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# The Argument of "National Security" and its Implications for the Israeli Political and Legal Systems

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***Introduction***

Debates of national security-related issues have played an integral, and prominent role in the institutional and cultural fabrics of Israel. The state's engagement in the Arab-Palestinian-Israeli conflict, and Israel's policies towards Arabs and Palestinians living within its pre-and post-1967 borders, generated and were affected by basic changes in the political setting, including the 'rule of law'.[i] The purpose of this article is to theorize, analyze, and reconceptualize the relationship between politics and law, following a study in a society and political regime for which 'national security' is a topic of fundamental importance.

In various historical periods, many states have experienced the sociopolitical impact of national security considerations on the rule of law. In the United States, for example, the Vietnam War contributed to the development of a protest culture against the establishment, and a wave of government scandals. Other examples include the transition, in 1958, from the Fourth to the Fifth French Republics, and the violent protracted British engagement in Northern Ireland which incited damage to civil and human rights (Barzilai, 1996). In these security crises, justified or otherwise, increased levels of governmental violence were brought to bare at home and in disputed areas aboard, and executive powers were expanded in the name of the 'rule of law.' All in all, legal settings became more oppressive, the level of the preservation of civil rights was significantly reduced, while the political rhetoric accentuated the need to overcome the 'enemy'.

The complexity of the interactions between national security, law, and the nature of political order have been well documented, even prior to the appearance of the 'modern' state on the world stage. In ancient city-states two legal codes existed: one for war, and another for

peace. The first imposed greater restrictions on human behavior and was aimed (at least partly) to abolish any opposition in times of crisis. The latter was suppose to ensure a greater degree of public accountability. In imperial Rome, for example, the legal code of war abolished all sorts of supervision over the Emperor.

The essence of legal settings is political, and it is contingent upon sociopolitical processes. A democratic legal system can not endure in a non-democratic domestic environment, and a liberal rule of law can not maintain its civic virtues while the state extensively is engaged in a military fight. In this context the conceptual distinction often imposed between law and politics is entirely inappropriate. Indeed, the rule of law must be seen and treated as a political device used in promoting political interests and in articulating political rights. The more political elites use the legal system to promote their aims during a national security crisis, the less liberal the legal setting will be.

In the first part of this article I will scrutinize the basic normative, theoretical, and empirical similarities, and antinomies, between fundamental elements of the democratic legal settings, on the one hand, and the phenomenon of national security crises, on the other. I will then focus on the process of nation building, the issue of national security, and the construction of law in Israel, as part of the development of a 'new' Jewish-Israeli identity and a 'new' set of democratic procedures, that ensured, *inter alia*, a repressive regime over the Arab minority. In the third section, I explore the interactions between the 'rule of law' and politics of national security in the 1967- 1993 period, beginning from the occupation of the territories and concluding with the Oslo agreement. In those years, the legal system was used repeatedly in order to soften the contradictions between a potentially liberal democracy and the realities of a military and civilian presence of occupation against an unwilling and resentful Palestinian population. The Intifada posed newer challenges to the Israeli rule of law and the democratic government, as did terrorism, counterterrorism, extremism, and the peace process. I then deal

### *A. 'Rule of Law' and 'National Security'-- The Mythical Sphere*

Wars and other national security crises endanger the potential or existing democratic attributes of the 'rule of law.' They often demand extensive mobilization of human and economic resources, in a way that often contradicts civil rights, e.g., rights for privacy and property. Hence, the nationalization of economic resources, the confiscation of private property, and the levying of heavier tax burdens are common phenomena in times of war. Britain in World War I, and the USA during the Korean War are only two examples of those occurrences (Barzilai,1996). While any expectation of democratic virtues in the rule of law should include the limited intervention of the state's power foci in individual life, wars and severe national security crises tend to confine this democratic tenet in legal settings.

The damage inflicted on individual rights in times of security crises is possible due to epistemological predicaments, cultural narratives, and institutional deeds. Human beings presume that political unity is a crucial element of military victory. Accordingly, a collective discourse that embraces institutional efficiency, almost at all costs, is generated, which can delegitimize, *inter alia*, judicial adjudication and public accountability. A democracy should strive to deconstruct the imposition of limitations on the individual autonomy and on the community *sui generis* identity, but one of the principles of war management, however, is public conformity. Authoritative laws, administrative sanctions, and emergency legislation (e.g., censorship, expropriations, and detentions) have been common in democracies like

Wars and democracies are not mutually exclusive. Democracies might not be inclined to fight other democracies, but peacefulness is not an in-built tenet of such regimes (Maoz & Russett, 1993). Students of world politics should bear in mind the phenomenon of 'warring democracies'. This category does not only include states like Britain, India or Israel, which have constantly been involved in ongoing military clashes, but states like France or the USA, which have also been involved in military struggles. The legal structure, and often specific legislation, enabled those countries to exert a great deal of military force, without severe constitutional constraints. Organizations of collective physical strength, like security services, the police and military, were rather free to utilize military force in the domestic and the foreign spheres. The ruling elite used the 'rule of law' in order to legitimize excessive use of force, against external and internal enemies. Higher courts did not hamper the trend of legalizing the use of military force. Instead, they were part of the general atmosphere of like-minded, fearing possible anti-judiciary legislation for anti-executive or anti-legislative rulings[ii] (Koh,1988; Mishler & Sheehan, 1993). Consequently, supreme courts and constitutional courts tended to be majoritarian and not countermajoritarian institutions, preserving the sociopolitical status quo, rather than altering it.

