

Article

*61 Comparative Constitutional Law and the “Judicial Role in Times of Terror” [\[FNa1\]](#)

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Constitutional cross-pollination is on the rise. Judges are increasingly conversing, most notably with respect to their role as guardians of democracy. This global judicial dialogue is particularly illuminating with regard to matters of transnational apprehension, not least among which is the ability to vigorously defend human rights while repelling the scourge of terrorism. Significantly, these exchanges involve the recurrent use of foreign precedent by courts seized with security-related matters. Inter alia, the “migration of ideas” is prominently evidenced by the House of Lords' landmark decision respecting the detention of suspected terrorists without bail that specifically draws on Canada's Oakes test. It is similarly prevalent in Canada itself, where judges generally unaccustomed to counterterrorist adjudication increasingly draw on foreign precedent.

In view of the pervasiveness of the “constitutional cross-fertilization of ideas,” the following will speak to the comparative method's distinct value in addressing the challenges (in a legal and social sense) associated with judging in an “age of terrorism,” exposing recurring themes in security adjudication. Following an examination of the factors sparking transnational judicial dialoguing, it will inquire into the social and juridical suitability of the practice and that which can be gained from comparative inquiry in the security context, specifically referencing Canada's own use of foreign precedent.

*The project's results -- not indifferent to the levelled criticisms -- could eventually serve to inform a more principled approach to the use of comparativism, and to counter its recurring misuse; to set out guidelines that will lay the foundation for an anthology, featuring a non-binding framework of analysis (not unlike the American Restatements) that courts reviewing security matters can draw upon in advance of possible crises. Significantly, the idea would not be to compel or even necessarily prescribe borrowing or uniformity in abstract of culture and context. Instead, the objective of this more principled approach is to lend greater coherence; to circumscribe misuse when foreign precedent is cited and to enhance courts' clarity in this intricate circumstance via the contrast that comparative inquiry tends to provide.*62 Although it cannot redress the profound deficiencies relating to the use of foreign law precedent, distilling and compiling cardinal principles in the security context is condign with curtailing much-maligned ad hoc or selective borrowing of foreign sources, supplying a more structured reference point for the “brisk international traffic in ideas about rights.”*

**63 “Terrorism is a global phenomenon and we do our nations and the Justice System itself a grave disservice if we do not learn from each other's experience and adopt each other's best practices”.*

• Justice Simon Noel, Federal Court of Canada, “Balancing Human Rights and Security Concerns: A Reality Check” (Speech) January 16, 2006, Ottawa, ON.

“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions”.

• Justice Kennedy in [Roper v. Simmons, 125 S. Ct. 1183, 1200 \(2005\)](#).

Constitutional cross-pollination is on the rise. Judges, particularly those hailing from higher or constitutional courts, are increasingly conversing, most notably with respect to their role as guardians of democracy [\[FN1\]](#). This global judicial dialogue is particularly illuminating with regard to matters of transnational apprehension, not least among which is the ability to vigorously defend human rights while repelling the scourge of terrorism.

Significantly, these exchanges involve the recurrent use of comparative law by sister-courts seized with security-related matters. *Inter alia*, the migration of ideas is prominently evidenced by the House of Lords' landmark decision respecting the detention of suspected terrorists without bail, a ruling that specifically draws on Canada's Oakes test [\[FN2\]](#).

In view of the pervasiveness of the “constitutional cross-fertilization of ideas” [FN3] among courts reviewing the constitutionality of counter-terrorism strategies, the following will speak to the comparative method's distinct value in addressing the unique challenges associated with judging in an “age of terrorism”, *64 exposing recurring themes in security adjudication. Following an examination of the factors sparking transnational judicial dialoguing more generally, this Article will highlight the suitability of this practice and that which can be gained from comparative inquiry in the security context particularly, referencing Canada's own use of foreign precedent in that arena.

Significantly, the idea would not be to compel or even necessarily prescribe borrowing or uniformity in abstract of culture and context. Instead, the objective of this more principled approach is to lend greater coherence; to circumscribe misuse when foreign precedent *is* cited and to enhance courts' clarity in this intricate circumstance via the contrast that comparative inquiry tends to provide. [FN4]

The idea then is to propose a principled framework might ultimately inspire a more coherent, *systematic* approach to counter-terrorism adjudication; guidelines that will lay the foundation for an anthology that courts reviewing security matters can draw upon in advance of possible crises. In other words, a model functioning not unlike the American Restatements, which are treatises aimed at promoting “the clarification and simplification of the law” [FN5]. That is to say, they are distillations of law; compilations of guiding principles which judges and jurists can refer to as a model for judicial review in the counter-terrorism context.

Like the Restatements, the proposed idea of a comparative anthology respecting counter-terrorism adjudication would certainly not constitute primary law, but merely act as *persuasive authority* whose objective would be to extract relevant principles from leading cases. This anthology would serve as a tool to indicate a trend in counter terrorism adjudication and, occasionally, to recommend what a rule or principle of constitutional interpretation might be transnationally.

As a first step towards this ambitious end, a number of questions would eventually have to be satisfactorily addressed. Namely and *inter alia*:

- What are the *criteria* for selecting certain sources and for determining which societies may be deemed “sister-democracies” or models?
- What are the circumstances most often prompting judges/courts to avail themselves of comparative principles?
- To what extent is harmonization of concepts desirable in diverging cultures, particularly with regard to constitutional interpretation?
- Should different societies look to adopt similar standards in counterterrorism adjudication?

