriented" intention, see RONALD DWORKIN, A MATTER OF PRINCIPLE 48–50, 52–55 (1985); Ronald Dworkin, *Comment*, *in* SCALIA, *supra* note 64, at 116–17; *see also* H.C. 547/84, Off HaEmek Registered Agric. Coop. Ass'n v. Ramat-Yishai Local Council, 40(1) P.D. 113, 143–44 (Isr.) ("The judge does not look to the legislative history for a concrete answer to the practical problem that he must decide. The court is not interested in the specific scenarios and concrete examples that the legislator considered. We seek the purpose of the legislation in the legislative history. We seek the interests and purposes that, after compromising and balancing among them, lead to the policy underlying the norm we must interpret. We seek the principled viewpoint, not the individual application. We seek the abstract, the principle, the policy and the objective. We are interested in the legislator's conception of the purpose of the law, and not in his conception of the solution to a specific dispute that is to be decided by the court." (citations omitted)).

[215] Many scholars have argued that a multimember body like a legislature has no identifiable intention. For example, Jeremy Waldron points out that, although each of the members of the legislature has a will, this fact does not imply the existence of a similar will behind the product of the collective body. The collective body only creates the statute itself. Because the legislators' shared views and sense of common purpose do not exist beyond the meanings embodied in a statutory text, interpreters must recognize the primacy of the language of the statute. *See* Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSPHY 353 (Andrei Marmor ed., 1995). Indeed, I accept that a collective body such as a legislature does not have a will in the same sense that an individual does. Instead of the will of any given individual, one should consider the purposes, social changes, and goals upon which the members of the legislature agreed. Such agreement does exist and can be identified, although it is not a part of the statute. Instead, it serves as a criterion for understanding the statute. Similarly, although the intention of a testator is also not part of his will, no one seriously argues that a will should not be interpreted according to the intention of the testator.

Subjective purpose is not the only purpose relevant to statutory interpretation, especially in situations where we lack information about that purpose. Sometimes, even when we do have such information, it does not help us in the interpretive task. Moreover, even when we do find useful information about the subjective purpose, we must keep in mind that focusing on legislative intent alone fails to regard the statute as a living organism in a changing environment. It is insensitive to the existence of the system in which the statute operates. It is not capable of integrating the individual statute into the framework of the whole legal system. It makes it difficult to bridge the gap between law and society. Thus, it does not allow the meaning of the statute to be developed as the legal system develops. Rather, it freezes the meaning of the statute at the historical moment of its legislation, which may no longer be relevant to the meaning of the statute in a modern democracy. If a judge relies too much on legislative intent, the statute ceases to fulfill its objective. As a result, the judge becomes merely a historian and an archaeologist[216] and cannot fulfill his or her role as a judge, which is to bridge the gap between the law and society. Instead of looking forward, the judge looks backward. The judge becomes sterile and frozen, creating stagnation instead of progress.[217] Instead of acting in partnership with the legislative branch, the judge becomes subordinate to a historical legislature. This subservience does not behoove the role of the judge in a democracy.

The objective purpose of the statute means the interests, values, objectives, policy, and functions that the law should realize in a democracy. Objective criteria at the time of interpretation determine the objective purpose, as the name indicates. The objective purpose is not a guess or conjecture about the original intent of the legislature; in fact, sometimes it is the opposite, because the objective purpose applies even when it is clear that the legislature could not possibly have intended such a purpose. Therefore, the objective purpose does not necessarily reflect the real intent of the legislature. It is not an expression of a psychological-historical reality. At low levels of abstraction, objective purpose reflects the intent the legislature would have had if it had thought about the matter, or the intent of a reasonable legislature.[218] At a higher level of abstraction, it reflects the purpose that should be

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Justice Breyer has rightly stated that even though the dictionary is not part of the statute, judges may certainly use it to interpret statutory language. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863 (1992).

216 *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (discussing the "archaeological" approach to statutory interpretation).

217 *See* ESKRIDGE, *supra* note 66.

218 *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002) (revised text of the James Madison Lecture on Constitutional Law, delivered on Oct. 22, 2001).

attributed to a statute of that nature. From the nature of the matter regulated by the statute, we can learn of its objective purpose. The nature of the "legal institution" — for example, sale, lien, agency, licensing regime — indicates its purpose. Finally, at the highest level of abstraction, the objective purpose of the statute is to realize the fundamental values of democracy. This purpose is not unique to one statute or another; it applies to all statutes, constituting a kind of normative umbrella that extends over all legislation.[219]

The judge can learn the objective purpose of the statute first and foremost from its language. From the subject regulated by the statute and from the nature of the arrangement, by exercising common sense the judge can further grasp the objective purpose underlying the statute. An interpreter may derive the objective purpose of a statute not only from the statute itself, but also from closely related statutes addressing the same issue (in pari materia). Moreover, the whole body of legislation provides information about the objective purpose of the statute. The individual statute becomes part of a body of legislation, thereby creating a reciprocal relationship, with the statute and the body influencing one another. As I expressed in one of my judgments:

> [A] piece of legislation does not stand on its own. It constitutes a part of the legislative body. It integrates into it, with the objective of legislative harmony. . . . [W]hoever interprets one statute interprets legislation as a whole. The isolated statute is related to the body of legislation by a system of interconnected vessels. The whole body of legislation influences the purpose of the individual statute. An earlier statute influences the purpose of a later statute. A later statute influences the purpose of an earlier statute.[220]

Moreover, a statute's social and historical background influences its purpose. Social needs drove the creation of the statute; therefore, it is relevant to consider them. Also relevant are the social and cultural premises upon which the statute was based. The jurisprudence of the system and its legal culture influence the process by which judges determine the purpose of every statute.[221] This jurisprudence serves as a well from which statutes draw their strength; it shapes common legal experience. Indeed, as every statute is created by a legal community, the community's fundamental views of culture, law, and jurisprudence inevitably imprint themselves upon the statute's purpose. Thus, the exact same statute in different legal systems may give rise to different objective purposes.

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[219] H.C. 953/87, Poraz v. Mayor of Tel Aviv-Jaffa, 42(2) P.D. 309, 328.

[220] H.C. 693/91, Efrat v. Dir. of Population Register, 47(1) P.D. 749, 765–66.

[221] *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533, 537, 542–43 (1967).

Lastly, the fundamental principles of the democratic legal system constitute the "spirit" (the purpose) that encompasses the "material" (the statute). Every statute springs from the backdrop of these principles, which serve as part of the objective purpose.[222] Purposive interpretation translates these principles into presumptions about the general purpose of every statute.[223] These presumptions become part of every statute's objective purpose. They are not limited to a particular type of legislation or merely to "unclear" legislation — they apply always and immediately. They accompany the interpretive process from beginning to end. They constitute what Sunstein calls the "background norms"[224] that assist the interpreter.

As in the interpretation of a constitution, the key question in the interpretation of statutes is the relationship between the subjective and the objective in determining the statute's ultimate purpose. Naturally, interpreters strive for synthesis and integration. The purposive interpreter does not look for conflicts; he aims for harmony. Nevertheless, conflicts and inconsistencies among the various purposes exist. How are they to be resolved? What I said with regard to the interpretation of constitutions[225] also applies to statutes. The interpreter resolves the subjective purpose (the intention of the legislature) and the objective purpose (the "intention" of the system) on the basis of constitutional criteria, of which the central one is democracy. As we have seen,[226] we must distinguish between formal democracy and substantive democracy. Formal democracy in this context means the rule of the people through their representatives in the legislature, from which the principle of legislative supremacy arises. Substantive democracy in this context means the supremacy of values and human rights. From this rich concept of democracy, what can we deduce about judicial statutory interpretation? In my opinion, we can derive two conclusions.

First, in interpreting statutes, the judge must attach considerable weight to the subjective purpose that underlies the statute. In this way the judge gives effect to legislative supremacy,[227] thereby recog-

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[222] *See Efrat*, 47(1) P.D. at 768; *see also* Regina v. Sec'y of State for the Home Dep't, *ex parte* Pierson [1998] A.C. 539, 587–88.

[223] For a discussion of this point, see CROSS, supra note 61; LOURENS M. DU PLESSIS, THE INTERPRETATION OF STATUTES 61 (1986).

[224] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 460 (1989); *see also* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1060 (1998) (discussing the application of "background principles" to administrative law).

[225] *See supra* p. 68.

[226] *See supra* section II.B.2.

[227] For various arguments regarding statutory interpretation and legislative supremacy, see Eskridge, *supra* note 62, at 319 (1989); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statu-*

nizing that the legislature does not enact statutes merely for the sake of legislation. Indeed, through legislation, the legislature determines social policy, allocates national resources, and orders national priorities. A statute is a tool for realizing these goals. The legislature does not produce a statute unless it wants to achieve a particular social goal. Legislative supremacy requires that the interpreter give effect to the (abstract) intention of the legislature. Indeed, where the judge has reliable information about the abstract intention of the legislature, and this intention is relevant to solving the questions that the judge faces, the judge should give weight to the subjective purpose in interpreting the legislation.

Second, in interpreting a statute, the judge should attach significant weight to its objective purpose. There is no democracy without a recognition of the values and principles that shape it, particularly human rights values. Just as the supremacy of fundamental values, principles, and human rights justifies judicial review of the constitutionality of statutes, so too must that supremacy assert itself in statutory interpretation. The judge must reflect these fundamental values in the interpretation of legislation. The judge should not narrow interpretation to the exclusive search for subjective legislative intent. He must also consider the "intention" of the legal system, for the statute is wiser than the legislature.[228] By doing so the judge is also able to give the statute a dynamic meaning and thus bridge the gap between law and society.

So we return to the original question: what is the proper relationship between abstract subjective purpose and objective purpose in the interpretation of statutes? In this regard, do we assume that the judge faces a clear and reliable subjective purpose and that it conflicts with the objective purpose? The reply of purposive interpretation is that one cannot view all statutes monolithically. Purposive interpretation distinguishes among different types of statutes. The age of the statute influences the relationship between the different purposes it contains. The older the statute, the greater the weight the judge should attach to its objective purpose. Conversely, the younger the statute, the greater the weight the judge should attach to its (abstract) subjective purpose. As Francis Bennion rightly points out:

> Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original

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tory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy, 71 B.U. L. REV. 767 (1991).

[228] *See* Gustav Radbruch, *Legal Philosophy*, *in* THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN 47, 141–42 (1950) ("The interpreter may understand the law better than its creators understood it. The law may be wiser than its authors — indeed, it must be wiser than its authors.").

> framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from the Act's legislative history, necessarily becomes less relevant as time rolls by.[229]

Purposive interpretation also distinguishes among various statutes according to the scope of the issues they regulate. A specific statute that deals with a narrow and defined issue, for instance, cannot be compared to the codification of a broad subject. The more specific and narrow the statute, the greater the weight the judge should attach to the subjective purpose the legislature wanted to achieve. By contrast, the more general and comprehensive the statute, the greater the weight the judge should attach to its objective purpose. It is possible to describe precisely the human behavior that a more specific or narrow statute is intended to regulate. It is possible to foresee future developments more precisely and thus to regulate them. In such circumstances, the justification for referring to the intention of the legislature increases and the need to refer to the general values of the system decreases. This is not the case with a general statute that regulates a large area of human activity. It is harder to describe precisely the modes of human behavior such a statute is meant to regulate. It is also more difficult to foresee future developments. Naturally, this type of statute must be couched in general language that describes the social behavior regulated. In such circumstances, there is a greater need to refer to the general values of the system and less need to refer to legislative intent, which, in any event, ceases to be helpful as time passes.[230]

It is also important to distinguish between a statute based on rules and a statute based on principles or standards.[231] My approach is to give great weight to the intention of the legislature in interpreting a rule-based statute and great weight to the principles of the system in a more policy-oriented statute. The reason for this approach is that under a statute establishing rules, adjudication usually must draw a clear line between what the statute forbids and what it permits, and that distinction can be derived from legislative intent. By contrast, a statute that formulates principles or policies prescribes an ideal to be achieved. This ideal operates within the framework of the legal system, is shaped by it, and in turn influences it. Naturally, significant

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229 F. A. R. BENNION, STATUTORY INTERPRETATION 687 (3d ed. 1997).

230 *See* Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978); *cf.* Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2214 (1991) (arguing that codes such as the UCC become integrated into the national legal heritage over time, making general principles and clauses more salient).

231 *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–69 (1992).

weight should be attached to the fundamental values of the legal system in order to shape the ideal according to the current thinking of members of society at the time of interpretation. Therefore, for a statute forbidding "unreasonable" behavior, legislative intent is of little help in defining reasonableness. The question is not what the legislature understood by the word "reasonable" at the time of the legislation. Rather, it is, how do members of society to whom the provision applies understand reasonableness at the time of interpretation?

Another relevant distinction is between statutes enacted by stable democratic social regimes and statutes enacted by undemocratic regimes that nonetheless remain in force after the state's transition to democracy. For statutes enacted during the undemocratic period, little weight should be attached to the intention of the undemocratic legislature. Indeed, consideration of legislative intent in statutory interpretation is based on the need to give expression to the intent of the *democratic* legislator. When the legislator is not democratic, there is no reason to give expression to his intent. Professor David Dyzenhaus expressed this well in addressing the argument in favor of interpreting statutes enacted by the white Parliament in South Africa during apartheid according to the intent of the legislature:

> [T]he legitimacy of that approach depends on a democratic theory which says that the people speak through their elected parliamentary representatives, and thus the statutes enacted by the legislature must be applied by judges so as best to approximate what those representatives actually intended. In others words, the legitimacy of an approach which requires judges to ignore in their interpretation of the law their substantive convictions about what the law should be requires a substantive commitment at a deeper level to the intrinsic legitimacy of that law. However, the Parliament whose statutes they interpreted was illegitimate by the criteria of any democratic theory and so the substantive justification for their approach was absent.[232]

Dyzenhaus notes that giving expression to legislative intent during apartheid led to results disastrous for civil liberties. Indeed, in that type of regime, one should give statutes a narrow semantic interpretation. Once the corrupt regime ends, and the statute is interpreted in the context of a democratic regime, the intent of the undemocratic legislature should be given no weight. Instead, weight should be attached to the fundamental democratic values in whose framework the old legislation now operates. An example of this interpretive principle is the interpretation of legislation enacted in Palestine during the period of the British Mandate. In a long line of cases, the Supreme Court of Israel has ruled that it should interpret this legislation in accordance

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[232] DYZENHAUS, JUDGING THE JUDGES, *supra* note 21, at 166.

with the fundamental values of the new, democratic state and not according to the intention of the undemocratic legislature.[233]

Finally, the content of the legislative arrangement may influence the relationship between the subjective purpose and the objective purpose. For example, in criminal law, great weight may be attached — for rule-of-law reasons like the need for publicity and certainty — to the objective purpose that is evident from the express language of the statute. This language is what is seen by members of society, and the purpose that is evident from it should be given great weight.

5. Purposive Interpretation and Judicial Discretion. — In both constitutional and statutory interpretation, a judge must sometimes exercise discretion in determining the proper relationship between the subjective and objective purposes of the law. Indeed, a theory of interpretation cannot be constructed without interpretive discretion as its foundation. Interpretation without judicial discretion is a myth. Any theory of interpretation — intentionalism, originalism, purposivism, and so on — must be based on an inherent internal element of interpretive discretion.[234] Discretion exists because there are laws with more than one possible interpretation.[235] In such circumstances, the judge undertakes "the sovereign prerogative of choice,"[236] bounded by the fundamental views of the legal community.[237] This conceptualization of the view of the "legal community" is, by its nature, imprecise. There are many borderline cases with no clear resolution. Still, judicial discretion is always limited, never absolute.[238] The limitations imposed on interpretive discretion are procedural and substantive. The procedural limitations guarantee the fairness of the exercise of judicial discretion. The judge must treat the parties equally. He must base his decision on the evidence presented to the court, and he must give reasons for that decision. Above all, the judge must act impartially, without appeal to personal biases or prejudices. The substantive limitations mean that the exercise of discretion must be rational, con-

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233 *See, e.g.*, H.C. 680/88, Schnitzer v. Chief Military Censor, 42(4) P.D. 617, 628; H.C. 2722/92, Alamarin v. IDF Commander in Gaza Strip, 46(3) P.D. 693, 705.

234 *See* BARAK, *supra* note 10, at 55–88; *see also* FARBER & SHERRY, *supra* note 124, at 155 ("[T]he grand theorists' desire to restrain judicial discretion is an impossible dream based on an unwillingness to tolerate uncertainty."); Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 ISR. L. REV. 1, 2–3 (1999).

235 *See* BARAK, *supra* note 10, at 7; WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES 179 (4th ed. 1999); THE USES OF DISCRETION (K. Hawkins ed., 1992); VILA, *supra* note 11, at 12–13. *See generally* JOSE JUAN MORESO, LEGAL INDETERMINACY AND CONSTITUTIONAL INTERPRETATION (1998) (using formal logical analysis to determine the truth-conditions of alternative interpretations of legislation).

236 OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 239 (1952).

237 *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744–45 (1982).

238 *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 61 (1924).

sistent, and coherent. The judge must act reasonably, taking into account the institutional constraints imposed by other parts of the legal system.

What will the judge who is aware of all these responsibilities and limitations do? Beyond the aforementioned procedural and substantive boundaries, there are no rules for exercising discretion, except that the judge must choose the solution that seems to him the best accommodation of the competing purposes he or she has considered.[239] Within this scope, pragmatism operates. My advice is that, at this stage of the interpretive activity, the judge should aspire to achieve justice. This means justice for the parties before the court and with regard to the whole legal system. Justice guides the entire interpretive process, for, indeed, justice is one of the core values of the legal system. Within the bounds of judicial discretion, justice becomes a "residual" value which can decide hard cases. Of course, it is only natural that different judges have different conceptions of justice, for justice is a complex concept. Despite all its theoretical complexity, however, each of us has an intuitive feeling about the just solution of a dispute. This feeling must guide us at all stages of the interpretive process. It must direct our decisions in hard cases, when judicial discretion becomes our most essential tool.

6. Purposive Interpretation and New Textualism. — United States case law and legal literature have recently begun using an interpretive system called "new textualism."[240] This system holds that the Constitution and every statute should be understood according to the reading of a reasonable reader at the time of enactment.[241] To this end, interpreters may refer to the language of the text as a whole. They may refer to contemporary linguistic aids in order to acquire information about how the text was understood when it was enacted. They also may refer to the various interpretive "maxims" — such as *expressio unius est exclusio alterius* (expression of the one is the exclusion of another) — because these indicate the way a reasonable reader may have understood the text at the time it was enacted. Similarly, in the case of

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239 *See* JOSEPH RAZ, THE AUTHORITY OF LAW 197 (1979).

240 *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1998) ("The meaning of statutes is to be found not in the multiple minds of Congress but in the understanding of the objectively reasonable person."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) [hereinafter Eskridge, *The New Textualism*]; William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998); Scalia, *supra* note 205, at 862–65 (arguing that the "originalist" approach to interpretation is preferable to the "nonoriginalist" approach); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330–32 (1995); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

241 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999).

a statute, judges may refer to other statutes passed by the same legislature to draw conclusions about its use of similar language. Reference to the history of the text's creation or to the system's fundamental values, however, is not allowed. In this interpretive system, the question is not at all what the founders or legislators intended. The question is what they said. Justice Scalia writes:

> It is the *law* that governs, not the intent of the lawgiver. . . . [T]he objective indication of the words, rather than the intent of the legislature, is what constitutes the law. . . . I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.[242]

I disagree with new textualism's presumption that the true intention of the author cannot ever be discovered.[243] Although it is not always possible to discover the true intention of the author, that does not mean that there are *no* cases in which the intent can be known. To the extent that new textualism views intent as irrelevant, or claims that taking intent into account undermines democracy, I disagree. Honoring authorial intent in giving meaning to a text upholds the formal democratic value of constitutional and legislative supremacy. Ignoring the intention of the author — thereby viewing the constitution or statute as a text with no intention — is precisely what undermines formal democracy.[244] When the founders or legislature enacted a text, they sought to give effect to a policy. This policy should be taken into account when interpreting the text.

Moreover, new textualism's refusal to take into account the legal system's fundamental values harms substantive democracy. Purely textual interpretation severs the constitution or statute from the fundamental values of society in general and from human rights in particular.

Worst of all, new textualism does not realize the judicial role. Under the new textualist approach, the interpretation of a constitution or statute ceases to be a tool for bridging the gap between the law and society, and the judge ceases to fulfill his or her role in protecting democracy. Instead, the judge focuses on language and the understanding of the reader at the time the text was created. Such a method expands judicial discretion and makes law less certain and less stable, which offends the principles of formal democracy. Admittedly, formal democracy holds that a statute is what the legislature actually enacts, not its intention, the "intention" of a reasonable legislator, or the "intention" of the legal system. But a judge who takes into account legis-

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242 SCALIA, *supra* note 64, at 17, 29, 31.

243 *See id.* at 31–32.

244 *See* Eskridge, *The New Textualism*, *supra* note 240, at 683; Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997) (reviewing SCALIA, *supra* note 64).

lative intent or the "intention" of the legal system does not claim that these constitute the text of the legislature. We must distinguish between the text — which the legislature enacted — and the criteria for understanding it.[245] New textualism also offends substantive democracy by failing to consider the legal system's fundamental values at the time of interpretation. The principle of separation of powers recognizes the judge's authority to interpret the text. This interpretation is based on a partnership that recognizes the need to examine both the intention of the author and the "intention" of the legal system (that is, the current values of society).

Because new textualism is inconsistent with fundamental principles of democracy, it cannot be a proper system of interpretation. Nonetheless, it can serve as a basis for a proper system of interpretation. Its focus on the text as a basis for interpretation is proper. A statute that forbids bringing a vehicle into a park[246] cannot be interpreted to forbid one from bringing an elephant into a park. Language limits the interpretation. New textualism's rejection of the author's intent as a permissible consideration has positive elements, too. Sometimes one cannot know what this intention is; sometimes there is no reliable evidence of it; sometimes, even if it can be discerned, it should not be given weight. Similarly, new textualism's insistence on considering the text as a whole as a source for understanding any part of it is also on point. Nonetheless, to arrive at a proper system of interpretation, the horizons of the interpreter need to be widened beyond those of new textualism. The context of the text — the importance of which is noted by new textualism, albeit narrowly — includes society's principles, values, and fundamental views, both at the time of enactment and at the time of interpretation. These and other changes would be necessary to transform new textualism into a proper system of interpretation. At that point, however, it would cease to be new textualism and become purposive interpretation.

B. The Fundamental Principles of the System

The fundamental principles of the legal system constitute both a goal to which judges should aspire and a means through which they realize this goal. Indeed, in addition to being a source of interpretive guidance, fundamental principles constitute a primary tool that I need to realize my role as a judge. My premise is that we are living in a normative world. Our universe is full of fundamental principles.

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[245] This distinction has been discussed by American realists. *See* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Radin, *supra* note 192; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

[246] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

There is no corner of our lives that is not controlled by them. Judges are steeped in them; a judge's whole being is a balance of conflicting principles. This premise holds true both in private and public law. These principles are the purposes to which we aspire. They are also the devices through which we act. This notion is well expressed by Justice Michael Cheshin of the Israeli Supreme Court in the following analogy:

> Morality and its directives appear as a lake of pure water, while law and its directives can be compared to water lilies immersed in the water, spread across the surface and drawing life and strength from the water. Morality feeds law at the roots and encompasses law. Some of these water lilies give legal force to the moral imperatives; some of the flowers of the water lilies act as concepts that frame law, whose content is filled by the directives of morality, both personal and social.[247]

The common law is replete with fundamental principles. They are the bases for its development. The interpretation of legal texts is dictated by fundamental principles, since they constitute the objective purpose of every legal text.[248] Indeed, a legal norm — whether enacted or in case law — is an organism that lives in its environment. This environment includes the fundamental principles of the system. Indeed, judges are not able to sever themselves from the fundamental values of their societies. They will give expression to them consciously or subconsciously. The use of fundamental principles raises several problems that I wish to consider briefly. I know that this is an area in which different judges are likely to have conflicting opinions. I can only indicate my own view regarding the status and role of fundamental principles in realizing the judicial role.