Political elite molds the 'rule of law' by referring to national security terms. The desire to form internal political order, by eliminating political foes or reducing the probability of an effective opposition, lead political elite to manipulate their legal systems in order to legitimize non-democratic measures in tpreserving democracy. The mythical power of law (in its broad sense) as a transcendent criterion for order, as an objective, absolute, and a just yardstick for managing public life, facilitates its manipulation by the political elite. Law is neither autonomous to the political essence of the state, nor is it independent of its institutional

Law and national security are public goods. Both have been aggrandized as being the idealization and articulation of the 'general will' (*volonte' generale)*. Both are perceived as objective notions reflective of collective needs, and therefore above the insufficiencies of politics. The terms 'national security' and 'law' or the 'rule of law' are carried, generated, articulated, and exerted through professional communities and organizations: militaries, soldiers, officers, and military experts; courts, judges, lawyers, and legal experts. The professionals incline to empower the mythical aspects of the public good. They have an interest in fostering the myths about the apolitical and objective nature of the 'rule of law' and 'national security,' as such erroneous perceptions allow the professionals to usurp or maintain their authority in the management of their public spheres. Consequently, public accountability and public criticism, so crucial for democracies, might seem to be useless and damaging. Legal reasoning, in much similarity to military knowledge, is mistakenly perceived as having its own internal, structured and autonomous logic. Citizens who are not members of the professional communities are considered outsiders who should not participate in the formation of such public goods.

National security and law are interrelated in the mythical sphere. If obedience to law is required for the collective security - as political elite claim - law should not be condemned or questioned. If national security is a collective need - as they claim - it may also legitimate the most abusive laws. If broad dissent or disobedience targeted against security authorities, and the political establishment, are defined as law infringements, national security policy is constructed as immune from criticism. Such mythical interdependence empowers and was empowered by the political praxis, in which law was influenced by national security and

### *B. State Building, National Security, and the Rule of Law*

Conventional studies of legal systems devote much effort to describing the formal structure of a given legal system. The unsatisfactory and superficial perspectives formed by such work lead to the conclusion that Israel does not have a constitution because of the opposition of the dominant political party during the formative years of its development (Mapai), and because of the religious-secular rift. However, one should note that since the 50s' the Israeli legal system formally was based on Basic Laws (eleven until 1996) as a replacement for a written constitution. My purpose, however, is to comprehend the legal setting beyond its technical aspects and to conceive its political facets and its interactions with national security.

Legalizing the new State of Israel was one of the most crucial aims of Premier David Ben-Gurion, and the Mapai party. Like other states, Israel tried to gain international recognition and an effective domestic system, while establishing its control over an integrated territory. Generally, legal systems were crucial in this process of statehood. Thus, at the international level, states declared the *raison de etre* in their constitutions. In the League of Nations, later the United Nations, such a practice became almost routine for most new states. Yet, scholars have not fully underscored the importance of legal myths, and legislation, in the process of state building.

The myth of law is composed of several components, first of which is the self-declared definition of law. Accordingly, the law pretends to be coherent, stable, complete, and independent of sociopolitical changes. Second, the boundaries between law and political reality, between the normative aspects of the law and its behavioral aspects, do not exist. The law's conceptualization of politics is the definition of politics. Third, law is transcendent to the

History should critically question the myth of law. The ability of the 'rule of law' to be an objective arbitrator between majorities and minorities, rich and poor, empowered and deprived national groups, various religious and cultural groups, and between weak and strong social groups is rather secondary. During times of warfare, when the mobilization of resources for national security purposes is considered by political elite and the general public as the most crucial aim, the subjectivity of law becomes most prominent. The exaggerated importance given to security issues breeds the marginalization of the 'rule of law' as a potentially autonomous source for social justice. Yet, the myth of law is functional for political elite because it helps mold the legal sphere as the dominant criterion for political order. The Israeli experience is demonstrative of this trend.

Upon declaring its independence, Israel labeled itself as a member of the democratic world. And, with the outbreak of the Korean War, Israel affiliated with the Western block, signing a number of international agreements. While questioning and protesting UN resolutions, Israel systematically portrayed itself as a law abiding country (Barzilai, 1997). In the authoritarian region of the Middle East such an image was functional for distinguishing

Israel from its neighbors. While Israel depicted the 'others' (i.e., the Arabs) as the symbol of evil, Israeli leaders were persistent in portraying their country as part of the Western and 'free' world. Such self-imposed image was very useful for Israel's consolidation as a recognized democracy in the international system, and after 1950 it was crucial for mobilizing economic, military, and diplomatic resources which served the state's interests. UN resolution 181 (November 1947), and the Israeli Declaration of Independence (May 1948) delineated Israel as an internationally recognized sovereign and democratic state.[iii]

The domestic challenge - intertwined with the foreign sphere - was more complex. Much of the political sphere during the Jewish-Zionist Yishuv period (1882-1948) was managed by unwritten rules, which enabled some regulation of the conflicts between and among political groups and a few para-military organizations. The hierarchical structure of the political matrix in the Yishuv generated a rather effective political order. The dominant parties, Achdut Haavoda (1919-1930), and Mapai (1930-1968), shaped modes of political cooperation (sometimes, as in 1946, military cooperation) between the Jewish political factions, even though the pre-state community lacked recognized sovereignty or a state'ageof enand punishment. The ruling elite was challenged by violence, and exerted violence, without any institutionalized definition of a 'due process of law', or formulated rules of its political game (Horowitz & Lissak, 1990; Shapiro, 1984).

The inception of the state (May 1948) was primarily characterized by the centralization of military power. In this conjunction of the creation of institutionalized state security forces, law played a crucial role. Ben-Gurion aspired to dismantle any para-military organization outside the framework of the Israel Defense Forces (IDF), and the secret services, which heavily relied on and managed by Mapai protagonists. The IDF Order (1948) asserted that the IDF was the only legal military in Israel, and it underscored the subordination of the military to the government. However, the Order did not mention the secret services. Their political

supervision was assigned to the Prime Minister. Such a distinction was representative of a political custom from the Yishuv period, when the secret service of Mapai was directly subordinated to the party chair. Through the Order and practices the ruling and dominant party, Mapai, controlled the means of collective violence. While the formal accountability of the IDF was clearly stated in the Order, the veil of secrecy over the secret services was greater, and was often used for internal political contentious purposes: primarily surveillance of political opponents and control over Israeli Arabs.

Relying on the myth of the rule of law and the perceived need to generate 'order', Ben-Gurion dismantled the Palmach, which was the main para-military organ of the Yishuv. Then, he successfully suppressed a revolt of several military senior officers in the IDF who opposed that move. Another political and military challenge was disassembling the two rival para-military organizations, which followed primarily the Revisionist political view: Etzel and Lechi.

