

Strengthening Justice Systems and the Rule of Law
Through Educating the Judiciary¹

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I. Introduction

Warm greetings to all the participants; special greetings to my brethren judges from all over the world. Yes, we are brethren. True, I am not acquainted with most of you. We have convened here from all corners of the world. However, it appears that we know each other well – for we are judges. We belong to the same family. We are close to one another. True, on many issues the distance between us is vast. Each of us is the product of her or his own legal system; each one of the systems has its own history, culture and problems. Each one of us received a different education. Nonetheless, that which we have in common is greater than that which we do not. What we have in common is one single fundamental fact: we are judges. By being elected, or appointed to the judiciary, we joined the family of judges. The members of this family have a common task, a common objective, and a common way of approaching that task. I see the International Organization of Judicial Training as a framework which will allow us to fulfill that which unites us.

II. Our Role as Judges

What unites us? What is our task? Certainly our task is to administer the law according to the procedural rules and to give a judgment – where necessary – according to law. In situations where we have discretion, how are we to rule? Certainly, on this issue, each of you has her or his own outlook. According to my approach, our task as judges is twofold: first, bridging the gap between law and society; second, protecting the constitution and its values.

¹ Lecture delivered at the Second International Conference on the Training of the Judiciary, Ottawa, Ontario, Canada, November 2004

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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. It is based on a given factual and social reality that is constantly changing. 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 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. It can be said that the history of law is the history of adapting the law to society's changing needs. The need for change presents the judge with a difficult dilemma, because change sometimes harms security, certainty, and stability. Law must be stable, but it cannot stand still. The judge must balance the need for change with the need for stability. Stability without change is degeneration. Change without stability is anarchy. The role of a judge 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 mere experience. 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. Among them he should 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.

b. *Protecting the Constitution and Democracy*

1. The Struggle for Democracy

The second role of the judge – and I am referring here to judges in democracies - is to protect the constitution and democracy itself. Legal systems with formal constitutions impose this task on judges, but judges also play this role in legal systems with no formal constitution. 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, but it is also true of the old and well-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 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 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 and made human rights central. It led to the recognition of defensive democracy and even militant democracy. And it shaped my belief that the main role of a judge in a democracy is to maintain and protect the constitution and democracy.

What do I mean by Democracy? Democracy has two aspects: formal and substantive. Formal democracy means the rule of the people through representatives in legislative bodies. Substantive democracy means the rule of law, separation of powers, the independence of the judiciary and human rights. They reflect the internal morality of Democracy, based on dignity and equality of all human beings.

III. Preconditions for Realizing the Judicial Role

What are the preconditions that must exist in a legal system to realize the judicial role? Let me mention three preconditions: (1)judicial impartiality and objectivity, (2)judicial independence, (3)public confidence in the judiciary.

a. *Judicial Impartiality and Objectivity*

The judge must realize his role 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. Absence of bias is essential to the judicial process; hence the image of justice as blindfolded. With impartiality comes objectivity. 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. The judge must look for the accepted values of society, even if they are not his or her values. He 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. When a judge considers the weight of different values, he must do so according to the fundamental views of the society in which he or she lives, not according to his own personal fundamental views.

This objectivity makes strenuous demands, requiring the judge to take moral stock of herself. The judge must be aware that he may have values that lack general acceptance and that his personal opinions may be exceptional and unusual. 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. 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 and to the restraints that it imposes.

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. 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. The judge is a contemporary creature. He or she progresses with the history of the people. All of these elements contribute to the judge's objective perspective.

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, 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, even when subjective elements are legitimately present, the path to full subjectivity is closed. 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. 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 internal pressure. They usually display caution and self-restraint. Their sense of personal responsibility reaches its peak. They feel greatly isolated. 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.

b. Independence of the Judiciary

Independence of the judiciary means both personal and institutional independence. Personal independence means 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. 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. 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.

Institutional independence means that the judiciary as an institution is independent. It should be managed by judges. Its budget should be approved by the legislature separately from the budget of the executive. Unfortunately, in many modern countries, the judiciary does not enjoy this full institutional independence. In some countries, the judiciary as an institution is connected to the Department or Ministry of Justice. In my opinion, this linkage is problematic. 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. 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.

c. Public Confidence in the Judiciary

An essential condition for realizing the judicial role is public confidence in the judge. This means confidence in judicial independence, fairness, and impartiality. 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. Indeed, the judge has neither sword nor purse. All he has is the public's confidence in him. This fact means 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. 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 account ability 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.

First, the judge ought to be aware of his power and his limits. A judge has great power. 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. Naturally, the judge knows the law and its power, but he must also learn the limits imposed on him as a judge; 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. I hope that if we admit our mistakes as judges, we will strengthen public confidence in the judiciary.

Third, in our writing and our thinking, judges must display modesty and an absence of arrogance.

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." Public confidence in the judiciary increases when the public is told the truth.

IV. The Means of Realizing the Role

a .Limited Means

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. 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.

The means we employ are diverse. They include, inter alia: interpretation, the development of the common law (in a common law system), balancing, comparative law, and a good philosophy. Within our project, let me mention only comparative law and "the good" philosophy.

b .Comparative Law

I have found comparative law to be of great assistance in realizing my role as a 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." 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. To the extent that these similarities exist, comparative law becomes an important tool with which judges

fulfill their role. Moreover, because many of the basic principles are common to many countries, there is good reason to compare them. Indeed, different legal systems often encounter similar problems. Examining a foreign solution may help a judge choose the best local solution.