*65 Significantly, comparative inquiry reveals certain cardinal features common to anti-terrorist adjudication in democratic states with Post-War constitutions [FN6]; meaningful generalities in Civilian parlance that might eventually form the basis for an organized, voluntary source of reference for judges engaging in this painstaking endeavor.

While previous scholarship, precipitated by Professor Slaughter's work, has already pointed to the aforementioned phenomenon now labeled “transnational judicial dialogue”, this Article's contribution in furtherance of that discussion is to specifically assert the use of *framing* these conversations by systematically compiling the substantive principles distilled from pertinent security jurisprudence, with an eye towards organizing them under one proposed framework for voluntary judicial reference [FN7]; a restatement of sorts [FN8].

To reiterate, this article suggests that what are needed are compilations of *non-binding*, comprehensive guiding principles, informing judicial thinking on constitutional interpretation in the security context transnationally, can serve as an essential analytical tool of sober and coherent judicial review, if an when foreign precedent is cited.

In line with advocating the eventual *assemblage* of a “Restatement” of generally accepted or recurring principles in the security context, this piece will adopt the following structure: *Part I* will entertain a discussion of the circumstances prompting reference to foreign court precedent in domestic jurisprudence. *Part II* will proceed to articulate preliminary parameters for the “cross-fertilization of ideas” in the national security context, with an eye towards eventually assembling an anthology, gleaned from comparative analysis. To this end, it will briefly outline the apparent criteria for selecting particular sources and then analyze a sample of the relevant caselaw, in order to educe the specific principles and practices seemingly endorsed transnationally.

As this is but an initial step towards the proposed, I will restrict my caselaw analysis to the German and Israeli models. As further discussed below, these Post-War constitutional democracies, invoked in

several leading Canadian security cases (including *Suresh infra* explicitly and *Charkaoui* implicitly), were selected as opening examples for their experience with counter-terrorism adjudication, coherent judicial doctrines on point, and for their consistent approach to security adjudication. Furthermore, the resemblance between their respective approaches to defining the *66 limitation of rights, namely the use of proportional analysis in identifying justifiable infringements, is no less noteworthy for our purposes [FN9].

Referencing the latter questions posed above, *Part III* will briefly address the chief criticisms leveled at the use of the comparative method and the general problems associated with transplantation of “foreign legal concepts” as they relate to the Restatement proposal. Notably, in response to recurring concerns that “foreign jurisprudence is used indiscriminately [and amounts to “(‘cherry picking’) to camouflage an activist agenda [FN10], I posit that a Restatement can respond to some of these apprehensions, palliating the ‘ad hoc’ borrowing problem by supplying a framework or structured common reference point for the “brisk international traffic in ideas about rights” [FN11].

A Word on Methodology

At this juncture, and in order to avoid any confusion that terms such as “Restatement” might occasion, a point of clarification: since the primary objective is to provide context (rather than to suggest a “one-size fits all” approach), the paper fits more closely into what Sujit Choudhry, discussing the methodology of comparative law, calls the “Dialogical” approach. [FN12]

Comparative law does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self-understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems.

This is to say that comparative case law is deployed to stimulate constitutional self-reflection or insight. In Choudhry's words.

“comparative materials are not asserted to be true or right; rather, they reflect a particular way of articulating underlying values and assumptions. Moreover, comparative materials are neither valid nor authoritative in the positivist sense. They need only be authoritative and valid for the system which is the source of comparative insight ... In dialogical interpretation *67 courts [might] identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions. Through a process of interpretive self-reflection, courts may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant the use of comparative law. Conversely, courts may conclude that comparative jurisprudence has emerged from a fundamentally different constitutional order; this realization may sharpen an awareness of constitutional difference or distinctiveness. Dialogical interpretation appears to make no normative claims; it is more a legal technique than a theory of legal interpretation”. [FN13]

The goal here, it is worth repeating, is to frame the use of comparative constitutional caselaw, to help avoid decontextualization and misuse when foreign precedent is cited (rather than to prescribe its use or point to a particular ‘best practice’ or approach that all should follow). Plainly put, when courts do choose to examine or cite foreign precedent (as they increasingly often do) it should be done in a manner that results in coherence, rather than in an anecdotal fashion or one that imports other problems inadvertently.

1. PART I: COMPARATIVE CONSTITUTIONAL LAW'S DISTINCT VALUE IN COUNTER-TERRORISM ADJUDICATION

The proliferation of judicial exchanges is best evidenced by the recurrent use of comparative law in human rights jurisprudence [FN14]. Even the United States Supreme Court, the last bastion of isolationism, [FN15] has arguably begun to show signs *68 of openness to comparative inquiry in the post 9/11 world [FN16]. Thus, for instance, Justice Stephen Breyer, although in the minority, has forcefully declared that “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights” [FN17]. Coming from a U.S. Supreme Court judge [FN18], such a statement emphasizing the worth of comparative law, running counter to the “American anomaly” [FN19], is arguably quite revolutionary. Indeed, more than one Justice on the [U.S. Supreme] Court has suggested that the area of constitutional rights relating to terrorism demands international cooperation and the study of comparative constitutionalism [FN20].

*69 But what, more generally, can be said to position judges towards “collective deliberation”? What prompts some courts or court members to resort to comparative inquiry, while others approach it with reticence?