Following the assassination of the UN mediator Count Folka Bernadot in September 1948, during a visit to Israel, the Order for the Prevention of Terrorism (1948) was issued. Against the backdrop of internal political terrorism, the Order included severe measures of punishment for unauthorized military organizations, especially those of Mapai's opponents. The Order authorized the judiciary to convict any group or individual who aspired to use violence against the ruling elite. It empowered the defense minister to submit to court a declaration pointing to the existence of such an individual or a group, and the defense minister's allegation was viewed as conclusive evidence. Accordingly, the Order was used for the purpose of disbanding Etzel and Lechi following their legal definition as terrorist organizations.

The consolidation of new rules, and the institutionalization of State and partisan power-foci, relied significantly on the machinery of law making and law application. The

So exclusive a politics of religiosity, which did not separate Israeli nationality from Judaism (in its Orthodox sense), and which stratified the political meaning of citizenship according to religious affiliations, also became closely intertwined with images of security. It was reflected in law, and was generated through the narration of law. Israeli Arabs were considered a rival community, whose animosity to the Jewish state must always be controlled and subdued. Indeed, from 1949 to 1966, Israel's Arab community fell under the jurisdiction of the military and security services, embodied in emergency regulations. Military rule imposed a number of constraints on the Israeli Arabs, including restrictions on freedom of movement, employment, organization, and expression. In addition, Arab lands were confiscated by the government, and those Arabs who returned to Israel after the 1948 war were deprived of their rights to land ownership.[v]

The Arabs' ability politically to protest was very limited, because they were subjected to a tight system of sanctions, and their efforts to organize the public were also restricted. In 1965 an Arab political party, Al-Ard [The Land], which had called for a bi-national state, was

excluded from participation in the national elections for the Sixth Knesset (1965-1969). The supreme court approved that decision, ruling that Al-Ard constituted a severe danger to the state's security (E.A 1/65 Yardor V. The Chair of the Central Election Committee). Preservation of Jewish hegemony was the main motive for the court ruling. Al-Ard was too small to endanger the physical existence of the state, nor was it proved in court that its members aspired to destroy the state. However, the party vigorously challenged the Jewish identity of Israel, and therefore it was perceived as a security hazard. The supreme court has functioned for the reflection and generation of the Jewish ethnocratic elements of the state. But its function was not only of mere articulation but of legal construction of unconventional political views of the minority as a menace to the state's existence.

### *C. The Effects of the 1967 War on Arguments over Law and National Security*

Law should not be understood as a value-free public good. Its essence is intertwined with sociopolitical events, and political interests. Therefore, Israel's control over the territories occupied in the 1967 War created a new sphere of activities inherently related to the meaning of law. The Israeli legal fabric had to be adapted to the IDF's control over 1.5 million Palestinians. Two principal arguments could have been raised for the future of the territories. The first defined them as legally occupied regions, which would be returned. In that case the application of Israeli laws and jurisdiction over the territories would have been considered useless. A second definition favored annexing the territories to Israel, and granting full rights of Israeli citizenship to the Palestinians. None of the above mentioned options was adopted by an Israeli government.

Instead, Israel's legal conceptualization of the territories became very complex. East Jerusalem and the Golan Heights were formally annexed, and the 'rule of law' was automatically enforced on those areas. The incorporation of populated territories, based on a

self-declared expansion of the Israeli rule of law, was severely criticized by some experts of international law (Benvenisti, 1993;Dinstein,1984; Sheleff,1993). However, the annexations were accepted by both the Labor Party and the Likud, and by the majority of the Jewish-Israeli public. Frequent public opinion polls, conducted among the Jewish-Israeli public, exhibited this propensity.[vi] Only the Arab-Israeli minority, and a few dovish Jewish groups questioned the legality of the takeover, but they could not alter the Israeli setting. Most members of Israel's legal community - lawyers, judges, and law professors - also accepted the occupation and territorial expansion. Indeed, the new formal disposition of Israel as sovereign power over the annexed areas was acknowledged within that professional coas thpoint of defor legal arguments and reasoning. Only a few Jewish lawyers and law professors questioned the legality of the annexation and called for the repealing of the relevant laws. By and large, however, the Jewish-Israeli public tended to advocate the annexation of East Jerusalem due to ideological and religious incitements, and the annexation of the Golan for security reasons.

Israeli law was presented as an advanced, just, liberal-democratic legal fabric. Formally, it was applied in the territories for the benefit of the local Arab inhabitants. The law of the 'other', the law of the occupied, was marginalized. The local Palestinians in East Jerusalem, and the Druze in the Golan, could register as Israeli citizens and vote for the Knesset, and after 1996, for the Prime Ministership, as well. In practice, though, only a minority among the Palestinians recognized the legitimacy of Israel as an occupier. The majority rejected the self-declared legality of the annexation.

Since the beginning of the 70s the supreme court adjudicated the operations of Israel in the un-annexed territories as well. The Court ruled that its judicial authority would apply to the regions under occupation, despite the fact that most of those areas were not annexed to the State of Israel (Barzilai & Yuchtman-Yaar & Segal, 1994). The judges could not stay aloof to the centrality of issues related to the Israeli rule over those territories, and could not evade the

eruption of legal crises regarding Israel's control over an hostile population. Yet, the supreme court was an organ of the Jewish state, it represented the Jewish-Israeli side in this protracted conflict, and it formed a judicial policy which constructed Palestinians not as ordinary people, but as an enemy striving to destroy the State. Hence, it could not become an objective arbitrator nor a neutral judge in the strife between Jews and Palestinians. Most of the appeals by Palestinians were dismissed; the Court referred to the claims made by the security authorities during the judicial deliberations as the ultimate basis for its rulings (Sheleff, 1993; Shamir,1990).

Ultimately, the adjudication of activities in the regions under occupation legalized and legitimized the occupation. In so doing the judges used arguments of national security. In justifying land confiscation or requisition they argued that military needs necessitate the paving of roads for the army and for the safety of the Jewish settlers. Hence, in 1978 the HCJ ruled over a principal issue of Israeli land requisition in the West Bank. The Court used a security argument in ruling against the appeal of the requisition:

> The principal is that from a pure security standpoint there is no doubt that the presence in the settlements - even "civil" ones - of citizens of the ruling power contributes significantly to the level of security and eases the task of the army and the carrying out of its tasks . . . There is no need to be a security expert in order to understand that terrorists act more freely in areas populated by apathetic people or supporters of the enemy, as compared to locations in which their actions are followed or the residents report about suspect groups (HCJ 606/78, 610/78 Ayub V. Minister of Defense, 119).

