The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism

AHARON BARAK*

Owen M. Fiss is my friend. From him I learned the meaning of friendship. Owen is my educator. He taught me the meaning of principled attitude toward judging. He opened before me the world of values and the role of the judge in giving meaning to those values. He led me in the development of my theories of interpretation — objectivity in interpretation — based on shared values of the legal community. For all that and for much more — this paper is dedicated.

A. *The Role of a Supreme Court*

I see my role as a judge of a supreme court in a democracy as the protection of the constitution and of democracy.[1] We cannot take the continued existence of a democracy for granted. This is certainly the case for new democracies, but it is also true of the old and well-established ones. The approach that "it cannot happen to us" can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us. I do not know if the supreme court judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that one of the lessons of the Holocaust and of the Second World War is the need to have democratic constitutions and ensure that they are put into effect by supreme court judges whose main task is to protect democracy. It was this awareness that, in the post-World War II era, helped disseminate the idea of judicial review of legislative action and make human rights central.[2] It led to the recognition of defensive democracy[3] and

---

* President of the Supreme Court of Israel. This article is based on selections from Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002). In that piece, I discussed my judicial philosophy. I tried to demonstrate how that philosophy is implemented in the context of the fight against terrorism.

1. For a comprehensive analysis of my thesis, see Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

2. *See* generally Mauro Cappelletti, Judicial Review in the Contemporary World 45 (1971); Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg et al. eds., 1993); The Global Expansion of Judicial Power (C. Neal Tate & Torbjorn Vallinder eds., 1995); Marina Angel, Constitutional Judicial Review of Legislation: A Comparative Law Symposium, 56 TEMP. L.Q. 287 (1983).

3. *See* E.A. 1/65, Yardor v. Chairman of Cent. Elections Comm. for Sixth Knesset, 19(3)

even militant democracy.[4] And it shaped my perspective, that the main role of the supreme court judge in a democracy is to maintain and protect the constitution and democracy. As I noted in one of my opinions:

> The struggle for the law is unceasing. The need to watch over the rule of law exists at all times. Trees that we have nurtured for many years may be uprooted with one stroke of the axe. We must never relax the protection of the rule of law. All of us — all branches of government, all parties and factions, all institutions — must protect our young democracy. This protective role is conferred on the judiciary as a whole, and on the Supreme Court in particular. Once again we, the judges of this generation, are charged with watching over our basic values and protecting them against those who challenge them.[5]

This approach — so I believe — is common to many supreme court judges in modern democracies. Judicial protection of democracy in general, and of human rights in particular, characterizes the development of most modern democracies.[6] The phenomenon is general, the result of the events that occurred during World War II and the Holocaust. Legal literature mostly analyzes this phenomenon in terms of an increase in judicial power relative to other powers in society.[7] This analysis confuses purpose with result. The purpose of this modern

---

P.D. 365 (Isr.). This case addressed the question whether the court could proscribe a party that denied the existence of the "State of Israel" from participating in the electoral process. This question arose because the relevant legislation did not include any express provision on the matter. The court held that such a party could not participate in the electoral process. For the majority, Justice Sussman wrote:

> The said basic *supra-legal* rules are merely, in this matter, the right of the organized society in the State to protect itself. Whether we call these rules "natural law" to indicate that they are the law of the State by virtue of its nature . . . or whether we call them by another name, I agree with the opinion that the experience of life requires us not to repeat the same mistake to which we were all witness. . .. As for myself, with regard to Israel, I am prepared to satisfy myself with "defensive democracy," and we have tools to protect the existence of the State, even if we do not find them set out in the Elections Law.

A few years later — after additional case law that restricted this power only to a party that denied the existence of the State but not its democratic nature, E.A. 2/84, Neiman v. Chairman of Cent. Elections Comm. for Eleventh Knesset, 39(2) P.D. 225 — the Knesset amended its Basic Law, enacting an express provision to this effect.

4. In contemporary Germany, the militant democracy (*streitbare Demokratie*) is one of the foundations of the constitutional structure. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 213 (1994); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 37 (2d ed. 1997).

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

6. *See* Michael Kirby, *Australian Law — After 11 September 2001*, 21 AUSTL. B. REV. 21 (2001); Sir Anthony Mason, *A Bill of Rights for Australia?*, 5 AUSTL. B. REV. 79, 80 (1989); Beverley McLachlin, The Role of the Supreme Court in the New Democracy 13–15 (2001) (unpublished manuscript, on file with the Harvard Law School Library).