1. What Are Fundamental Principles? — Every legal system has its own fundamental principles. Nonetheless, most democratic legal systems share some common ones. As I wrote in one of my opinions:

> These general principles include the principles of equality, justice, and morality. They extend to the social goals of the separation of powers, the rule of law, freedom of speech, freedom of movement, worship, occupation, and human dignity, the integrity of judging, public safety and security, the democratic values of the State and its very existence. These principles include good faith, natural justice, fairness, and reasonableness.[249]

This list is certainly not exhaustive. It is composed of three types of fundamental principles: ethical values (such as justice, morality, and human rights), social purposes (such as the existence of the state and public safety within it, certainty and stability in interpersonal ar-

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247 C.A. 3798/94, Anonymous v. Anonymous, 50(3) P.D. 133, 182.

248 *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1007–09 (1989); Sunstein, *supra* note 224, at 426–28.

249 Cr.A. 677/83, Borochov v. Yefet, 39(3) P.D. 205, 218.

rangements, and human rights), and proper ways of behavior (such as reasonableness, fairness, and good faith). The distinctions among the three types is not precise, and there is considerable overlap. It is sufficient to point out that we are concerned with general and accepted principles that form a central element of the legal system. They constitute both the principles and the policies of the legal system.[250]

2. The Sources of the Fundamental Principles. — Since there is usually no central text that articulates the fundamental principles of the legal system, how will the judge derive them? One thing is clear: judges must not impose their own personal, subjective perceptions of the fundamental principles on the society in which they operate. Judges should not reflect their own principles, but rather the fundamental principles that are implied by the legal system and the ethos that it characterizes.[251] The nature of the fundamental principles and the balance among them are determined by the fundamental positions and fundamental beliefs of the society, such as those written into its constitution or its declaration of independence. Judges also learn of the fundamental principles from the democratic regime itself, including principles about the separation of powers, the rule of law, and the independence of the judiciary. From the democratic nature of the state, judges can infer the existence of human rights. Indeed, there is a reciprocal relationship between the democratic nature of the state and its fundamental principles: judges learn of the democratic nature of the state from its fundamental principles. And from this democratic nature, and the different statutes that characterize it, they may derive the state's fundamental principles.

3. New and Old Fundamental Principles. — Fundamental principles do not live forever. New fundamental principles come into the system, while outdated ones leave the system. New fundamental principles find expression in new constitutions and in new statutes consistent with the new constitutions. But even in the absence of new constitutions and new statutes, introduction of new fundamental principles is made possible by case law. The judge is faced with the difficult and complex tasks of recognizing new fundamental principles and of removing outdated ones from the system. Judges must understand the legal system in which they operate and feel the pace and direction of its development. They must introduce into the system only

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[250] Dworkin distinguishes between principle and policy. *See* DWORKIN, *supra* note 14, at 244. I do not insist on this distinction. *See also* N. MacCormick, *On Reasonableness*, *in* LES NOTIONS A CONTENU VARIABLE EN DROIT chs. 5–8 (Chaim Perelman & Raymond Vander Elst eds., 1984).

[251] *See* CARDOZO, *supra* note 18, at 88–89, 108.

those fundamental principles that are ripe for recognition.[252] Different values are gradually absorbed and gradually ripen until the moment arrives when judges ought to recognize them as fundamental values of their systems. We are concerned, therefore, with a lengthy social process. This process was discussed by President Agranat of the Supreme Court of Israel:

> The conception and birth of these truths are the result of social thought. Their creation and development are the outcome of clarifications and elucidation through social organs (political parties, newspapers, various associations and professional organizations, etc.). Only after they have undergone this process of initial crystallization does the State — i.e., the laws of the legislature, the regulations and rulings of the executive, and the judgments of the courts — come and reshape them, translate them into the language of law and impress on them the positive and binding stamp of the law. The explanation for this is as follows: the role of the State is — so democracy teaches us — to fulfill the will of the people and to give effect to norms and standards that the people cherish. What follows from this is that a process of "common conviction" must first take place among the enlightened members of society regarding the truth and justice of those norms and standards, before we can say that a general will has been reached that these should become binding with the approval and sanction of the positive law. It should be noted that the "common conviction" is not that these norms and standards are yet to be born, but that they exist in the present and contain truth, even though they lack an official statutory stamp of approval. It follows that the social consensus regarding the truth and justice of one norm or another must precede legal recognition from the State, and the process of creating this kind of social consensus does not begin and end in a day; it is a process of gradual development, which continues for a long time and is sometimes renewed. [253]

Generally, values that are insufficiently developed and that do not enjoy social recognition and agreement should not be introduced into the legal system judicially. This notion was discussed by Justice Holmes:

> As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets

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[252] *See* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 849 (1972) ("In most countries one of the most general principles restraining judicial discretion enjoins judges to act only on those values and opinions which have the support of some important segment of the population."); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 236 (1973).

[253] H.C. 58/68, Shalit v. Minister of Interior, 23(2) P.D. 477, 602.

> that what seem to him to be first principles are believed by half his fellow men to be wrong.[254]

At times judges may find certain values to be fundamental and proper, but this reason alone should not generally be sufficient for judges to recognize them as fundamental values of the system. In principle, judges should recognize only values that appear to be fundamental to the society in which they live and operate. The social consensus around fundamental views is usually what ought to guide judges, with regard to both the introduction of new fundamental principles and the removal from the system of fundamental principles that have become discredited. Consensus is a complex concept. As a rule, I have always tried to carry out my role as a judge within the framework of social consensus, to the extent that data exist about it.[255] The judge should generally not be the flagbearer of a new social consensus. As a rule, judges should reflect values and principles that exist in their system, rather than create them. Justice Traynor rightly stated: "The very responsibilities of a judge as an arbiter disqualify him as a crusader."[256]

Nevertheless, there are cases — and they must naturally be few — in which the judge carries out his role properly by ignoring the prevalent social consensus and becoming a flagbearer of a new social consensus. I do not know what the consensus was in the United States just before the Supreme Court's decision in *Brown v. Board of Education*,[257] but, in my opinion, the Court at that time fulfilled its role even if it ruled against the then-prevailing consensus. Naturally, a supreme court will not retain public confidence if it announces a new *Brown* twice every week. Similarly, a supreme court will lose public confidence if it misses an opportunity like *Brown* when faced with it. In the final analysis, everything is a question of degree.

The consensus within which judges usually ought to operate should be a consensus grounded in the fundamental values of the legal system. Judges should not act according to a consensus formed by transient trends that are inconsistent with the society's fundamental values. Judges' social framework must be central and basic, not temporary and fleeting. When society is not being true to itself, judges are not required to give expression to its passing trends. They must stand firm against these trends, while giving expression to the social consensus that reflects their society's fundamental principles and ten-

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254 Oliver Wendell Holmes, *Law and the Court*, *in* HOLMES, *supra* note 236, at 291, 294–95.

255 *See* BARAK, *supra* note 10, at 213–15.

256 Traynor, *supra* note 41, at 1030.

257 347 U.S. 483 (1954).

ets: "[They] must reveal what is principled and fundamental, while rejecting what is temporary and fleeting."[258]

Remaining in touch with these views requires a study of social consensus; it requires judicial self-restraint, moderation, and sensitivity. In exceptional situations, judges may depart from the current consensus. Moreover, fundamental principles are the result of modern experience. While even modern experience sprouts from the soil of the past to which it is connected, its horizons are not limited to the horizons of the past. Every generation has its own horizons. This approach to fundamental principles — emphasizing deeply held views and not the temporary and the fleeting, emphasizing history and not hysteria — also provides a proper answer to the criticism that taking into account the fundamental principles of the present may harm individuals in the minority.[259] The answer to this criticism is, inter alia, that the fundamental values of the present are not necessarily the values that today's majority accepts. They are the deeply held values of the society that have developed over time. Again, it is precisely judges, enjoying the independence of an appointed position, who are in the appropriate position to ignore passing vogues and give expression to the deeply held values of society.[260] Indeed, judges' nonaccountability is their most precious asset,[261] enabling them to give expression to the deeply held principles of society in its progress through history.

4. The Status and Weight of Fundamental Principles. — Fundamental principles play various roles in the law. They are the reason for creating new legal norms and for changing existing norms. They influence the legislature in creating legislation and influence the judge in developing the common law. They are sources of rights and duties, and they are criteria for the validity of legal norms. As we have seen within the framework of the objective purpose, fundamental principles are an interpretive tool for all legal texts.

The legal status of fundamental principles is determined by their normative sources. Fundamental principles derived from the constitution have constitutional status; fundamental principles derived from statutes have statutory status; fundamental principles derived from the common law have common law status. This framework leads to an important question: are there principles so fundamental that they have — in a legal system with a formal constitution (such as the United States) — supra-constitutional weight,[262] or — in a legal system with

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258 H.C. 693/91, Efrat v. Dir. of Population Register, 47(1) P.D. 749, 780 (Isr.).

259 *See* Scalia, *supra* note 28, at 315–17.

260 *See* BICKEL, *supra* note 138, at 24.

261 *See* Atiyah, *supra* note 139, at 369.

262 The question arises whether every constitutional amendment that complies with the formal provisions relating to amendments is constitutional. Alternatively, is it perhaps possible to recog-

no formal constitution (such as England and New Zealand) — supra-legislative status?[263]

Fundamental principles reflect ideals. What makes them unique is that they can be realized at different levels of intensity. When fundamental principles conflict, they do not cancel each other out. Instead, the result of the conflict is a redefinition of the scope of each principle's boundary. The two conflicting principles continue to apply in the legal system, and a proper balance is maintained between them.[264]

An important quality that characterizes principles — as discussed by Dworkin[265] — is that they have "weight." It is possible to resolve a conflict between principles by means of "balancing" their respective weights. The weight of a fundamental principle reflects its relative social importance, its place in the legal system, and its value within the entire array of social values. Similarly, it is possible to speak of a "gravitational force" of fundamental values. This gravitational force varies according to the nature of the principles, their sources, and their importance. William Eskridge rightly points out that "[p]ublic values have a gravitational force that varies according to their source (the Constitution, statutes, the common law) and the degree of our historical and contemporary commitment to these values."[266]

How does the judge determine the "weights" of the various fundamental principles? The answer to this question is difficult. Legal science has not yet developed a satisfactory "theory of values," and it is questionable whether such a theory could ever be developed. But it is certainly possible to say that a fundamental principle enshrined in a superior norm, such as a constitution, is of greater "weight" than a fundamental principle enshrined in an inferior norm, such as a statute or common law. A judge can also take into account the weight given to competing fundamental principles in the past. The judge must harmonize the relative weight given to a fundamental principle in one case (freedom of speech versus public safety) with the weight that should be given to that fundamental principle in another case (freedom of expression versus reputation). In doing so, the judge must aspire to

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nize constitutional amendments as unconstitutional? *See* TRIBE & DORF, *supra* note 196, at 102–03, 110. The most interesting judicial treatment of this issue comes from the Indian Supreme court. In a series of decisions, the Court established that a constitutional amendment is unconstitutional if it changes the constitution's basic structure and framework. *See* Matthew Abraham, *Judicial Role in Constitutional Amendment in India: The Basic Structure Doctrine*, *in* THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS 195, 201–04 (Mads Andenas ed., 2000).

263 *See* Sir Robin Cooke, *Fundamentals*, 1988 N.Z. L.J. 158, 164; Lord Woolf of Barnes, *Droit Public — English Style*, 1995 PUB. L. 57, 67.

264 I discuss this issue further below and more extensively in section IV.C.

265 *See* DWORKIN, *supra* note 12, at 26–27.

266 Eskridge, *supra* note 248, at 1018.

uniformity and harmony. But we must admit that in certain cases the matter is subject to judicial discretion.

There are many values and principles of substantive democracy. I wish to discuss two of them: tolerance and good faith. "Democracy is based on tolerance. This means tolerance for the acts and beliefs of others. It also means tolerance for intolerance. In a pluralistic society such as ours, tolerance is the unifying force that allows us to live together."[267] Indeed, "tolerance constitutes both an end and a means. It constitutes a social goal in itself, which every democratic society should aspire to realize. It serves as a means and a tool for balancing between other social goals and reconciling them, in cases where they conflict with one another."[268] As I have stated in one case:

> Tolerance is a central value on the public agenda. If every individual in a democratic society seeks to realize all of his desires, in the end society will not be able to realize even a small number of its desires. Proper social life is naturally based on reciprocal concessions and mutual tolerance.[269]

Of course, tolerance has its limits.[270] But although it is not an absolute value, it is a central value to be considered and balanced against others.

Tolerance means respect for the personal opinions and feelings of every individual. Tolerance also means attempting to understand others, even if they behave in a way that is unusual, and tolerance means protecting opinions, ideas, and beliefs. Tolerance in religious-secular relations, for example, means recognizing the existence of two important human rights — freedom of religion and freedom from religion — that require accommodation and compromise. Indeed, tolerance means the willingness to compromise: compromise between the individual and society and compromise between individuals. This willingness to compromise does not mean waiving principles, but it does mean waiving the use of all means to realize goals: "Tolerance is not a slogan for accumulating rights, but a criterion for granting rights to others."[271]

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[267] H.C. 399/85, Kahane v. Broad. Auth. Mgmt. Bd., 41(3) P.D. 255, 276–77 (Isr.) (citations omitted).

[268] C.A. 294/91, Jerusalem Cmty. Burial Soc'y v. Kestenbaum, 46(2) P.D. 464, 521 (Isr.).

[269] C.A. 105/92, Re'em Eng'g Contractors Ltd. v. Municipality of Upper Nazareth, 47(5) P.D. 189, 211.

[270] *See* RAPHAEL COHEN-ALMAGOR, THE BOUNDARIES OF LIBERTY AND TOLERANCE 122–31 (1994); Raphael Cohen-Almagor, *Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination*, *in* LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE 79, 81 (Raphael Cohen-Almagor ed., 2000); Mary Warnock, *The Limits of Toleration*, *in* ON TOLERATION 123, 139 (Susan Mendus & David Edwards eds., 1987). *See generally* LEE BOLINGER, THE TOLERANT SOCIETY (1988); SUSAN MENDUS, JUSTIFYING TOLERATION (1988); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

[271] H.C. 257/89, Hoffman v. Dir. of the W. Wall, 48(2) P.D. 265, 354.

The second principle of substantive democracy is good faith. I am not referring to the subjective meaning of good faith, which is a lack of evil intent. I am referring to its objective meaning,[272] which determines the standard of behavior for relationships among members of society.[273] In explaining this objective principle, I wrote in one opinion:

> The principle of good faith determines the mode of behavior of people that life brings together. It establishes that this behavior must be honest and fair as required by . . . society's sense of justice. By its very nature, the principle of good faith constitutes an "open" criterion that reflects . . . society's fundamental conceptions about the proper behavior between people. The categories of good faith are never closed; they are never rigid and they do not rest on their laurels. Good faith introduces into our system a foundation of flexibility that allows the system to adapt itself to the needs of changing life. It allows the law to bridge the gap between the needs of the individual and the needs of society; between individualism and community. It is a conduit through which the law absorbs new ideas. Good faith does not assume benevolence. Good faith does not require a person not to take account of his own personal interest. In this way, the principle of good faith is different from the principle of fiduciary duty (that applies to a director, agent, guardian, or civil servant). The principle of good faith determines the standard of behavior for people concerned with their own interest. The principle of good faith determines that protection of one's own interest must be done fairly and with consideration for the justified expectations and proper reliance of the other party. Person-to-person, one cannot behave like a wolf, but one is not required to be an angel. Person-to-person, one must act like a person.[274]

The main application of the principle of good faith is in private law, for in public law the public authority has a heavier duty than the one derived from the principle of good faith.[275] The judge develops private law using the principle of good faith, and uses good faith to

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[272] *See* Robert S. Summers, *The General Duty of Good Faith — Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 829–30 (1982).

[273] This concept has been developed mainly in continental law, and especially in German law. The German Civil Law Code provides (in English translation) that "[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage." § 242 BGB. Israel has a similar provision, according to which every legal action, such as a contract, must be executed in good faith. *See* The Contracts (General Part) Law, 1973, 27 L.S.I. 123, § 39 (1972–73). Before legislation was enacted to this effect, Israeli common law recognized this principle. On good faith in contract law, see STEVEN J. BURTON & ERIC G. ANDERSON, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (1995); GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT (Roger Brownsword, Norma J. Hird & Geraint Howells eds., 1999); GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann eds., 1995).

[274] C.A. 6339/97, Roker v. Salomon, 55(1) P.D. 199, 279 (citations omitted).

[275] The following interesting question has arisen in Israel: is the duty of the individual to the state limited merely to good faith, or does the individual have a fiduciary duty to the state? *See* H.C. 164/97, Kontris Ltd. v. Fin. Ministry, Customs Branch, 52(1) P.D. 289.

interpret, for example, contracts[276] and wills. The judge will consider whether to void a contract that violates the principle of good faith.[277] By relying on good faith, judges are able to fill a lacuna in a contract[278] or a will. Indeed, good faith constitutes one of the main tools with which I fulfill my role as a judge. By virtue thereof, I have held that every power given to an individual in private law should be exercised in good faith, including procedural rights,[279] property rights,[280] contract negotiations,[281] and performance of contracts.[282] Every remedy in private law should be exercised in good faith.

C. Balancing and Weighing

From my judicial experience, I have learned that "balancing" and "weighing," though neither essential nor universally applicable, are very important tools in fulfilling the judicial role. Even where applicable, however, they do not produce singular, unambiguous legal solutions. Indeed, the main significance of balancing and weighing is the order they lend to legal thinking rather than the particular legal judgments they produce. To apply these tools, one must first identify the relevant values and principles whose framework provides a necessary context for balancing and weighing.[283] These tools express the complexity of the human being and of human relationships. They also ex-

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[276] *See* Steven J. Burton & Eric G. Anderson, *The World of a Contract*, 72 IOWA L. REV. 861, 873 (1990); Martijn Willem Hesselink, *Good Faith*, *in* TOWARDS A EUROPEAN CIVIL CODE 285, 294 (Arthur Hartkamp et al. eds., 1998).

[277] Judges did so in a number of countries during periods of extremely high inflation, including Germany prior to World War II. *See* SHIRLEY RENNER, INFLATION AND THE ENFORCEMENT OF CONTRACTS 12 (1999); KEITH S. ROSENN, LAW AND INFLATION 90 (1982); John P. Dawson, *Effects of Inflation on Private Contracts: Germany, 1914–1924*, 33 MICH. L. REV. 171, 206 (1934).

[278] Good faith replaces the doctrine of implied terms. It is similar to the principle of reasonableness set out in the *Restatement (Second) of Contracts*. *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979).

[279] *See* C.A. 305/80, Shilo v. Ratzkovsky, 35(3) P.D. 449.

[280] *See* C.A. 6339/97, Roker v. Salomon, 55(1) P.D. 199, 279.

[281] This concept has not yet been recognized as a general legal principle in the United States. *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.26, at 312 (1998); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

[282] This principle is accepted in United States law. *See* FARNSWORTH, *supra* note 281, § 7.17, at 550–53.

[283] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946–47 (1987); Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 23 (1988); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1025 (1978); Gerard V. La Forest, *The Balancing of Interests Under the* Charter, 2 NAT'L J. CONST. LAW 133, 134 (1992); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 321 (1992); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992).

press my eclectic approach,[284] which takes the entirety of the values and interests into consideration, and which seeks to balance them according to society's changing needs. I do not believe that one comprehensive theory can explain the complicated relationship between an individual and society.[285] Rather, I believe that jurists should balance various theories and approaches, in recognition of the fact that law is not all or nothing. Bridging the gap between law and society and protecting democracy demand accounting for this complexity. An expression of it can be given by means of the tools of "balancing" and "weighing." Balancing and weighing, themselves metaphors,[286] reflect the need to decide a conflict between values and principles that are accepted in the legal system.[287] The result of the balance is important both to the development of common law and to the determination of objective purpose in a legal text (such as statutes and constitutions).[288] The concept of balancing recognizes that fundamental principles may conflict with one another, and that the proper resolution of this conflict lies not in the elimination of the inferior value but in determining the proper boundary between the conflicting values. Similarly, the concept of "balance" reflects the recognition that fundamental principles have "weight" and that it is possible to classify them according to their relative social importance. The act of "weighing" is merely a normative act designed to give the principles their proper place in the law.

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284 *See infra* p. 66.

285 *See* FARBER & SHERRY, *supra* note 124 (arguing that no single, all-encompassing theory can successfully guide judges or provide definitive (or even sensible) answers to every constitutional question).

286 *See* William J. Winslade, *Adjudication and the Balancing Metaphor*, *in* LEGAL REASONING 403 (Hubert Hubien ed., 1971).

287 *See* H.C. 14/86, Laor v. Film & Play Review Bd., 41(1) P.D. 421, 434.

288 In a number of articles, Professor Richard Pildes has emphasized that judges who talk about "balance" do not "balance" but rather only interpret. *See* Richard H. Pildes, *Against Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711–12 (1994); Richard H. Pildes, *The Structural Conception of Rights and Judicial Balancing*, 6 REV. CONST. STUD. 179, 188–89 (2002). I agree with Pildes that balancing is not an economic analysis of costs and benefits. I also agree that, as far as a constitution or statute is concerned, we are interested in interpreting the text. My claim is that, within the framework of interpreting a text and determining its objective purpose, a balancing process takes place. For example, a statute originating from the time when Israel was under British mandatory rule provides that the High Commissioner — today, the Minister of Interior — may close a newspaper if, in his discretion, "any matter appearing in a newspaper is . . . likely to endanger the public peace." Press Ordinance, 1933, § 19(2)(a). In interpreting the word "likely," the Israeli Supreme Court has balanced the right to freedom of speech with the interest in public peace, holding that "likely to endanger the public peace" means there is near certainty that the publication will indeed harm the public peace. *See* H.C. 73/53, "Kol HaAm" Co. v. Minister of Interior, 7 P.D. 871. The classification that Pildes suggests does not negate the theory of balancing. It simply locates it within the framework of the interpretive process. On this point, I agree with him, and I have acknowledged as much in numerous opinions. *See* H.C. 693/91, Efrat v. Dir. of Population Register, 47(1) P.D. 749; Cr.A. 6696/96, Kahana v. State of Israel, 52(1) P.D. 535.

Naturally, acts of balancing and weighing are not scientific in nature. They do not negate the existence of judicial discretion.[289] Nonetheless, they confine such discretion to those situations in which the legal system fails otherwise to clarify the relative social status of the conflicting values and principles. In this respect, one should not trade one extreme for the other. Just as balancing and weighing do not negate judicial discretion entirely, these techniques also do not constitute an open invitation for judicial discretion in every case. I should point out that the doctrine of balancing has not been sufficiently developed in the law. This is regrettable, since balancing is so central to fulfilling the judicial role. I hope that jurisprudence will make a contribution to answers for these questions. There have been some inroads in this area. Consequently, I would like to consider several issues that have arisen in the case law of the Supreme Court of Israel, which may further the understanding of the balancing process.

