When terrorism upsets the scales of justice

Opinions differ sharply on the role of the High Court in terms of Israel's actions in the territories

In a recent lecture, the Supreme Court President, Justice Aharon Barak, told the audience about judges, law professors and lawyers in the West who ask how Israel is able to cope with terror and preserve its image as a democratic society. Barak quoted William Brennan, the U.S. Supreme Court justice, who said, "It is the State of Israel that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security."

"Indeed, the work is far from easy," Barak added. "We have not always been successful. But in the general view, we seem to have stood up to the test."

The test, as far as Barak is concerned, is whether the war on terror is extra-judicial or intra-judicial, using the tools the law places at the disposal of the democratic state. Barak has no doubts on this issue. "On this point, we are different from the terrorists. They act in opposition to the law, violating and trampling it. Whereas the State of Israel, as a democratic state, which champions the law, acts in the war on terror within the framework of the law and according to the law."

Both right and left seems to have their criticisms of the functioning and involvement of the Supreme Court in army and security affairs. One side feels the court is too involved, the other that the Supreme Court is not involved enough. Two dramatic decisions - the ban on violent shaking of persons under Shin Bet interrogation, and the release of the Lebanese "bargaining chips" that were held for the purpose of negotiating for the release of Ron Arad - support the allegations of the right. Conversely, the legal backing given to the army on issues such as closure of cities, house demolition, restriction of movement and expulsion, supports the claims of the left.

Demolition - in proper measure

Professor Yitzhak Zamir, who until recently served as a Supreme Court justice: "There is a measure of misunderstanding regarding the role the court can and should fill in society in general, especially at a time of emergency such as the present-day warfare. Some people feel the court is not supposed to and not permitted to intervene at all in the military and security realm, whereas others expect the court to be involved in every detail, so as to ensure that all activity is carried out within the framework of the law. Israel is in the middle, between the two approaches: the court is not supposed to - or able - to solve all of the problems and contentions vis-a-vis the legality of military and security decisions, but neither is it completely exempt from intervention."

What are the criteria for deciding whether to intervene or not? "In the cases you cited, the court determined that there is no authority to shake violently and no authority to hold bargaining chips. You need a positivist law to permit such things, and no such law existed; on the other hand, on issues such as closure or house demolition, there is law: international law and the orders issued by the commander. International law permits an army to impose a curfew if there is security justification for it. The court will intervene only in instances of clear irregularity, that is, the use of measures that are `out of proportion.'" In other words, a closure has to cause the starvation of people so that the court will intervene? "Certainly in this instance the court would intervene. In the past, Israeli petitioners assailed a curfew placed on a Palestinian village. I ruled that the army has the authority to impose a curfew. The petitioners said they were starving the residents, but did not present evidence. The court cannot intervene when it is presented with all-inclusive claims that are not grounded in evidence."

As an example, Zamir mentions the petition by MK Mohammed Barakeh on the subject of targeted killings, which Zamir says was "an all-inclusive petition." "But the court cannot issue a decision when it is not provided detailed, exact facts and figures. For example, I once rejected a petition by Minister Uzi Landau when he was only an MK, to demolish all of the illegal buildings," says Zamir. "I rejected it because the petition was all-inclusive."

When Palestinians petition against demolition of a house and the court authorizes the army to seal but not to demolish the house, it is interpreted as an intervention that weakens the means that the army sought to make use of.

"This is an example of intervention that seeks to examine the proportionality of the response. The law permits demolition of a structure when there is a security need for it. During the previous intifada, army commanders came to us and said they did not have any other punishment than demolition of houses to deter suicide terrorists. Justice Barak, in the Turkman verdict, determined that the demolition must be proportional, and only the part of the building where the suicide bomber lived should be sealed off. Recently, in a petition against a house that was designated for demolition for purposes of exposure, Justice Dorit Beinish issued a restraining order against the demolition. Two days later, the army retracted its request to demolish the house."

One mustn't forget in this debate the fact that the subordination of the Israeli military government in the occupied territories to the judicial oversight of the Supreme Court is an exclusive Israeli invention. "Israel's Supreme Court set a first and only precedent in the world," says Zamir, "according to which it is willing to judge any argument regarding legality of actions carried out by Israeli authorities, civilian or military, in occupied territory. There was no precedent for this anywhere else in the world. The fact that the Supreme Court opens its gates to Palestinians and Israeli groups made it possible to oversee, to a certain degree, the legality of actions in the territories. The court is prepared to hear petitions without insisting on legal standing, either, which further increases the number of petitions and the number of organizations that can submit petitions. And, after all, even if the intervention is limited, it is still much more than what is done in any other country. The authorities take it into account, and it has a positive and mitigating effect on their actions in the field."

Zamir says that nevertheless, not everything can be adjudicated. "In Israel, as in every other democratic country, there is a concept that not all matters can be adjudicated at the institutional level. Some matters are definitely decided upon by other authorities. It would be incorrect to say that our Supreme Court will rule on every matter. For instance, we did not intervene when the

minority government of Ehud Barak pursue diplomatic talks in Taba at the end of its term of government."

Are they really security needs?

