

THE ROLE OF THE SUPREME COURT OF ISRAEL IN PROTECTING HUMAN RIGHTS

Ayala Procaccia*

Part I: Introduction

Two basic features characterize the essence of Israeli society: It is, the unconditional commitment to the existence and survival of the Jewish people in their homeland, following the annihilation of most of the Jewish congregations in Europe during the "Shoah"; and it is, a deep commitment to the moral structure of Israeli society, bound by democratic principles of government and protecting freedoms of the individual. These two elements lie at the core of our society, and at times are hard to reconcile. The need to take actions to protect lives in times of war and terror may stand in contradiction to principles of human rights of the individual. The struggle to preserve these two corner-stones of Israeli society and the need to balance between them, mark the important role the Supreme Court of Israel plays in protecting democratic principles in time of conflict. The ways by which the Court exercises this role will be the center of my presentation today.

Part II: Protecting Human Rights

(1) The Supreme Court of Israel performs a multi-judicial role. It adjudicates over 12,500 cases each year, acting as an appellate court in criminal and civil matters, dealing with a variety of legal issues pertaining to

* Justice of the Supreme Court of Israel.

all walks of life. As such, the Court develops norms of life and behavior in the private and public spheres, which affect strongly the Israeli society, and play a major role in shaping its way of life as a modern-democratic community.

(2) However, the major and unique role of the Supreme Court lies in its functions as a High Court of Justice and Constitutional Court, reviewing the legality and constitutionality of government action upon the premise of separation of powers, and the defense of basic human rights of the individual.

(3) Israel's legal system is based on constitutional norms, although we still do not have a comprehensive written constitution. It has recognized long ago the basic constitutional principles that form the foundation of its democratic structure in its political system and mode of government. It applies fundamental constitutional principles regarding the superiority of basic human rights of the individual. Some of these norms have been enacted into formal statutes. Others are enforced as Common Law by adjudication of the Court and date back decades ago.

The role of the Court as High Court of Justice and in its constitutional function is, therefore, two-fold: First, it performs judicial review as to the legality and constitutionality of legislative and executive actions. Second, it protects the human rights of the individual. This is *the* major role of the Court in its constitutional capacity. Our Basic Laws that have attained special legal status, recognize the constitutional superiority of man's basic human rights to life, and dignity; personal liberty, movement, privacy and employment.

Freedom of speech, not part of the statutory form as yet, has long been recognized in Common law as a superior individual freedom. The same holds true for freedom of religion.

The supremacy of the individual human rights has penetrated into all areas of law, private and public alike. It often marks decisions in Contracts, Property, and Criminal Law. Their dominance has created a revolution in the general legal vision, and in the daily application and interpretation of concrete legal situations.

The Court deals on a daily basis with issues that involve human rights in all avenues of life, both within Israeli territory as well as in the territories governed by martial law. I shall focus on this aspect of the Court's role, elaborating on the major principles and tools applied in the judicial process related to matters of human rights. I shall then demonstrate the way in which these concepts materialize in concrete cases.

II. A. Human-Rights – Balanced against Major Needs of Society

Individual human rights, in spite of their constitutional supremacy, cannot always be protected to their full and absolute extent. In the context of complex social existence, there are tensions and contradictions between human rights of individuals in relation to one another. Moreover, there are constant tensions between individual human rights and general social goals, essential to its existence and well being. Ignoring these needs may turn out to be suicidal. Especially so, in a society as Israel, which, since its foundation, has been confronted with threats to its physical existence, first by enemy

military forces, and at present– by constant danger of terrorist attacks, that have brought the danger closer – from distant battlefields to the streets and houses of innocent civilians.

Principles of ethics, justice, morality and human rights cannot endure in a society that does not assign proper weight to its crucial needs of existence and survival. Considerations of public peace, safety, stability and certainty in the daily lives of the citizens are critical to any social form. Thus, these considerations are essential to the democratic scheme of government as well.

The major role of the Court in the advancement of constitutional principles is to properly balance the weight of individual human rights vis-à-vis the general purposes, crucial to social existence and essential to its defense and security. The eternal historical trauma of the holocaust that prevailed in our homes through our parents' experience, lies in the background of the commitment to maintain and ensure our survival; but survival through the respect and protection of individual human dignity and liberty; existence through insistence on democratic principles of government action. It is between these two parameters of justice that the pendulum of the Court's adjudication is moving.

