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ON SOCIETY, LAW, AND JUDGING

Aharon Barak*

A. ON SOCIETY

Law is everywhere — though law is not everything. Law is everywhere in the sense that all human conduct is the subject of a legal norm. Even when an activity — such as friendship — is controlled by the autonomy of individual will, that autonomy exists within the law. Without it, everyone would have the freedom to invade that area. However, law is not everything. There is religion, and morals. The law is a means to organize life between the members of a given society at a given time. The law is a tool that allows society to function. Each society's members must determine the appropriate character of relationships in that society. Naturally, the different members of society have different views regarding what are appropriate societal relations. There are those who would like to see human rights as the focus of and the foundation of these relationships. Others see belief in God and the observing of his commandments as the necessary guide. There are those who would emphasize the good of the state as a whole, and there are those who concentrate on the good of the individual. It is necessary to reach a national compromise when choosing between values and principles. Indeed, the human beings are a complicated social being. Their life is complex. Their objectives are multidimensional. We want freedom of religion and freedom from religion; we wish to ensure both the common good and the individual good. But as attaining everything is impossible, we must choose and determine what our national priorities are.

The methods of determining national priorities vary from one society to another. In a democratic system of government, the choice is made by the people, through their representatives. Behind this choice are the “rules of the game”, in the center of which is the understanding that the people's representatives will seek out national compromise which will allow the individuals that make up society to live together. This national compromise is based on the recognition of basic human rights on the one hand, and the conservation of the existence of the state framework on the other. Democracy is not simply majority rule.¹ Democracy is majority rule intended to ensure human rights in the context of a living, breathing state. The state must not be sacrificed on the altar of human

* This article was published previously as the Montesquieu Lecture for 2010 held at Tilburg University, together with comments by European scholars on Barak's approach to judicial lawmaking. See Maartje de Visser and Willem Witteveen (editors), *THE JURISPRUDENCE OF AHARON BARAK, VIEWS FROM EUROPE*, NIJMEGEN, THE NETHERLANDS (2011) (www.wolfpublishers.com).

1. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 23 (2006); RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006); C. NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 8 (1998).

rights. Human rights are not a prescription for national self-destruction.² However, human rights must not be sacrificed on the altar of the state. The state exists for its individuals. Balance is needed between the common good and individual good, and between the good of each individual and that of his fellow individuals. Naturally, this balance varies from one society to another, and in the context of a given society, it varies from one time to another. It is influenced by the dangers that society faces, by its social structure, by its collective history, and by other factors which make up society's identity.³

B. ON LAW

The law, in a given democracy, at a given time, reflects the national balance that society has achieved. At that society's foundation stands the national decision to uphold a democratic form of government, whilst rejecting extreme alternatives. That decision is usually entrenched in a formal constitution which ensures that the character and form of government remain unchanged. The constitution determines certain priorities, to be preserved by future generations. From that standpoint, it can be said that the constitution it is not democratic, as it does not necessarily reflect the national priorities of the present members of society, but rather, the national compromise reached in the past. However, this lack of democracy is illusory for three reasons: *first*, the constitution sets forth ways for its amendment. Through the amendment process, society adapts the national priorities determined in the constitution to the national priorities understood to be appropriate in the present;⁴ *second*, the constitution preserves — as part of the essence of the government's form entrenched in the constitution — human rights. Opposite the majority's inability to change the national priorities (which impinges the democratic approach regarding majority rule) stand the recognized and protected human rights (which fulfill the democratic approach regarding human rights);⁵ *third*, the constitution usually employs — particularly in the field of individual rights — “majestic generalities.”⁶ These generalities, entrenched in fundamental rights (such as equality, human dignity, liberty, freedom of expression), constitute vague standards, which allow every given society, at a given time, to assign them the meaning that reflects the fundamental societal views of that period. Thus, a bridge is found between the past and the present's national compromise.

2. See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); EA 2/84 Neiman v. Chairman of the Cent. Elections Comm. 39(2) P.D. 225, 310 [1985] (Isr.), available at http://elyon1.court.gov.il/files_eng/84/020/000/Z01/84000020.z01.pdf.

3. See CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES (Michel Rosenfeld ed., 1994).

4. On the Unconstitutional Constitutional Amendments, see Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV (forthcoming, 2012).

5. See *id.*

6. See *Fay v. New York*, 332 U.S. 261, 282 (1947).

C. ON JUDGING

1. *Deciding Disputes*

Democracy is based upon a separation of powers. The meaning of this principle is twofold.⁷ *First*, a demarcation between the various branches of government is recognized, whereas each governmental branch is assigned a role as its main and principal role; *second*, there is a reciprocal relationship between the various branches, such that each branch checks and balances the other branches, safeguarding the individual's rights.⁸ In that context, the main and principal function of the legislative branch is the creation of general norms, whereas the principal function of the judicial branch is resolving disputes. While resolving a dispute, and as byproduct⁹ of that, the judicial branch must determine the law according to which the dispute is settled. The extent to which it determines the law while resolving the dispute varies from one legal system to another, and is derived from its tradition and culture. Every legal system recognizes the legitimacy of the judicial determination of law by way of the interpretation of the provisions of the constitution, statutes, contracts, or wills which apply to the dispute.¹⁰

In many cases, determining the law according to which the dispute is to be settled does not entail any judicial creativity whatsoever. The law before and after the dispute's resolution is the same law. In determining what that law is, the judge merely states the existing law. His actions are declarative and not creative. Only in the small minority of cases does the determination of the law involve judicial creativity. In these cases, the law prior to and after the dispute's resolution is not the same law. The judge does not merely declare what the existing law is; he creates new law. In such cases, the judge engages — incidentally to deciding the case¹¹ — in judicial lawmaking.¹² Such lawmaking does not just create an individual legal norm (*inter partes*), whose only power is in the resolution of the dispute between the parties; it creates a general legal norm (*ergo omnes*), whether through the force of the principle of *stare decisis*, or other recognized technics that obligates not only the parties to the dispute, but all branches of the government and members of the public.

