HUMAN RIGHTS IN TIMES OF TERROR – A JUDICIAL POINT OF VIEW

by

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A. The Role of the Judge – To Protect Democracy

I see the role as a judge on the Supreme Court or on a Constitutional Court of a democracy as the protection of the constitution and of democracy.[2] We cannot take the continued existence of a democracy for granted. This is certainly the case for new democracies, but it is also true for the old and well-established ones. The approach that "it cannot happen to us" can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in 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 if the Supreme Court judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that one of the lessons of the Holocaust and of the Second World War is the need to have democratic constitutions and ensure that they are put into effect by Supreme Court judges whose main task is to protect democracy. It was this awareness, in the post-World War II era that helped disseminate the idea of judicial review of legislative action and make human rights central.[3] And it shaped my perspective that the main role

[1] President (retired) of the Supreme Court of Israel. This article is based on selections from Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 Harv. L. Rev. 16 (2002) and Aharon Barak, The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism, 58 U.Miami L. Rev.. 125. In the first piece, I discussed my judicial philosophy. I tried to demonstrate how that philosophy is implemented in the context of the fight against terrorism.

[2] For a comprehensive analysis of my thesis, see Aharon Barak, The Judge in a Democracy, 20 (Princeton 2006)

[3] *See* generally Mauro Cappelletti, Judicial Review in the Contemporary World 45 (1971); Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds., 1993); The Global Expansion of

of the Supreme Court judge in a democracy is to maintain and protect the constitution and democracy. As I noted in one of my opinions:

> 'The struggle for the law is unceasing. The need to watch over the rule of law exists at all times. Trees that we have nurtured for many years may be uprooted with one stroke of the axe. We must never relax the protection of the rule of law. All of us - all branches of government, all parties and factions, all institutions – must protect our young democracy. This 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.'[4]

According to my approach, judges in modern democracies, have a major role to play in protecting democracy. We should protect it both from terrorism and from the means the state wishes to use to fight terrorism. 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 we fail in our role in times of war and terrorism, we will be unable to fulfill our 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. We should assume that whatever we decide when terrorism is threatening our security will linger many years after the terrorism

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Judicial Power (C. Neal Tate & Torbjorn Vallinder eds., 1995); Marina Angel, Constitutional Judicial Review of Legislation: A Comparative Law Symposium, 56 TEMP. L.Q. 287 (1983).

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

is over. Indeed, we 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 deviate after the crisis passes.[5] In one of my judgments I wrote:[6]

> "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. This was well expressed by Justice Jackson in Korematsu v. United States, where he said:
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> '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

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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 Can. B. Rev. 181, 186 (2001) (noting the general agreement that "judicial independence is both an individual and a systemic, institutional or 'collective' quality").

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Moreover, democracy ensures us, as judges, independence. It strengthens us, because of our 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 our 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, we must embrace our supreme responsibility to protect democracy and the constitution. We should always reflect history – not hysteria. Admittedly, the struggle against terrorism turns our democracy into a "defensive democracy" or even a "fighting or militant democracy."[7] Nonetheless, this defense and this militant fight must not deprive our regime of its democratic character. 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.

B. The Battle Against Terror – Within the Law

There is a well-known saying that when the cannons speak, the Muses are silent. A similar idea was expressed by Cicero in his maxim "*Silent enim*

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[6] HCJ 7052/03 Adalah V. The Minister of Interior (Forthcoming in Israel Law Reports 2006), pp. 34-35

[7] In contemporary Germany, the militant democracy (streitbare Demokratie) is one of the foundations of the constitutional structure. See David P. Currie, The Constitution of the Federal Republic of Germany 213 (1994); Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 37 (2d ed. 1997). See also András Sajó (ed.),, Militant Democracy, (2004)

leges inter arma" (In battle, indeed, the laws are silent).[8] These statements are regrettable; I hope they do not reflect the way things are.[9] I am convinced they do not reflect the way things should be. Every battle a country wages - against terrorism or against any other enemy - must be waged in accordance with rules and laws. There is always law according to which the state must act. There are no black holes in which there is no law.[10] And the law needs Muses. We need the Muses most when the cannons speak. We need laws most in times of war.[11] In one of my judgments I wrote:

> The decision has been laid before us, and we must stand by it. We are obligated to preserve the legality of the regime even in difficult decisions. Even when the artillery booms and the Muses are silent, law exists and acts and decides what is permitted and what is forbidden, what is legal and what is illegal. And when law exists, courts also exist to adjudicate what is permitted and what is forbidden, what is legal and what is illegal. Some of the public will applaud our decision; others will oppose it. Perhaps neither side will have read our reasoning. We have done our part, however. That is our role and our obligations as judges.[12]

The struggle against terrorism is not conducted *outside* the law, but *within* the law, using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it. In its

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[8] CICERO, PRO MILONE 16 (N.H. Watts trans., Harvard Univ. Press, 5th ed. 1972).