7. *See* The Global Expansion of Judicial Power, *supra* note 2, at 1-5.

development is not to increase the power of the court in a democracy. The purpose is the protection of democracy and human rights. An increase in judicial power is a side effect, since judicial power is one of many factors in preserving democratic balance.

Democracy means the rule of the people, acting through their representatives in the legislature. It is therefore essential to democracy that free elections are held periodically for the election of representatives on the basis of a political program proposed by them, and that they are accountable to the people, who can, if they so desire, periodically replace them.[8] Hence the connection between democracy and legislative supremacy. However, real or substantive democracy, as opposed to merely formal democracy, is not satisfied by the presence of these conditions. Democracy has its own internal morality, based on the dignity and equality of all human beings. Thus, in addition to formal requirements, there must also be substantive requirements. These are reflected in the supremacy of certain underlying values and principles based on human dignity, equality, and tolerance.[9] There is no (real) democracy without recognition of values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights that the majority cannot take away by force of its numerical superiority.[10] Real democracy is not just the law of rules and legislative supremacy. Democracy is a multidimensional concept. It requires recognition of the power of the majority and limitations on the power of the majority. It is based on legislative supremacy and the supremacy of values, principles and human rights. When there is internal conflict, the formal and substantive elements of democracy must be balanced, to protect the essence of each of the aspects of democracy. In this balance, limitations are placed both on legislative supremacy and on the supremacy of human rights.

With that approach to my role as a judge I will turn to the role a supreme court should play when a democratic state launches a war on terror. In doing so, I will refer to the Israeli Supreme Court's experience in dealing with that problem. My aim is not to discuss specific cases or specific results. My aim is to lay down a way of thinking about the judicial role in times of terror.

B. *The Supreme Court and the Problem of Terrorism*

1. TERRORISM AND DEMOCRACY

Terrorism plagues many countries. The United States realized ter-

8. *See* ROBERT A. DAHL, ON DEMOCRACY 95–96 (1998).

9. *See* RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 35–36 (1990).

10. Lord Woolf, *Droit Public — English Style*, PUB. L. 57, at 68-69; McLachlin, *supra* note 6.

rorism's devastating power on September 11, 2001. Other countries such as Israel have suffered from terrorism for a long time.[11] While terrorism poses difficult questions for every country, it poses especially difficult questions for democracies, where not every effective measure for preventing or punishing acts of terrorism can be used. I discussed this in one case, in which the Supreme Court of Israel held that violence (torture) in interrogation of a suspected terrorist is not permitted, even if using violence may save human life by preventing impending terrorist acts:

> We are aware that this decision does not ease dealing with that reality. 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 security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.[12]

Terrorism creates much tension between the components of democracy. One pillar of democracy — the rule of the people through their elected representatives — may encourage the taking of all steps effective in fighting terrorism, even if the impact on human rights is harmful. The other pillar of democracy — human rights — may encourage protecting the rights of every individual, including the terrorist, even at the cost of undermining the fight against terrorism. Struggling with this tension is primarily the task of the legislature, and the executive, both of which are accountable to the people. But the legislature and the executive must act within the constitutional and legislative scheme — a scheme that is subject to judicial review.

We, judges in modern democracies, have a major role to play in protecting democracy. We should protect it both from terrorism and from the means that the state wants to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of war and terrorism. The protection of human rights of every individual is a duty much more formidable in situations of war or terrorism than in times of peace and security. If we fail in our role during times of war and terrorism, we will be unable to fulfill our role during times of peace and tranquility. It is a

---

11. For a comparison of the American experience and the Israeli experience, see William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Time of Security Crises*, 18 ISR. YEARBOOK HUM. RTS. 11 (1988).

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

myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that we can limit our judicial ruling so that they will be valid only during wartime, and that we can decide that things will change in peacetime. The line between war and peace is thin — what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over a long term. We should assume that whatever we decide when terror is threatening our security will linger many years after the terror is over. Indeed, we judges must act with coherence and consistency. A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes.[13]

Moreover, democracy ensures us, as judges, independence. It strengthens us — because of our political non-accountability — against the fluctuations of public opinion. The real test of this independence comes in situations of war and terrorism. The significance of our non-accountability becomes clear in these situations when public opinion is near-unanimous. Precisely in these times of war and terrorism, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution. Lord Atkins's remarks on the subject of administrative detention during World War II aptly describe these duties of the judge. In a minority opinion in November 1941, he wrote:

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which . . . we are now fighting, that the judges . . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[14]

---

13. *See* Korematsu v. United States, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting): "[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty . . . . A military order, however unconstitutional, is not apt to last longer than the military emergency . . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need . . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image."