2. *Judicial Lawmaking*

What is the anatomy of judicial lawmaking?¹³ It varies according to the kind of legal activity being carried out. The main judicial activity is the interpretation of a legal text (e.g., constitution, statute, regulation, contract, will), according to which the dispute

7. See Barak, *supra* note 1, at 35.

8. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The purpose [of separation of powers] was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”).

9. See AHARON BARAK, *JUDICIAL DISCRETION* 174 (1989).

10. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 40 (2005).

11. See BARAK, *supra* note 9, at 173-74.

12. *Id.* at 90.

13. On judicial lawmaking, see *id.*; Mauro Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 *MONASH U. L. REV.* 15 (1981).

is to be resolved. Interpretation is a rational activity giving legal meaning to a text.¹⁴ Interpretation, at times (but not always), involves judicial creativity.¹⁵ The meaning of a text before the act of interpretation, and its meaning afterwards, are not one and the same. The reason for this can be found in the character of normative texts, which, just like any other text, is at times ambiguous and vague regarding a given set of factual circumstances.¹⁶ This ambiguity and vagueness is usually clarified via the rules of interpretation, which succeed — without turning to judicial creativity — in extracting, from the various literal meanings of the normative text, a single legal meaning. However, the rules of interpretation do not always succeed in performing such extraction without any creativity whatsoever. At times, the success of the extraction — that is, the determination of a single legal meaning from the spectrum of literal meanings — requires creative judicial activity. This creativity is necessary when the employment of the rules of interpretation do not bring forth one single meaning. In such a situation, the rules of interpretation require the interpreter to continue the process of interpretation — while moving on from the declarative stage to the creative stage — as well to use interpretative discretion, with which the choice between the available possibilities is made, in a manner, that from the spectrum of literal meanings, one single legal meaning will be extracted. In such a situation, the rules of interpretation do not direct the interpreter in his choice, and that choice is subject to his discretion.

3. *Judicial Discretion*

Judicial discretion does not mean mere consideration and thought. Judicial discretion means choosing between two legitimate opinions.¹⁷ As such, it is a normative process. In each legal system there are cases in which a judge faces a situation in which, on the one hand, the system requires him to interpret the legal text according to which the dispute will be decided, but on the other hand, the system does not force on him to choose a particular option from the spectrum of possibilities. These are “hard cases”.¹⁸ How will a judge know that in a certain situation, there is judicial discretion? When will we determine that two or more options are legal, in such a manner that the choice between them requires judicial discretion? My answer is that the existence of judicial discretion is the result of the legal community’s view in a given legal system.¹⁹ The legal community is a normative concept that reflects the fundamental views, principles, rules of interpretation, and social consensus regarding the judicial activity in a given society at a given time.²⁰ An option is legal if it is viewed as such by the legal community.

Judicial discretion is necessary. In my opinion, it is not possible to build a legal

14. See BARAK, *supra* note 10, at 3.

15. See *id.* at 207.

16. See *id.* at 100.

17. See BARAK, *supra* note 9, at 7 (stating “discretion is the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful”); see also MARISA IGLESIAS VILA, FACING JUDICIAL DISCRETION: LEGAL KNOWLEDGE AND RIGHT ANSWERS REVISITED 8 (2001).

18. On “hard cases” see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

19. See BARAK, *supra* note 9, at 9.

20. See *id.*; Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

interpretive system without judicial discretion.²¹ If a legal norm is embodied in a literal text, the interpretation process is necessary, and every interpretation process requires the recognition of judicial discretion. Judicial interpretation without judicial discretion is a myth. The ambiguous and vague nature of language (including the language and rules of interpretation), and the lack of consensus regarding the rules of interpretation, their sources and the internal relationships between them, require the recognition of interpretative discretion. Man's wisdom cannot create a general legal principle that can provide an unequivocal answer without the use of discretion, regarding the infinite amount of situations (some of which cannot be expected in advance) to which a principle may apply.

Judicial discretion is never absolute.²² Even when the judge has the freedom to choose between one interpretation and another, he cannot choose between them however he pleases. He cannot toss a coin. He must employ his discretion within the boundaries set out by the law. He must act in the framework of the (substantive and procedural) considerations, considered to be legitimate by the law. Within the legal framework itself, he has discretion regarding the choice between the various options available. Indeed, judicial discretion — like any governmental discretion in a democratic state — is always limited.

A judge must act objectively.²³ He has no discretion to act in a way that is not objective. Judicial discretion exists only in the framework of the judge's objective activity. Judicial discretion exists only in the choice between the possibilities that have withstood the objective crucible. Again: the judge must act without favoritism or conflict of interest. But the objectivity requirement is even more comprehensive than that. A judge is objective when the choice of a given possibility, amongst a spectrum of possible options, is made because it is called for by a normative requirement, external to the judge. Such a requirement is necessitated, *inter alia*, by the fundamental attitudes of the society in which the judge lives. It is the fruit of the society's deep understanding regarding justice and the public's morals in the society in which he lives. When even this standard presents more than one possibility, the judge has no choice other than to choose what, subjectively, appears to him, as the best solution.²⁴ This does not forfeit the need for objectivity. The judge has already gone through the objective stages. Only after he has done so, and found himself faced with a number of possibilities, must he act subjectively. He is left alone.

According to my approach, not only does judicial discretion exist; the judge and the public should be aware of its existence.²⁵ For the judge, a reasonable decision is a conscious decision. An unconscious decision to employ judicial discretion does not carry with it the feeling of responsibility necessary for every judicial decision, and does not allow the judge to stand on guard regarding the need for judicial objectivity. The public, as well, should be aware of the fact that in the proper circumstances a judge has judicial

21. See BARAK, *supra* note 10, at 207.

22. See BARAK, *supra* note 9, at 19; see also BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921); BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 60 (1924).

