

Judicial Setbacks, Material Gains: Terror Litigation at the Israeli HJC

**Menachem Hofnung
Keren Weinshall
Department of Political Science
The Hebrew University of Jerusalem
E-MAIL: msmh@mscc.huji.ac.il
weinsh1@017.net.il**

Working Draft: October 2009

Abstract

Recent research indicates that even in countries with strong judicial review, supreme courts have proved reluctant to oppose restrictions on civil liberties in times of war, or in crises which resemble war-like emergencies. Accordingly, most research conducted on the Israeli High Court of Justice argues that despite using the rhetoric of human rights, the HCJ rarely intervenes in security-based decisions targeted to prevent terrorist activity.

Our research, based on empirical sample of cases litigated at the HCJ in 2000-2008, argues that the picture is more complex, and that in fact the Israeli Court does play a significant role in reducing human rights violations. Although in most cases the HCJ does not overtly intervene in the decisions of the security authorities, we show that the Court's decisions on terror contain an implicit, yet no less important facet in preventing numerous harmful decisions. We further test the relationship between the overt and latent nature of the HCJ's power, and show how different political and security conditions, such as the public mood or the occurrence of deadly terror attacks, affect justices' decisions to reject a petition, openly accept it, or intervene more latently in the security authorities' policies .

Introduction

On 9 November 2000 an Israel Defense Force helicopter fired three missiles at a car driven by Hussein Abayat, a senior Fatah Tanzim (Palestinian Militia) activist, killing him along with two innocent women. According to statistics published by B'Tselem,¹ from November 2000 to November 2008 the Israeli security forces killed 232 Palestinian activists in a series of targeted killings that also resulted in the death of 154 non-targeted civilians (*Ha'aretz*, November 28, 2008). A legal challenge to the policy of "targeted killings" was first brought before the Israeli High Court of Justice (HCJ) in 2002, when Knesset Member Mohammed Barakeh asked the Court to issue an order stopping the use of this combat policy. A panel of three justices rejected the petition in a brief decision stating that "The choice of combat means used by the respondents with the objective of putting a stop to murderous terror attacks is not among the matters that this Court sees as its authority to intervene with."² This court decision was handed down at the end of January 2002, in the midst of a series of suicide attacks; yet five years later, in a relatively peaceful period in December 2006, the HCJ heard an almost identical petition³. Unlike the first time, the court in 2006 was willing to look at the "choice of combat means." After emphasizing its authority to review *all* security matters, the Court has stated that the targeted killing *policy* is not prohibited according to international law, but the legality and proportionality of each individual killing must be determined by itself. The sixty pages of the Court's decision touch upon the dilemmas and difficulties faced by a democratic society wishing to balance the needs of enforcing bearable standards of human rights on the one hand, and the need to fight terrorist organizations who abide only by their own internal operating rules on the other.

Terrorism presents democracy with a difficult challenge. How does a state

combat a security threat when the enemy is either unknown or operates in hiding? Unlike the case of a war against an external power, fighting terror involves conducting operations on one's own soil and among one's own citizens. This is especially the case when a terrorist organization is able to penetrate a democratic society, recruiting and mobilizing activists among the local population. When terrorist acts wreak havoc, causing fear and panic among law abiding citizens, governments are pressured to react, or to bear the political consequences of being looked upon as soft or inept. In most cases, a state reaction involves enacting anti-terror legislation that relax existing criminal laws regarding the treatment of persons alleged of committing acts of terrorism. Such legislation often calls for the grant of special executive powers to combat terrorism. In doing so, the legislation changes the balance of powers between branches of government in such a way that the executive branch is entrusted with special emergency powers of legislation and judicial authorizations at the expense of the legislature and judiciary.

When such change in the internal balance of powers occurs in conjunction with with the relaxation of the rules of due process of law, a question arises: Who can prevent an abuse of powers and defend personal liberties? At this point, the work of courts becomes crucial for striking the balance between executive desire to eradicate terror at all costs, and the need to prevent misuse and abuse of extraordinary powers.

It is often claimed that the Israeli H CJ fails in striking this balance and that it rarely intervenes in security-based decisions aimed at preventing or reducing terrorist activity. It is further argued that the Court, while using the rhetoric of human rights, sacrifices basic civil liberties for false claims of national security (see for example Kretzmer, 1993 and 2002; Shamir, 1990; Kuttab, 1992). Using empirical data based on a sample of terror related cases brought before the H CJ, we set out to evaluate

what role the judiciary plays in trying to strike a balance between the often clashing interests of fighting terror and maintaining a reasonable degree of civil liberty. Does the Israeli court regularly favor national security interests over human liberties?

We address these questions by situating them within a wide theoretical context; namely, assessing high court political power rather than analyzing court doctrines as the ultimate variable. In doing so, we explore and identify the transparent and latent methods in which the judiciary can influence policy making in a democratic country. Employing this theoretical framework, which adds another layer to the earlier studies conducted on the HCJ role in fighting terror, leads to more complex results than those reported in previous studies. Based on our sample of 638 terror related individual opinions given by HCJ justices, in 200 petitions between the years 2000 to 2008, we argue that the Israeli HCJ does indeed play a significant role in restraining executive measures that contain considerable violations of human rights. Despite the fact that in most cases, the HCJ does not *overtly* intervene in the decisions of the security authorities, we show that the Court's decisions on terror contain an *implicit*, yet no less important component in preventing numerous harmful Executive initiated measures. We also show that changing external conditions, such as the domestic political constellation and the public mood, have an effect on the range and frequency of judicial intervention.

Our goal in this study is twofold. First, we try to uncover the HCJ role in the ongoing war against terror in Israel. Second, by exposing the different aspects of the HCJ decision-making process in this sphere, we wish to add another layer to the theoretical debate concerning the ways in which the judiciary can influence decisions in a highly volatile public policy area.

The paper is composed of five sections. First, we begin by looking into the

Court's role in balancing the constant tension between maintaining adequate standards of human rights while simultaneously fighting terrorist activity. In doing so we take into account the Court's institutional limitations and look into the latent ways in which the Judiciary has developed a strategy to affect policy making, while at the same time keeping its own impartial posture. The second section focuses on the Israeli case, briefly introducing Israel's HCJ and its approach towards matters of national security. In the third section, we introduce our research methodology, which combines both quantitative and qualitative content analysis. The fourth section presents our empirical data in three sub-sections: a) An overview of the 638 individual decisions taken by justices from a sample of 200 court cases; b) The result of a multinomial logistic regression testing the conditions for the justices' intervention in the war against terror, and the form of intervention (overt or latent); c) An assessment of the court's power and authority to intervene in terror related cases, and the political consequences of applying judicial powers. In the final section we summarize our results, discuss their theoretical implications, and offer challenges for future research.

The Judiciary Role in Emergency Crisis

Finding the balance between security needs and adherence to the basic principles of human rights and dignity is of fundamental importance for any democracy under threat, as wars, terror and internal subversion endanger democratic characteristics of the 'rule of law' (Hofnung 1996; Gross 2006). These extraordinary conditions also call for an extensive mobilization of human and economic resources, in a way that often contradict civil rights (Barzilai 1999: 246). In the case of ongoing terror attacks, the trauma to democracy can be even greater, since confronting terror involves operations on a state's own soil and among its own citizens. Terror further hurts democracy because the balance between security and rights is closely related to

the presumed gravity of the particular situation and the panic it raises. Unlike the case of fighting an enemy country on the battlefield, terror can strike anyone at any time or place. Terror eradicates the traditional lines between the frontline and the rear, and therefore harms the very basic feeling of internal security and public safety that any government is expected to provide (Laqueur 1987).

Confronting terrorism thus raises the following questions: How is a democratic government supposed to act when a terrorist threat is perceived as real and imminent? Do state security considerations override all other competing concerns? To what extent are values of human rights taken into account in decision-making related to facing threats of terror?

The point at which the two objectives of defending citizens, and of upholding human rights and the rule of law, meet, or perhaps clash, determines the scope and substance of what is and is not permissible behavior for a government in times of national danger. In a modern democracy, the judicial branch often has the final say in what is permissible in public life (Becker & Feeley 1973, Tate & Vallinder 1995, Pacelle, 2002). While one of the primary functions of the executive is maintaining national security, the judiciary is entrusted with the protection of human rights. Thus, we would expect the judiciary to review and place limits on the executive's efforts to fight terror in cases where the magnitude of the violation of rights is too high. However, most of the recent research indicates otherwise: Even in countries with strong judicial review, the courts have proved reluctant to oppose reductions in civil liberties in times of war, or in crises of war-like emergencies (See for example Waldron 2003: 191; Rehnquist 1998; Epstein et al.⁴. 2005)⁵. What then is the role of the courts in fighting terror?

