Introduction: In the Name of Security

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Probing Legal Doctrine

It is difficult to devote an issue of a critical journal published by a human rights organization to the theme of "security." For in such a case, the work of critique is expected to juxtapose security considerations with human rights, and to reveal the violations of the latter carried out "in the name of security." The attempt to challenge the legality of rights violations based on security considerations often relies on several main arguments: exposing the fallacy of security-centered reasoning in a given situation, asserting the superiority of other important democratic values, or alerting against the disproportionate restriction on rights. Human rights lawyers are expected to master these legal doctrinal arguments and to vigorously employ them in the juridical field.

Each of these doctrinal arguments conceives of security as an objective state: in the first argument, as a matter of empirical proof, and in the second and third arguments, as a matter to be exposed or balanced against other rights or values. Notwithstanding their critical pretension, these arguments fail to escape the meta-narrative of security-centric reasoning that takes security to be "the condition of being protected from or not exposed to danger."[1] Consequently, "security" continues to carry one shared meaning between both human rights and security advocates: an objective and natural state of safety.[2]

This objectivist and naturalist definition of security is prevalent in Israeli Supreme Court rulings. It is constitutive of the balancing formula through which the Supreme Court responds to legal challenges against state security practices endangering peoples' rights.[3] Through this formula, the court weighs the rights of an individual or a group against the need for public order and/or national security. In a recent academic article, Supreme Court Chief Justice Aharon Barak summarizes the position of the Supreme Court on this matter.[4] In the section in which he discusses the question of national security and individual liberties, he writes:[5]

> On the one hand we must consider the values and principles relating to the security of the state and its citizens. Human rights are not a stage for national destruction; they cannot justify undermining national security in every case in all circumstances… But, on the other hand, we must consider the values and principles relating to human dignity. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited license to harm individuals. Democratic nations must find a balance between these conflicting values and principles. Neither side can rule alone…

Chief Justice Barak probes the question of the balancing formula in the context of discussing terrorism. In his text, security gains meaning through a discussion of war and violence, death and pain. The text operates to disregard other meanings of security and leaves us with a singular meaning: a state of peace, safety, protection, and well-being. The balancing formula is, therefore, unthinkable without this objectivist and naturalist definition of security. Thus defined, the heavy toll of restricting human rights and balancing them against security considerations emerges, at times, as a necessity.

Most legal scholars writing on the subject of security have also adopted the balancing formula in their (critical) analysis of questions of security and human rights. Despite the various

approaches represented in this legal doctrinal scholarship, it is possible to generally argue that an objectivist naturalist definition underlines their analyses.[6]

Scholars writing from outside the juridical field approach questions of security in a different fashion. Hanna Herzog and Ronen Shamir, for example, argue that "the concept [of security] not only relates to basic notions of 'law and order,' to personal protection against harm, or to concrete threats of violence and war. In its deepest sense 'security' is associated with the ability of the Jewish state to remain sovereign..."[7] Despite the attempt to transcend the limited definition of security, it remains, in their analysis, closely related to notions of threat. These, however, are not specific threats, as the conventional understanding of security would have it. Rather, these are threats jeopardizing the very existence of the state as Jewish.

Are there other ways to conceive of Israeli state security practices that do not reproduce the legal argumentation used before the courts to challenge these practices? Whereas these doctrinal legal arguments are instrumental for human rights lawyers working "before the law," they only offer one perspective on the workings of security. Is it, therefore, possible to discuss other logics of security without adopting the commonsensical logic that security is achieved by the elimination of threat? Can we talk about the suppressed rights of the oppressed without being forced into a discussion about the empirical existence or non-existence of a threat? More specifically, in the case of Israel, how is it possible to critically address the practices carried out "in the name of security" against Palestinian citizens of Israel without recasting these citizens, or some of their practices, as a threat?

A Black Hole

Demography, Arab-owned lands, Arab Palestinians moving and crossing borders, political dissent, certain forms of knowledge, speech, memory and the relationship to the past – all of these, as the articles in this issue elaborate, have been realized as security concerns. All of these non-security issues have become part of the state security problematic.

To understand the transformation of these non-security issues into security issues, one needs to historicize and contextualize the use of the term security and its socio-linguistic operations. The term security in the current Israeli context is linguistically employable at any given moment without a need to reference the reasons for any of its particular operations. Take for example a recent article in the daily Hebrew newspaper *Ma'ariv* which reported that Israel's Prime Minister was presented with a report about a specific security threat: polygamy among Arabs in Israel, resulting in a higher birth rate.[8] What is of importance in this example is the newspaper's unquestioned acceptance of the categorization of polygamy as a security threat. The term security contains the reasons, the means and the ends, and as such, it justifies its own deployment. It is a magical term able to absorb any and all content. It is like the Black Hole in outer space into which energy, stars and other heavenly matter collapse and disappear.

