

UIC School of Law

## UIC Law Open Access Repository

---

UIC Law Open Access Faculty Scholarship

---

1-1-2003

### Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel - A Comparative Perspective, 31 Ga. J. Int'l & Comp. L. 493 (2003)

Ralph Ruebner

*The John Marshall Law School, [7ruebner@jmls.edu](mailto:7ruebner@jmls.edu)*

Follow this and additional works at: <https://repository.law.uic.edu/facpubs>



Part of the [Comparative and Foreign Law Commons](#), [Courts Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), and the [Military, War, and Peace Commons](#)

---

#### Recommended Citation

Ralph Ruebner, Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel - A Comparative Perspective, 31 Ga. J. Int'l & Comp. L. 493 (2003).

<https://repository.law.uic.edu/facpubs/132>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Open Access Faculty Scholarship by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

## DEMOCRACY, JUDICIAL REVIEW AND THE RULE OF LAW IN THE AGE OF TERRORISM: THE EXPERIENCE OF ISRAEL—A COMPARATIVE PERSPECTIVE

Ralph Ruebner\*

### I. INTRODUCTION

Academic discourse has generally focused on the question of whether the doctrine of judicial review promotes democracy or whether it is anti-majoritarian and therefore undemocratic.<sup>1</sup> The more apt question, I believe,

---

\* Professor of Law, The John Marshall Law School. The author is indebted to his research assistant, Joshua B. Adams, for his diligent and valuable research assistance and to Professors Walter J. Kendall, III, William B.T. Mock, Jr. and Samuel R. Olken of The John Marshall Law School for their helpful suggestions and critique. I especially wish to express my gratitude to Dr. Shlomo D. Levine, Rabbi of Congregation Ner Tamid Ezra Habonim of Chicago and Rabbi Aaron Melman, Assistant Rabbi of Congregation Beth Shalom of Northbrook, Illinois, for guiding me through complex Jewish texts.

<sup>1</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH*, 16-17 (2d ed. 1986).

The root difficulty is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of "the people," the limits that they have ordained for the institutions of a limited government. And it has been done ever since in much the same fashion by all too many commentators. Marshall himself followed Hamilton, who in the 78th *Federalist* denied that judicial review implied a superiority of the judicial over the legislative power—denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority. "It only supposes," Hamilton went on, "that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." But the word "people" so used is an abstraction. Not necessarily a meaningless or a pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people

is whether the process of judicial review protects individual rights and human rights. Professor Ruth Gavison claims that "democracy neither prohibits nor requires judicial review."<sup>2</sup> She cautions, however, that this conclusion should not be confused with the need for judicial independence in a democratic regime whose laws protect human rights. She asserts, and I agree, that courts have a "distinct counter-majoritarian task," a duty to protect the rights of individuals from the tyranny of the majority.<sup>3</sup> Professor Eugene Rostow has defended judicial review because judges serve the important role of "constitutional mediators," *inter alia*, to guard against "unauthorized governmental action against individuals."<sup>4</sup> The power of the courts to police the Constitution, argues Rostow, enhances democracy.<sup>5</sup> As Professor Gavison explains,

[c]ourts are assigned the crucial task of prevention of populist lynching in the broad sense; i.e., the victimisation of individuals who are perceived by the majority to be enemies and a threat. Or, generally, the prevention of the violation of rights which are clear and protected legal rights of individuals and groups simply because the *vox populi* requires such violation.<sup>6</sup>

The President of the Supreme Court of Israel, Professor Aharon Barak, has asserted that judges are the guardians of human rights.<sup>7</sup> Is he correct? I shall argue that the concept of judicial review and the inseparable doctrine of the rule of law do promote individual rights and human rights; however, there is

---

of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.

*Id.* See also Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); ALBERT P. MELONE & GEORGE MACE, *JUDICIAL REVIEW AND AMERICAN DEMOCRACY* (1988); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* (1994).

<sup>2</sup> Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 236 (1999).

<sup>3</sup> *Id.* at 242, 257.

<sup>4</sup> Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195-97 (1952).

<sup>5</sup> *Id.* at 197.

<sup>6</sup> Gavison, *supra* note 2, at 241.

<sup>7</sup> Aharon Barak, *The Constitutionalization of the Israeli Legal System As a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3, 21 (1997).

an irrational disconnect between the theoretical underpinning of the doctrine and its application by the courts in Israel and the United States, which is driven by fear for public security and safety. When a democracy fights terrorism the law is silent.

## II. JUDICIAL REVIEW PROMOTES INDIVIDUAL RIGHTS

The doctrine of judicial review is enshrined in the constitutional jurisprudence of the United States and Israel as a bulwark against the excesses of government. The courts decide whether the acts of the legislature or the administrative conduct of the executive are repugnant to the Constitution. As Chief Justice Marshall proclaimed in *Marbury v. Madison*, ours is “a government of laws, and not of men.”<sup>8</sup> Marshall explained that the role of the court in exercising the power of judicial review “is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers perform duties in which they have a discretion.”<sup>9</sup> The Supreme Court of Israel has extended this power to review the reasonableness of the exercise of executive discretion.<sup>10</sup> But does judicial review promote justice and human rights or place the judiciary as the guardian of individual rights? “The very essence of civil liberty,” explains Marshall, “certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>11</sup> Other decisions of the United States Supreme Court, such as *Youngstown Sheet & Tube Co. et al. v. Sawyer*,<sup>12</sup> *United States v. Nixon*,<sup>13</sup> and *Clinton v. Jones*,<sup>14</sup> have reaffirmed the principle that the executive is not above the law, and that it is the duty of the court “to say what the law is.”<sup>15</sup> National security claims by the executive are also subject to judicial review. In *United States v. Reynolds*,<sup>16</sup> the Supreme Court rejected an absolute military privilege claim reasoning that “[j]udicial control over the evidence in a case cannot be

---

<sup>8</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>9</sup> *Id.* at 170.

<sup>10</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1 (Israel).

<sup>11</sup> *Marbury v. Madison*, 5 U.S. at 163. I credit my colleague, Professor Samuel Olken, with the notion that *Marbury* is an individual rights case.

<sup>12</sup> 343 U.S. 579 (1952).

<sup>13</sup> 418 U.S. 683 (1974) (rejecting executive privilege claim because not supported by need to protect military, diplomatic or national security secrets).

<sup>14</sup> 520 U.S. 681 (1997) (stating courts have the authority to adjudicate the legality of the President's unofficial conduct while he is in office).

<sup>15</sup> *United States v. Nixon*, 418 U.S. at 705.

<sup>16</sup> 345 U.S. 1 (1953).

abdicated to the caprice of executive officers.”<sup>17</sup> In *United States v. The Washington Post*<sup>18</sup> (the Pentagon Papers case), the Court, in a *per curiam* decision, defended the newspaper’s First Amendment right to publish over a blanket national security claim. In a concurring opinion, Justice Black opined that

[t]he word “security” is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.<sup>19</sup>

Justice Douglas claimed in a concurring opinion that “[s]ecrecy in government is fundamentally antidemocratic. . . .”<sup>20</sup> In *Nixon* the Court recognized that the rule of law serves to promote the “integrity of the judicial system” and ultimately to ensure “that justice is done.”<sup>21</sup> Judicial review also promotes the integrity of the administrative process by focusing attention on whether the administrator exercises his authority and discretion lawfully, although courts will generally defer to the administrator’s expertise in matters of national security.<sup>22</sup>

Similarly, the Israel Supreme Court, sitting as the High Court of Justice, has arrogated to itself the authority of judicial review in order to safeguard the rule of law.<sup>23</sup> Professor Barak has defended the exercise of judicial review as an essential ingredient of democracy in that judges interpret the law and give meaning to the constitution.<sup>24</sup> In *Kol Ha’am v. Minister of Interior*,<sup>25</sup> a decision that preceded Israel’s constitutional revolution, Justice Agranat embraced the power of judicial review to review the legality of the decision of

---

<sup>17</sup> 345 U.S. at 9-10.

<sup>18</sup> 403 U.S. 713 (1971).

<sup>19</sup> 403 U.S. at 719.

<sup>20</sup> 403 U.S. at 724 (Douglas, J., concurring).

<sup>21</sup> *United States v. Nixon*, 418 U.S. 683, 709 (1974).

<sup>22</sup> See *Webster v. Doe*, 486 U.S. 592 (1988); *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 176-79 (1985).

<sup>23</sup> See generally Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT’L L. REV. 1 (1993).

<sup>24</sup> See Aharon Barak, *The Role of the Supreme Court In a Democracy*, 33 ISR. L. REV. 1, 3 (1999).

<sup>25</sup> H.C. 73/53, *Kol Ha’am Co. v. Minister of Interior*, 7 P.D. 871, reprinted in 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 105 (1962).

the Minister of the Interior to suspend, in the interests of public peace, the publication of two newspapers that had criticized the Government's foreign policy. In *Barzilai v. Attorney General*,<sup>26</sup> the court exercised its authority to review the President's pardoning power. Justice Shamgar explained that the rule of law serves to protect against anarchy and is "essential for the preservation of political and social frameworks and the safeguarding of human rights, none of which can flourish in an atmosphere of lawlessness."<sup>27</sup> In *Schnitzer v. Chief Military Censor*,<sup>28</sup> judicial review was extended to review the legality of military censorship of the press in the interests of public security. Justice Barak, who authored the opinion, reasoned that the doctrine of separation of powers demands that the court review the lawfulness of an administrative decision, including one that pertains to public security. In his words, "[t]he scope of judicial review should be uniform for all government authorities."<sup>29</sup> The *Kol Ha'am* and *Schnitzer* cases established a new reality in Israel for judicial review; a claim of national security is not a sacred cow and the Supreme Court will not shy away from exercising the power of review when a national security claim is made by the Government.

The concept of the rule of law is tied to judicial review. It is not a sterile concept, nor is it devoid of value. Instead, I would suggest, the rule of law is imbued with moral principles and moral values that enhance a democracy. Professor Barak characterizes these principles as

ethical values regarding morality and justice; social values related to public order, to the purity of judging and security of the state and the public; suitable modes of conduct which demonstrate reasonableness, tolerance, proportionality, good faith and propriety. These basic values include an aspiration to realize reasonable expectations, assuring certainty in law, and confidence in inter-personal relations. In the center of all these basic values stand human rights—political, social, and economic.<sup>30</sup>

---

<sup>26</sup> H.C. 428/86, *Barzilai v. Attorney General*, 40(3) P.D. 505, reprinted in 6 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (1986).

<sup>27</sup> *Id.* at 40.

<sup>28</sup> H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617, reprinted in 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 77, 107 (1989).

<sup>29</sup> *Id.* at 107.

<sup>30</sup> Barak, *supra* note 24, at 3.

In the context of judicial review, the rule of law is a morally-weighted concept. Professor Ronald Dworkin identifies two distinct views of the rule of law. The first, which he calls the "rights" conception, "assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole."<sup>31</sup> This conception, according to Dworkin, joins the rule of law with "substantive justice"<sup>32</sup> and permits the individual to adjudicate these rights through the courts.<sup>33</sup> The other aspect of the rule of law is the "rule-book" conception, which claims that "the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all."<sup>34</sup> Here, "substantive justice" is not joined to and is independent of the rule of law.<sup>35</sup> I understand the former conception of the rule of law to be value-laden and inextricably tied to the concept of justice. The latter is not.

The constitutions of the United States and Israel describe individual or human rights in vague or abstract language. Dworkin identifies the First Amendment's freedom of speech clause as an example.<sup>36</sup> "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>37</sup> I can point to Israel's Basic Law for an illustration: "[t]here shall be no violation of the life, body or dignity of any person as such."<sup>38</sup> According to Dworkin, when judges interpret these vague terms "they invoke moral principles about political decency and justice."<sup>39</sup>

But whose values do they invoke? For Justice Cardozo, it was the "mores of the community."<sup>40</sup> Cardozo cautioned that in shaping a judgment according to "reason and justice," the "standard must be an objective one."<sup>41</sup> Dworkin counters that in distilling a community's moral values, judges necessarily inject some of their own conception of morality.<sup>42</sup> Professor Barak advances

<sup>31</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11 (1985).

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *See id.* at 27.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *See id.* at 11.

<sup>36</sup> *See* RONALD DWORKIN, *FREEDOM'S LAW, THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996).

<sup>37</sup> U.S. CONST. amend. I.

<sup>38</sup> Basic Law: Human Dignity and Liberty § 2, *translated in* 33 *ISR. L. REV.* 718 (1999).

<sup>39</sup> DWORKIN, *supra* note 36, at 2.

<sup>40</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (6th ed. 1991).

<sup>41</sup> *Id.* at 88-89.

<sup>42</sup> DWORKIN, *supra* note 36, at 2-4; *see* FRANK MICHELMAN, *BRENNAN AND DEMOCRACY* 26 (1999).