The judiciary is a political institution, intended, among other things, to ensure

public trust in the policy decisions of all other institutions of the state. In order to ensure public trust while preserving its own neutral political posture, the court cannot allow itself to overtly intervene in the lion's share of the government's actions (Dahl 1957; Devins, 2004; Epstein, Knight, & Martin, 2004; Shamir 1990). Courts hesitate to regularly confront elected officials not only in terror related cases, but on any major policy issues, unless the judiciary feels that it enjoys considerable public support (Giles, Blackstone & Vining 2008; Flemming and Wood 1997; McGuire and Stimson 2004; Mishler and Sheehan 1993). Thus, when terror related cases are brought to court, we would expect even less intervention than in other matters. This is the case because citizens presume that national unity is an essential element of military power, and as such, public support rarely exists for court decisions that overturn Executive actions taken to reinforce public safety and fight terror.⁶ Accordingly, collective discourse that embraces institutional efficiency (at almost any cost) is generated, and it is this discourse which can delegitimize, inter alia, judicial adjudication and public accountability (Barzilai 1999: 246; Posner & Vermeule, 2007).

Nevertheless, courts, even when they generally approve steps taken by the elected authorities, can play an important role in the preservation of human rights and the rule of law. When courts are repeatedly asked to review cases of national security, they acquire expertise and gradually realize that the issue is not of a temporary, but rather a permanent nature. They become more skeptical and less willing to automatically endorse executive policies (Tushnet [2003] refers to this process as "social learning"). At this point the Court becomes more willing to question the wisdom of individual acts, striking out at blatant cases of abuse and signaling to the executive that there are limits to the use of emergency powers. When courts overtly rule against the security establishment in these extreme cases, they empower human

rights both directly, by delegitimizing specific actions taken in a specific case, and indirectly, by creating the precedent of a "human rights" victory that the state should take into consideration before future actions. The indirect effect becomes even stronger since each intervening court decision increases the political salience of the judiciary and enhances further judicial power concerning security powers and human rights (Shamir, 1990).

Other, more latent ways, in which courts can tip the scales towards human rights, can be found during the process of judicial hearings. First, even in cases where judicial restraint is exercised, the examination of the merits of cases by the court can serve, in and of itself, as a moderating influence on future arbitrary use of power. Specifically, the court's hypothetical power to intervene forces security authorities to seek legal advice, to take human rights considerations into account, and to adopt policies that implement precedents already decided on by the Court. In other words, the mere discussion of fighting terror in a courtroom and the chance of an intervening decision, can produce an internal moderating effect on the state's methods of adopting policies intended to eradicate terror.

A second latent way in which the court can influence security-based decisions is by exerting judicial management techniques and informal pressure on the security authorities to settle the case or to revise their positions before the court reaches its decision. Unlike final judicial decisions, out of court settlements are not officially published and they receive much less public exposure. Settlements are not conceived by the public as direct interventions in executive policies, and therefore enable the court to exert its influence in a more subtle way. Furthermore, settlements do not carry the weight of binding precedents, yet if the court systematically pressures the security authorities to settle in certain situations, this can affect future policy making

regarding these situations in a more lengthy and internal process (Dotan & Hofnung 2001).

Terror Related cases in the Israeli High Court of Justice

Since the establishment of the State of Israel in 1948, its independence and territorial integrity have been challenged by a constant military threat by its Arab neighbors and non-state organizations operating across the borders. The fear shared by the country's leaders and the majority of its residents is not merely for the security of Israel's borders, but also for Israel's very existence and that of its population. Terror can present a major threat when it is supported and financed by neighboring political entities, and a part of the population under the effective control of the state is willing to actively engage in or support acts designed to bring about a change of rule by waging indiscriminate attacks against civilians. During its 61 year existence, Israel has gone to war nine times with its neighbors. It has also had to counter incessant aggressive hostile threats and terrorist attacks perpetrated by countries hostile to it, or by organizations whose aim is its destruction and replacement with a different political entity.

Under such circumstances, Israel has developed a high level of war preparedness, devoting enormous human and material resources to security. In order to fight terror, security agencies seek permission for acts including: wiretaps, following suspects, aggressive interrogations, extended detainments, physically eliminating would be terrorists in order to prevent future attacks, and more. Most of these acts come before court review in Israel; they all reach the door of the Supreme Court.

Having been subject to almost permanent clandestine activity throughout its

existence, Israel makes an interesting case study regarding the fight against terror in a democratic state. The institutional characters of the High Court of Justice in Israel, coupled with the Court's public prestige, add another layer to the importance of analyzing judicial decisions in an attempt to understand how public policy is shaped when considerations of national security and human rights are presented as two opposing extremes that the Court is asked to balance.

Israeli public law is almost entirely a judge-made law, created and shaped by the decisions of the Supreme Court. This is because the principal forum for judicial review is the Supreme Court itself, sitting as the HCJ. Thus it should be noted that the Israeli Supreme Court, has a dual function: It serves both as the highest appeals court in civil and criminal matters, as well as sitting as the HCJ. As the latter, it has *original and final* jurisdiction in petitions brought against the state and its organs in matters that fall outside the jurisdiction of other courts. It is within this latter capacity that litigation between public petitioners and policymakers takes place. This is especially the case with petitions concerning national security where the respondents are almost always cabinet ministers, agencies entrusted with security powers, or the Israeli army⁷.

The HCJ's jurisdiction is set out in section 15(c) of Basic Law: The Judiciary, according to which the High Court shall hear matters in which it deems it necessary to grant relief for the sake of justice. Unlike the "case of controversy" requirement (Article III of the United States Constitution), the Israeli Court's power extends to any matter it finds necessary to decide in order to forward the administration of justice. The HCJ has the power to intervene in almost any type of decision-making process and to issue orders to almost any state agency. Its decisions are closely followed and intensively covered by both the media and the public (Dotan and Hofnung 2005).

Additionally, when sitting as the HCJ, special procedural rules apply, resulting

in an altogether more relaxed and simplified legal process. This simplified procedure—coupled with the finality of its decisions— has turned the HCJ into a relatively accessible and attractive institution for public petitioners.

During the 1980s and the early 1990s, the HCJ reformulated its doctrines on standing, justiciability, and reasonableness, opened its gates to individuals claiming to represent the public interest, and entertained petitions on an array of issues that had long been considered political in nature (and therefore unfit for judicial decision). Public petitioners are now allowed to bring their rival claims into the Court without the need to establish their right of standing; in fact, there is no social or political issue that is not deemed “justiciable” (Rubinstein and Medina, 2005: 250-264). These trends in the HCJ have resulted in an increase in the number of the petitions submitted to the Court, among them petitions related to national security.

The scope of security-related decision making was also expanded considerably as a result of the Six Day War of 1967, in which Israel took over sizable areas inhabited by a large Palestinian population. Israel placed the occupied territories under military government, and operated according to security legislation. It did not take long for the HCJ to establish that it had jurisdiction over military commanders and their actions in the occupied territories⁸. Among the powers challenged constantly at the HCJ today are anti-terror measures imposed by military commanders in the occupied territories.⁹

Simplified procedures, a reformulation of doctrine, and an expanded scope of jurisdiction which includes the occupied territories, has resulted in an enhanced number of cases relating to national security and war on terror coming before the HCJ’s review.

The Israeli HCJ experience in fighting terror is unique: The Court has engaged in terror matters since its inception, and even more so since the 1967 Six Day War. In

addition, the hearings before the HCJ are conducted at a court that sits at the same time as a first and final judicial instance; almost all matters concerning national security are considered “justiciable”, and public petitioners continue to bring their issues to the Court. As such, the HCJ has acquired expertise and experience in dealing with national security matters including the war on terror.

We believe that these unique features enable the court to play an important role in securing human rights in both explicit and more latent ways. When a court faces a significant volume of cases and controls its timetable, as the Israeli HCJ does in terror related cases, the judiciary may engage in a complicated strategic and political game of developing more hidden techniques for intervention, timing final decisions, balancing one anti-executive with another pro-executive ruling, and other judicial maneuvers that can increase or diminish the media impact of any given decision. We assume that these judicial techniques enable the judiciary to become a major actor in forming policy over diverse areas of national security, while somewhat diminishing the resentment, objections and allegations that the Court, as an active player applying its own agenda in security matters, is expected to confront.

This assumption has not been sufficiently explored in former studies. Most studies on the HCJ role in fighting terror have focused on the overt features of the justices final decisions and have concluded that the Court's main function is in legitimating the prolonged infringement upon human rights in the name of security needs (Kretzmer, 1993 and 2002; Shamir, 1990; Shelef, 1993; Kuttub, 1992). Kretzmer (1993), for example found that the HCJ has intervened in only three out of 150 house demolishing orders issued by the military until the 1990s. Shamir (1990) found that the Court accepted less than 1% of the petitions submitted by Palestinians to the HCJ between 1967 and 1986, and concluded that these rare cases in which the

Court defended human rights served to enhance the legitimizing function of the Court by reinforcing its image as an impartial body.

Very few studies have been conducted on more latent aspects of the Court's role in war on terror cases, and they have all reached an opposite conclusion, finding instead that the Court has a restraining function on the security authorities. Dotan (1999), in a thorough study focusing on out of court settlements in petitions by Palestinians showed that the Court frequently forced the security authorities to compromise with the petitioner. Moreover, he asserts that as a result of the Court's influence the authorities frequently back down or compromise before the matter reaches the Court.