[9] See Re Application Under S. 83.28 of the Criminal Code [2004], 2 S.C.R. 248, 260: "While Cicero long ago wrote '*inter arma silen legas*' we, like others, must strongly disagree" (Iacobucci and Arbour JJ). *But cf.* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998).

[10] Johan Steyn, Guantanamo Bay: The Legal Black Hole, International and Comparative Law Quarterly, Vol. 53, 1 , 2004

[11] *See* Harold Hongju Koh, The Spirit of the Laws, 43 Harv. Int'l L.J. 23 (2002): "In the days since, I have been struck by how many Americans-- and how many lawyers--seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this."

[12] H.C. 2161/96, Rabbi Said Sharif v. Military Commander, 50 (4) P.D. 485, 491.

war against terrorism, a democracy acts within the framework of the law and according to the law. Indeed, the war against terrorism is a war of a law-abiding nation and law-abiding citizens against lawbreakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the law against its enemies.

C. The Need for a balanced Approach

Democracies should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. On the one hand, we must consider the values and principles relating to the security of the state and its citizens. Human rights cannot justify undermining national security in every case and in all circumstances. Human rights are not a stage for national destruction.[13] The Constitution is not a suicide pact. As I stated in one case:

> A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction (*cf*. The remarks of Justice Jackson in *Terminiello v. Chicago*). The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights depend upon the existence of the State, and they should not be made into a spade with which to bury it.[14]

On the other hand, we must consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited license to harm the individual.

Every balance that is made between security and freedom will impose certain limitations on both security and freedom. A proper balance will not be achieved when human rights are fully protected, as if there were no terrorism. Similarly, a proper balance will not be achieved when national security is afforded full protection, as if

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[13] *See* E.A. 2/84, Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset, 39(2) P.D. 225, 310; *cf.* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[14] C.A. 2/84 Neiman v. Chairman of Cent. Election Comm. For Eleventh Knesset, 39(2) P.D. 225, 310. The judgment cited is Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe, and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can exist with security. It follows that the balance between security and freedom does not reflect the lack of a clear position. On the contrary, the proper balance between security and freedom is the result of a clear position that recognizes the need for security and the need for human rights.

When I speak about the balance, I don't mean an external normative process that changes the scope of rights and the protection accorded them because of terror. I mean the ordinary process and the ordinary balancing rules we have that take place when we address the relationship between individual rights and the needs of society. In this latter process, rights are not absolute. They may be limited to serve the needs of society. In a judgment that dealt with the battle on terror I wrote:

> …Israeli constitutional law has a consistent approach to human rights in periods of relative calm and in periods of increased fighting. We do not recognize a clear distinction between the two. We do not have balancing laws that are unique to times of war. Naturally, human rights are not absolute. They can be restricted in times of calm and in times of war. I do not have a right to shout ‘fire’ in a theatre full of spectators (see the analogy of Justice Holmes in Schenck v. United States. War is like a barrel full of explosives next to a source of fire. In times of war the likelihood that damage will occur to the public interest increases and the strength of the harm to the public interest increases, and so the restriction of the right becomes possible within the framework of existing criteria. Indeed, we do not have two sets of laws or balances, one for times of calm and the other for times of terror. This idea was well expressed by Lord Atkin more than sixty-five years ago, during the Second World War, in a minority opinion where he said:

> 'In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which… we are now fighting, that the judges… stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law' (Liversidge v. Anderson)"[15]

When the court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from both sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights. The supporters of security argue that the court gives too much protection to human rights and too little to security. Frequently, the persons making these arguments read only the judicial conclusion without considering the judicial reasoning that seeks to make a proper balance between the conflicting values and principles. None of this intimidates the judge. He must and does rule according to his best understanding and conscience.[16]

This balance is based upon the view that in democracy, not all means are acceptable. The ends do not justify the means. Thus, we ruled that parts of the separation fence in the West Bank, which is intended to prevent terrorists from the West Bank from entering Israel are not legal. We determined that the additional security attained by the location chosen for the security fence by the army is not proportional to the harm which that fence location causes to the fabric of the lives of the local inhabitants. In one case I wrote:

> "Ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot

[15] HCJ 7052/03 Adalah V. The Minister of Interior (Forthcoming in Israel Law Reports 2006), pp. 33-34

[16] *See* H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 585 (Barak, J., dissenting).