Cardozo's philosophy and argues that a judge's subjective manifestation of what is morally right or wrong should be rarely used, and if necessary, only in "exceptional instance," in a "hard case" when all "objective means have been exhausted . . . ."<sup>43</sup>

In the *Kol Ha'am* case, Justice Agranat deduced Israel's moral values as a democratic state from the Declaration of Independence, which "expresses the vision of the people and its faith . . . ."<sup>44</sup> The interpretation of the law, he concluded, "must be studied in the light of its national way of life."<sup>45</sup> Although his reference to the Declaration is scant,<sup>46</sup> the Declaration itself is a repository of moral values: "[the State] will be based on freedom, justice and peace as envisaged by the prophets of Israel . . . ."<sup>47</sup> According to Professor Leon Sheleff, "the Declaration is . . . an explicit articulation of universally accepted concepts of natural justice in the Israeli legal system."<sup>48</sup>

In the *Schnitzer* case, Justice Barak went beyond the Declaration to derive the community's values from the very nature of democracy:

The Declaration of Independence is not the only source from which one can learn about the basic values of the state. For example, the Supreme Court refers from time to time to the "basic principles of equality, freedom and justice, which are the legacy of all advanced and enlightened states" and to "basic rights which are not recorded in texts, but emanate directly from the character of our state as democratic and freedom-loving."<sup>49</sup>

In the landmark decision for judicial review, *United Mizrahi Bank v. Migdal Cooperative Village*,<sup>50</sup> Justice Barak validated judicial review as an

<sup>43</sup> Barak, *supra* note 24, at 11.

<sup>44</sup> H.C. 73/53, "Kol Ha'am" Co. v. Minister of Interior, 7 P.D. 871, *reprinted in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 105 (1962).

<sup>45</sup> *Id.* at 105.

<sup>46</sup> "Moreover, the matters set forth in the Declaration of Independence, especially as regards the basing of the State 'on the foundations of freedom' and the securing of freedom of conscience, mean that Israel is a freedom-loving State." *Id.*

<sup>47</sup> The Declaration of the Establishment of the State of Israel, 1 L.S.I. 3 (1948).

<sup>48</sup> LEON SHELEFF, WHEN A MINORITY BECOMES A MAJORITY—JEWISH LAW AND TRADITION IN THE STATE OF ISRAEL, IN INTRODUCTION TO THE LAW OF ISRAEL 120 (Amos Shapira ed. 1997).

<sup>49</sup> H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617, *reprinted in* 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 77, 89 (1989) (citations omitted).

<sup>50</sup> *United Mizrahi Bank v. Migdal Cooperative Village*, 49(iv) P.D. 221, *translated in* Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259



affirmation of democracy itself. “[T]he judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of basic values and human rights as expressed in the constitution.”<sup>51</sup> Israel’s constitution, The Basic Law: Human Dignity and Liberty, recognizes human rights as fundamental, reaffirms the principles of the Declaration of Independence,<sup>52</sup> and identifies “the values of the state of Israel as a Jewish and democratic state.”<sup>53</sup>

Professor Barak has also pointed to the Jewish heritage and traditions and Jewish law as sources of moral values:

“A Jewish state” is a country that espouses the values of freedom, justice, equity and peace that are part of the heritage of Israel. “A Jewish state” is a state whose values are drawn from its religious tradition, in which the Bible is the basis of its literature and the prophets of Israel are the foundations of its morality . . . . “A Jewish state” is a state in which the values of the Torah, the values of the Jewish tradition and the values of Jewish law are among its most fundamental values.<sup>54</sup>

### III. JUDICIAL REVIEW FAILS THE RULE OF LAW IN TIME OF WAR

I shall contend next that in a war against terrorism, for a democracy like the United States or Israel, judicial review fails to protect the goals of the rule of law, and, in turn, creates undemocratic results. In the case of Israel, it also produces results that are inimical to Jewish values.

Is the law silent in war? Cicero said yes: *inter arma silent leges*.<sup>55</sup> I will first explore the American experience, which yields contradictory positions. During the Civil War, President Lincoln suspended the constitutional privilege of the writ of *habeas corpus* and imposed martial law, pursuant to Congressio-

---

(1999).

<sup>51</sup> *Id.* at 287-88.

<sup>52</sup> Basic Principles § 1, translated in Barak, *supra* note 7, at 21.

<sup>53</sup> *Id.*; see Dan Avnon, *The Israeli Basic Laws' (Potentially) Fatal Flaw*, 32 ISR. L. REV. 535 (1998) (criticizing standard).

<sup>54</sup> 3 AHARON BARAK, INTERPRETATION IN LAW, CONSTITUTIONAL INTERPRETATION (1994) (Hebrew), reprinted in SHIMON SHETREET, BETWEEN THREE BRANCHES OF GOVERNMENT: THE BALANCE OF RIGHTS IN MATTERS OF RELIGION IN ISRAEL (2001).

<sup>55</sup> H.C. 7015/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1, 34 (Israel) (quoting CICERO, PRO MILONE).

nal authority. In this context, a military tribunal tried, convicted, and imposed the death penalty on one L.P. Milligan, a civilian and citizen of Indiana, a non-rebellious state, on charges of conspiracy to release and arm rebel prisoners of war. In *Ex Parte Milligan*,<sup>56</sup> a unanimous Supreme Court held that the military trial of Milligan was without legal authority. Speaking separately for the majority, Justice Davis chastised the President for acting outside the law in time of war:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, and the theory of necessity on which it might be based is false for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.<sup>57</sup>

The law, said Justice Davis, protects human rights; “withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people.”<sup>58</sup> In the annals of American constitutionalism, *ex parte Milligan* is the finest hour for human rights and the rule of law in time of war.

---

<sup>56</sup> *Ex Parte Milligan*, 71 U.S. 2 (1866). See generally ALFRED H. KELLEY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION—ITS ORIGINS AND DEVELOPMENT* 441-48 (3d ed. 1963).

<sup>57</sup> *Ex Parte Milligan*, 71 U.S. at 120-21.

<sup>58</sup> *Id.* at 119. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952):

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up. We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: “Then I am to be under the law—which it is treason to affirm.” Chief Justice Coke replied to his King: “Thus wrote Bracton. ‘The King ought not to be under any man, but he is under God and the law.’”

The darkest moment was *Korematsu v. United States*,<sup>59</sup> decided before the end of World War II. I have chosen this case especially because the Supreme Court of Israel has used *Korematsu*, ill-advisedly, as a barometer for judicial review. Fearing a Japanese invasion of the West Coast and acts of espionage and terrorism from supposedly disloyal Japanese-Americans, President Roosevelt initially ordered curfew, and then ordered the exclusion of Japanese-Americans from certain designated military areas.<sup>60</sup> He subsequently authorized the removal and internment of more than 120,000 individuals of Japanese descent.<sup>61</sup> As many as 77,000 were United States citizens.<sup>62</sup> They were taken from their homes, separated from their property and employment, and relocated to segregated detention centers for up to four years. All of this was accomplished pursuant to a series of executive orders promulgated by the President in his capacity as the Commander-in-Chief of the military. Congress enacted a law to grant the executive branch authority to enforce these directives through the criminal law.<sup>63</sup> *Korematsu*, a United States citizen of Japanese descent, was convicted in a civilian court for remaining unlawfully in a designated military zone. His loyalty to the United States was never questioned.<sup>64</sup> Justice Black, speaking for the Supreme Court majority, dodged the constitutionality of the internment orders and limited the Court's judicial review to the exclusion order. The court found that the exigencies of war justified the order.<sup>65</sup>

Absent from the Court's judgment was a discussion, or even a hint, that this kind of treatment of United States citizens was an affront to the values of American democracy. In war, the law was silent; at least that is how Justice Frankfurter saw it. In his concurrence, Frankfurter stated that "the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless."<sup>66</sup> Justice Murphy wrote a blistering dissent, characterizing the exclusion order as "go[ing] over 'the very brink of constitutional power'

---

<sup>59</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>60</sup> See S. REP. NO. 100-202 (1987), reprinted in 1988 U.S.C.C.A.N. 1135, 1136-37 (apologizing to citizens and resident aliens of Japanese ancestry who were evacuated, relocated and interned during WWII).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*; see generally KELLEY & HARBISON, *supra* note 56, at 835-41.

<sup>64</sup> See *Korematsu v. United States*, 323 U.S. at 215-16.

<sup>65</sup> See *id.* at 223-24.

<sup>66</sup> *Korematsu v. United States*, 323 U.S. at 224 (Frankfurter, J., concurring).

and fall[ing] into the ugly abyss of racism.”<sup>67</sup> Justice Jackson dissented separately, explaining that it is the duty of the Court to expound the meaning of the Constitution no matter how expedient or necessary a military order may be.<sup>68</sup>

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.<sup>69</sup>

Chief Justice Rehnquist, in his recent book *All The Laws But One*, validated Cicero’s maxim that in time of war the law is silent. This maxim, according to Chief Justice Rehnquist, explains why the Court, which decided *Korematsu* during the war, was “unwilling . . . to decide constitutional questions unnecessarily. . . .”<sup>70</sup> But what Chief Justice Rehnquist fails to acknowledge is that the Court’s self-imposed limitations on judicial review defeated for thousands of citizens the very essence of American democratic values: freedom, justice, and fairness.

Years later, the Congress of the United States formally apologized to the Japanese-American community. It concluded that the rule of law had failed to protect the constitutional rights of resident aliens and United States citizens.<sup>71</sup>

The Congress finds that the internment in the United States of permanent resident aliens, and American citizens, of Japanese ancestry was carried out without any documented acts of espionage or sabotage, or other acts of disloyalty, by any citizen or permanent resident alien of Japanese ancestry on the West Coast. Nor was there any military reason for the relocation. In fact, racial prejudice, war hysteria, and a failure of political leadership caused the internment . . . . Congress finds that the exclusion and relocation caused individuals of Japanese ancestry

---

<sup>67</sup> *Id.* at 233 (Murphy, J., dissenting).

<sup>68</sup> *See id.* at 247.

<sup>69</sup> *Id.* at 247 (Jackson, J., dissenting).

<sup>70</sup> WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE—CIVIL LIBERTIES IN WARTIME* 202 (1998).

<sup>71</sup> *See* S. REP. NO. 100-202, *supra* note 60, at 1147.

enormous damages and losses, as well as incalculable losses in education and job training, all of which resulted in significant human suffering. The evacuation and internment fundamentally violated the basic civil liberties and constitutional rights of the individuals of Japanese ancestry so affected.<sup>72</sup>

Another failure of American constitutionalism in the wake of terrorism is the current use of secret courts and secret evidence. In *North Jersey Media Group, Inc. v. Ashcroft*,<sup>73</sup> the United States Court of Appeals for the Third Circuit ruled that administrative directives to close “special interest” deportation hearings to the public and the press in the adjudication of individuals with connection to or having knowledge of the September 11, 2001 terrorist attacks are constitutional. The court abdicated its role as the protector of individual rights when it acknowledged that the Government had presented “substantial evidence” that openness “would threaten national security,”<sup>74</sup> but that it was “quite hesitant to conduct a judicial inquiry into the credibility of these security concerns . . . .”<sup>75</sup> The court reasoned that the judiciary should extend “great deference to Executive expertise” regarding national security.<sup>76</sup> The court concluded that “[t]o the extent that the Attorney General’s national security concerns seem credible, we will not lightly second-guess them.”<sup>77</sup>

In contrast to the *North Jersey Media* case, the United States Court of Appeals for the Sixth Circuit ruled in favor of openness in *Detroit Free Press v. Ashcroft*.<sup>78</sup> Openness of court proceedings promotes fundamental democratic values, assures fairness in administrative proceedings, guards against

---

<sup>72</sup> *Id.*

<sup>73</sup> 308 F.3d 198 (3d Cir. 2002).

<sup>74</sup> *Id.* at 217. *But see* JOHN RAWLS, A THEORY OF JUSTICE 210 (Rev. ed. 1999) (“Trials must be fair and open, but not prejudiced by public clamor. The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained.”).

<sup>75</sup> *North Jersey Media Group, Inc.*, 308 F.3d at 219.

<sup>76</sup> *Id.*; *see, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that “terrorism or other special circumstances” might warrant “heightened deference to the judgments of the political branches with respect to matters of national security”). *See also* *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting that “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”). The assessments before us have been made by senior government officials responsible for investigating the events of September eleventh and for preventing future attacks. These officials believe that closure of special interest hearings is necessary to advance these goals, and their concerns, as expressed in the Watson Declaration, have gone un rebutted.

<sup>77</sup> *North Jersey Media Group, Inc.*, 308 F.3d at 219.

<sup>78</sup> 303 F.3d 681 (6th Cir. 2002).

governmental mistakes, provides catharsis and therapeutic outlet for the public, enhances the public's confidence that proceedings reflect "integrity and fairness," and allows the citizenry to be educated participants in the political process of "our republican system of self-government."<sup>79</sup> Judge Keith understood that secrecy is foreign to democratic values, as he expressed in the statement: "[d]emocracies die behind closed doors."<sup>80</sup> On the other hand, openness serves to protect the durability of a democracy. In the words of Judge Keith, "[a] government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution."<sup>81</sup>

Has judicial review in Israel promoted democratic values and in turn individual rights and human rights as the state combats terrorism? In a recent decision of the High Court of Justice, *Ajuri v. IDF Commander*,<sup>82</sup> Justice Barak, who had authored a unanimous decision for the nine member court, took issue with Chief Justice Rehnquist and declared that the Roman maxim " 'In battle laws are silent' . . . does not reflect the law as it is, nor as it should be."<sup>83</sup> This is how the Israeli Supreme Court sees itself these days. As an outsider looking in, I have reluctantly concluded that this is an illusion. In the judicial review process of legal claims brought by the inhabitants of the occupied territories, the Court has demonstrated scrupulous adherence to procedural process, but it has avoided the harder substantive question of the day. Namely, are the various practices of the IDF and the security forces in

---

<sup>79</sup> *Id.* at 703-05.

<sup>80</sup> *Id.* at 683.

<sup>81</sup> *Id.* at 710.

<sup>82</sup> HC 7015/02, *Ajuri v. IDF Commander*, [2002] I.L.R. (Israel).