See Patricia Hughes, *Judicial Independence: Contemporary Pressures and Appropriate Responses*, 80 CAN. B. REV. 181, 186 (2001) (noting the general agreement that "judicial independence is both an individual and a systemic, institutional or 'collective' quality").

14. *See* Liversidge v. Anderson, 3 All E.R. 338, 361 (1941) (Atkins, L.J., minority opinion).

Admittedly, the struggle against terrorism turns our democracy into a "defensive democracy" or even a "fighting democracy." Nonetheless, this defense and this fight must not deprive our regime of its democratic character. Judges in the highest court of the modern democracy should act in the spirit of defensive democracy as opposed to uncontrolled democracy.

2. IN BATTLE, THE LAWS ARE NOT SILENT

There is a well-known saying that when the cannons speak, the Muses are silent. A similar idea was expressed by Cicero in his maxim "*Silent enim leges inter arma*" (In battle, the laws are silent).[15] These statements are regrettable. I hope they do not reflect the way things are.[16] I am convinced they do not reflect the way things should be. Every battle a country wages — against terrorism or against any other enemy — must be done in accordance with rules and laws. On the international plane, these rules are of international law; on the domestic plane, they are the rules of domestic law. There is always law according to which the state must act. There are no black holes where there is no law.[17] And the law needs Muses. We need the Muses most when the cannons speak. We need laws most in times of war.[18]

During the Gulf War, Iraq fired missiles at Israel. Israel feared chemical and biological warfare as well, so the government distributed gas masks. A suit was brought against the military commander, and it was argued that he distributed gas masks unequally in the West Bank. We accepted the petitioner's argument. In my opinion, I wrote:

> When the cannons speak, the Muses are silent. But even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on the recognition that it is fighting for values that deserve protection. The rule

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

16. *But cf.* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998) (arguing that Cicero's approach reflects reality).

17. *See* Abbasi v. Sec'y of State for Foreign and Commonwealth Affairs (2002) EWCA Civ 1958: "(W)e do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole' " (Lord Phillips M.R.).

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

of law is one of these values.[19]

This opinion sparked criticism. Some argued that the Supreme Court of Israel had intervened in Israel's struggle against Iraq. I believe that this criticism was unjustified. We did not intervene in military considerations, for which the expertise and responsibility lies with the executive. Rather, we intervened in considerations of equality, for which the expertise and responsibility rest with us, as judges. Indeed, the struggle against terrorism is not conducted outside the law but within the law using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it. In its war against terrorism, a democracy acts within the framework of the law and according to the law. This principle was well expressed by Justice H. Cohen of the Israeli Supreme Court more than twenty years ago, when he said:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and the objective justification of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justification, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and they are perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never yield to its enemies.[20]

Indeed, the war against terrorism is a war of a law-abiding nation and law-abiding citizens against lawbreakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the law against its enemies. A recent opinion of the Israeli Supreme Court addresses this role of the rule of law as a primary actor in the context of terrorism. The case involved armed terrorists and citizens who ensconced themselves in the Church of the Nativity in Bethlehem, which is in the territory of the Palestinian Authority, outside Israel. The Israeli army laid siege, trying to force them to leave the church (precincts). The army claimed there was a shortage of food and water. In the course of holding negotiations with the army, the terrorists petitioned the Supreme Court. We considered the petition and applied the relevant rules of international law. In doing so, I said:

> Israel finds itself in a difficult war against rampant terrorism. It is acting on the basis of its right to self-defense (see art. 51 of the

