



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

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

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**A. The role of the judge – to protect democracy**

I see the role of any judge – national or international – as the protection of democracy.<sup>1</sup> We cannot take the continued existence of a democracy for granted. This is certainly the case for new democracies, but it is also true for the old and well-established ones. The approach that "it cannot happen to us" can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in 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 judges whose task is to protect democracy. It was this awareness, in the post-World War II era, that helped disseminate the idea of judicial review of legislative action, both at the national level and at the international level – and make human rights central. And it shaped my perspective that the main role of the judge in a democracy is to maintain and protect democracy.

According to this approach, judges – whether national or international – have a major role to play in protecting democracy. They should protect it both from terrorism and from the means the State wishes to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of terrorism. The protection of the human rights of every individual is a much more formidable duty in situations of terrorism than in times of peace and security. If judges fail in their role in times of terrorism, they will be unable to fulfil their role in times of peace and tranquillity. It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of terror and the status of human rights during a period of tranquillity. It is self-deception to believe that judges can limit their judicial rulings so that they will be valid only during terror, and that they can decide that things will change in peacetime. The line between terror and tranquillity is thin. In any case, it is impossible to maintain this distinction in the long term. Judges should assume that whatever they decide when terrorism is threatening security will linger many years after the terrorism is over. Indeed, judges must act

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<sup>1</sup> For a comprehensive analysis of my thesis, see AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 20 (2006).

with coherence and consistency. A wrong decision in a time of terrorism plots a point that will cause the judicial curve to deviate after the crisis passes.<sup>2</sup>

Moreover, democracy ensures the independence of judges – both national and international. It strengthens them, because of their political non-accountability in the face of fluctuations in public opinion. The real test of this independence comes in situations of terrorism. The significance of judges' non-accountability becomes clear in those situations when public opinion is more likely to be near-unanimous. Precisely in these times of terrorism, judges must embrace their supreme responsibility to protect democracy. They should always reflect history – not hysteria. Admittedly, the struggle against terrorism turns our democracy into a “defensive democracy” or “militant democracy”<sup>3</sup>. Nonetheless, this defence and this militant fight must not deprive our regime of its democratic character. Judges should act in the spirit of defensive fighting or militant democracy, as opposed to uncontrolled democracy.

### **B. The battle against terror – within the law**

There is a well-known saying that when the cannons speak, the Muses are silent. A similar idea was expressed by Cicero in his maxim “*Silent enim leges inter arma*” (In battle, indeed, the laws are silent).<sup>4</sup> These statements are regrettable; I hope they do not reflect the way things are. I am convinced they do not reflect the way things should be. Every battle a country wages – against terrorism or against any other enemy – must be waged in accordance with rules and laws. There is always the law, according to which the State must act. There are no black holes in which there is no law. And the law needs Muses. We need the Muses most when the cannons speak. We need laws most in times of war.

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

### **C. The need for a balanced approach**

Democracies should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. On the one hand, we must consider the values and principles relating to the security of the State and its citizens. Human rights cannot justify

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<sup>2</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944): “[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 CANADIAN B. REV. 181, 186 (2001) (noting the general agreement that “judicial independence is both an individual and a systemic, institutional or ‘collective’ quality”).

<sup>3</sup> See MILITANT DEMOCRACY (András Sajó ed., 2004).

<sup>4</sup> CICERO, *PRO MILONE* 16 (N.H. Watts trans., 5th ed. 1972).

undermining national security in every case and in all circumstances. Human rights are not a stage for national destruction.<sup>5</sup> The Constitution is not a suicide pact. Judges always recognise the power of the State to protect its security and the security of its citizens.

On the other hand, we must consider the values and principles relating to human rights. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited licence to harm the individual. Judges always emphasise that the rights of every individual must be preserved, including those of the individual suspected of being a terrorist. Also, a terrorist is a human being and his dignity must be protected.

Every balance that is struck between security and human rights will impose certain limitations on both security and human rights. 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 is 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 human rights does not reflect the lack of a clear position. On the contrary, the proper balance between security and freedom is the result of a clear position that recognises both the need for security and the need for human rights.