<sup>83</sup> *Id.* at 35 (relying on the dissent of Lord Atkin in *Liversidge v. Anderson*, 3 All E.R. 338, 361 (1941) who had proclaimed:

In [England] amid 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 on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alter to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

The English courts have acknowledged the correctness of his position. *See, e.g.*, *Inland Revenue Commissioners and Another v. Rossminster Ltd. and Others*, 1 All E.R. 80, 93 (1980). *See also* H.C. 608/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617, *reprinted in* 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 77, 108.

their treatment of the Palestinian people morally acceptable to a state that professes democratic and Jewish values?

A case in point is the practice of home demolition. Israel has inherited the practice of home demolition from English Mandatory Palestine. The Military Commander of the occupied territories has the authority to issue a home demolition order pursuant to Regulation 119 of the Defence (Emergency) Regulations of 1945.<sup>84</sup> The authority is extra-judicial but is subject to Israel's administrative law and procedure. It is widely used by the IDF as punishment for past terrorist acts and to deter against future acts of terrorism.<sup>85</sup> This practice of home demolition violates international law. Article 53 of the Fourth Geneva Convention prohibits home demolition "except where such destruction is rendered absolutely necessary by military operations."<sup>86</sup>

---

<sup>84</sup> The Regulation was promulgated by the Mandatory High Commissioner. 1442 Palestine Gazette, Supp. No. 2 1055, 1089 (September 27, 1945), as amended by 1600 Palestine Gazette Extraordinary, Supp. 2, 1159 (July 31, 1947). It was made part of the law of the State of Israel. See 11 Law and Administration Ordinance, 5708-1948:

119.(1) A Military Commander may by order direct the forfeiture to the Government of Israel of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged, or of any house, structure or land situated in any area, town, village, quarter or street, the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land. Where any house, structure or land has been forfeited by order of a Military Commander as above, the Defence Minister may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land shall revert in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order of forfeiture had not been made.

<sup>85</sup> For example, on December 13, 2002, security forces destroyed the homes of two terrorists in the Hebron area. One was "the home of Hamas terrorist Imad Razam who attempted to infiltrate the yeshiva in Givat Haharsina on June 20." The other belonged to Ali Muhammad Atsfara, "an accomplice in the terrorist infiltration of Karmeit Zsur on June 8 in which three Israelis were killed and five wounded." Margot Dudkevitch, *Buildings Used in Hebron Attack on Military Police Destroyed*, JERUSALEM POST, Dec. 15, 2002, at 2.

<sup>86</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August

Typically, home demolitions are not carried out as an incident to actual military combat situations. Generally, home demolition makes innocent members of the terrorist's family homeless, and therefore it is an illegal punishment of a person "for an offence he or she has not personally committed."<sup>87</sup> In most instances, demolition acts as impermissible collective punishment of innocent individuals including children and the elderly, and as such, constitutes a "grave breach" of international humanitarian law.<sup>88</sup>

---

12, 1949, art. 53, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention] ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited except where such destruction is rendered absolutely necessary by military operations."). See also *id.*, art. 33 ("Reprisals against protected persons and their property are prohibited.").

According to the Israeli human rights organization B'Tselem, Israel has completely demolished 644 homes and partially demolished another 64 homes since the beginning of the first *intifada* (Dec. 9, 1987) through the end of 2002. See The Israeli Information Center for Human Rights in the Occupied Territories, House Demolitions-Statistics, at [http://www.btselem.org/english/House\\_Demolitions/Statistics.asp](http://www.btselem.org/english/House_Demolitions/Statistics.asp). But see Emanuel Gross, *Democracy's Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area*, 30 GA. J. INT'L & COMP. L. 165, 201 (2002) (arguing that home demolition is justified to prevent its use as a future terrorist base and even as a "punitive conception").

<sup>87</sup> Fourth Geneva Convention, *supra* note 86, at art. 33: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited."

<sup>88</sup> *Id.* art. 147.

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

See Emanuel Gross, *Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standards*, 31 CAL. W. INT'L L.J. 215, 220 (2001) (arguing that courts should balance the deterrent effect with the rights of innocent family members and to apply the test of proportionality).



The practice of home demolition came before the High Court of Justice in *Association for Civil Rights in Israel v. Central District Commander*.<sup>89</sup> In this decision, the court established procedures for judicial review of a military commander's order to demolish a home before its execution.<sup>90</sup> The judgment of the High Court focused on procedural aspects of home demolitions. It did not, however, address the hard question: whether the practice violates the substantive rights of the individuals who had been made victims of its policy.

According to the judgment, home demolition promotes public safety and order through deterrence.<sup>91</sup> It also suggests that home demolition is an appropriate punishment for a criminal act detrimental to safety and public order.<sup>92</sup> It then establishes procedural steps for judicial review. An aggrieved person whose property is slated by the Military Commander for demolition, except in military-operational situations that require immediate action, has the right to be heard before the demolition takes place. The applicant has the right to receive notice of the commander's order, and the right to an opportunity to be heard at an administrative hearing before the Military Commander and a panel, with the assistance of counsel of his or her choosing. A final order of the hearing panel is then reviewable by the High Court of Justice.<sup>93</sup> This process, according to Justice Shamgar who had authored the Court's judgment, is not required by the international law of occupation,<sup>94</sup> but is instead mandated by Israel's administrative law.<sup>95</sup> The function of judicial review is to examine whether the commander has exercised his discretion lawfully and whether a demolition in a given situation is "commensurate with the seriousness of the act" which prompted the order.<sup>96</sup>

---

<sup>89</sup> H.C. 358/88, *Assoc. for Civil Rights in Israel v. Cert. Dist., Commander*, 43(2) P.D. 529, reprinted in 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (1989).

<sup>90</sup> *Id.* at 13. One example of this is the appeal to the Supreme Court from the order of Central Command that Major-General Moshe Kaplinsky issued on November 29, 2002, to demolish Palestinian homes in the Hebron area in response to the murder of twelve soldiers and border policemen twelve days earlier. See Dan Izenberg, *High Court Delays IDF Demolition of Arab Homes in Hebron*, JERUSALEM POST, Dec. 19, 2002, at 2.

<sup>91</sup> H.C. 358/88, *Assoc. for Civil Rights in Israel v. Cert. Dist. Commander*, 43(2) P.D. 529, reprinted in 9 SELECTED JUDGMENT OF THE SUPREME COURT OF ISRAEL 1 (1989).

<sup>92</sup> *Id.* at 17.

<sup>93</sup> *Id.* at 19.

<sup>94</sup> *Id.* at 13 (referring to Regulation 43 to the Supplement to the 1907 Hague Regulations Regarding the Law and Customs of War of Land, and Article 64 of the Fourth Geneva Convention).

<sup>95</sup> *Id.* at 13.

<sup>96</sup> *Id.* at 16.

In its zeal to accommodate procedural due process, the Court overlooked the substantive rights of the victims of home demolition. It did not look at the human tragedy that follows the destruction of a home. Missing from the Court's judgment was an acknowledgement that this practice derogates democratic values, demeans the dignity and security of the home dwellers, and diminishes the integrity and social fabric of the family unit and the interests of home ownership. I agree with Professor Dan Simon's assessment that formalism in the judicial review process "immunize[s] the practice [of demolition] from moral or legal scrutiny."<sup>97</sup> The judgment is not only silent on democratic principles, but it also exacerbates the problem by allowing the Court to delude itself into believing that what the Court affords Palestinians procedurally is more than what is due under international law. This is especially true when the practice of home demolition is compared to what the United States Supreme Court sanctioned in *Korematsu v. United States*.<sup>98</sup>

The judgment of the High Court also stands at odds with Jewish values. The rule of law *is* a Jewish concept. It is embedded in moral values, foremost of which is the concept of justice. "Shall the Judge of all the earth not do Justice,"<sup>99</sup> implored Abraham. The call for justice is at the core of Jewish values. "Justice, justice shall you pursue," proclaimed Moses.<sup>100</sup> One Torah scholar posited that the repetition of the word "justice" in the foregoing command is to signal two separate components of justice: that the end must be just, and the means must also be just. "It is not enough to seek righteousness; it must be done through honest means: the Torah does not condone the pursuit of a holy end through improper means."<sup>101</sup> The Prophets of Israel heralded justice as a key to Jewish life. Isaiah said, "[l]earn to do good, seek justice, vindicate the victim, render justice to the orphan, take up the grievance of the widow."<sup>102</sup> Hosea implored, "[s]ow for yourselves righteousness and you will reap according to kindness; till for yourselves a tilling and set a time to seek

---

<sup>97</sup> Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 38 (1994).

<sup>98</sup> *Id.* at 14.

<sup>99</sup> *Genesis*, 18:25.

<sup>100</sup> *Deuteronomy*, 16:20.

<sup>101</sup> Rabbi Bunam of P'shis'cha. RABBI NOSSON SCHERMAN, THE CHUMASH-THE STONE EDITION 1025, n.20 (1993) (explaining the words of Rabbi Bunam of P'shis'cha). Rabbi Bunam restated Rashi's commentary: *Haloch achar beit din yafeh*. "Go seek a proper court of justice." Rashi drew on *Sifrei* and *Sanhedrin* 32b to conclude that both the end and the means must be just. V CHUMASH AND RASHI'S COMMENTARY 86 (Rabbi A.M. Silbermann ed. 1985).

<sup>102</sup> *Isaiah*, 1:17.

God until He comes and teaches you righteousness."<sup>103</sup> Amos proclaimed, "establish justice by the gate";<sup>104</sup> "let justice well up as waters, and righteousness as a mighty stream."<sup>105</sup> Micha asked, "[w]hat does God require of you but to do justice, to love kindness and to walk humbly with your God?"<sup>106</sup> And Zechariah admonished the Nation to act, "[n]ot by might, and nor by power, but by My spirit says the Lord of Hosts."<sup>107</sup>

Equally clear is the Jewish view that in war the law is *not* silent. Jewish values recognize the dignity of every person, including the enemy, and links this human right to the concept of justice in the execution of war. The Torah instructs, for example, that a soldier who captures a woman must not dishonor her because she is entitled to her dignity even in her captivity.<sup>108</sup> Equally instructive is the obligation of a king to write for himself two copies of the Torah in a scroll, which he must carry with him at all times. "[H]e shall read in it all the days of his life" in order to observe the commands of the law.<sup>109</sup> Maimonides (Rambam) interprets this command to mean that "[w]hen he goes to war, this [scroll] should accompany him."<sup>110</sup> Home demolition is the antithesis to Jewish values, as the Torah instructs that one is obligated to build a home. For example, a soldier who was not able to complete the task of building his home was given an exemption from military service during war. "Let him go and return to his house, lest he die in the war and another man will inaugurate it."<sup>111</sup> The home in Jewish tradition represents the sanctity and the integrity of the family, and the cradle of its spirituality. "How goodly are your tents, O Jacob, your dwelling places, O Israel."<sup>112</sup> The home of a neighbor, including an enemy, deserves the protection of the law to safeguard its inhabitants from the violence of war. "You shall love your neighbor as yourself . . . ."<sup>113</sup> Rabbi Hillel explained that this verse is the centrality of

<sup>103</sup> *Hosea*, 10:12.

<sup>104</sup> *Amos*, 5:15.

<sup>105</sup> *Amos*, 5:24.

<sup>106</sup> *Micha*, 6:8.

<sup>107</sup> *Zechariah*, 4:6.

<sup>108</sup> *Deuteronomy*, 21:10-14.

<sup>109</sup> *Deuteronomy*, 17:18-20.

<sup>110</sup> MAIMONIDES, *Sefer Shoftim, Hilchot Melachim U'milchamotehem (The Laws of Kings and Their Wars)*, in *MISHNEH TORAH* 516 (Rabbi Eliyahu Touger trans. 2001).

<sup>111</sup> *Deuteronomy*, 20:5. See also MAIMONIDES, *supra* note 110, at 568 (discussing the one year deferment granted for building and dedicating a home, marrying "the woman he consecrated or his *yevamah*," or for redeeming his vineyard).

<sup>112</sup> *Numbers*, 24:5.

<sup>113</sup> *Leviticus*, 19:18.

Judaism. "What is hateful to you, do not do to another; this is the basis of the entire Jewish law, while the rest is a mere commentary thereon."<sup>114</sup> Rabbi Akiba declared that the command to "love thy neighbor as thyself is the most comprehensive rule of the Torah."<sup>115</sup> The Torah instructs that in waging war against a city under siege, soldiers must not destroy the fruit bearing trees.<sup>116</sup> Maimonides comments that this prohibition also protects against the drying up of the enemy's irrigation ditches, as both serve the subsistence needs of the people under siege.<sup>117</sup> According to Maimonides, the prohibition also applies to the destruction of buildings.<sup>118</sup>

Home demolition also represents impermissible collective punishment. It punishes the innocent along with the guilty. The Torah teaches against collective punishment. "Fathers shall not be put to death because of sons, and sons shall not be put to death because of fathers; a man should be put to death for his own sin."<sup>119</sup> Abraham's plea to God is a powerful illustration of individualized punishment: "[w]ill You also stamp out the righteous along with the wicked?"<sup>120</sup> "It would be sacrilege to You to do such a thing, to bring death upon the righteous along with the wicked; so the righteous will be like the wicked. It would be sacrilege to You . . . ."<sup>121</sup>

Professor Sheleff is correct in his observation that the Supreme Court of Israel generally fails to consider Jewish values in the judicial review process in cases that address individual rights. He suggests that Jewish traditions should be used as a complement to democratic principles, and that "there may be aspects of social life in which the Jewish approach is more progressive and enlightened than what some democracies are prepared to accept . . . ."<sup>122</sup>

<sup>114</sup> II SOLOMON GANZFRIED, *KITZUR SHULHAN ARUKH—CODE OF JEWISH LAW* note xiv (1963) (quoting *Shabbat* 31a).