> surpass, even if the purpose whose attainment is being attempted is worthy."[17]

In one case we decided that the executive branch has no authority to authorize (ante) torture, though the interrogators may act out of necessity and have a (post) defense in criminal _____. This (ante) prohibition is comprehensive, and applies even in a "ticking bomb" situation. In my judgment I wrote:

> We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties.[18]

In one of my last judgments, I had to deal with the constitutionality of a statute that imposed a temporary flat ban of family unification between an Israeli and his West-Bank or Gaza spouse. The reason for the ban was that in twenty six cases the non Israeli spouse, who came to Israel by the program of family unification, was directly involved in terrorist activities. I decided that the statute is unconstitutional as it affects in a non-proportional way the right to family unification, which is a constitutional right derived from the right to dignity. In my judgment I wrote:

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[17] HCJ 8276/05 Adalah - The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense (unpublished ,paragraph 30 of my judgment)

[18] H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845.

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; that 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 violate 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. This is how the court acted in many different cases. Thus, for example, adopting physical measures ('torture') would without doubt increase security. But we held that our democracy was not prepared to adopt them, even at the price of a certain harm to security. Similarly, determining the route of the separation fence in the place decided by the military commander in Beit Sourik Village Council would have increased security. But we held that the additional security was not commensurate with the serious harm to the lives of the Palestinians. Removing the family members of suicide bombers from their place of residence and moving them to other places ('assigned residence') would increase security in the territories, but it is inconsistent with the character of Israel as a 'democratic freedom-seeking and liberty-seeking state'. We must adopt this path also in the case before us. The additional security achieved by abandoning the individual check and changing over to a blanket prohibition

> involves such a serious violation of the family life and equality of many thousands of Israeli citizens that it is a disproportionate change. Democracy does not act in this way. Democracy does not impose a blanket prohibition and thereby separate its citizens from their spouses; Democracy does not prevent them from having a family life; democracy does not impose a blanket prohibition and thereby give its citizens the option of living in it without their spouse or leaving the state in order to live a proper family life; democracy does not impose a blanket prohibition and thereby separate parents from their children; democracy does not impose a blanket prohibition and thereby discriminate between its citizens with regard to the realization of their family life. Indeed, democracy concedes a certain amount of additional security in order to achieve an incomparably larger addition to family life and equality. This is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terror. It is precisely in these difficult times that the power of democracy is revealed. Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test.[19]

D. The Israeli Case

I will describe now the way we approach in Israel the battle on terror.[20] Please recall, that in Israel we had not only September 11, but also September 10 and September 12. By describing our way of dealing with terror, I do not make a general

[19] HCJ 7052/03 Adalah V. The Minister of Interior (Forthcoming in Israel Law Reports 2006), pp. 93-94

[20] See Judgments of the Israel Supreme Court : Fighting terrorism within the law, Vol. 1 & 2 (Israel Supreme Court, 2004 & 2006),

claim that ours is the best way, and every judge in a democracy should do the same. I am not so naïve. Of course, every country should reflect, in its war of terror, its history, its constitutional structure and aspirations, the way it solves non-terrorists cases, and the role of courts in its legal tradition. My claim is much more restricted. I do claim, that the way our Supreme Court is doing it, is the proper way for Israel, for whom security threats are part of ordinary life. Other legal systems will have to make their own reflections. As in any other area of comparative law the foreign law is only a source of inspiration; a mirror through which we see ourselves – like a good book or article that gives us confidence in the path we take. In my description, I am concentrating on the role of the judge. Judges are not conducting the battle on terror. Judges will not solve the problem of terror. That is the duty of the other branches of government. Judges are adjudicators. Their duty within the constitutional scene is to say what the law is, and to what extent are the means used by the state according to law.