National security considerations were also used to uphold house demolition as a means of punishment, to legalize illegal deportations, and to permit the government to act in the occupied territories in contrast to the Israeli administrative law. In 1992 the HCJ summarized its policy of favoring 'security needs' over the right to be heard before the court, an ability

established in Israeli administrative law. The HCJ justified acts of deportations of Palestinians from the territories without letting the deportee appear and be heard prior to being deported, on the condition that a 'security need' existed, and provided that the deportee could appeal to the committee, after the deportations took place:

> This verdict is not based on written law, but on opinions established by the court, which require all institutions to act fairly. The rejection of the right to be heard before the committee is similar to the denial of the individual to a fair trial. However in conditions of emergency, the right of the individual is superseded by a contrasting necessity which requires preferential status (HCJ 5973/92 The Israeli Association for Civil Rights V. The Defense Minister, 284).

In few cases the supreme court ruled in favor of the Palestinians. In such cases the Court recognized the right of the Palestinians to be heard before a judicial tribunal, the right to meet a lawyer during an administrative arrest, and the right to appeal to a judicial tribunal before the demolition of a house. The importance of such rulings should not be overshadowed. Despite the legal and sociopolitical discourse of a military regime imposed on the territories, the supreme court, albeit very rarely, hampered some punitive military acts against Palestinians. Such examples are even more intriguing considering that Palestinians perceive the Court to be part of the Jewish Zionist State and expect it to evade any possible clashes with the political or military establishments. The Palestinians view the supreme court as instrumental only as a limited means to halt the machinery of control, by using one of its organs - the Court - against others, i.e., the government and the security forces.

In general, the judges were affected by the protracted national security crisis. The judicial elite, like others, was embroiled in the security syndrome. It would be wrong to presume that the judicial elite would be above the ever-present reality of frequent wars and limited military action inside Israel and beyond its borders. The definition of national security,

its essence and scope in relation to other values (e.g., freedom of expression) were debated in the Court, not only implicitly, but also as part of its legal reasoning.

Within the rhetoric of judiciability the Court was careful not to be identified with either side of the political spectrum, especially regarding the future of the territories. Hence, appeals against the management of war or the conclusion of peace accords were dismissed. Yet, while the Court refused to be identified with any call for a change in the basic political and social characteristics of Israel, it did play the role of a major proponent of the territorial status-quo. Such judicial policy was based on a rather narrow judicial interpretation of the term 'national security.'

In supreme court rulings an emergency situation was defined as a permanent state of a war or a protracted fight against terrorism. In such an atmosphere, the Court was reluctant to intervene in decisions made by security experts. The common judicial presumption was that emergency conditions necessitated only a very limited and a very partial judicial review over the security establishment (Barzilai, et al., 1994; Barzilai,1996; Sheleff, 1996). The multifaceted siege mentality of Jewish-Israeli society touched its judges as well (Bar-Tal,1991; Bar-Tal & Antebi, 1992). It was articulated in rulings and *obiter dictum* in which Israel was defined as a democracy in a state of defense or as a democracy at war.[vii] Such images incited the judicial elite's construction of legal arguments that hampered effective judicial review. They did not preclude the few salient court rulings which paved the way for a better balance between national security and other democratic values, but the net effect of the argumentation on behalf of national security invariably was enormous. The judges were prone to identify with the security argument, preferring in general the opinions of the defense establishment over the ordinary citizen or resident of the territories. The Jewish ethnicity of the supreme court, its structured position as part of the ruling apparatus, the articulation of security considerations in

Court by military experts, and the belligerent pracsis and discourse during a protracted conflict, marginalized the Palestinian ijudicial deli.

Issues onational security were often raised in matters relating to the press. In no other matter was national security under as strict a judicial review as in regard to freedom of expression. In 1953, the ***Kol Haam*** case, the supreme court defined freedom of expression as a constitutional right, and established the 'near proximate danger' test as the criterion for censorship. In that case the Court abolished a writ issued by the minister of the interior against the Arab-Jewish newspaper of the Maki communist party. The paper accused Ben-Gurion of assisting the USA in its military efforts in the Korean War. The HCJ ruled that regardless of the veracity of the report, it did not constitute a 'near and proximate danger' to national security (HCJ 73/53 Kol Haam V. Minister of Interior).

The essence of this ruling, its *ratio decidendi*, advanced the democratic aspect of the Israeli constitutional infra-structure. It created a crucial civil right, freedom of expression, without a written constitution and in the absence of any alternative legal source that suggested the possibility of creating such a right. But the Court did reflect the siege mentality that prevailed in Israel. It rejected the more liberal criterion of "clear and present danger," as embodied in the American jurisprudence, and emphasized that the security conditions of Israel necessitated a more conservative standard for deciding between freedom of ex and national security. On the one hand, the Court made use of the Declaration of Independence (a non legal instrument) in order to justify the establishment of partial autonomy for the Court in relation to other state branches. On the other hand, the judges presumed that freedom of expression was not an absolute right, that it could be limited in light of national security requirements.

In the context of the belligerent atmosphere and the security tension, censorship was not significantly challenged until 1973. Following the eruption of the 1973 war, public accusations were made that had the censor approved the publications of information about

Syrian preparations for the war, the hostilities could had been prevented. Public criticism against the military and the political establishment reached new levels of intensity, and with it the public's willingness to limit freedom of expression because of security needs began to decline. Protest against the Labor-led government, the Agranat Committee report, the growing activities of extra-parliamentary groups, and the public debates following the military blunder were all clear manifestations of this process.