The recent criminal indictment of Sheikh Ra'ed Salah, the head of the Islamic Movement in Israel, is another case in point. In June 2003, the state prosecutor submitted an indictment against Sheikh Ra'ed Salah and four other members of the Islamic Movement, as well as two Arab humanitarian organizations for allegedly "supporting terror" by transferring

funds to charity organizations associated with Hamas in the 1967 Occupied Territories. While this case goes beyond our discussion, pointing out the operation of the emergency law against "supporting terror" on which the main charges in the indictment are based, is central for illuminating the workings of security. This doctrine, similar to the doctrine of "material support" in the United States, constitutes a legal mechanism through which the black hole of security operates. These doctrines, as David Cole convincingly argues in the context of criminal "terrorism" cases brought against individuals in the United States since 11 September,[9] do not necessitate proof that the support was intended to further "terrorist" actions, or in fact furthered any terrorist actions. In fact, in Sheikh Ra'ed Salah's case, the police and the state prosecutor have publicly stated on several occasions that there is no evidence that the Islamic Movement transferred funds for terror acts against Israeli civilians. The vagueness of the term "supporting terror," however, under both Israeli and US law, could turn any act of charity into a security threat that need not be tolerated and should be punished. Such are potentially the contributions of thousands of individuals to different orphanages in the Occupied Territories associated with any politically-selected "terror" organizations.

The security hole can absorb many non-security realities. It sucks in all that is beyond it and exterior to it, and these in turn disappear into it. It follows that security is simultaneously vacant of meaning and all encompassing. When all issues become potential matters of security, security loses any distinct socio-linguistic meaning. This is the strength and weakness of the term security – it captures everything at the risk of losing itself in itself.

Security and Securing

Security can be defined as the negation of fear. It can also be defined as "freedom from doubt; confidence, assurance… well-founded confidence, certainty," and as "a means of securing or fixing in position." "To secure," therefore, is not only an act aimed at the protection from danger. It also an act aimed at fixing a certain position, solidifying and objectifying it. To seek to secure is to seek to transform a tentative reality into an objective, finalized one. "To take security," in the field of law, means in some cases to secure "a person's 'good behavior,' his appearance in court at a specified time, or his performance of some undertaking." Accordingly, to secure is to compel a certain behavior, to insure its realization.[10]

Instead of considering security in opposition to other rights and interests, and therefore, overlooking the act of making secure and the various definitions of what is secure, articles in this issue of *Adalah's Review* probe the politics of securing as efforts to impose a specific reality, to fix it, and to attempt to bring it to a close. The articles interrogate security as a discourse of suppressing dissent, of exclusion and of preventing oppositional change.[11] The articles approach security-related practices as central to the governance of actions and reality, to their regulation and determination. They also attend to the work of securing as a work of elimination, erasure and wiping out. Together the articles consider both the methods of governance and the means of elimination that secure certain forms of knowledge, memories, practices, language, geography, demography, movement, political action, dissent, etc. as dominant discourses.

Hillel Cohen, for instance, discusses security legislation and the production of knowledge in his examination of laws that limit access to information about the security apparatus of the state. He suggests that such laws can play a crucial role as a mechanism of suppressing the production of alternative streams of discourse. The mainstreaming of an official historical narrative reinforced by legal restrictions on information, argues Cohen, dramatically hinders attempts to bring about oppositional changes, secures the reproduction of official memory as collective memories, and stabilizes the status quo.

Performative

As an empty category that is simultaneously all encompassing, security has become impossible to distinguish from non-security. Yet, in the search for stability and finality, security-aimed rituals need instability as their *raison d'etre*. Security is needed as a reminder that insecurity is avoidable. Insecurity is required as a mobilizing engine for rituals of security. For security rituals to continue to fulfill their governance objective, insecurity must persist; conversely, security-rituals must not bring about absolute security, or alternatively must always engage in redefining what security means.

Rhoda Kannaneh's exploration of Arab soldiers in the Israeli military analyzes this complex relationship between security and insecurity. Whereas these soldiers are entrusted with the enforcement of security, they are themselves forever considered a source of insecurity. This double construction is far from a simple case of schizophrenia. It is rather a ritual of governance through which the subject is simultaneously monitored and perpetually "improved" without ever being able to attain recognition as "perfect" or to escape exclusion or "otherness." It is thus a ritual that has no specific end (as Arab soldiers will always constitute a security threat), the importance of which is symbolic. This theoretical insight is developed by Allen Feldman, who probes the performative role of wars of public safety carried out by the United States, both internally against groups such as illegal immigrants and criminals, and abroad in places such as Afghanistan and Iraq. These wars, he argues, refuse to yield satisfaction and reconciliation with social existence, and as such, they are open-ended.