Our starting point in Israel has been that the doors of the Supreme Court - which in Israel serves as a court of first instance for complaints against the executive branch - are open to anyone wishing to complain about the activities of a public authority. There are no areas without judicial review.[21] The open door approach is expressed in a number of ways. *First*, it is very rare that the court would close its doors on grounds of nonjusticiability.[22] At times the state may argue that most of its counterterrorism activities are beyond the reach of the judiciary because they take place outside the country, because they constitute an act of state, or because they are political in nature. All these arguments were made before us in the Israeli Supreme Court, and they were rejected when human rights were directly affected. Thus, we have ruled in petitions concerning the power of the state to arrest suspected terrorists[23] and the conditions of their confinement in Israel or outside it.[24] We have decided petitions concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated.[25] We have ruled about the legality

[21] *See* Ressler v. Minister of Defence 42(2) PD 441, 458
[22] *Id.*
[23] See H.C. 3239/02, Maraab v. Commander in Judea and Samaria, 57(2) P.D. 349.
[24] *See* H.C. 3278/02 The Center for Defense of the Individual Founded by Dr. Lotta Salzberger v. IDF Commander in the W. Bank 57(1) P.D. 385; H.C. 5591/02 Yassin v. Commander of Kziot Military Camp 57(1) P.D.403; H.C. 253/88 Sajadia v. Minister of Def., 42(3) P.D. 801.
[25] *Maarab*, 57(2) P.D. at 377 (the right to legal representation). *See* H.C. 5100/94 Public Comm. Against Torture v. State of Israel, 53(4) P.D. 817 (means of interrogation).

of the fence Israel is building to provide security from terrorists crossing its borders. Recently, we ruled regarding the legality of targeted killings. The rule which guided us in all of those judgments was that there is no place for an argument of noninjusticiability when the petition regards human rights. When a claim of violation of a human right is raised, the suit is always justiciable.

Second, the court opens its doors to anyone claiming that civil rights have been violated. Everyone has standing. This is the general approach of the court in time of peace.[26] We apply it also in times of terror. It is used mainly by civil rights associations that come to us in defense of human rights of those sectors of society that most people do not wish to protect – including, of course, suspected terrorists.

Third, our judgments regarding many of the terrorist cases committed outside Israel are based on international law dealing with humanitarian law or human rights law applicable to international armed conflicts. Thus, terrorist in many cases are not viewed as regular criminals. To the extent that they take part in hostilities, they are not protected against attack. This international law is part of our common law.

In applying customary international law national judges should take the judgment of the International court of Justice (the ICJ) very seriously. Even if the judgment of the International Court of Justice in the Hague is only advisory, it is of great weight.[27] The ICJ is the highest judicial body in international law. Its interpretation of international law should be given its full appropriate weight. We should also look to decisions of other international courts like the European Court for Human Rights in Strasbourg. We cite their judgment regularly, though we are not part to the European Convention on Human Rights. Judgments of national courts, applying international law should be consulted. Of course academic writings on international law are of great importance. I myself felt quite restraint in my

[26] The Israeli Supreme Court's general approach is that in cases of serious violation of the rule of law, everyone in Israel has standing. For an analysis of this approach, see Barak, supra note 2, at 190.
[27] HCJ 7957/04 Maraabe v. the Prime Minister of Israel (2005, forthcoming) paragraph 56 to my judgment.

freedom to interpret international law, as I am not the only judicial player in the field, especially when I have to interpret an international treaty or customary international law.

In all these decisions – and there have been thousands of them – we recognized, on the one hand, the power of the state to protect its security and the security of its citizens. On the other hand, we emphasized that the rights of every individual must be preserved, including those of the individual suspected of being a terrorist. The balancing point between the conflicting values and principles is not fixed. It differs from case to case and from issue to issue. The damage to national security caused by a given terrorist act and the nation's response to the act affects the way in which the freedom and dignity of the individual are protected. To the extent that the terrorist activity takes place in Israel, we apply the regular criminal law. Our Parliament has generally not created a special criminal law of the enemy.

The fight against terrorism requires the interrogation of terrorists. Such interrogations must be conducted according to the ordinary rules of interrogation. Physical force must not be used. We decided specifically, that the persons being interrogated must not be tortured.[28] A democracy – even a defensive or militant democracy – should not (ante) bureaucratize the use of torture, though it may view such acts (post) as triggering the defense of necessity in criminal law.

E. Judicial Review of the Battle on Terror

Judicial review of the battle against terrorism, by its very nature, raises the question of the timing and scope of judicial review. There should not be a theoretical difference between applying review at a time that the state is under threats of terrorism and doing so at a time after the terrorism is gone. We should never postpone our judgment until terror is over, because the fate of a democracy and of human beings may hang in the balance. Protection of human rights would be bankrupt if, during combat, courts - consciously or

[28] H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Gov't of Israel, 53(4) P.D. 817, 835.

unconsciously - decided to review the behavior of the executive branch only after the period of emergency ended.