II.B. Modes of Balancing between Conflicting Interests

The need of search for the right equilibrium between these ever-conflicting considerations marks a deep inner struggle in the judicial process, and is frequently a fruitful source of debate among the judges in their deliberations. At times, it is the cause for diversity of opinions on the bench; it

is also a frequent source of critical writing and speech from within the public, the media, and the political arena, both right and left, typical to situations where questions of fateful importance await their verdict. Rightist movements often claim we do not give enough emphasis to state considerations concerning defense needs and public order; Leftist movements maintain that we are often over-attentive to social purposes at the expense of infringing upon individual rights. The Court is constantly under fire of heavy criticism by a stormy media, which reflects an extremely sensitive and highly involved and opinionated public, aware of every event and move that occurs within Israeli public life. Nonetheless, the critics are first to petition the court for redress to claimed social or personal grievances. Thus, the criticism is hardly a sign of lack of public trust in the Court, but rather a reflection of its influence on the Israeli scheme of public and private life.

We, therefore, perform our duty in an extremely sensitive and complex climate. It is a source of difficulty on the one hand, but at the same time, the forceful reactions and involvement of the general public reflect both the strong democratic roots of our system, and the effectiveness of the Court's role on our society's thought and action. I believe there is deep public trust in the judicial process of law in Israel.

II.C. The Balancing Formula

Israeli statutory law and the decision making process have generated several tools to apply the balancing process between individual rights and essential social needs. The first and foremost of these tools is a general

balancing formula, which establishes the criteria for balancing between individual rights and social needs, so that they may coincide, enabling the individual to exercise his basic rights, and at the same time preserving the conflicting crucial needs of society. Balancing as such may demand putting limitations either on the social need or on the individual right or on both, according to their relative weight. The balancing formula, formulated in a Basic Law, consists of several elements: The balancing process should benefit the values of the State of Israel; it should serve a proper purpose; and the impingement on human rights should be to an extent no greater than required in order to achieve general social goals.

This formula inserts into the judicial evaluation moral values vis-à-vis the needs of social existence based on considerations of proportionality and reasonableness. By proportionality we mean that an infringement upon the individual's right will be regarded as tolerable if it is appropriate in order to achieve the conflicting social goal aimed at; where there are no other means available for achieving this goal with less damage to the individual right; and where the harm caused to the basic human right involved is no greater than the benefit expected to be derived from the relevant social goal to be achieved.

The Court is often confronted with the dilemma of balancing military and security considerations with opposed individual human rights. The general balancing formula is applied to concrete situations of all kinds and variations, and it had become a major tool in the judicial process regarding the protection of human rights.

II. D. Other Legal Means utilized in the Protection of Human Rights:

II.D.1 Justiciability and Standing

There were times when the Israeli Court put barriers on petitions brought before it, on the basis of non-justiciability and lack of standing (*Locus-standi*). It has dismissed petitions on the premise that the subject-matter was a state/political matter, thus unsuitable for legal ruling; There were times when a petitioner, lacking personal interest in the outcome of the case, was refused a remedy on the basis that he had no standing to claim redress for another.

Today, this is no longer the case. In the past two decades, the Court has opened its gates to virtually every issue of constitutional implication, and by almost every petitioner, notwithstanding the subject-matter of the case, or the identity of the petitioner – whether personally interested in the outcome of the case, or not. The Court deals with the case on its merits, reviewing whether there is just cause for legal intervention.

Minimizing the barriers of justiciability and standing brought about multitude of issues to the adjudication of the Court, bearing on every aspect of Israeli private and public life. It broadened the legal horizons of the Court's involvement and its influence on the constitutional framework of the system, including human rights precepts. It conveyed the message to other branches of government, the Knesset and the Executive, that the scope of judicial inspection of the legality and constitutionality of their activities has become broader. It rendered human-rights associations a standing to bring to Court

grievances of individuals who do not have the means and strength to petition themselves. The relaxation on the limitations of justiciability and standing assists the Court in performing its significant role in protecting democratic principles and human rights. As president Barak remarked in one of his rulings: "When there is no Judge, there is no Law. The ability to turn to the Court is the corner-stone of the rule of law".