(a) Circumstances Prompting Reference to “Foreign” Precedent

(i) *Judicial Philosophy and Cultural Imperatives*

A priori, an overview of the use of foreign precedent in constitutional interpretation suggests that the decision to revert to comparative analysis derives in large part from the individual judge's doctrinal approach and ideological proclivities. For example, in his discussion of the U.S. Supreme Court's often reluctant use of comparative methodology, Saby Ghoshray concludes that dogma or the individual “justices' foreign source inclination” chiefly accounts for U.S. court members' dialectic opposition between staunch objection versus amenability to foreign sources [FN21]. The same appears true outside the U.S., as Bijon Roy's telling empirical study of the Supreme Court of Canada's use of foreign sources in Charter cases reveals, and as Christopher McCrudden, author of a leading book on point confirms, there is “likely ... [to be] as great a variation within -- as between -- national courts on the issue” [FN22].

Beyond individual judicial penchant, national culture might very well be said to play a role in a judge's propensity towards the use of a comparative methodology. Thus, for instance, as distinguished from an enduring attachment to originalism or textualism in the U.S., the living tree approach or the “multicultural values reflected and promoted in Canada's *Charter of Rights and Freedoms* are in fact indicative of a national experience that embraces looking outward to foreign jurisprudence*70 and international instruments as a source of domestic jurisprudence” [FN23]. The same is said to hold true for other multicultural societies such as South Africa, Israel and New Zealand. More specifically, available scholarship on point, however scant, exposes *five* related contexts that lend themselves particularly well to the receptiveness of comparative inquiry, or what Kersh aptly labels “going global”: the first is principled or moral and the rest are pragmatic in nature.

(ii) *Human Rights and Post-War Constitutionalism*

It can be said that questions of human rights are distinctive in that they evoke a sense of moral universalism [FN24]. As has already been established elsewhere, courts in constitutional democracies seem more predisposed to borrow from one another with respect to the protection of human rights in an effort to unite to preserve the shared values of post-war constitutionalism [FN25], perhaps somewhat paradoxically since the values in question are oft enshrined in constitutions, which themselves are deemed to be symbolic of national distinctiveness, as discussed in Part III, *infra*.

The unspeakable atrocities perpetrated during the Holocaust in what had been considered a “democracy”, at least procedurally speaking, evidenced the appalling moral failings of legal positivism and sparked a re-conceptualization of democracy, shifting the focus from the procedural to the substantive aspects of democracy [FN26]. This reexamination ushered in what Lorraine Weinrib eloquently deems “a new constitutional paradigm” [FN27]. Plainly put, a conception of democracy limited to majority*71 rule [FN28] was discredited and substituted by the view that it is was necessary to predicate the legitimacy of laws on their comporting with preset values of the highest order within the hierarchy of norms [FN29]. True to Elster's now famous analogy, the Constitution “sets forth ‘precommitments’ that bind us and keep us safe from the temptations that would otherwise cast us against the cliffs of history” [FN30].

For our purposes, the global nature of this paradigm shift and its embrace of constitutionalism [FN31], not unlike transnational judicial exchanges concerning the interpretation thereof, comports with a purposeful (or designedly) universal vision of human rights.

With respect to security questions in particular, and as many, including Canada's Chief Justice cited *infra* note 102, have observed, the “dangers we face are global in scope” [FN32] and threaten democracy's very fabric. Quite obviously, terrorism and related perils are transnational and for that very reason can easily escape the *72 control of individual nation states [FN33], thus requiring international cooperation [FN34]. Terrorism [FN35] is of course borderless in both its claims and actions. Coordination between similar-minded jurisdictions is therefore not a luxury but a necessity, as Eyal Benvenisti opines: “to prevent their jurisdictions from becoming a haven for terrorists and to prevent international pressure on their

governments not to comply with their courts' rulings, it was necessary for courts to coordinate outcomes with their counterparts across international jurisdictions" [FN36]. Significantly, judges can turn to foreign sources "to elicit confirmation or to render invalidation of a specific doctrinal development" [FN37].

(iii) Local "Lacunae" and Perceived Inexperience

Pragmatically, judges are drawn to comparative inquiry in the face of a domestic law's insufficiency; that is to say, in the absence of requisite solutions to novel problems, foreign sources can supply courts with the analytical tools needed to address unchartered problems. This is all the more true when there are several jurisdictions facing the same or similar predicaments, as is certainly the case regarding⁷³ issues of counter-terrorism in North America [FN38].

So too regarding predictive value. Comparative inquiry can serve a practical purpose when courts wish to gauge or foresee the consequences of a particular solution or interpretation and gain "a more accurate sense of what the consequences of her decision will be" [FN39].

(iv) Bolstering Judicial Legitimacy and Courts' Social Function

Relatedly, and certainly of no less significance, are considerations relating to the Court's very legitimacy and that of judicial review, particularly in the face of accusations of improper "activism". Although certainly not immune from criticism, pointing to a similar path taken by respected or experienced foreign courts, as already alluded to, serves to shore up public confidence in the judiciary; to "bolster the credibility of a particular argument simply by highlighting that the same reasoning has been adopted by judges or courts whose decisions we respect." [FN40] It is, in Bijon's words, an "appeal to authority in a rhetorical sense" [FN41], or as Slaughter puts it, "the persuasiveness of any one particular decision may be enhanced by a simple demonstration that others have trodden a similar path" [FN42]. Transjudicial cooperation in particular, is a constructive if not requisite approach for *domestic* courts that have, often despite themselves, come to assume a central role in "international" counter-terrorism policy making, with constitutional interpretation inadvertently, but increasingly becoming the *de facto* [FN43] adjudicatory counter-terrorism tool of choice.