Kretzmer claims that while the Court's decisions in cases related to the occupied territories do not defend human rights, the "court's shadows" play a significant role in restraining the security authorities (Kretzmer, 2002: 189-191). The shadows of the Court, according to Kretzmer, are produced by the justices' pressure on the authorities to amend their initial positions and settle cases, as well as by the procedural constraints and limitations that result from bringing the government's actions in the territories under a legal umbrella (for a similar claim, see Bisharat, 1995).

In our study, we wish to look not only at both the overt and the latent aspects of the Court's role in maintaining human rights while fighting terror, but also at the relationship between these two faces of power, the overt and latent.

Methodology and Database

We set out to analyze both overt and latent aspects of the Court's decisions on terror related offences or executive operational measures, but for clarity of the empirical evaluation we limited ourselves to only final court decisions. We believe that a fresh look at judicial final written decisions, which served as the main data for empirical judicial studies, is needed. Large empirical study that looks not only at the Court outcomes but at the individual opinions of the Justices has not been done in Israel, as far as dealing with security offences is concerned. Out of court settlements bear the Court's stamp of approval, but the preferences of the judges sitting on the case cannot be quantified and analyzed.

An analysis of the HCJ's final decisions, taking into account both overt and latent rulings of terror related litigation, calls for a dual level of analysis: qualitative and quantitative. We built a quantitative sample of the HCJ decisions, and applied a methodology that combines quantitative and qualitative content analysis to the sample. The latter is mainly manifested by the way court rulings were coded. We encoded not only the end outcome of the case, but also multiple factual variables that were part of the entire picture considered by the Court before reaching its decision on any given petition, including the conflicting interests debated in the case, the legal argumentation, the application of judicial tests such as "proportionality"¹⁰, and the severity of the threat to state security. The qualitative research method is also present throughout the data analysis, particularly in the sub-section on the HCJ's authority to intervene in military operations aimed at eliminating terror.

Our sample is composed of 638 individual opinions (among them short

endorsements of the leading opinion)¹¹ handed down by High Court justices in 200 court cases from 2000 to 2008.¹² The unit of analysis is the decision, written or endorsed, by an individual *justice* in each petition, rather than the final outcome of a given *case* (the latter includes either the panel's majority or unanimous decision of the Court). The choice of selecting an individual unit of analysis was made despite the fact that in the overwhelming majority of cases, the entire bench gave a stamp of approval for the opinion written by the justice appointed to draft the HCJ decision. The main advantage of employing an individual unit of analysis is the ability to test various attitudinal tendencies among the justices, as they balanced human rights against the need to fight terror. This also holds true when we try to identify and measure semi-transparent judicial techniques for arriving at a desired end, for instance, granting actual relief to petitioners while formally rejecting their petition. Another advantage of encoding individual opinions is that it brings minority votes of the Court into the equation.

The sample was built randomly using the Supreme Court's data pool, which includes all the rulings handed down by the Court since October 1997.¹³ For the purpose of building the sample, we have delineated five categories that form the core of the public discourse on anti-terror measures that may infringe on individual human rights. These five categories are: administrative detentions; house demolitions; confiscation of land for building the separation wall between Israel and the West Bank; curfews and closures; and military operations.¹⁴ The above-mentioned categories were selected for several reasons. First, each of them involves inflicting severe harm to basic human rights in the name of eradicating terror (according to the state's claim). The severity of the anti-terror measured becomes obvious when they are compared to "routine" practices applied to criminal proceedings.¹⁵ Second, the

legal provisions regulating the war on terror are grounded in emergency wartime legislation (e.g., the Defense Regulations (State of Emergency) 1945; the Emergency Regulations (Administrative Detention) 1979, and Prevention of Terror Ordinance, 1948). All five categories are mainly used in the territories occupied by Israel in 1967 and much less so inside Israel. Let us now turn our attention to a short description of these five categories.

Administrative detention is a preventative measure aimed at stopping or eliminating actual terrorist subversion or imminent danger by placing suspects in custody without a formal trial.¹⁶ In some cases the detention is based on secret information that is not available to the detainee or his lawyers. A court is asked to review the procedure and approve the length of the detention (Gross 2004:692). According to B'tselem figures, the number of administrative detainees from 2001 to 2008 is between 600 and 1,000 at any given time.¹⁷

The second category, demolitions or sealing off terrorists' homes (hereinafter: "house demolitions") is intended to deter potential terrorists or their family members from engaging in clandestine activities.¹⁸ A house demolition is an administrative proceeding carried out by an executive order signed by a military commander of a geographic area according to Regulation 119 of the Emergency Regulations, 1945. Following the issue of a house demolition order, the residents of the house to be destroyed can submit an appeal to the military commander. In 1988, the HCJ ruled that if an administrative appeal is rejected, the appellant is still allowed to petition the HCJ before the demolition is carried out.¹⁹ From 2000 to 2005, 675 dwellings were demolished by following this legal procedure.²⁰ In February 2005, then-Defense Minister Shaul Mofaz accepted the recommendation of a special committee for the cessation of demolitions of terrorists' houses because these demolitions did not prove

to be an effective deterrent (Ha'aretz, February 18, 2005). Yet following two deadly attacks in Jerusalem in the summer of 2008, new demolition orders were issued and carried out in April 2009 (*HCI 9353/08; HCI 124/09*).

The third category in this study is the Court supervision of the construction of the separation wall between Israel and the West Bank. The wall's construction limits access of thousands of Palestinians to their livelihoods, their farmland and their schools, and requires the confiscation of agricultural land which surrounds villages and homes. The decision to build the wall was made by the Israeli government in 2002 in the midst of a series of suicide attacks carried out mainly by Palestinian residents of the West Bank. The building of the fence is politically sensitive as claims are often made that the real motive for drawing the wall's lines is Israel's desire to unilaterally annex significant parts of the West Bank. Aware of the political sensitivity of the issue, the Court has heard numerous petitions regarding the separation wall. We were able to count over 150 petitions that have been submitted to the Supreme Court on this issue.

The fourth category concerns curfews and closures that are carried out almost exclusively in the occupied territories. These measures are imposed by force of the Defense (Emergency) Regulations, 1945²¹. Curfews and closures restrict movement and the personal autonomy of the individual. Curfews require individuals to stay in their homes for a period determined by the military commander for reasons of preventing disturbances, or when military operations (including searches for terrorists) are carried out in a designated area. Closure is another form of restricting free movement. Unlike curfews in which people are not permitted to move outside of their homes, with a closure, an entire area is closed and nobody can enter or leave the area without a permit. Consequently, movement within the closed area is not

restricted. Thus for example, before the Israeli withdrawal from the Gaza Strip in the summer of 2005, a full closure was declared in Gaza (*Ha'aretz*, July 1, 2005).

The fifth and final category is petitions intended to stop or restrict military operations carried out by the Israeli army. The basis for such petitions is grounded in humanitarian concerns for the life and basic human rights of a civilian population residing in an area of combat. Examples of such cases in our sample are petitions asking the Court to ban targeted killings of individuals involved in terrorist activity, mainly in areas where the Israeli army operates freely. Another example is a technique known as “neighbor practice”, wherein the IDF has forced Palestinians in the West Bank to enter houses that were thought to be booby-trapped, or to approach houses where wanted men were thought to be hiding, in advance of the soldiers who sought to arrest them.²²

Analysis of Findings

1. Dispositions of decisions dealing with terror and human rights

The most immediate, direct, and overt influence of the HCJ when examining a case is the practical implications of the legal decision it renders. Do petitioners asking the Court to reverse anti-terror executive decisions have a chance in the HCJ? In a simple binary division of the cases, the question can be presented as: In what percentage of individual judicial rulings does the executive decision get a stamp of approval, and in what percentage of the cases is that decision reversed or modified? Before we provide an answer to that question, we would like to turn our attention to the way the Court operates when handling the above types of terror-related cases.

Our analysis shows that in most terror-related cases the Court follows a routine pattern composed of three analytical stages. In the first stage, the justices

tackle the issue of whether the Court has the authority to intervene in matters concerning national security (in the next section, we will discuss this stage in depth). Once this hurdle is cleared, the justices review the merit of the case, and decide whether the particular method that lies at the heart of the petition is in and of itself lawful or not. In the third stage, if the method used by the security authorities is not banned as a result of its own nature, the justices examine the legality and “proportionality” of the method in the specific case at hand. In the majority of the rulings (85.1%) the declared legal grounds for the justices’ decision has been based on proportionality.

These three analytical stages of judicial review have been applied in cases questioning the construction of the separation wall. At the end of June 2004, in a landmark decision in the *Beit Sourik* case (HC 2056/04), the HCJ first established that it holds the authority to intervene in the matter of the separation wall, and second, determined that the building of the wall itself is a lawful activity. Then the Court applied the third step of review, and ruled that the route chosen does not follow the legal measure of “proportionality”; namely, it failed to balance between the extent of harm to the local residents of the occupied territory and the security efficacy Israel derives from the wall’s path.

