Remarks at a Conference Marking the Retirement of President Grunis

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In an event held in a Supreme Court courtroom upon the retirement of President Dorit Beinisch and the beginning of the Justice Asher Grunis' term as President, I congratulated them both and expressed my confidence that President Grunis would safely sail the Court through troubled waters to a safe haven.

President Grunis fulfilled this hope and in his wisdom was able to sail the ship securely and calmly. His term was characterized by lowering the visibility of disputes between branches of government, and by working inward in order to make the system more efficient and to correct its flaws. On the latter, I was privileged, in my current position as ombudsman of the Israeli judiciary, to enjoy the President's full cooperation both in handling individual judges and on a broader systemic level.

Justice Grunis' jurisprudence fit into this approach of lowering the flames of contention, establishing limits on the Court's intervention, while fiercely preserving the Court's authority and the realization of human rights in Israel.

President Grunis repeatedly emphasized how important it is for the State to follow the Supreme Court's rulings. He rebuffed the State's attempts to withdraw from its obligations. In his opinions, he zealously protected fundamental rights, particularly minority rights, and he did not hesitate to strike down primary legislation that violated constitutional rights.

At the same time, he reiterated the need for judicial restraint during the process of subjecting the Knesset's legislation to judicial review, and avoiding overly expanding the scope of constitutional rights. He emphasized the need to avoid unchecked use of reasonableness as justification for intervention in the decisions of other branches of government. The primary drawback of reasonableness, he wrote, is in its high level of abstraction, which increases judicial discretion and in turn legal uncertainty. He also proposed, in a particular context, to reconsider the flexibility regarding standing rights as a threshold for approaching the High Court of Justice for relief, to the extent of eliminating such flexibility.

Indeed, the misconception that flexibility in threshold requirements and expansion of justiciability heightens the power of the Court should be re-evaluated. The opposite is true: threshold mechanisms and screening mechanisms are tools that were given to courts in order to protect them from intervening in issues of deep conflict, from involvement in matters where other government agencies have exclusive authority, and from harm to the status of the Court.

The resources at the Court's disposal are limited. As early as over 200 years ago, Alexander Hamilton wrote that the judiciary has neither a budget nor means of enforcement. It has "no influence over either the sword or the purse." He added – though the following part is not usually mentioned – that the court "may truly be said to have… no will." It only addresses real disputes that come before it. It does not address matters of principle or theory, or academic matters that are brought before it by a party that has no real interest in an actual dispute.

This principle is enshrined in the Constitution of the United States, to which judges have added what they called "prudential rules." These were designed to insulate the judicial system from issues that are not justiciable. "Not everything is justiciable" and the world is more than law.

American courts do not address a constitutional question unless it is necessary to do so in order to reach a concrete decision. The prudential rules that were developed by the courts themselves lay standing rights and justiciability rules as a threshold for policy questions. The courts defer to other branches of government in the areas that are beyond the institutional fitness of the courts. The courts in the United States do not provide advisory opinions. A party has no right of standing where the outrage expressed is merely general. An American court does not address a dispute that has yet to be born. This is the ripeness doctrine that was also adopted in Israel through President Grunis' opinions and through opinions in which I, too, participated. This is linked to the advantage in indirect and concrete challenges of a constitutional question as opposed to direct challenge to a statute's constitutionality. Direct challenges might inspire constitutional questions prematurely and unnecessarily.

Theories of justiciability preserve the court's resources for when it is called upon to exercise authority where it is the only or primary protector of human rights. The Court's resources, which center mainly on public's trust, are limited. Becoming involved in a public or social dispute unnecessarily compromises these precious resources. Deference for political authorities in the appropriate cases is not meant to strengthen those authorities' powers but to preserve the resources of the judiciary. The Court must protect its resources so that it might have them when it is called upon to fulfill its duty to protect fundamental rights, and especially minority rights.

President Grunis emphasized that the main justification for judicial review of primary legislation is the need to protect minorities and individuals from majority tyranny. Additionally, the role of the Court is to ensure that the rules of the game of democracy are followed. He therefore rejected, for instance, the petition against the statute that regulated deferral of service for yeshiva students. He did not view this as a harm to a minority but a possible harm to the majority. As a loyal student of Ely, he believed that the usual democratic tools were sufficient to rectify the issue.

This is an incredibly important insight about the role of the Court. The American historical experience teaches us that where the Court chose, while colliding head-on with the executive, to intervene in matters of policy, it did not prevail. The Court-Packing bill of the 1930s ended with the Court's full retreat and abandonment of any attempts to intervene in economic policy. In a central opinion from 1938, the Court wrote in a footnote that has later become the law of the land (footnote 4), that discriminating against minority groups that potentially weakens

democracy may warrant judicial review. President Grunis excelled in enshrining this view in his opinions, in both the affirmative and the negative.

President Grunis avoided rhetoric where it was unnecessary. He preferred outcome over rhetoric. Here, too, the historic experience is interesting: the constitutional revolution that changed forever the face of the American legal system took place in 1803 in a decision that established the Court's authority to apply constitutional judicial review and to strike down unconstitutional statutes. This monumental revolution was carefully and wisely written in the opinion. Careful and wise expression – but groundbreaking. Such is the jurisprudence of President Grunis.

Many congratulations to you, Asher, my friend, much health and success wherever you may go.