1. *Balancing Formulae.* — The social status of a fundamental principle is determined according to its relationship to all the principles of the legal system. We must compare different values of varying weights. As I wrote in one of my opinions:

> A social principle (such as freedom of expression) does not have "absolute" weight. The weight of a social principle is always relative. The status of a fundamental principle is always determined relative to other principles, with which it may conflict. The weight of the freedom of speech relative to the freedom of movement is different from its weight relative to judicial integrity, both of these are different from the weight of the freedom of speech relative to reputation or privacy, and all of these are different from the weight of the freedom of speech relative to the public interest in security and safety.[290]

The "balancing formula" reflects this relative value. The number of balancing formulae will always exceed the number of conflicting values, since within the limits of a given value (such as freedom of expression) there may be different levels of weight (political expression, commercial expression, and so on). We should not search for only one balancing formula to balance all of the conflicting principles.[291]

2. *Principled Balancing and Ad Hoc Balancing.* — Balancing between fundamental principles may be principled or ad hoc. Principled balancing determines a "weight" that is normative, leading to a legal criterion or formula that can be applied in future cases. Thus, for example, the principled balance between freedom of speech and public safety in Israeli case law is that the state may restrict the freedom of

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289 *See* HANS KELSEN, PURE THEORY OF LAW 352 (Max Knight trans., 1967) (1960).

290 C.A. 105/92, Re'em Eng'g Contractors Ltd. v. Municipality of Upper Nazareth, 47(5) P.D. 189, 211.

291 *See* H.C. 2481/93, Dayan v. Jerusalem Dist. Comm'r, 48(2) P.D. 456.

speech to protect public safety only if there is a near certainty that unrestricted speech would severely compromise public safety.[292] Ad hoc balancing, by contrast, is not based on a general "formula" that can be applied in similar cases other than the baseline determination that one should balance the competing principles according to what the circumstances of the case require. Principled balancing is usually preferable to ad hoc balancing. Judges should formulate a "rational principle" that reflects "a criterion that incorporates a principled guideline,"[293] thus distancing themselves from a "random paternalistic criterion, whose directions and nature cannot be anticipated."[294]

3. Vertical Balancing and Horizontal Balancing. — In several opinions, I have discussed the distinction between two main types of balancing: horizontal and vertical.[295] Horizontal balancing occurs between values and principles of equal standing. This balancing will happen, for example, when two constitutional human rights conflict with one another. Thus, the freedom of speech may conflict with the rights of privacy, reputation, or movement. Horizontal balancing expresses the degree of reciprocal compromise that each of the fundamental principles must make, instructing judges to preserve the essence of the conflicting principles by crafting reciprocal compromises at the margins. This balancing attempts to ensure that the various compromises are proportionate and to give "breathing space" to each competing principle. One must avoid giving full expression to one fundamental principle at the expense of another. Restrictions must consider time, place, and manner, so that each of the competing principles enjoys a substantive and real existence. Therefore, traffic considerations should not necessarily preclude a demonstration in a city's main streets, but the city may nevertheless reasonably restrict a demonstration's time and manner. Horizontal balancing determines the boundaries of the conflicting rights. The freedom of speech ends where the right to reputation begins; the freedom of movement ends where the freedom of demonstration begins.

Vertical balancing is different. The vertical balancing formula determines the conditions under which certain fundamental principles take precedence over others. This balancing occurs, for example, when a human right is not fully protected because of the need to balance it with a state interest, such as public security or public order. Thus, for example, an Israeli court has held that national security or

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[292] *See "Kol HaAm" Co.*, 7 P.D. at 871; Aharon Barak, *Freedom of Expression and Its Limitations*, *in* CHALLENGES TO DEMOCRACY: ESSAYS IN HONOUR AND MEMORY OF ISAIAH BERLIN 167, 179–80 (Raphael Cohen-Almagor ed., 2000).

[293] *"Kol HaAm" Co.*, 7 P.D. at 881.

[294] F.H. 9/77, Isr. Elec. Co. v. Haaretz Newspaper Publ'g Ltd., 32(3) P.D. 337, 361.

[295] *See, e.g.*, *Dayan*, 48(2) P.D. at 475.

public safety needs may restrict the freedom of speech or the freedom of religion if there is a near certainty that actualizing these freedoms will cause serious damage to national security or public safety.[296] Similarly, considerations of national security allow restriction of the freedom of movement outside Israel if there is a genuine and serious fear that granting this freedom will harm national security.[297] Vertical balancing does not determine the boundaries of the right that is being infringed; rather, it determines the degree of protection that the legal system affords a given right.[298] Of course, the distinction between vertical and horizontal balance is not absolute. In complex situations, both types of balancing are required.

D. Justiciability or "Political Questions"

Another important tool that judges use to fulfill their role in a democracy is determining justiciability.[299] That is, judges identify those issues about which they ought not make a decision, leaving that decision to other branches of the state.[300] The more non-justiciability is expanded, the less opportunity judges have for bridging law and society and for protecting the constitution and democracy. Given these consequences, I regard the doctrine of non-justiciability or "political questions" with considerable wariness. I prefer — insofar as possible — to examine an argument on its merits, or to consider abstaining from a decision for lack of a cause of action rather than because of non-justiciability.[301] In many cases where my colleagues have dismissed claims on the grounds of non-justiciability, I dismissed on the grounds that the disputed executive action was legal and therefore that the claim should be dismissed on the merits. My approach does not assume that the court is always the best institution to resolve disputes; indeed, I accept that certain disputes are best decided elsewhere. However, the court should not abdicate its role in a democracy merely because it is uncomfortable or fears tension with the other branches of the state. This tension not only fails to justify dismissing claims, but is even desirable on occasion.[302] It is because of this tension that the

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296 *See supra* note 292 and accompanying text.

297 *See* H.C. 448/85, Dahar v. Minister of Interior, 40(2) P.D. 701.

298 For the distinction between the scope of the right and the degree of protection afforded it, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89 (1982).

299 On justiciability and the political question doctrine, see generally 1 TRIBE, *supra* note 195, § 3-13, at 365–85; YAACOV S. ZEMACH, POLITICAL QUESTIONS IN THE COURTS (1976).

300 *See* Geoffrey Marshall, *Justiciability*, *in* OXFORD ESSAYS IN JURISPRUDENCE 265, 269–70 (A.G. Guest ed., 1961).

301 *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 621–22 (1976); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1055 (1984); *see also* Hershkoff, *supra* note 27, at 1877–98.

302 *See infra* Part V.

freedom of the individual is guaranteed. True, the "passive virtues" that Professor Alexander Bickel advocates so persuasively do have great force.[303] Like everything, though, their power is relative and must be balanced with their significant shortcomings.[304] Overall, the benefit gained from a broad doctrine of non-justiciability is significantly smaller than the benefit gained from a narrow one. Nonetheless, I know that many judges in the Anglo-American and other legal systems think otherwise and regard the barrier of justiciability as a proper protection of the court's effectiveness in other areas. Under either view, the argument over this question goes to the heart of the judicial role, and for this reason is of fundamental importance. Below, I discuss the nature of non-justiciability and the considerations motivating my aversion to it. I begin by making a distinction that seems to me essential: between normative justiciability and institutional justiciability.[305]

1. *Normative Justiciability.* — Normative justiciability aims to answer the question whether there are legal criteria for determining the given dispute. This type of justiciability was discussed by Justice Brennan, who said that a dispute is non-justiciable — or more correctly, raises a political question — if there is "a lack of judicially discoverable and manageable standards for resolving it."[306] I reject this approach. In my opinion, every dispute is normatively justiciable. Every legal problem has criteria for its resolution. There is no "legal vacuum." According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be "imprisoned" within the framework of the law. Even actions of a clearly political nature — such as waging war — can be examined with legal criteria, as evidenced by the laws of war in international law. The mere fact that an issue is "political" — that is, holding political ramifications and predominant political elements — does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality. Of course, an activity's political nature may occasionally create a legal norm that, by the content of the norm, gives broad discretion to the political authority to act as it wishes. In that case, the political authority is then free to act within,

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303 *See* BICKEL, *supra* note 138, at 111; Alexander M. Bickel, *The Supreme Court, 1966 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42–58 (1961).

304 *See generally* Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

305 *See* H.C. 910/86, Ressler v. Minister of Def., 42(2) P.D. 441. The two other Justices who joined the majority, President Shamgar and Vice-President Ben-Porat, reserved judgment on various aspects of my approach. For an English translation of the judgment, see ITZHAK ZAMIR & ALLEN ZYSBLAT, PUBLIC LAW IN ISRAEL 275–302 (1996).

306 Baker v. Carr, 369 U.S. 186, 217 (1962).

but not without, the law. Naturally, in a liberal system of law, the premise is that the individual is free to do everything except what the law prohibits, and the government may not restrict his or her conduct without the law's authorization. This freedom of the individual is not a freedom that operates outside the law, but rather a freedom that the law recognizes. Once again, I do not claim that legal solutions are always the most important or the best; human relationships certainly extend beyond the law. I have already said that, in my opinion, the law is a tool for regulating relationships between people, but of course this tool is not the only one. My argument is instead jurisprudential — that although not everything is law, there is law in everything.

Several rulings of the Supreme Court of Israel illustrate this point. One case assessed the question whether a transitional or "lame-duck" government — that is, a government that has resigned or does not have the confidence of parliament and is awaiting impending elections — is authorized to negotiate peace agreements.[307] I said that it may do so, if it is reasonable in the circumstances of the case. Several other judges dismissed the action as non-justiciable. In my opinion, in the absence of a specific relevant provision, this question was governed by the general principles of administrative law, one of which is the principle of reasonableness. Consequently, this principle produced the legal criteria on which my decision turned.

Another case considered whether the Oslo Accords, signed by the Israeli government and marking agreement with the Palestinians, were null and void. I dismissed the petition, but not because no relevant legal norm existed.[308] I certainly would have granted the petition had it proved, for example, that Israel's negotiators received a bribe from the Palestinian side. Instead, I dismissed the petition because the petitioners failed to show that the Israeli government secured the Accords through unlawful, unreasonable conduct. I stated that different people had different and conflicting opinions about the Oslo Accords, all of which may fall within the zone of reasonableness.

In another petition, the Court assessed whether to prevent the release of a terrorist within the framework of a political "package deal."[309] Again, I decided the petition using the concept of reasonableness, and I avoided resorting to the claim — which I think was in-

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307 *See* H.C. 5167/00, Weiss v. Prime Minister, 55(2) P.D. 455.

308 *See* H.C. 6057/99, Victims of Terrorism Ass'n v. Gov't of Israel (unreported); *see also* H.C. 3230/99, Elias v. Gov't of Israel (unreported); H.C. 8840/96, Elazra v. State of Israel (unreported); H.C. 5934/95, Shilansky v. Prime Minister (unreported); H.C. 4064/95, Porat v. Chairman of Knesset, 49(4) P.D. 177.

309 *See* H.C. 6315/97, Federman v. Prime Minister (unreported); H.C. 2455/94, "BeZedek" Organization v. Gov't of Israel (unreported); H.C. 5581/93, Victims of Arab Terrorism v. State of Israel (unreported); H.C. 1403/91, Katz v. Gov't of Israel, 45(3) P.D. 353; H.C. 659/85, Bar Yosef-Yoskovitz v. Minister of Police, 40(1) P.D. 785.

correct — that there were no legal criteria for resolving the disputed legal issue. Such criteria exist, according to which the release of terrorists falls into the sphere of the executive authority's administrative discretion. If I had been convinced that the release was, for example, motivated by personal considerations or personal gain, I would not have refrained from voiding the action.

In yet another case, the Israeli government held negotiations with the Palestinian Authority concerning the future of various persons who had holed themselves up inside the Church of the Nativity in Bethlehem while the Israeli army surrounded the church. The petitioners argued that the Israeli government was not providing sufficient food to those besieged in the church.[310] The government argued that the petition should be dismissed because it was non-justiciable. I held that customary international law regulated the provision of food, and that the government was obliged to comply with that law. I further held — after analyzing these rules and verifying the supply of food — that the government had not violated these rules.

In a number of other judgments, the Supreme Court has considered the legal scope of "political agreements" (mostly coalition agreements among the parties forming the government or local councils).[311] The normative framework exists, inter alia, in the general principles of administrative law dealing with the restrictions that reasonableness and proportionality impose on administrative discretion.

In a petition considered recently, we were asked to rule whether the government should erect a security fence separating the state of Israel from the areas of Palestinian autonomy. We dismissed the petition on the grounds that there could be different perspectives on the erection of a border fence, all of which fell into the scope of reasonableness.[312] In *Ressler v. Minister of Defense*,[313] I summarized the doctrine of normative justiciability this way:

> My approach is that where there is a legal norm, there are also legal criteria that operate the norm. To say there are no legal criteria with which to decide an issue means only that the legal norm that the petitioner argues does not apply to the matter, but that another norm does apply to it. It follows that the argument that the matter is not normatively justiciable is merely the argument that the petitioner did not indicate a legal norm that makes the executive action forbidden. Thus the argument about norma-

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310 *See* H.C. 3451/02, Almadani v. Minister of Def., 56(3) P.D. 30.

311 *See, e.g.*, H.C. 5364/94, Walner v. Chairman of Israeli Labor Party, 49(1) P.D. 758; H.C. 2285/93, Nahum v. Mayor of Petah-Tikva, 48(5) P.D. 630; H.C. 4248/91, Natanzon v. Mayor of Holon, 46(2) P.D. 194; H.C. 1635/90, Jerjevsky v. Prime Minister, 45(1) P.D. 749; H.C. 1601/90, Shalit v. Peres, 44(3) P.D. 353. For a critical analysis of the case law, see David Kretzmer, *Political Agreements: A Critical Introduction*, 26 ISR. L. REV. 407 (1992).

312 *See* H.C. 3460/02, HaLevy v. Prime Minister (unreported).

313 H.C. 910/86, Ressler v. Minister of Def., 42(2) P.D. 441.

> tive non-justiciability is merely an argument that there is no cause of action. In accepting an argument of normative non-justiciability, the Court does not evade a consideration of the legality of the action. On the contrary, it adopts an attitude with regard to the legality of the action and determines that it is legal. . . .
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> The question arises as to whether every executive or administrative decision is justiciable. For example, are going to war and making peace also "justiciable" decisions that may be "confined" to a legal norm and a judicial proceeding? My answer is yes. Even with regard to war and peace we must determine which branch is competent to make the decision and what is the nature of its considerations (for example, the prohibition of personal corruption). It is of course possible to determine — and this question is open and difficult — that the other restrictions governing the use of administrative discretion do not apply. In this last case, the petition will be dismissed not because of its non-justiciability, but because the action is legal. In summary, the doctrine of normative justiciability (or non-justiciability) seems to me to have no independent existence.[314]

2. Institutional Justiciability. — Whereas normative justiciability focuses on whether legal criteria exist to adjudicate a dispute, institutional justiciability concerns the question whether the dispute should be adjudicated in a court of law at all. As I wrote in *Ressler*:

> A dispute is not institutionally justiciable if the dispute ought not to be decided according to legal criteria in the court. Institutional justiciability therefore deals with the question whether the law and the court are the proper frameworks for deciding the dispute. The question is not whether it is possible to decide the dispute according to the law and in court; the answer to that question is yes. The question is whether it is desirable to decide the dispute — which is normatively justiciable — according to legal criteria in court.[315]

This aspect of non-justiciability was discussed by Justice Brennan, who said:

> [A dispute is non-justiciable if there is] a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[316]

This reasoning is unconvincing. Consider the first non-justiciable matter mentioned by Justice Brennan, namely the determination of a question entrusted to a political authority. This is in fact the case with

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[314] *Id.* at 483–88.

[315] *Id.* at 488–89.

[316] Baker v. Carr, 369 U.S. 186, 217 (1962).

regard to *all* of the issues that are considered in constitutional or administrative law. That a certain matter is entrusted exclusively to one branch of the state is not a permit for that branch to act contrary to the constitution or a statute. When a certain provision of law gives authority to a branch of government, it still requires the branch to act lawfully within the framework of that authority. The provision also gives the courts the authority to interpret it in order to determine the scope of its application and to decide if it was exercised lawfully. Entrusting a decision about a certain act to a branch of state does not mean that the question of the legality of that act is also entrusted to that branch of state. On the contrary, "the final and decisive interpretive decision about a statute that is in force at any given time rests with the court, and, regarding issues submitted for consideration within the court system, the final decision lies with the highest court."[317] It follows that determining the legality of an act whose performance is entrusted to a particular branch of the state should not be regarded as non-justiciable.

The second type of dispute Justice Brennan called non-justiciable is one that is impossible to resolve judicially without expressing disrespect for coordinate branches of the state.[318] This reasoning is unpersuasive. All constitutional and administrative laws determine criteria for the legality of the behavior of government. The court must do its job and determine whether the government acted unlawfully, without letting considerations of respect for coordinate branches of the state inhibit its decision. As I have written:

> [T]he role of the court is to interpret the statute, and sometimes, the court's interpretation is different from that of another governmental branch. It is inconceivable that preferring the judicial interpretation to the interpretation of the other branch (whether executive or legislative) expresses disrespect for that branch. How can we intervene in the actions of the executive, if we take the attitude that we are being disrespectful to it whenever we interpret the law contrary to its opinion? . . . [T]here is no disrespect to the other branches, when each branch fulfills its constitutional role and does what the law has ordered it to do. When the court interprets the law, it carries out its role, and if its interpretation is different from the one acceptable to the other branches, it advises them of their mistake, and in doing so it expresses disrespect for them.[319]

I made a similar point in *Ressler*: "The important question is not respect for one branch or another. The important question is respect for the law. Personally, I cannot see how insisting that a branch of the

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317 H.C. 306/81, Flotto-Sharon v. Knesset Comm., 35(4) P.D. 101, 141.

318 *See Baker*, 369 U.S. at 217.

319 H.C. 73/85, "Kach" Faction v. Chairman of Knesset, 39(3) P.D. 141, 163.

state respect the law can harm that branch or undermine the relationship between it and the other branches."[320]

One could argue that institutional non-justiciability is implicit in the principle of the separation of powers. I cannot accept this argument. The separation of powers is not a permit for a branch of the state to violate the constitution or a statute. Admittedly, it is natural for a political branch to take political considerations into account, but to the same degree it is also natural that the judiciary should examine whether these political considerations — no matter how prudent they are — are consistent with constitutional or statutory law. As I wrote in *Ressler*:

> There is nothing in the principle of separation of powers that can justify negating judicial review of government acts, whatever their character may be, and whatever their content may be. On the contrary, the principle of separation of powers is what justifies judicial review of the acts of the government, even if they are of a political nature, since it ensures that every branch acts lawfully within its sphere, thus guaranteeing the separation of powers.[321]

Nor is recognition of institutional non-justiciability implicit in the concept of democracy itself. The formal aspect of democracy — the rule of the majority — does not justify negating judicial involvement where the argument is that the action is contrary to the constitution or a statute. The substantive aspect of democracy — the rights of the individual — does not justify negating judicial review either. On the contrary, judicial review usually aims to protect the individual and ensure his freedom, thereby promoting democracy. As I wrote in *Ressler*:

> [T]his judicial review keeps a democratic system working properly. It aims to guarantee, on the one hand, that the opinion of the majority finds proper expression within the legal frameworks established by the regime (constitution, statute, subordinate legislation, administrative rules) and does not depart from these frameworks, and that executive action is carried out within the legal framework determined by the majority through its vote in the legislature; it aims to ensure, on the other hand, that the majority does not harm individual rights, unless the law authorizes it. Democracy is not harmed by judicial review invalidating actions by other branches of the state which do take political considerations into account, when those branches act unlawfully. Note that the court does not criticize the internal logic or practical efficiency of such political considerations. The court considers their legality. This evaluation does not undermine democracy in any way. Nothing in democracy authorizes the majority to act contrary to the statute for whose legislation it is responsible. Even the most political of decisions must anchor themselves in lawful decisions. In a democracy, law is not politics, and politics is subject to law. There is

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320 *Ressler*, 42(2) P.D. at 490.

321 *Id.* at 491.

therefore nothing in the principles of democracy that justifies institutional non-justiciability.[322]

3. Justiciability and Public Confidence. — All that remains is the argument that institutional non-justiciability is justified because it protects the court itself from a "politicization of the judiciary" that could undermine public confidence in judicial objectivity. The argument is that the general public is not aware of the fine distinctions I have discussed and that it may mistake a judicial ruling that a government act of a clearly political nature is lawful or unlawful for a judicial ruling on the *propriety* of the act. In one case, the Israeli Supreme Court ruled that the expropriation of land in an area under Israeli military occupation for the purpose of establishing a settlement was unlawful.[323] The Court rejected the argument that the issue of settlement construction in occupied territories was non-justiciable, since reviewing individual harm is justiciable and the settlement construction allegedly harmed an individual's property right. On this point, Justice Landau said:

> This time we have proper sources for our decision and we do not need — indeed, we are even forbidden, when sitting on the bench — to involve our personal views as citizens of the State. But there is still serious cause for concern that the court will be seen to have abandoned its proper sphere and to have entered the arena of public debate, and that our decision will be welcomed by part of the public with cheers and be wholly and fiercely rejected by the other. In this sense, I see myself here as someone whose duty it is to rule according to the law on every matter that is lawfully brought before the court. I am compelled to do so, even though I knew from the outset that the general public will not pay attention to the legal reasoning but only the final conclusion, and that the proper status of the court, as an institution above the disputes that divide the public, is likely to be undermined. But what can we do? This is our role and our duty as judges.[324]

Indeed, the public confidence argument is, in my opinion, problematic. Public confidence may be undermined if the court decides a dispute containing a political aspect, but it also may be undermined if the court refrains from deciding it. Moreover, public confidence relates not just to the content of the judicial decision, but to its motive. It would be a great mistake — a mistake likely to undermine public confidence — to refrain from making a decision merely because the decision may undermine public confidence. The role of the court is to adjudicate disputes, even if the public or some portion of it does not like the outcome. For these reasons, I think that the United States Su-

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[322] *Id.*

[323] H.C. 390/79, Dawikat v. Gov't of Israel, 34(1) P.D. 1.

[324] *Id.* at 4.

preme Court rightly decided to hear *Bush v. Gore*[325] rather than abstain on grounds of non-justiciability.[326] The issue was justiciable — both normatively and institutionally — and the Court did well to rule on it.[327]

Thus, the doctrine of institutional non-justiciability is very problematic.[328] A number of democratic countries reject it: The German Constitutional Court has rejected it.[329] The Supreme Court of Canada has not adopted it.[330] The Supreme Court of Israel has also rejected it in many cases loaded with political tension. In one case, for example, the Court was required to review the validity of a pretrial pardon granted by the President of the state to the head of the Israeli General Security Services and to a number of its agents for illegal acts that they committed.[331] The Israeli public was divided on this question. The Court decided that the President may grant pretrial pardons. We unanimously rejected the argument of non-justiciability. In another case, the Court held that exceptional methods of interrogation (sleep deprivation, loud music, head covering, and painful sitting positions) employed by the Israeli security services against terrorists were illegal even if used to prevent the explosion of a "ticking bomb."[332] This question, too, was the subject of significant public dispute, but the Court did not refrain from deciding it because of non-justiciability.

Even though I am critical of the doctrine of non-justiciability, I cannot say that it should never be used. In a number of cases, Israeli judges, myself included, have resorted to it.[333] I should point out, however, that I prefer to dismiss a petition for lack of a cause of action

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325 531 U.S. 79 (2000).

326 For an opposite view, see Steven G. Calabresi, *A Political Question*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 129 (Bruce Ackerman ed., 2002); Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, *in* BUSH V. GORE, *supra*, at 145.

327 Note that I do not express an opinion on the content of the decision, as I am not familiar with the details of the legal issue.

328 My approach has been criticized in Israel. *See, e.g.*, RUTH GAVISON, MORDECHAI KREMNITZER & YOAR DOTAN, JUDICIAL ACTIVISM, FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY 84 (1990).

329 *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 170 (1994).

330 *See* Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, 455 ("[C]abinet decisions fall under s. 32(1)a of the *Charter* and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution."); HOGG, *supra* note 103, at 810 ("[I]t is clear that there is no political questions doctrine in Canada."). *But see* LORNE SOSSIN, BOUNDARIES OF JUDICIAL REVIEW: THE LAW OF JUSTICIABILITY IN CANADA 199 (1999) ("Based on the various settings in which Canadian courts have held political disputes to be non-justiciable, the view that Canada has no 'political questions' doctrine would seem in need of reappraisal.").