II.D.2 The Supreme Court's Adjudication of the Occupied Territories

Another important tool in the legal protection of human rights lies in the opening of the Court's gates to petitioners who reside in the occupied territories, which are not an integral part of Israel's legal territorial jurisdiction. For many years, the Court has ruled on petitions brought by residents of the "area" against Israeli defense forces in control of the territories. Its authority stems from the fact that the military commander in the area is bound, like other public entities, to the principles of Israeli Public Law. Therefore, its actions in the territories are subject to judicial review. Very often, Israeli public organizations with no personal interest, file petitions to Court on behalf of individual Palestinian residents. The Court adjudicates these matters on a daily basis. It deals not only with the highly conceptual matters which become later precedents for time to come, but in daily situations concerning basic essential needs of the individual in the territories. Many times, the judicial proceedings are interwoven with the happenings as they occur. Some relate to actions in times of actual fighting. The decision has to be given in real-time.

II. E. State Policies

Striking down the barriers of justiciability and standing enables the Court to decide on the merits of petitions brought before it. However, wide as the judicial review has become, there is marked judicial self-restraint in intervening in pure state policies, political actions and professional considerations of the public authority under review. Principles of separation of powers and the independence of the government branches limit the extent of judicial intervention to aspects of legality, constitutionality and reasonableness of the action reviewed. It is the legality of the action, not its wisdom or desirability, which is put to test. Therefore, the Court rarely intervenes in state-political policies, in military operations, or in economic long-term plans as such. It will intervene, however, when infringement on human rights occurs.

Part III: Protection of Human Rights as applied in Recent Supreme Court Decisions

I shall briefly review several Supreme Court decisions given lately which exemplify the modes of application of constitutional principles and the balancing formula in concrete situations. I shall center on cases regarding the protection of basic human rights of terrorists; The security fence; and freedom of expression in times of conflict.

III.A. Terror and Human Rights

Terrorism has been hitting the Israeli fabric of life for many years. Before, wars to defend the existence of the state were fought in the battlefields; today the war of terrorism is fought in city streets, in private houses, and in public recreational places. Fighting terrorism and securing the lives of our people are a major consideration of our government and our security forces. However, the law plays a part in ensuring that fighting terrorism will be within the law and not outside it. This assumption often requires the search for appropriate balance between security and essential public interests, and at the same time, protecting terrorists' human rights to the extent possible, without endangering public safety unproportionately. The law assures that Israeli security operations will be held within the framework of the rule of law, essential to the democratic order. The Court's vision of this matter has been long based on the theme expressed by Justice Haim Cohen back in 1980:

"What distinguishes the war of the state from the war of its enemies is that the state fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the government's war depend entirely on upholding the laws of the state. (HCJ 320/80 Kawasma v. Minister of Def. 35(3) PD. 113, 132).

The ability to confront the enemy depends to a large extent on the inner moral strength and the commitment to the preservation of human values by the rule of law. The weight given to human rights in times of war has a direct bearing on the preservation of constitutional norms in times of peace, as

Lord Atkins said during World War II: "The law speaks the same language in war and in peace".

The Israeli Court has ruled on petitions concerning the power of the state to detain suspected terrorists and upon the conditions of their detention; There is close judicial supervision as to the justification of the detention from its beginning; There is periodical review of the actual need and necessity of the continuation of the detention as time advances. Several judicial instances review the factual material concerning the justification of the detention within a fixed period of time required by law. This is true as to detention both in Israel and in the Territories. The Court has ruled upon rights of suspected terrorists to legal representation; It supervises closely the use by the security forces of their right to prevent, for a limited period of time, the meeting of the suspect with his lawyer for interrogation purposes. It inspects closely, behind closed doors, highly confidential materials brought by the security forces to justify the detention or the limited prevention of the meeting between the suspect and his lawyer. Generally speaking, the cause of "security-requirements" is no longer a magic word, accepted without judicial analysis. Highly confidential material of significant security importance, being ground for the public authority's action, is brought to the Court's review on a daily basis. Hearings concerning these matters take place in real-time. Petitions regarding those issues amount to thousands throughout the years.