The market of views became broader, and national security became more of a debatable issue. The security argument remained very influential in judicial decisions, but the supreme court, and the legal system as a whole, began to defend the freedom of expression more widely than ever before. In a series of court rulings, the supreme court exhibited a reluctance to legalize censorship over the theater or the broadcast media.[viii] In several cases the supreme court dismissed arguments of national security which were raised in justification of censorship. The Court demonstrated a certain public proclivity to acknowledge the legitimacy of non conventional criticism against the military and the political establishments. In one case, ***Laor***, the supreme court approved a show in which an analogy between the Israeli occupation of the territories and the Natzi regime was put forward as point of criticism. The HCJ rejected the argument put forward in defense of the canceling the play on the grounds that it constituted a danger to the state's survival (HCJ 14/86 Laor V. The Council for Review of Movies and Theatrical Shows).

The American influence over the sociopolitical and legal settings was evident. It meant more sensitivity to the rhetoric of civil rights, and more resentment towards a tight state control over public opinion. At the judicial level it was reflected in a growing inclination on the part of the judges to use American jurisprudence to empower their rulings. But the Americanization of Israel was also expressed on deeper levels. The myth of national security further was debunked. The Lebanon War (1982-1985) spurred greater condemnation of government

policies and exacerbated the level of political polarization across Israeli society regarding the future of the territories, the Palestinian issue, the use of force, and the shape of the permanent borders. Public opinion had diversified, and the media articulated this change. In a rather technological society, with a stronger attachment to the western liberal sphere, and an incrementally accumulated set of liberal values, the polarization was associated with the freedom of expression. National security as a limitation of the freedom of expression ceased to be accepted with regularity. Judges, like other elite, asked more about the scope and validity of national security arguments, while freedom of expression was viewed more as a public virtue and individual right.

Such a tendency was clearly expressed in the 1989 ***Schnizer*** affair (HCJ 680/88 Schnizer V. The Military Censor). In that case the local Tel-Aviv weakly, Ha'eir (The City) requested permission to publish an article which criticized the Mosad and its director. The military censor, relying on the mandatory regulations (1945) refused to permit its publication. After several attempts to reach a compromise between the newspaper and the military censor, the case was brought to court. In one of the most commonly cited opinions of justice Aharon Barak, he (and the other two judges) ruled in favor of the appeal, and rejected most of the claims made by the censor. In pure legalistic terms that ruling has two substantial aspects. First, it has adopted the principle of "near proximate danger," and incorporated it in executive and emergency legislation. Second, it transferred the burden of proof from the appellant to the establishment, and hence made the acceptance of any argument in favor of censorship less probable. But seeing that decision in a political and social configuration is more telling.

In ***Schnizer*** the HCJ expressively asserted that freedom of the press, in the more narrow sense of freedom of expression, is a virtue tied to the well being of democracy. Accordingly, it legitimized direct criticism of the security establishment. This case was often cited during the Intifada, when the violent Israeli-Palestinian struggle raised the level of dissatisfaction among

However, national security remained an influential myth and continued to be used by the political elite for forming legal prohibitions and shaping political order. This was exhibited in court rulings and in legislation alike. In 1986 the Order for the Prevention of Terrorism was amended. This time it was not targeted against right-wing political activists but against left-wing protagonists. The amendment was aimed to prevent meetings between PLO activists and Israelis. the veil of a argumentation of preveterrorism, the government used the law in order to serve its immediate interests. At the time a 'unity government' (Labor and Likud) was in power, and the amendment to the Order was designed to prevent political activists at the peripheries of the political system to meet with PLO activists. The recognition of the political aspirations of the PLO was defined as a prime danger to the existence of the state; restrictions on freedom of speech and freedom of association were defined as a democratically valid means to blunt that threat.

The supremacy given to national security as a value was reemphasized in crucial judicial decisions. Rulings of the supreme court reflected that with the exception of issues associated with freedom of expression, national security was a prime value that dominated court adjudication and framed the content of the rule of law. Thus, this phenomenon was reflected in rulings concerning freedom of movement, administrative arrests, military disobedience, and confiscation of lands from Israeli-Arabs in the course of the 1948 war. In those issues the HCJ ruled that national security arguments justified restrictions over specific civil rights.ix One clear example is the Ikrit affair. In this case, a group of Israeli-Arabs asked the HCJ to be allowed to return to their lands, from which they were expelled in 1948 during the war, according to a military order. Latter, in the early 50s' their expulsion was ratified by subsequent military order. The Court dismissed their requests. They appealed several times in the 50s, their efforts were to no avail. (HCJ 64/51 Daud V. Ministry of Defense; 239/51 Daud V. Committee of Appeals for the Security Zones in the Galilee) .

They appealed again in 1981. The Court feared reconstructing 'the right of return,' and the judges again used the security argument to reject the appeal:

> We cannot accept the claims. We must debate the appeal from the assumption that the closure order was given as law, that the military command had security considerations in mind. In order to succeed in the appeal, the appellant would have to demonstrate that the condition present during the giving of the order no longer exists., and that therefore there is no reason not to cancel the order. From the reports known to all, the situation on the Lebanese border is far from peaceful, nor has there been an extended period of calm. The line of settlements which exists along this frontiers form part of our integrated defense. And, although there is an enclave of Arab villages near the Lebanon border, this fact does not negate the concerns of those responsible for security. The return of the appellants to their village, Ikrit, would constitute a security threat, even without calling into doubt the

loyalty of the appellants to the state ( HCJ 141/81 The Committee for Ikrit Refugees V. Israeli Government, 133).

Another similar case was the 1986 ***Barzilai*** affair (HCJ 428/86 Barzilai V. The Israeli Government). In 1984 two Palestinians hijacked an Israeli bus near Beer Sheva. Israeli security forces in a military rescue operation captured them. The security forces released the hostages, interrogated the two Palestinians, and then executed them without a trial and or any form of due process of law. The details of the incident were concealed from the media. When the facts ultimately were discovered by one of the major newspapers in Israel, Chadashot (News) they were censored, according to the presumption that publication of the events might create a 'near and proximate danger' to Israel's security.

Nevertheless, Chadashot ran the story, complete with a picture of the two terrorists before their execution. The military censor, in reaction and based on his claim that the newspaper had ignored a direct request to submit the information to the censor, and not to publish the information, decided to shut down the newspaper for few days using his powers as defined in the emergency regulations (1945). Chadashot appealed to the supreme court as a result of the censor's actions. The HCJ dismissed the appeal based on the argument that the information should have been submitted to the censor, and due to considerations of national security It was an incorrect decision. In its ruling the Court chose to prevent the press from becoming an opposition to the security establishment in its counterterrorism efforts. The judges were overly influenced by the security argument and accordingly presumed that concealing the facts from the public was necessary in order to allow the security services efficiently to fight against terrorism.