Since judges serve as keepers of rights and sentinels of the state's duty to respect them, they are united by this familiar undertaking and increasingly look to ⁷⁴ one another for inspiration and reassurance [FN44]. Chief Justice Barak (ret.) explains that comparative law "grants comfort to the judge and gives him the feeling that he is treading on safe ground." [FN45] All the more so when courts on the one hand, are expected to resolve these thorniest of political controversies, and on the other, attacked for so doing [FN46]. In view of the fact that legitimacy and maintaining public confidence are the judge's sole devices [FN47], there is strength and credence to be found in trans-judicial unison; empathy in light of the profound unease felt by citizens of democratic polities worldwide.

2. PART II: ESTABLISHING PARAMETERS FOR SECURITY ADJUDICATION THROUGH THE "CONSTITUTIONAL CROSS-FERTILIZATION OF IDEAS": SOME PRINCIPLES GLEANED FROM SELECTED MODELS

Having set forth the circumstances appearing to precipitate comparative inquiry, let us now turn to the practical implications of the above-stated.

German scholar Donald Kommers once defined comparative constitutional study as a search for "principles of justice and political obligations that transcend the culture bound opinions and conventions of a particular political community" [FN48]. ⁷⁵ Judicial dialogues [FN49], predicated on universal human rights values [FN50] and practical considerations such as the need to respond to new challenges, to determine the Courts' social role, and to maintain judicial legitimacy are, as the preceding section strove to indicate, conducive to fostering conversations between legal cultures [FN51].

These conversations might, as set out earlier, cumulatively generate principles that form the basis for a cogent framework relevant to counter-terrorism adjudication. Plainly put, a fortifying judges' reference manual of sorts that can *inform* judicial thinking in the security context.

To be clear, this is not to suggest that the national court be effaced or discrete legal communities reinvented. Nor does it purport to preach conformity, particularly with regard to the U.S., which, as has been rightly pointed out, in addition to structural and cultural constitutional variations, has distinct

preoccupations stemming from its role as systemic hegemon. [FN52] Rather, the shared principles referenced in this specific context are delineated by a common understanding of the universal values at stake and of the pragmatic benefits that their exposition as distinguished from their transplantation -- offers, particularly, as noted, in terms of avoiding misuse. Most importantly perhaps, they are purely discretionary [FN53]. Again, they do not *76 bind courts, but simply serve to inspire and support them when such guidance is expressly sought. Agreement on what is unacceptable as well as a strengthened common understanding of human rights is a cardinal feature of the proposed principle. The goal here is to find the “common” ground” between legal systems via comparative constitutional concepts, while refraining from threatening cultural distinctiveness.

It stands to reason that harmonizing, rather than integrating, a basic interpretation of constitutional concepts at the level of principle [FN54] at a high level of abstraction in order to produce this informal catalog, while not a panacea, might nevertheless serve to provide a measure of context to judicial practices and alleviate some of the qualms relating to “selective” foreign precedent, as addressed in Part III *infra*. In consequence, and in an effort to avoid extemporaneous judicial responses to counter-terrorism actions that naturally augur poorly for consistency, let us now cast our reflections on the *first steps* towards a Restatement of principles drawn from selected foreign jurisprudence.

(a) Laying the Foundations: Some Relevant Criteria

Laying this foundation in turn requires a preliminary overview of the criteria for selecting particular sources for inclusion, prior to exposing the distilled principles themselves. Anne-Marie Slaughter, who as noted presciently initiated the discussion of global judicial dialogues, points to the perception of a “*common substantive mission*” (emphasis added) as the foremost requirement for reference to foreign judgments [FN55].

More practically speaking, the persuasive character of non-domestic caselaw is of course dependant on recognition of the foreign court's *similarity in function and interpretation tools*; it must be “sufficiently like the national court, or at least significantly embodying the aspirations of the national legal system” [FN56]. In Justice Barak's words, “an essential condition ... is that the legal institutions which are compared are fit for comparison, that is to say, that they are based on common fundamental assumptions and come to realize common goals” [in the *Kupat Am* case Rehearing of Civil Appeal 13/80)]. As outlined above, these words often ring true for courts in what Ran Hirchl has called the “new constitutionalism world order”, of which Canada is part [FN57]. This is all the more true for those judicial models that employ proportional analysis when delineating the justifiable limitations of constitutional rights.

*77 Additionally, *common pedigree* in the English common law and other cultural similarities may serve as criteria for including selected sources of foreign jurisprudence in an anthology, thus prompting interdisciplinary reflection. Not surprisingly therefore, a study conducted by Ostberg, Wetstein et Ducat [FN58], quantifying foreign source use by the Canadian Supreme Court in Charter jurisprudence confirms that between 1984 and 1995, the decisions most often cited boasted the following origins: U.K, English-Speaking, Commonwealth or former British colonies.

The same study and others further reveal that expertise in dealing with a shared legal problem also plays an important role. Experience with counter-terrorism strategies might therefore naturally be considered as a criteria for inclusion [FN59].

(b) Distilling Principles from Relevant Models: A First Step

With that in mind, let us proceed to evincing practical examples as an initial step towards eventually developing the proposed framework, intended to provide greater context and clarity to judicial practices and curtail the misuse of comparative law. Again, the objective at this preliminary stage is not to analyze all of the relevant case law in any depth, but instead to draw out the principles and underlying judicial philosophy from some pertinent models, with an eye on an anthology. Since a comprehensive analysis of all relevant jurisdictions, particularly the U.K., -- although eventually of the essence given Canadian use of U.K. precedent in particular- far exceeds the scope of this opening endeavor, I will restrict my examination to what are arguably two of the most developed models at hand in terms of experience with the systematic judicial appraisal of counter-terrorism strategies: Israel and Germany [FN60].