III.A.1 Interrogation, Detention Conditions, Prior Warning and "Bargaining Chips"

Security services interrogate regularly terrorist suspects in an effort to obtain information and thwart pre-planned terrorist attacks. The question arose as to what extent, if at all, physical means of interrogation may be used when critical information may prevent danger to life ("Ticking Bomb" situations). The court ruled that according to present law, there was no legal basis for any use of physical means of interrogation. An interrogator, member of the security forces, who breaks this rule, may be criminally indicted. The legal defense of "necessity" may be raised. The decision stresses the importance and value of human rights of the individual suspect even in face of threats of terror.¹ There is conscious awareness that there may be a significant price to the limitations put on the interrogation methods. This price is, nevertheless, paid in order to preserve basic individual rights.

On March 2002, due to a severe escalation of terrorist attacks on Israel, the security forces launched a wide-ranging operation to uproot terrorist infrastructure. As part of this operation a large number of suspects were detained. In a petition regarding their detention conditions, the Court decided that the human rights of the detainees must be respected.² In another case,

¹ HCJ 5100/94 *Public Committee against Torture in Israel v. The State of Israel*, PD 53(4) 817.

² HCJ 3278/02 *The Center of Defense of the Individual v. The Commander of Israel Defense Forces in the West Bank*, PD 57(1) 385.

the Court ruled that holding detainees for 12 days without a judicial hearing is contrary to law.³

In a recent case, the Court ruled that a military procedure allowing Israeli soldiers to send a local Palestinian resident to give prior warning before commencing an in-house search for terrorist suspects is illegal according to international law and should be ceased. The procedure was aimed at protecting lives of civilians who may be staying in houses under search for terrorists, and saving lives of Israeli soldiers. Even though the procedure was pre-conditioned by the consent of the individual civilian and the anticipation of the army that no harm is likely to be caused to him by exercising his mission, the Court ruled of its illegality. According to Humanitarian principles of International Law, it is prohibited to make use of civilian residents for promoting military efforts of the occupying forces, and the separation of military and civilian activity must be respected. The Court applied these principles of International Law, aware of the dangers to lives that may intensify, and the price paid by the limitations put on the army's actions.⁴

Lebanese citizens, members of the Hezbollah organization, were held in administrative detention in Israel. They themselves did not pose specific threat to national security. The reason for their detention was based on their possible use in the future as "Bargaining Chips" in negotiations for the

³ HCJ 3239/02 *Marab v. The Commander of the Israeli Defense Forces in the West Bank*, PD 57(2) 349.

⁴ HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights v. Yitzhak Eitan, OC Central Command et al.*, (unpublished, available at: <http://elyon1.court.gov.il/files/02/990/037/a32/02037990.a32.HTM>).

exchange of Israeli prisoners of war believed to be held captive by terrorist organizations. At first, the Supreme Court decided by a majority ruling, that detention for the sake of future negotiations of exchange of Israeli prisoners of war was of vital interest to the state, and in the balancing process, this consideration overrides the basic individual rights of the detainees. Later on, the Court reviewed its own decision by enlarging its panel. This time, it ruled that there was no authority on the part of the Minister of Defense to place a person in administrative detention with the sole purpose of using him as a "bargaining chip".⁵ The balance point of the scales of justice turned a different direction. The detainees were released. This case reflects the complexity and hardship the judicial process faces in balancing the relevant values at stake. The inner struggle to find the right point of balance is never ending.

The common feature underlying these cases is the judicial balancing process by which basic human rights of terrorists are weighed against heavy security considerations. Achieving goals of general public interest is by no means an unlimited concept. It is limited by need to recognize relative individual rights, to the extent they may and should coincide with society's claim to existence. In the balancing process, general social interests, including security interests, may have to endure limitations.

⁵ AAP John Does v. Minister of Defense, PD 53 (1) 97; AAP John Does v. Minister of Defense, PD 55(4) 913.

III.A.2 The Security Fence

The need to construct the security fence arose in 2002, when Palestinian terrorist infiltration into Israel became a critical danger. The fence was planned as a defense measure, to form a security corridor that will ensure the safety of Israeli citizens. Part of the fence's route has been planned and erected in the Territories. A great number of petitions were brought before the Court by residents of the territories, seeking relief for grievances caused by the construction of the fence.