19. H.C. 168/91, Morcos v. Minister of Def., 45(1) P.D. 467, 470–71.

20. H.C. 320/80, Kwasama v. Minister of Def., 5(3) P.D. 113, 132.

> United Nations Charter). This fighting is not carried out in a normative vacuum. It is carried out according to the rules of international law, which set out the principles and rules for waging war. The statement that "when the cannons speak, the Muses are silent" is incorrect. . . . The reason underlying this approach is not merely pragmatic, the result of political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic State that is fighting for its survival and the battle of terrorists who want to destroy it. The State is fighting for and on behalf of the law. The terrorists are fighting against and in defiance of the law. The war against terrorism is a war of the law against those who seek to destroy it. . . . But it is more than this: the State of Israel is a State whose values are Jewish and democratic. We have established here a State that respects law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular; between these two there is harmony and agreement, not conflict and alienation.[21]

3. THE BALANCE BETWEEN NATIONAL SECURITY AND FREEDOM OF THE INDIVIDUAL

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

> A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction (*cf.* the remarks of Justice Jackson in *Terminiello v. Chicago*). The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the State, and they should not be made into a spade with which to bury it.[22]

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

Democracies must find a balance between these conflicting values

21. H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 34–35.

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

and principles. Neither side can rule alone. In one case, which dealt with the legality of administrative detention, I wrote:

> We cannot avoid — in a democracy aspiring to freedom and security — a balance between freedom and dignity, and security. Human rights may not become a tool for denying security to the public and the State. A balance is required — a sensitive and difficult balance — between the freedom and dignity of the individual, and national security and public security.[23]

Every balance that is made between security and freedom will impose certain limitations both on security and on freedom. A proper balance will not be achieved when human rights are fully protected, as if there were no terrorism. Similarly a proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can exist with security. It follows that the balance between security and freedom does not reflect a lack of a clear position. On the contrary, the proper balance between security and freedom is the result of a clear position that recognizes the need for security and the need for human rights. I discussed this in a case addressing whether the state may forcibly assign residents of an occupied territory to another place in the occupied territory if such person poses a threat to the security of the territory. I noted in the judgment that: "A delicate and sensitive balance is necessary. That is the price of democracy. It is a high price, but worthwhile to pay. It strengthens the state. It gives it a reason to fight."[24]

When I speak about the balance, I don't mean an external normative process that changes the scope of rights and the protection accorded them because of terror. I mean the ordinary process that takes place every day, when we address the relationship between individual rights and the needs of society. In this latter process, rights are not absolute. They may be limited to serve the needs of society. I do not have the right to shout "fire" in a crowded theater. The threat of terrorism increases the probability that serious damage may occur, which allows the right to be limited. But note that we do not conduct two systems of balancing, one for regular times, and an additional one under a threat of terrorism. There is one balancing process, and terrorism determines the physical conditions under which the balancing takes place.

When the court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from

23. Cr.A. 7048/97, Anonymous v. Minister of Def., 54(1) P.D. 721, 741.

24. H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, 56(6) P.D. 352, 383.

both sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights. The supporters of security argue that the court gives too much protection to human rights and too little to security. Frequently, the persons making these arguments read only the judicial conclusion without considering the judicial reasoning that seeks to make a proper balance between the conflicting values and principles. None of this intimidates the judge. He must and does rule according to his best understanding and conscience.[25]

Our point of departure in Israel has been that the doors of the supreme court — which in Israel serves as court of first instance for complaints against the executive branch — are open to anyone wishing to complain about the activities of a public authority. There are no black holes where there is judicial review.

The open door approach is expressed in a number of ways. *First,* it is very rare that the court would close its doors on grounds of nonjusticiability. At times the state may argue that most of its counterterrorism activities are beyond the reach of the judiciary because they take place outside the country, because they constitute an act of state, or because they are political in nature. All these arguments were made before us in the Israeli Supreme Court, and most of them were rejected when human rights are directly affected. Thus, we have ruled on petitions concerning the power of the state to arrest suspected terrorists[26] and the conditions of their confinement.[27] We have ruled on petitions concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated.[28]

Second, the court opens its doors to anyone claiming that civil rights have been violated. Everyone has standing. This is the general approach of the court in time of peace.[29] We apply it also in times of terror. Thus, civil rights associations often come to us in defense of human rights of those sectors of society that most people do not wish to protect — including, of course, suspected terrorists.

Third, our judgments regarding many of the terrorist cases are based on international law. Thus, for example, in a recent case the issue

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

26. *See* H.C. 3239/02, Maraab v. Commander in Judea and Samaria, 57(2) P.D. 349.