What is the scope of judicial review in time of terror ? The answer to this question should vary according to the essence of the concrete question raised. On the one end of the spectrum stands the question – "what is the law on the battle against terror ?" That question is within the realm of the judicial branch. The court is not permitted to liberate itself from the burden of that authority. The question which the court should ask itself is not whether the executive branch's understanding of the law is a reasonable understanding. The question should be is it the correct understanding. We have not accepted the Chevron doctrine.[29] On the other end of the spectrum is the decision, made on the basis of the knowledge of the military professionals, to execute a military operation. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the Court will not exchange the military commander's security discretion within the security discretion of the Court. Judicial review regarding the military means to be taken is the regular review of reasonableness. True, "military discretion" and "state security" are not magic words which prevent judicial review. However, the question is not what I would decide in the given circumstances, rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security.

Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. One of those legal aspects is the decision about proportionality. By proportionality I mean the legal concepts that require that any limitation of human rights – whether by statute or by an administrative regulation – should fulfill the following requirements: (a) there should be a rational

[29] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

connection between the goal to be achieved and the means used, (b) there are no less restrictive means to achieve that goal, (c) the benefit to the public interest achieved by the means is proportional to the harm caused to the human rights. Many judgments I gave dealing with the battle on terror were dealing with proportionality. Thus, in occupied territories, the military can not take possession of land, if the harm to the local population does not fulfill the requirements of proportionality. Similarly, under customary international law the state can not harm civilians while fighting terror if such harm does not fulfill the proportionality requirement. I a recent case, I dealt with targeted killings. It was decided, that the state can not target a terrorist that takes direct part in terrorist activities if the collateral damage to civilians will be non-proportional.

Who decides about proportionality ? Is it a military decision to be left to the reasonable application of the military, or a legal decision within the discretion of the judges ? Our answer is that the proportionality of military means used in the fight against terror is a legal question, left to the judges. In the case, regarding the proportionality of the harm which the separation fence causes to the fabric of life of the local inhabitants, 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. That is his expertise. We examine whether this route's harm to the local residents is proportionate. That is our expertise".[30]

Proportionality is not a standard of precision. At times there are a number of ways to fulfill its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch's decision. That is its margin of appreciation.

[30] HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel (2005) PD 58(5), 845

The decision should not rest on issuing general declarations about the balance of human rights and the need for security. Rather, the judicial ruling must impart guidance and direction in the specific case before the court. Justice Brennan correctly noted, "[A]bstract principles announcing the applicability of civil liberties during times of war and crises are ineffectual when a war or crisis comes along unless the principles are fleshed out by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security concerns."[31]

From a judicial review point of view, the situation in Israel is unique. Petitions from suspected terrorists reach the Supreme Court – which has exclusive jurisdiction on the matter – in real time. The judicial adjudication takes place not only during combat, but often while the events being reviewed are taking place. For example, the question of whether the General Security Service may use extraordinary methods of interrogation (including what has been classified as torture) did not come before us in the context of a criminal case in which we had to rule, ex post, on the admissibility of a suspected terrorist's confession.[32] Rather, the question arose at the beginning of his interrogation. At the start of the interrogation, the suspect's lawyer came before us and claimed, on the basis of his past experience, that the General Security Service would use force against his client. We summoned the state's representative – the same day or the next day – and we heard arguments, and made a decision in real time.

Often the court will encounter the argument from the executive that security considerations led to an action of the government, followed by a request that the court be satisfied with this statement. Such a request should not be granted. "Security considerations" are not magic words. The court must insist on hearing the specific security considerations that prompted the government's actions. The court must be persuaded that the security considerations actively motivated the government's action and were not

[31] William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Time of Security Crises, 18 Isr. Yearbook Hum. Rts. 11 (1988)., at 19

[32] See H.C. 4054/95, Pub. Comm'n Against Torture in Israel. v. Gov't of Israel, 43(4) P.D. 817.

merely a pretext. The court must be convinced that the security measures adopted were proportional. Indeed, in several of the many security cases that the Supreme Court heard, senior army commanders and heads of the security services testified before us. Only if we were convinced that the security consideration was the dominant one and that the security measure was proportionate, did we dismiss the challenge against the security action.[33] In dismissing challenges to security actions, we should not be naïve or cynical. We should analyze the evidence before us objectively. In the case dealing with review under the Geneva Convention, of the state's decision to assign Arab residents from the West Bank to the Gaza Strip, I noted that:

> In exercising judicial review … we do not make ourselves into security experts. We do not replace the military commander's security considerations with those of our own. We take no position on the way security issues are handled. Our job is to maintain boundaries, and to guarantee the existence of conditions that restrict the military commander's discretion … We do not, however, replace the commander's discretion with our own. We insist upon the legality of the military commander's exercise of discretion and that it fall into the range of reasonableness, determined by the relevant legal norms applicable to the issue.[34]

Is it proper for judges to review the legality of the fight on terrorism? Many argue that the court should not become involved in these matters. These arguments are heard from both ends of the political spectrum. On one side critics argue that judicial review undermines security. On the other side, critics argue that judicial review gives legitimacy to actions of the government authorities in

[33] In Sec'y of State for the Home Dep't v. Rehman, No. UKHL 47, 2001 WL 1135176 (H.L. Oct. 11, 2001) (U.K.), Lord Hoffman noted that "the judicial arm of government [needs] to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security." I hope the meaning of these comments is limited to the general principle that a court determines not the means of fighting terrorism but rather the lawfulness of the means employed.

their battle against terrorism. Both arguments are unacceptable. As to the argument that judicial review undermines security: Judicial review of the legality of the battle on terrorism may make the war against terrorism harder in the short term. Judicial review, however, fortifies and strengthens the people in the long term. The rule of law is a central element in national security. As I wrote in a case of pre-trial pardon given to the heads of the General Security service who committed crimes against terrorists:

> There is no security without law. The rule of law is an element of national security. Security requires us to find proper tools for interrogation. Otherwise, the General Security Service will be unable to fulfill its purpose. The strength of the Service lies in the public's confidence in it. Its strength lies in the court's confidence in it. If security considerations are decisive, the public will have no confidence, and the court will have no confidence in the security service and the lawfulness of its interrogations. Without this confidence, the branches of the state cannot function. This is the case with regard to public confidence in the courts, and it is the case with regard to public confidence in the other branches of state.[35]

With regard to considerations of legitimacy: To the extent that legitimacy by the court means that the acts of the state are lawful, the court fulfills its traditional role. Both when the state wins and when the state loses, the rule of law and democracy benefit. It should be remembered that the effect of the judicial decision does not occur only in the individual instance that comes before it. Rather the main effect occurs in determining the general norms according to which the government authorities act, and in

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[34] H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, 56(6) P.D. 352, 375-76
[35] H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 622 (citation omitted).

establishing the deterrent effect this norm will have. The test of the rule of law arises not merely in the few cases brought before it, since government authorities are aware of the ruling of the court and act accordingly. The argument that judicial review somehow validates the governmental action does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom of the battle against terrorism, but only the legality of the acts taken in furtherance of the war. The court does not ask itself if it would have adopted the security measures that were adopted, if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be within the bounds of the law to adopt the security measures that were adopted. Thus, the court does not express agreement with the means adopted but rather fulfills its role by reviewing the constitutionality and legality of the executive acts.

Naturally, one must not go from one extreme to the other. One must recognize that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of government. The role of the court is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the battle against terrorism is conducted within the framework of the law and not outside it. This is the court's contribution to the struggle of democracy to survive. In my opinion, it is an important contribution, one that aptly reflects the judicial role in a democracy. Realizing this role during the battle against terrorism is difficult. Judges cannot and would not want to escape from this difficulty.

I regard myself as a judge who is sensitive to his role in a democracy. I take the tasks imposed on me – protecting the constitution and democracy – seriously. Despite criticism often heard I have continued on this path for twenty eight years. I hope that by doing so, I am serving my legal system properly. Indeed, as

judges in the highest court, we must continue on our path according to our consciences.

Judges, have a North Star that guides them: the fundamental values and principles of constitutional democracy. A heavy responsibility rests on our shoulders. Even in hard times, we must remain true to ourselves. I discussed this in the opinion considering whether extraordinary methods of interrogation - torture or inhuman treatment - may be used against a terrorist in a "ticking bomb" situation:

> Deciding these petitions weighed heavily on this Court. 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 isolated 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. Our concern that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. Our fellow-citizens demand that we act according to the law. This is also the same standard that we set for ourselves. When we sit at trial, we too stand trial.[36]

13 February 2008

[36] H.C. 4054/95, Pub. Comm'n Against Torture in Israel. v. Gov't of Israel, 43(4) P.D. 817, 845.