23. See BARAK, *supra* note 1, at 102.

24. See *id.* at 105.

25. See BARAK, *supra* note 9, at 218.

discretion. Indeed, if judicial discretion means judicial lawmaking, the public is entitled to know who is creating its law and within what boundaries they are acting. The truth should not be hidden. The public confidence in the judicial branch would be damaged if the public becomes aware that judges say one thing, yet do another. The legitimacy of the judiciary can be maintained only if the public knows how to assess — and when necessary, criticize — the way its discretion is employed.²⁶ Thus, judicial discretion should be discussed out in the open. It should not be swept under the rug. The judges themselves should express the judicial freedom granted to them and the considerations that led them to choose one option or another.

4. *On the Role of A Judge*

In exercising their discretion, the judge should aim to achieve two main objectives: The *first* is to bridge between law and life.²⁷ Thus when interpreting a constitution or a statute, the judge should give the text a dynamic meaning,²⁸ one that strives to bridge the gap between law and life's changing reality without changing the text itself. In doing so, the judge must balance the need for change with the need for stability. Professor Roscoe Pound expressed this well more than eighty years ago; "Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. Law must be stable and yet it cannot stand still."²⁹

Stability without change is decline. Change without stability is anarchy. The role of a judge is to help bridge the gap between the needs of society and the law without allowing the legal system to decline or collapse into anarchy.³⁰ The judge must ensure stability with change, and change with stability. Like the eagle in the sky, maintaining stability only when moving, so too is the law stable only when moving. Achieving this goal is very difficult. The law's life is complex. It is not mere logic. It is not simply experience. It is both logic and experience together. The law's evolution throughout history must be cautious. The choice is not one between stability and change. It is a question of how fast the change occurs. The choice is not between rigidity and flexibility. It is a question of the degree of flexibility.

The judge's *second* objective is to protect the constitution and democracy.³¹ If we want to preserve democracy, we cannot take its existence for granted. We must fight for it. The assumption that "it won't happen to us" can no longer be accepted. Anything can happen. If democracy was disallowed and destroyed in the Germany of Kant, Beethoven, and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us. I do not know whether the judges in Germany could have prevented Hitler from coming to power in the 1930s, but I do know that the lessons of the Holocaust and of the World War II era, helped promote the idea of judicial review of legislative

26 See JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 678 (1966).

27. See BARAK, *supra* note 1, at 3.

28. See BARAK, *supra* note 10, at 41; WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

29. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY I (Harvard Univ. Press 1946) (1923).

30. See BARAK, *supra* note 1, at 11.

31. See *id.* at 20.

action³² and made human rights crucial. These lessons led to the recognition of the defensive democracy³³ and even the militant democracy.³⁴ It shaped my belief that the main role of the 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 never-ending. 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 loosen the protection of the rule of the law. All of us — all branches of government, all parties and factions, all institutions — must protect our young democracy. This 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.³⁵

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

This second objective is tested when a democracy fights terror.³⁶ Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of war and terrorism. The protection of human rights of every individual is a duty much more formidable in situations of war or terrorism than in times of peace and security. If judges fail in their role in times of war and terrorism, they will be unable to fulfill their role in times of peace and tranquility. It is a myth to think that it is possible to 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 we can limit judicial rulings so that they will be valid only during wartime, and that we can decide 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 in the long term. Judges should assume that whatever they decide when terrorism is threatening security will linger many years after the terrorism is over. Indeed, judges must act with coherence and consistency. A wrong decision in a time of war and terrorism plots a point that will cause the judicial curve to

32. See MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjorn Vallinder eds., 1997); GERHARD VAN DER SCHYFF, *JUDICIAL REVIEW OF LEGISLATION: A COMPARATIVE STUDY OF THE UNITED KINGDOM, THE NETHERLANDS AND SOUTH AFRICA* (2010).

33. On defensive democracy, see BARAK, *supra* note 1, at 21, 30, 287.

34. On militant democracy, see BARAK, *id.* See also MILITANT DEMOCRACY (Andras Sajo ed., 2004); *THE 'MILITANT DEMOCRACY' PRINCIPLE IN MODERN DEMOCRACIES* (Markus Thiel ed., 2009).

35. HCJ 5364/94 Velner v. Chairman of the Israeli Labor Party, 49(1) P.D. 758, 808 [1995] (Isr.).

36. See Aharon Barak, *Human Rights in Times of Terror – A Judicial Point of View*, 28 *LEGAL STUD.* 493 (2008).

deviate after the crisis passes.³⁷ In one of my judgments I wrote:

if we fail in our task in times of war and terror, we will not be able to carry out our task properly in times of peace and calm. From this viewpoint, a mistake by the judiciary in a time of emergency is more serious than a mistake of the legislature and the executive in a time of emergency. The reason for this is that the mistake of the judiciary will accompany democracy even when the threat of terror has passed, and it will remain in the case law of the court as a magnet for the development of new and problematic rulings. This is not the case with mistakes by the other powers. These will be cancelled and usually no-one will remember them.³⁸

Moreover, their democracy ensures judges independence. It strengthens the judges, because of their political non-accountability against the fluctuations of public opinion. The real test of this independence comes in situations of war and terrorism. The significance of the judge's non-accountability becomes clear in these situations when public opinion is more likely to be near-unanimous. Precisely in these times of war and terrorism, judges must embrace their supreme responsibility to protect democracy and the constitution. They should always reflect history — not hysteria. Admittedly, the struggle against terrorism turns our democracy into a 'defensive democracy'³⁹ or even a 'militant democracy.'⁴⁰ Judges in the highest court of the modern democracy should act in the spirit of defensive fighting or militant democracy, as opposed to uncontrolled democracy.

D. ON THE REALIZATION OF THE JUDICIAL ROLE

1. *The Legitimacy of the Means*

The means of realizing the judicial role must be legitimate; the principle of the rule of law applies first and foremost to judges themselves, who do not share the legislature's freedom in freely creating new tools.⁴¹ The bricks with which we build our structures are limited. Our power to fulfill our role depends on our ability to design new structures with the same old bricks or to create in its limited discretion new bricks.⁴²

37. See *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson J., dissenting) ("[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 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."). See Patricia Hughes *Judicial Independence: Contemporary Pressures and Appropriate Responses*, 80 CANADIAN B. REV. 181, 186 (2001) (noting the general agreement that 'judicial independence is both an individual and a systemic, institutional or 'collective' quality').