(c) Relevance to Canadian Courts

The jurisdictions of Germany and Israel are an appropriate place to start for Canadian audiences since, like Canada, they are part of what Professor Ackerman calls the “rise of world constitutionalism” [\[FN61\]](#). More importantly, in light of the exposed criteria and unlike the U.S., Germany and Israel employ *proportionality review* or analysis, a template of judicial review in line with Canadian values, predicated on an express limitation clause under judicial supervision.

Significantly, these similarities have been explicitly, and more often implicitly, recognized by Canadian courts in both judgments and judicial speeches. For *78 instance, in discussing proportionality analysis in [J.T.I. MacDonald Corp. v. Canada, 2007 SCC 30, 364 N.R. 89, 281 D.L.R. \(4th\) 589](#), the Supreme Court recently cited Israeli and German sources expressly:

Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate. The concept of proportionality finds its roots in ancient and scholastic scholarship on the legitimate exercise of government power. *Its modern articulations may be traced to the Supreme Court of Germany and the European Court of Human Rights, which were influenced by earlier German law: A. Barak [Proportional Effect: The Israeli Experience](#)” (2007), 57 U.T.L.J. 369, at pp. 370-371*. This Court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality -- first, the law must serve an important purpose, and second, the means it uses to attain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of effects (emphasis added).

German judges,

in essence follow the same path [as Canadians] when they apply the proportionality test. Since the test requires a means *Ggeremant*, ends comparison, both courts [Canadian and German] start by ascertaining the purpose of the law under review. Only a legitimate purpose can justify a limitation of a fundamental right. The three-step proportionality test follows [\[FN62\]](#).

Furthermore, in Germany, like in Israel, “the third step has become the most decisive part of the proportionality test”, an approach gaining notice in Canadian counter-terrorist jurisprudence [\[FN63\]](#).

With regard to security in particular, not unlike the German Constitutional Court,

the Supreme Court of Israel has dealt many times with questions regarding the role of the Court in the era of terrorism and has developed a model for judicial review in counter-terrorism ... [T]he basic philosophy of the Court in these counter-terrorism cases is consistent both in terms of its procedural and substantive holdings and the rhetoric it uses to explain them. Because these features are coherent, repetitive, and based on the same foundation, they are a model [\[FN64\]](#).

*79 Significantly, Canadian judges have recognized the Israeli model's pertinence and sought guidance from it in the counterterrorism context. Thus, for instance, as Chief Justice Lutfy recently recalled: “Last year [2006], the Federal Court received the Chief Justice of Israel, President Aharon Barak, to discuss the judgments of his Court in balancing human rights against terror” [\[FN65\]](#) Chief Justice Barak was again received as Keynote at the Administration of Justice and National Security conference in Ottawa the following year (2007).

In addition to the implicit borrowing of extracted principles detailed below, explicit references to Israeli case law can be increasingly found in prominent Canadian security jurisprudence. In [Suresh v. Canada \(Minister of Citizenship and Immigration\), \[2002\] 1 S.C.R. 3, 2002 SCC 1](#), the Supreme Court of Canada stated, at paragraph 74:

... we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combating terrorism and protecting national security: H.C. 6536/95, [Hat'm Abu Zayda v. Israel General Security Service \(1999\)](#), 38 I.L.M. 1471.

In [Application under s. 83.28 of the Criminal Code \(Re\), 2004 SCC 42](#), the Supreme Court stated at paragraphs 5 and 7 of its decision:

The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law. So, while Cicero long ago wrote “*inter arma silent leges*” (the laws are silent in battle) (*Pro Milone* 14), we, like others, must strongly disagree: see A. Barak, “[Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy](#)” (2002), 116 *Harv. L. Rev.* 16, at pp. 150-51 [...]

Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism.

At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy. *As eloquently put by President Aharon Barak of the Israeli Supreme Court:*

This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

(H.C. 5100/94, *Public Committee Against Torture in Israel* *80 v. *Israel*, 53(4) P.D. 817 at p. 845, cited in Barak, *supra*, at p. 148.) (emphasis added)

In light of the above, let us first examine the Israeli model more closely.

(d) Selected Case Law: Substantiating Principles

(i) The Israeli Model [FN66]

Since its inception, the Jewish State has been the object of relentless terrorist attacks, deliberately targeting innocent civilians in buses, malls and even children's schools. At this juncture and prior to proceeding, it bears repeating that "terrorism", in the context of this paper, refers to the intentional targeting, killing and maiming of civilians [FN67].

The Israeli experience is of particular import in that the perpetual terrorist menace it affronts threatens not merely the survival of a given political regime, but that of the very state and its people [FN68], thereby indisputably rendering the judicial role in counter-terrorism adjudication all the more laborious. Beyond this dubious distinction, Israel is also peculiar in that its Supreme Court (hereinafter: the Court) performs a dual role, as the highest court of appeals *and* as a separate institution known as the High Court of Justice (HCJ) [FN69]. The latter is charged with addressing *81 petitions presented directly to the Court by individual citizens primarily regarding the legality of State actions and the constitutionality of laws [FN70]. Finally, Israel's *Basic Laws* are modeled on the Canadian Charter, and the Supreme Court borrows heavily from Canadian jurisprudence in interpreting them [FN71]. Having underlined the Israeli counter-terrorism adjudication model's pertinence, let us now investigate its substance [FN72].

(A) Anti-Terror Fence Cases: The Beit Sourik and Alfei Menashe Cases

Concise rendered, amidst what had become weekly if not daily deadly terror attacks on civilians in markets, shopping malls and town squares, the Israeli government erected a fence, the purpose of which was to prevent the continuing infiltration of terrorists, terror cells and recruiters from the West Bank into Israel. In order to build the fence, the Commander of the IDF (Israel Defence Forces) took possession of land plots in the area, much of it private land belonging to Arab owners.