Once the Court’s authority and mode of action are established we can turn our attention to the end results. The question here is how to define what is to be regarded as “success” at court? It should be noted that in all decisions sampled here, the party bringing the case to the Court was either a citizen or organization protesting a rights violation, and the respondent was a state authority. Thus, in our sample there is, *prima facie*, a binary division that allows us to attribute an initial success for the petitioner with a “success” for human rights²³. By “success” in litigation, we mean that the

petitioner managed to gain a tangible, rather than merely a symbolic reward as the result of opting for litigation (Handler 1978:36-37).

Nevertheless, close inspection of the Court's caseload reveals a more complex reality than a simple binary dichotomy between “winning and losing”. Our classification method is geared to capture this complex reality by adding two other categories between A (full victory for the petitioner) and D (complete failure). Category B measures partial victory for the petitioners. A partial victory is a situation wherein the Court, in its formal decision, intervenes in a security based decision because it violates human rights, yet the petition is not fully accepted. In such a situation, the petitioner achieved something not offered before petitioning the Court, and less than what was asked for in the petition. The final legal result is a partial acceptance of the petition by the Court. An illustration of partial success may be found in the case of an order to demolish a house. If at the end of the legal hearing the house still standing but all or partly sealed, it means that the administrative decision can be reversed at any point of time.²⁴

Category C stands for decisions wherein the Court acknowledges the validity of the petitioners’ human rights claims and at the same time issues a formal decision rejecting the petition at hand. By doing so, the Court plays a sophisticated politico-legal game, whereby it grants the petitioners part or all of what they are seeking and, at the same time, avoids a binding legal precedent that will curbs future activities involved in waging a war against terror. By opting for C the Court is able to reduce violations of human rights and simultaneously, to prevent dangerous showdowns with both elected officials and the politically powerful security establishment.²⁵

Category C is much more interesting than B, because here we define as partial success court cases that in a simple textual analysis can be easily classified as total

failures (D). Category C involves cases where, in the course of deliberations and under the HCJ's questioning, the security establishment changes its initial stand and moves towards a position that accepts some or most of the petitioner's demands. Yet on the record, the HDJ formally rejects the petition. Examples of such cases can be found in several petitions challenging the path of the separation wall. During the course of the hearings, the Ministry of Defense agreed to modify the wall's path in a way that gave the petitioners part of the land that was earlier confiscated according to security considerations. In such cases, the petitioners believed that the proposed new route still violates their rights, and therefore did not rescind their petitions. For its part, the HCJ, after examining the petitioners' claims against the wall's new route, *rejected the petition*, but did so by accepting the "proportionality" of the new route, and not that of the old map.²⁶

In other words, in the above-mentioned cases, the petition was rejected entirely, yet by the time the HCJ has reached its decision, the petitioners' situation improved considerably in comparison to the moment when the petition was submitted. In such cases, the HCJ's influence is latent, and is discernible only to those participants actively engaged in the legal process, or to those who conduct a careful reading of the case as opposed to skipping to the bottom line. *In such situations, the HCJ's political power and influence is manifested without its having to actually activate its powers.*

Table 1 shows the breakdown of the sample on terror-related cases. The most surprising finding is that in 40% of the final decisions, the Court's has forced security authorities to amend their decisions (at least partially). In 6% of the decisions, the petition was entirely accepted by the justices. In another 6.2% the petitioners gained partial victory²⁷. Thus in 12.2% of the decisions, the justices opted for *explicit*

intervention on behalf of the petitioners. Additionally, in 27.8% of the decisions in the sample, the Court's intervention was *latent*, leading the security authorities to amend their position during the proceedings, and thus enabling the Court to reject the petition while still providing full or partial relief to the petitioners.

(Table 1 about here)

Figure 1 highlights a recurring pattern in all the selected categories of cases that we examined. All categories show that the most common HCJ decision is rejection of the petition, the second most frequent response is latent intervention, and the least common outcome is the acceptance of the petition, whether in whole or in part. However, there are categories in which the HCJ's inclination to intervene varies, as in cases of administrative detention. The low intervention rate in detention cases can be explained by the fact that this is the only category where the direct damage to human rights is inflicted on the terror suspect himself, as opposed to all other categories in which the rights of the larger civilian population are also impinged upon. Moreover, the justices sitting in detention cases see before them an alleged terrorist, in a process that resembles criminal trials (which overwhelmingly have very low acquittal rates) more than administrative petitions.

Figure 1 also outlines two categories wherein total rejections occurred in less than 50% of the decisions: Those are the construction of the separation wall, and military operations.²⁸ Accordingly, *latent intervention* is fairly high in these categories: In 35% of the decisions on the separation wall, the petition was rejected while the construction was rerouted in favor of the petitioners. In a similar manner, in 39% of the decisions regarding military operations, the HCJ forced the military to

stop or reduce the effect of its planned operations, while at the same time rejecting the petition on hand. In other words, our findings show that in a significant percentage of the rejected petitions, the security forces, when facing court proceedings, preferred to relax their position rather than taking the risk of a legal defeat.

(Figure 1 about here)

2. Conditions for court intervention in the terror cases

When will justices act overtly to defend human rights that are "in the way" of fighting terror? Are the conditions in which the Court acts overtly in defense of human rights different from the circumstances that the Court opts for covert intervention in favor of human rights? Does the Court take into consideration, either overtly or covertly, the political climate or the security situation at the time it delivers a decision to intervene?

In order to answer these questions and determine the basic conditions which result in the Court's decision to openly accept a petition, to intervene more latently in the security establishment's policies, or to reject a petition, we constructed a multinomial logistic regression, described in Table 2. We tested five types of independent variables that were expected to affect the Court's decisions (see the Appendix for detailed information on the way the variables were constructed). Note that although we analyze the effect of each of these variables on the Justices' final decisions, some of the variables can also influence the final outcome by directly affecting the opposing sides of the petition. This is true particularly in the case of covert intervention, as these decisions are indeed initiated by the justices, but ultimately achieved by the state's decision to amend its policy coupled with the

plaintiff's decision to proceed with court hearings. Unfortunately, the existing data is not sufficient to measure the relative effect of each variable on every player (namely the Court, petitioner, and respondent) in a specific court case (see further discussion in a following section).

The first type of explanatory variable involves case factors. Here we identify different types of petitioners and present a variable which separates human rights interest groups as frequent player petitioners, and other types of incidental petitioners. Based both on general and Israeli studies which suggest a correlation between the plaintiff's knowledge and expertise in legal proceedings and the success rates in final court decisions (Sheehan, Mishler, & Songer, 1992; Dotan & Hofnung, 2001), we hypothesize that having a human rights interest group as a petitioner would increase the probability of both overt and covert pro-human-rights decisions. Another case variable measures the category of the case (detention, demolitions and so forth).²⁹

The second group of independent variables tests the political context of the decision. The effect of the immediate political climate on the tendency of Supreme Court justices to opt for judicial action or judicial restraint has been studied in Israel as well as in other systems (Hofnung, 1999; Eskridge, 1991). A justice constantly ruling against a rightwing government on terror matters, or ruling contrary to the public opinion, may not maintain an impartial position and the legitimacy conferring capacity this position entails (Sommer, 2006). Hence, we assumed that the presence of leftwing parties in the ruling coalition, or a relatively high rate of public support for peace negotiations, would raise the probability of a justice overtly supporting human rights. Conversely, we assume that the opposite situation, namely a rightwing government and public opinion opposing peace concessions would decrease the probability for an overt pro-human rights decision, and would increase the probability

for either rejection of the petition or for more latent intervention. This is so because covert pro-human rights decisions do not get the same media attention and public exposure as an open intervention that nullifies an executive decision.

The third type of variable measures the national security state of affairs at the time the judicial decision was handed down. We hypothesize that in the aftermath of a terrorist attack or during a military operation, the probability of the Court rejecting a petition is higher than in times of tranquility, and vice versa, meaning the probability of both open or latent intervention, is lower. This hypothesis assumes that the justices themselves, as private citizens, are also directly affected by threat perceptions. Furthermore, in many cases, the justices have the capacity to time the publication of their decisions, and may choose to delay the publication of an overt pro-human rights decision to a period when public emotions cool down. In addition, we assume that in times of national emergency and cases where the Court sees intervention as necessary, the justices will prefer to intervene more latently, and thus the probability for overt, as compared to latent intervention at these times will be lower.

Note that this hypothesis is not consistent with Epstein et al (2005) findings, according to which security crises in the US do not affect decisions in cases directly related to the security situation, but rather that their effect is limited only to other civil rights cases. Epstein et al explain their surprising finding by noting that security cases in times of crises are decided by a process-oriented dimension, instead of the frequent liberal-conservative dimension that usually guide justices' decisions. We argue that this is not the case in Israel, as the dimension referred to by all Israeli policy makers, including justices, is the security dimension (Arian, 1998). This will be especially evident in cases related to national security.