27. *See* H.C. 3278/02, The Center for the Def. of the Individual (established by Dr. Lota Salzberger) v. IDF Commander in the W. Bank, 57(1) P.D. 385; H.C. 5591/02 Yassin v. Commander of Kziot Military Camp, 57(1) P.D. 403; H.C. 253/88 Sajadia v. Minister of Def., 42(3) P.D. 801.

28. *Maarab*, 57(2) P.D. at 377 (the right to legal representation). *See* H.C. 5100/94, Public Comm. Against Torture v. State of Israel, 53(4) P.D. 817 (means of interrogation).

29. The Israeli Supreme Court's general approach is that in cases of serious violation of the rule of law, everyone in Israel has standing. For an analysis of this approach, see Barak, *supra* note 1, at 106.

was whether the state could relocate inhabitants of the West Bank to Gaza.[30] We decided that such inhabitants could be relocated, but only upon convincing evidence that there is a reasonable probability that such person will present a real danger of harm to the security of the occupied territory. The state cannot assign residence of innocent persons. In deciding so, we relied exclusively on humanitarian provisions of the Fourth Geneva Convention, which deals with assigned residence and internment.

In all these decisions — and there have been hundreds of this kind — we recognized, on the one hand, the power of the state to protect its security and the security of its citizens. On the other hand, we emphasized that the rights of every individual must be preserved, including those of the individual suspected of being a terrorist. The balancing point between the conflicting values and principles is not fixed. It differs from case to case and from issue to issue. The damage to national security caused by a given terrorist and the nation's response to the act affects the way in which the freedom and dignity of the individual are protected. Thus, for example, when the response to terrorism was the destruction of the terrorists' house, we discussed the need to act proportionately. We concluded that only when human life has been lost is it permissible to destroy the buildings where the terrorists lived, and even then the goal may not be collective punishment (which is forbidden in the area under military occupation). Such destruction may be used only for preventive purposes, and only if the terrorist himself was living there. There is, of course, a right to prior hearing, unless actualizing it would interfere with military activity. Obviously, there is no right to a hearing in the middle of a military operation.[31] But when the time and place permit — and there is no fear of interfering with security forces that are fighting terrorism — a right to a hearing should be honored.[32] When it was necessary to use administrative detention against terrorists, we interpreted the relevant legislation to the effect that the purpose of the laws of administrative detention is two-fold: "on the one hand, protecting national security; on the other hand, protecting the dignity and freedom of every person."[33] We added that "protection of national security is a social necessity that every State tries to achieve. Within this framework, democratic countries that aspire to freedom recognize

30. *See* H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, 56(6) P.D. 352.

31. *See* H.C. 5510/92, Turkeman v. Minister of Def., 48(1) P.D. 217. Harsh criticism has been leveled at this opinion and others like it. *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 160–61 (2002).

32. *See* H.C. 6696/02, Adal Sado Amar v. IDF Commander in the W. Bank, 56(6) P.D. 110.

33. Cr.A. 7048/97, Anonymous v. Minister of Def., 54(1) P.D. 721, 740.

the 'institution' of administrative detention."[34] We also held that "understanding and protecting . . . freedom and dignity extend also to the freedom and dignity of someone whom the state wishes to detain in administrative detention."[35] Against this background, we held that "it is possible to allow — in a democratic state that aspires to freedom and security — the administrative detention of a person who is regarded personally as a danger to national security, but this possibility should not be extended to the detention of a person who is not regarded personally as a danger to national security, and who is merely a 'bargaining chip.'"[36]

The fight against terrorism requires the interrogation of terrorists. Such questioning must be conducted according to the ordinary rules of interrogation. Physical force must not be used; specifically, the persons being interrogated must not be tortured.[37] A democracy — even a defensive or fighting democracy — should not bureaucratize the use of torture. It may, however, view it as defensible ex post facto.

4. THE SCOPE OF JUDICIAL INTERVENTION

Judicial review of the war against terrorism by its nature raises the question of the timing and scope of judicial intervention. There should not be a theoretical difference between applying judicial review at the time that the state is under terror threats or after the terror is gone. In practice, however, as Chief Justice Rehnquist correctly noted, the timing of judicial intervention affects its content. As he stated, "Courts are more prone to uphold wartime claims of civil liberties after the war is over."[38] In light of this recognition, Chief Justice Rehnquist goes on to ask whether it would be better to abstain from judicial adjudication during warfare.[39] The answer, from my point of view — and I am sure, also from the Chief Justice's point of view — is clear: Both of us will adjudicate a question when it is presented to us. We will not defer it until the war on terror is over, because the fate of a democracy and human beings may hang in the balance. Protection of human rights would be bankrupt if, during combat, courts — consciously or unconsciously — decided to review the behavior of the executive branch only after the period of emergency ended.