38. See HCJ 7052/03 *Adalah Leg. Ctr. For Arab Minority Rights in Isr. v. Minister of Interior*, 61(2) P.D. 202 [2006] (Isr.), available at http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf.

39. See *id.* at 102, 123, 221.

40. See *id.* at 102, 122.

41. See BARAK, *supra* note 1, at 113.

42. See M. Landau, *Case-Law and Discretion in Doing Justice*, 1 MISHPATIM 292 (1965).

Sometimes there is great similarity between the new structures we build with the old bricks and the old structures we know from 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 regarding the rate of progress, its direction, and the forces propelling it. Moreover, sometimes we succeed in creating new “tools.” Here law’s genius is evident. But such inventions are few and far between. Usually we come back to the old tools and use them to resolve these new situations. The most important tool is interpretation.

2. *On Interpretation*

The supreme and constitutional courts’ main activity is interpretation. This is true of both civil law and in common law legal systems. The key question is what is the proper system of interpretation? Neither common law⁴³ nor civil law⁴⁴ systems have a satisfying answer to that question.⁴⁵ It seems to me that the solution lies in the answer to another question: What is the aim of interpretation? My answer is that interpretation’s aim is to realize the law’s purpose.⁴⁶ Hence, my theory of interpretation is the purposive theory of interpretation.⁴⁷ In constitutional law it means, that the purpose of the constitutional text is its subjective-historical purpose and its objective-modern purpose. How should the constitution be interpreted when the subjective purpose conflicts with the objective purpose? The answer to that question lies in the unique character of the constitution.⁴⁸ A constitution enshrines a special kind of norm and is found at the top of the normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the state’s appearance and its aspirations throughout history.⁴⁹ It determines the state’s fundamental political views. It lays the foundation for its social values. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one.

How does a constitution’s unique character affect its interpretation? In determining the purpose of a constitution, how does its distinctive nature affect the relationship between its subjective and objective elements? My answer is this:⁵⁰ one should take both the subjective and objective elements into account when determining the purpose of the

43. HENRY MELVIN HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William Eskridge & Philip P. Frickey eds., 1994).

44. See Konrad Zweigert & Hans Jurgen Puttfarcken, *Statutory Interpretation – Civilian Style*, 44 *TUL. L. REV.* 704, 714 (1970).

45. See GIDON GOTTLIEB, *THE LOGIC OF CHOICE: AN INVESTIGATION OF THE CONCEPTS OF RULE AND RATIONALITY* 91 (1968). On comparison between common law systems of interpretation and civil law systems of interpretation, see *INTERPRETING STATUTES: A COMPARATIVE STUDY* (Neil MacCormick & Robert S. Summers eds., 1991).

46. See BARAK, *supra* note 10, at 219.

47. *Id.*

48. *Id.* at 371.

49. See William J. Brennan, Jr., *Construing the Constitution*, 19 *U.C. DAVIS L. REV.* 2 (1985).

50. See BARAK, *supra* note 10, at 375-84.

constitution. The framers' original intent at the time of drafting and the original understanding of that time is important. One cannot understand the present without understanding the past. The original understanding lends historical depth to understanding the text in a way that honors the past. The original understanding, 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 freedom. It must contend with his 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 understanding and present principles.

We return, then to the original question: What is the proper relationship between the subjective and objective elements in determining the purpose of the constitution when the subjective and the objective pull in different directions? In my opinion, greater weight should be accorded to the objective purposes.⁵¹ Only by preferring the objective elements can the constitution fulfill its purpose. Only in this way is it possible to guide human behavior through generations of social change. Only in this way is it possible to balance the past, present and future. Only in this way can the constitution provide answers to modern needs. Admittedly, the past influences the present, but it does not determine it. The past guides the presents, 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 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. The vision of their time. Similarity, what those fundamentals mean for us, our descendants will learn, cannot be their measure to the vision of their time.⁵²

The same idea was advanced by the Justice Michael Kirby of the High Court of Australia, who said that “[0]ur Constitution belongs to the 21st century, and not the 19th.”⁵³

Various courts have issued opinions in the same spirit,⁵⁴ including the Canadian Supreme Court⁵⁵ the Australian High Court,⁵⁶ the Israeli Supreme Court⁵⁷ and the

51. See BARAK, *supra* note 10, at 384-93.

52. Brennan, *supra* note 49, at 7.

53. Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 14 (2000).

54. See generally INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy, ed.) (2006) [hereinafter INTERPRETING CONSTITUTIONS].

55. See PETER HOGG, CONSTITUTIONAL LAW OF CANADA (5th ed. 2007).

56. See Haig Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia*, 25 FED. L. REV. 211 (1007); Jeffrey Goldsworthy, *Australia: Devotion to*

German Constitutional Court.⁵⁸ 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 ages and becomes more difficult to change. In interpreting such constitutions, the preferred objective purpose reflects deeply held modern views in the legal system's movement through history. The constitution thus becomes a living norm and not a fossil, preventing the enslavement of the present to the past.

In these legal systems — Canada, Australia, Israel and Germany — neither the original understanding, nor the intent of the framers, occupies a central role in judicial consideration of constitutional interpretation.⁵⁹ Of course, neither is it ignored; but they remain far from being the discussion's focal point.

This approach was not adopted in the United States.⁶⁰ There is hardly a consensus regarding the proper weight to be accorded to past interpretations. Instead, in the United States, the competing notions of original intent of the founding fathers (also known as "intentionalism"), the original understanding of the terms used in the Constitution ("originalism"), and the "living constitution"⁶¹ are all sources of an ongoing debate in academic writing and on the bench.⁶² Indeed, the United States Supreme Court itself is — and has been for years — divided on this issue.⁶³ The entire corpus of American

Legalism, in INTERPRETING CONSTITUTIONS, *supra* note 54, at 144.