In a first petition, the *Beit Sourik* case [FN73], the expropriated petitioners and others impugned both the seizure orders' and the very fence's legality, arguing that the IDF's procedures violated property rights. They also argued that the fence's *location*, which complicated, and at times precluded, access to agricultural terrains, caused them serious financial hardship, in addition to perturbing access to medical facilities and schools, thus infringing upon their mobility rights *inter alia*.

The Supreme Court, sitting as the High Court of Justice, upheld the petition in part, letting the twin pillars of proportionality (least harmful means) [FN74] and flexibility serve as its guide [FN75].

In particular, it saw fit to balance between national security imperatives, on the one hand, and the mobility rights of local residents on the other [FN76]. On the facts, *82 the Court accepted the IDF Commander's position regarding the life-protecting/security aims of the Fence, but ruled that the military must take steps to reduce the breadth of the infringement upon the local inhabitants' rights by *altering* the fence's trajectory in most areas forming the object of the complaint.

Both "fence" rulings (*Beit Sourik* and *Alfei Menashe*) emphasize that the military commander's decision must respect the imperatives of proportionality [FN77], as the legal duty of proportionality is found in both Israeli administrative law and public international law. To this end, the Court employed a three-part test reminiscent of the *Oakes* test, as previously alluded to, aimed at assessing whether the military commander's actions expropriating the land in question were justified:

The principle of proportionality is based on three subtests which fill it with concrete content. The *first* subtest calls for a fit between goal and means. There must be a rational link between the means employed and the goal one is wishing to accomplish. The *second* subtest determines that of the gamut of means which can be employed to accomplish the goal, one must employ the least harmful means. The *third* subtest demands that the damage caused to the individual by the means employed must be of appropriate proportion to the benefit stemming from it [FN78].

Applying that standard in both cases touching on the fence's legality, the Court concluded that the fence's particular route violated the least restrictive means component of said test and was therefore unlawful. Opined the Court, in the first instance of the *Beit Sourik Case*: “[C]ertain land seizures were illegal because the harm that they caused to the individual was not proportional to the benefits thereof” [FN79]. It held that, with better planning, the military could have routed the fence so as to cause lesser offence to local inhabitants' rights, all while satisfying security imperatives.

Similarly in the *second* instance (*Alfei Menashe*), the Court deemed one specific segment of the fence illegal for it “offended the proportionality principle in that its effects of violating the local's mobility rights exceeded the least harmful means necessary” [FN80]. The Court held that less restrictive means could be employed to achieve the same national security objective and, significantly, ordered the army to *relocate* portions of the fence whose specific location unnecessarily encroached upon local inhabitants' mobility rights. Again, the focus was on whether the least restrictive and intrusive means were used under the circumstances.

As for flexibility, perhaps the rulings' greatest virtue is that its remedy of dramatically ordering the military to reroute part of the structure prompted policy makers to go “back to the drawing board” as it were, leaving them no choice but to better plan their initial scheme in a manner more respectful of mobility and other rights, all while maintaining their objective and chosen means. The Court was simply compelling the IDF to narrow the scope of its encroachment, so as to comport with constitutional imperatives.

The fact that this complex rerouting was actually achieved, as Mersel recounts, attests to the efficacy of the proportionality-based approach to counter-terrorism adjudication and the judicial role in reviewing security matters:

[A]fter the judgment in *The Beit Sourik Case* was handed down [First fence case], the issue went back to the military commander. He reexamined the route which had been under discussion in that case. He made alterations to it, which, in his opinion, implement the content of the judgment [FN81].

The second related matter in the *Beit Sourik* case submitted by local residents and by the Association for Civil Rights in Israel, went further to argue that the fence should be dismantled and rebuilt on the Green Line, or at the very least that it not include certain villages within its boundaries. The Court expansively discussed the ICJ Advisory Opinion on the structure's legality, and found that the ICJ and the Supreme Court of Israel in the first *Beit Sourik* Case had a common proportionality-based normative basis upon which they based their decisions.

Applying this proportionality-based framework once again, the Court concluded that the fence in question constituted a necessary security means for safe-guarding the local population's lives from terrorist infiltrations that were no longer mere suspicions but concretely demonstrated threats. The Court also concluded that the village of Alfei Menashe could not be excluded without seriously endangering innocent citizens' lives. That having been said, it decided that the existing route on the facts could be more thoughtfully planned in order to constitute a lesser interference with local Palestinian villagers' routines. It therefore ordered the State to reconsider the various alternatives for the fence route at Alfei Menashe, focusing on options that least restrict the daily lives of the affected Palestinians.

Most notable is that the directed remedy, which is further discussed below, constitutes yet another recurring salient principle invoked in the German and Canadian context. Namely, *suspension of remedies* in the security arena to allow for government authorities to revisit their decision to comply with human rights imperatives and implement the judgment's dictates within a *reasonable period*, rather than immediately, in light of the delicate nature of the questions addressed and the related logistical hardships. Realizing that the fence could not be moved overnight without severely compromising the population's security, the Court *suspended its remedy* for a period considered reasonable for secure relocation.