Furthermore, the decision should not rest on issuing general declarations about the balance of human rights and the need for security.

34. *Id.*
35. *Id.*
36. *Id.* at 741.
37. H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Gov't of Israel, 53(4) P.D. 817, 835.
38. Rehnquist, *supra* note 16, at 222.
39. *Id.*

Rather, the judicial ruling must impart guidance and direction in the specific case before the court. Justice Brennan correctly noted, "[A]bstract principles announcing the applicability of civil liberties during times of war and crises are ineffectual when a war or crisis comes along unless the principles are fleshed out by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security concerns."[40]

From a judicial review point of view, the situation in Israel is unique. Petitions from suspected terrorists reach the supreme court — which has exclusive jurisdiction on the matter — in real time. The judicial adjudication takes place not only during combat, but often while the events being reviewed are taking place. For example, the question of whether the General Security Service may use extraordinary methods of interrogation (including what has been classified as torture) did not come before us in the context of a criminal case in which we had to rule, ex post, on the admissibility of a suspected terrorist's confession.[41] Rather, the question arose at the beginning of his interrogation. At the start of the interrogation, the suspect's lawyer came before us and claimed, on the basis of his past experience, that the General Security Service would use force against his client. We summoned the state's representative — the same day or the next day — and we heard arguments, and made a decision in real time. In another case, more than ten years ago, the state sought to deport 400 suspected terrorists to Lebanon. Human rights associations petitioned us. I was the justice on call at the time. Late that night, I issued an interim order enjoining the deportation. At the time, the deportees were in automobiles en route to Lebanon. The order immediately halted the deportation. Only after a long hearing throughout the night, including testimony by the army chief-of-staff, did we invalidate the deportation order. We ruled that the state breached its obligation to grant the deportees the right to a hearing before deporting them, and we ordered a post factum right to a hearing.[42]

Our basic premise is that the court should not adopt a position on the question of what are the efficient security measures for the war against terrorism. As I said in one case: "This court will not adopt any

40. Brennan, *supra* note 11, at 19.

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

42. *See* H.C. 5510/92, Turkeman v. Minister of Def., 48(1) P.D. 217. Our opinion was criticized. The criticism was that we permitted post-factum hearings to take place. The critics thought that we should have avoided the deportation because it was done without a hearing and without the authority to deport. We decided that his last issue needed to be raised in the hearings: See Kretzmer, *supra* note 31, at 184-86.

position about the manner of conducting the war."[43] For example, in *Church of the Nativity*, a petition was filed while negotiations were being held between the Government of Israel and the Palestinian Authority regarding a solution to the problem. I wrote that in my judgment "this court is not conducting the negotiations, and is not a participant in them. The national responsibility in this respect lies with the executive and those acting on its behalf."[44] Indeed, the efficiency of the security measures is a matter that is in the proper jurisdiction of the other branches of government. As long as the other branches are acting within the framework of the "zone of reasonableness,"[45] there is no basis for judicial intervention.

Often the court will encounter the argument from the executive that security considerations led to an action of the government, followed by a request that the court be satisfied with this statement. Such a request should not be granted. "Security considerations" are not magic words. The court must insist on hearing the specific security considerations that prompted the government's actions. The court must be persuaded that the security considerations actively motivated the government's action and were not merely a pretext. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights. Indeed, in several of the many security cases that the supreme court heard, senior army commanders and heads of the security services testified before us. Only if we were convinced that the security consideration was the dominant one, and that the security measure was proportionate, did we dismiss the challenge against the security action.[46] In dismissing challenges to security actions, we should not be naïve or cynical. We should analyze the evidence before us objectively. In the case dealing with review under the Geneva Convention, of the state's decision to assign Arab residents from the West Bank to the Gaza Strip, I noted that:

> In exercising judicial review . . . we do not make ourselves into security experts. We do not replace the military commander's security considerations with those of our own. We take no position on the way security issues are handled. Our job is to maintain boundaries, and to guarantee the existence of conditions that restrict the military