57. See BARAK, *supra* note 10.

58. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 42 (2nd ed., 1977).

59. See Claire L'Heureux-Oube, *The Importance of Dialogue: Globalization, The Rehnquist Court and Human Rights*, in THE REHNQUIST COURT: A RETROSPECTIVE 234 (M. H. Belsky ed., 2002).

60. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, 45-82 (2011).

61. See discussion *infra*, Part D.

62. The literature on the issue is vast. See, e.g., LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 47-70 (3rd ed., 2000); see also; William Kaplin, *The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future*, 42 RUTGERS L. REV. 983 (1990); Michael Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991); CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION (S. J. Brison & W. Sinnott-Armstrong eds., 1993); R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994); WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); CHARLES SAMPFORD & KIM PRESTON, INTERPRETING CONSTITUTIONS (1996); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW (1999); DENNIS GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM (2005); INTERPRETING CONSTITUTIONS (Jeffrey Goldsworthy ed., 2006); JOHNATHAN O'NEIL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2007); SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009); KENT GREENAWALT LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS (2010); Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft & Bradley Miller eds., 2011).

63. See, e.g., *W. Va. Univ. Hosp. Inc. v. Casey*, 499 U.S. 83, 112 (1991) (Stevens, J. dissenting). See also M. C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 4 (1998); Cf. Justice Brennan's position, *supra* note 49, with Antonin Scalia, *Modernity and the Constitution*, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313, 315 (Eivind Smith ed., 1995) ("I do not worry about my old Constitution 'obstructing modernity,' since I take that to be its whole purpose. The very objective of a basic law, it seems to me, is to place certain matters beyond risk of change, except through the extraordinary democratic majorities that constitutional amendment requires.... The whole purpose of a constitution — old or new — is to impede change, or, pejoratively put, to 'abstract modernity.'").

constitutional law finds itself in a state of crisis due to this lack of consensus. Without accord in the legal community about the proper role that original intent, original understanding, and current notions of constitutional interpretation should play in determining the meaning of constitutional provisions today, the entire constitutional system is hanging in the balance.⁶⁴ A crisis of this sort has been avoided in Canada, Australia, Germany and Israel. Hopefully other constitutional legal systems will successfully avoid this dangerous situation, which may tear apart the legal system as well as focus all legal energy on the crisis.

According to the purposive constitutional interpretation approach, the intent of the framers or the original understanding should not be ignored; however, they should not be of higher status.⁶⁵ It is the objective — rather than the subjective — purpose that should be accorded most of the interpretative weight. The objective purpose properly reflects the basic modern notions of the legal system as it moves across history. This is how a constitution turns into a living document rather than remains stagnant parchment. This is how the present is not subjugated by the past. Indeed, constitutional interpretation is the process in which every generation expresses its own basic concepts as they were shaped against the nation's historical background.⁶⁶ This process is not limitless; it is not open-ended. The interpreter, providing meaning to the constitutional text, must work within a given social and historical framework. And although the judge is sometimes accorded judicial discretion by the system, this discretion is bounded by a limited set of values, traditions, history, and text that are unique to the system in which he operates. Indeed, the process of eliciting a constitutional purpose is based on fundamental concepts that seek to create a strong link to the constitutional past and grant it its due weight. The interpreter does not disconnect from the system's constitutional history. And while the ultimate modern constitutional purpose is objective, its roots lie far in the constitutional past. "The constitutional provision was not legislated in a constitutional vacuum and does not develop in a constitutional incubator. Rather, it is a part of life."⁶⁷

By stressing the importance of the objective purpose of the constitution the rules of interpretation as used by judges enable the judiciary to fulfill its role: to bridge the gap between law and society and to protect the constitution and democracy.

64. That includes the approach that the founding fathers themselves wanted the Constitution to be interpreted according to its objective purpose. See, e.g., Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Robert Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177 (1987); Charles Lofgren, *The Original Understanding of Original Intent?* 5 CONST. COMMENT. 77 (1988); Paul Finkelman, *The Constitution and the Intention of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Hans Baade, *'Original Intent' in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1994); William Michael, *The Original Understanding of Original Intent: A Textual Analysis*, 26 OHIO N. U. L. REV. 201 (2000).

65. For criticism on my approach, see Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109 (2008). Regarding intentionalism, see Larry Alexander, *Of Living Trees and Dead Hands: The Interpretation of Constitutions and Constitutional Rights*, 22 CAN. J. L. & JURIS. 227 (2009).

66. See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068 (1981).

67. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) P.D. 221, 235 [1995] (Isr.) (Barak, P.).

3. On Balancing

“Balancing” is a very important tool in fulfilling the judicial role.⁶⁸ There are three main reasons for that: *First*, it expresses the complexity of the human being and the complexity of human relations. Law is not everything or nothing. Law is a complex system of principles that in certain situations are in harmony with each other and lead to a single conclusion, whereas in other situations, they clash with each other, making adjudication necessary. The balancing technique expresses this complexity. It nicely reflects my eclectic philosophy that takes the entirety of values into consideration and seeks to balance them according to life’s changing needs.⁶⁹ The approach is based on the broader view that law is based on principles; that these principles are not always in harmony, that principles sometimes conflict, that every legal system establishes the proper balances between the different principles, that those balances constitute the infrastructure of every legal system. Indeed, the entirety of public law is balance of clashing principles. This is the case of the internal conflicts between the various components of formal democracy. This is the case of the internal conflicts within substantive democracy. Indeed, constitutional, administrative, and criminal law are the product of these conflicts. Similarly, the entirety of private law is a balance between various human rights. For example, tort law is a balance between the individual’s freedom of activity vis-a-vis the state and the constitutional rights of others vis-a-vis the state and the public interest. *Second*, balancing is particularly well-suited for realizing the judicial role. Bridging law and life and protecting the constitution and its values can best be attained through the technique of balancing, which takes modern constitutional principles into consideration.⁷⁰ This balancing, if conducted properly, bridges the gap between the old law and life’s new reality, protecting the constitution and its principles. *Third*, balancing introduces order into legal thought. It requires the judge to identify the relevant principles; it requires the judge to address the problem of the relative social importance; it requires judges to reveal their way of thinking to themselves, as well as to others. It facilitates self-criticism and criticism from the outside.⁷¹