<sup>115</sup> *Id.*

<sup>116</sup> *Deuteronomy*, 20:19. See also III E. DEVATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* § 166, 293 (Charles G. Fenwick trans. 1916).

Those who tear up vines and cut down fruit trees, unless their object be to punish the enemy for some offense against the Law of Nations, are to be regarded as savages; they render a country desolate for many years and go far beyond the needs of their own safety. Such conduct is dictated not by prudence, but by hatred and passion.

<sup>117</sup> See MAIMONIDES, *supra* note 110, at 554.

<sup>118</sup> *Id.* at 556. See also MAIMONIDES, *SEFER HA-MITZVOH OF MAIMONIDES* 54-55 (Charles B. Chavel trans. 1967).

<sup>119</sup> *Deuteronomy*, 24:16.

<sup>120</sup> *Genesis*, 18:23.

<sup>121</sup> *Genesis*, 18:25.

<sup>122</sup> SHELEFF, *supra* note 48, at 128-29.

Another example of skewed judicial review, this time in Israel's post constitutional revolution, is the case of *Public Committee Against Torture in Israel v. General Security Service*.<sup>123</sup> In this case, the Supreme Court reviewed the practice of the General Security Service ("GSS"), which allowed investigators to use various forms of "physical means" during the interrogation of terrorists who had committed crimes against the security of the State of Israel. The applicants characterized these practices as "torture".<sup>124</sup> The authority to use physical means during such interrogations rested on the agency's own internal regulations, which the special Ministerial Committee on GSS had later approved. Although the Court did not examine these directives,<sup>125</sup> it did review the findings of the Commission of Inquiry Regarding the GSS' Interrogation Practices with Respect to Hostile Terrorist Activities, a commission that had been chaired by retired Supreme Court Justice Moshe Landau, which had sanctioned some coercive interrogation methods.<sup>126</sup>

The Supreme Court sitting as the High Court of Justice addressed four separate legal questions. First, did the GSS have explicit statutory authority to interrogate? Second, in the absence of expressed legislative authority, could the authority be implied from the executive's residual or prerogative powers? Third, may a GSS investigator, who in the eyes of the law is a police officer, make use of physical means in the course of an interrogation? Lastly, is such conduct authorized by the criminal law's necessity defense?<sup>127</sup> The Court answered each question in the negative. The expanded Court of nine judges ruled unanimously; however, Justice Kedmi wrote a separate concurrence.<sup>128</sup>

Seven separate petitions were brought to the Court. Five applicants were individuals who had personally experienced "physical means" while being interrogated by GSS personnel. The remaining two petitioners were NGOs, the Public Committee Against Torture in Israel<sup>129</sup> and the Association for Civil

---

<sup>123</sup> H.C. 5100/94, *Judgement on the Interrogation Methods applied by the GSS*, Sept. 6, 1999, available at <http://www.derechos.org/human-rights/mena/doc/torture.html> [hereinafter *GSS*].

<sup>124</sup> *Id.* at 8.

<sup>125</sup> *Id.* at 5.

<sup>126</sup> *See id.* at 3, 9. The Commission "officially and explicitly sanctioned the use in interrogations (though not in the preinterrogation detention period) of 'psychological pressure' and 'moderate physical pressure,' in effect giving the GSS, and in some cases the police, blanket permission to use certain forms of torture." BENNY MORRIS, *RIGHTEOUS VICTIMS* 600-01 (2001).

<sup>127</sup> *See GSS*, *supra* note 123, at 10-25.

<sup>128</sup> *See id.*

<sup>129</sup> *See id.* at 1, 3-4.

Rights in Israel.<sup>130</sup> Their participation before the High Court of Justice exemplifies the Court's relaxed standing doctrine, which confers standing to organizations and individuals whose claims raise substantial questions of constitutional law that go to the heart of the state's democratic values and its commitment to the rule of law.<sup>131</sup> A more relaxed standing rule apparently allows the Court to secure its authority to review human rights violations.

Unlike the home demolition case that was devoid of a human face, this decision informs the reader of the interrogation methods in detail. Petitioners Wa'al Al Kaaqua and Ibrahim Abd'alla were arrested in June, 1996. On July 21, 1996, their attorney sought a preliminary injunction (order *nisi*) to prohibit the use of physical means during their interrogation sessions. The Court granted the order, and subsequently the two individuals were released from custody prior to the final hearing before the Court. It is noteworthy that the Court elected to hear their claims even after their release "in light of the importance of the issues they raise in principle."<sup>132</sup> Hat'm Abu Zayda was arrested on September 21, 1995, and interrogated by the GSS until October 19,

---

<sup>130</sup> See *id.* at 1, 4.

<sup>131</sup> The standing rules have been relaxed to allow NGO's and individuals without personal interest in the litigation (*actio popularis*) to bring these type of cases before the High Court of Justice. See, e.g., Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 96 (1991) (citing H.C. 910/86, Ressler v. Minister of Defence, 42(2) P.D. 441, 449-72, 509-12, 514 (1990)). Generally, standing is limited to a person who has a sufficient interest in the case. This "means that the applicant must have some personal interest different from that of the public at large." I. Zamir, *The Rule of Law and Civil Liberties in Israel*, 7 CIV. JUST. Q. 64, 69 (1988). The Supreme Court will in its discretion allow this type of intervention in cases involving rule of law concerns: Professor Zamir explained the reasons as:

- (1) that in matters of constitutional importance it is desirable to have an authoritative statement of the law;
- (2) that the rule of law, requiring the prevention of unlawful governmental action, should not be compromised on procedural grounds; and
- (3) that in some cases dismissal of an application for lack of standing is practically tantamount to a grant of immunity from judicial review.

*Id.* at 69. According to former Justice Netanyahu, the rule of standing must remain "flexible". She explained: "The greater the defect complained of, the more prominent the character of the dispute, the more it affects the public at large, the fewer are the holders of rights and interests. All the more reason in such cases to recognize the public petition. Access to the Court is the cornerstone of the rule of law. Closing the Court's doors to the public petitioner in such situations would mean refraining from performing the Court's duty to maintain the rule of law by imposing it on the Governmental authority." Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1, 5 (1993).

<sup>132</sup> GSS, *supra* note 123.

1995. On October 22, 1995, his attorney filed an action before the High Court of Justice complaining about various interrogation methods. Zayda was subsequently convicted of terrorist activities and sentenced to 74 months in prison.<sup>133</sup> Abd al Rahman Ismail Ganimat was arrested on November 13, 1997, and interrogated by the GSS. He appealed to the High Court of Justice on December 24, 1997. Subsequently, he was convicted of various terrorist acts of murder and sentenced to five consecutive life sentences and an additional twenty year sentence.<sup>134</sup> Fouad Awad Quran was arrested on December 10, 1997, and interrogated by the GSS. He petitioned the Court on December 25, 1997. The Court issued an order *nisi* and held an immediate hearing. The State assured the Court at that time that the GSS was no longer employing the *shabach* method against him, and therefore the Court did not enter a preliminary injunction.<sup>135</sup> Issa Ali Batat was arrested on February 22, 1999. He turned to the Court for a preliminary injunction. At a hearing on the application, the Court was informed by the State that he had been indicted and was awaiting trial and that his interrogation had ended.<sup>136</sup>

In this consolidated case, and in each previous separate preliminary hearing, the applicants were represented by counsel. Moreover, the Court was not sitting as an appellate court to review the lawfulness of the arrests or the convictions.<sup>137</sup> The Court reached its judgment without expressing any concern for standing or mootness, notwithstanding the eventual termination of the interrogation of the five individual applicants, the release, indictment and pendency of trial, or conviction of the various petitioners.<sup>138</sup>

The State was prepared to present evidence by GSS investigators *in camera* but the applicants had objected to this procedure. Instead, the Court received

---

<sup>133</sup> *Id.* at 4.

The convicting Court held that the applicant both recruited and constructed Hamas' infrastructure, for the purpose of kidnapping Israeli soldiers and carrying out terrorist attacks against security forces. It has been argued before us that the information provided by the applicant during the course of his interrogation led to the thwarting of an actual plan to carry out serious terrorist attacks, including the kidnapping of soldiers.

<sup>134</sup> *See id.* His interrogation revealed that he was involved in numerous terrorist activities in the course of which many Israeli citizens were killed. He was instrumental in the kidnapping and murder of [an] IDF soldier . . . . Additionally, he was involved in the bombing of the Cafe "Appropo" in Tel Aviv, in which three women were murdered and thirty people were injured.

<sup>135</sup> *See id.* at 5.

<sup>136</sup> *Id.* at 5.

<sup>137</sup> *See id.* at 11-15.

<sup>138</sup> *See generally id.*

affidavits and counter-affidavits from the parties. The State did not deny the allegations and offered instead an explanation to justify the GSS practices.<sup>139</sup> On the practice of shaking,<sup>140</sup> the Court received affidavits of expert witnesses and counter opinions.<sup>141</sup> On the practice of *shabach*,<sup>142</sup> the Court reviewed affidavits submitted by the applicants and the State's explanation.<sup>143</sup> On the "Frog Crouch" method,<sup>144</sup> the Court reviewed the lone applicant's affidavit.<sup>145</sup> On the practice of excessive tightening of handcuffs, it appears that the Court did not receive affidavits, although some of the applicants had complained about this practice in their applications.<sup>146</sup> The same can be said of the complaints against the practice of sleep deprivation.<sup>147</sup>

Justice Barak, who had authored the Court's judgment, first determined that the GSS investigators did not have statutory authority to interrogate. An interrogation infringes on the freedom of the person who is interrogated. As such, he concluded, an interrogation by one who is not explicitly authorized by statute to interrogate, violates the "Rule of Law" and the "principle of administrative legality."<sup>148</sup> The "Rule of Law" is identified here to be both procedural and substantive. Since no explicit statutory authority exists, it follows that the GSS interrogation is *ultra vires* and illegal.<sup>149</sup> The Court next rejected the State's argument that the authority of the GSS to interrogate could be implied from the government's "residual or prerogative powers."<sup>150</sup> Justice

---

<sup>139</sup> See *id.* at 5.

<sup>140</sup> See *id.* at 6. The shaking method involves "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." One person died during such procedure.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* The suspect is seated on a small, low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Loud music is played in the room. According to the affidavits submitted, suspects are detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals.

<sup>143</sup> See *id.* at 7.

<sup>144</sup> *Id.* The practice involves periodic crouching on the tips of the individual's toes, each time lasting five minutes.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> *Id.* at 12.

<sup>149</sup> See *id.*

<sup>150</sup> *Id.* Article 40, Basic Law: The Government. The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on



Barak explained that this authority empowers the executive to act if and when there is an "administrative vacuum."<sup>151</sup> "A so-called 'administrative vacuum' of this nature does not appear in the case at bar, as the relevant field is entirely occupied by the principle of individual freedom."<sup>152</sup>

To allow the government to act without explicit authority would undermine the democratic nature of the state.<sup>153</sup> Justice Barak reasoned that:

An individual's liberty is not to be the object of an interrogation—this is a basic liberty under our constitutional regime. There are to be no infringements on this liberty absent statutory provisions which successfully pass constitutional muster. The government's general administrative powers fail to fulfill these requirements.<sup>154</sup>

The Court next determined that the GSS directives, even with ministerial approval, would not have the force of law, and therefore, they cannot grant lawful authority to interrogate.<sup>155</sup> Justice Barak found the authority of the GSS to interrogate in Article 2(1) of the Criminal Procedure Statute, explaining that "GSS investigators are tantamount to police officers in the eyes of the law."<sup>156</sup>

another authority.

<sup>151</sup> *Id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.* at 13.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> *Id.* The Court continues:

Article 2(1) of the Criminal Procedure Statute [Testimony] provides (in its 1944 version, as amended):

A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined.

It is by virtue of the above provision that the Minister of Justice particularly authorized the GSS investigators to conduct interrogations regarding the commission of hostile terrorist activities. It has been brought to the Court's attention that in the authorizing decree, the Minister of Justice took care to list the names of those GSS investigators who were authorized to conduct secret interrogations with respect to crimes committed under the Penal Law-1977, the Prevention of Terrorism Statute-1948, the (Emergency) Defence

He concluded, however, that this authority does not allow the use of physical means to extract a confession.

The heart of the Court's opinion is devoted to a review of the principles and values that Justice Barak believes characterize a democratic regime. Among them is the recognition that when an investigator uses physical means to obtain a confession, he harms the suspect's fundamental right to dignity and at the same time tarnishes society's fabric as a whole.<sup>157</sup> He concludes that the prohibition against the use of force during interrogation is mandated first by the state's law of interrogation. An ordinary police officer cannot use physical means in the interrogation of a suspect. It follows that a GSS investigator has no greater authority while interrogating a suspect.<sup>158</sup> The second rationale for not allowing the practice is the limitation of the law on the state under various international treaties, to which it is a signatory, prohibiting such conduct.<sup>159</sup> "These prohibitions, [he declares], are 'absolute'. There are no exceptions to them and there is no room for balancing."<sup>160</sup> The Court was willing to assume that the defense of necessity would be available in certain circumstances to a GSS investigator who had used unlawful physical means to obtain a confession from a suspected terrorist and was himself later prosecuted on criminal charges.<sup>161</sup> A "ticking bomb" situation would probably qualify. Justice Barak

Regulations-1945, The Prevention of Infiltration Statute (Crimes and Judging)-1954, and crimes which are to be investigated as per the Emergency Defence Regulations (Judea, Samaria and the Gaza strip-Judging in Crimes and Judicial Assistance-1967). It appears to us—and we have heard no arguments to the contrary—that the question of the GSS' authority to conduct interrogations can thus be resolved.