331 *See* H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505.

332 *See* H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817.

333 *See infra* pp. 131–32 (concerning restrictions on the scope of a court's involvement in administrative decisions of legislative organs).

rather than for institutional non-justiciability. In cases where my colleagues on the bench dismissed petitions because of institutional non-justiciability, I also found that the case should be dismissed, but not due to non-justiciability; rather, I found that the challenged act fell within a broad zone of reasonableness, and was thus lawful. Focusing on the legality of the act rather than on institutional non-justiciability increases public confidence in the state and allows the supreme court to realize its role in a democracy.[334]

E. Standing

The issue of standing appears to be marginal in public law. This is certainly the case if one adopts the view that only a person who has experienced an injury in fact possesses standing. But if we liberalize the tests for standing, we will usher in a new era for judicial decision-making whose ramifications are far greater than the issue of standing itself. This is the case because liberal rules of standing enable courts to hear matters that ordinarily would not find their way before a court. Take, for example, the case I mentioned of the pretrial pardon given by the President of the state of Israel to the head of the General Security Services and his men.[335] A private lawyer brought the petition to the Court. If the Supreme Court had restricted standing to those who suffer an injury in fact, the pardon's legality would not have been reviewed since only a few persons in Israel, if any, would have had standing to challenge it. However, the liberal rules of standing adopted in Israel opened the door to judicial review of the pretrial pardon and the scope of the President's discretion. Liberal rules of standing have also allowed judicial review of claims challenging the legality of civil servants' behavior even where no individual interests were harmed. The ordinary citizen would normally have no standing in these cases. The Court can consider these questions only if it adopts a liberal approach to the rules of standing. The following are several questions the Supreme Court of Israel has been able to consider because of its liberal standing rules: Did the Attorney General exercise his discretion properly in deciding not to indict someone?[336] Did the Prime Minister exercise his discretion properly when he decided not to dismiss a cabinet minister against whom an indictment had been is-

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334 A bill proposed by legislators in the Israeli Parliament (the Knesset) this year provided that "[m]ilitary matters of an operational or combat character are not justiciable, and courts may not address them." The bill did not pass. Draft bill amending the BASIC LAW: THE JUDICIARY, (presented to the Chairman of the Knesset May 20, 2002).

335 *See Barzilai*, 40(3) P.D. at 505.

336 *See* H.C. 935/89, Ganor v. Attorney Gen., 44(2) P.D. 485.

sued for bribery and embezzlement of public funds?[337] Did the Minister of Justice exercise his discretion properly in deciding not to extradite someone suspected of committing a crime outside Israel?[338] Did the government act lawfully when it held political negotiations over a peace agreement at a time when it did not have the confidence of Parliament?[339] Did a parole board act lawfully when it reduced a sentence imposed by a civil[340] or military[341] court?

Another standing issue involves a person whose right has been harmed, but who refrains from suing. The recognition that another party may sue — in most cases, human rights groups operating in the country — allows the court to review the legality of the harm suffered. Examples from the Israeli experience include Supreme Court recognition of the Israel Women's Network's standing to petition the Court to enforce the provisions of the Government Corporations Law directing that the composition of boards of directors should include members of both sexes[342] and Supreme Court recognition of a citizen watchdog group's standing in various petitions intended to ensure proper and honest administration of the law.[343]

1. Standing and the Judicial Role. — How a judge applies the rules of standing is a litmus test for determining his approach to his judicial role.[344] A judge who regards his role as deciding a dispute between persons with rights — and no more — will tend to emphasize the need for an injury in fact. By contrast, a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing. I wrote the following in *Ressler*, a judgment that led to the liberalization of Israel's standing rules:

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337 *See* H.C. 4267/93, Amitai: Citizens for Proper Admin. & Integrity v. Prime Minister of Isr., 47(5) P.D. 441; H.C. 3094/93, Movement for Quality Gov't v. Gov't of Israel, 47(5) P.D. 404.

338 *See* H.C. 852/86, Aloni v. Minister of Justice, 41(2) P.D. 1.

339 *See* H.C. 5167/00, Weiss v. Prime Minister, 55(2) P.D. 455.

340 *See* H.C. 1920/00, Galon v. Parole Bd., 54(2) P.D. 313; H.C. 89/01, Pub. Comm. Against Torture v. Parole Bd., 55(2) P.D. 838.

341 *See* H.C. 3959/99, Movement for Quality Gov't v. Sentencing Review Comm., 53(3) P.D. 721.

342 *See* H.C. 453/94, Isr. Women's Network v. Gov't of Israel, 48(5) P.D. 501.

343 *See* H.C. 6673/01, Movement for Quality Gov't v. Minister of Transp. (not yet reported); H.C. 932/99, Movement for Quality Gov't v. Chairman of Appointments Review Comm., 53(3) P.D. 769; H.C. 3073/99, Movement for Quality Gov't v. Minister of Educ., 44(3) P.D. 529; H.C. 6972/96, Movement for Quality Gov't v. Attorney Gen., 51(2) P.D. 757; H.C. 2533/77, Movement for Quality Gov't v. Gov't of Israel, 51(3) P.D. 46.

344 *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 162 (1997) ("Like their constitutional counterparts, these 'judicially self-imposed limits [i.e. standing] on the exercise of federal jurisdiction' are 'founded in concern about the proper — and properly limited — role of the courts in a democratic society' . . . ." (citations omitted)); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers.").

> You cannot formulate the rules of standing if you do not formulate for yourself an outlook on the role of these rules in public law. In order to formulate an outlook about the nature and role of the rules of standing, you must adopt a position on the role of judicial review in the field of public law. . . . [I]n order to formulate an outlook with regard to the role of judicial review, you must adopt a position on the judicial role in society and the status of the judiciary among the other branches of the state. A judge whose judicial philosophy is based merely on the view that the role of the judge is to decide a dispute between persons with existing rights is very different from a judge whose judicial philosophy is enshrined in the recognition that his role is to create rights and enforce the rule of law.[345]

As can be seen from this Foreword and from a long list of judgments, my approach is that the role of the supreme court in a democracy is not restricted to adjudicating disputes in which parties claim that their personal rights have been violated. I believe that my role as a judge is to bridge the gap between law and society and to protect democracy. It follows that I also favor expanding the rules of standing and releasing them from the requirement of an injury in fact. The Supreme Court of Israel has adopted this approach.[346] Gradually — at first in minority opinions of justices in the 1960s and 1970s, and thereafter as a majority — we have adopted the view that when the claim alleges a major violation of the rule of law (in its broad sense), every person in Israel has legal standing to sue. Fears that the court would be "flooded" with frivolous lawsuits have proven groundless. In practice, it is primarily citizen watchdog groups and human rights organizations that have exploited this provision. I think that, overall, the outcome has been positive. I was happy to learn that the Republic of South Africa adopted a similar solution in its Constitution. Section 38, applicable only to the Bill of Rights, provides that:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
> (a) Anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members.[347]

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345 H.C. 910/86, Ressler v. Minister of Def., 42(2) P.D. 441, 458.

346 *See generally* ZEEV SEGAL, THE RIGHT OF STANDING IN THE HIGH COURT OF JUSTICE (1984).

347 S. AFR. CONST. § 34.

Like the Israeli Supreme Court, the Supreme Court of India has reached a similar result by adopting a liberal standing doctrine.[348]

2. Standing and the Rule of Law. — The rules of standing are closely related to the principle of rule of law. Closing the doors of the court to a petitioner with no injury in fact who warns of a public body's unlawful action means giving that public body a free hand to act without fear of judicial review. The result is the creation of "dead areas" in which a legal norm exists but the public body is free to violate it without the possibility of judicial review. Such a situation may lead in the end to a violation of the legal norm, undermining the rule of law and undermining democracy. As I wrote in one case: "When there is no judge, there is no law. The ability to turn to the court is the cornerstone of the rule of law."[349] Naturally, even without judicial review the law itself exerts a strong gravitational pull that shapes the way people act. Furthermore, there are other means — for example, public opinion or legislative review — of reviewing executive actions. Where these methods of supervision are effective, they may suffice. But where there is no tradition of executive self-restraint, and where the other means of review are insufficient, judicial review is critical.

3. Standing and the Separation of Powers. — Does giving the "public petitioner" (*actio popularis*) standing undermine the separation of powers, which in itself forms a basis for the rules of standing? Can it be said that where there is no interest, there is no dispute (*lis*), and that the existence of a dispute is an essential condition for exercising judicial power? Does allowing a public petitioner to activate the exercise of judicial power, therefore, undermine the very principle of separation of powers?[350] In my opinion, the answer to these questions is "no." I accept that where there is no dispute, there can be no exercise of the judicial function. But this requirement makes no demand with regard to the nature of the dispute:[351]

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348 *See* Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible*, 37 AM. J. COMP. L. 495, 498–99 (1989). *See also* Gupta v. Union of India, A.I.R. 1981 S.C. 87, 218–20.

349 *Ressler*, 42(2) P.D. at 462.

350 For an argument that the answer is "yes," see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). *Cf.* 1 TRIBE, *supra* note 195, § 3-14, at 386 (noting the general requirement of "injury in fact" for standing in the United States).

351 *See* HANS KLINGHOFFER, ADMINISTRATIVE LAW 8 (1957) ("The concept of the dispute between the parties (*lis inter partes*) has no *a priori* test with regard to the nature of the dispute. Legal logic does not require us to regard certain matters as matters that may serve as the subject of a dispute, while excluding other matters from the possibility of being the subject of a dispute. This depends entirely on the positive legal arrangement . . . . [J]udging in the functional sense has *a priori* no objective test. Judging takes place with regard to those matters with respect to which positive law gives the procedure a form of a dispute.").

> [W]hat characterizes judging is the decision between claims. . . . Sometimes it is not the right that creates the dispute, but the dispute that creates the right. If a right is a desire or interest protected by law, then it is through the judicial decision, which provides the law's protection, that the right itself is created. It follows that the judicial nature of the function is determined not by the content of the dispute but by its very existence.[352]

I take issue with a standing doctrine under which someone who claims that a public body unlawfully took his private money can resort to the courts, but someone who claims that a public body unlawfully took public money cannot. What is the principled argument, based on jurisprudence and the doctrine of separation of powers, to justify this distinction? In my view, recognition of the standing of the public petitioner closes the "circle of standing." This circle begins with the requirement that, to have standing, a petitioner have a definable right that the government has violated. At the next level, the courts recognize the standing of a petitioner with an interest in a governmental action but no definable right. At the subsequent level, courts recognize the standing of a petitioner with no tangible interest but who complains of a substantial breach of the rule of law. Finally, the circle culminates with the realization that the petitioner's right to insist upon governmental compliance with the rule of law is imputed to the petitioner by his very status as a member of society. Thus, the "circle of standing" concept is based on the recognition that standing, at its core, derives from membership in society.

F. Comparative Law

1. The Importance of Comparative Law. — I have found comparative law to be of great assistance in realizing my role as a supreme court judge. The case law of the supreme courts of the United States, Australia, and Canada, of United Kingdom courts, and of the German Constitutional Court have helped me significantly in finding the right path to follow. Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge "expands the horizon and the interpretive field of vision. Comparative law enriches the options available to us."[353] In different legal systems, similar legal institutions often fulfill corresponding roles, and similar legal problems (like hate speech, privacy, and now the fight against terrorism) arise.[354] To the extent that these similarities exist, comparative law becomes an

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352 *Ressler*, 42(2) P.D. at 465.

353 C.A. 295/81, Estate of Sharon Gavriel v. Gavriel, 36(4) P.D. 533, 542–43.

354 See *The Police v. Georghiades*, (1983) 2 C.L.R. 33, 50–54, 60–65, in which Justice Pikis compared different national and international legal systems to give content to the right of privacy. It was decided by the Supreme Court of Cyprus that the right of privacy applies not only vis-à-vis the state, but also within the relationships between individuals.

important tool with which judges fulfill their role in a democracy ("microcomparison").[355] Moreover, because many of the basic principles of democracy are common to democratic countries, there is good reason to compare them ("macrocomparison").[356] 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 basis. 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 potential latent in 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. Additionally, even when comparative law is consulted, the final decision must always be "local." The benefit of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decisionmaking structures available.

2. Comparative Law and the Interpretation of Statutes. — Comparative law is an important source from which the judge may learn the objective purpose of a statute.[357] This is the case with regard to both the specific purpose ("microcomparison") and the general purpose ("macrocomparison") of the statute. The comparison is relevant even if it is clear that the legislature was not inspired by foreign law. In looking for the specific statutory purpose, a judge may be inspired by a similar statute in a foreign democratic legal system. This is so when he wishes to learn of the purpose underlying legislation that regulates

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355 *See* 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 5 (Tony Weir trans., 2d ed. 1987).

356 *See id.* at 4–5.

357 For a discussion of comparative law and the courts, see generally THE USE OF COMPARATIVE LAW BY COURTS (Ulrich Drobnig & Sjef van Erp eds., 1999); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985); H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977 (2001).

a legal "institution," such as an agency or a lease. The judge does not refer to the details of the foreign laws. Rather, he examines the function that the legal institution fulfills in the two systems. If there is a similarity in the functions, he may find interpretive ideas about the (objective) purpose of the legislation. An example of this potential use is the principle of good faith in executing a contract. To the extent that this principle fulfills a similar function in different legal systems, it is possible to use the law of a foreign system to discern the purpose that underlies the principle of good faith in local law. Moreover, it is possible to use comparative law — from other national systems and from international law — to determine the general (objective) purpose that reflects the basic principles of the system. Again, however, this comparative analysis is possible only if the two legal systems share a common ideological basis.

3. Comparative Law and Interpretation of the Constitution. — Comparative law can help judges determine the objective purpose of a constitution. Democratic countries have several fundamental principles in common. As such, legal institutions often fulfill similar functions across countries. From the purpose that one given democratic legal system attributes to a constitutional arrangement, one can learn about the purpose of that constitutional arrangement in another legal system. Indeed, comparative constitutional law is a good source of expanded horizons and cross-fertilization of ideas across legal systems.[358] This is clearly the case when the constitutional text of one country has been influenced by the constitutional text of another. But even in the absence of any (direct or indirect) influence of one constitutional text on another, there is still a basis for interpretive inspiration. An example is where a constitution refers expressly to democratic values or democratic societies.[359] But even without such a reference, the interpretive influence of comparative law is proper.[360] This is the case

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[358] *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 695–96 (1998); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, *in* HUMAN RIGHTS AND LEGAL HISTORY 29 (Katherine O'Donovan & Gerry R. Rubin eds., 2000); Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Lorraine Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 23 (Vicki Jackson & Mark Tushnet eds., 2002).

[359] *See, e.g.*, CAN. CONST. (Canadian Charter of Rights and Freedoms), § I; S. AFR. CONST. § 36(1); *see also* David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 102–09 (2001).

[360] *See* Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 MARSHALL J. PRACS. & PROCS. 685 (1976).

with regard to determining the scope of human rights, resolving particularly difficult issues such as abortion and the death penalty, and determining constitutional remedies.

Nonetheless, as we have seen, interpretive inspiration is only proper if there is an ideological basis common to the two legal systems and a common allegiance to basic democratic principles. A common basis of democracy is, however, a necessary but insufficient condition for comparative analysis. As judges, we must also examine whether there is anything in the historical development and social conditions that makes the local and the foreign system different enough to render interpretive inspiration impracticable.[361] But when there is an adequate similarity, interpretive inspiration is proper. This is the case with regard to inspiration from the law of another democratic country. It is also the case with regard to interpretive inspiration from international law, as various international conventions enshrine constitutional values.[362] These conventions influence the formation of the objective purpose of different constitutional texts.[363] The case law of international and national courts that interpret these conventions ought to serve as a basis for the interpretation of the constitutions of various nations.

4. Use of Comparative Law in Practice. — The use of comparative law for the development of the common law and the interpretation of legal texts is determined by the tradition of the legal system. Israeli law, for example, makes extensive use of comparative law. When the Supreme Court of Israel encounters an important legal problem, it frequently examines foreign law. Reference to United States law,[364] United Kingdom law, Canadian law, and Australian law is commonplace. Those with the linguistic ability also refer to Continental law,

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361 *See* R. v. Keegstra [1990], 3 S.C.R. 897, 740; Rahey v. The Queen, [1987] 1 S.C.R. 588, 639 ("While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances."); HOGG, *supra* note 103, at 827.

362 For the products of some of the most important international conventions, see International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, pt. 1, at 71, U.N. Doc. A/810 (1948).

363 *See, e.g.*, Newcrest Mining (WA) Ltd. v. Commonwealth, (1998) 195 C.L.R. 513, 655.

364 *See* Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 23 (1981).

and sometimes we use English translations of Continental (mainly German, French, and Italian) legal literature.

In countries of the British Commonwealth, there is much cross-fertilization. Each such nation refers to United Kingdom case law. United Kingdom judges refer to Commonwealth case law, and Commonwealth judges, in turn, refer to each other's case law. The Supreme Court of Canada is particularly noteworthy for its frequent and fruitful use of comparative law.[365] As such, Canadian law serves as a source of inspiration for many countries around the world.

Regrettably, the United States Supreme Court makes very little use of comparative law.[366] Many democratic countries derive inspiration from the United States Supreme Court, particularly in its interpretation of the U.S. Constitution.[367] By contrast, most Justices of the United States Supreme Court do not cite foreign case law in their judgments. They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems. Justice Claire L'Heureux-Dubé of the Canadian Supreme Court has rightly observed that "[i]f we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way not only to the advancement of human rights but to the pursuit of justice itself, wherever we are."[368] Of course, American law in general, and its constitutional law in particular, is rich and developed. American law is comprised of not one but fifty-one legal systems. Nonetheless, I think that it is always possible to learn new things even from other democratic legal systems that, in their turn, have learned from American law. As Judge Guido Calabresi rightly said: "Wise parents do not hesitate to learn from their children."[369]

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365 *See* Anne Bayefsky, *International Human Rights Law in Canadian Courts*, *in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 295, 310 (Benedetto Conforti & Francesco Francioni eds., 1997).

366 *See* Printz v. United States, 521 U.S. 898, 921 n.11 (1997) ("Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution."); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant."); Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation.").

367 *See* Gerald V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211 (1994); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

368 *See* L'Heureux-Dubé, *supra* note 25, at 247.

369 United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995).

G. A Good Philosophy

I will conclude my discussion of the tools for realizing the judicial role with an important tool: a good philosophy. Maybe philosophy ought not to be called a tool in the hands of a judge. My intention is merely to say that the most practical instrument for a judge is good philosophy. I am referring to several types of philosophy: philosophy of life, philosophy of law, philosophy of judging. A full discussion of this complex subject is outside the scope of this Foreword, but I would like to make three points.

First, I consider it essential that a supreme court judge in a democracy have the tools to allow him to understand the philosophical dialogue through which he may participate in the search for truth, the limits of the human mind, and the role of human beings. Many judges whom I have met are frustrated philosophers because they have not been given the opportunity to participate in this rich dialogue. Personally, I enjoy and admire the writing of Judge Richard Posner, who merges tools for philosophical thinking with a practical judicial approach. I am aware that Posner believes that the final adjudication must be pragmatic,[370] but such pragmatism, as Posner himself acknowledges, is a philosophical theory.[371]

Second, from the outset of our studies in law school until the end of our professional lives, we are exposed to various philosophical approaches to the law:[372] positivism, naturalism, realism, legal process, critical legal studies, law and sociology, law and economics, feminism, and others. I have found these theories to be of great interest. Personally, I think that each has an element of truth. Nonetheless, my approach is that human experience is too rich to allow it to be imprisoned in only one legal theory. I accept the following remarks that Professor Edwin Patterson made fifty years ago:

> My own philosophy of law is eclectic because I recognize that each of the major philosophers has begun his system with several appealing self-evident principles, and I cannot reject th as wholly wrong. . . . My eclecticism in legal philosophy is based partly on my belief in tolerance, partly on my belief in pluralism, and partly on the inertia of habit.[373]

Indeed, in my view, only by considering all the theories, while giving each of them the proper weight, will it be possible to understand the law and the role of the judge. In my opinion, law is a tool that is intended to realize social goals. There is no consensus about the con-

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370 *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227 (1999); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

371 *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

372 *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (2d ed. 1999).

373 EDWIN PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 556 (1953).

tent of these goals, which is why it is necessary to find a balance among the various theories inter se. Some will regard the eclectic approach as an attempt to avoid a coherent legal theory. There will doubtless be others who regard the eclectic approach as an independent legal theory in itself.[374] Whatever the case, each judge should adopt for himself a position on these questions. It will serve him as a tool for realizing his judicial role. It is unfortunate that in recent years, a widening gap has formed between academics involved in the philosophy of law and a large number of judges.[375] I think we should do whatever we can to narrow this gap. Judges need theories of law. Theories of law need judges. I fully acknowledge that I learned these theories from others, especially the legal process movement, which I first learned from Professor Henry Hart himself at a seminar in 1966, and also Dworkin's approach, which seems to me to be the closest to the judicial philosophy that should guide a judge.

Third, in fulfilling his judicial role, a judge would do well to formulate for himself a judicial philosophy. A judge should be aware of his own judicial policy. Most of us have one, but only a few of us, trying to follow in the footsteps of Cardozo, think about it and consciously formulate it. In this Foreword I have tried to put my judicial philosophy into writing. It is the most important tool with which I realize my judicial role.

V. THE RELATIONSHIP BETWEEN THE SUPREME COURT AND THE OTHER BRANCHES OF THE STATE

A. The Relationship Between the Judiciary and the Other Branches

1. The Tension Among the Branches. — There is constant tension in the relationships between the supreme court and the other branches of the state,[376] a tension that stems from the different roles of the branches. The role of the judiciary is to review the actions of other branches and evaluate whether they are acting lawfully. This role naturally meets with opposition from the other branches, particularly

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374 *See* JAMES E. HERGET, CONTEMPORARY GERMAN LEGAL PHILOSOPHY 23–24 (1996) (discussing the theory of integrative jurisprudence and the work of Winfried Brugger); Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988); Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View*, 42 AM. J. COMP. L. 395 (1994); Jerome Hall, *Integrative Jurisprudence*, *in* INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND 313 (Paul Sayre ed., 1947).

375 *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

376 *See* Lord Woolf, *Judicial Review — The Tensions Between the Executive and the Judiciary*, 114 L.Q. REV. 579 (1998).

when the judiciary, by its rulings, frustrates political goals the other branches pursue. In such circumstances many argue that a body that is not accountable to the people should not be able to frustrate the will of the people. The more cherished the voided act is to the hearts of the political authorities, the greater the criticism, amplified across all forms of media. The court has limited access to such media. As a result, the tension between it and the other branches increases. It reaches its peak when the other branches try to use their powers to change the composition or jurisdiction of the court.[377] In these situations, an impartial court examines the use of these powers by the other branches with the same objectivity that it usually exercises, for the court does not seek to protect its own composition or jurisdiction but rather to protect the values of democracy.[378] The court may determine, therefore, that some of these means are lawful. In the event that the court makes such a determination, the composition or jurisdiction of the court may be preserved only with the help of social forces that seek to protect democracy and the court. In this instance, public confidence in the court plays a central role.

Tension between the court and the other branches is natural and, in my opinion, also desirable. If the court's rulings were always satisfactory to the other branches, it would raise suspicion that the court was not properly fulfilling its role in the democracy. Thus, criticism of the court's rulings is proper and benefits the court itself, for this criticism helps to guard the guardians. Matters begin to deteriorate, however, when the criticism loses its objectivity and transforms into unbridled attack. Public confidence in the courts may be harmed, and the checks and balances that characterize the separation of powers may be undermined. When subjective attacks affect the composition or jurisdiction of the court, the crisis point is reached. This condition may signal the beginning of the end of democracy.