The fourth type of variable examines the Court's rhetoric, testing whether a

decision based on "proportionality" is more likely to yield a pro-human-rights result than one that utilizes international law or cites other legal sources to justify the final decision, and whether the probability for an intervening decision increases in cases in which the Court explicitly mentions its authority to rule on security policies.

The fifth type of variable is aimed at testing the personal inclination of each justice. Here we employ the attitudinal model of Supreme Court decision making, a model that assumes that ideological preferences can be identified when a large number of court precedents and individual opinions are analyzed (Segal & Spaeth, 2002). If this model works, we expect that the ideological preferences of a single Justice can be identified by statistical analysis of a sizable number of individual decisions. In other words, some justices will be more naturally inclined to rule in favor of human rights, and others will tend to favor security needs. Additionally, to determine both overt and latent intervention, we searched for ruling patterns and tendencies of different justices. Since the norm of consensus between the panels of justices in security based petitions is very high (approximately 90% in our sample), we also decided to test the effect that the identity of the head justice, i.e., the justice writing the main court opinion, had on the final ruling.

(Table 2 about here)

Our hypotheses were tested in the multinomial logistic regression model reported on in Table 2. The Chi-square statistic for the model allows us to reject the null hypothesis that the dependent variables do not improve prediction regarding the likelihood of final decisions. Nagelkerke's pseudo R-square (R2L) value of 40.2% suggests that the model accounts very well for the variation in the dependent variable.

Most subject categories did not show significant effect on the justices' decisions. Exceptions are cases of administrative detention, which increase the

probability for rejection of a petition compared to latent intervention, and petitions submitted against the building of the separation wall, which increase the probability for an intervening decision (both overt or covert). The Court's intervention in petitions against the separation wall, compared to intervention in other categories, is more likely to be overt. Petitions submitted by human rights interest groups in terror related matters are more likely to be overtly accepted by the justices rather than either rejected or latently intervened. However, our findings show that interest groups did not fare better than one shot petitioners, as far as the Court's decision to latently intervene in favor of human rights , rather than rejecting the petition.³⁰

The variables testing the effect of the political context reveal that indeed having a leftwing government raises the probability that a justice will overtly support human rights, as opposed to both rejection of the petition or latent intervention. The effect of the make-up of the ruling coalition on the justice is especially strong when deciding to overtly accept a petition as opposed to rejecting the petition. In accordance with our assumptions, high public support for the peace process with the Palestinians is negatively related to the probability of rejecting a petition, when compared to overt or latent acceptance. However, neither pro or anti-peace public opinion, significantly affected the choice between overt or latent intervention.

The security situation at the time a decision is handed down has the strongest effect in the direction we anticipated. If a decision is given after a terrorist attack or at the time of a military operation, the probability of it overtly supporting human rights significantly decreases. The effect of the security situation is most noticeable when comparing overt intervention to rejection of the petition, but it is also visible in its effect in decreasing the probability of overt intervention compared to latent intervention. Additionally, justices will tend to reject the petition in these situations

rather than latently accept it, although this effect is only marginally significant ($p < 0.1$).

Finally, the results that surprised us most related to the attitudinal explanation: we could not find significant patterns in most justice's rulings, with the exceptions of Justices Barak and Dorner, whose judgments raise the probability of an intervening decision.³¹ Both Justices, and especially Dorner, show tendencies towards overt rather than latent intervention. It is also interesting to note that Justices Barak's and Dorner's effects on the decisions of the Court were even higher when they sat as head of the panel (see Table 2). Particularly noteworthy was the substantial effect that Justice Dorner's existence on the panel had in increasing the likelihood of an overt decision in favor of human rights.

An overview of the results reveals that the variables that show the greatest influence in the sub-model are those comparing between the rejection of a petition and overt intervention (the right hand column in Table 2). *Thus, we believe that the latent intervention option is an intermediate option, between rejection of a petition and overt acceptance.* This conclusion is supported by comparing the coefficient for rejection verses overt decisions, with latent intervention as reference (the left and middle columns of Table 2). The opposite effects, revealed by almost all the coefficients, indicate that rejection decisions or overt intervention are the two extremes, while latent intervention exists in-between the two, consistent with a midway solution.

The results presented above lead us to a rather interesting hypothesis about the process of decision-making in terror related cases. In many of the cases where at the outset the justices conclude that the security-based actions cannot be justified, they tend to opt first for latent intervention in the state's actions. Namely, they ask the state

to consider an alternative plan of action. If the authorities refuse to amend their current course of action, the Court will then debate whether to overtly intervene or reject the petition.

We found written and clear evidence for this structured decision-making process in about 15% of the decisions of overt intervention for human rights. In those 15% of cases, the Court took pains to explain that it was accepting the petition only after its attempts to reach an agreement between the opposing sides had failed. Our theory is nicely summarized in the words of Justice Procaccia, in a decision to overturn that state's decision to confiscate a piece of land: "During the hearings on the petition we suggested different paths in the hope of obtaining an agreement which would balance between the needs and the different interests of the sides, but, unfortunately, these offers were not accepted... and so there is no escape from judicial decision in the petition"³². Accordingly, we also found a few rejection decisions, where the Court stressed that it had decided in favor of state only when it could not bring the sides to a settlement.

This decision-making process clarifies the limitation of latent rulings in favor of human rights. A decision of latent intervention is not one that the Court makes as its preferred judicial act. It is rather made by the state through government lawyers,³³ as a risk reducing measure, after hearing and calculating the Court's hints.

3. The Court's power to intervene in terror related cases

The findings presented in the previous sub-chapter show that in about a quarter of the decisions, the state, after hearing the initial court hearings, amends its position and offers a better package to the petitioners, before the Court makes a binding decision. The state's new course of action is arrived at through a post-hearing

and pre-court calculation whereby it decides that acting upon the Justices' hints and cues is likely to prevent a unfavorable legal precedent (see more in Dotan 1999 and Kretzmer 2002:189-192). We further suggest that *the mere possibility of the Court's overturning existing policy* causes policy-makers to take into account the justices' positions on the matter even before they reach the courtroom. Therefore, the Court can exert considerable influence on decision-making related to the terror prevention measures by the very act of conducting open hearings on the subject.

The deterrent power of the judiciary is exercised in three different ways that complement each other. First, occasionally the Court does intervene explicitly in anti-terror measures (12.2% of the decisions in our sample). Second, even in cases where judicial restraint is exercised, the Court's examination of the merits of the case, has a moderating effect on future arbitrary use of state power. Third, in cases where the petition is rejected outright, the HCJ may still remind the parties that it has the authority, both institutional and theoretical, to intervene in any operative decision made by the security forces, even in the midst of military operation.

In order to test the ways in which the HCJ creates and preserves its role in the decision-making sphere related to the war on terror, we looked at two additional variables. The first measured whether the Court had conducted its own investigation in cases that were litigated.³⁴ The second looked at how far the justices were willing to stretch their legal authority to examine both military tactics and the use of the weaponry employed while waging a war on terror.

As for examination of the case details by the Court, the results are clear: *In 95.6% of the decisions, a thorough investigation was conducted.* It is interesting to note that an examination of the actual matter at hand was also conducted in *two thirds of the rare cases wherein the Court rejected the petition out of hand*, due to the

absence of previous proceedings or due to "non-justiciability". An interesting case demonstrating the Court's willingness to conduct a thorough examination, was handed down by the Court in April 2003. The petitioners asked the Court to ban the use of the deadly "flechette shells" during military operations. The panel, which included Justices Matza, Levy and Chayut, ruled that the Court is not about to intervene in the choice of weaponry used by the security forces, thereby refusing to prohibit the use of the "flechette" shell, which is considered especially injurious. Simultaneous to this statement of "non-interference", the justices investigated the shell's configuration, the rules of engagements and international law regarding the shell. After completing their study, they stated that the shell's use was lawful (HCJ 8990/02 Physicians for Human Rights v The Commander of the IDF Southern Command). It appears to us that in this ruling, the moderate statement made by the Court regarding its lack of authority stands in contradiction to the Justices willingness to carry out full investigation.

The second variable testing the application of the Court's "deterrent" power yields similar results. It is often argued by the state that the Court does not possess the capacity or the expertise to review an operative measure adopted by the respondents. In only 3.8% of the decisions, the justices accepted to this claim, while in 39.8% of the rulings, the justices explicitly expressed the HCJ's authority to intervene, emphasizing that there are no particular limits to the scope of judicial review in security matters. Moreover, in several cases related to matters such as administrative detention and house demolitions, it was ruled that the scope of the HCJ's judicial review is wider than usual, due to the severe injury to human rights involved in employing such measures.³⁵ Occasionally, the justices state their authority to intervene in a security matter irrespective of the parties' arguments, simply out of

preservation and empowerment of its authority.³⁶

A close inspection of these 3.8% of decisions in which the Court renounced its authority in matters related to the war on terror reveals that all of these decisions were published in times of warlike emergencies in Israel. Several of these petitions were brought again to the Court under less tense security circumstances, and were then decided by the Justices on the merits. The most famous example is the two targeted killing petitions described in the introduction (HC 5872/01 and HC 769/02).