When I speak about balance, I don't mean an external normative process that changes the scope of rights and the protection accorded them because of terror. I mean the ordinary process and the ordinary balancing rules we have when we address the relationship between individual rights and the needs of society. In this latter process, rights are not absolute. They may be limited to serve the needs of society. In a judgment that dealt with the battle against terror I wrote:<sup>6</sup>

“... Israeli constitutional law has a consistent approach to human rights in periods of relative calm and in periods of increased fighting. We do not recognise a clear distinction between the two. We do not have balancing laws that are unique to times of war. Naturally, human rights are not absolute. They can be restricted in times of calm and in times of war. I do not have a right to shout ‘fire’ in a theatre full of spectators ... War is like a barrel full of explosives next to a source of fire. In times of war the likelihood that damage will occur to the public interest increases and the strength of the harm to the public interest increases, and so the restriction of the right becomes possible within the framework of existing criteria ... Indeed, we do not have two sets of laws or balances, one for times of calm and the other for times of terror.”

When the court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from both sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights.

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<sup>5</sup> See EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, 39(2) P.D. 225, 310 [1985], available at

<http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Neiman%20v.%20Chairman%20of%20the%20Central%20Elections%20Committee.pdf>. Based on *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson J dissenting).

<sup>6</sup> HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior*, 61(2) P.D. 202, 282–283 [2006] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/03/520/070/a47/03070520.a47.pdf](http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf)

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 strike a proper balance between the conflicting values and principles. None of this should intimidate the judge. He or she must and does rule according to his or her best understanding and conscience.

This balance is based upon the view that in democracy, not all means are acceptable. The ends do not justify the means. Thus, we ruled that parts of the separation fence in the West Bank, which was intended to prevent terrorists from the West Bank from entering Israel, were not legal. We determined that the additional security attained by the location chosen for the security fence by the army was not proportionate to the harm which the fence's location caused to the fabric of the lives of the local inhabitants. In one case I wrote:<sup>7</sup>

“The ends do not justify the means. This is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy.”

In one case we decided that the executive branch had no authority to authorise torture (*ex ante*). This prohibition is comprehensive, and applies even in a "ticking bomb" situation. In my judgment I wrote:<sup>8</sup>

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

In one of my last judgments, I had to deal with the constitutionality of a statute that imposed a temporary blanket ban on family unification between Israelis and their West Bank spouses. The reason for the ban was that in twenty-six cases the non-Israeli spouse who had come to Israel under the programme of family unification was directly involved in terrorist activities. I decided that the statute was unconstitutional as it disproportionately affected the right to family unification, which in Israel is a constitutional right derived from the right to dignity. In my judgment I wrote:<sup>9</sup>

“Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that

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<sup>7</sup> HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence*, 62(1) P.D. 1, 37 [2006] (Isr.), available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Defense.pdf>

<sup>8</sup> HC 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*, 53(4) P.D. 817, 845 [1999] (Isr.), available at [http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel%281%29\\_0.pdf](http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel%281%29_0.pdf)

<sup>9</sup> *Adalah*, *supra* note 6, at 347–348.

are enjoyed by Israelis. These principles are that the end does not justify the means; that security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterised by the fact that it imposes limits on the ability to limit human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority. This is how the court acted in many different cases. Thus, for example, adopting physical measures ('torture') would without doubt increase security. But we held that our democracy was not prepared to adopt them, even at the price of a certain harm to security ... Similarly, determining the route of the separation fence in the place decided by the military commander [in Beit Sourik Village Council] would have increased security. But we held that the additional security was not commensurate with the serious harm to the lives of the Palestinians. Removing the family members of suicide bombers from their place of residence and moving them to other places ('assigned residence') would increase security in the territories, but it is inconsistent with the character of Israel as a 'democratic freedom-seeking and liberty-seeking state' .... We must adopt this path also in the case before us. The additional security achieved by abandoning the individual check and changing over to a blanket prohibition involves such a serious violation of the family life and equality of many thousands of Israeli citizens that it is a disproportionate change. Democracy does not act in this way. Democracy does not impose a blanket prohibition and thereby separate its citizens from their spouses; democracy does not prevent them from having a family life; democracy does not impose a blanket prohibition and thereby give its citizens the option of living in it without their spouse or leaving the State in order to live a proper family life; democracy does not impose a blanket prohibition and thereby separate parents from their children; democracy does not impose a blanket prohibition and thereby discriminate between its citizens with regard to the realisation of their family life. Indeed, democracy concedes a certain amount of additional security in order to achieve an incomparably larger addition to family life and equality. This is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terror. It is precisely in these difficult times that the power of democracy is revealed ... Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test."

#### D. Judicial review of the battle against terror

Judicial review of the battle against terrorism, by its very nature, raises the question of the timing and scope of such review. There should not be a theoretical difference between applying judicial review at a time when the State is under threat of terrorism and doing so at a time after the terrorism seems to have gone. We should never postpone our judgment until terror is over, because the fate of a democracy and of human beings may hang in the balance. The protection of human rights would be bankrupt if courts – consciously or unconsciously – decided to review the behaviour of the State only after the period of emergency had ended.