A Matter of History

The objectives that the state wishes to secure are not fixed. They change historically and they adapt to new circumstances. The process of securing is both transforming and transformative, always imbued with accommodation and resistance. To look at the dynamic process of making secure, and to abandon an objective definition of security, is therefore to adopt an historical perspective and to unpack the changes in the process of securing. As such, the articles in this issue cover a period spanning the establishment of the state of Israel in 1948 until the present.

Following the establishment of the state of Israel, military rule was imposed on the areas in which Arab citizens were concentrated. The military regime was justified on the grounds of security and it resisted attempts at abolition until 1966 for these very reasons. As Alina Korn explains in her article, these security considerations did not correspond to an actual danger that Arab citizens of Israel presented.

Rather, security discourses were linked to expanded Israeli Jewish settlement and hegemony. Security practices were directed at preventing Arabs from returning to their lands, as well as developing a structure of dependency and control in which Arab citizens of Israel became reliant on the security apparatus.

The lifting of the military regime, some might argue, brought about the end of an era in which the very existence of the Arab citizens in Israel came to be constituted both through a security lens and by the state security apparatus. It might, however, be more appropriate to ask what has replaced the "old" regime and how the "new" era has substituted old forms of repression with new ones. A historical comparison might not reveal a repudiation as much as a reconfiguration of political repression and of definitions of security.[12]

As Farid Ghanem elaborates in his reflections on Emile Habiby's, *The Pessoptimist*, the military regime's treatment of the Arabs in Israel as forever moving in a security sphere has only escalated over the years. Ghanem's article, together with that of Areen Hawari, clarify that the Palestinian citizens of Israel continue to be burdened by the inheritance of the military regime; its specters continue to haunt them. Whether one purports to reject or deplore this inheritance, or if one remains unconsciously in its hold, the specters of that past continue to haunt the present, thus narrowing the passage between past and present. In Hawari's article, it is the specter of the military regime's governors and their networks of informers that continue to haunt the masculinity of Palestinian men citizens of Israel. Ghanem's essay locates security threats, during the military regime and its aftermath, in the very presence of Arabs in the Jewish state.

The Rule of (Security) Law

It is commonly argued that security-related practices are employed during times of emergency or when an exceptional situation necessitates the deployment of a security-based legality. Security legalities function as exceptional measures that temporarily suspend liberal norms and substitute them with anti-liberal legalities directed at eliminating threats and restoring order. In effect, the balancing formula that is employed in the juridical field is one that is grounded in such an understanding. The limiting of rights and freedoms takes place *only* when security considerations require this limitation. The word "only" signifies the limited restriction of rights for security reasons. It signifies an exceptional situation that is external to the general rule.

There is hardly any modern constitution that does not recognize the right of the executive branch to suspend the normal rules of government, including the rights and freedoms of citizens, during periods of crisis. This right is not a product of the modern era, but has roots in a long tradition of emergency rule. What is distinct about the modern right, however, is that it accompanies a universal theory of law, which, subsequently, constitutes exceptional emergency powers as a violation of the general rule, and, therefore, as endangering the legitimate order. Rethinking the modern exceptionality of emergency powers, therefore, entails a simultaneous rethinking of the structure of modern universal law and the belief in a singular legality applied to all citizens without exception. This in turn invites a different theorization of the relationship between exceptional security powers and the general rule of law.

Examining this relationship is vital to any

understanding of the relationship between the state of Israel and its Arab citizens.[13] Ever since they *came to be* the "Arab citizens of Israel," their lives have been regulated, even constituted, by the exceptional legalities of emergency powers. They lived under a military regime imposed only on them wherein emergency regulations were the major mechanisms of governance.[14] Even when the military regime was finally lifted, emergency regulations continued to be enforced on the Palestinian population both in Israel and the West Bank and Gaza. In 1998, during its first review of Israel as a state party to the International Covenant on Civil and Political Rights, the UN Human Rights Committee raised concerns with Israel regarding both the fifty-year officially proclaimed state of emergency as well as the continued use of emergency regulations. In 2001, in response to these concerns, Israel stated that while the government did not favor the continued use of these regulations, "the actual termination of the state of emergency could not be executed immediately, as certain fundamental laws, orders and regulations legally depend upon the existence of the state of emergency."[15] This statement implies that if emergency regulations are to be abolished, security legislation will persist as part of the general law. It is worth noting here that in the mid-1980s, Apartheid South Africa abolished all emergency regulations, but it re-enacted them in the general law.[16]

The special dossier of this volume of *Adalah's Review* is devoted to exceptional powers and their relation to the general structure of Israeli law. We include four reprints of primary documents that together speak to the difficulty in distinguishing exceptional security law from the general non-security law as these are applied to the Arab citizens of Israel.