Conclusion

At the outset of this study it was asked what role courts can play in defending or preserving human rights when political entities try to put a stop to a mounting series of terror attacks aimed at bringing down an existing political order. Terror attacks sow fear, panic and havoc, and governments may not encounter stiff opposition from society at large in cracking down on armed threats or political movements that support violent means of forcing political change.

We asked whether the judicial branch can be counted on to provide words of caution and moderation in places and times in which temptations run high, and extreme far-reaching measures may obtain overwhelming public support. Based on analysis of terror-related cases brought before the Israeli H CJ, our study shows that in general the Court did act as a reasonable defender of human rights. While the H CJ's intervention is explicit in a small minority of the cases, its influence is felt when we look at the litigation process as a whole rather than simply at the bottom line wording of the Court's decision (a win or loss). A mere reading of the text of the Court's decision does not provide sufficient explanation for why people bother submitting petitions to the Court, especially when their chances of stepping out of court with a completely decisive victory are small. If however, one examines the entire process of litigation, then petitioning the H CJ

appears to be more beneficial. *Every two out of five petitioners came out with some gain as a result of turning to the Court.*

By opting to grant relief during litigation, the Court asserts itself as a political player, able to extend relief in a particular case without curbing future security operations. By taking this route, the HCJ can abstain from forcing harmful showdowns with the elected branches of government. This policy often results in internal and international attacks on the HCJ, describing the latter as a fig leaf for all kinds of abuses of power. However, our analysis points out that by employing this judicial strategy of carefully avoiding written decisions in favor of the petitioners, the Court can maintain its invisible power to force security agencies to consider less drastic solutions for fear of being overruled by the Court.

Our findings also show that the Court does indeed take into consideration the political circumstances, such as the government make-up, public opinion, and the security climate at any given time. The influence of these factors is most notable when deciding between rejection of a petition and overt intervention, while latent intervention is, to an extent, an intermediate option between the two extremes. Latent intervention also demands cooperation of the state and state lawyers, variables that we could not measure directly, although we do hope to take on this challenge in future work.

We further argued that the HCJ's latent power is also manifested by the fact that it meticulously examines almost every terror related petition, and frequently reminds the state of its authority to decide on terror cases. In other words, we claim that the Court does not have to regularly exert judicial critique in order to influence decision-making; it is sufficient that it has the power and authority to do so.

We believe the *power and authority* to intervene helps the HCJ in reducing blatant violations of rights on the part of the security forces. The process of judicial review, through the three procedural stages (establishing Court authority, carrying out

independent investigation and measuring the proportionality of the executive actions), forces security authorities to seek legal advice, to take into account human rights considerations, and to adopt policies that implement precedents already decided by the Court. At the same time, previous case law forbidding exceptional violations still does not prevent their occurrence in many cases. In cases where the violations are not prevented, the Court can intervene. *Such intervention, though rare, maintains the continuous deterrent power of the Court, while at the same time allowing non-intervention in most subsequent cases.*

This constitutes the dynamic and dialectical relationship between the Court's active voice in the war on terror and its passive role; between the overt and the more latent facets of the Court's power. The two facets contradict each other: One is rarely seen in the Court's actual final decisions, and the other is camouflaged and also appears in the Court's "non-decision". At the same time, we assume that each of these contradictory facets enables the other to exist. In spite of, and because of the fact that in most cases the HCJ overtly favors state security considerations over individual freedoms, the HCJ is able to create a "mobilization of bias" (Bachrach and Baratz, 1962: 949), namely, discouraging other harmful options from being adopted.

References

- Arian, A (1998) *The second republic: Politics in Israel*. New Jersey: Chatham House Publication.
- Bachrach, P. and Baratz M. (1962) "Two Faces of Power" *American Political Science Review*, 56(4): 947-952.
- Barak, A. (2002) "A Judge on Judging: The Role of a Supreme Court in a Democracy", *Harvard Law review*, 116: 97-106.
- Barzilai, G. (1999) "The Argument of "National Security" in Politics and Jurisprudence" in Bar-Tal D., Jacobson D., Klieman A. (eds.) *Security*

- Concerns: Insights from the Israeli Experience*. Greenwich: JAI Press, 243-265.
- Becker, T.L. & Feeley, M.M. (eds.) (1973) *The Impact of Supreme Court Decisions*, New York: Oxford Uni. Press.
- Bendor, A. (2007) "Justiciability of the Israeli Fight against Terrorism" *George Washington International Law Review*, 39: 149-173.
- Bisharat, G.E. (1995) "Courting Justice? Legitimization in Lawyering under Israeli Occupation," *Law & Social Inquiry* 20: 349-405.
- Dahl, R.A. (1957) "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* 6:279-95.
- Devins, N. (2004) "Is Judicial Policy Making Countermajoritarian?" in *Making Policy, Making Law: An Interbranch Perspective*. Mark C. Miller and Jeb Barnes (eds). Washington, D.C.: Georgetown University Press, 189-202.
- Dotan, Y (1999) "Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada" *Law & Society Review*, 33(2):319.
- Dotan, Y. and Hofnung, M. (2001) "Interest Groups in in the Israeli High Court of Justice: Measuring Success in Litigation and In-Out-of-Court Settlements" *Law & Policy* 23(1):1-27.
- Epstein, L., J. Knight & A. Martin (2004) "Constitutional Interpretation from Strategic Prospective" in *Making Policy, Making Law: An Interbranch Perspective*. Mark C. Miller and Jeb Barnes (eds). Washington, D.C.: Georgetown University Press, 170-189.
- Epstein L., E. Ho Daniel E, G. King & J.A. Segal (2005) *The Supreme Court During Crisis: How War Affects Only Non-War Cases*. *New York University Law Review* 80: 1-116
- Eskridge, P. (1991) "Reneging on History? Playing the Court/Congress/President Civil Rights Game." *California Law Review*, 79:613.
- Flemming, R.B. & B.D. Wood (1997) "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods" *American Journal of Political Science* 41(2): 468-98.

- Gavison R, M. Kremnitzer, and Y. Dotan. (2000) *Judicial Activism: For and Against; The Role of the High Court of Justice in Israeli Society*. Jerusalem: Magnes Press, [Hebrew].
- Giles, M.W., B. Blackstone & R.L. Vining (2008) "The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making" *The Journal of Politics* ,70(2): 293-306.
- Graber, M (2005) "counter stories: Maintaining and Expanding Civil Liberties in Wartimes" in Tushnet, M.V. (ed.) *The constitution in wartime: beyond alarmism and complacency*, Durham: Duke University Press 95-124.
- Gross, E. (2006) *The Struggle of Democracy Against Terrorism: Lessons from the United States, the United Kingdom, And Israel*. Charlottesville: University of Virginia Press
- Handler, Joel F. (1978) *Social Movements and the Legal System: A Theory of Law Reform and Social Change*. New York: Academic Press.
- Hofnung, M. (1996) *Democracy, Law and National Security in Israel*. Aldershot: Dartmouth Publishing Co.
- Hofnung, M. (1999) "Israeli Constitutional Politics: The Fragility of Impartiality." *Israel Affairs*, 5(2-3), 34-54.
- Kretzmer , D. (1993) "Judicial Review over Demolition and Sealing of Houses in the Occupied Territories" in I. Zamir, (ed.) *Klinghoffer Book on Public Law*. Jerusalem: Harry Sacher Institute (in Hebrew).
- Kretzmer , D. (2002) *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*. Albany: State University of New York Press.
- Kuttab, J. (1992) "Avenues Open for Defense of Human Rights in the Israeli Occupied Territories," in Playfair E., ed. *International Law and the Administration of Occupied Territories*. Oxford: Oxford University Press, 489.
- Laqueur, W. (1987) *The Age of Terrorism*. Boston: Little, Brown and Company.
- McGuire, K.T. & J.A. Stimson (2004) "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences" *Journal of Politics* 66(4): 1018–35.
- Mishler, W. & R.S. Sheehan (1993) "The Supreme Court as a Countermajoritarian

- Institution? The Impact of Public Opinion on Supreme Court Decisions”
American Political Science Review 87 (1): 87–101.
- Moodrick-Even Khen, H. (2007) "Can We Now Tell What “Direct Participation in Hostilities” is? *HCJ 769/02 The Public Committee Against Torture in Israel v. the Government of Israel*" *Israel Law Review* 40(1): 213-244.
- Pacelle, R.L. (2002) *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?*. Boulder CO: Westview.
- Posner, E.A. & A. Vermeule (2007) *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford University Press.
- Rehnquist, W.H. (1998) *All the Laws but One: Civil Liberties in Wartime*. New York: Knopf.
- Rubinstein, A. & Medinah B. (2005) *Ha'Mishpat Ha'Constitutioni Shel Medinat Israel (The Constitutional Law of the State of Israel)* (6th ed.) Jerusalem: Schocken.
- Segal, J.A. & Spaeth, H.J. (2002) *The Supreme Court and the Attitudinal Model Revisited*, Cambridge, UK: Cambridge University Press.
- Shamir, M. & K. Weinshall Margel (2005) "Perceived Threat and Disqualification of Political Party Lists and Candidates for the Knesset: From Yardor to the 2003 Elections" *Law and Government* 8:119-155 [*in Hebrew*].
- Shamir, R. (1990) "Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice" *Law & Society Rev.* 24(3): 781.
- Shetreet, S. (1996) Standing and Justiciability in Zamir, I. and Zysblat, A. (eds.) *Public Law in Israel*, Oxford, UK: Clarendon Press, pp. 265-264.
- Sheehan, R. S., Mishler, W., and Songer, D. R. (1992). “Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court.” *The American Political Science Review*, 86(2), 464-471.
- Sommer, E.N. (2006) “Strategic Behavior and Internal Institutions on the Israeli High Court of Justice”, paper presented at the Southern Political Science Association Annual Meeting: January 2006, Atlanta, GA.
- Stone, G.R. (2003) "Civil Liberties in Wartime", *Journal of Supreme Court History*, 28: 215-251.

