National Security in Courts and Law:

A Theoretical and Comparative Analysis

Professor Gad Barzilai

Tel- Aviv University

Synopsis

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I. Theoretical Framework: A Concept of Political Judicial Making

Until the beginning of the 20th century, once the realist approach to law and society was emerging as part of academia, a prevailing concept among scholars of law held that justices solely rule on concrete disputes concerning specific controversial issues (*lis*). The rules of judicial engagement were largely perceived as based on autonomous set of external criteria that are transcendent to immediate sociopolitical interests. Honestly, that erroneous concept was prevalent in political studies as well. Liberal democratic theory for its part has perceived justices, in theory and in empirical research, as institutionally separate from governmental officials and legislatures. In different cultures around the globe, and in various languages, officials and legislatures have been perceived as policy makers, while justices have been perceived as messengers of normative justice as opposed to political praxis.

Some prominent trends in liberal political theory and in theories of law, politics, and society have generated that erroneous conception which has dichotomized between policy making and judicial decisions. Apparently, whilst policy makers were supposed to navigate the polity, justices were aimed to resolve legalistic formalistic disputes. With the emergence of legal realism in the 20th century, with its effects on political science since the 1950s' and later with the evolvement of critical political legal studies, such a dichotomy between law and policy- making has gradually been demystified. Empirical studies concerning issues ranging from education, housing, racial relations, gender issues, health, abortion, transportation, religion, and national security, have demonstrated that justices formed and promoted public policy, above and through their functions in resolving distinct and concrete legal disputes (Fisher,

Horwitz, and Reed: 1993; Krislov, 1965). Even in countries like USA, England and Israel where there is no formal principle of an *a-priori* judicial review by the courts, justices are policy makers who have abstracted concrete remedies much beyond the formal *lis*, and made them available as options for public policies.

Justices have special characteristics as policy makers. They are often nominated for life [as in the US Federal Supreme Court] or at least they enjoy long terms of tenure before retirement [e.g., in Israel, where justices retire at the age of 70]. They are not subjected to electoral cycles to the degree that other politicians are subjected. Their decisions are not phrased in formal political language, but rather they are formulated in a legalistic language, often within the formal and even technical text, that may be seen in public as "objective" and as "politically neutral." The inclination of courts and justices to use myths of judicial supremacy and procedural justice, that surround their professional terminology enables them to objectify their institutional interests and the ideological and political meanings of their decisions and it renders them a great deal of political power. In other words, justices often hide under the veil of myths, as if they are never politically biased (Fitzpatrick: 1992; Glendon: 1991).

That public image of courts in democracies as being politically neutral is a double-edged political sword. On the one hand, it provides courts with the institutional ability to engage in political controversial affairs, based on litigation and cases submitted to courts by various public agents, like Non Governmental Organizations (NGOs). The more a political setting is publicly viewed as segmented, polarized, fragmented and corrupted, the more appeals are submitted to courts that are perceived as detached from low politics and as reliable institutions of democratic supervision.

On the other hand, it makes courts rather confined in their predilection to actually challenge the state, its power foci, narratives, and legal ideology, since such a systematic judicial challenge may be publicly seen as biased and political.

Courts are facing three meaningful constraints as institutions of policy making. First, national narratives are constraints. State's courts can not and would not incline to struggle with national narratives, i.e., with the most fundamental ideologies of the state. Accordingly, one would not expect the US Federal Supreme Court to directly challenge the value of the American Federation or to significantly criticize the essence of the capitalist system. The second constraint is public opinion, and the fact that only rarely courts rule against a specific and prevailing public mood as articulated by influential public organizations and communities (Barzilai and Sened: 1997; Mishler and Sheehan. 1993). In other words, courts are majoritarian institutions, and they incline to rule in compatibility with the usually perceived general public trend as reflected in political struggles and political pressures.

It does not mean that justices ignore the formal legal text. However, where the formal legal text is broad and vague enough (as legal texts usually are), a majoritarian interpretation by the justices is more plausible than an alternative challenging hermeneutics (Cover: 1992, Mishler and Sheehan: 1993). Courts would like to be supported by the general public, especially by those public segments that empower them as political institutions- the middle and the upper social classes and the professional legal community of law professors, lawyers, and legalistic reporters. In this context, the attitudes of the professional community may have a special effect on justices. The third constraint is structural. Supreme Courts may be reluctant to alter

the status quo whilst a certain significant political coalition, e.g., within the parliament and the executive, may overturn the court's ruling through counter-judicial legislation or administrative sanctions (Epstein and Knight: 1998). In other words, the strength of a political coalition outside the courtroom may well affect the tendency of justices to rule in a way that changes a prevailing public policy (Barzilai and Sened: 1997).