*Id.* at 14.

<sup>157</sup> *See id.* at 15.

<sup>158</sup> *See id.* at 17.

<sup>159</sup> *See id.*

<sup>160</sup> *Id.*

<sup>161</sup> *See id.* at 21. The Court explains:

We are prepared to assume that—although this matter is open to debate. See A. Dershowitz, *Is it Necessary to Apply 'Physical Pressure' to Terrorists—And to Lie About It?*, 23 ISR. L. REV. 193 (1989); Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks*, 30 ISR. L. REV. 171, 208-10 (1998)—the "necessity" defence is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature. Likewise, we are prepared to accept—although this matter is equally contentious—that the "necessity" exception is likely to arise in instances of "ticking time bombs," and that the immediate need ("necessary in an immediate manner" for the preservation of human life) refers to the imminent nature of the act

reasoned, however, that it is impossible to infer from a *post factum* defense to an indictment legal authority to use force during an interrogation.<sup>162</sup>

The reasoning underlying our position is anchored in the nature of the "necessity" defence. This defence deals with deciding those cases involving an individual reacting to a given set of facts; It is an ad hoc endeavour, in reaction to a[n] event. It is the result of an improvisation given the unpredictable character of the events. Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power. The administrative power is based on establishing general, forward looking criteria . . . .<sup>163</sup>

The defense of necessity excuses a criminal act; it allows one "to escape criminal liability."<sup>164</sup> But it does not have "any additional normative value."<sup>165</sup>

Justice Barak suggested that were the legislature to enact a law authorizing an interrogator to use force in the interrogation process, the investigator would be protected from criminal liability through the defense of justification.<sup>166</sup>

rather than that of the danger (see M. Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law or the Law to the Needs of the Security Service?*, 23 ISR. L. REV. 216, 244-47 (1989)). Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence. See Kremnitzer & Segev, *The Application of Force in the Course of GSS Interrogations—A Lesser Evil?*, [1998] 4 MISHPAT U'MIMSHAL 667 at 707; see also Feller, *Not Actual "Necessity" but Possible "Justification" "Not "Moderate Pressure," but Either "Unlimited" or "None at All"*, 23 ISR. L. REV. 201, 207 (1989). Consequently, we are prepared to presume, as was held by the *Inquiry Commission's Report*, that if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the "necessity" defence is likely to be open to him in the appropriate circumstances.

GSS, *supra* note 123, at 22, 23.

<sup>162</sup> See *id.* at 23.

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> *Id.* at 24.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 25 (quoting Article 34(13) of The Penal Law: "A person shall not bear criminal liability for an act committed in one of the following cases: (1) He was obliged or authorized by law to commit it").

This *obiter* is a clear indicator that the Court understands the limits of its own authority. Under the separation of powers doctrine, the wisdom of enacting such authority rests with the legislature, not the judiciary:

Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latter's dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the Rule of Law and security. These questions and the corresponding answers must be determined by the Legislative branch. This is required by the principle of the Separation of Powers and the Rule of Law, under our very understanding of democracy.<sup>167</sup>

It is curious that this suggestion was made in the first place, given the Court's earlier pronouncement that the use of force at the very least would violate Israel's international law obligations.

Justice Barak recognized that the choice the Court made in this case to uphold the "way of truth and the Rule of Law" may not be accepted by the public, which faces the reality of terrorism on a daily basis.

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of

---

<sup>167</sup> *Id.* at 25 (citations omitted). The Court explains:

If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty "befitting the values of the State of Israel," is enacted for a proper purpose, and to an extent no greater than is required (Article 8 of the Basic Law: Human Dignity and Liberty).

*Id.*

security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>168</sup>

Justice Barak argued that the court is obligated to uphold the Rule of Law. It has no other choice.

Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us 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 apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our brethren require us to act according to the law. This is equally the standard that we set for ourselves. When we sit to judge, we are being judged. Therefore, we must act according to our purest conscience when we decide the law.<sup>169</sup>

With these final thoughts, the Court's opinion concluded, making its order *nisi* absolute.<sup>170</sup>

To be sure, this judgment did uphold individual rights. But there is something very unsettling about the nature of the judicial review process here. I make this observation fully mindful of the fact that this was a very hard case for the Justices and that it took courage for the court as an institution to side against the state in its fight against terrorism. What is missing from the judgment, however, is a clear message that the state is morally wrong when it uses physical force during the interrogation of a terrorism suspect. Although the judgment makes fleeting references to the dignity of the suspect, it does not convey moral outrage. It is important to note here that I make no moral equivalency claim between terrorism and the interrogation methods used by the GSS.

The judgment falls short of the mark because it makes no reference to the ideals of the nation, including: "freedom, justice and peace as envisaged by the

---

<sup>168</sup> *Id.* at 26.

<sup>169</sup> *Id.* at 27.

<sup>170</sup> *Id.*

prophets of Israel . . . .”<sup>171</sup> Equally missing from the judgment is an examination of the moral fiber and values of the state “as a Jewish and democratic State.”<sup>172</sup> Instead, the judgment conveys the message that the state of Israel is nothing more than a “democratic regime” whose conduct can be justified or criticized on neutral legal and political principles without having to reach the more difficult moral question. Absolutely, judges should feel the pain of terrorism, and they should denounce terrorism as morally wrong. It is not inconsistent, however, for judges in the age of terrorism to embrace the spirit of the nation and its moral core and resolve to uphold the Rule of Law as positive proof of its true commitment to democracy.

The latest decision of Israel’s Supreme Court, once again sitting as a High Court of Justice with the participation of nine justices, to address terrorism and the rule of law is *Ajuri v. IDF Commander*.<sup>173</sup> The issue for the Court was whether the IDF Commander of the West Bank could lawfully order the residency transfer of three West Bank residents to Gaza for a period of two years because of their activities in aiding and abetting acts of terrorism.<sup>174</sup> The question was phrased in two parts: “Was the military commander authorized to make the order assigning place of residence? Did the commander exercise his discretion lawfully?”<sup>175</sup>

The reader must be mindful that the *GSS* judgment was decided one year prior to the commencement of the second *intifada* in September, 2000. *Ajuri* was decided two full years after its inception and during its ongoing reign of terror.<sup>176</sup> At the outset I want to make another observation: Justice Barak, who

<sup>171</sup> Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3. Although the Declaration does not lay down a constitutional principle or rule, it “expresses the vision of the people and its faith, [therefore the Supreme Court is] bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State . . . .” See H.C. 73/53, “Kol Ha’am” Co. v. Minister of the Interior, 7 P.D. 871, *reprinted in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 105 (1962). See also H.C. 680/88, Schnitzer v. Chief Military Censor, 42(4) P.D. 617, *reprinted in* 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 77.

<sup>172</sup> Basic Law: Human Dignity and Liberty § 1A, translated in Eliahu Haron, *The Impact of the Basic Law: Human Dignity and Liberty on the Law of Criminal Procedure and Evidence*, 33 ISR. L. REV. 678, 718 (1999).

<sup>173</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1 (Israel). The makeup of the nine judge court was substantially the same as the *GSS* court with two changes: J. Kedmi and J. Zamir were replaced in *Ajuri* by J. Türkel and J. Beinisch. See *id.*; see also *GSS*, *supra* note 123.

<sup>174</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1 (Israel).

<sup>175</sup> See *id.* at 5.

<sup>176</sup> *Id.* The Court explained the background of the case:

once again authored the judgment, failed to discuss the ramifications of the GSS decision or even mention it in the judgment of the Court.<sup>177</sup> The court's judgment was based on four premises. The first is that the State of Israel on at least two occasions has responded to terrorism by initiating military operations in self-defense.<sup>178</sup> This war necessitated the reoccupation of some West Bank towns and areas that were completely or partially under the control of the Palestinian Authority by agreements between Israel and the Palestinian Authority.<sup>179</sup> Second, the military response was essential to destroy the infrastructure of terrorism and to prevent future terrorist attacks.<sup>180</sup> Third, the military response failed to adequately prevent terrorism.<sup>181</sup> Fourth, the government took additional steps to curb terrorism, including residency transfers of West Bank Palestinians connected to terrorism to Gaza.<sup>182</sup>

The transfer option was developed by the Government Ministerial Committee for National Security in consultation with the Attorney General on July 31, 2002.<sup>183</sup> The Committee acted on the recommendations of the IDF, the General Security Service, the Institute for Intelligence and Special Tasks (the *Mossad*), and the police.<sup>184</sup> The stated rationale for the transfer policy was:

---

Since the end of September 2000, fierce fighting has been taking place in Judeaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than six hundred citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. Moreover, in one month alone—March 2002—120 Israelis were killed in attacks and hundreds were wounded. Since March 2002, as of the time of writing this judgment, 318 Israelis have been killed and more than 1,500 have been wounded. Bereavement and pain overwhelm us.

*Id.*

<sup>177</sup> See generally *id.*

<sup>178</sup> *Id.* at 6 (describing special military Operations "Protective Wall," March, 2002, and Operation "Determined Path," June, 2002).

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*

<sup>184</sup> See *id.*

[That] these additional measures might make a significant contribution to the struggle against the wave of terror, resulting in the saving of human life. This contribution is two-fold: *first*, it can prevent a family member involved in terrorist activity from perpetrating his scheme (the preventative effect); *second*, it may deter other terrorists—who are instructed to act as human bombs or to carry out other terror attacks—from perpetrating their schemes (the deterrent effect).<sup>185</sup>

On August 1, 2002, the IDF Commander in the West Bank issued an amending order that implemented the policy of the Ministerial Committee. It states:

#### Special supervision and assigning a place of residence

- a. A military commander may direct in an order that a person shall be subject to special supervision.
- b. A person subject to special supervision under this section shall be subject to all or some of the following restrictions, as the military commander shall direct:
  - (1) He shall be required to live within the bounds of a certain place in Judaea and Samaria or in the Gaza Strip, as specified by the military commander in the order.<sup>186</sup>

This amended order must be read together with the original order<sup>187</sup> which had limited the authority of the Commander to place a person under “special supervision” if “it is imperative for decisive security reasons.”<sup>188</sup> The order of the Commander is appealable to an Appeals Board which is appointed by the Commander and chaired by a judge who is a jurist.<sup>189</sup> If the Commander’s decision is affirmed by the Board, the status of the transferee is reviewed by the Board automatically every six months, with or without his or her request for further review.<sup>190</sup>

---

<sup>185</sup> *Id.* at 6-7.

<sup>186</sup> *Id.* at 8.

<sup>187</sup> *See id.* at 7 (referring to the “Security Provisions (Judea and Samaria) Order (No. 378), 5730-1970).

<sup>188</sup> *Id.* (referring to § 84(2) of original order).

<sup>189</sup> *See id.* (referring to § 86(e) of original order).

<sup>190</sup> *See id.* (referring to § 86(f) of original order).



On the same day, August 1, 2002, the Commander assigned the place of residency of three West Bank residents to Gaza for a period of two years, finding that their transfer was "essential for decisive security reasons, and because of the need to contend with acts of terror and their perpetrators."<sup>191</sup> The residents appealed the order to the Appeals Board.<sup>192</sup> Separate hearings were held for each petitioner before two boards.<sup>193</sup> On August 12, 2002, the boards affirmed the Commander's orders.<sup>194</sup> The next day, August 13, 2002, the residents petitioned the High Court of Justice.<sup>195</sup>

The first petitioner was Amtassar Muhammed Ahmed Ajuri, a thirty-four year old unmarried sister of terrorist Ahmed Ali Ajuri.<sup>196</sup> The Court's judgment is silent as to whether she was represented by counsel before the Board. At that hearing, the Board reviewed secret evidence ("privileged material") which was presented by the testimony of GSS investigators. The petitioner also testified in person, but the Board rejected it as unreliable.<sup>197</sup> The Board found that she had aided the terrorist acts of her brother<sup>198</sup> by sewing an explosive belt herself.<sup>199</sup>

The next petitioner was Kipha Mahmud Ahmed Anjuri, a thirty-eight year old married brother of the terrorist Ahmed Ali Ajuri and father of three children.<sup>200</sup> The Appeals Board heard his testimony and examined the statements that he had given in his July 23, 2002 interrogation.<sup>201</sup> The Board determined that he aided and abetted his brother's terrorist activities by acting

---

<sup>191</sup> *Id.* at 9.

<sup>192</sup> *See id.*

<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

<sup>197</sup> *See id.* at 27.

<sup>198</sup> *See id.* "[The terrorist activities of her brother], Ahmed Ali Ajuri, includ[ed] sending suicide bombers with explosive belts, and responsibility, *inter alia*, for the terrorist attack at the Central Bus Station in Tel-Aviv in which five people were killed and many others were injured." *Id.* at 26-27.

<sup>199</sup> *See id.* at 27.

[The Board also concluded that she] knew about the forbidden activity of her brother—including his being wanted by the Israeli security forces—and that she knew that her brother was wounded when he was engaged in preparing explosives, and *prima facie* she also knew that her brother was armed and had hidden in the family apartment an assault rifle.

*Id.*

<sup>200</sup> *See id.* at 28-29.