What should supreme court justices do when they find themselves in this tension? Not much. They must remain faithful to their judicial approach; they should realize their outlook on the judicial role. They must be aware of this tension but not give in to it. Indeed, every judge learns, over the years, to live with this tension. Experience strengthens the judge. Many factors affect the intensity of the tension between the court and the other branches of the state. In the following pages, I would like to consider two of these factors: the attitude

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377 *See* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (describing President Roosevelt's desire "to pack the court").

378 This exercise of judicial authority created a tension between the Appellate Division and the Parliament in South Africa with regard to the implementation of apartheid. *See* C. F. FORSYTH, IN DANGER FOR THEIR TALENTS 58–128 (1985).

toward the state, and the judiciary's and other branches' understandings of the principle of the separation of powers.

2. The Attitude Toward the State. — The intensity of the tension between the judiciary and the other branches derives, in part, from the attitudes of society and the judiciary toward the state itself. This attitude, in turn, reflects that polity's history and the way the polity formulates its national identity. Naturally, this attitude is always complex, and I am far from an expert. Nonetheless, I think that we can distinguish roughly among three primary societal models.

The first model is that of societies that regard the state with great suspicion. In these societies, the state is perceived as a force that threatens the individual and his freedom rather than as a sovereign power that protects the individual and his freedom. The purpose of this particular constitutional arrangement is to restrict the power of the state — embodied mainly in the legislature and the executive — and thereby to protect the individual. In American society — in view of its history, particularly its revolution against British rule — this attitude seems prevalent. The Bill of Rights and other constitutional amendments are mainly composed of restrictions on the power of the branches of state ("No State shall,"[379] "Congress shall make no law"[380]). The main rights recognized in the Bill of Rights are the freedoms that the state is forbidden from harming. These freedoms thus constitute "negative" rights (status negativus) that are concerned with limiting state action.[381] Under these limitations, the tension between the court and the other branches of government may reach a crisis point. A longstanding political tradition and significant government restraint in exercising power — including judicial restraint based on the view that the judiciary is itself a branch of the state — are all that

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379 U.S. CONST. amend. XIV, § 1.

380 U.S. CONST. amend. I.

381 *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties."); Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019, 1026 (1997) ("Our courts, through judicial review, are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what the government must do."). *But see* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (challenging *DeShaney* on the grounds that the framers of the Fourteenth Amendment intended it to establish a constitutional right to affirmative protection by the government). Professor Owen Fiss argues that the state should be responsible not just for refraining from violating an individual's right to freedom of speech, but also for protecting it. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 27–49 (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 32–46 (1996).

can prevent a crisis. Both of these safeguards, of course, exist in the United States.

Under the second model of society, the state — represented by the executive and legislative branches — is viewed as a realization of national aspirations. The attitude toward the state is one of respect and admiration rather than one of suspicion. I think that this was the approach in several Continental countries before World War II. In this model, there is minimal tension between the judiciary and other branches: the judiciary acts as a public institution representing the state, and sees its purpose as allowing the state to achieve national goals and aspirations.

Under the third model of society, the state is perceived both as a source of good and a source of evil. The state is feared as a source of harm to the individual, but it is also supported as a source of protection for the individual. In this model, the rights of the individual include not just the negative right against state intervention, but also the positive right (status positivus) to protection of essential freedoms and provision of vital services.[382] I think that Australia[383] and Canada[384] can be included in this group. These countries obtained independence from England through a democratic process, rather than revolution, and thus experienced continued and extensive absorption of traditional English principles.[385] These principles underlie the Canadian Charter's recognition not merely of the duty of the state not to harm the freedom of the individual, but also of the duty of the state to protect the individual.[386] Another example of this model may be Israel. For many, the establishment of the state was the realization of a longstanding dream — hence the attitude of respect and admiration for the state. But the state is also seen as the source of power and restriction of freedom — hence the suspicion of it. This tension is reflected in the fact that people trust the state somewhat, but not fully. The Israeli Bill of Rights provides, in part, that "[t]here shall be no violation of the

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382 *See* William W. Black, *The Charter of Rights and Freedoms and Positive Obligations*, *in* LAW, POLICY, AND INTERNATIONAL JUSTICE 298 (William Kaplan & Donald McRae eds., 1993) (arguing that the Canadian Charter of Rights and Freedoms imposes not only negative restrictions on government, but positive duties as well); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (arguing that the Supreme Court has sometimes interpreted negatively phrased constitutional provisions as imposing positive governmental duties).

383 *See* MELISSA CASTAN & SARAH JOSEPH, FEDERAL CONSTITUTIONAL LAW: A CONTEMPORARY VIEW 24 (2001).

384 *See* Brian Dickson, *The Canadian Charter of Rights and Freedoms: Dawn of a New Era?*, 2 REV. CONST. STUD. 1, 2–3 (1994); McLachlin, *The Role of the Court*, *supra* note 1, at 52.

385 *See* Dickson, *supra* note 384, at 15–16.

386 *See* McKinney v. Bd. of Governors of the Univ. of Guelph, [1990] 76 D.L.R. 545, 624 (expressing skepticism of the proposition that "the government could not be found to be in breach of the Charter for failing to act").

life, body or dignity of any person as such."[387] This provision, which limits state action, reflects a conception of the state as a threat to the individual. However, another provision states that "[e]very person is entitled to protection of his life, person and dignity."[388] Here, the state is conceived as a force that protects the individual. Thus, for example, in one opinion I derived from this provision the right to the minimum goods and services necessary to maintain human existence.[389] In societies reflecting this third model, the intensity of the tension between the judiciary and the other branches depends on the balance between acts of the state that are viewed as harming the individual and those that are viewed as protecting him.

3. The Separation of Powers. — Substantive democracy is based on the separation of powers.[390] It is "the backbone of [the] constitutional system."[391] When a single branch creates the statutes, administers them, and adjudicates disputes arising from them, arbitrary government results, freedom suffers, and real democracy does not exist. Indeed, as I have written:

> [T]he separation of powers is not a value in itself. It is not designed to ensure efficiency. The purpose of separation of powers is to strengthen freedom and prevent the concentration of power in the hands of one governmental actor in a manner likely to harm the freedom of the individual.[392]

The principle of separation of powers does not mean that a branch may overstep its authority without the other branches intervening. Nor does it mean that, within the framework of its authority, any branch may act unlawfully. As Meir Shamgar, my predecessor as President of the Israeli Supreme Court, wrote:

> Separation of powers does not precisely mean creation of a barrier that decisively prevents any connection or contact between the branches. Rather, it finds expression mainly in the existence of a balance among the branches' powers — in theory and in practice — that makes possible independence in the context of definite reciprocal supervision.[393]

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387 BASIC LAW: HUMAN DIGNITY AND LIBERTY § 2 (1992).

388 *Id.* § 3.

389 *See* C.A. 4905/98, Gamzu v. Yeshiahu, 55(3) P.D. 360, 375–76 ("Human dignity includes . . . protection of the minimum of human existence. A homeless person with no place to stay suffers a blow to human dignity. A person who does not have enough to eat suffers a blow to human dignity. A person without access to basic medical treatment suffers a blow to human dignity. A person reduced to living under humiliating physical conditions suffers a blow to human dignity.").

390 *See supra* pp. 66–04. *See generally* 1 TRIBE, *supra* note 195, §§ 2-1 through 2-10 (discussing the separation of powers).

391 Cooper v. Canada, [1996] 3 S.C.R. 854, 867.

392 H.C. 3267/97, Rubinstein v. Minister of Def., 52(5) P.D. 481, 512; *accord* Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

393 H.C. 306/81, Flatto-Sharon v. Knesset Comm., 35(4) P.D. 118, 141.

I have expressed similar views:

> An enlightened democracy is a regime of separation of powers. This separation does not mean that every branch is an authority unto itself, not taking the other branches into account. Such a perspective would profoundly harm the foundations of democracy itself, since it means a dictatorship of every branch within its own sphere. On the contrary, the separation of powers means reciprocal checks and balances among the various branches — not walls among the branches, but bridges that balance and control.[394]

The separation of powers means that every branch is independent within its sphere, so long as it operates lawfully. The judiciary ultimately decides whether an action is lawful. In my opinion, the role of the judiciary is to adjudicate disputes, and in doing so to give a binding interpretation of the constitution and statutes. In the words of Chief Justice Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[395]

This assignment of tasks reflects the partnership between the drafters and interpreters of the constitution and statutes. As I have argued above, the former is the senior partner, while the latter is the junior partner. Since the power of all branches of government is enshrined in the constitution and statutes, courts make binding determinations about the extent of power and the legality of the actions of each branch of government: "the examination of the legality of any act — whether or not it is of a public nature — is the task of the judiciary, and amounts to fulfilling its purpose in the system of separation of powers."[396] Thus, when a court determines that a statute violates the constitution, or that decisions (other than statutes) of the legislature depart from the applicable statutes or regulations, the court is not exceeding its role within the separation of powers. On the contrary, by defending the constitution, statutes, and regulations, the court is restoring the constitutional balance that underlies the principle of the separation of powers — a balance that was undermined when the unlawful decision was made.[397] This result gives expression to the modern meaning of the separation of powers, which is concerned with checks and balances among the branches of the state. This perception of the separation of powers has practical implications for the extent of judicial review of the legislature and of the executive as well as the means available to the judge in fulfilling his or her judicial role.

My view of the separation of powers is by no means universally accepted, however. Indeed, a central factor impacting the degree of ten-

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394 H.C. 73/85, "Kach" Faction v. Chairman of Knesset, 39(3) P.D. 141, 158.

395 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *accord* United States v. Nixon, 418 U.S. 683, 703–05 (1974).

396 H.C. 910/86, Ressler v. Minister of Def., 42(2) P.D. 441, 463.

397 *See supra* pp. 66–04.

sion between the judiciary and the other branches of the state is the way the principle of separation of powers is perceived. We all speak of separation of powers, but there is substantial variety in the content hidden behind this label. In conversations with judges and law professors in the United States, I have found that despite the common rhetoric of separation of powers, much of the American legal community conceives of this principle very differently than I. Here, I do not refer to potential differences in the concept of separation of powers that may exist between a presidential democracy like that of the United States and a parliamentary democracy like that of the United Kingdom, Canada, Australia, and Israel. Instead, I refer to differences in the concept of the role of the judiciary within the separation of powers and the relationship of the judiciary to the legislative and executive branches.

For example, it appears that the accepted approach in the United States is that if the Supreme Court were to void a presidential pardon because it was given for improper motives, the Court would violate the principle of separation of powers; if the Court were to void a Senate impeachment proceeding because it had defects,[398] the Court would violate the principle of separation of powers;[399] if the Court were to order the President to dismiss a Secretary of State who was facing criminal proceedings, the Court would violate the principle of separation of powers. In contrast, I would say the Court actions described in these examples conform to the principle of separation of powers. Indeed, under my approach, separation of powers means that every branch may act independently only as long as it acts lawfully within its jurisdiction. When a branch of state acts unlawfully — whether it exceeds its authority or exercises its authority for unlawful reasons — it is the role of the judiciary, as part of the principle of separation of powers, to ensure that the unlawful action is voided. As I wrote in one case, "separation of powers is not the absolutism of each branch in its own sphere. Such absolutism harms the freedom whose realization is the basis for the separation of powers."[400] For this reason, I do not see any difference between a case in which the executive or legislature acts contrary to the constitution[401] and a case in which these branches act contrary to any other legal norm. Under my ap-

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398 *But see* Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring in the judgment) (suggesting that judicial review may be warranted if the Senate impeached a person "upon a coin toss").

399 *See* 1 TRIBE, *supra* note 195, § 2-7, at 152–53 (noting that impeachments are generally considered beyond the reach of American judicial review).

400 H.C. 5364/94, Velner v. Chairman of Israeli Labor Party, 49(1) P.D. 758, 790.

401 Such was the case in *Powell v. McCormack*, 395 U.S. 486 (1969), in which the Supreme Court held that Congress had unlawfully refused to seat an elected congressman who satisfied the criteria for House membership contained in Article I, Section 2. *Id.* at 489.

proach, the principle of the rule of law always binds the branches of the state, irrespective of the source of the legal norm.

If we wish to avoid invalidating executive or legislative acts that are contrary to law, we should do so not by insisting that the judiciary's behavior violates the separation of powers, but by changing legal norms themselves, so that the acts in question are no longer unlawful. If the presidential pardon power allows the president to grant pardons based on considerations such as a family relationship or monetary payment, then there is no basis for judicial disqualification of pardons of this type. The reason is not that judicial review would violate the principle of separation of powers. Rather, the reason is simply that the action is lawful, so the claim should be dismissed on the merits. The same is true of the other examples that I have given above. I have difficulty with the view that, in situations like these, the principle of separation of powers is an obstacle to judicial review. Rather, under my approach, it is precisely this principle that is the source of judicial review. As I have written:

> [I]n my view, a court in a democracy has the task of protecting the rule of law. This means, in part, that it must enforce the law against the branches of the State and that it must ensure that the State acts according to law; this view of the judicial role conflicts with neither the principle of separation of powers nor the role of the court within the framework of that principle. On the contrary, this approach draws its strength from the principle and rules of separation of powers. The modern meaning of this principle is checks and balances . . . among the various branches. . . .
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> These checks and balances mean, in part, that within the framework of a dispute brought before the court, the court must ensure that all the branches of the state — the legislature, the executive, and the judiciary — act within the framework of the law. In doing so, the court does not undermine the principle of separation of powers but rather actualizes it . . . .
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> In my opinion, the principle of separation of powers does not mean that a problem of a public nature is resolved by the legislature and the executive, and not by the judiciary. The principle of the separation of powers means that the legislature may — in the absence of constitutional restraints — establish the legal framework in which a problem of a public nature will be regulated, and that the executive may resolve a public problem within the legal framework established for it. However, once this framework is established, the court must decide — and this is its role as among the branches of the State — whether the legal framework established has been maintained in practice. Nothing in the principle of separation of powers permits any of the branches to act contrary to the law. Nor does anything in the principle of separation of powers require the judiciary to refrain from becoming involved in actions of a public nature, insofar as this involvement focuses on the legality of the action . . . . Indeed,

> the examination of the legality of any act — whether or not it is of a public nature — is the task of the judiciary, and amounts to fulfilling its purpose in the system . . . .[402]

My view of the separation of powers would not increase the tension between the judiciary and the other branches, of course, if they accepted it. But when the very meaning of separation of powers is a source of dispute among the different branches, the tension among them grows. What the judiciary does in accordance with its understanding of the separation of powers may be regarded by the other branches not only as incorrect (which may sometimes be a natural and appropriate criticism), but also as illegitimate.

4. The Rule of Law. — The principle of the rule of law governs, among other things, the relationship between the judiciary and the other branches of state. This principle — like the separation of powers — is not intended to guarantee effective administration or even merely to ensure the legality of administrative action. Rather, its purpose is to protect the liberty of the individual.

The concept of the rule of law has numerous interpretations.[403] However, everyone agrees that the rule of law means, at a minimum, rule by law. That is its formal aspect, whereby, as I have written:

> [A]ll actors in the State, whether private individuals and corporations or branches of government, must act according to the law, and violations of the law must meet with the organized sanction of society. The rule of law, in this sense, has a double meaning: the legality of government and enforcement of the law. This is a formal principle; we are concerned not with the content of the law but with the need to enforce it, whatever its content. The rule of law in this sense is connected not to the nature of the regime but to the principle of public order.[404]

In this sense, it can be said, as Justice Scalia aptly put it, that the rule of law is a law of rules.[405]

But this idea is an impoverished notion of the rule of law. In this weak form, the rule of law exists even in a dictatorship. A friend once told me that during World War II, several Jews were in prison in Germany as a result of sentences received before the war broke out. The Gestapo did not harm those Jews because the law mandated that they not be exterminated in the death camps before finishing their prison sentences, and this rule of law had to be maintained. But when the prisoners finished serving their sentences, the Gestapo was waiting

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402 H.C. 910/86, Ressler v. Minister of Def., 42(2) P.D. 441, 462–63.

403 *See* CASS, *supra* note 59, at 1 ("[T]he rule of law still means very different things to different people."); *see generally* Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467 (exploring both formal and substantive concepts of the rule of law, as articulated by various scholars).

404 H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 621 (Barak, J., dissenting).

405 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

for them at the gate. The prisoners were taken to the death camps and murdered. The formal rule of law was observed.

In addition to this formal understanding of the rule of law, the rule of law exists in a jurisprudential sense. According to this conception, the rule of law includes certain minimum requirements without which a legal system cannot exist, and which distinguish a legal system from a gang whose leader imposes his will on everyone else.[406] Professor Lon Fuller calls these requirements, collectively, the "inner morality of law."[407] Among philosophers, there is disagreement over these minimum requirements. Fuller requires that the law be general; legal rules must be publicized, clear, intelligible, and stable enough to enable a subject to conform to them; the law must not be overly retroactive; statutes should not conflict with one another; the law should not demand the performance of acts beyond one's powers; the rules must be administered as announced.[408] Other philosophers have offered different lists of requirements.[409]

Although this jurisprudential conception is important, and I am prepared to regard it as an essential condition for the rule of law, I do not believe that it is enough. It cannot — just as the formal rule of law cannot — release people from the duty of complying with a corrupt statute (lex corrupta). Why should we hold inviolable a piece of legislation that gives the government — publicly, prospectively, and in general — the power to deal a mortal blow to human rights? Haim H. Cohn, a judge on the Supreme Court of Israel, rightly said:

> [The rule of law] does not mean only that the ruling authorities in the State act according to law: even totalitarian governments act according to the laws of their countries. Are those not the laws that they themselves enacted for their own purposes and according to their own scheme? Consider the Nazis, who came to power lawfully and committed most of their crimes by virtue of explicit legal authorizations that they took for this purpose: no one would say that "rule of law" reigned in Nazi Germany, and no one would dispute that what reigned there was the rule of crime.[410]

Indeed, it is not proper to identify the rule of law as merely the principle of the legality of government, with jurisprudential requirements added in. Dworkin has rightly said that we must not be satisfied with the "rule-book conception" of the rule of law.[411] It must be

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406 *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 101–20 (1996) (discussing the jurisprudential conception of the rule of law).

407 *See* LON L. FULLER, THE MORALITY OF LAW 41–94 (rev. ed. 1969).

408 *See id.* at 39.

409 *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 236–39 (1971); Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195, 198–202 (1977).

410 HAIM H. COHN, HA-MISHPAT [THE LAW] 143 (1991).

411 DWORKIN, *supra* note 214, at 11.

extended to the "right conception" of the rule of law. There is certainly no agreement as to the scope of this concept. In my opinion, it means guaranteeing fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of society.

According to my approach, the rule of law is not merely public order: the rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself, but a means to allow the individual to live in dignity and develop himself. What underlies this substantive perception of the rule of law are the human being and human rights, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual."[412] This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. The judge must protect this rich concept of the rule of law. This perception of the rule of law has practical implications for the methods available to the judge in realizing his role and for his relationship to the other branches of government.

5. Activism and Self-Restraint. — Supreme court judges in a democracy have a great deal of responsibility. Much is expected of them. There is consensus about some of those expectations, while others are disputed. The tools in their possession are limited. They are subject to criticism, much of which revolves around terms like "activism" and "self-restraint." Those who use these terms usually do not define them, as there is disagreement over their definition.[413]

A study by Professor Bradley Canon establishes six parameters for evaluating judicial activism in constitutional law.[414] These parameters deal with the extent to which the judge is prepared to invalidate policies that have been determined by democratic procedures, the degree to which the judge is prepared to change an existing judicial ruling, the degree to which he is prepared to depart from the intention of the authors of the constitution and the clear language of the text, the degree to which the court determines policy and does not limit itself to protecting the democratic process, the degree to which the court determines policy or leaves its determination to the executive or to the individual, and the degree to which the judicial decision supplants the

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412 H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 622 (Barak, J., dissenting).

413 *See* BARAK, *supra* note 10, at 147.

414 *See* Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

considerations of the other branches regarding a given issue. According to Canon, a judge may be an activist according to one parameter but self-restrained according to another. For each of the parameters, Canon distinguishes among very active, not active, and somewhat active. This, of course, is merely the beginning of the evaluation, since the internal weight of the various parameters must also be considered.

This model indicates the complexity of the terms "activism" and "self-restraint." It demonstrates the need to conduct a detailed analysis before answering the question whether activism or self-restraint is desirable. Moreover, the model indicates that this pair of terms — activism and self-restraint — refers to thought and action processes rather than the quality of resolutions. A judge may extend or limit human rights without any necessary correlation of activism or self-restraint. Likewise, there is no point in attempting to correlate activism or self-restraint with a "liberal" or "conservative" approach.[415] Furthermore, we should not encourage judicial activism simply when we like the activist result the court reaches but then demand judicial restraint when the result is not to our liking. Support for or opposition to activism or self-restraint must be about the relationship among the branches, not the results of that relationship. This is the primary limitation of analyzing a court through the lens of activism or self-restraint: the analysis fails to focus on the proper function of a court in a democracy. In my opinion, we would do better to substitute the inquiry into whether a court is active or self-restrained with an inquiry into whether the court is fulfilling its role in a democracy.

In my opinion, we would do well not to talk about activism or self-restraint. The terms are part of a social dialogue characterized by empty slogans and superficial labels, and the damage they cause outweighs their benefits. If we want to examine this pair of concepts seriously with regard to a particular judge or a particular court, then we should perform a detailed examination of various aspects of the judge or court and the overall results he or it produces. I doubt whether the outcome of such an examination would interest anyone. In any event, I am not at all interested in whether my legal community thinks that I am an activist or that I show self-restraint. Such opinions result from thought processes and evaluations that, as Canon indicates, normally take place without anything to guide them.

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[415] *See* Michael Kirby, *Judicial Activism*, 27 U.W. AUSTL. L. REV. 1, 5 (1997) ("[J]udicial activism is not confined to a particular ideological or social viewpoint. It may be liberal. But it may also be conservative.").

B. The Relationship Between the Judiciary and the Legislature

1. Jurisdiction for Judicial Review. — (a) Jurisdiction for Review of Statutes. — Most supreme courts in democracies exercise judicial review of the constitutionality of statutes.[416] Since the end of World War II, most new constitutions have included express provisions about judicial review, thereby ending the legal debate over its legitimacy. Naturally, the debate about the wisdom of implementing this review continues although "the worldwide debate does not usually occur within the same terms as it does in the United States."[417] A number of countries have constitutional provisions stating that there is no judicial review of the constitutionality of statutes.[418] Even in these countries, there is no room for argument as to the legitimacy of the absence of judicial review. What remains is debate over the wisdom of the constitutional provision. In several countries, including the United States and Israel, there is no express provision in the constitution for judicial review of legislation. Nonetheless, the courts in these two countries have held that judicial review of legislation is implied by interpretation of the constitution. In the United States, this ruling was made in 1803.[419] In Israel, it was made in 1995.[420] In both countries, there are still those who argue against the legitimacy of these rulings. I think that in the United States, this argument is on the wane. But in Israel, it is still alive and vibrant, particularly because some of the founders of the Israeli Constitution are still alive and they do not hesitate to state their opinions on the rulings of the Supreme Court. Imagine the lively debate that would take place in the United States today over judicial review of the constitutionality of statutes if Madison, Jefferson, and Hamilton were active participants.

The position of Israeli judges is therefore not easy, and they are subject to tremendous tension. But they must fulfill their role. If our legislature — which is also the constitutive authority that is competent to change our Constitution — is not pleased with the existence of judicial review, it may amend the Constitution. I hope that such amendment will not occur. The likelihood that it will is small, since judicial review enjoys the confidence of the public.

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416 *See* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE (David M. Beatty ed., 1994); C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 1, 1–10 (C. Neal Tate & Torbjörn Vallinder eds., 1995); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997).