43. H.C. 3114/02, Barakeh v. Minister of Def., 56(3) P.D. 11, 16.

44. H.C. 3451/02, Almadani v. IDF Commander in Judea & Samaria, 56(3) P.D. 30, 36.

45. For an analysis of this concept, see Barak, *supra* note 1, at 145-47.

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

> commander's discretion. . . . We do not, however, replace the commander's discretion with our own. We insist upon the legality of the military commander's exercise of discretion and that it fall into the range of reasonableness, determined by the relevant legal norms applicable to the issue.[47]

Is it proper for judges to review the legality of the fight on terrorism? Many argue that the court should not become involved in these matters. These arguments are heard from both ends of the political spectrum. On one side, critics argue that judicial review undermines security; on the other side, critics argue that judicial review gives legitimacy to actions of the government authorities in their war against terrorism. Both arguments are unacceptable. As to the argument that judicial review undermines security: Judicial review of the legality of the war on terrorism may make the war against terrorism harder in the short term. Judicial review, however, fortifies and strengthens the people in the long term. The rule of law is a central element in national security. As I wrote in a case of pre-trial pardon given to the heads of the General Security service who committed crimes against terrorists:

> There is no security without law. The rule of law is an element of national security. Security requires us to find proper tools for interrogation. Otherwise, the General Security Service will be unable to fulfill its purpose. The strength of the Service lies in the public's confidence in it. Its strength lies in the court's confidence in it. If security considerations are decisive, the public will have no confidence, and the court will have no confidence in the security service and the lawfulness of its interrogations. Without this confidence, the branches of the state cannot function. This is the case with regard to public confidence in the courts, and it is the case with regard to public confidence in the other branches of state.[48]

I concluded my opinion in that case with the following:

> It is said that there was a dispute between King James I and Justice Coke. The question was, whether the king could take matters, in the province of the judiciary, into his own hands and decide them himself. At first, Justice Coke tried to persuade the king that judging requires expertise that the king did not have. The king was not convinced. Then Justice Coke rose and said: "*Quod rex non debet esse sub homine, sed sub Deo et sub lege.*" The king should not be subject to man, but subject to God and the law. Let it be so.[49]

The security considerations entertained by the branches of the state are subject to "God and the law." In the final analysis, this subservience

47. H.C. 7015/02, Ajuri v. IDF Commander in the W. Bank, 56(6) P.D. 352, 375-76.
48. H.C. 428/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, 622 (citation omitted).
49. *Id.* at 623.

does not weaken democracy but actually strengthens it. It makes the struggle against terrorism worthwhile. With regard to considerations of legitimacy: To the extent that legitimacy by the court means that the acts of the state are lawful, the court fulfills its traditional role. Both when the state wins and when the state loses, the rule of law and democracy benefit. It should be remembered that the main effect of the judicial decision does not occur in the individual instance that comes before it. Rather the main effect occurs in determining the general norms according to which the governmental authorities act, and in establishing the deterrent effect this norm will have. The test of the rule of law arises not merely in the few cases brought before the court, but also in the many cases that are not brought before it, since government authorities are aware of the ruling of the court and act accordingly. The argument that judicial review somehow validates the governmental action does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom of the war against terrorism, but only the legality of the acts taken in furtherance of the war. The court does not ask itself if it would have adopted the security measures that were adopted, if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be within the bounds of the law to adopt the security measures that were adopted. Thus, the court does not express agreement with the means adopted but rather fulfills its role by reviewing the constitutionality and legality of the executive acts.

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

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

> have done our part, however. That is our role and our obligation as judges.[50]

I regard myself as a judge who is sensitive to his role in a democracy. I take the tasks imposed on me — protecting the constitution and democracy — seriously. Despite criticism often heard — and it frequently descends to personal attacks and threats of violence from extremists — I have continued on this path for many years. I hope that by doing so, I am serving my legal system properly. Indeed, as judges in the highest court, we must continue on our path according to our consciences. We, as judges, have a North Star that guides us — the fundamental values and principles of constitutional democracy. A heavy responsibility rests on our shoulders. Even in hard times, we must remain true to ourselves. I discussed this in the opinion considering whether extraordinary methods of interrogation may be used against a terrorist in a "ticking bomb" situation:

> Deciding these applications weighed heavily 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 that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. Our fellow-citizens demand that we act according to the law. This is also the same standard that we set for ourselves. When we sit at trial, we stand on trial.[51]

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

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