Public dissent following the press reports enforced the government to form a committee of inquiry. However, a number of Shabak (Shin-Bet, the Israeli internal security service) commanders fabricated evidence during its hearings. Consequently a criminal investigation

was conducted against the highest levels of the Shin-Bet. Following political, including governmental pressures, a pardon for the potential accused was considered. The Attorney-General, Professor Yitzak Zamir, insisted to continue the police investigation against the Shin-Bet commanders, and refused to the possibility of a pardon. Therefore he was forced by the government and the defense establishment to resign, and Haim Herzog, then President of Israel, pardoned the suspects in the case. This was a clear example of an illegal state act being embraced by the most symbolic figure in the Israeli political setting. In his writ the President emphasized that the security authorities were dealing with a crucial national effort, the fight against terrorism, and therefore they should be exempt from criminal investigation in that case.[x] The President created a dangerous precedent in which illegal acts committed by the security establishment are publicly considered legal as long as they are explained and framed in the context of security activities.

Security organizations are tools of collective violence; they establish the state's power to control its citizens. The construction of external and internal enemies helps to justify the operations of those organizations. Often, the legality referred to their existence and operations is not defined in a clear statutory framework. It is politically constructed as if the legality of their existence and activities should be presumed by the public. The matter to which such a presumption would hold is contextually contingent.

In 1986 several civil rights activists appealed to the supreme court against the President's writ of pardon, asking for its cancellation. The writ was very problematic because it was intended to halt criminal investigations before any charges against the accused were submitted. It was a result of an understanding that was concluded between defendant's lawyer, Prof. Yaacov Neeman, and the President of Israel, who had been Neeman's partner in a private law firm, co-established and co-managed by the President prior to his nomination for Presidency. The writ of pardon was based on section 11 of the 1964 Basic Law: The President.

Section 11(b) permitted the President to pardon criminal offenders and to reduce or convert their verdict.

Two issues were discussed in ***Barzilai***: first, did the President's act of pardon fall within the scope of section 11(b) or was it an act of *ultra vires*, i.e., outside the formal authority of the President? Second, was the act of pardon appropriate? Two judges, Meir Shamgar and Miriam Ben-Porat ruled that the pardon was well within the President's authority, and that he properly used his statutory discretion. A third judge, Aharon Barak, decided in the contrary, and asserted that the act of pardon was done without authority. The concrete issue of contention between the majority opinion and the minority was whether a pardon could have been granted to suspects who had not yet been formally accused or convicted. Shamgar and Ben-Porat replied positively, and contrary to the usual meaning of the term "criminals," decided that the term included those had not yet been accor convic. Barak suggested ot, claiming that the majority opwas to license the President as a political authority to interfere with the professional discretion of the police in the process of its criminal investigations.

The contention over the second issue is indicative of the motives prompting the judges either to justify or to condemn the pardon by interpreting section 11(b). Shamgar and Ben-Porat asserted that national security is an ascendant value that sometimes justifies deviation of the ruling authorities from the 'rule of law'. Formally, such a claim was an *obiter dictum* (a judicial assertion that is not part of the formal ruling), but it influenced the legal reasoning that molded their decision. They postulated that the rule of law is what the rulers think the law should be when national security is intimately associated with the implementation of legal principles in the field of counterterrorist activity.

By so ruling, they unwittingly articulated that the fight against terrorists challenges the democratic legal setting and, in fact, changes it. Under the veil of national security the law was not equally applied. A civilian criminal could not enjoy the same process of law as a criminal

in the state's service. The application of the due process of law was contingent on the identity of the criminal and the political context of his/her activities. From that perspective the Court ruled that an illegal act of the state might become legal if the activities were relevant to national security. National security, however, is a political value in itself and is framed according to specific sociopolitical aspirations and interests. It can not objectively be measured nor can it objectively be agreed upon. The Court has legitimized the political implementation of the notion 'rule of law' according to the needs and purposes of the military and civilian establishment. The supreme court was a central pillar in that establishment. While a naive conception of judicial review would assume that it would facilitate civilian control of the ruling elite, the judiciary operated otherwise by legalizing violent state functions in the sphere of national security. The majority opinion in ***Barzilai*** joined the general trend of the Israeli legal and political settings to grant a great deal of importance to national security argumentation.

Justice Barak criticized the majority opinion for yielding too much weight to national security considerations at the expense of other crucial democratic values, like the due process of law. Barak, one of the most influential figures in Israel since the 70s, and the Chief Justice since August 1995, represented in that affair a rather liberal approach, according to which political life is pluralistic, and judges should comprehend the existence of various, often non-complementary and even contradictory values. From that perspective national security should be conceptualized as another value in the sphere of competing values. Nonetheless, Barak himself articulated and generated the group-oriented effect of the national security myth on supreme court judges. The 1993 judicial ruling to confirm the deportations of the Hamas activists clearly exhibits this tendency (HCJ 5973/92 The Association of Civil Rights in Israel V. The Defense Minister). In December 1992, following a series of terrorist attacks in which a number of Jewish citizens were murdered, the Rabin-led government decided to expel around

400 Hamas activists from the West Bank and the Gaza Strip to a plot of no-man's-land in Southern Lebanon.

The deportees appealed to the supreme court claiming that expulsions are prohibited by the Geneva Covenant (1949), and that the deportations were illegal even by the criteria defined in the Israeli administrative law and in its supreme court rulings. Initially, the HCJ issued a temporary writ that halted the expulsions until the final court ruling. However, the final decision upheld the deportation. Even the three judges who previously had issued the writ to stop the expulsions changed their minds and decided to dismiss the appeal. The court ruled unanimously, choosing to legalize the government's act of collective and massive deportation.