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 decision-making structures available.

c. A Good Philosophy

Another tool for realizing the judicial role is 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. In this respect let me make three points.

First, I consider it essential that a judge will 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.

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: 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. My philosophy is thus eclectic. It is based on my belief in tolerance, pluralism and the complexity of the human being.

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 content 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. 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. I think we should do whatever we can to narrow this gap. Judges need theories of law. Theories of law need judges.

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 think about it and consciously formulate it. It is the most important tool with which I realize my judicial role. Within my judicial philosophy, education fulfills a central role. On the one hand, a judge is an educator. We do educate our people about the rule of law and the values of our societies. We are all teachers in national seminars. On the other hand we are always students. We should be always educated.

V. The Role of the Judge and Legal Education

The education should be directed towards granting the judge understanding of her or his role in society – bridging the gap between law and society and protecting the constitution; the education must qualify the judge to be keenly aware of the need for judicial objectivity, judicial independence and public legitimacy; the

education should grant the judge the knowledge to use the existing judicial tools to fulfill his task, including interpretation, development of the common law, the awareness of the need to balance between human rights and the public interest and between the security of the stability of the law and the need for change, the use of comparative law, and the development of legal and judicial philosophy.

This education is necessary, as we were not born judges. We were not granted, at the moment of our appointment as judges, wisdom which we did not previously have. We are human, just as the other members of society. We have personal talents. They are a necessary condition for us as judges. They are not a sufficient condition. Judging is both a profession and a way of life. It is a profession which requires learning. It is a way of life, since the behavior allowed for every person, is likely to be forbidden to a judge.

Thus, judicial education must grant judges the tools for fulfilling their role. It must recognize our differences as judges; it must accept our subjectivity, but it must also provide us with the tools to be as objective as is humanly possible. Among those, I would like to stress the following tools:

1) Granting knowledge of the various branches of procedural and substantive law upon which the judge will come in his judicial work. On this issue, in my opinion, a holistic approach is appropriate. The law is not a confederation of branches of law. It has an all-encompassing unity, albeit fragile. The judge must be updated regarding the changes occurring in all branches of law, and regarding the fundamental trends of the development of law in his system and in comparative law. The judge must understand the constitutional structure of the legal system. Every judge must internalize the constitution and its values. That is the general part of every legal system. The judge must be aware of the rules of interpretation. The judge must honor the precedents – even if he is not bound by them.

2) Internalization and review of judicial ethics. We work in glass houses. All is visible to the public at large. We must not act in a way which we cannot defend, should it appear tomorrow in the newspaper. In our behavior outside of the courtroom, we must honor our role as judges. Our behavior as judges must reflect the humanity within us. This is more important than all of our professional knowledge. A judge who is not a warm, understanding and humane can never be a good judge. We must honor criticism and be willing to take it. The judge must be

trained to develop “thick skin” which will allow her or him to function despite the criticism.

3) Internalization of the need for judicial objectivity, judicial independence and preservation of public confidence. Understanding, that although we have discretion in the hard cases, it is a very limited discretion. We must be educated to restrain our subjectivity; we must learn to reflect and mirror the basic values of our society. We seek not power. We strive not to rule. We are professionals. We absorb the need for judicial objectivity in our judicial lives. Our aspiration is to do justice within the law. Many of the political problems on our countries’ national policy agendas will come before us for judicial decision. We must train ourselves to decide these problems as judges and not as politicians. We were not elected by the public, and we do not have the accountability which lay with elected officials. Political non-accountability is our most important characteristic. In its place comes education towards judicial accountability: accountability to the parties, to the appellate court, to the legal profession and to the foundational values of the legal system.

4) Education is an ongoing process. A judge who thinks he does not need education, or that he had enough of it, is impoverished. I doubt if he is fit to judge. For me, judicial education is something that I must do everyday. I must spend time in self-study of the world in which we live. I must take the time to be sure that I am learning the changes in the substantive law of my country and I must be constantly reading so as to permit me to reflect on my own judicial philosophy. To you who are involved in judicial training, I say this. Every course you design must have one goal in mind: to teach judges to be life-long students. Education can take many forms, and you will see them at this conference: the teaching of skills, the methods to teach substantive law, education about the judicial role, how to establish a good judicial philosophy, teaching about human rights, equality, and, above all, the teaching of virtue, morality and ethics. But through all of this, remember that no course is complete unless it leaves in the student the desire to learn more.

Of course, not everything can be achieved in a given time and place. There is always a shortage of judges and physical facilities. We should never make the very good the enemy of the good. What I tried to do is to provide a direction, even if it cannot be achieved fully. Furthermore, the needs of the judiciary differ in different countries. Education cannot be a homogenizing process. Judges have to retain their differences so as to provide the judiciary with significant resources, but

having said that, there must be a common acceptance among the judiciary of the core principles of judicial independence, impartiality, diligence, equality and integrity---and for this, education must play a continuing role.

A heavy responsibility weighs on our shoulders as judges. That is how it always was. Certainly, that is how it has been in recent years, as terror hits us all. Terror tends to create great tensions between the judges and the executive and legislative branches. We must be able to stand this tension. Indeed, 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.

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