Balancing is a normative process by which one attempts to resolve a conflict between conflicting principles.⁷² The solution is not one of “all or nothing.” The losing principle is not removed from the law. The decision is made by assigning weight to the conflicting principles, and preferring the prevailing one. In balancing, the various principles preserve their place in the legal system. One cannot balance without a scale, and one cannot use a scale unless the relative weight of the various principles is determined. One example of this is the conflict between the principle of public peace and the freedom of speech. The system of balancing assigns each of the conflicting principles weight and determines when it is permissible to limit those principles (freedom of speech) in order to further another principle (public peace).

The process of balancing is based on the identification of principles relevant to

68 On balancing in constitutional law, see BARAK, *supra* note 60, 340-70.

69. See discussion *infra*, Part D.

70. See *supra* Part C.IV.

71. See BARAK, *supra* note 60, 457-80.

72. See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 100 (2002).

resolving the question before the judge. Each of these principles is given a certain weight, and placed on the scale. The result of the weighing determines the answer to the question. There is of course, no physical scale. Physical weights and balances are not to be found. The principles do not appear before the judge with a label displaying their weight. The process is not physical but normative. The talk of “balancing”, and “weight” is metaphorical speech.⁷³ Such speech cannot provide a solution to the conflict between the principles. It can only present it in a descriptive way. Indeed, like other metaphorical expressions, such as the reasonable person, the metaphors do not grant normative content to the ideas brought across by them. Nor do they grant logical basis to the ideas. They merely present them in an understandable way.

How can one balance between public peace and freedom of speech? Isn't it like balancing between five kilos and four meters?⁷⁴ The answer is that balancing requires a common denominator. That denominator is the social importance of the conflicting principles at the point of conflict.⁷⁵ One has to balance between the social importance of more public peace and the social importance of less free speech. Please note that the comparison is not between the advantages gained by public peace generally and the disadvantage of limiting free speech generally. The comparison is between the marginal benefit to public peace and the marginal harm to free speech. The comparison is concerned with the marginal and the incremental.⁷⁶

In determining the social marginal importance the judge has to look at the legal system as a whole. He has to consider the constitution and the role the different principles play in it. He has to read the legal systems history and the jurisprudents of the courts. The judge attempts to express the basic values of the society in which he lives.

The applicability of balancing is very broad. We balance the formal and substantive aspects of democracy; we balance the fundamental of democracy against human rights, we balance the various fundamental principles; we balance the conflict between different kind of human rights. We also use balancing in context of purposive interpretation.⁷⁷

One of the most important situations where balancing is used is the case where a statute limits constitutional rights. Thus, a statute may limit the constitutional right of freedom expression in order to advance the public peace or another constitutional right, like privacy or reputation. The constitutionality of the statute will be decided by the rules of proportionality.⁷⁸ One of the most important components of proportionality is balancing (or proportionality *stricto sensu*).⁷⁹

How is this balancing conducted? What are the rules of balancing?⁸⁰ The basic

73. See BARAK, *supra* note 1, at 168.

74. See *Bendix Autolite Corp. v. Midwesco Enterprises Inc.*, 486 U.S. 888, 897 (1988) (“[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”).

75. See BARAK, *supra* note 60, 481-92; BARAK, *supra* note 1, at 168.

76. See STEVEN HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 70 (2008); Deiter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L. J. 383, 396 (2007).

77. On interpretive balancing, see BARAK, *supra* note 60, 45-82.

78. See BARAK, *supra* note 60.

79. See *id.* at 340-70.

80. See ALEXY, *supra* note 72, at 100.

rule of balancing can be expressed as follows: To the extent that greater importance is attached to preventing the marginal limit to a constitutional right and to the extent that the probability of the right being limited is higher, the marginal benefit to the public interest brought about by the limitation must be of greater importance, of greater urgency, and possessing a greater probability of materializing.⁸¹ Following this rule there is always a concrete balancing — *ad hoc* balancing — which reflects the specific circumstances of the case.

In my view there is place to create an intermediate level between the basic balancing and the concrete balancing. This should be a principled balance that translates the basic balancing rule into a number of principled balancing rules formulated at the lower level of abstraction than the basic balancing rule and at a higher level than that of a concrete balancing. This level would express the principles at the basis of the right and the justification for its limitation.⁸² Here is an example: Assume that the goal of the limitation is protection of public peace in face of hate speech. The principled balancing rule might determine that it is only permissible to limit freedom of political speech when the goal of protecting public peace from the consequences of hate speech is crucially important for the realization of an urgent social need that is required to prevent extensive and immediate harm to public peace. The principled balancing rule is thus characterized by a level of abstraction that gives expression to the reasons underlying the right and the justifications for its limitation.

Is it proper for the judge to be involved in balancing? It is not the function of the political branches? In my view the final word on balancing between constitution rights and their sub-constitutional limitations should be of the judges.⁸³ In a case dealing with the constitution of the separation fence in the west bank I wrote:

The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. This is his expertise. We examine whether this route's harm to the local residents is proportionate. This is our expertise.⁸⁴

It is my view that in a democracy, the judiciary — the unelected independent judiciary — should be entrusted to be the final decision-maker — subject to constitutional amendments⁸⁵ — about proper ends that cannot be achieved because they are not proportional *stricto sensu*.⁸⁶ There are certain limits of proportionality *stricto sensu* that the political branches are forbidden to cross. A case in example is *Adalah v. The Minister of Interior*, in which the Israeli Supreme Court ruled that a statute that prohibits family unification between Israeli Arab citizens and their non-Israeli spouses from the West Bank because of the security risk associated with non-Israeli spouses, which caused in the past more than twenty terrorist attacks, is unconstitutional since it is