Until now, I have posed the strategic political environment in which justices are operating as policy makers through judicial engagement in public issues. There are four variables that should be counted and expounded in any theoretical and empirical analysis: the relevant legal text, national narratives, majoritarian/counter-majoritarian mood in its relation to appeals submitted to court, and the political coalition/opposition outside the courtroom that may react to the judicial ruling. In a different paper/article I and Itai Sened have explained that once the legal text and the national narratives are taken as fixed parameters, fascinating institutional games are developed between the courts and the executive (Barzilai and Sened 1997). A fifth variable may be the judicial coalition within the courtroom, but this variable deserves a separate article by itself. Now, in that theoretical configuration that relates importance to political context as a strategic constraint on justices and judges, let us turn to exploration of the essence of powerful national security arguments. I shall argue that we can theorize why in that context, national security arguments hamper judicial review. Exemplification of my arguments through analysis of counter-terrorist law will follow.

II. A Concept of National Security Arguments in Courts

Wars and other national security crises endanger the potential and existing democratic attributes of the 'rule of law.' They often demand extensive mobilization of human and economic resources, in ways that often contradict 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. While any expectation of democratic virtues in the rule of law should include the limited intervention of state's power foci in individual life, wars and severe national security crises tend to confine this democratic tenet in legal settings (Gross 2003).

The damage inflicted on human rights in times of security crises is possible due to epistemological predicaments, cultural narratives, and institutional deeds. Human beings presume that unity is a crucial element of military victory. Accordingly, a collective discourse that embraces institutional efficiency, almost at all costs, is generated. It can delegitimize, *inter alia*, judicial adjudication and public accountability (Barzilai 1996). A democracy should strive to deconstruct the imposition of limitations on the individual autonomy and on the community *sui generis* identities, 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 Britain, France, India, Israel, Turkey, and the USA, during military campaigns or security challenges as counter-terrorist activities (Gross 2003).

Wars and democracies are not mutually exclusive. Democracies may not be inclined to fight other democracies, in full- scale warfare, but peacefulness is not an in-built tenet of such regimes. Students of world politics should bear in mind the phenomenon of 'warring democracies'. This category does not only include states like Britain, India and Israel, which have constantly been involved in ongoing protracted military clashes, but it also includes states like France and the USA, which have also been involved in military struggles. The legal structure, and often specific legislation, has enabled those countries to exert a great deal of military force, without severe constitutional constraints. Organizations of collective violence, 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 'solidarity', fearing possible anti-judiciary legislation for counter majoritarian rulings. Consequently, supreme courts and constitutional courts have tended to be majoritarian and not countermajoritarian institutions, preserving the sociopolitical status quo, rather than altering it.

Political elite mold the 'rule of law' by referring to national security terms. The desire to form internal political order, by eliminating political foes and reducing the probability of an effective opposition, lead political elite to manipulate their legal systems in order to legitimize non-democratic measures in the name of preserving democracy. The political elite facilitate the mythical power of law (in its broad sense) as if it is transcendent criterion for order, an objective, absolute, and a just yardstick for managing public life. Law is neither autonomous to the political ideology of the

state, nor is it independent of its institutional conjunction and apparatus of control. Its perceived association with national security allows the political elite to utilize it further for external and internal political purposes.

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 that are reflective of collective national needs and therefore above the insufficiencies of daily 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 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 and maintain their authority in the management of their public spheres. Consequently, public accountability and public criticism, so crucial for democracies, may seem to be useless and damaging. Legal reasoning, in much similarity to military knowledge, is mistakenly perceived as having its own internal, structured, harmonious, 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 a broad dissent and disobedience targeted against security authorities, and the political establishment, are defined as law infringements, national security policy is perceived as immune from criticism. Such mythical interdependence empowers and is empowered by the political praxis, in which law is influenced by national security and manipulated for political purposes.

III. Fighting Terrorism as a Challenge to Judicial Making: Or- Who is a Terrorist?

1. The Legal Text and National Narratives

The legal text is one variable to be considered once the force of national security arguments in courts is analyzed. There are two levels of definition of a terrorist.- a. Basic level- a man/woman who kills innocent human beings for political purposes. B. A compound level that suggests various problematizations to that basic definition. Many of these problematizations are outside the scope of legal arguments in courts. For example- what about states that kill; under which conditions states are terrorists?

I claim that the legal field cannot be the first order criterion for such definitions since the legal field already reflects various political categorizations. Accordingly, the etiology of Ani-Terrorist Acts should be looked at in various sociopolitical configurations. Doing that explores the political forces that are embodied in and generated through anti-terrorist laws. Two main political forces underline anti-terrorist laws: uncertainty and the desire of political elite to control.