<sup>201</sup> *See id.* at 29.

as a look-out when his brother moved explosive charges from a hideout apartment and providing food and shelter to his brother's terrorist cell.<sup>202</sup>

The last petitioner was Abed Alnasser Mustafa Ahmed Asida, a thirty-five year old married brother of terrorist Nasser A-Din Asida and a father of five children.<sup>203</sup> The petitioner was interrogated on July 28, 2002, and admitted that he knew that his brother was wanted for murder and that he had provided food, clean clothes, and a car, but not shelter.<sup>204</sup> He claimed that he did not know his brother's purpose in using the car.<sup>205</sup> On another occasion he drove his brother to Nablus but did not know the purpose of the trip.<sup>206</sup> He also admitted driving his brother to the hospital when he injured himself while preparing an explosive charge.<sup>207</sup> At the Board hearing, he testified that he had driven his brother but that he did not give him a car, and also that he saw his brother with a weapon.<sup>208</sup> The Board concluded that the petitioner had aided and abetted a terrorist but alerted the Commander that his acts were not as

---

<sup>202</sup> *Id.* at 29-30. The Court explains:

Petitioner was aware of his brother's deeds, his brother's possession of the weapon and hiding it. The Board also held that [he] knew of the hide-out apartment, had a key to it and removed a mattress from it. The Board held that [he] knew about the explosive charges in the apartment and did indeed act as a look-out when the charges were moved. The Board further pointed to the occasion when [he] brought food to the members of the group, after he saw them make a video recording of a youth who was about to perpetrate a suicide bombing. The Board said that 'the gravity of the deeds and the extensive terrorist activity of [his] brother is very grave. The involvement of [the petitioner] with his brother is also grave, and it is particularly grave in view of the fact that [the petitioner] does not claim that his wanted brother forced him to help him, from which it follows that he had the option not to help the brother and collaborate with him.'

*Id.*

<sup>203</sup> *See id.* at 31.

[A-Din Asida was wanted by the GSS] for extensive terrorist activity including, *inter alia*, responsibility for the murder of two Israelis in the town of Yitzhar in 1998 and also responsibility for two terrorist attacks at the entrance to the town of Immanuel, in which 19 Israelis were killed and many dozens were injured.

*Id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See id.* at 32.

<sup>206</sup> *See id.*

<sup>207</sup> *See id.* at 33.

<sup>208</sup> *See id.*

serious as the acts of Kipah Ajuri “for the purpose of the proportionality of the period [of the residency transfer].”<sup>209</sup>

The same day the petitioners appealed to the High Court of Justice, the Court entered a show cause order and a preliminary injunction against the forcible transfer to Gaza to allow it to review the orders.<sup>210</sup> The State filed its response on August 19, 2002, and a hearing was held before a three judge panel.<sup>211</sup> The panel ordered the two separate petitions consolidated, appointed three international law experts to give their opinions, and ordered the review by an expanded Court.<sup>212</sup> The nine judge Court heard oral arguments on August 26, 2002.<sup>213</sup> All three petitioners were represented before the Court by counsel.<sup>214</sup> The Court allowed the participation of a private respondent, Bridget Kessler, the mother of a terrorism victim who had been murdered two months earlier.<sup>215</sup> She spoke to the Court as the voice of victims of terrorism in support of the State’s position before the Court and “emphasized the moral aspect in assigning the residence of the petitioners to the Gaza Strip.”<sup>216</sup>

The Court rejected the unsigned affidavits of the petitioners on procedural grounds and on a finding that they were cumulative with their arguments.<sup>217</sup> The Court also denied the Deputy Chief of Staff, General Ashkenazi, an opportunity to address the Court about the “security background” of the Commander’s orders, since the matter was fully presented before the Appeals Board hearings.<sup>218</sup> The State’s response was supported by an affidavit which the Court reviewed in its judgment.<sup>219</sup> The Court summarily dismissed arguments by the petitioners contending that there were procedural defects in the Appeals Board hearing: prejudice of the panels, lack of opportunity to be fully heard, ignoring of factual and legal arguments, limitations on presenting witnesses, and limitations on cross-examination.<sup>220</sup>

The Court initially determined that the authority of the commander to assign the residence of a West Bank resident to Gaza comes from the

---

<sup>209</sup> *Id.*

<sup>210</sup> *See id.* at 9.

<sup>211</sup> *See id.*

<sup>212</sup> *See id.*

<sup>213</sup> *See id.* at 10.

<sup>214</sup> *See id.* at 5, 10.

<sup>215</sup> *See id.* at 10.

<sup>216</sup> *Id.* at 11.

<sup>217</sup> *See id.*

<sup>218</sup> *Id.*

<sup>219</sup> *See id.* at 29.

<sup>220</sup> *See id.* at 11.

international law of belligerent occupation. This is the source of his authority to enact the amending order.<sup>221</sup> The Court next concluded that the conduct of the commander in the occupied territories must be measured by customary international law of war as expressed by the Fourth Hague Convention.<sup>222</sup> Justice Barak sidestepped a thornier question, whether the terms of Fourth Geneva Convention bind Israel in its occupation of the West Bank, and opted instead to accept the State's longstanding position that the Government had "decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention."<sup>223</sup> Consequently, the Court "assumed" that in addition to the Fourth Hague Convention, the Fourth Geneva Convention applies in this case.<sup>224</sup> Additionally, principles of Israel's administrative law supplied the law of the case.<sup>225</sup>

Justice Barak identified three fundamental interests that a residence transfer would affect: "rights of a person to his dignity, his liberty and his property . . ."<sup>226</sup> These rights, he opined, are relative, not absolute. As such, they can be

restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society. Therefore, they may be restricted in order to uphold similar rights of other members of society. They may be restricted in order to further proper social goals which will in turn further human rights themselves. Indeed, human rights and the restriction thereof derive from a common source, which concerns the right of a person in a democracy.<sup>227</sup>

These interests of the transferee must be balanced against the State's "security reasons in an area subject to belligerent occupation."<sup>228</sup> The balancing analysis begins with a finding by the Court that Article 78 of the Fourth Geneva

---

<sup>221</sup> *See id.* at 12.

<sup>222</sup> *See id.*

<sup>223</sup> *Id.* at 12, 13.

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *Id.* at 13.

<sup>227</sup> *Id.* at 13-14.

<sup>228</sup> *Id.* at 14.

Convention is the exclusive and dispositive law governing the case.<sup>229</sup> The Court rejected the application of Article 49 of the Fourth Geneva Convention that prohibits deportation from the occupied territory, since the Commander who had issued the amending order and the subsequent individual orders against the petitioners “acted within the framework of ‘assigned residence’ (according to the provisions of article 78 of the Fourth Geneva Convention).”<sup>230</sup>

The Court next rejected the Petitioners’ argument that their assigned residence to Gaza is situated outside the territory, claiming therefore that Article 78 of the Fourth Geneva Convention was violated, since this assignment removed them from the territory.<sup>231</sup> The petitioners contended that the provisions of Article 49 of the Fourth Geneva Convention apply instead.<sup>232</sup> The Court disagreed and reasoned that the two areas—the West Bank and Gaza—make up a single occupied territory from historical, social and legal perspectives.<sup>233</sup> Consequently, the Court found no reason to address the

---

<sup>229</sup> See *id.* at 14; see also Fourth Geneva Convention, *supra* note 86, art. 78, stating that:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

<sup>230</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. at 15 (Israel).

<sup>231</sup> See *id.* at 17.

<sup>232</sup> See *id.*

<sup>233</sup> See *id.* The Court stated:

The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. Thus, for example, our attention was drawn by counsel for the Respondent to the provisions of clause 11 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, which says:

The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement.

This provision is repeated also in clause 31(8) of the agreement, according

applicability of Article 49.<sup>234</sup> The Court then turned to the central question before it; namely, the scope of the commander's discretion to assign residence. Assignment of residence is only permissible as a means of preventing the assignee "from continuing to constitute a security danger."<sup>235</sup> It is not a form of punishment.<sup>236</sup> Similarly, it may not be used to deter the terrorist acts of others.<sup>237</sup> The scope of the Commander's authority to assign residence is measured solely by "the consideration of preventing [further] danger . . . by a person whose place of residence is being assigned."<sup>238</sup> In light of this singular purpose, the Court articulated important restrictions on the exercise of the power to assign a residence. For example, the assignment of one who is "innocent" of terrorist activities is impermissible even if the commander's purpose is to deter others.<sup>239</sup> Equally impermissible is the assignment of one who is "not innocent" of such acts but who nonetheless "no longer presents any danger."<sup>240</sup> It follows that the Commander may assign residence to one who had committed a terrorist act as long as he or she continues to present a danger to the security of the area.<sup>241</sup> Lastly, the Commander may not assign residence to an "innocent family member," who did not personally engage in terrorist activities.<sup>242</sup> The power of the Commander to assign residence is "most severe"; it should be carefully exercised and used "only in extreme and exceptional cases."<sup>243</sup>

Judicial review of the commander's decision to assign residence focuses on its legality and its reasonableness.<sup>244</sup> In this assessment, the High Court of Justice takes into account norms of international humanitarian law and "our Jewish and democratic values."<sup>245</sup> Justice Barak explained:

---

to which the "safe passage" mechanisms between the area of Judaea and Samaria and the area of the Gaza Strip were determined. Similarly, although this agreement is not decisive on the issue under discussion, it does indicate that the two areas are considered as one territory held by the State of Israel under belligerent occupation.

<sup>234</sup> *See id.*

<sup>235</sup> *Id.* at 19.

<sup>236</sup> *See id.*

<sup>237</sup> *See id.* at 23.

<sup>238</sup> *Id.* at 19.

<sup>239</sup> *See id.*

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* at 20.

<sup>242</sup> *See id.* at 19.

<sup>243</sup> *Id.* at 21.

<sup>244</sup> *See id.* at 26.

<sup>245</sup> *Id.* at 20-22.

From our Jewish heritage we have learned that “Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing” (Deuteronomy 24, 16 [38]). “Each person shall be liable for his own crime and each person shall be put to death for his own wrongdoing.” H.C. 2006/97, *Janimat v. Central Commander*, at 654 (remarks of Justice M. Cheshin). “[E]ach person shall be arrested for his own wrongdoing—and not for the wrongdoing of others” (Cr. A. 4920/02, *Federman v. State of Israel*, (remarks of Justice Y. Turkel)). The character of the State of Israel as a democratic, freedom-seeking and liberty-seeking State implies that one may not assign the place of residence of a person unless that person himself, by his own deeds, constitutes a danger to the security of the State. Cf. CrimFH 7048/97, *A v. Minister of Defence*, at p. 741.<sup>246</sup>

Justice Barak next examined the proper measure for determining whether continued dangerousness to the security of an area would justify the decision of the Commander to assign residence. He found the answer in the administrative law of the State of Israel. This power may

only be exercised if there exists administrative evidence that—even if admissible in a court of law—shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory . . . .<sup>247</sup>

The Commander’s broad power is not absolute and must be exercised in line with the administrative principle of proportionality, which takes into account both the seriousness of the danger to an area’s security and the benefit that will follow from the assignment of residence.<sup>248</sup> In the exercise of this power, the Commander “must decide whether decisive security reasons—or imperative reasons of security—justify assigned residence.”<sup>249</sup> Since the assignment seeks to prevent or frustrate security danger to an area, the

---

<sup>246</sup> *Id.* at 20-21.

<sup>247</sup> *Id.* at 21.

<sup>248</sup> *See id.* at 23.

<sup>249</sup> *Id.* at 24.

principle of proportionality requires judicial review to consider, in each case, whether the elimination of that danger can be achieved by non-administrative procedures, such as the criminal prosecution of the accused.<sup>250</sup>

The last and most important principle of judicial review is that the court does not make its own independent determination as to which measure achieves the objective of security in a given area.<sup>251</sup>

The Supreme Court, when sitting as the High Court of Justice, exercises judicial review over the legality of the discretion exercised by the military commander. In doing so, the premise guiding this court is that the military commander and those carrying out his orders are public officials carrying out a public office according to law. In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted. Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld . . . .<sup>252</sup>

Critical to this judicial review process is the pronouncement that justiciability concepts like “security of state,” “act of state,” or “act of war” will not deter the court from its power to review the legality of the Commander’s conduct under Article 78.<sup>253</sup> “We will consider the legality of the military commander’s discretion and whether his decisions fall into the ‘zone of reasonableness’ determined by the relevant legal norms that apply to the case.”<sup>254</sup>

Under this principle, for example, it is not the function of the court to determine whether the measure of assigning residence is ineffective.<sup>255</sup> In light of the foregoing judicial review principles, the Court held that the conduct of Amtassar Ajuri was “very grave” and that she would pose “a significant danger

---

<sup>250</sup> See *id.* at 26.

<sup>251</sup> See *id.*

<sup>252</sup> *Id.* at 25 (citations omitted).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 26.

<sup>255</sup> See *id.*



to the security of the area.”<sup>256</sup> In affirming the decision of the Appeals Board, the Court agreed that assigning her residence to Gaza was “a rational measure—within the framework of the required proportionality—to reduce the danger she presents in the future.”<sup>257</sup> The Court did not follow its own prescription for judicial review on the question of proportionality. This conclusion is evident from the court’s willingness to accept without challenge the State’s explanation why Ajuri was not subjected to the criminal law process of indictment and trial. The government argued “that there is no admissible evidence against her that can be presented in a criminal trial, for the evidence against her is privileged and cannot be presented in a criminal trial.”<sup>258</sup> The Court accepted this as a “satisfactory answer”<sup>259</sup> without conducting an *in camera* inspection of the evidence.

Under Israel’s evidence law, the invocation of privilege by the State against the disclosure of evidence that “is likely to impair the security of the State”<sup>260</sup> is not absolute. The accused is entitled to the disclosure of the evidence if a judge of the Supreme Court “finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.”<sup>261</sup> This determination must be made *in camera*.<sup>262</sup> Thus, the interests of justice may outweigh the confidentiality interest of the State against the disclosure of the evidence.