Tate, N.C., & Vallinder, T. (eds.) (1995) *The Global Expansion of Judicial Power*. New York: NYU Press.

Tushnet, M. (2003) "Defending Korematsu?: Reflections on Civil Liberties in Wartime" *Wisconsin Law Review* 1:273-309.

Table 1: Dispositions of individual justices' decisions on terror cases

Category	Number of Decisions	percentage
A: Court fully accepts the petition	38	6%
B: Court accepts part of the petition	40	6.2%
C: Court rejects the petition after forcing the state to amend its position	177	27.8%
D: Court rejects the petition	383	60%
N=638		

Figure 1: Overt and latent decisions on terror and human rights

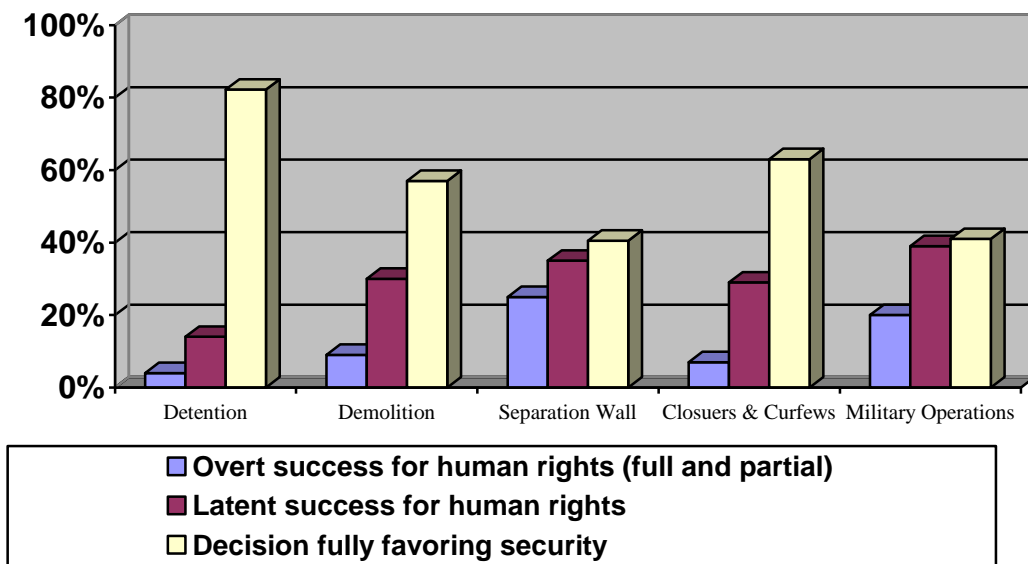


Table 2: Multinomial Logistic Regression Results for Justices' Decisions on Terror Cases

	Rejection of the petition (Latent Intervention as Reference)		Overt Intervention (Latent Intervention as Reference)		Overt Intervention (Rejection of the Petition as Reference)	
	B	Exp(B)	B	Exp(B)	B	Exp(B)
Separation Wall	-0.751** (.368)	0.472	1.202** (.571)	3.326	1.953***** (.570)	7.047
Detention	1.470***** (.391)	4.347	0.542 (.872)	1.720	-0.927 (.855)	0.396
House Demolition	0.097 (.383)	1.101	1.030 (.684)	2.800	0.933 (.671)	2.542
Combating Terror	-0.649 (.422)	0.523	0.526 (.632)	1.692	1.175* (.649)	3.237
Petitioner	-0.32 (.270)	0.969	1.327***** (.417)	3.771	1.359***** (.421)	3.892
Government	-0.401 (.260)	0.670	1.682***** (.459)	5.378	2.083***** (.468)	8.031
Public Opinion	-.579***** (.100)	0.561	0.044 (.150)	1.045	0.623***** (.152)	1.864
Security Situation	0.461* (.257)	1.586	-2.178***** (.548)	0.113	-2.639***** (.544)	0.071
Court's Authority	0.441* (.240)	1.555	0.239 (.361)	1.270	-0.203 (.360)	0.816
Proportional ity	-0.188 (.310)	0.829	0.276 (.523)	1.318	0.464 (.535)	1.590
Head Chair Barak	-0.223 (.315)	0.800	0.952** (.410)	2.597	1.176*** (.407)	3.240
Head Chair Dorner	-1.282** (.638)	0.277	2.055** (.875)	7.805	3.337***** (.993)	28.143
Intercept	2.404***** (.586)		-4.440***** (1.005)		-6.844***** (1.015)	

N=638 ;
Model Chi-square: 251.867***; df = 24
Nagelkerke R² = 0.402

* $p < .10$, ** $p < .05$, *** $p < .01$, ***** $p < .001$

APPENDIX

Dependent Variable:

Final Decision = 0 if the decision fully Rejects the petition; = 1 rejection of the petition after forcing the state to amend its position (Latent intervention in the security establishments policy); = 2 if the decision overtly accepts part, or all, of the petition.

Predictors:

Separation Wall =1 if the cause for the petition is confiscation of land for building the separation wall between Israel and the West Bank; =0 Otherwise

Detention =1 if the cause for the petition is administrative detention; =0 Otherwise

House Demolition =1 if the cause for the petition is house demolition; =0 Otherwise

Combating Terror =1 if the petition is intended to stop or restrict military operations carried out by the Israeli army; =0 Otherwise

Petitioner =1 if human rights organizations are included among the petitioners; =0 Otherwise

Government =1 if the ruling coalition at the time the decision was handed down consisted partly or solely of leftwing parties; =0 otherwise

Public-Opinion – an ordinal variable measuring the public opinion concerning a potential peace process between Israel and Arabs in the month the decision was given. The data is abstracted from *The War and Peace Monthly Public Opinion Survey*, which is based on a probabilistic representative sample of the entire adult population of Israel. The size of the sample is about 600 men and women and the sampling error is about 4.5%. The survey has been conducted by the Tami Steinmetz Center for Peace Research from September 1993 to the present. See at <http://www.spirit.tau.ac.il/xeddexcms008/manage.asp?siteID=5&lang=2&pageID=2344&stateID=65>

Security Situation =1 if a decision is handed down within a period of 5 days from a major terrorist attack in which at least 3 Israeli citizens were killed, (Source: data collected by Arie Perliger based on Newspapers clips from 1948) or if the decision was made during a military operation. The operations include “Homat Magen” and “Derech Nehusha” in 2002, the second Lebanon war in 2006, and other operations in the occupied territories, lasting from a few days to a month (Sources: Foreign Affairs Ministry website); = 0 Otherwise.

Court’s Authority = 1 if the decision explicitly states the court’s authority to intervene in security based decision made by the security forces; = 0 otherwise

Proportionality =1 if the declared legal grounds for the justices decision is based on proportionality; = 0 otherwise

Head Chair Barak =1 if Justice Barak is the main opinion writer; =0 otherwise

Head Chair Dorner=1 if Justice Dorner is the main opinion writer; =0 otherwise

¹ B’Tselem, the Israeli Center for Human Rights in the Occupied Territories.

² HCJ 5872/01 *Barakeh v the Prime Minister*, hereinafter: “Barakeh”.

³ HCJ 769/02 *The Public Committee against Torture v The Israeli Government*. In the ruling, Justice Barak referred briefly to the Barakeh precedent, yet completely ignored it when making an explicit and detailed statement to the effect that the Court has the authority to discuss the policy of targeted killings (For more see Moodrick-Even Khen, H. (2007)).

⁴ Epstein et al analyzed every civil rights and liberties case decided by the US Supreme Court since the 1940 and found that in times of security crises justices are substantially more likely to curtail rights and liberties than when peace prevails. However, the effect of crises was noted only in cases that were

not directly related to the war. We elaborate more on their findings and their implication on our research on page 24.

⁵ For the contradicting, less established claim, according to which Courts act as effective guardian of rights during times of security crisis, see Barak 2002, Stone 2003 and Graber 2005.