Professor Leon Sheleff of Tel Aviv University decries the same point of which Zamir is so proud: the entry of the High Court of Justice into the territories. The architect of this incursion was Meir Shamgar, who as attorney general did not oppose the subordination of the military government to the judicial oversight of the High Court of Justice. "The court should not have accepted the decision of the attorney general not to oppose it, which was initiated by Shamgar. The court never explained where it received its authority to do so. The agreement of the sides does not in itself confer this sort of authority on the court. The only way to receive authority is to accept the Geneva Convention as binding, and then prevent the settlements."

The settlements, says Sheleff, are the original sin: "The Geneva Convention legally forbids settlements, transfer of the occupier's population to the territory of the occupied, which is what now stands in the way of any worthy, logical solution of separation between the sides. The court did not implement the convention, and did not prevent settlements until the Elon Moreh case. It was then that the real motive was revealed: the settlements were motivated not by security needs, but by the historical connection."

"In very few cases," Sheleff argues, "did the High Court of Justice decide in favor of Palestinian petitioners. And when it did decide, the reasons were very focused. For instance, masks were not distributed to Palestinians during the Gulf War, and the Court reprimanded the army for discriminatory behavior, and identified with the distress of the petitioners. Conversely, when the court identifies the legal dispute as part of the national conflict, it tends to stand up and snap a salute to the needs of security. In this respect, we are not out of the ordinary. All over the democratic world, the law toes the government line at times of emergency, even though its job is not to toe the line." And how do you explain the verdicts on violent shaking and bargaining chips?

"In both instances, it seems to me the court was reacting to sharp criticism in Israel and abroad. There is no real way to explain the court's about-face in these cases from its prior

decisions. Incidentally, I am not overly excited about the verdict on violent shaking. Although it forbade its systematic use, the court threw the ball into the court of the attorney general and declined to accept responsibility for advance examination of extraordinary circumstances that legitimize the use of torture. In order to carry out a secret wiretap, you have to get a judge's authorization in advance, so why don't you have to apply to a judge before you torture a person?"

MK Barakeh's petition on targeted killings was turned down in a verdict only a few sentences long, due to its being all-inclusive, but the court is now considering a highly detailed and reasoned petition brought by attorney Avigdor Feldman. Sheleff understands the problematic aspect of the case. "International law does not deal with terrorists. There are no rules on the matter. Therefore, targeted killings are a problem. The minimum the High Court of Justice can say is that it is a gray area, and if there is a chance that innocents will be harmed in an action, then it is forbidden to carry it out. The Feldman petition is definitely the test."

Supreme Court Justice Dorit Beinish expanded on this subject in a lecture she gave several months ago. "No other court, which follows the system familiar to us," said Beinish, "has to contend with the need to implement such broad judicial oversight over measures used to foil terrorism: administrative arrests, restrictions of movement, expulsions, interrogation methods and numerous other emergency measures. To be more precise, the court did not consider the security policy, or the political wisdom - but the legality of implementing the emergency measures.

"The heavy price paid by society and its judicial system stemmed from the need to implement, use and approve offensive measures. The accomplishment that resulted from the judicial intervention was, inter alia, recognition of the importance of imposing the principle of legality among the security branches and the ability to subordinate them to the law, and deeper awareness of the status of basic rights of the individual.

"In the United States, Canada, England and Europe, there is new attention being focused on the war on terror, which has led to far-reaching emergency legislation. In some countries, for instance the United States, this is impulsive

legislation that was enacted under pressure, which empower the authorities to adopt extreme measures, while granting widespread authorities to the relevant organs of government. We are familiar with the measures, most of which have been employed here since the beginning of time. However, we already passed, years ago, from the stage of granting emergency authorities to the stage of overseeing their implementation."

The High Court of Justice is good for Palestinians

Dr. Menachem Hofnung and Dr. Yoav Dotan of the Hebrew University conducted a study in which they evaluated the rate of success of serial petitioners, that is, organizations that submitted 10 or more petitions during the five years of the sample.

Five serial petitioners, which submitted a total of 213 petitions, were surveyed. They were Moked - Defense of the Individual, the Association of Civil Rights in Israel (ACRI), the Center for Jewish Pluralism, the Movement for Quality Government in Israel and the Society of St. Yves.

Moked - Defense of the Individual, which only petitions the court on behalf of Palestinians, in cases of family reunification, work permits, demolition of houses, restrictions of movement, etc., recorded the greatest success of all: 89 percent of 74 petitions (about one-third of all "serial" petitions).

Success does not necessarily mean winning the verdict. Full or partial redress of the wrong is sufficient. The "success" is hardly ever expressed in the final verdict. Either the High Court of Justice presses for a compromise, or the State concedes in order not to have a fundamental verdict ruled against it.

Moked's highest percentage of success among all serial petitioners is followed by ACRI, which represents Palestinians (but not exclusively) and recorded a 69 percent success rate.

Among his conclusions, Hofnung asserts that, "The Palestinians get more in the High Court of Justice then they get in any other authority."

Meaning that you're pleased with the situation? "Relative to the rest of the world, the situation here is excellent," says Hofnung. Our Supreme Court has intervened much more than courts in Western countries. Compared to countries with judicial systems similar to ours, the United States and Britain, the court has gone above and beyond. Has it done enough? Maybe not. You can always do more. But, in any case, the court cannot replace the political authorities or the political discourse in reaching decisions on fundamental questions that polarize society. Any attempt or hope of repairing society through the court is sterile."

By Moshe Gorali