Furthermore, we should not accept arguments that the battle against terror is non-justiciable. When human rights are affected by State action, such action should always be justiciable.

What is the scope of judicial review in times of terror? The answer to this question should vary according to the essence of the concrete question raised. At one end of the spectrum stands the question: "What is the law on the battle against terror?" That question is within the realm of the judicial branch. The court is not permitted to liberate itself from the burden of that authority. The question which the court should ask itself is not whether the executive branch's understanding of the law is a reasonable understanding. The question should be: is it the correct understanding? At the other end of the spectrum is the decision, made on the basis of the knowledge of military professionals, to carry out an operation against terrorists. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the court will not exchange the military commander's security discretion for the security discretion of the court. True, "military discretion" and "State security" are not magic words which prevent judicial review. However, the question is not what the judge would decide in the given circumstances, but rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security.

Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. One of those legal aspects is the decision about proportionality.

Who decides about proportionality? Is it a military decision to be left to the military, or a legal decision within the discretion of the judges? My answer is that the proportionality of the military means used in the fight against terror is a legal question, which should be left to the judges. In a case concerning the proportionality of the harm which the separation fence caused to the fabric of life of the local inhabitants, I wrote:<sup>10</sup>

"The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military

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<sup>10</sup> HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) P.D. 807, 845 [2004] (Isr.), available at [http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel\\_0.pdf](http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel_0.pdf)

commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportionate. That is our expertise."

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

Often the court will encounter the argument from the legislature or the executive that security considerations led to an action by the State, followed by a request that the court should 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 State's actions. The court must be persuaded that the security considerations actively motivated the State's action and were not merely a pretext. The court must be convinced that the security measures adopted were proportionate. Indeed, in several of the many security cases that the Supreme Court has heard, senior army commanders and heads of the security services testified before us. Only if we were convinced that the security consideration was the prevailing one and that the security measure was proportionate did we dismiss the challenge against the security action. In dismissing challenges to security actions, judges should not be naïve or cynical. Judges should analyse the evidence before them objectively. In a case dealing with a review, under the fourth Geneva Convention, of the State's decision to assign Arab residents from the West Bank to the Gaza Strip, I noted:<sup>11</sup>

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

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 battle against terrorism. Both arguments are unacceptable.

As to the argument that judicial review undermines security, judicial review of the legality of the battle against terrorism may make the battle 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

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<sup>11</sup> HC 7015/02 *Ajuri v. IDF Commander in the West Bank*, 56(6) P.D. 352, 375–376 [2002] (Isr.).

wrote in a case involving a pre-trial pardon given to the heads of the General Security Service, who had committed crimes against terrorists:<sup>12</sup>

“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 fulfil 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 the State.”

And, I would add, to confidence in international courts.

As to considerations of legitimacy: to the extent that legitimacy conferred by the court means that the acts of the State are lawful, the court fulfils its traditional role. Both when the State wins and when the State loses, the rule of law and democracy benefit. It should be remembered that the effect of a judicial decision does not occur only in the individual case that comes before the court. Rather, the main effect occurs in determining the general norms according to which the State acts, 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, since State authorities are aware of the ruling of the court and act accordingly. The argument that judicial review somehow validates the State's actions does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom of the battle against terrorism, but only the legality of the acts carried out in furtherance of the battle. 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 fulfils its role by reviewing the legality of executive acts.

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

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<sup>12</sup> HC 428/86 *Barzilai v. Government of Israel*, 40(3) P.D. 505, 585 [1986] (Isr.) (Barak J dissenting), available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Barzilai%20v.%20Government%20of%20Israel.pdf>

I regard myself as a judge who was sensitive to his role in a democracy. I took the tasks imposed on me – protecting democracy – seriously. Despite criticism often heard, I continued on this path for twenty-eight years. I hope that by doing so, I was serving my legal system properly. Indeed, as judges, we must continue on our path according to our consciences.

Judges have a North Star that guides them: the fundamental values and principles of democracy. A heavy responsibility rests on their shoulders. Even in hard times, they must remain true to themselves. I discussed this in an opinion considering whether extraordinary methods of interrogation – torture or inhuman treatment – could be used against a terrorist in a "ticking bomb" situation. The answer was no. I wrote:<sup>13</sup>

“Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. We know its problems, and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our concern that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. Our fellow-citizens demand that we act according to the law. This is also the same standard that we set for ourselves. When we sit at trial, we too stand trial.”

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<sup>13</sup> *Public Committee Against Torture in Israel*, note 8 above, at 845.