The obvious background to anti-terrorist laws is domestic and international conflicts. Thus, recent anti-terrorist legislation was prepared in the US and some European countries prior to the September 2001 events and activated afterwards. I would like to offer a distinction between ideological 'terrorism' and ethno-religious or national 'terrorism.' In fighting terrorism, the first is less problematical as long as infringement on human rights is concerned since it is more focused on targeted people/groups, and the second is more problematical since it may encompass large- scale populations. Furthermore, as the experiences of Germany, Italy, and Japan compared with Israel, US, Indonesia, Philippines, Russia, Spain, and England/North Ireland, demonstrate, anti- terrorist laws are more efficient in the first case of ideological terrorism than in the case of the latter, national or ethnic-religious terrorism.

Since the definition of terrorism raises a variety of epistemological and empirical difficulties, state law may be used for the generation and construction of hegemonic cultures in the political center on the expense of marginalized communities and political groups. Hence, it might be, and that danger should be avoided, that a politics of 'who is a terrorist' will become through law, a politics of 'who is a patriot.'[The Patriot Act of 2001 is an irreducible example of that]. State law may generate symbols of patriotism, especially under conditions of perceived emergency. Citizens only rarely defeat symbols of 'patriotism' generated through arguments of national security in courts.

Especially in multicultural societies a problem might raise how to respect non-liberal and even religious fundamentalist communities of aliens and immigrants, which political liberalism does not incline to offer collective rights, and yet to effectively

fight terrorism. Such problems are now evident, e.g., in Europe since there is a temptation to infringe on the rights of the Muslim communities in order to fight terrorism, or under that excuse. Furthermore, the ability to construct political rivals as terrorists bears meaningful and yet distressful repercussions for marginalized groups, primarily national non-ruling communities.

Legislation of prevention of terrorism may become a legal regime that marginalizes opposition groups by their stigmatization as terrorists. I argue that post-structural and critical analysis of state's power may significantly assists in conceptualizing how states are using national security arguments in order to mold law and activate it as a marker that serves the state in its struggles against internal political challenges. Under the veil of arguments of national security in courts, state law enables more room for state expansion into domains of civil society.

Thus, the reactions in European countries to the attack on the US on September 11, 2001, have already encouraged several European countries like Spain, England, and Germany to marginalize minority and opposition groups through using anti-terrorist legislation in order to propel means as surveillance and ethnic profiling. Courts have not inclined to hamper these trends. The mere definition of 'terrorist' is made in most democracies by the executive branch, without sufficient judicial and parliamentary supervision, if at all. Once a group is on the terrorist list, it is subjected to harsh legalistic means without sufficient democratic guarantees. Furthermore, during perceived national security challenges, the political discretion to form lists of suspected terrorists is gradually transformed to the bureaucratic level of security services and armed forces.

2. Coercive Majoritarianism and the Lack of Opposition: The Lasswellian Model- The Garrison State Hypothesis

In the beginning of the 1940s Harold Lasswell, one of the most important legal sociologist ever, has published his classic and seminal work on processes of militarization during protracted security conflicts. According to Lasswell, conditions of uncertainty in times of warfare generate more reliance of civilian elites including judges, on the security establishment, and in turn such a process incites militarization of democratic societies.

Based on that model, the Garrison State Model, I argue that conditions of fighting terrorism significantly infringe upon the ability of courts to supervise over security and military authorities. Furthermore, how a democracy should balance between these values and the secrecy required for efficient fighting against terrorism? How the public would know against whom the means of anti-terrorist laws is actually targeted? I argue that this important set of questions is crucial for democracies in the aftermath of the September 11, events.

The Israeli case—that gradually begins to be more relevant for Western democracies--- demonstrates the complexities of judicial supervision on the security authorities. First, let me relate to the issue of tortures. Following the September 11 attack on the US, that problem would become even more severe in the West, since decision-makers are under the pressure of the danger of a ticking bomb. Unknowing exactly where the terrorist is and facing high levels of uncertainty, tortures might become

even a more prevalent problem. While international law and Amnesty International are very clear in the prohibition of tortures, the praxis is more complex, dangerous, and challenging, and judges have to deal with it.

In Israel, following the salient ruling of 1999, there is a conflict between the Supreme Court, which is trying to partly limiting tortures by excluding four systems of tortures as unlawful, and the security services that are under pressures to prevent large-scale terrorist attacks and incline to broaden the definition of the ticking bomb. Traditionally the Court has accepted national security arguments and has justified tortures. In 1999 the Court under public pressures has not argued that tortures are unlawful but it has confined the scope of tortures. The Israeli instance of tortures demonstrates that even under effect of liberal moments, Courts do not challenge the logic of security arguments.