Some raised the basic question of the mere legality of this action, claiming there was no legal authority to do so. Some contested the specific chosen route of the fence, maintaining it affects unproportionately their daily lives and infringes upon their right to property, and freedom of movement. They, therefore, asserted that the route should be redrawn in other directions.

The Court, in two major cases, "*Beit Surik*"⁶ and "*Alfei Menashe*"⁷ decided on questions of principle regarding the fence, and applied it to the specific circumstances of each case.

First, it held that the fence is oriented towards security needs and is not rooted in political motivations of territory annexation.

Second, according to international law principles applicable to belligerent occupation, the military commander in the area has authority to maintain law and order in the territories. This authority imposes on him an obligation to defend the lives of the residents in the area – either Palestinians

⁶ HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* (Unpublished, available at: <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>).

⁷ HCJ 7957/04 *Zabaran Yunis Muhammad Mara'abe v. The Prime Minister of Israel* (Unpublished, available at: <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>).

or Israelis. As to Israelis, the need to ensure their safety exists, regardless of whether their presence in the area conforms to International Law norms, a question the Court did not rule upon. Therefore, if security needs so dictate, the military commander is authorized and may even be obligated to order the construction of the fence as means to protect lives and public order in the Territories under his control. In exercising his authority, the military commander is bound by international law principles, as well as by local legislation and the basic principles of Israeli public law. Being part of the Israeli executive branch, his actions are under judicial review by the Supreme Court.

Third, in erecting the security fence, a proper balance is required between the infringement of basic human rights of the residents living by the fence, and the general security considerations of the military forces in the area. Among the basic rights that may be harmed by the fence we find property rights, when land may be physically severed from its owners, limitation on freedom of movement, and injury to the general "fabric of life" of the residents, caused by their separation from their urban and commercial centers, that were an integral part of their lives. In applying the balancing formula, relative weight was given to each of the considerations, evaluating carefully the security needs as opposed to present and future harm to the residents.

Fourth, the Court discussed the legal force of the advisory opinion given by the International Court of Justice regarding the fence. This opinion held that the construction of the fence in the Territories violates International

Law. The opinion stated that, based on factual material brought before it, there was no proof that the wall in its current route beyond the green line was necessary to attain security objectives, and therefore it could not be justified on ground of national security and public order. It stated: "The construction of such a wall, accordingly, constitutes breaches by Israel of various obligations under the applicable international humanitarian law and human rights instruments".

The Israeli Court regarded the International Court's opinion as an important interpretive document of International Law principles, given by the highest legal tribunal of International Law. As such, it should be given the significant weight, though being an advisory opinion, it is not binding as "*Res Judicata*".

The major discrepancy between the advisory opinion and the Supreme Court's ruling does not stem from differences in the normative framework which lay at the basis of each ruling, but in the basic difference in factual material and informative data put before each of the Tribunals. Extensive data concerning the security situation that was put before the Israeli Court was absent from the material brought before the International Court. Likewise, this is true with regard to the extent of injury caused to the local residents by erecting the fence. Consequently, the balancing process handled by the two Courts was based on different factual assumptions. This brought about the contradicting outcomes in the two rulings.

The Israeli Court ruled, therefore, that due to the basic differences in the factual basis underlying the opinions, it could not view the advisory

opinion of the International Court as binding. It will continue, therefore, to inspect every segment of the fence brought to its adjudication, searching for the proportional balance between the military/security needs and the basic human rights of the local residents.

Fifth, in the cases of *Beit Surik* and *Alfei Menashe* the Court accepted the petitions of the local residents in the Territories, finding they were injured by the fence contrary to law, due to lack of proportional balance between security needs and the harm caused to the individual with regard to the choice of the route in the specific segment of the fence under review. The Court found that security goals could be reached, although not to their optimal extent, using an alternative route that would lessen the injury to the basic freedoms of movement and property of the local residents, and would reduce harm caused to their complex "fabric of life". The public authority was ordered to find suitable alternatives to the current route of the fence according to the Court's guidelines. In many other cases concerning other segments of the fence, petitions were dismissed where detailed findings have shown that the construction of the fence in the specific area was required for security purposes, and the specific route does not breach proportionality requirements.