*84 (B) *The “Means of Interrogation” Case* [FN82]

The legality of Israel's General Security Services' (GSS) [FN83] use of “moderate means of physical pressure”. such as seating the terror suspect in an uncomfortable position, handcuffing them for lengthy

intervals and sleep deprivation [FN84], in the counter-terrorism context was also challenged before the High Court. In its decision, the Court declared these practices unlawful, not because they amounted to torture as the complainants had charged, but because they were not *authorized* by law [FN85]. It is important to note that the Court refrained from expressing its view on whether the practices amounted to torture. Hence,

the Court held that any infringement of human dignity, and especially of the physical integrity of a detainee, must be prescribed by law. The GSS had failed to point to any legal provision authorizing the use of such methods, and they were therefore declared illegal according to Israeli constitutional and criminal law. The Court added, however, that there might be circumstances where an interrogator would act illegally using such methods but would nevertheless have the opportunity to employ a “necessity” defense which, if successful, would excuse his or her actions and avoid the imposition of criminal liability [FN86].

Harnessing another important judicial tool, namely *ex post* flexibility, in response to the ticking time bomb scenario argument, the Court concluded that whereas a necessity defense, generally available under the *Criminal Code*, could not serve to authorize such means and could *not* absolve these tactics *ex ante*, the defence *might* potentially nevertheless become available in certain circumstances *after the fact* to absolve a GSS security agent who resorted to prohibited interrogation methods in order to prevent a “ticking bomb” from going off. Even then, the necessity defence might only be available when the tactics were immediately necessary*85 to save human life [FN87].

More recently in H CJ 3799/02 *Adalah v. GOC Central Command* [FN88], the Supreme Court of Israel again reverted to an *ex post* rather than *ex ante* solution in the security realm, holding that although the Israeli military's tactic of enlisting local Palestinians to aid in the arrest of brethren suspected of terrorist activity was illegal, it may under certain circumstances be excused *ex post* based on a necessity defense [FN89].

This approach is illustrative of a third recurring principle: leaving an *ex post* window allowing for greater flexibility in the security context. As further illustrated below, this “tool” arguably resurfaced in Canada in *Suresh supra*, where the Canadian Supreme Court hinted that deportation to a substantial risk of torture might be constitutional in yet undefined “exceptional circumstances”.

(C) The “Targeted Killings” Case: Proportionality as a Limit with *ex post* Flexibility [FN90]

Perhaps as a result of the fact that it views its role principally as an evaluator of means assessed through the prism of proportionality, rather than a scrutinizer of policy objectives *per se*, the Israeli Supreme Court, sitting as the High Court of Justice, found that it was not possible to determine the legality of a particularly controversial measure *ex ante* in a recent judgment respecting the legality of the preventative extrajudicial killing of terrorists. Instead, it held that the legality of such actions needed to be individually examined *after the fact*. The Court therefore imposed a mandatory, independent *after-the-fact* investigation [FN91], having decided that the legality of a particular strike cannot be fully assessed *ex ante*.

Having opined that the impugned “preemptive strikes” may or may not be justified depending on the circumstances, the Court set out criteria for courts assessing their lawfulness *ex post* [FN92]. Namely, that they be based on the presence of verified and “well-founded information” enshrined in a triad of requirements provided in the decision. That is to say, an *imminent threat* from an *active participant* *86 in *hostilities* that *cannot be otherwise eschewed*. In the words of the Court, in order for a preemptive strike to be lawful a Court must find that “*there are no other means available that would be less harmful*, such as the arrest, investigation and prosecution of the terrorist” (emphasis added) [FN93].

While lamenting the Customary International Law of armed conflict's failure to adapt to modern circumstances [FN94] where terrorist organizations, rather than boasting a military are oft composed of what would otherwise be considered “civilians” in outdated parlance, the judgment emphasized the distinction between combatants who are legitimate targets of military strikes and civilians, ruling that: “although terrorists cannot be considered the former [FN95], the protection afforded to civilians does not extend to the *time* of their direct participation in hostilities” [FN96].

*87 In other words, the decision distinguished between innocent civilians and those civilians who under International law precepts [FN97] “lose their civilian immunity” “for such time” that they act directly and consciously in the service of terrorist organizations of their own free will. Enunciated the Court:

[T]he basic approach is thus as follows: a civilian -- that is, a person who does not fall into the category of combatant -- must refrain from directly participating in hostilities (*see* FLECK, at p. 210). A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long

as he is taking a direct part in hostilities he does not enjoy -- during that time -- the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, *e.g.* those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack. [\[FN98\]](#)

This assertion is quite nuanced, which is why the Court, comporting with its philosophy of war within law (see para. 60), cautioned that “there is thus no escaping examination of each and every case” [\[FN99\]](#). In consequence, whether a civilian has lost said status “for such time” as he or she is so acting, is decided on a by case-by-case basis, with the prospect of *ex post* justification, however exigent the scrutiny [\[FN100\]](#).

To that end, four criteria, evincing proportionality and flexibility, must be *88 respected:

1- There must be strong and convincing evidence that the individual targeted is taking direct part in hostilities;

2- This individual, while not immune, has by no means relinquished his human rights. The least harmful means, proportionate to the objective of saving innocent lives, must be employed;

3- A thorough after the fact investigation must be conducted;

4- No effort must be spared to minimize harm to innocent civilians during military attack.

Emphasizing *proportionality*, as per its custom, the Court stressed that a measure's legality will, to a great extent, be a function of whether its harm is condign with its necessity. Whether preemptively choosing to fatally strike a non-combatant who has lost his immunity under international law for such time as he is directly participating in terrorist activities is commensurate with the state's duty to protect its citizens' rights to life and physical integrity, what must remain

“Central and indeed recurring (as alluded to above) is of course “the principle of proportionality ... a general principle in law. It is part of our legal conceptualization of human rights. It is an important component of customary international law ... (internal citations omitted)” [\[FN101\]](#).