81. See BARAK, *supra* note 60, 340-70; See also *id.*

82. See BARAK, *supra* note 60, 528-46; BARAK, *supra* note 1, at 171.

83. See BARAK, *supra* note 60, 379-418.

84. HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel, 58 P.D. 807, 845 [2004] (Isr.).

85. Those amendments should be constitutional: see *supra* Part B.

86. See BARAK, *supra* note 60, 379-418.

it disproportionately limits the right to dignity. In my judgment I wrote:

Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end do not justify the means; the security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterized by the fact that it imposes limits on the ability to limit human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority.⁸⁷

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

4. *On Justifiability*

The Law is everywhere. Thus, every problem is “justiciable” in the sense that, there is a legal norm that takes a stance towards it. That is “normative” (or material) justiciability.⁸⁸ According to this approach — which does not recognize a lack of normative justiciability — there is no limit to the law’s reach. Everywhere there are people, there is law. There are no areas of life that are external to the law. There are no acts (actions or omissions) that the law does not apply to. Every act is caught in the law’s net. Even the most political of activities — such as making peace or war — are examined by legal standards. The international and municipal law takes a stand regarding its legality. Indeed, an issue’s nature as “political” — that is, the fact that its resolution involves political implications — does not negate the fact that it is under the law’s control. Everything is subject to the law’s control in the sense that the law takes a stance on the question of whether it is legal or not. Of course, the political character of the activity is likely, at times, to formulate a legal norm which grants, pursuant to its content, wide discretion to the political branch to act as it wishes. However, this freedom is not freedom from law, but rather freedom within the law.⁸⁹

The other type of justifiability is “institutional” justifiability.⁹⁰ Institutional justifiability is intended to answer the question whether it is appropriate for the court, as a state organ, to decide certain types of disputes. Those who claim a lack of institutional justifiability believe that there are certain disputes inappropriate for the court to decide. These disputes, although not outside the law — should be settled outside the court. An example of such a case is a dispute regarding the legality of making peace or war. The argument is that the court is not an appropriate institution for such decisions; that it is appropriate that a political decision be made by the political organs. The argument is that involving the court in these decisions violates the principle of separation of powers, the

87. *See supra* note 38, at 109.

88. *See BARAK, supra* note 1, at 178.

89. *See id.* at 177.

90. *See id.* at 183.

democratic form of government, and damages the court's status. These arguments assume — and the assumption is correct — that handing the decision in these disputes over to the political organs means that the decision may be made not according to legal standards. All are aware that by replacing the deciding organ we may also replace the standards according to which the decision will be made. The argument therefore is that it is not appropriate for the decision in such matters to be made by the court and according to the law.

Prima facie, this is a very problematic argument. The assumption is that the court has the jurisdiction to decide the dispute. From where does the court draw the power to refuse to adjudicate this type of disputes? Is it not a basic rule of law and adjudication that the court must decide the disputes brought before it, and that it is not permitted to turn away the parties to a dispute within its jurisdiction? Is this not an expression of political thinking — inappropriate for a judge — to refrain from adjudication in light of the political nature of the dispute? Moreover, the argument that the court is not an appropriate institution to resolve political disputes is based on the incorrect assumption that the court will settle the dispute through political standards. Indeed, if the court's decision is "political" — that is, not made according to legal standards — it is appropriate that the decision be made by the political organs. In this context, the argument that a court's "political" decision in a political dispute violates the separation of power and democracy and harms the court's status is correct. But what fault exists when the court decides a political dispute according to legal standards? What fault is there in taking a legal stand on a question whether political activity is legal — as opposed to the determination that it is appropriate or inappropriate from the political point of view? Should it not be said that the principle of separation of powers justifies judicial review — on the basis of legal standards — of all state acts, including those that are of a political nature *par excellence*? How, from the standpoint of separation of powers, can refraining from making a legal decision on the basis of legal standards be justified? Is there no truth in the argument that the real meaning of the judicial branch's removing its hand from the decision of a political dispute — by legal standards — constitutes the recognition of the political branches' power to decide political disputes illegally? By that, not only is the rule of law violated, but also the principle of separation of powers — which is intended to ensure balancing and checking between the various branches — is breached. Should it not be said that the appropriate relief for those wishing to ensure flexibility of action for the political branches is not in locking the gates of the court and therefore in the implicit consent to violation of the law, but rather in making a substantive amendment to the law which grants the political branches greater freedom to act? And regarding those unwilling to take such an extreme step must they not ultimately consent to judicial review performed according to legal standards? What harm is there to the status of the court when it decides a political dispute according to legal standards? Is there no foundation to the argument that it is actually the removing of the court's hand from the political dispute that will lead to an undermining of public confidence in adjudication?⁹¹

91. See *id.* at 186.

5. *On Standing*

The issue of standing appears to be marginal in public law. I disagree.⁹² The rules of standing are central in the performance of the judicial role. They are a vital tool in bridging the gap between law and society, and in protecting the constitution and democracy. Tell me what your views on standing are and I will tell you what your views on judging are. I wrote in one of my judgments thirty years ago:

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 regarding 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 settle 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.⁹³

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

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”⁹⁴

The South African Constitution goes on to state that “anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill Rights has been infringed or threatened”⁹⁵

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

92. *See id.* at 190.

93. HCJ 910/86 Ressler v. Minister of Defense, 42(2) P.D. 441, 458 [1988] (Isr.).

94. S. AFR. CONST., 1996 art. 33(1).

95. S. AFR. CONST., 1996 art. 38(d).

6. Comparative Law

I have found comparative law to be of great assistance in realizing my role as a judge.⁹⁶ The case law of the courts of the United States, Australia, Canada, the United Kingdom and Germany have helped me significantly in finding the right path to follow. Indeed, comparing oneself to others allows for greater self-awareness. With comparative law, the judge expands the horizon and the interpretive landscape. Comparative law enriches the options available to us. In different legal systems, similar legal institutions often fulfill corresponding roles, and similar legal problems (such as hate speech, privacy, and now the fight against terrorism) arise. To the extent that these similarities exist, comparative law becomes an important tool with which judges fulfill their role in democracy (“microcomparison”).⁹⁷ Moreover, because many of the basic principles of democracy are common to democratic countries, there is good reason to compare them (“macrocomparison”) as well.⁹⁸ Indeed, different democratic legal systems often encounter similar problems. Examining a foreign solution may help a judge choose the best local solution. This usefulness applies both to the development of the common law and to the interpretation of legal texts.