We choose to reproduce three of these four documents in particular because they shed light on and challenge three different forms of security-oriented legislative activities. The first legislative activity is one that is aimed at amending a basic law, which is a "constitution-like" law. Here, the reference is made to the 2002 amendment to the Basic Law: The Knesset, which prevents political party lists or candidates from participating in the parliamentary elections on the grounds that they "support terror," and thus endanger state security. The second legislative activity is an intervention in a regular statute, passed as a temporary order or a security exception. Here, we are referring to the 2003 temporary order/statute that prohibits Palestinians from the 1967 Occupied Territories from obtaining citizenship, permanent residency, and/or temporary residency status in Israel by marriage to an Israeli citizen. The governmental justification for the temporary order/statute is that Palestinians from the Occupied Territories who were unified with their spouses, citizens of Israel, were involved in attacks against the security of the state. The third legislative activity is a series of state of emergency laws and regulations that are understood to be generating purely exceptional legalities, the sole purpose of which is to protect state security. Some of these legalities are grounded in the continuous declaration of a state of emergency, and are not passed by the parliament.

Instead of reprinting the three actual laws/ orders/regulations, and thus, contributing to their uncritical reproduction, we choose to present the readers of this volume with various legal challenges to them. One objective is to shed light on the ways in which human rights lawyers

attempt, in practice, to challenge security law. Another purpose is to point out the various forms that security-oriented legalities can embody, and to re-situate emergency regulations, supposed exceptional security legalities, as part of the general law. No longer appearing to be confined to that which is called the exception, security laws begin to make an appearance everywhere in Israeli law.

The fourth and final document reprinted in the special dossier is the text of the 2003 UN Human Rights Committee's Concluding Observations on Israel. While the UN HRC welcomes some positive reforms that Israel has introduced in other areas, and recognizes at the outset the security concerns of Israel, it takes issue with the many practices and policies, most of which are enshrined in law, that the state carried out "in the name of security" both in Israel and in the Occupied Territories.

The myriad of issues that impact security considerations – issues such as the extent to which emergency powers were central to the very making of the "Arabs in Israel" – cannot be fully explored in a single volume. Considered together, however, the articles and the special dossier in this issue reveal the pervasiveness of exceptional legalities "in the name of security" in the lives of Palestinian citizens of Israel. In many spheres of their lives, Arab citizens of Israel experience the general law of the state as inseparable from these exceptional security legalities. For them, the exceptional legalities have become an integral part of the working of the Law – a general law rooted, for some citizens, in a perpetual state of emergency.

End Notes

1   Quoted from *Oxford English Dictionary* (online version).

2   For an example of such an approach by human rights advocates, see "Special Report: Justice on Trial: State Security, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey: Report of the Joseph P. Crowley Program/Lawyers Committee for Human Rights: Joint 1998 Mission to Turkey," 22 *Fordham International Law Journal* 2129 (1999).

 See also Venkat Iyer, "States of Emergency: Moderating their Affects on Human Rights," 22 *Dalhousie Law Journal* 125 (1999) at 128: "This article will examine the legal and practical justification for emergency powers, and trace the history of their evolution in international law. It will describe recent and ongoing efforts by intergovernmental and non-governmental organizations to moderate the effects of emergency regimes on human rights. An attempt will also be made to analyze the effectiveness of provisions in the major international human rights instruments designed to control the abuse of emergency powers. The discussion will also encompass suggestions for improvement of the existing system of controls of the exercise of such powers, at both international and domestic levels."

 See also Derek P. Jinks, "The Anatomy of Institutionalized Emergency: Preventive Detention and Personal Liberty in India," 22 *Michigan Journal of International Law* 311 (2001). Jinks looks for ways to accommodate the structural tension between the ideal of an international legal order and the demands of effective domestic governance: "Finding a 'third way' will require fine-grained comparative legal work that takes seriously both the proffered rationales for state practices and the deficiencies of international standards (at 368)."

3   See H.C. 5100/94, *The Public Committee Against Torture in Israel v. State of Israel*, 53(4) P.D. 817. The Court considered the use of "moderate physical pressure" by the General Security Services (GSS) in their interrogation of Palestinians, and recognized that in order to accurately resolve this issue, an acknowledgment of the collision of values was involved. This resulted in the Court's condemnation of "moderate physical pressure" as a mode of interrogation. In "ticking time bomb" situations, however, the defense of necessity is applicable but this would be need to be prescribed by statute authorizing the administration of this effect.