In fairness to the Court, the petitioners did not ask for such disclosure; nonetheless, it appears that the interests of justice were not upheld in this case, particularly when the State admitted to the Court that it had no admissible evidence against Amtassar Ajuri other than what it claimed to be privileged. Had the State brought a criminal prosecution against her and then not offered this evidence because it was considered privileged, Amtassar Ajuri would have been acquitted. This was not a situation where the privileged evidence was merely marginal to the offense.<sup>263</sup> Alternatively, had the Court pierced the privilege in the interests of justice in a criminal trial setting, she would have

---

<sup>256</sup> *Id.* at 28.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Evidence Ordinance (New Version) § 44(a), 1971, 2 L.S.I. 198, 208 (1968-1972).

<sup>261</sup> *Id.* § 44(a).

<sup>262</sup> *Id.* § 46(a).

<sup>263</sup> See Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 67 (1991) (citing M.A.H.C. 497/88, *Shachshir v. Commander of the I.D.F. in the West Bank*, 43(1) P.D. 529, 535-36 (1989)).

had an opportunity to contest the reliability of the evidence through effective cross examination and the presentation of her own evidence to contradict the State's evidence.<sup>264</sup> That, too, possibly could have resulted in an acquittal. Justice was not done here, since the State was able to restrict Ajuri's liberty significantly on the basis of secret evidence whose reliability was never demonstrated.

I understand the implications of my argument. A ruling that would require the State to disclose privileged evidence at an administrative hearing on the question of whether a person poses a danger to the area's security would necessarily force the State to reveal the identity of its intelligence sources. This could compromise security. Obviously, if pressed, the State would not disclose the information for security reasons. This, in turn, would improve the person's chances of not being reassigned, which would frustrate the State's security interests. The Supreme Court had rejected such a result in the past,<sup>265</sup> and I am certain it would do so again. But if the State of Israel is indeed committed to the rule of law, is it just for the state, in the name of security, to act on secret evidence to strip a person of procedural fairness, which in turn will necessarily deprive her of her substantive right to freedom and dignity? This is the inherent evil of secret evidence; it forces the State to derogate its commitment to the rule of law. There is a way, in my opinion, to accommodate and balance these conflicting interests: by amending the Evidence Ordinance to make the judicial *in camera* inspection of the privileged evidence mandatory in all administrative hearings, including emergency security measures, and in High Court of Justice hearings that contest the commander's orders. The *in camera* inspection should not be dependent on a request of a party or the consent of the State. Should a judge or a panel of the Supreme Court determine after an *in camera* inspection to disclose the evidence in the interests of justice, the opponent of the evidence will have an opportunity to contest its reliability. However, if the *in camera* inspection favors nondisclosure, a judge or a panel of the Supreme Court should nonetheless find the evidence reliable before it can be used in the administrative proceeding. In making this preliminary determination, the judge or a panel of the Supreme Court would have an opportunity to review the evidence and receive testimony from security personnel. A preponderance of the evidence standard for finding reliability would suffice. This proposed change would not alter the well-

---

<sup>264</sup> See *id.* at 67-71.

<sup>265</sup> See *id.* at 64 (citing, among other cases, H.C. 792/88, *Matour v. Commander of the I.D.F. in Judea and Samaria Region*, 43(2) P.D. 221, 223-24 (1989)).

established principle that “[t]he question of the weight and credibility of the evidence is a matter for the administrative authority to determine.”<sup>266</sup>

The case against Kipah Ajuri merits similar criticism because the Court once again accepted the State’s explanation, without a challenge, that a criminal prosecution was “not practical.”<sup>267</sup> Since the Court found “no basis” for the order of assigned residence of the last petitioner, Abed Asida,<sup>268</sup> the Court avoided the question of why a criminal prosecution was not pursued against him.

Finally, Justice Barak suggested that the “new reality” of terrorism somehow calls for a different judicial interpretation of Article 78 of the Fourth Geneva Convention. “We doubt whether the drafters of the provisions of art. 78 of the Fourth Geneva Convention anticipated protect[ing] persons who collaborated with terrorists and ‘living bombs.’ This new reality requires a dynamic interpretive approach . . . .”<sup>269</sup> The Court is absolutely right to express society’s moral outrage against terrorism; however, the intent of the drafters of Article 78 is not relevant to the inquiry, nor does the new reality of terrorism require a different interpretation of Article 78. The State has two choices. It may prosecute terrorists and those who aid and abet acts of terrorism, convict them, and then impose severe punishment as prescribed by law, or alternatively, apply the objective legal standards of Article 78 and reassign residence. The objective legal standards of Article 78 take into account, “for imperative reasons of security,” a variety of conduct, including acts of terrorism.<sup>270</sup>

The *Ajuri* decision is significant in that the Court seized on the horror of terrorism to balance individual rights against the State’s security interest, ultimately favoring the security interest, without any reference to its judgment in the GSS case. As the reader will recall, the GSS judgment upheld the human dignity interest in the context of an interrogation as an absolute. There was no balancing. Not even a “ticking bomb” exception was permitted in the use of force during the interrogation of terrorist suspects. Different times. Different results. In time of war, the law is silent.

---

<sup>266</sup> *Id.* at 62-63 (quoting H.C. 442/71, *Lanski v. Minister of Interior*, 26(2) P.D. 337, 357 (1972)).

<sup>267</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1, 30 (Israel).

<sup>268</sup> *See id.* at 31-33.

<sup>269</sup> *Id.* at 33.

<sup>270</sup> Fourth Geneva Convention, *supra* note 86, at art. 78.

As with the rule of standing,<sup>271</sup> the Supreme Court of Israel has liberalized the concept of justiciability so as to allow judicial review of the military commander's conduct in the occupied territories.<sup>272</sup> The reasonableness of the commander's security conduct is measured by normative legal standards; therefore, a legal challenge to the commander's order claiming that his conduct fell outside the zone of reasonableness is justiciable.

[E]verything is normatively justiciable. There is no act to which the law does not apply; everything is a legal matter in the sense that the law takes a position as to whether it is permitted or forbidden. There is no legal void; where there is a legal norm there are also legal standards to implement the norm. Reasonableness is such a standard.<sup>273</sup>

This notion of justiciability is necessary to protect the rule of law and the democratic principles of the state.<sup>274</sup> The *Ajuri* judgment exemplifies the willingness of the Court to exercise its power of judicial review and hold the military commander accountable for his security measures in the occupied territories. I shall address the justiciability of Israel's targeted killing policy separately.

Do we have a clearer understanding of the nature of the rule of law? Neither the *GSS* decision nor *Ajuri* provides an answer. Here is an answer articulated by Justice Brandeis:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its

---

<sup>271</sup> See H.C. 358/88, *Assoc. for Civil Rights in Israel v. Cert. Dist. Commander*, reprinted in 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (1989).

<sup>272</sup> See I. Zamir, *Rule of Law and Civil Liberties in Israel*, 7 CIV. JUST. Q. 64, 71; Bracha, *supra* note 263, at 96.

<sup>273</sup> Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1, 7 (relying on *Ressler v. Minister of Defence*, H.C. 910/86, 42 P.D. (2) 441 (1993)).

<sup>274</sup> *Id.* at 10. However, conduct that is "obviously of military character" is not justiciable. *Id.* at 11.

example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.<sup>275</sup>

In *Ajuri*, Justice Barak equated the rule of law with “a law abiding state.”<sup>276</sup> An example is found in the following statement:

The State of Israel is a freedom-seeking democracy. It is a defensive democracy acting within the framework of its right to self-defence—a right recognized by the charter of the United Nations. The State seeks to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law.<sup>277</sup>

Accordingly, one value of a democratic state is that it is law abiding. This value and other values form the basis for the exercise of judicial discretion. Professor Barak explains:

Indeed, the movement of our nation throughout history, its social and religious roots, the national renaissance against the background of the Second World War and the Holocaust—all these are a powerful source from which the judge draws the basic values of the state and the political system. The democratic character of our regime, and the social values derived from it—such as separation of powers, independence of the judiciary, the rule of law—constitute a system of principles and values according to which the judge creates law.<sup>278</sup>

In the exercise of discretion, the judge identifies and utilizes the values of his society to interpret the law.<sup>279</sup> In this mix of values, some values may be

---

<sup>275</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

<sup>276</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1, 34 (Israel).

<sup>277</sup> *Id.*

<sup>278</sup> Barak, *supra* note 24, at 3.

<sup>279</sup> *Id.*

The judge learns about basic values from the fundamental documents, such as the constitution itself. From our constitution we learn that the values of the State of Israel are the values of a Jewish and democratic state; that its basic rights are grounded on the recognition of the value of the human being, of the

in conflict with other values. For example, the state's security interests will create a tension *vis-a-vis* human rights interests. According to Professor Barak, where values are at odds with each other, the Court must weigh and balance them.<sup>280</sup>

Our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile.<sup>281</sup>

Professor Barak recognizes that there are “no binding” rules which will guide the judge in weighing and balancing the conflicting values.<sup>282</sup> He offers, however, the following Cardozo-like guidelines. First, the weighing process should be rational and harmonious with the rest of the legal system.<sup>283</sup> Second, the weighing process should not be subjective. This guideline calls for objectivity.<sup>284</sup> “Objectivity means giving expression to the general scale of values, not to the judge’s own scale of values.”<sup>285</sup> Here the judge reflects “the

---

sanctity of human life, and of human freedom. From the Declaration of Independence we learn that Israel is to be built in the principles of freedom, justice, and peace, and the social and political equality of all its citizens. The judge learns about basic values from the statutes and precedents. Yet above all—he learns about them from the national experience, from the nature of the political system as a democracy, and from his understanding of the basic conceptions of the nation. ‘Surely it is a known axiom,’ wrote Justice Agranat over forty years ago, ‘that the law of a nation is learned from the looking-glass of its national life.’

<sup>280</sup> See *id.* at 6. But see JOHN RAWLS, A THEORY OF JUSTICE, 25 (Revised ed. 1999):

Justice denies that the loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

<sup>281</sup> H.C. 7015/02, H.C. 7019/02, *Ajuri v. IDF Commander*, [2002] I.L.R. 1, 35 (Israel).

<sup>282</sup> Barak, *supra* note 24, at 5.

<sup>283</sup> See *id.* at 6.

<sup>284</sup> See *id.* at 7.

<sup>285</sup> *Id.*

deep consensus and the shared values of the society."<sup>286</sup> An aspect of objectivity calls for the judge to weigh and balance consistently.<sup>287</sup> Third, the process should be linked to precedent and "hold deep respect for tradition."<sup>288</sup> Fourth, judicial balancing should not be exercised in a vacuum; instead it should take into account that "other branches [of the government] also create law."<sup>289</sup> The Fifth guideline calls for the judge to keep an open mind and "be receptive to new ideas."<sup>290</sup> This, in turn, calls for humility. If all these suggestions fail and the judge still has to make a decision in a "hard case," Professor Barak cautions that the judge should then reflect on her subjective belief about justice. This should be the last step and exercised in "exceptional" situations only.<sup>291</sup>

As an abstract principle, I can accept Professor Barak's formula for weighing and balancing. However, I must reject it in light of another "truth". Professor Barak finds that "[t]here is no contradiction between individual rights and the security of the state."<sup>292</sup> This conclusion is derived from a flawed premise that defines individual rights and security rights as interchangeable human rights. Under the Barak conception, in balancing the community's human right to security against the rights of the individual, the state would necessarily have the upper hand each time to infringe on human rights in order to protect itself. He explains:

Our starting point is that Human Rights are conditional upon the existence of a social structure which respects them. Human Rights do not view the individual as an isolated island. Human

---

<sup>286</sup> *Id.*; see also JOHN RAWLS, POLITICAL LIBERALISM 236 (1993). John Rawls stated it this way:

The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.

<sup>287</sup> See Barak, *supra* note 24, at 8.

<sup>288</sup> *Id.* at 10.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 11-12; see RONALD DWORKIN, A MATTER OF PRINCIPLE 3 (1985). "Even in hard cases, though judges enforce their own convictions about matters of principle, they need not and characteristically do not enforce their own opinions about wise policy."

<sup>292</sup> Barak, *supra* note 7, at 6.

Rights, as stated in the Basic Laws, view the individual as part of society. The individual is a social creature. The society has national goals. Society is based on a government the aim of which is the promotion of national goals. The power of the government is essential to the existence of society as well as of Human Rights themselves. The Constitutional Revolution is based on a national compromise between the power of the State and the individual's rights. It is the result of the recognition that one has to protect both fundamental Human Rights and the social structure. It is intended to prevent the sacrifice of the social structure on the altar of Human Rights. It is intended to prevent the sacrifice of Human Rights on the altar of the social structure. There is no contradiction between individual rights and the well-being of the community. The Constitutional Revolution does not affect society's right to protect itself from its criminals.<sup>293</sup>

Under this formulation, balancing will almost always favor the state's security interests over individual rights. A case in point is Israel's targeted killing policy. This balancing formula also explains why the High Court has refused to review the policy. Israel's most controversial weapon against terrorism is the targeted killing by military personnel of individuals who had carried out prior acts of terrorism and individuals planning to carry out such attacks in the future against Israeli civilians.<sup>294</sup> Opponents have charged that

---

<sup>293</sup> *Id.*

<sup>294</sup> United States Department of State, Country Reports on Human Rights Practices—2001, Israel and the Occupied Territories, at 24 (Mar. 4, 2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/nca/8262pf.htm> [hereinafter Department of State Country Report].