417 L'Heureux-Dubé, *supra* note 25, at 242.

418 *See, e.g.*, GRW. NED. art. 120 ("The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.").

419 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

420 *See* C.A. 6821/93, United Mizrahi Bank Ltd. v. Migdal Coop. Vill., 49(4) P.D. 221.

(b) Jurisdiction for Review of Decisions That Are Not Legislation. — Is a supreme court authorized to practice judicial review of legislative decisions that are not statutes in the formal sense? For example, the legislature may make determinations of a quasi-judicial nature, such as decisions regarding the impeachment of the President and federal judges in the United States or revoking the immunity of a member of Parliament in Israel. Similarly, the legislature, or one of its organs, may make administrative decisions. This practice occurs when the speaker of the legislature or the chairman of a parliamentary committee makes decisions, subject to the rules of parliament, about the agenda of the plenum or committee, or about the composition of the various committees. Finally, the legislature may make decisions that are not primary legislation. Thus, in Israel, a committee of Parliament has the statutory power to determine the salaries of the members of Parliament and of judges. Is a decision of the legislature (or of one of its organs) that does not have the formal guise of a statute subject to judicial review? In the absence of an express provision in the constitution — which most constitutions do not have — the answer is derived from the view of the legal system and its judges toward the principle of separation of powers. I have already shown that the American position is very narrow in supporting a rigid separation of powers.[421] The approach of English law is also narrow.[422] But the approaches of the constitutional courts in Germany[423] and Spain[424] are different. These courts regard themselves as competent to exercise judicial review of all decisions of the legislature. Thus, for example, the German Constitutional Court has exercised judicial review on the following questions: Do parliamentary rules requiring two readings for statutes that address certain issues violate the constitution?[425] Was the amount of time set for deliberations of the plenum over a matter of great public importance sufficient?[426] Is the exclusion of members of a certain party from one of the parliamentary committees unconstitutional?[427] Are parliamentary rules limiting the rights of an independent member of parliament who left his party — such as restrictions on his right to address the plenum and the time allotted to him and limitations on his right to submit private bills — consistent with constitutional guaran-

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421 *See supra* pp. 121–22.

422 *See* Rediffusion (H.K.) Ltd. v. Attorney Gen., [1970] A.C. 1136 (P.C.) (appeal taken from H.K.); Harper v. Home Sec'y, 1 Ch. 238 (C.A. 1954); Bilston Corp. v. Wolverhampton Corp., 1 Ch. 391 (1942); Bradlaugh v. Gossett, 12 Q.B.D. 271 (1884).

423 *See* KOMMERS, *supra* note 75.

424 *See* E.A. ÁLVAREZ, LOS ACTOS PARLAMENTARIOS NO NORMATIVOS Y SU CONTROL JURISDICCIONAL (1998).

425 *See* BVerfGE 1, 144 (1952).

426 *See* BVerfGE 104 (1959).

427 *See* BVerfGE 70, 324 (1986).

tees concerning the rights of a member of parliament?[428] The Supreme Court of Israel has adopted a similar attitude,[429] based on the principle of separation of powers. Separation of powers does not mean a "dictatorship of powers." The separation of powers means "mutual checks and balances among the various powers — not walls between the powers, but bridges of checks and balances."[430]

This is the case with regard to judicial review of the decisions of the Knesset (the Israeli legislature) that conflict with the constitution, as well as those that conflict with statutes that it has enacted. Indeed, our approach is that:

> The legislative branch is not exempt from compliance with a statute. Once the legislature has determined its content and given it life, without exempting itself textually from its ambit, the legislature must honor the statute like everyone else . . . . Once the provision has been dressed in the garb of a statute, everyone, including the Knesset authorities, must honor it. Its content and the scope of its application may be amended only in the manner in which any other Knesset legislation is amended. Authority to exercise judicial review of the actions of the Knesset is also apparent from basic constitutional concepts, according to which judicial review of the constitutionality of the acts of each branch is a basic condition for the rule of law, and in respect of which the separation of powers does not find expression in blocking the road to judicial review.[431]

We have adopted a similar approach with regard to the Knesset's secondary legislation and its quasi-judicial[432] and administrative decisions.[433]

2. Judicial Discretion in Reviewing Decisions That Are Not Legislation. — Jurisdiction and discretion are distinct. This distinction raises the question whether the scope of judicial review of nonstatutory legislative decisions is the same as the scope of judicial review of the decisions of other branches of the state. The answer of the German Constitutional Court is yes,[434] but this is not the answer of the Supreme Court of Israel. We distinguished between these two types of

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428 *See* BVerfGE 80, 188 (1989).

429 *See* David Kretzmer, *Judicial Review of Knesset Decisions*, 8 TEL AVIV U. STUD. L. 95 (1988); Meir Shamgar, *Judicial Review of Knesset Decisions by the High Court of Justice*, 28 ISR. L. REV. 43 (1994).

430 H.C. 73/85, Kach Faction v. Speaker of Knesset, 39(3) P.D. 141.

431 H.C. 325/85, Miari v. Speaker of Knesset, 39(3) P.D. 122, 127–28.

432 *See, e.g.*, H.C. 5151/95, Cohen v. Attorney Gen., 49(5) P.D. 245; H.C. 1843/93, Pinhasi v. Knesset, 48(4) P.D. 492; H.C. 1848/93, Pinhasi v. Knesset, 49(1) P.D. 661; H.C. 620/85, Miari v. Speaker of Knesset, 41(4) P.D. 169; H.C. 306/81, Flatto-Sharon v. Knesset Comm., 35(4) P.D. 118.

433 *See* H.C. 9070/00, Livnat v. Chairman of Constitution, Law & Justice Comm., 55(4) P.D. 800, 806.

434 *See* KOMMERS, *supra* note 75.

actions by the Knesset,[435] holding that when the Knesset carries out a quasi-judicial action, full judicial review is appropriate. Therefore we have on several occasions voided a decision of the Knesset to revoke or not to revoke the immunity of a member of the Knesset.[436] In both cases, we interpreted statutory provisions dealing with the scope of legislative immunity, determining the parameters that the members of the Knesset must consider and evaluating whether those parameters were met in practice. Naturally, in light of the broad scope of considerations the legislature may take into account, only in a few cases will the court determine that the Knesset exercised its discretion unlawfully. The number of cases is small, however, not because decisions of the Knesset are institutionally non-justiciable, but because they are usually lawful. As I wrote in one of my opinions:

> The special status of the Knesset is taken into account in formulating the substantive law that applies to its quasi-judicial activity. This special status does not need to come into play once again, to curtail the scope of judicial review. Judicial review is intended to ensure a minimal threshold required to preserve the validity of a quasi-judicial decision. Self-restraint in exercising judicial discretion in the course of judicial review of quasi-judicial decisions means undermining the elementary fairness of the parliamentary process. There is no justification for this.[437]

The Supreme Court has adopted a different approach with regard to Knesset decisions of an administrative nature.[438] On one hand, the court considered the rule of law in the legislature. The rule of law implies that every organ of the Knesset must observe the rules that apply to the Knesset's internal operations. As long as the Knesset does not change them, its rules bind it as does any other legal norm. On the other hand, the court considered the Knesset's need to decide its internal management on its own, and decided that the Knesset is best equipped to resolve these matters. In balancing these two considerations, the Supreme Court held that it will exercise discretion, and will review the legality of an act of the Knesset or one of its organs in matters of internal management only if the Court decides that intervention is necessary to prevent substantial harm to the fabric of democratic life and the foundations of the regime's structure. I said in this case that:

> The proper balance between the need to ensure the "rule of law in the legislature" and the need to respect the exclusivity of the Knesset in its decisions on internal matters will be ensured if we adopt a criterion that takes into account the degree of alleged harm to the texture of parliamentary

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435 *See* H.C. 1956/91, Shammai v. Chairman of Knesset, 45(4) P.D. 313, 316 (expressing institutional non-justiciability).

436 *See Pinhasi*, 49(1) P.D. at 492; H.C. 761/86, Miari v. Chairman of Knesset, 42(4) P.D. 868.

437 *Pinhasi*, 49(1) P.D. at 702.

438 *See* H.C. 652/81, Sarid v. Chairman of Knesset, 36(2) P.D. 197 (translated in ZAMIR & ZYSBLAT, *supra* note 305, at 318).

> life, as well as the degree to which that harm affects the structural foundations of our constitutional regime. . . . In adopting the aforementioned criterion, which considers the extent of harm and the interest harmed, we wish to establish a flexible test inherently amenable to precise definition, whose content and scope will be determined by the court according to the needs of time and place.[439]

Critics on both sides have attacked the Israeli Supreme Court's approach on this issue. One side argues that self-restraint is insufficient. According to this view, all intraparliamentary decisions should be (institutionally) non-justiciable.[440] The other side argues that self-restraint is inappropriate, claiming that an intraparliamentary decision is the same as any other unlawful decision by a state institution.[441] This clash of opinions was presented to us in one case. We rejected the conflicting viewpoints. This is what I wrote in the judgment:

> [S]elf-restraint . . . is proper. It should not be made too broad and it should not be made too narrow. It expresses a proper balance between the principle of the "rule of law in the legislature" . . . and the uniqueness and status of the Knesset. This balance gives proper weight to the fact that at the end of the day, at issue are the internal affairs of the Knesset and not actions with legislative effect (statutes, secondary legislation). It reflects a recognition that the Knesset — like every institution — requires basic rules that regularize its various activities, and, by extension, recognition of the importance of autonomy in implementing these rules. This self-restraint properly expresses "the great caution obligatory in every judicial decision that has implications for the interrelationship between the main branches of the state and that determines their form." . . . It aptly expresses the "relationship of mutual respect between the legislature and the judiciary." This self-restraint constitutes a "kind of golden path . . . between full judicial activism and full self-restraint." . . . On one hand self-restraint ensures a situation in which "the court will not turn itself into part of the political struggle, for which the Knesset is the central and national arena," by means of the court's distancing itself from "the everyday affairs of internal management." . . . On the other hand, the restrictions on self-restraint protect the principle of the rule of law and the supremacy of the constitution.[442]

Using this framework, we considered and invalidated decisions by the Speaker of the Knesset preventing the tabling of a racist draft bill in the plenum[443] and establishing a rule that only a multimember

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439 *Id.* at 204.

440 *See* Kretzmer, *supra* note 429, at 97–99.

441 *See* Ariel Bendour, *The Administration of Justice in the High Court of Justice*, 17 MISHPATIM 592 (1987).

442 H.C. 9070/00, Livnat v. Chairman of Constitution, Law & Justice Comm., 55(4) P.D. 800, 813.

443 *See* H.C. 742/84, Kahana v. Chairman of Knesset, 39(4) P.D. 85.

party could propose a vote of no confidence in the government.[444] We thought that both of these decisions materially undermined the fabric of our democratic life. In contrast, we have dismissed many petitions challenging decisions by the Speaker of the Knesset and of committee chairpersons setting the time for deliberations on various draft bills.[445] We thought that these decisions related merely to the day-to-day internal management of parliament and that it was therefore not proper to exercise judicial review of them.

Is the balance we have struck proper? Viewed in terms of theoretical consistency, the German approach is the proper one. All branches of state are subject to judicial review in *all* of their acts, even decisions of internal management. The propriety of the self-restraint displayed by the court in Israel is not self-evident:

> It allows an illegal act of the Knesset to stand, without its validity being undermined by reason of its illegality. This self-restraint therefore allows the Knesset to violate its own law. It is not easy to see what justifies the court's self-restraint, which effectively allows an illegal act to stand.[446]

Despite this difficulty, the Supreme Court has chosen to maintain the delicate balance that I have discussed. Only time will tell whether we are justified in doing so.

3. The Dialogue Between the Judiciary and the Legislature. — In addition to the constant tension, there is also a constant dialogue between the judiciary and the legislature. This dialogue does not take place at meetings between judges and legislators; it takes place when each branch carries out its constitutional role. The main role of the legislature is to enact statutes. These statutes are subject to judicial review of their constitutionality and judicial interpretation of their meaning. If the judiciary determines that a statute is unconstitutional, the matter returns to the legislature. In many such cases, the legislature may enact a new statute that achieves the same fundamental purpose as the voided statute while adopting more proportionate means. If the legislature does not want to do this, it can — in legal systems that permit this (such as Canada and Israel) — enact a conflicting ordinary statute by using an override.[447] It can also — again, if this is possible in the relevant legal system — amend the constitution and then reenact the statute. This new statute is also subject to judicial review, and the process can continue. This process is a proper dia-

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[444] *See* H.C. 73/85, Kach Faction v. Chairman of Knesset, 39(3) P.D. 141.

[445] For a list of the judgments, see *Livnat*, 55(4) P.D. at 814.

[446] *Id.* at 810.

[447] For a discussion of the legislature's override power under Section 33 of Canada's Charter of Rights and Freedoms, see Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 83–84 (1997).

logue between the branches.[448] In this dialogue, the legislature usually enjoys considerable latitude.

A similar dialogue occurs when the judiciary interprets a statute in a way that is unacceptable to the legislature. The legislature may enact a new statute or amend the original one to better achieve its aim. The cycle of interpretation and amendment can then repeat. Such amendment does not constitute a forbidden intervention of the legislature into the judicial sphere, provided that the new legislation does not retroactively apply to the original case decided by the court. The new statute does not "interpret" the older statute. The new statute creates a fresh normative reality reflecting the wish of the legislature. Enacting a new statute is the right and the power of the legislature.[449] It does not constitute disrespect of the judiciary.[450] On the contrary, it is a "healthy practice"[451] that properly expresses the dialogue between the branches that are partners in the legislative enterprise. Thus, the Supreme Court of Israel has written:

> [I]n enacting a statute that aims to change the court's ruling, the legislature reveals understanding of judicial interpretive activity, considers it on the merits, and responds to it on the basis of its advantages and drawbacks. This is the unending "dialogue" between a legislature and a judge, between one branch of the State and another.[452]

This dialogue provides several benefits for democracy. First, the dialogue — particularly the fact that the legislature has the power to respond to and effectively modify judicial rulings[453] — expresses the

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[448] For various discussions of how this "dialogue" works in the Canadian system, see Vriend v. Alberta, [1998] 1 S.C.R. 493, 565–67; Hogg & Bushell, *supra* note 447, at 79–81; Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. B. REV. 481, 517–30 (2001).

[449] For a discussion of this legislative prerogative in the American system, see *James v. United States*, 366 U.S. 213 (1961) (Black, J., concurring in part and dissenting in part), which notes that Congress may change statutory interpretations "when it believes that this Court's interpretation of a statute embodies a policy that Congress is against." *Id.* at 233–34; *see also* Regina v. Mills, [1999] 3 S.C.R. 668 (Can.).

[450] *See* Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 198 n.198 (1991) ("Congress understands that it is not constitutional blasphemy to criticize the Court or to seek to overturn a decision by subsequent legislation."); *cf.* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 387–89 (1991) (suggesting that congressional overrides can occur when congressional preferences change, when the Court misinterprets congressional preferences, or when the Court has signaled that congressional action is needed). *But see* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 731 (1991) (noting that "[u]nfortunately, the overruling dialogue between Congress and the Court is not always based on such a healthy relationship").

[451] William O. Douglas, *Legal Institutions in America*, *in* LEGAL INSTITUTIONS TODAY AND TOMORROW 274, 292 (Monrad G. Paulsen ed., 1959).

[452] H.C. 5364/94, Velner v. Chairman of Israeli Labor Party, 49(1) P.D. 758, 791 (Barak, J., dissenting).

[453] *See Vriend*, [1998] 1 S.C.R. at 566.

complex democratic accountability of the judiciary. Second, judicial-legislative dialogue enriches public debate by placing issues on the public and legislative agenda that would otherwise remain within the confines of the executive branch in the absence of judicial adjudication. For example, the Israeli Supreme Court has held that under the doctrine of non-delegation, the Defense Minister may not grant religious seminary students an exemption from the military draft without specific legislative authorization.[454] This judicial ruling put the issue before both the Knesset and the general public, who then struggled with the difficult dilemmas it raised.

Naturally, judges should examine the content of a new statute. Sometimes the statute may undermine the principles of (substantive) democracy. In such a case, review of a new statute should focus not on the fact that it changes the previous ruling of the court, but on the fact that it undermines democracy. Moreover, everything is a question of degree. If the interpretation of a statute is met with an immediate and hasty response from the legislature in the form of new legislation, uncertainty about the law will result, and the public will lose confidence in the legislative branch. This is not the case, however, when the change in legislation after a judicial ruling reflects a thorough and deliberate examination of the ruling and an objective expression of the will of the legislature.

A case concerning the proper mechanics for the judicial-legislative dialogue arose before the Israeli Supreme Court in 1994.[455] Two large political parties in Israel signed a "coalition agreement" that when any Supreme Court statutory interpretation decision changed the status quo in matters of religion and state, the two parties would vote for a change to the statute that would restore the status quo. The legality of this agreement was attacked in the Supreme Court.[456] Although all the justices strongly criticized the agreement, the majority thought that the agreement should not be voided as contrary to public policy.

My minority opinion argued that such an agreement undermined public confidence in judges, in part because it drained the Court of its role as a judicial institution. I also argued that the agreement violated the separation of powers because of a prior agreement to bring about a change in the judicial interpretation of legislation:

> It dissolves the partnership between the branches in the legislative enterprise. It erects a wall between the legislature and the judiciary. It creates a rift between the legislature and the judiciary. It requires the legislature to change the judicial interpretation without considering it on its merits, without examining its benefits and shortcomings and without even looking

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454 *See* H.C. 3267/97, Rubinstein v. Minister of Def., 52(5) P.D. 481.

455 *See Velner.*

456 *See id.* at 758 (Barak, J., dissenting).

> at it. Even if the judicial interpretation is called for by the fabric of the system's structure, even if it follows naturally and rationally from a variety of principles and values, even if it serves most of the interests and values that deserve protection, and even if it is firmly linked to the totality of the system's arrangements — none of this justifies even one quick glance at the decision and its logic, the ruling and its reasoning. The legislative eye does not read the decision. The legislative ear does not take it in. The legislative heart does not feel it.[457]

Thus I argued that the coalition agreement was void because it undermined the fabric of democratic life, which is contrary to public policy.[458]

4. The Importance of the Legislature. — The foundation of democracy is a legislature elected freely and periodically by the people. Without majority rule, as reflected in the power of the legislature, there is no democracy. As judges and legal scholars, we often forget this fundamental principle. Common law legal thought focuses mainly on the judiciary and neglects the legislature. Jeremy Waldron has rightly said that "legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law."[459] In contrast, my conception of the role of a judge in a democracy recognizes the central role of the legislature. Undermining the legislature undermines democracy. My conceptions of the rule of law and of the separation of powers do not undermine the legislature. Rather, they ensure that all branches of state act within the framework of the constitution and statutes. Only thus can we maintain public confidence in the legislature; only thus can we preserve the dignity of legislation. Purposive interpretation, which I have discussed, is also intended to protect the status of the legislature. Indeed, in interpreting legislation, purposive interpretation considers the legislature's subjective intent. I regard it as an internal inconsistency in Waldron's approach that he wishes to guarantee the status and importance of the legislature[460] but is not prepared to interpret its legislation according to its own intent.[461] My conception of the partnership between the judge and the legislature is intended to emphasize the importance of the legislature and its senior position with regard to legislation. Justice McLachlin rightly said that in democracies, "the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of pro-

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457 *Id.* at 791–92.

458 Section 30 of Israel's Contract Law provides that "[a] contract the making, contents or object of which is or are illegal, immoral or contrary to public policy is void." The Contracts (General Part) Law, 1973, 27 L.S.I. 117 (1972–1973).

459 JEREMY WALDRON, THE DIGNITY OF LEGISLATION 1 (1999).

460 *See id.* at 2.

461 *See id.* at 26–28.

found respect for the other. We are not adversaries. We are all in the justice business, together."[462]

Because of the democratic importance of the legislature, I regard with concern the growing tendency of legislatures to delegate their legislative powers to the executive. I am aware of the practical considerations that underlie this tendency. Nonetheless, it seems to me that the status of the legislature should be preserved at all costs. Thus, we must ensure that the legislature prescribes all fundamental legal arrangements by statute, and that the administrative agency has only the power to implement the legislative will. The principle of separation of powers requires this relationship. It implies that the legislature "lay[s] down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases."[463] The German Constitutional Court has discussed this requirement of the separation of powers principle, stating that "[i]f [a statute] does not adequately define executive powers, then the executive branch will no longer implement the law and act within legislative guidelines but will substitute its own decisions for those of the legislature. This violates the principle of the separation of powers."[464]

The rule of law also "requires the legislature to establish the primary arrangements and principled standards, whereas the administration has authority to actualize these primary arrangements by establishing secondary arrangements and modes of implementation."[465] As the German Constitutional Court has explained:

> The basic tenets of the rule of law require that an empowering statute adequately limit and define executive authorization to issue burdensome administrative orders according to content, subject matter, purpose, and scope . . . so that official action [will] be comprehensible and to a certain extent predictable for the citizen.[466]

Indeed, the principle of democracy demands that:

> [T]he substantive decisions regarding the policy of the State and the needs of society must be made by its popularly elected representatives. [The legislature] is elected by the people to enact its laws, and it therefore enjoys social legitimacy in this activity. . . . The legislature may not refer the critical and difficult decisions to the executive without giving it guidance.[467]

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462 McLachlin, *supra* note 131, at 36 (1999).

463 Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

464 8 BVerfGE 274, 325 (1958), *translated in* KOMMERS, *supra* note 75, at 138.

465 H.C. 3267/97, Rubinstein v. Minister of Def., 52(5) P.D. 481, 507.

466 8 BverfGE, at 325.

467 *Rubinstein*, 52(5) P.D. at 508–10.

In legislative decisions that restrict human rights, the legislature must determine the primary arrangements of the restrictions. Only in this way will it be possible, in a democracy, to protect human rights properly. Even a regime whose constitution protects human rights may restrict them under certain conditions, one of which is that when the restriction is made by statute, the statute must set out the principled, basic criteria for the restriction.

Naturally, the dividing line between primary arrangements, which must be established by the legislature, and secondary arrangements, which may be established in secondary legislation, is not clearly defined. The realities of life sometimes necessitate a compromise in this respect. It is difficult, in a modern democracy, to maintain fully this principled approach to primary arrangements. The legislature can be given some space to maneuver. Although a reasonably high level of abstraction may be acceptable for criteria and policy guidelines, the essential distinction between the roles of primary and secondary legislation must remain. Primary legislation must determine the general plan and the criteria for making decisions that are critically important to the life of the individual. From the statute itself — according to its accepted interpretation — it must be possible to deduce the zone in which the executive may act, and the primary directions that should guide the executive in its actions.

Other countries have adopted this principled approach. United States law accepts the doctrine of non-delegation, though this doctrine has been clouded and infrequently applied.[468] The German Constitutional Court more actively applies the doctrine in limiting the legislature's ability to delegate power to executive officers or other institutional actors.[469] In Israel, use of the doctrine began only recently.[470] If we wish to preserve the proper status of the legislature in a democracy, we must ensure that the legislature makes critical lawmaking decisions and establishes criteria for other important decisions in its legislation.

C. The Relationship Between the Judiciary and the Executive

1. The Scope of Judicial Review with Regard to the Executive and Its Chief Officers. — The executive derives its powers from the constitution and statutes. Therefore, it must act within the framework of the constitution and statutes. If it exceeds the authority given it, or if it exercises that authority unlawfully, the judiciary must exercise the power of review given to it by the constitution and statutes. The judi-

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468 *See* 1 TRIBE, *supra* note 195, § 5-19, at 977–78.

469 *See* CURRIE, *supra* note 75, at 132–33; KOMMERS, *supra* note 75, at 145.