⁶ Justices may be reluctant to safe-guard rights in times of emergency crisis as they too, like all citizens and other elite groups, are influenced by security threats. However, justices, compared to other elite and non-elite groups, are less affected by the sense of security threats (Tushnet 2003: 304; Shamir and Weinshall Margel 2005)

⁷ It should be noted that most, but not all, of the terror-related cases reach the Supreme Court while sitting as the HCJ. We looked at random samples of 150 terror related cases that were decided at the Supreme Court in 2000-2005. About 10% of the cases were decisions of the Supreme Court acting as court of appeals.

⁸ The Court, as an institution, has many tools with which it can influence decision-making regarding state actions against terror. One central tool, which is especially fitting to decisions relating to terror, is choosing the law that may be applied to a given situation. Terrorist activity is carried out in many cases by multi-national organizations across borders. In the case of Israel there is one government, two different legal systems (Israel and the occupied territories) and three sets of laws (Israeli law, military law applied by Israel in the territories and international humanitarian law). The Court may often find itself referring to one, two or all three sets of law. The choice of the relevant law can decide the fate of a case under consideration. For example, the US courts preferred for a long time to ignore detention of hundreds of terror suspects held by the US in Guantanamo Bay in Cuba. The legal reasoning for not applying judicial review was that the court does not have territorial jurisdiction to hear non-US citizens held outside of US soil. The Israeli HCJ has solved a similar issue by deciding that when there is no territorial jurisdiction, the Court may possess personal jurisdiction over officials who are accountable to the Israeli government. By the Israeli standard no office holder can bring a claim of inapplicability of Israeli law as long as s/he acts in an official capacity.

⁹ In addition, similar powers are exercised, to lesser degree, in Israel itself.

¹⁰ Proportionality is a legal principle in which the benefits of the war on terror coming from the security authorities actions are compared with the damages to be caused by the violations to human rights.

¹¹ A justice who agreed with the ruling of the head of bench without having written her own opinion was coded in relevant variables identically to the coding of the justice with whose ruling s/he agreed with.

¹² For data comparing the results of the analyses regarding the individual rulings to analyses of the cases, see footnote 27.

¹³ In order to ascertain the sample's credibility, inter-rater reliability and consistency, 10% of the decisions in the sample were coded simultaneously by three experts in the field, showing more than 90% agreement between the experts.

¹⁴ Because the sampling was taken from a simple sample, the incidence of subjects of rulings matches that of the subjects heard in the Court. Therefore, close to 35% of the rulings deal with administrative detention, while the number of cases on military operations is significantly lower, less than 10%.

¹⁵ So, for example, criminal proceedings brought against aiders and abettors of terrorists were not included in the sample, even though in such proceedings, much stricter penal policy is commonly applied than in other criminal proceedings in Israel. The severity in the punishment of aiders and abettors of terrorists does not in our opinions constitute a difference in the nature of compromise of rights.

¹⁶ Administrative detention in the territories grants authority to the Defense Regulations (State of Emergency) of 1945, which have been in effect since the British Mandate, and which is considered part of the local law of the territories. In 1979, the State of Emergency Authorities Act (Detention) of 1979

was passed, which enables administrative detention in Israel during states of emergency only, yet because the state of emergency was never annulled, this law's validity remains. In 2002, the Imprisonment of Unlawful Combatants Act was passed, which gives the Chief of Staff the authority to decree the imprisonment of any individual who joined in enemy activity against the state and is not eligible for the status of Prisoner of War according to international law.

¹⁷ http://www.btselem.org/Hebrew/Administrative_Detention/Index.asp. Last accessed, July 7, 2008.

¹⁸ Critics of house demolition claim that the objection and consequence of the demolitions is collective punishment. For more see Kretzmer (1993).

¹⁹ HCJ 355 / 88 of the *Association for Civil Rights in Israel (ACRI) vs. the Commander of the Central District*.

²⁰ In addition to the 675 house demolitions, close to 2500 houses were razed or destroyed during military operations (*B'Tselem Report*, November 2004, cited in *Ha'aretz*, November 16, 2004).

²¹ "Security legislation" means administrative orders issued by the ruling area military commander, using his authority according to international law applied to occupied territory.

²² In July 2005, the HCJ ruled that the army's use of Palestinians to deliver warnings to wanted men about impending arrest operations is illegal, as it violates the principles of international law (HCJ 3799/02 *Adallah v. Military Commander*). Following the HCJ ban the IDF has adopted a new practice known as "outstretched arm," which allows the IDF to ask Palestinians to assist in mediating between soldiers and the wanted men - but only in very limited situations (*Ha'aretz*, November 11, 2005).

²³ A test that we conducted on 300 other rulings handed down by the Court on selected subjects revealed that a situation wherein the state was the petitioner was actually rare: We found only three such cases, and they were all appeals regarding the disclosure of evidence, or motions to refrain from releasing administrative detainees.

²⁴ It should be noted that in a recent case the HCJ approved another technique. In a case of a house demolition in Jerusalem that was to be carried out in the flat floor of a multi story building, an order was issued for filling the flat with cement, while the other flats remained intact. It was established in court, that using cement as a technique is irreversible as far as the flat in question is concerned (HC 9353/08 *Abu Dahim v. Home Front Commander*).

²⁵ It is likely that in Dotan's (1999) research on settlements in petitions brought by Palestinians during the years 1986-1995, such cases were categorized as partially successful in a *settlement*. His study revealed that 27% of the Palestinian petitions ended in a settlement wherein the petitioners gained a partial victory.

²⁶ See for example HCJ 1074/04, *Salame vs. the Head of the IDF Central Command*.

²⁷ Note that this percentage is slightly higher than the results of other studies on the same subject. This is so because we used a different analysis unit, i.e., the position of the presiding justice, instead of the collective ruling (the minority opinions were usually in favor of human rights). Analysis of our data based on the 200 rulings showed that in 4% of the rulings, the petition was accepted (Category A); while in 5%, it was accepted partially (Category B); 27% of the rulings were covert interventions (Category C); and the remaining 64% were rejection of the petition (Category D). These findings are close to the findings reported a decade ago by Yoav Dotan in a study looking at Palestinian petitions from 1986-1995. In Dotan's study, of the petitions ending in a final ruling, 6% ended in full victory, and 12% in partial victory (Dotan 334:1999).

²⁸ Note that the relatively high intervention rate in these two categories can only be partly explained by the existence of innocent civil population that suffers from the securities authorities' action (as opposed to terror suspects or their families). While in all cases of petitions challenging the security fence there are innocent "victims" as a result of the security authority's actions, only 70% of the petitions regarding military actions concern a human rights offence that directly hurts innocent civilians. Moreover, petitions regarding military actions from our sample are more likely to be accepted (overly or covertly) if the direct human right insult is infringed upon a terrorist suspect rather than innocent population: 80% intervention in military operation petitions that concern terrorists rights compared to 50% intervention in military operation petitions that concern human right violations to civilian population). For more on the relationship between the immediate "victim" to the authorities actions and the justices decisions see footnote 29.

²⁹ Note that due to a multicollinearity problem with the category variable, we could not include a variable measuring the population that was hurt because of the authority's actions (terror suspects, their families or innocent civilian population). However, when we ran a separate regression including the "victim" case-variable instead of the category variable – the regression results were significantly reduced – pointing that the category factor explains the justices' decisions better than the question of the hurt party in the petition.

³⁰ This result may be due to the fact that our sample does not contain out of court settlements that were withdrawn without the Court giving a final decision in the matter. Hence, repeat players in the Court, as are human rights interest groups, may tend to withdraw cases in which the Court has already intervened latently (since the settlements are satisfactory or because they know that their chances for more covert intervention are slim).

³¹ Both, Barak and Dorner no longer serve in the Court. Justice Dorner has retired in 2004 and Chief Justice Barak retired in 2006.

³² HCJ 7862/04 *Abu Daher v The Commander of the IDF for Judea*, p.5. For another examples, see HCJ 4764/04 *Physicians for Human Rights v The Commander of the IDF in Gaza* and HCJ 2577/04 *Taha v the Prime Minister*.

³³ for more on the role of government layers, see Dotan, 1999.

³⁴ Measuring of this variable was conducted by applying three tests: 1) A court examination of the petitioners' bio (In petitions brought by "repeat players" arguing on behalf of others, we related specifically to the injured parties and their particulars as the ones bringing the petition); 2) The harm inflicted on the petitioners; 3) The security objective argued by the state to justify its decision.

Note that in several decisions, particularly regarding administrative detainees, the Court specified that it had examined confidential evidence. Naturally, there is no expansion in the ruling upon classified intelligence data.

³⁵ See for example HCJ 5784/03 *Salama v The Commander of the IDF in Judaea and Samaria* and HCJ 9441/07 *Anonymous v The Commander of the IDF in Judaea and Samaria*.

³⁶ In 58.4% of the decisions the justices did not discuss the question of their authority to intervene in the security forces' policy (more than two thirds of these cases were proceedings wherein the Court's authority was explicitly written into law).