The IDF targeted for killing at least 33 Palestinians during the year [2001]. The Israeli Government explicitly or implicitly acknowledged its role in the targeting and killing of at least 22 Palestinians, and also acknowledged its role in killing another 5 persons who were not targets while attempting to kill 3 militants. In January a senior public official in the Israeli Government, speaking off-the-record to Israeli journalists, stated that the IDF deliberately had targeted 10 Palestinians since the beginning of the Intifada. According to the IDF, the targeted persons were militants whom the IDF believed recently had attacked or had been planning future attacks on Israeli civilians, settlements, or military targets. The IDF stated that it targeted persons only with the authorization of senior political leaders. The Government of Israel stated that such actions were exceptional self-defense measures taken only against those engaged in hostilities against Israeli citizens, and were justified by its obligation to protect its citizens against terrorism and consistent with



the policy allows the military to carry out assassinations, liquidations, and extra-judicial executions of mere political activists who oppose Israel's occupation of the territories. In the process, in addition to terrorists, innocent men, women, and children have been killed.<sup>295</sup> A vivid example was the missile strike in Gaza against Hamas leader Saleh Shehada that left him and fourteen civilians dead. Among the dead were nine children.<sup>296</sup> The government has defended the policy as anticipatory self defense against future acts of murder against Israeli civilians,<sup>297</sup> but limited it to the "ticking bomb"

---

its right to self-defense. In the death of at least seven other Palestinian militants, Israeli officials either declined to take responsibility for the action or actively denied Israel's involvement. During the course of the year, Israeli Prime Minister Sharon stated publicly that there would be targeted killings that the Israeli Government would deny publicly. In several cases in which Israeli officials denied that the killings were targeted, officials acknowledged that the persons killed had been wanted by the Israeli Government for past or planned attacks on Israelis, and the circumstances of the attacks led to suspicion that Israeli authorities were responsible for the killings.

*See also* Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 224 (2001) (arguing that targeted killing is justified as a preemptive act of self-defense but not as punishment for a past act of terrorism).

<sup>295</sup> Department of State Country Report, *supra* note 294, at 24. The report states:

PA officials, Palestinian political leaders, and Palestinian and Israeli human rights organizations stated that four of the Palestinians targeted and killed during the year were political activists who were not involved in violent attacks. IDF forces killed 18 Palestinian bystanders, relatives, or associates of those targeted, and injured a number of others during the operations (see Section 1.c.); however, the Government of Israel has stated that it makes every effort to avoid collateral injuries or deaths and has aborted operations against known terrorists when it became clear that they might endanger innocent civilians. In most cases, the only death or serious injury was the person targeted, although in some cases there were unintended victims.

*See also* Yael Stein, Position Paper: *Israel's Assassination Policy: Extra Judicial Executions* (2001), available at [www.btsalem.org](http://www.btsalem.org).

<sup>296</sup> Howard Witt, *U.S. Splits with Israel on Bloody Air Strike*, CHI. TRIB., July 24, 2002, at A1.

<sup>297</sup> Louis Rene' Beres, *On Assassination As Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 340 (1991). *See also* Prime Minister Ariel Sharon, quoted in *Ha'aretz* (Eng. ed.), Jan. 29, 2002 (following a helicopter attack against the Nablus headquarters of Hamas). As a result of the attack, eight Palestinians were killed, two of them children. The target of the attack was the leader of the radical Islamic Palestinian organization in Nablus, Jamal Mansour, and his associates. The two dead children were the brothers Ashraf and Bilal Abd al-Muna'am Halil, aged eight and ten. They were in a nearby shop when the Hamas offices on the third floor of a seven-story building were hit by missiles fired from helicopter gunships. *Id.*

situations.<sup>298</sup> The IDF has formalized the policy. In February, 2002, the Judge Advocate General of the IDF issued conditions for the use of selective assassinations of terrorism suspects. The policy prohibits targeting as “retribution for past terror strikes.”<sup>299</sup> The four conditions allowing selective assassinations are:

There must be well-supported information showing the terrorist will plan or carry out a terror attack in the near future.

The policy can be enacted only after appeals to the Palestinian Authority calling for the terrorist’s arrest have been ignored.

Attempts to arrest the suspect by use of IDF troops have failed.

The assassination is not be carried out in retribution for events of the past. Instead it can only be done to prevent attacks in the future which are liable to toll multiple casualties.<sup>300</sup>

This policy violates international law<sup>301</sup> and Israel’s constitution; ultimately it obliterates the rule of law, and with it, the state’s democratic and Jewish values. The Universal Declaration of Human Rights recognizes that “[e]veryone has the right to life, liberty, and the security of person.”<sup>302</sup> The International Covenant on Civil and Political Rights provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>303</sup> Targeted killing is

---

<sup>298</sup> *Ha'aretz* (Eng. ed.), Mar. 18, 2002.

<sup>299</sup> Harel Amos & Gideon Alon, *IDF Lawyers Set 'Conditions' For Assassination Policy*, HA'ARETZ, Feb. 4, 2002.

<sup>300</sup> *Id.* Stating IDF legal sources who believe:

The select assassination policy must be viewed as killing to preempt terror attacks. If you know the person has four times in the past sent his people to shoot at Israelis traveling on the roads, and if you have information about his intention to sponsor more activities of this sort tomorrow or the day after tomorrow, then the suspect meets the assassination criteria.

<sup>301</sup> GEOFFREY R. WATSON, *THE OSLO ACCORDS* 177-80 (2000).

<sup>302</sup> Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948).

<sup>303</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., No. 16, art. 6(1), U.N. Doc. A/6316 (1966). Israel is a party to the covenant. *See also* UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Mar. 24, 1989, Principle 1:

Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate

considered a "grave breach" of the international humanitarian law of occupation.<sup>304</sup>

I do not mean to suggest that the right to life is absolute or that the state is not justified at times in using lethal force against a terrorist in self-defense. The normal process, however, should involve the arrest and the prosecution of the suspected terrorist.<sup>305</sup> It is only in the extreme situation of a "ticking bomb" or when the suspect resists arrest that killing can be justified as self-defense.<sup>306</sup> This policy must be measured against the right to life clauses of Israel's Basic Law<sup>307</sup> and the Limitations Clause of the Constitution.<sup>308</sup> Jewish

penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions.

<sup>304</sup> Fourth Geneva Convention, *supra* note 86, at art. 3(1)(a) ("[T]he following acts are and shall remain prohibited . . . (a) violence to life and person, in particular murder of all kinds . . ."); *id.* art. 147 ("Grave breaches . . . shall be those involving . . . wilful killing . . .").

<sup>305</sup> See Fourth Geneva Convention, *supra* note 86, at art. 5.

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

<sup>306</sup> See Ami Ayalon, HA'ARETZ (Eng. ed.) Dec. 19, 2001 ("There's no moral dilemma about killing someone whose death will save the lives of dozens of civilians . . . . Killing should be used as a method only when there's no way of arresting [a suspect]. You cannot kill ideologies by killing leaders . . . ."); see Ariel Sharon, HA'ARETZ (Eng. ed.), Mar. 16, 2002; GEOFFREY R. WATSON, THE OSLO ACCORDS, *supra* note 301, at 179; see also Emanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1194 (2002) (arguing that "these preemptive acts are only permitted as a last resort where there is no possibility of capturing the terrorist alive").

<sup>307</sup> See BASIC LAW: HUMAN DIGNITY AND LIBERTY §§ 1, 2, 4, translated in Barak, *supra* note 7.

values are equally pertinent to this discussion. The killing of a murderer without a trial is prohibited under Jewish law.<sup>309</sup> A murderer is entitled to due process of law, and according to Maimonides, “he who violates this Commandment is deemed in every respect a murderer [himself] . . . .”<sup>310</sup>

On January 24, 2002, two human rights organizations, the Public Committee Against Torture and the Palestinian Society for the Protection of Human Rights and the Environment, petitioned the High Court of Justice to declare the policy of targeted killings to be illegal. They claimed such killings are “stretching the limits of self-defense beyond those of immediate threat . . . .”<sup>311</sup> They also charged that the policy “cross[es] the line into the realm of war crimes.”<sup>312</sup> The Court rejected the petition a week later on a finding of non-justiciability, reasoning that it would not interfere in military matters.<sup>313</sup> A petition brought by MK Muhammad Barakei was also dismissed on January 29, 2002, for the reason that “the court does not interfere in the IDF’s operational decisions.”<sup>314</sup> In a volatile hearing, Presiding Justice Elihu Mazza rejected the argument that victims of this policy are either civilians under occupation or nationals of a foreign country: “There is a third possibility, which is called terrorism . . . . These terrorists are the enemies of the entire world. They do not belong to on state or another and their citizenship is irrelevant. They belong to a third world upon which the nations of the world

Section 1: “Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.”

Section 2: “There shall be no violation of the life, body or dignity of any person as such.”

Section 4: “All persons are entitled to protection of their life, body and dignity.”

<sup>308</sup> See *id.* § 8 (“There shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorisation in such Law.”).

<sup>309</sup> See *Numbers*, 35:12.

<sup>310</sup> II MAIMONIDES, SEFER HA-MITZVOH OF MAIMONIDES, *supra* note 118, at 272.

<sup>311</sup> Ferry Biederman, *Rights Groups File Petition Against Army*, INTER PRESS SERVICE, Jan. 25, 2002.

<sup>312</sup> *Israel: Court Petition Demands End to “Targeted Killings” Policy*, BBC MONITORING INTERNATIONAL REPORTS, Jan. 25, 2002.

<sup>313</sup> See *Israel Court Upholds Assassinations*, USA TODAY, Jan. 30, 2002, at 9A.

<sup>314</sup> Dan Izenberg, *High Court Rejects Petition Against Targeted Killings*, JERUSALEM POST, Jan. 30, 2002, at 1.

have declared war."<sup>315</sup> Presiding Justice Mazza's response suggested that terrorists have no claim to the process of the law. Other members of the Court similarly expressed concerns that the policy is political in nature, and, therefore, the Court is not the proper venue in which to deliberate it.

The Court also rejected the petitions because the petitioners did not have a personal interest in the outcome of the litigation.<sup>316</sup> This demonstrates a retreat from the prior conception of justiciability as seen in the home demolition and GSS interrogation cases. Two days later, Justice Barak defended the decision in a speech claiming that Israel is a democracy but it "has to actively defend itself."<sup>317</sup> He articulated three principles to guide a democracy in its war on terrorism. First, a democracy should not abandon "the norms of the law." Second, society must balance the "contradictory" values of security and human rights. "Human rights is not a theater for national extermination [while] national security does not justify restricting Human Rights in all circumstances . . ."<sup>318</sup> Finally, society must find "a compromise between the two principles" which "recognizes the essential importance of both."<sup>319</sup> Of course, the application of these principles favors the state's security interests. The importance of the ruling of the Court in rejecting these petitions is that it reflects a new reality. In times of terrorism, not "everything is justiciable."<sup>320</sup> Once again the judicial review process has failed the rule of law. In war, the law is silent.

#### IV. CONCLUSION

When a democracy uses security as a trade off against individual and human rights, real security will elude it. Security comes to a nation when it adheres to the Rule of Law. Justice William Brennan, Jr. appreciated the danger of balancing away human rights in time of war. "A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger."<sup>321</sup>

---

<sup>315</sup> *Id.*

<sup>316</sup> *See id.*

<sup>317</sup> Dan Izenberg, *Justice Barak: Fight Terror Within the Law*, JERUSALEM POST, Feb. 1, 2002, at 4A.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *The Silence of the Supreme Court*, HA'ARETZ (Eng. ed.), Mar. 10, 2002.

<sup>321</sup> *See* William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in*

The conception that equates human rights as security and security as human rights disrespects individual rights and the Rule of Law. At the end, it is nothing more than a rationalization for why security should come out on top in a balancing scheme. Professor Mordechai Kremnitzer is correct to conclude “that with the apparatus of balancing it is possible to reach any result.”<sup>322</sup> A democratic state must be willing to meet the challenges of terrorism with an embrace of its fundamental values, including the Rule of Law. Otherwise, it will infringe on basic individual rights, and as Professor Michael Walzer has observed, then “talk about justice cannot possibly be anything more than talk.”<sup>323</sup> The admonition of Justice Robert Jackson is worth repeating here. “[T]he rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.”<sup>324</sup>

Judicial review must continue to promote the Rule of Law and individual rights; otherwise the enemies of democracy, and the terrorists, will win. Judge Schroeder understood this:

We must always be vigilant to make certain that the rule of law, and not emotion, carries the day. There can be no doubt that the Constitution of the United States and our concepts of democracy provide sufficient strength and protection to bring citizens to justice without weakening our security. We must never adopt an “end justifies the means” philosophy by claiming that our Constitutional and democratic principles must be temporarily furloughed or put on hold in cases involving alleged terrorism in order to preserve our democracy. To do so, would result in victory for the terrorists.<sup>325</sup>

The task of a democracy is to prove Cicero wrong. In times of war, the law is *not* silent.

---

*Times of Security Crises*, 18 ISR. Y.B. ON HUM. RTS. 11, 14 (1988).

<sup>322</sup> Mordechai Kremnitzer, *Constitutionalization of Substantive Criminal Law: A Realistic View*, 33 ISR. L. REV. 720, 725 (1999).

<sup>323</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* 10 (2d ed. 1992).

<sup>324</sup> ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 322 (1979).

<sup>325</sup> *United States v. Goba*, 220 F. Supp. 2d 182, 184 (W.D.N.Y. 2002).