III.B. Freedom of Expression

Constitutional protection of human rights in Israel is not limited to the physical and economic well-being of the individual. Preserving constitutional principles and fundamental individual freedoms will never be complete without the wide guarantee of freedom of expression and speech. These

assure the spiritual freedom of man. They protect political freedom, essential for the democratic process, and enable the development of free cultural, intellectual and spiritual creativity in a multi-cultural modern society. Freedom of speech has gained far-reaching recognition in the Israeli constitutional system. It is reflected in the media, in the arts and culture, and in political life.

Achieving broad protection of free speech is not to be taken for granted in a country living under constant threats of war and terror. Deep tensions often arise between state interest in security and defense, and freedoms to express facts, ideas, and opinions which may have a harmful impact on achieving state goals. However, the long reality of security tensions, which has become an integral part of life in Israel, has not deterred the Court from protecting freedom of expression to its extreme reach. The balancing formula applied to the spiritual freedom puts the utmost weight on the individual right vis-à-vis general social goals. Only extreme situations of public interest and national security requirements of high significance may justify limitations on free speech. Freedom of expression has been described in one of the major rulings on this issue by a literary simile as the “bird of the soul” of democracy, and its strong roots in the Israeli society have grown deeper throughout the years.

A recent example reflecting the complexity involved in protecting freedom of expression in times of war and terror concerns the movie “Jenin, Jenin”, produced by an Israeli Arab, Muhammed Bacri.

On Passover 2002, a terrorist attack took place in a hotel in Natanya, where about 250 people were celebrating around a Passover table. In the suicide attack, 30 of the guests were killed and 160 injured. Two days later, Israeli forces launched a military operation, with the goal of uprooting terrorist infrastructure responsible for severe killings of Israeli civilians. Jenin served as the center of these terrorist infrastructures. After Israel ordered the civilian population to evacuate, its forces engaged in intense house to house combat. In a fierce battle, Israeli soldiers were fired at from within civilian houses where terrorists hid among civilians. Under these circumstances, Israel refrained from using jets and artillery during combat so as to minimize the injury to Palestinian civilians. Twenty-three Israeli soldiers were killed, 60 were wounded. There were heavy casualties on the Palestinian side and serious damage to property. The battle of Jenin was extremely traumatic both to the Israeli soldiers who fought there, and lost their friends fighting beside them, to the Israeli general public, and the Palestinians.

As the battle ended, the struggle for public opinion began. Muhammed Bacri entered the refugee camp and filmed reactions of Palestinian residents to the battle and edited it into a film. He admitted from the outset that he did not attempt to represent the Israeli view or a balanced portrayal of the events. He aimed at representing the Palestinian story. He showed the picture through various private and public channels of the media, but when he requested permission for commercial screening, he was not given a permit from the Israel Film Council. The Council's refusal was based first, on the basis that the film distorted the real events as reflected by Israeli and

International investigative bodies, and that screening it could mislead the public as to the true facts of the battle. Second, the content of the film would affect harmfully the feelings of the general public, still under trauma, caused by the massive loss of lives in the battle.

Bacri petitioned the Supreme Court to overrule the Council's refusal to permit the screening of the film. He claimed his freedom of expression was violated and its limitation is contrary to constitutional standards.⁸

Among the respondents were naturally the Council and the State. But 30 other respondents joined the proceedings, among whom were soldiers who fought in Jenin, one of whom was the military medical doctor who was engaged with the troops, and mothers, fathers and widows of soldiers who fell in battle. Their involvement had nothing to do with left or right political inclinations. They expressed a deep and painful reaction of people who had undergone a personal life tragedy, to prevent what they understood to be a distorted and inciting presentation of facts as to what really took place in the battle of Jenin. According to them, accusing the soldiers of being war criminals, and Israel as performing war crimes when the army did not make use of more destructive weapons that perhaps could have saved lives, was intolerable and unacceptable. I do not remember in my long experience as a judge, many more painful and heartbreaking hearings, as we allowed the widows, the bereaved parents, and the soldiers who survived, to speak their hearts and minds. Some of them cried as each told his individual story. At a certain point, the burst of emotions became so intense that we could not

⁸ HCJ 316/03 *Muhammad Bacri v. Israel Film Council*, PD 58(1) 249.

proceed with the hearing, and had to leave the courtroom for several hours until spirits calmed down, and it was possible to renew the session. Large segments of the Israeli public supported the prohibition of the film, sharing their feelings with the soldiers and the bereaved families. The legal dilemma was therefore accompanied by deep emotions and sensitivities to the feelings of the public and of individuals.