That judicial decision merits a criticism. The deportation was collective, the aim of the expulsion was not to punish an individual or to prevent a specific act of terror, but it was aimed to punish and to deter Hamas as an organization. The Court clearly ignored this concept, even though in its previous rulings collective deportations were found to be illegal. The deportees could not exert the right to be heard before the expulsion took place. In that respect they could not enjoy the basic right that the Israeli law granted to Palestinians in the territories. However, the judges ruled that this legal deficiency should not justify the nullification of the deportations, rather they granted the deportees the right to be heard before military tribunals in Israeli-held territory in South Lebanon. Moreover, the supreme court did not apply international law, refusing to recognize the Geneva Covenant (1949), that should have been applied to the occupied areas and prohibited deportations of local inhabitants.

In this case, the HCJ ruled under the influence of the security crisis. The public was deeply unsatisfied with the government's inability to prevent terrorist attacks within the Green Line. The Rabin-led Labor party had only recently won the 1992 elections, in part due to its promises to make daily life safe. Now it was under pressures to keep its promises to the agitated public. An atmosphere of belligerency prevailed in the Knesset as well, as members of

the coalition and opposition alike demanded a vigorous governmental response to the wave of terrorist attacks. The judges hared this mood. They also understood that regardless of their specific individual attitudes, judicial intervention in the uniquely government dominated sphere of national security, could have led to anti-judiciary legislation, supported by the general political climate.

The national security argument was prominent in the Court ruling. It was often cited in the ruling as the primary justification for act, as part of what the government called its counter-terrorism policy. The Court was not an autonomous institution. It functioned mainly within the limits of two intertwined narratives: Jewishness and national security. Indeed, the procedures of the state within the Green Line were democratic and her institutions should have operated for the benefits of all citizens. Yet, the judicial elite was mainly Jewish, and it inclined to serve the aspirations of the Jewish majority. As a crucial part of the ruling apparatus it functionally legitimated what was perceived in the political sphere to be an act of greater national security importance.

The centrality of the security argument is reflected in Knesset legislation as well. In 1979 the Knesset passed the Emergency Powers (Detentions) Law-1979, intended to replace mandatory regulations dealing with administrative detentions and deportations (Mandatory Defense (Emergency) Regulations, 1945; Regulations 111-112B). The regulations did not embody any apparatus of judicial review as an integral part of the detention process. Up until 1979, a detainee only legal recourse was to appeal to the supreme court. The 1979 law changed that, and in so doing it helped further Israel's limited democratization; it imposed judicial review of a district court in 48 hours after the detention was made, and it limited the detention period to six months.

However, the 1979 law also legalized administrative detentions as part of the Israeli constitutional framework, and it granted the security authorities broad discretionary powers in

detaining suspects for long periods. Clause 2 states: “If the Defense Minister has a reasonable basis to assume that state security or the public security necessitates that someone will be arrested, the Minister is entitled, in a writ signed by the Minister, to arrest a human being for a period thatwill not exceeds six mon”. The law was a clear example of thecentrality of security arguments in the Israeli setting.[xi]

The Supreme Court has not significantly restricted the scope of that law. In a series of rulings the Court instructed the authorities as follows: the law is intended for the future, and not the past, meaning that it serves a preventive and not a punitive role; the law is not a replacement for criminal proceedings; the Court will not intervene in the security authority’s discretion; and that the Minister has the right to issue a writ of detention even when the danger to state security is not a ‘near proximate danger’. The first two rulings have soften undemocratic facets of the law, but the last two broadened the actual authority of the Defense Minister and his/her ability to use security arguments for imposing restrictions on civil and human rights.[xii]

In 1985 the Knesset legislated clause 7A of the Basic Law: The Knesset, that was aimed to restrict the ability of political parties to compete in the national elections for the Knesset. Among other provisions, the clause was directed against Arab-Israeli parties, which challenged the Jewish character of the state. Clause 7A asserted: “A list of candidates can not participate in Knesset elections if its purposes or acts, expressively or implicitly, are one of the following....”. Clause 7A (1) asserted: “Negation of the existence of the State of Israel as the state of the Jewish people.” The legislature, similar to the judiciary (E.A. 2/88 Ben- Shalom), did not differentiate clearly between security hazards to the physical safety of the state, and ideological or political challenges to the Jewishness of the state. In this matter the national security argument was *de jure* very central to the legislation and the adjudication that followed.

However, *de facto* it was meant to limit the civil freedom of Israeli-Arabs to be elected, if their views were in sharp contradiction to the central Zionist ethos of the state.

### *D. Liberalism and the Security Argument*

As explored in this article, the complexity and ambiguity of the antinomic relations between fundamentals of democracy and national security as a prime collective value should not be dismissed. A political culture of liberalism will make the tensions between national security and other needs of democracy more acute. Theoretically, liberalism reduces the priority given to national security as a collective value, because liberalism encourages individual rights, preferring them in principle over collective values. Yet, liberalism does not abolish the collective value of national security. Rather, it presupposes that collective safety is contingent upon the preservation and articulation of individual freedoms.

In practice, the more severe a security threat to the collective is perceived to be, the stronger the inclination to restrict individual freedoms might become. The state, including the judiciary, will be the crucial element in generating the perceived threat, and it is the central institutional body in articulating it. Hence, liberalism (as a deep commitment to individual rights), and national security (as a collective value) coincide, and the exact practical relations between them are historically and contextually contingent.

Since the early 70s Israel has undergone a process of liberalization, that became more evident in the 80s, and the 90s. Accompanying the accumulation of private property, individualistic lifestyles, growing expectations of professionalism, hedonism, and the broadening influence of the media, the legal setting has exhibited several legislative and judicial attempts to make Israel more liberal. In 1992 two Basic Laws were enacted, Basic Law: Freedom of Occupation (that was reenacted in 1994), and Basic Law: Human Dignity and

Freedom. This legislation was the first in Israel constitutionally and systematically to approach the issue of civil rights.