470 *See Rubinstein*, 52(5) P.D. at 502.

ciary should use this power to determine the consequences of the executive's actions. Justice Nolan rightly said that "the proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the court as to what its lawful province is."[471] In this activity, the judiciary does not confront the countermajoritarian argument, because in such cases, as long as no constitutional problem arises, the legislature has the power, if it so wishes, to change the outcome reached by the judiciary by amending the statute. Indeed, when the judiciary reviews executive acts, it operates within the framework of its classic role in the separation of powers and in accordance with its role of maintaining the rule of law. In this respect, there is no difference between the chief executive and any one of its many ordinary employees. Every person who has authority must exercise it lawfully, and if authority has been exercised unlawfully, it must be subject to judicial review. Therefore, if the president of the state grants a pardon, his action is subject to judicial review. There is nothing in the nature of this act or in the status of the person committing it to prevent this review. The court must examine the criteria used by the president and evaluate whether he acted lawfully. This is how the Supreme Court of Israel acted with regard to a petition in which the legality of the President's pretrial pardon of the head of the General Security Service and several members of the Service was considered.[472] With regard to the claim that there should be no judicial interference with the President's pardons, I responded:

> We are one branch of the state, and our role is to ensure that the other branches act within the framework of the law, in order to preserve the rule of law in the state. The branches of the state are lofty, but the law is higher than all of us. We would not fulfill our judicial role if, in the context of lawfully submitted petitions, we did not review the actions of the other branches as they appear from the petitions before us.[473]

With regard to the merits of the case, the court decided, by a majority opinion from which I dissented, that the President had the power to give a pardon before trial and that this power had been lawfully exercised.

The Supreme Court of Israel adopted a similar approach when it considered the cases of a cabinet minister indicted for bribery[474] and a deputy minister indicted for making false entries in corporate docu-

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471 M. v. Home Office, 1 Q.B. 270, 314–15 (Eng. C.A. 1992).

472 H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505.

473 *Id.* at 585–86 (Barak, J., dissenting)

474 H.C. 2533/97, Movement for Quality Gov't v. Gov't of Israel, 51(3) P.D. 46.

ments and for fraud[475] who both refused to resign their positions despite these serious charges. The petition before us challenged the Prime Minister's decision not to dismiss the cabinet minister and deputy minister. We decided in both cases that the Prime Minister unlawfully failed to exercise his power of dismissal and ordered him to dismiss them.[476] They resigned before the power of dismissal was exercised. In the petition referring to the deputy minister, I said:

> [T]he Government, the Prime Minister, and all other ministers are public trustees. They have nothing of their own. All that they have, they have for the good of the public. . . .
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> From this fiduciary duty derives the law — a general law that applies to every governmental authority, including a government, a prime minister, and other ministers — that discretion granted to a public authority must be exercised fairly and honestly, making reasonable use of relevant considerations alone. . . .
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> . . . .
>
> The fiduciary duty of the Prime Minister, the Government and each of the ministers imposes a duty to consider whether to terminate the tenure of a deputy minister who has been indicted. . . .
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> Neither the Prime Minister, nor the Government, nor any of its ministries may say: "the law has given us power to terminate the tenure of a deputy minister; if we wish, we may terminate it, and if we wish, we may refrain from doing so. The discretion is ours, and we will exercise it as we see fit." Every power given to a branch of state must be exercised fairly and reasonably. Every power has limits. We do not recognize "absolute" discretion, bereft of any limits or restrictions.[477]

In that case, it was argued that we should distinguish between an "ordinary" civil servant and an elected public official, on the ground that an elected public official holds office because of the public's confidence in him, as expressed through a democratic electoral process, and that this same process empowers the public to remove him from office. I replied to this argument by saying:

> The judgment of the voter is no substitute for the judgment of the law. Indeed, the very fact that a person is an elected public official requires him to adhere to a stricter, more ethical standard of behavior than an "or-

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[475] H.C. 4267/93, Amitai — Citizens for Proper Admin. & Integrity v. Prime Minister of Isr., 47(5) P.D. 441.

[476] In *Amitai*, I said that:

> We again pointed out to the parties that ideally, they themselves should draw the conclusions called for by the state of affairs, without judicial decision. We did not say this because we think that the dispute before us is "non-justiciable." We said it because we think that in this justiciable matter, the executive office holders should, first and foremost, craft for themselves the norms for proper behavior by themselves.

Id. at 474.

[477] *Id.* at 461–62.

> dinary" civil servant. Whoever is elected by the people must set an example for the people, be faithful to the people, and deserve the trust that the people have shown him. Therefore, when the executive holds the power to terminate [a public official's tenure], it must exercise it when the official undermines the confidence of the public in the government, whether the official is elected (such as a member of Knesset serving as a deputy minister) or is a civil servant (such as an employee of the State whom a minister has the power to dismiss).[478]

Similarly, in another case, we invalidated the appointment of the director-general of a government ministry because he had admitted to very serious offenses for which he had been pardoned (as part of a pretrial pardon that the President gave to the members of the General Security Service).[479] We balanced the accomplishments of the candidate and the pardon that he had received (ten years before the appointment) against the offenses to which he had confessed. We determined that in this case, his criminal past was decisive. In particular, we emphasized that the director-general of a ministry exercises disciplinary powers over the employees of his ministry. Giving such an important public office to this man would undermine public confidence in the civil service.[480] His defenders argued that once the government decided upon the appointment, there was no basis for judicial intervention. The government, it was argued, had balanced the various considerations, and after it had decided to make the appointment, the Court should not have intervened and supplanted the government's discretion with its own discretion. We rejected this argument by concluding that the appointment amounted to an unreasonable action in the extreme. We said that "the lofty status of the Government, as the State's executive authority . . . cannot give it powers that the law does not give. Every state authority that makes an unreasonable decision is subject to the court's intervention, and the Government is no exception to this rule."[481] At the end of the opinion I added:

> [T]his is the strength of a democracy that respects the rule of law. This is the formal rule of law, under which all state authorities, including the Government itself, are subject to the law. No authority is above the law; no authority may act unreasonably. This is also the substantive rule of law, under which a balance must be struck among the values, principles, and interests of the democratic society, while empowering the State to exercise discretion that appropriately balances the proper considerations.[482]

2. Judicial Review of the Attorney General's Decisions. — The Attorney General in Israel — who is a civil servant and not a political

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[478] *Id.* at 470.

[479] H.C. 6163/92, Eisenberg v. Minister of Housing, 47(2) P.D. 229.

[480] *Id.* at 266.

[481] *Id.* at 274 (citation omitted).

[482] *Id.*

appointee — has extensive powers to issue indictments. Are these powers subject to judicial review?[483] The Supreme Court of Israel has said that they are.[484] The Attorney General does not have a special status; he is not immune from judicial review. He, like every other civil servant, must exercise his discretion lawfully. He must act according to relevant considerations, without discrimination, fairly, and reasonably. If he deviates from this mandate, the Court will exercise judicial review over the legality of his actions. But the Court will not consider the wisdom of those actions or set itself up as a super Attorney General.[485] The Court will treat the Attorney General like every other civil servant whose actions are subject to judicial review. It follows that:

> [T]he key question is not the extent of the court's intervention, but the validity of the Attorney General's decision. The real question is not the grounds for the court's intervention, but the grounds that invalidate the decision. . . . The question is not the court's discretion, but the discretion of the Attorney General. Indeed, the extent of the court's intervention maps onto the extent of the illegality of the Attorney General's decision. . . .
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> In a country ruled by law, where the rule of law governs, there is no justification for using special criteria to assess the validity of the discretion of the person who heads the public prosecution service. Note that this conclusion does not mean replacing the discretion of the Attorney General with the discretion of the court. This conclusion does not mean invalidating a "wrong" decision of the Attorney General — that is, one in which he chooses an undesirable but lawful decision. This conclusion means only that all governmental actors are equal in the eyes of the law.[486]

The Court has acted in accordance with this principle. We have invalidated the Attorney General's exercise of discretion when he declined, for lack of public interest, to indict bankers in charge of several of Israel's banks. According to the findings of a State Commission of Inquiry — findings that the Attorney General accepted — these bankers acted contrary to the law, caused serious damage to many investors, and caused serious pecuniary loss to the state.[487] In a similar vein, we held that the Attorney General exercised his discretion unlaw-

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[483] *See generally* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA (1981).

[484] The main judgment is in H.C. 935/89, *Ganor v. Attorney General*, 44(2) P.D. 485, *translated in* ZAMIR AND ZYSBLAT, *supra* note 305, at 334.

[485] For this reason petitions against the Attorney General have been dismissed on several occasions in circumstances where the judges thought that, had they been acting as Attorney General, they would have decided otherwise. *See, e.g.*, H.C. 6209/01, Bar-Lev v. Attorney Gen. (not yet reported).

[486] *Ganor*, 44(2) P.D. at 527–28 (citation omitted).

[487] *See id.*

fully when he decided not to file a disciplinary claim against the Chief Police Commissioner who unlawfully received gifts of small monetary value, not for acts related to his position, but from persons who came into contact with him as a result of his position as a policeman.[488] In a much greater number of cases, though, we dismissed petitions against the Attorney General after holding that he had acted reasonably.[489]

In these rulings, we determined a proper legal regime for the behavior of the Attorney General. The head of the public prosecution service has significant power. Power without responsibility becomes arbitrariness. We prevented this arbitrariness. By doing so we also protected the office of the Attorney General against all those who wished to reduce its powers. One of the defenses against critics of these powers is that they are not absolute because they are subject to judicial review. It is no surprise that Israel has had no Watergate, since an Attorney General who participates in illegal activity would very quickly have to explain his actions and justify his decisions before the Supreme Court. Every Attorney General, including myself during my tenure in that position, knows this, and it helps him protect the constitution and democracy.

3. Judicial Interpretation and Executive Interpretation. — Since the *Chevron*[490] decision, United States case law has provided that when certain conditions exist, such as when the intention of the legislature regarding the jurisdiction of the executive is unclear and its language is ambiguous, the court must defer to the executive's interpretation, provided that this interpretation is reasonable.[491] I accept that, in interpreting a statute dealing with the powers of a government authority that has expertise in a field pertaining to the statute, some weight should be attached to this authority's understanding of the statute. This weight increases as the statute becomes more technical or professional. I do not, however, accept that the judiciary should defer to the executive's interpretation simply because this interpretation is reasonable. In my view, the constitutional role of interpreting every legal text — whether it is the constitution itself or a statute — belongs to the Court: "The question that the court must ask itself is not whether the executive's interpretation is reasonable. The question that the court must ask itself is what is the correct interpretation of the state power."[492] The responsibility of the judge, within the framework

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488 *See* H.C. 7074/93, Suissa v. Attorney Gen., 48(2) P.D. 749.

489 *See* H.C. 2534/97, Yahav v. State Attorney, 51(3) P.D. 1; H.C. 6781/96, Olmert v. Attorney Gen., 50(4) P.D. 793; H.C. 4162/93, Federman v. Attorney Gen., 47(5) P.D. 309; H.C. 223/88, Sheftel v. Attorney Gen., 43(4) P.D. 356.

490 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

491 *See* 1 TRIBE, *supra* note 195, § 5-19, at 993–94.

492 H.C. 693/91, Efrant v. Dir. of Population Register, 47(1) P.D. 749, 761–62.

of the separation of powers, is to give the proper interpretation to the constitution and statutes. The judge cannot escape this responsibility.

Interpreting a statute is different from implementing or executing it. A court's interpretation of a statute gives it a meaning that establishes the scope of executive authority. In implementing a statute, the executive branch uses this authority. Using interpretation to determine the scope of authority is the job of the court. There is no deference here. In contrast, when there is more than one way to implement a statute, the executive branch has the constitutional authority to choose how to implement it. A judge must defer to the choices made by the executive authority. The court will not interfere with a lawful and reasonable implementation by the executive, even if it would not have implemented the statute in the same way. For this very reason, though, the court must intervene in a lawful and reasonable interpretation by the executive if the court's own interpretation differs. The "professional" implementer of the statute is the executive; the "professional" interpreter of the statute is the judiciary. In the constitutional structure of a democratic state, the responsibility for interpreting statutes lies with the judiciary, and it must ensure that its interpretation — and not merely a reasonable interpretation of the executive — be given to the statute: "A court will not be allowed to abandon its duty — and its authority — in favor of the statutory interpretation of experts or the competent public body. The court is the 'expert' in statutory interpretation . . . ."[493] I expressed this idea in one of my opinions:

> [W]hen a judge faces two lawful interpretive solutions, he need not suppress his view of the proper interpretation because of the public authority. The court must form its own opinion regarding which of the lawful interpretations is proper. In doing so, it must take into consideration all the circumstances of the matter. One of the "circumstances" in this regard is the viewpoint of the public authority with regard to the proper interpretation. This approach is vital to an orderly regime. It does not ignore the professionalism and responsibility of the other branch. At the same time, it does not ignore the professionalism and responsibility of the judiciary. Indeed, the court's interpretation of any given statute integrates, in this way, into the court's interpretation of the entire body of legislation. A statute does not stand alone. Nor is it interpreted only by the public authority that implements it. All of the statutes constitute one system, in which they mesh together in legislative harmony. When one interprets one statute, one interprets all statutes. The overall responsibility for uniting the systems lies with the court, and within the court system, the re-

[493] H.C. 3648/97, Stamka v. Minister of Interior, 53(2) P.D. 728, 744.

> sponsibility is with the Supreme Court. The Supreme Court may not escape this responsibility.[494]

This approach is also accepted by the courts of other nations, including those of the United Kingdom[495] and Canada.[496]

4. Zone of Reasonableness. — Although the court should not defer to the reasonable interpretation of the executive if the court's own interpretation differs, the court must defer to the executive's implementation of a statute as long as the means of implementation falls within a range or "zone" of reasonableness. The court must refrain from imposing its own preferences regarding implementation onto the society in which it operates.

The key test here is reasonableness. Put simply, the executive must act reasonably, for an unreasonable act is an unlawful act. In many cases, the test of reasonableness allows for only one possibility, which the executive *must* choose. Sometimes, however, the reasonableness test allows for several possibilities, thereby creating a "zone of reasonableness." The executive has freedom of choice within this range. The principle of separation of powers requires the executive, rather than the judiciary, to choose one possibility within this zone. But the principle of separation of powers requires the court, rather than the executive, to determine the limits of the zone of reasonableness.

The zone of reasonableness sets the boundaries for determining the scope of judicial review of the executive's implementation. Nonetheless, the concept of reasonableness is notoriously vague. Most people use the term in a circular manner without giving it any real content. The only way to further the discussion about the substance of reasonableness is to recognize that reasonableness is neither a physical nor a metaphysical concept, but a normative one. Reasonableness means that one identifies the relevant considerations and then balances them according to their weight.[497] Indeed, reasonableness is an evaluative process, not a descriptive process. It is not a concept that is defined by deductive logic. It is not merely rationality. A decision is reasonable if it was made by weighing the necessary considerations, including fun-

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494 H.C. 399/85, Kahana v. Broad. Auth. Mgmt. Bd., 41(3) P.D. 255, 305–06.

495 *See* Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG, [1975] All E.R. 810, 828 ("[I]t is the function of the courts to say what the application of the words [of a piece of legislation] used for particular cases or individuals is to be. . . . [I]t would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.").

496 *See* Southam Inc. v. Dir. of Investigation & Research, [1997] 1 S.C.R. 748, 751–52.

497 *See* Manuel Atienza, *On the Reasonable in Law*, 3 RATIO JURIS 148 (1990); MacCormick, *supra* note 250, at 131.

damental values in general and human rights in particular.[498] Nothing is reasonable "in itself."[499]

When I engage in judicial review of executive activity, the criterion of reasonableness and the "zone of reasonableness" play a central role. These factors are particularly important when the relevant balance is between the needs of the public and the rights of the individual[500] or in matters dealing with government ethics and proper administration. For example, our Court used the principle of reasonableness to hold that a minister and deputy minister indicted for serious offenses were obliged to resign;[501] indeed, it would have been unreasonable not to dismiss them. Similarly, we held that a person with a significant criminal past cannot be appointed as director-general of a government ministry.[502] The principle of reasonableness has also guided us in deciding to review the legality of the Attorney General's use of prosecutorial discretion[503] in holding that the army should not promote officers who had committed sexual harassment[504] and in restricting a transitional or "lame duck" government's scope of power to negotiate a peace agreement.[505]

This last ruling was met with criticism in Israel.[506] Those same individuals who supported the use of the reasonableness test in the context of human rights strongly criticized its use in the government ethics context. I understand this criticism, but I disagree. It is appropriate to use the reasonableness test in reviewing executive actions, including issues of government ethics. Naturally, in countries where there is self-restraint in government, there may be no need to develop the principle of reasonableness in government ethics. But in countries where this self-restraint is lacking — and the concept of "it is not done" is insufficiently developed — it is proper to extend the principle of reasonableness to all government actions. I do not see any possibility of restricting reasonableness to one field. If the principle of reasonableness should be applied in protecting the freedom of the individual, it should also be applied to other kinds of protections involving government activity. Consistent application of this principle can strengthen public

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498 *See* Jeffrey Jowell, *Courts and the Administration in Britain: Standards, Principles and Rights*, 22 ISR. L. REV. 409, 419 (1988); Jeffrey Jowell & Anthony Lester, *Beyond* Wednesbury: *Substantive Principles of Administrative Law*, 1987 PUB. L. 368, 370–71.

499 H.C. 935/89, Ganor v. Attorney Gen., 12(2) P.D. 485, 514.

500 *See* Jowell & Lester, *supra* note 498, at 373.

501 *See supra* pp. 66–41.

502 *See supra* p. 66.

503 *See supra* pp. 66–43.

504 *See* H.C. 1284/99, Anonymous v. Army Chief of Staff, 62(2) P.D. 57.

505 *See* H.C. 5167/00, Weiss v. Prime Minister, 455(2) P.D. 55.

506 *See* Ruth Gavison, *Public Involvment of the Supreme Court: A Critical View*, *in* JUDICIAL ACTIVISM: FOR AND AGAINST — THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY 79 (Ruth Gavison, Mordechai Kremnitzer & Yoav Dolan eds., 2000).

confidence in the government, which is fundamental to government's operation.

I should reemphasize that the reasonableness test requires the evaluator not to consider how he himself would act in the role of the civil servant but how the "reasonable civil servant" would act. Acting as the reasonable civil servant, I do not impose my subjective perspective on the government but instead recognize that there can be multiple reasonable ways to achieve a given goal. As with all of my judicial activity, when applying the reasonableness test, I give weight to the various considerations and balance them.

In recent years, the concept of proportionality has developed along with the concept of reasonableness. Proportionality first spread in Continental law, and then entered the common-law systems. Proportionality first impacted constitutional law through holdings that a law limiting a constitutional human right must be proportional;[507] it then spread into administrative law.[508] The path is open for it to penetrate other fields of law.

To determine proportionality, a judge employs three cumulative sub-tests:[509] First, an action is proportionate if it is appropriate for achieving the goal. The means must fit the goal. The means must be appropriate for achieving the goal. The means must lead, rationally, to the realization of the goal. Thus, for example, a statute establishing a presumption that anyone possessing illegal narcotics is a drug dealer is disproportionate, because there is no rational connection between possessing a small amount of a "recreational" drug and dealing drugs.[510] Second, an action is proportionate if there are no other means appropriate for achieving the goal that would undermine the principles that we want to protect (such as human rights) to a lesser degree. Thus, for example, some consider the death penalty disproportionate because life imprisonment, a less extreme action with respect to human rights, can also achieve the purposes of punishment.[511] Third,

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507 The Supreme Court of Canada has adopted the principle of proportionality in its interpretation of the Limitation Clause. *See* CAN. CONST. pt. I, § 1; *see also* The Queen v. Oakes, [1986] 1 S.C.R. 103, 105; HOGG, *supra* note 103, at 889. In view of the great similarity between the Continental test and the Canadian test, we may assume that the former influenced the latter. The United Kingdom ultimately adopted a similar test. *See* Regina (Daly) v. Sec'y of State for the Home Dep't, 2 W.L.R. 1622 (2001).

508 *See* CURRIE, *supra* note 75, at 309; JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 677 (1992); MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 165 (2001); Gráinne de Búrca, *Proportionality and* Wednesbury *Unreasonableness: The Influence of European Legal Concepts on UK Law*, 3 EUR. PUB. L. 561 (1997). *See generally* NICHOLAS EMILOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW (1996); THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999).

509 *See Oakes*, [1986] 1 S.C.R. at 138–39.

510 *Id.* at 106.

511 *See* S v. Makwanyane 1995 (3) SA 391, 437 (CC) (S. Afr.).

an act is disproportionate if the harm to a protected value is too drastic in relation to the benefit of achieving the goal. Suppose, for example, a foreign worker commits a minor offense. Proportionality demands that the government not deport this worker because he would be separated from his wife who lives in that country and from his children who were born there.[512] Therefore, like its partner the reasonableness test, proportionality serves as a powerful tool for a judge to realize his role in a democracy.

VI. THE SUPREME COURT AND THE PROBLEM OF TERRORISM

A. Terrorism and Democracy

Terrorism plagues many countries. The United States realized its devastating power on September 11, 2001. Other countries, such as Israel, have suffered from terrorism for a long time.[513] While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our Court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts:

> We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.[514]

Terrorism creates much tension between the essential components of democracy. One pillar of democracy — the rule of the people through its elected representatives — may encourage taking all steps effective in fighting terrorism, even if they are harmful to human rights. The other pillar of democracy — human rights — may encourage protecting the rights of every individual, including the terrorists, even at the cost of undermining the fight against terrorism. Struggling with this tension is primarily the task of the legislature and the executive, which are accountable to the people. But true democratic accountability cannot be satisfied by the judgment of the people alone.

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512 *See* SINGH, *supra* note 508, at 166–67.

513 For a comparison of the American experience and the Israeli experience, see WILLIAM J. BRENNAN, JR., *The Quest to Develop a Jurisprudence of Civil Liberties in Time of Security Crises*, 18 ISR. YEARBOOK HUM. RTS. 11 (1988).

514 H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845.

The legislature must also justify its decisions to judges, who are responsible for protecting the principles of democracy.

We, the judges in modern democracies, are responsible for protecting democracy both from terrorism and from the means the state wants to use to fight terrorism. Of course, matters of daily life constantly test judges' ability to protect democracy, but judges meet their supreme test in situations of war and terrorism. The protection of every individual's human rights is a much more formidable duty in times of war and terrorism than in times of peace and security. If we fail in our role in times of war and terrorism, we will be unable to fulfill our role in times of peace and security. It is a myth to think that we can maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that a judicial ruling will be valid only during wartime and that things will change in peacetime. The line between war and peace is thin — what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long term. Since its founding, Israel has faced a security threat. As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock.

Furthermore, a mistake by the judiciary in times of war and terrorism is worse than a mistake of the legislature and the executive in times of war and terrorism. The reason is that the judiciary's mistakes will remain with the democracy when the threat of terrorism passes, and will be entrenched in the case law of the court as a magnet for the development of new and problematic laws. This is not so with a mistake of the other branches, which can be erased through legislation or executive action and usually forgotten. In his dissent in *Korematsu v. United States*,[515] Justice Jackson expressed this distinction well:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty . . . . A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review

[515] 323 U.S. 214 (1944).

> and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[516]

Indeed, we judges must act coherently and consistently. A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes. This is not the case with the other branches of state, whose actions during a time of war and terrorism may amount to an episode that does not affect decisions made during times of peace and security.