Administrative detentions are another crucial aspect and a painful one which reflects attempts to fight terrorism, but that may be a stage in the creation of what Clinton Rossiter has called: 'constitutional dictatorships.' I would point to the situation in Israel that is very problematical as was demonstrated for example in the case of the Lebanese detainees that were in fact bargaining chips in the efforts to release Ron Arad. Administrative detentions have become more prevalent in Western democracies, especially the US, following the September 11 attack. In most legal cases of administrative detentions judges are inclined to let the security authorities with a broad discretion almost with no judicial intervention.

A third issue that I would like to raise in that context of infringements of human rights is the targeted executions. I argue that targeted killings raise a great deal of problems for judicial supervision and for the tenets of democracy despite the fact that they may constitute 'the least dangerous option' comparing it to more massive usage of military force. In Israel as in other democracies judges and courts are prevented from scrutinizing that policy that has a great deal of negative ramifications on human rights. In relation to the Israeli case, Amnesty International has noted:

"When questioned about the modalities of approving targets for attack, especially the Legal Department assessment of the evidence against those targeted, Colonel Reisner stated that the IDF Legal Department was not consulted on individual cases. When Amnesty International delegates raised individual cases of killings with him, where Palestinians had been killed in the IDF's attacks or where those deliberately killed could have been arrested, he stated that he was not aware of the individual cases raised."[1]

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[1] The Head of the Military Legal Department is directly subjected to the Chief of Staff, but the Attorney General directs his/her legal opinion.

There are many other domains in which infringements of human rights occur- ethnic profiling, attempts to legislate a duty to restore e-mail information in servers for two years, are among the many other examples that point to the danger of infringing privacy in severe magnitude. Extradition agreements following the September events make it easier to transfer suspects from one country to another and create new problems for human rights activists. For example, European citizens might be exposed to capital punishment in the US. Last, and certainly not least, European human rights organizations are reporting on increasing criminalization of social movements. States and their police forces incline more than in the 90s to prevent demonstrations and hamper movements of demonstrators from one country to another. Courts only very rarely and in a very confined way hamper these negative phenomena.

From Judicial Review to Political Prosecution

While parliamentary review is often too fragile and limited due to fragmentation, polarization, and politicization, judicial review might be seen as a better means of supervision. But courts are often majoritarian, and in cases in which national security arguments are raised, the establishment of the security authorities and the executive, most often win. Among the reasons that explore why judicial review over fighting terrorism is limited, two important causes are the uncertainty that incites more reliance of the judicial elite on the military and security elite. Another important reason is that laws of prevention of terrorism and the judicial elite are both heavily influenced by slogans of patriotism and feelings of 'rally around the flag'. Hence, we

are witnessing expanding bureaucratization of the criminal procedure whilst more power is being transferred, in processes explained by Lasswell, from the courts to investigation and prosecution authorities. As Antonio Gramsci has already noted, needs are partly imagined and constructed by hegemonic cultures. 95% of Americans in a poll conducted in September 11, 2002, do not presume that the new legislation, like the Patriot Act endanger their own liberties. Under the veil of secrecy and anti-terrorist legislation, Americans feel secure as long as the government establishes a clear border between 'us' and 'them', between citizens and aliens, between Manhattan and Gutaneamu.

Conclusion

One who dwells on the experience of democracies, especially taking into account the reactions to the September 11 2001 events, may suggest that the dilemma that we are unfortunately forced to face is not how much national security a democracy can take, but how much democracy a national security can take.

Democracies can survive a protracted national security crisis of fighting terrorism, but with a very significant price. Such a price may severely damage democratic virtues to a degree that Athens does not exist, and a Garrison State prevails. Courts are part of that process, since in essence they are majoritarian institutions when national security arguments are raised. It is not only a Middle Eastern nightmare, but it is a European and American growing predicament as well. When the Trade Center was demolished, with pieces of the Empire Creed, a new challenge for democracies was emerging, the

challenge of democratic survival facing vague transnational enemy, outside, and maybe worst, partly inside its corridors of power.

Mitigating such a conflict means to re-conceptualize not only the West and the Islam, but the relations between the liberal state and its non- liberal communities. Integrating efficiency in combating terrorism with communal and individual rights should be a major political constitutional challenge in the next decade. Otherwise, once Al-Kaida is defeated, democracies might discover that they have harshly bitten themselves. Can judges respond to that challenge? As my article has analyzed, they can not and often do not like to.

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