The Court decided to accept the petition, and allowed the unrestricted commercial screening of the film "Jenin, Jenin." The balancing process in face of the ongoing military operation and severe terrorist threats was complex and painful. The right of expression was weighed against the immense offense it inflicted upon the deep, still bleeding, sensitivities of the public.

The question of truth or falsity of the contents of the film cannot, according to the Court's ruling, be regarded as legal basis for limiting the freedom of screening. Assuming the portrayal of events in the film was untrue, it is the general public who should face false allegations, painful as they may be, and confront them by revealing its truths in a free market of ideas and information. Much weight was given to the severe offense to public feelings that the film arose, especially in times of high security tension. The criterion developed to balance the conflicting interests in similar situations is that, in light of the extraordinary importance of freedom of expression, as a dominant feature of democratic life, its limitation should be recognized only when offense to public feelings reaches a degree of intensity which is beyond the level of tolerance that people in a democratic society should accept. The question of tolerance to offensive speech is a normative one, evaluating legally

the proportionate value of each of the elements that need weighing and balancing. The level of tolerance required here is extremely high. In this case, in spite of the severity of the offense to public feelings, grave as it was, and occurring when armed operations were still on, the Court found it did not exceed the high level of public tolerance required as a precondition for the limitation of freedom of expression. The Israeli public *can* endure and *should* endure hostile attacks on its morality and humanity, false and offensive as they may be, even when it concerns soldiers in active combat, and affects a society that has suffered heavy losses just days before. Israel's collective social strength should withstand forceful attacks on its national character, preserving at the same time freedom of expression in all media, and basic principles of democratic social order. The balance formula takes its toll through the limitations put on methods and ways used in fighting terrorism; it takes its toll through the harm and pain it may encumber upon the public and army morale in times of combat. The price is paid in preservation of basic human rights and democratic principles.

Part IV: Conclusion

Times of war and armed conflict create dilemmas in a constitutional legal system that honors and protects its individual human rights. Perhaps, somewhat paradoxically, it is times of crisis that bring individual human rights to full focus, enhancing the formation of safeguards to protect from infringement of basic freedoms. Acute life and death situations often bring about the need to combine social goals with individual rights which

strengthen the fabric of democratic life; The deep roots of democratic principles which are planted in wartime later bear fruits in times of peace.

Questions of life and death and the protection of human rights rise in very hard cases, and at times, demand very painful decisions. We, Judges, are part of our society. We feel its sensitivities and grief. We are part of its achievements and struggles. We deeply sense the tragedy of the Palestinian people, and the need for a constructive solution; We see and feel the agony and yearning of the Palestinian individual to exercise full individual rights, and realize for himself and his family, a free and better life.

In these complex situations of critical importance to society and the individual, we try to build a bridge that will harmonize between conflicting considerations. Under the unique legal and moral leadership of our president, Justice Aharon Barak, we are constantly in search for the right point of balance between individual human rights and general social needs.

I shall conclude on a personal note. I was born 7 years before the Declaration of Independence of the state of Israel, in an agricultural Kibbutz in the Jordan Valley. My young and adult life, as those of my generation, was interwoven with the gradual growth of the state, and the evolution and formation of its values and moral forms. Since our early childhood, there was a grey cloud of war, terror and danger to life, laying low above our heads. But, at the same time there were blue skies, with a strong, shining mid-east sun, conveying hope for building a democratic society in Israel, constructed on justice, morality, and respect for the dignity of man – who ever he may be. The Declaration of Independence engraved in words of prophecy the basic

moral and spiritual values of the emerging state. Time was needed to transform those ideals into daily truths, and apply them broadly to all walks of life. It is the commitment to the eternal existence of our homeland after the disaster of the holocaust on the one hand, and the preservation of human values, on the other, that mark the core of our physical and moral existence. The Court is responsible for setting the balances and the borderlines. Our role is not to let terror and existential dangers blur the basic concepts of human rights.

We are still a young country. The formation process of our social values has by no means reached its end. It grows and evolves with time. The Court is a partner to this process, struggling, as ever, in search for the optimal equilibrium of the scales of justice.