 For a critical review of this decision, see Ardi Imseis, "'Moderate' Torture on Trial: Critical Reflection on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods," 19 *Berkeley Journal of International Law* 328 (2001). Imseis

evaluates the decision as an "overly simplistic contextualization of the case before it as merely requiring the balance between respecting the liberty rights of 'the hostile terrorists' and protecting the 'security' of the state" (at 349).

4   Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy," 116 *Harvard Law Review* 16 (2002).

5   Id. at 153.

6   See e.g., Pnina Lahav, "The Right to Know, Freedom to Publish and Official Secrets," 6 *Mishpatim* 562 (1975) (Hebrew); Itzhak Zamir, "Human Rights and National Security," 19(1) *Mishpatim* 17 (1989) (Hebrew); Shimon Shetreet, "Emergency Legislation in Israel," 1(2) *Law and Government in Israel* 433 (1993) (Hebrew); David Kretzmer, "Fifty Years of Public Law in the Supreme Court of Israel," 5(1) *Law and Government in Israel* 297 (2000) (Hebrew).

     There are a few exceptions to this approach. See e.g., Daniel Statman, "The Absoluteness of the Prohibition Against Torture," 4(1) *Law and Government in Israel* 161 (1979) (Hebrew); and Ariel Bendor, "Against the Relativity of Basic Rights," 4(2) *Law and Government in Israel* 343 (1998) (Hebrew). Both Statman and Bendor defend the absoluteness of human rights.

7   Hanna Herzog and Ronen Shamir, "Negotiated Society? Media Discourse on Israeli Jewish/Arab Relations," 9(1&2) *Israel Social Science Research* 55 (1994).

8   Eitan Rabin, "Special Report: Polygamy and the Arab Sector – Security Risk," *Ma'ariv*, 4 February 2003.

9   David Cole, "The New McCarthyism: Repeating History in the War on Terrorism," 38(1) *Harvard Civil Rights-Civil Liberties Law Review* 1 (2003).

10   Quoted from *Oxford English Dictionary* (online version).

11   Note that there exist additional meanings for the term security. In its World Report for the years 2002-2003, Amnesty International states that governments have spent billions to strengthen national security and the "war on terror." Yet, for millions of people, the real sources of insecurity are corruption, repression, discrimination, extreme poverty and preventable diseases. Security is thus understood to be economic prosperity for all, equality and dignity. Report available on Amnesty's website: http://www.amnesty.org.

12   See e.g., James Ron, "Varying Methods of State Violence," 51(2) *International Organization* 275 (1997). Ron looks at changes in the interrogation and torture practices carried out against Palestinian detainees by Israeli security personnel in the Occupied Palestinian Territories. He argues that torture had not ceased but its nature has fundamentally changed from unregulated violence toward a more calibrated rule-bound regime.

13   In his essay on the exception and emergency powers, Tel Aviv University legal scholar Oren Gross draws on the Schmittian theorization of the relationship between normalcy and emergency. He demonstrates that the distinction between national security and non-security issues follows the same pattern. Gross argues that Schmitt's theory, understood as descriptive and not normative, is still relevant today. Gross fails, however, throughout his text, to mention the relevance of his article to the legal regime in Israel. One would have hoped for such a reference because Gross concludes his essay with a personal note about academic accountability. There are times, he writes, that academics cannot enjoy the privilege of not taking sides and not expressing positions. See Oren Gross, "Exception and Emergency Powers: The Normless and the Exceptionless Exception: Carl Schmidt's Theory of Emergency Powers and the 'Non-Exception' Dichotomy," 21 *Cardozo Law Review* 1825 (2000) at 1867.

14   See Alina Korn, *Crime, Political Status and Law Enforcement: The Israeli Arab Population During the Military Government (1948-1966)* (Thesis Submitted for the Doctor of Philosophy Degree, Hebrew University, 1997) (Hebrew). See also Nur Masalha, *The Land Without a People: Israel, Transfer and Palestinians, 1949-1996* (London: Faber and Faber Ltd., 1997).

15   Addendum to Israel's Second Periodic Report on the International Covenant on Civil and Political Rights (CCPR/C/ISR/2001/2), 4 December 2001.

16   Venkat Iyer, supra note 2, at 173: "In the mid-1980s the white minority government decided to end the formal emergency proclaimed under the *Public Safety Act* 1953, but only after it had replicated most of the emergency powers in its ordinary law."

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