In both laws the Declaration of Independence (1948) was defined as part of the Israeli constitutional structure, and Israel was termed a "Jewish and Democratic State." This phrasing illuminated a political compromise between the secular and liberal trend, on the one hand, and the more conservative and religious trend, on the other hand, to preserve the Jewish gist of the state. While this compromise was consolidated between secular and religious Jews, Arab parliamentarians were marginalized. Their consent or rejection of the term "Jewish and democratic," was deemed irrelevant from the formation of the national good. In the Jewish State, where the security argument was well rooted in the political culture, such an exclusion of Arabs as individuals and as a collective was taken for granted. The legislative purpose was not revolutionary but partially reformative. It was aimed to establish additional civil rights reflective of a limited basis for a more civil society. Those laws were the primary, although not the exclusive, characteristics of this legalistic trend. A more bourgeoisie western-like society was eager to encourage the enactment of civil rights conducive to the engendering of the citizen's autonomy vis-a-vis the state.

The peace process (1993-1996) reinforced statements made by justice Aharon Barak and other jurists as if a "constitutional revolution" had occurred. Barak expressed the view that the two new Basic Laws empowered the supreme court to nullify Knesset's legislation if a specific law contradicted the values of Israel as a "Jewish and democratic state" (Barak,1993). A similar view was articulated in various court rulings, in which the supreme court claimed, in obiter dictum, that it had the authority and the will to nullify laws that contradicted the content of the above mentioned Basic Laws.[xiii]

The general perception in the mid-90s' that the Arab-Israeli-Palestinian conflict was less acute made the judges more willing to impose a more liberal judicial review. Yet, even

during this period (1992-1996) the Court remained loyal to its inclination not to intervene in the decisions and actions of the security forces, inside Israel and in the territories. Even in the most liberal moments of the Israeli society, the judges continued to emphasize the centrality of security considerations in their judicial action, and as such it highlights the limitations of the liberal discourse. Such a discourse may empower individual rights. Indeed, during this period the Court ruled in favor of gender equality more than ever before.[xiv] Yet, that discourse was limited in the sense that it could not be significant enough to generate social powers that would demystify the security myth, which was constructed within the legal setting.

### *E. Conclusion*

Previous research has exposed the fact that national security and the rule of law are not autonomous entities with objective and indisputable meanings. Both types of public goods are political by their nature, and their precise meaning is contingent upon cultural and institutional contexts. The interactions between national security and legal settings conceptually have not been explicated. In this article I suggest appreciating the intimate common denominator and interdependence between the two at the state level, at the mythical level, and in practice.

This underscoring of their similarities and interactions assists in understanding the contradictions between legal democratic settings and imagined or actual states of national security crisis. The Israeli experience can teach us a great deal about law and security. Legal settings might be convenient frameworks for state expansion into various domains of civil life. National security crises might encourage limitations on the scope of democratic legislation and impair civil and human rights. The processes are dynamic over time. But the argument of national security - often a manipulated one - has a significant effect on the legal setting that in turn legalizes action taken in the name of national security. The strength and content of those dynamic processes have a significant weight in determining the essence of the state a ruling

apparatus and thway citizens view themselves in relation the state. This is the conceptual, theoretical, and empirical story that the Israeli experience brings to light.

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HCJ 239/51 ***Daud V. Committee of Appeals for the Security Zones in the Galilee***. P.D. 6, 229.

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i. The 'rule of law' is not an objective term or a set of free-value norms. Law by its definition is a political entity. For few perspectives, see: Fisher, Horwitz, & Reed, 1993; Fitzpatrick, 1992; Shapiro, 1993.

ii. For an excellent theoretical and empirical analysis, see: Rosenberg, 1991; For a reply see McCann & Feeley, 1992.

iii The Declaration of Independence emphasizes the Jewish essence of the state, while the term 'democracy' has not been mentioned. The Declaration, however, refers to the need to preserve human freedoms without discrimination. The Declaration refers to the Arab minority as a religious group, and its nationality has not been mentioned as a basis for equality.

iv. See for example: E.A. (Election Appeal) 1/65 Yardor V. The Chair of the Central Election Committee for the Sixth Knesset Elections P.D. 19 (3) 365; E.A. 2/88 Ben-Shalom V. The Chair of the Central Election Committee for the Twelve Knesset Elections P.D. 43 (4) 221.

v. See for example: HCJ 64/51 Daud V. The Ministry of Defense P.D. 5 1117; HCJ 141/81 The Committee of the Ikrit Refugees V. The Israeli Government P.D. 36 (1) 129.

vi This finding is based on various polls, part of which were conducted by the author together with Prof. E. Inbar from BESA Center at Bar-Ilan University.

vii. See for example: HCJ 734/83 Shain V. Defense Minister P.D. 38 (3) 393.

viii. See for example: HCJ 399/85 Kahana V. The Managing Board of the Broadcasting Authority P.D. 41 (3) 255.

9. See for examples: HCJ 64/51 Daud V. Ministry of Defense P.D. 5, 1117, HCJ 239/51 Daud V. Committee of Appeals for the Security Zones in the Galilee P.D. 6, 229, HCJ 734/83 Shain V. Minister of Defense P.D. 38 (3) 393, A.A.D. 2/82 Lerner V. The Defense Minister P.D. 42 (3) 529; A.A.D. 1/80 Kahana and Green V. The Defense Minister P.D. 35 (2) 253; A.A.D. 1,2/88 Agbarie and Maagana V. The State of Israel P.D. 42 (1) 840.

x. For a good analysis of this affair, see: Lahav, 1988.

xi. See a review of the law, and yet a somewhat different view: Shetreet, 1984.

xii. See for examples: A.A.D. 1/82 Qauasme V. The Defense Minister P.D. 36 (1) 666; A.A.D. 2/82 Lerner V. The Defense Minister P.D. 42 (3) 529; A.A.D. 1/80 Kahana and Green V. The Defense Minister P.D. 35 (2) 253; A.A.D. 1,2/88 Agbarie and Maagana V. The State of Israel P.D. 42 (1) 840.

xiii. See for examples: HCJ 3299/93 Veckselbaum V. The Defense Minister P.D. 49 (2) 195; C.A. 6821/93 The Mizrachi United Bank V. Migdal (February 3,1995).

xiv. See for examples: HCJ 453/94 The Israeli Female Organization V. The Israeli Government P.D. 48(3) 501; HCJ 4541/94 Miller V. The Defense Minister P.D. 49 (3) 94; HCJ 721/94 Danilovitch V. El Al P.D. 48 (5) 749.