Naturally, one must approach comparative law cautiously, remaining cognizant of its limitations. Comparative law is not merely the comparison of laws. A useful comparison can exist only if the legal systems have a common ideological foundation. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration. Indeed, the importance of comparative law lies in extending the judge’s horizons. Comparative law awakens judges to the latent potential of their own legal systems. It informs judges about the successes and failures that may result from adopting a particular legal solution. It refers judges to the relationship between a solution to the legal problem before them and other legal problems. Thus, comparative law acts as an experienced friend. Of course, there is no obligation to refer to comparative law. Thus the South African Constitution provides that when courts interpret the bill of right they “must consider international law and may consider foreign law.”⁹⁹ Additionally, even when comparative law is consulted, the final decision must always be local. The benefit of comparative law is an expanding judicial thinking about the possible arguments, legal trends, and decision-making structures available.

This measured approach towards the use of comparative constitutional law is not shared by all; in particular, the issue has created a deep rift within the American legal

96. See BARAK, *supra* note 1, at 197; BARAK, *supra* note 60, 45-82; Aharon Barak, *Constitutional Interpretation*, in L’INTERPRÉTATION CONSTITUTIONNELLE (2005). See also; Sir Basil Markensinis & Jorg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005); Aharon Barak, *Response to the Judge as Comparatist: Comparison in Public Law*, 80 TUL. L. REV. 195 (2005); Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markensinis & Jorg Fedtke*, 80 TUL. L. REV. 169 (2005); Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa*, 123 S. AFRICAN L. J. 497 (2006).

97. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3rd ed. 1998).

98. *Id.* at 4.

99. S. AFR. CONST., 1996 art. 39(1)(b) – (c).

system.¹⁰⁰ There, the “originalist” camp — supporting the notion that the original understanding should govern the interpretation of the constitutional text — strenuously opposes the idea of considering any comparative or foreign law not part of such understanding. Despite that, the pattern in American law seems to have moved in the direction of more openness towards foreign and comparative law.¹⁰¹ It is hoped the Court will proceed in this direction.¹⁰²

E. ON LEGAL AND JUDICIAL PHILOSOPHY

While working as a judge, I have found that a good philosophy is a very practical tool in solving hard cases in which the judge has discretion. A philosophy of life and a philosophy of law assists the judge in understanding life and law. As to philosophy of law, I found myself having an eclectic approach.¹⁰³ It contains components from each of the main theoretical doctrines. In my opinion, the relationship between members of society, and between society and its members, is complicated and complex to the extent that it cannot be described by one single point of view. Human experience is too rich to be limited to one theory. In my opinion, the naturalists, the positivists, the realists and the neo-realists, the members of the historical — economic or sociological schools — all reflect, from different angles, the amassed human experience. Each of them has truth in it. One can “theoretically” agree with each of them, but there arises a need to balance between the various views. According to my approach, the solution is not found in one single independent theory. One must take certain components from each of the main theories, while determining a proper balance between them. None of the theories can remain pure. Balancing is always needed. It may be that this eclectic philosophy is a philosophy in and of itself. Whatever the case may be, in my opinion, the law, as a normative system, has a role in society. It is intended to ensure functional social life. It contains order and security alongside justice and morals. My pluralistic approach teaches me that there is no consensus regarding the relative weight of these values, and that different people have different opinions on the subject. The democratic form of government determines which institutions and organs are assigned the role of determining such relative weight.

Most importantly for a judge, however, is to articulate to themselves their judicial philosophy.¹⁰⁴ By judicial philosophy I mean a system of nonobligatory considerations that will guide the judge in exercising his discretion. These are a set of thoughts about how to exercise discretion in hard cases. Judicial philosophy is an organized thought about the way in which a judge is to contend with the complexities of a hard case. In my experience, the majority of judges have such a judicial philosophy. For most, it is an

100. See BARAK, *supra* note 60, 45-82.

101. See Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009); Jeremy Waldron, *Foreign Law and the Modern *ius Gentium**, 119 HARV. L. REV. 129 (2005); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality”, Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999).

102. See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 408 (2008).

103. See BARAK, *supra* note 1, at 117.

104. *Id.*

unconscious philosophy. I strive to raise judicial philosophy into the realm of consciousness and subject it to public critique.

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

One must always remember that judicial philosophy is relevant only in the realm in which the judge has judicial discretion. It functions only within a zone of reasonableness. It works only in those cases where the legal problem has more than one legal solution. It is relevant only in the hard cases, in which the judge strives to achieve the optimal solution. Judicial philosophy aims to bring us to this safe space. It is the main compass that directs the judge (consciously or unconsciously) in discovering the solution to the hard cases with which he is confronted. Professor Freund wrote that "the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none."¹⁰⁵

F. FINAL REMARKS

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

Deciding these applications has been difficult for us. True, from the legal

105. Paul Freund, *Social Justice and the Law*, in *SOCIAL JUSTICE* 93, 110 (Richard Brandt ed., 1962).

perspective, the road before us is smooth. We are, however, part of Israeli society. We know its problems and we live its history. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The fear that our ruling will prevent us from properly dealing with terrorists troubles us. But we are judges. We demand that others act according to law. This too, is the demand we make of our-selves. When we sit at trial, we stand on trial.¹⁰⁶

106. HCJ 5100/94. Pub. Comm. Against Torture in Isr. v. Israel, 43(4) P.D 817, 845 [1999] (Isr.).