Moreover, democracy ensures us, as judges, independence and impartiality. Because of our unaccountability, it strengthens us against the fluctuations of public opinion. The real test of this independence and impartiality comes in situations of war and terrorism. The significance of our unaccountability becomes clear in these situations, when public opinion is more likely to be unanimous. Precisely in these times, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution. Lord Atkins's remarks on the subject of administrative detention during World War II aptly describe these duties of a judge. In a minority opinion in November 1941, he wrote:

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which . . . we are now fighting, that the judges . . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[517]

Admittedly, the struggle against terrorism turns our democracy into a "defensive democracy" or a "fighting democracy." Nonetheless, this defense and this fight must not deprive our regime of its democratic character. Defensive democracy: yes; uncontrolled democracy: no. The judges in the highest court of the modern democracy must act in this spirit. We have tried to do so in Israel, and I will now discuss several fundamental views that have guided us in these efforts.

B. In Battle, the Laws Are Not Silent

There is a well-known saying that when the cannons speak, the Muses are silent. Cicero expressed a similar idea when he said that "*inter arma silent leges*" (in battle, the laws are silent).[518] These statements are regrettable; I hope they do not reflect our democracies to-

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[516] *Id.* at 245–46 (Jackson, J., dissenting).

[517] Liversidge v. Anderson, 3 All E.R. 338, 361 (1941) (Atkins, L.J., minority opinion).

[518] *See* CICERO, PRO MILONE 16 (N.H. Watts trans., Harvard Univ. Press, 5th ed. 1972).

day.[519] I *know* they do not reflect the way things should be. Every battle a country wages — against terrorism or any other enemy — is done according to rules and laws. There is always law — domestic or international — according to which the state must act. And the law needs Muses, never more urgently than when the cannons speak. We need laws most in times of war. As Harold Koh said, referring to the September 11, 2001 attacks:

> In the days since, I have been struck by how many Americans — and how many lawyers — seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this.[520]

During the Gulf War, Iraq fired missiles at Israel. Israel feared chemical and biological warfare as well, so the government distributed gas masks. A suit was brought against the military commander, arguing that he distributed gas masks unequally in the West Bank. We accepted the petitioner's argument. In my opinion, I wrote:

> When the cannons speak, the Muses are silent. But even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.[521]

This opinion sparked criticism; some argued that the Supreme Court had improperly interfered with in Israel's struggle against Iraq. I believe that this criticism is unjustified. We did not intervene in military considerations, for which the expertise and responsibility lie with the executive. Rather, we intervened in considerations of equality, for which the expertise and responsibility rest with the judiciary. Indeed, the struggle against terrorism is not conducted *outside* the law, but *within* the law, using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it, while in its war against terrorism, a democratic state acts within the framework of the law and according to the law. Justice Haim Cohen expressed this idea well more than twenty years ago, when he said:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while

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[519] *But cf.* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998) (arguing that Cicero's approach reflects reality).

[520] Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002).

[521] H.C. 168/91, Morcos v. Minister of Def., 45(1) P.D. 467, 470–71.

> violating the law. The moral strength and objective justness of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never succumb to the state's enemies.[522]

Indeed, the war against terrorism is the war of a law-abiding nation and its law-abiding citizens against lawbreakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the Law against its enemies. My recent opinion in the case involving the alleged food shortage among the besieged Palestinians in the Church of the Nativity in Bethlehem addressed this role of the rule of law as a primary actor in matters of terrorism. We considered the petition and applied the relevant rules of international law. In doing so, I said:

> Israel is in a difficult war against rampant terrorism. It is acting on the basis of its right to self-defense . . . . This armed conflict is not undertaken in a normative vacuum. It is undertaken according to the rules of international law, which establish the principles and rules for armed conflicts. The saying that "when the cannons speak, the Muses are silent" is incorrect. . . . The reason underlying this approach is not merely pragmatic, the result of political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic State fighting for its survival and the battle of terrorists rising up against it. The State is fighting for the law and for the law's protection. The terrorists are fighting against and in defiance of the law. The armed conflict against terrorism is an armed conflict of the law against those who seek to destroy it. . . . But in additon, the State of Israel is a State whose values are Jewish and democratic. Here we have established a State that preserves law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular. Between these two there are harmony and accord, not conflict and estrangement.[523]

Therefore, as Justice Michael Cheshin has written: "[W]e will not falter in our efforts for the rule of law. We have sworn by our oath to dispense justice, to be the servant of the law, and we will be faithful to our oath and to ourselves. Even when the trumpets of war sound, the rule of law will make its voice heard."[524]

Discussing democracy's war on terrorism, Justice Kirby has rightly pointed out that it must be waged while "[k]eeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the

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[522] H.C. 320/80, Kwasama v. Minister of Def., 5(3) P.D. 113, 132.

[523] H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 34–35.

[524] H.C. 1730/96, Sabiah v. IDF Commander in Judea & Samaria, 50(1) P.D. 353, 369.

rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects."[525]

C. *The Balance Between National Security and Freedom of the Individual*

Democratic nations should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. On one hand, we must consider the values and principles relating to the security of the state and its citizens. Human rights are not a stage for national destruction; they cannot justify undermining national security in every case and in all circumstances. Similarly, a constitution is not a prescription for national suicide.[526] But on the other hand, we must consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited license to harm the individual.

Democratic nations must find a balance between these conflicting values and principles. Neither side can rule alone. In a case that dealt with the legality of administrative detention, I said:

> There is no avoiding — in a democracy aspiring to freedom and security — a balance between freedom and dignity on the one hand, and security on the other. Human rights must not become a tool for denying security to the public and the State. A balance is required — a sensitive and difficult balance — between the freedom and dignity of the individual, and national security and public security.[527]

This synthesis between national security and individual freedom reflects the rich and fertile character of the principle of rule of law in particular, and of democracy in general. It is within the framework of this approach that the courts in Israel have made their decisions concerning the state's armed conflict against the terrorism that plagues it. Our Supreme Court — which in Israel serves as the court of first instance for complaints against the executive branch — opens its doors to anyone with a complaint about the activities of a public authority. Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue. We have not used the Act of State doctrine or non-justiciability under these circumstances. We consider these issues on their merits. Nor do we require injury in fact as a standing requirement; we recognize the standing of anyone to challenge the act. In the context of terrorism, the Israeli Supreme Court has ruled on petitions concerning

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525 Kirby, *supra* note 77, at 32.

526 *See* C.A. 2/84, Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset, 39(2) P.D. 225, 310; *cf.* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackon, J., dissenting).

527 Cr.A. 7048/97, Anonymous v. Minister of Def., 54(1) P.D. 721, 741.

the power of the state to arrest suspected terrorists and the conditions of their confinement. It has ruled on petitions concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated. These hearings sometimes take place just hours after the alleged incident about which the suspected terrorist complains. When necessary, the Court issues a preliminary injunction preventing the state from continuing the interrogation until the Court can determine that it is being conducted legally. In one case, the state sought to deport 400 suspected terrorists to Lebanon. Human rights organizations petitioned us. I was the Justice on call at the time. Late that night, I issued an interim order enjoining the deportation. At the time, the deportees were in automobiles en route to Lebanon. The order immediately halted the deportation. Only after a hearing held in our Court throughout the night that included comprehensive argumentation, including testimony by the Army's Chief of Staff, did we invalidate the deportation order.[528] We ruled that the state breached its obligation to grant the deportees the right to a hearing before deporting them, and we ordered a post factum right to a hearing.

In all these decisions — and there have been hundreds of this kind — we have recognized the power of the state to protect its security and the security of its citizens on the one hand; on the other hand, we have emphasized that the rights of every individual must be preserved, including the rights of the individual suspected of being a terrorist. The balancing point between the conflicting values and principles is not constant, but rather differs from case to case and from issue to issue. The damage to national security caused by a given terrorist act and the nation's response to that act affect the way the freedom and dignity of the individual are protected. Thus, for example, when the response to terrorism was the destruction of the terrorists' homes, we discussed the need to act proportionately. We concluded that only when human life has been lost is it permissible to destroy the buildings where the terrorists lived, and even then the goal of the destruction may not be collective punishment (which is forbidden in an area under military occupation).[529] Such destruction may be used only for preventive purposes, and even then the owner of the building to be destroyed has a right to a prior hearing unless such a hearing would interfere with current military activity.[530] Obviously, there is no right to a

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[528] *See* H.C. 5973/92, Ass'n for Civil Rights in Isr. v. Minister of Def., 47(1) P.D. 267.

[529] *See* H.C. 5510/92, Turkeman v. Minister of Def., 48(1) P.D. 217. Harsh criticism has been leveled at this opinion and others like it. *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 160–61 (2002).

[530] *See* H.C. 6696/02, Adal Sado Amar v. IDF Commander in the W. Bank, http://www.court.gov.il.

hearing in the middle of a military operation. But when the time and place permit — and there is no danger of interference with security forces that are fighting terrorism — this right should be honored as much as possible.[531]

When it was necessary to use administrative detention against terrorists, we interpreted the relevant legislation to determine that the purpose of administrative detention laws is twofold: "On one hand, protecting national security; on the other hand, protecting the dignity and freedom of every person."[532] We added that "protection of national security is a social interest that every State strives to satisfy. Within this framework, democratic freedom-loving countries recognize the 'institution' of administrative detention."[533] We also concluded that "defending and protecting . . . freedom and dignity extend even to the freedom and dignity of someone whom the state wishes to confine in administrative detention."[534] Against this background, we held:

> [I]t is possible to allow — in a democratic state that aspires to freedom and security — the administrative detention of a person who is regarded personally as a danger to national security. But this possibility should not be extended to the detention of a person who is not regarded personally as any danger to national security, and who is merely a "bargaining chip."[535]

The war against terrorism also requires the interrogation of terrorists, which must be conducted according to the ordinary rules of interrogation. Physical force must not be used in these interrogations; specifically, the persons being interrogated must not be tortured.[536]

Any balance that is struck between security and freedom will impose certain limitations on both. A proper balance will not be achieved when human rights are fully protected, as if there were no terrorism. Similarly, a proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe, and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can have security. It follows that the balance between security and freedom does not reflect the lack of a clear position. On the contrary, the proper balance is the result of a clear position that recognizes both the need for security and the need for human rights. I discussed this in a difficult case addressing whether the state may forcibly relocate residents of an occupied territory who pose a threat to state security:

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531 *See id.*

532 *Anonymous*, 54(1) P.D. at 740.

533 *Id.*

534 *Id.*

535 *Id.* at 741.

536 H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 835.

"A delicate and sensitive balance is necessary. That is the price of democracy. It is expensive but worthwhile. It strengthens the state. It gives it a reason to its fight."[537]

When a court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from all sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights. The supporters of security argue the converse. Frequently, those making these arguments only read the judicial conclusions without considering the judicial reasoning that seeks to reach a proper balance among the conflicting values and principles. None of this should intimidate the judge; he must rule according to his best understanding and conscience.[538]

D. The Scope of Judicial Intervention

Judicial review of the war against terrorism by its nature raises questions regarding the timing and scope of judicial intervention. There is no theoretical difference between applying judicial review before or after the war on terrorism. In practice, however, as Chief Justice Rehnquist has correctly noted, the timing of judicial intervention affects its content. As he stated, "courts are more prone to uphold wartime claims of civil liberties after the war is over."[539] In light of this recognition, Chief Justice Rehnquist goes on to ask whether it would be better to abstain from judicial adjudication during warfare.[540] The answer, from my point of view — and, I am sure, that of Chief Justice Rehnquist — is clear: I will adjudicate a question when it is presented to me. I will not defer it until the war on terror is over, because the fate of a human being may hang in the balance. The protection of human rights would be bankrupt if, during armed conflict, courts — consciously or unconsciously — decided to review the executive branch's behavior only after the period of emergency has ended. Furthermore, the decision should not rest on issuing general declarations about the balance of human rights and the need for security. Rather, the judicial ruling must impart guidance and direction in the specific case before it. As Justice Brennan correctly noted: "abstract principles announcing the applicability of civil liberties during times of war and crisis are ineffectual when a war or other crisis comes along unless the principles are fleshed out by a detailed jurisprudence ex-

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537 H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, http://www.court.gov.il.

538 *See* H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 585 (Barak, J., dissenting).

539 REHNQUIST, *supra* note 519, at 222.

540 *Id.*

plaining how those civil liberties will be sustained against particularized national security concerns."[541]

From a judicial review perspective, the situation in Israel is unique. Petitions from suspected terrorists reach the Supreme Court — which has exclusive jurisdiction over such matters — in real time. The judicial adjudication may take place not only during combat, but also often while the events being reviewed are still taking place. For example, the question whether the General Security Service may use extraordinary methods of interrogation (including what has been classified as torture) did not come before us in the context of a criminal case in which we had to rule, ex post, on the admissibility of a suspected terrorist's confession.[542] Rather, the question arose at the beginning of his interrogation. The suspect's lawyer came before us at the start of the interrogation and claimed, on the basis of past experience, that the General Security Service would torture his client. When we summoned the state's representative hours later, he confirmed the lawyer's allegation but nonetheless argued that the interrogation was legal. We had to make a decision in real time. How must we, as Supreme Court justices in a democracy, approach such an issue?

I believe that the court should not adopt a position on the efficient security measures for fighting against terrorism: "this court will not take any stance on the manner of conducting the combat."[543] For example, in a petition filed by citizens who were in the precincts of the Church of the Nativity when it was besieged by the Army — a petition that was filed while negotiations were being held between the Government of Israel and the Palestinian Authority regarding a solution to the problem — I wrote that "this court is not conducting the negotiations and is not taking part in them. The national responsibility in this affair lies with the executive and those acting on its behalf."[544] Indeed, the efficiency of security measures is within the power of the other branches of government. As long as these branches are acting within the framework of the "zone of reasonableness,"[545] there is no basis for judicial intervention. Often the executive will argue that "security considerations" led to a government action and request that the court be satisfied with this argument. Such a request should not be granted. "Security considerations" are not magic words. The court must insist on learning the specific security considerations that prompted the government's actions. The court must also be persuaded that these considerations actually motivated the government's

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541 BRENNAN, *supra* note 513, at 19.

542 *See* H.C. 4054/95, Pub. Comm'n Against Torture in Isr. v. Gov't of Israel, 43(4) P.D. 817.

543 H.C. 3114/02, Barakeh v. Minister of Def., 56(3) P.D. 11, 16.

544 H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 36.

545 *See supra* pp. 66–46.

actions and were not merely pretextual. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights. Indeed, in several of the many security measure cases that the Supreme Court has heard, senior army commanders and heads of the security services testified. Only if we were convinced, in the total balance, that the security consideration was the dominant one, and that the security measure was proportionate to the terrorist act, did we dismiss the challenge against the action.[546] We should be neither naïve nor cynical. We should analyze objectively the evidence before us. In a case dealing with review, under the Geneva Convention, of the state's decision to assign the residence of Arabs from the West Bank to the Gaza Strip, I noted that:

> In exercising judicial review . . . we do not make ourselves into security experts. We do not replace the military commander's security considerations with our own. We take no position on the way security issues are handled. Our job is to maintain boundaries, and to guarantee the existence of conditions that restrict the military commander's discretion . . . because of the important security aspects in which the commander's decision is grounded. We do not, however, replace the commander's discretion with our own. We insist upon the legality of the military commander's exercise of discretion and that it fall into the range of reasonableness, determined by the relevant legal norms applicable to the issue.[547]

Is it proper for judges to review the legality of the war on terrorism? Many, on both extremes of the political spectrum, argue that the courts should not become involved in these matters. On one side, critics argue that judicial review undermines security; on the other side, critics argue that judicial review gives undeserved legitimacy to government actions against terrorism. Both arguments are unacceptable. Judicial review of the legality of the war on terrorism may make this war harder in the short term, but it also fortifies and strengthens the people in the long term. The rule of law is a central element in national security. As I wrote in the case of the pretrial pardon given to the heads of the General Security Service:

> There is no security without law. The rule of law is a component of national security. Security requires us to find proper tools for interrogation. Otherwise, the General Security Service will be unable to fulfill its mission. The strength of the Service lies in the public's confidence in it. Its

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[546] In *Secretary of State for the Home Department v. Rehman*, No. UKHL47, 2001 WL 1135176 (H.L. Oct. 11, 2001) (U.K.), Lord Hoffman noted that "the judicial arm of government [needs] to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security." I hope the meaning of these comments is limited to the general principle that a court determines not the means of fighting terrorism but rather the lawfulness of the means employed.

[547] H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, http://www.court.gov.il.

> strength lies in the court's confidence in it. If security considerations tip the scales, neither the public nor the court will have confidence in the Security Service and the lawfulness of its interrogations. Without this confidence, the branches of the state cannot function. This is true of public confidence in the courts, and it true of public confidence in the other branches of state.[548]

I concluded my opinion in that case with the following historical analogy:

> It is said that there was a dispute between King James I and Justice Coke. The question was whether the king could take matters in the province of the judiciary into his own hands and decide them himself. At first, Justice Coke tried to persuade the king that judging required expertise that the king did not have. The king was not convinced. Then Justice Coke rose and said: "Quod rex non debet sub homine, sed sub deo et lege." The king is not subject to man, but subject to God and the law. Let it be so.[549]

The security considerations entertained by the branches of the state are subject to "God and the law." In the final analysis, this subservience strengthens democracy. It makes the struggle against terrorism worthwhile. To the extent that the legitimacy of the court means that the acts of the state are lawful, the court fulfills an important role. Public confidence in the branches of the state is vital for democracy. Both when the state wins and when it loses, the rule of law and democracy benefit. The main effect of the judicial decision occurs not in the individual instance that comes before it but by determining the general norms according to which governmental authorities act and establishing the deterrent effect that these norms will have. The test of the rule of law arises not merely in the few cases brought before the court, but also in the many potential cases that are not brought before it, since governmental authorities are aware of the court's rulings and act accordingly. The argument that judicial review necessarily validates the governmental action does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom of the war against terrorism, but only the legality of the acts taken in furtherance of the war. The court does not ask itself if it would have adopted the same security measures if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be prudent to adopt the security measures that were adopted. Thus, the court does not express agreement or disagreement with the means adopted, but rather fulfills its role of reviewing the constitutionality and legality of the executive acts.

Naturally, one must not go from one extreme to the other. One must recognize that the court will not solve the problem of terrorism.

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548 H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 622 (citation omitted).

549 *Id.* at 623.

It is a problem to be addressed by the other branches of government. The court's role is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law. This is the court's contribution to democracy's struggle to survive. In my opinion, it is an important contribution, one that aptly reflects the judicial role in a democracy. Realizing this rule during a fight against terrorism is difficult. We cannot and would not want to escape from this difficulty, as I noted in one case:

> The decision has been laid before us, and we must stand by it. We are obligated to preserve the legality of the regime even in difficult decisions. Even when the artillery booms and the Muses are silent, law exists and acts and decides what is permitted and what is forbidden, what is legal and what is illegal. And when law exists, courts also exist to adjudicate what is permitted and what is forbidden, what is legal and what is illegal. Some of the public will applaud our decision; others will oppose it. Perhaps neither side will have read our reasoning. We have done our part, however. That is our role and our obligations as judges.[550]

VII. WHAT OF THE FUTURE?

What does the future hold for the role of a supreme court in a democracy? It is, of course, impossible to foretell the future. But we can make several suppositions. Will the pendulum of history return us to the status and role of supreme courts before the human rights revolution? Can we expect a counterrevolution? Personally, I do not foresee such a drastic change in the perception of the nature of constitutional democracy and the status of human rights in a democracy. If we deal with the phenomenon of terrorism properly, even it will not be able to undermine the proper perceptions of human rights and the judicial role. It is possible to contend with terrorism within the framework of constitutional democracy. Terrorism will have triumphed if it alters the nature of constitutional democracy in the direction of undermining human rights.

I hope that in the future we will have a better understanding of the tools with which the court fulfills its role. Jurisprudence and case law must provide the courts with an acceptable doctrine for the interpretation of constitutions and statutes. It is a badge of shame for us all that such a doctrine has not yet been established. I also hope that jurisprudence will provide us with a better understanding of the tool of "balancing" and aid us in determining the "weight" of competing val-

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[550] H.C. 2161/96, Rabbi Said Sharif v. Military Commander, 50(4) P.D. 485, 491.

ues. I am convinced that with globalization, comparative law will play an increasingly prominent role.[551]

Will we develop new tools for the court to fulfill its role? I hope that the answer will be yes. The concept of reasonableness has furthered the ability of the courts to ensure the freedom of the individual and the integrity of the government. Proportionality has now joined reasonableness. Presumably, new concepts will join these two in the future and perhaps even replace them.

What does the future hold for the relationship among the branches of the state? I assume that the criticisms of unaccountability will continue. Since these arguments will not succeed in weakening the judicial commitment to realizing its role, they are likely to be directed toward the method of choosing judges. The pressure to politicize supreme court appointments in democracies is likely to increase.[552] I hope that the various democracies will stand up to this pressure, and take affirmative measures to reduce the politicization of the appointment of judges where it exists. I am critical of the system in a number of U.S. states where judges are chosen through general elections. I am also critical of the high political profile of appointing federal judges. As for Israel, I am satisfied with its system of the appointment of judges, under which the duty to appoint judges is entrusted to a constitutional body of which most members reflect nonpolitical considerations.[553]

We must distance ourselves from the erroneous view that regards judges as the representatives of the people and as accountable to the people much like the legislature is. Judges are not the representatives of the people, and it would be a tragedy if they became so. The principle of representation that applies to the legislature (and directly or indirectly to the executive) does not apply to the judiciary. It is sufficient that the judiciary reflects the different values that are accepted in

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551 *See generally* WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 174–93 (2000) (arguing that comparative studies should be central to a cosmopolitan discipline at the end of the twentieth century).

552 *See generally* HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988).

553 *See* BASIC LAW: ADMINISTRATION OF JUSTICE § 4 (1984). The President of the State — who is not the head of the executive but rather the symbol of state sovereignty — appoints all judges. The President is obliged to act according to the recommendation of the Judicial Appointments Committee. This Committee has nine members: two cabinet ministers, two members of the Knesset (one from the majority and one from the opposition), two lawyers appointed by the Israeli Bar Association, and three Supreme Court judges consisting of the Supreme Court President and two judges chosen by their peers for three-year appointments. Thus, a professional, not political, majority controls the committee. The political coalition in power is prevented from controlling court appointments. A similar arrangement exists in South Africa. *See* S. AFR. CONST. ch. 8, § 174(3).

society, and it should have an accountability that reflects its independence and its special role in a democracy.

One development that is particularly difficult to predict relates to international jurisdiction. In various fields — human rights, in particular — the state is losing its judicial exclusivity as international courts grow and strengthen. This phenomenon should weaken arguments accusing national judges of unaccountability since the international judge is even less accountable. This interplay between national and international courts can also affect the scope of institutional nonjusticiability. What point is there in recognizing institutional nonjusticiability at the national level if it is clear that the international court (for example, the International Criminal Court recently established at the Hague)[554] will recognize the institutional justiciability of the same matter? Whatever the case, the growth of international tribunals will add a new dimension to the role of the national judge.

I regard myself as a judge who is sensitive to his role in a democracy. I take seriously the tasks imposed upon me — bridging the gap between law and society and protecting the constitution and democracy. Despite frequent criticism (and it frequently descends to personal attacks and threats of violence), I have continued on this path for many years. I hope that by doing so, I am serving my legal system properly. Indeed, as judges in our countries' highest courts, we must continue on our paths according to our consciences. We, as judges, have a North Star that guides us: the fundamental values and principles of constitutional democracy. A heavy responsibility rests on our shoulders. But even in hard times, we must remain true to ourselves. I discussed this duty in an opinion considering whether extraordinary methods of interrogation may be used on a terrorist in a "ticking bomb" situation:

> 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 not in an ivory tower. We live the life of this country. 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 the law. This is also the demand that we make of ourselves. When we sit at trial, we stand on trial.[555]

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[554] On the International Criminal Court, see generally THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee ed., 1999); SHABTAI ROSANNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 210 (2002).

[555] H.C. 4054/95, Pub. Comm'n Against Torture in Isr. v. Gov't of Israel, 43(4) P.D. 817, 845.