(e) General Principles Recap

To reiterate, the following *general principles* may be extracted from the above-cited caselaw for our purposes:

**89 (i) Principle I: War within Law*

As illustrated above, this is a cardinal idea permeating Israeli national security jurisprudence. As alluded to above, the Israeli Supreme Court has on various occasions unequivocally proclaimed that the battle against terrorism, like any battle or war, must be fought with respect for the Rule of Law and that it is the role of the Court to ensure that it is so [\[FN102\]](#).

Said the Court in one such instance:

It is when the cannons roar that we especially need the laws (*see* HCJ 168/91 *Murkus v. The Minister of Defense*, 45(1) PD 467, 470, hereinafter *Murkus*). Every struggle of the state -- against terrorism or any other enemy -- is conducted according to rules and law. There is always law which the state must comply with Indeed, the State's struggle against terrorism is not conducted “outside” of the law. It is conducted “inside” the law, with tools that the law places at the disposal of democratic states [\[FN103\]](#).

And in another:

... [T]he fight against terrorism must be a war fought by the law itself against the forces threatening it” [\[FN104\]](#) ... “[t]he power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values [\[FN105\]](#).

Therefore, as the Court instructed in *Ajuri v. IDF Commander in the West Bank*:

[E]ven when the cannons speak, the military must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values ... [T]he position of the State of Israel is a difficult one. Our role as judges is also not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State.

It provides a reason for its struggle. Our work, as judges, is hard. But we cannot *90 escape this difficulty, nor do we wish to do so [\[FN106\]](#).

While this might appear evident or universal, one must consider that this thinking might, in fact, be owed to, and drawn from, Jewish law, which requires, even in ancient times, that there be justice in war (*jus in bello*) for “all of the laws and commandments are binding on the king and on the people, even in times of war” [\[FN107\]](#). Jewish law expert Professor HaCohen teaches that “this approach contrasts that of those who hold that war cannot be carried out ‘according to the principles of the Magna Carta’ and that in wartime there is no need to preserve and protect human rights and human dignity” [\[FN108\]](#). So too does it stand in stark contrast to Cicero's assertion: “during war, the laws are silent” (*silent enim legis inter arma*). The Israeli Court's reasoning can therefore, even if inadvertently [\[FN109\]](#), be said to comport with this biblical injunction, as frequently echoed in President Barak's opinions:

The saying that “when the cannons speak, the Muses are silent” is incorrect ... It is an expression of the difference between a democratic State fighting for its survival and the battle of the terrorists rising up against it.. The armed conflict against terrorism is an armed conflict of the law against those who seek to destroy it ... [\[FN110\]](#).

At this juncture, it is worth repeating that the Chief Justice of the Supreme Court of Canada has explicitly cited her Israeli counterpart in recognizing the judiciary's role of ensuring that any “war” against terrorism is fought within the confines of law, upholding a substantive definition of democracy, as already alluded to above. Said the Chief Justice:

... in the words of Aharon Barak, President of the Supreme Court of Israel: *91 “Democracy is not only majority rule. Democracy is also the rule of basic values [...] values upon which the whole democratic structure is built, and which even the majority cannot touch”. Without independent judges, we cannot have protection of rights or the rule of law. And without protection of rights and the rule of law we cannot have democracy. Far from being antithetical to democracy, an independent judiciary is its guarantee ... [\[FN111\]](#).

And, as already discussed in the Introduction, the Canadian Supreme Court echoed this very principle in [Application under s. 83.28 of the Criminal Code \(Re\), 2004 SCC 42:](#)

... a democracy cannot exist without the rule of law. So, while Cicero long ago wrote “*inter arma silent leges*” (the laws are silent in battle) (*Pro Milone* 14), we, like others, must strongly disagree: see A. Barak, “[Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy](#)” (2002), 116 *Harv. L. Rev.* 16, at pp. 150-51. [\[FN112\]](#)

Canada is not alone in citing the Israeli model in this context. Australia's highest court, for its part, did the same in *Thomas v Mowbray*, [2007] HCA 33, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame*, [2005] HCA 36 and most saliently in *Al-Kateb v Godwin* [\[FN113\]](#):

This point [war within law] was well made by Barak P. for the Supreme Court of Israel, sitting as the High Court of Justice in *Beit Sourik Village Council v The Government of Israel* That case concerned a challenge by Palestinian villagers to the “security fence” or wall being constructed on their land. In the course of reasons that upheld some of the petitions, Barak P. cited an earlier decision of the Court in *The Public Committee against Torture in Israel v The Government of Israel* in which, after referring to the implications of the decision for national security, he had said:

This is the destiny of a democracy -- she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.

The Supreme Court of Ireland also quoted from Israeli jurisprudence in *T.D. v. The Minister for Education et al.*, [2001] IESC 101 [\[FN114\]](#):

The Constitution of Ireland, 1937 presciently heralded in the post World War II democratic constitutions of many countries which include judicial *92 protection of fundamental rights by judicial review ... *An apt description of the part played by superior courts in countries with modern constitutions, democracy, the rule of law, fundamental rights and judicial review has been given by Chief Justice Barak of Israel.* The place of judicial review and democracy was analyzed by the Israeli Supreme Court in *United Mizrahi Bank Ltd. v. Migdol Village* (1995), 49(4) P.D. 221 [proceeding to quote the Israeli decision]. (emphasis added).

(ii) *Principle II and III: The Mechanism of Proportionality -- A “Sober Second Thought” with ex post Discretion*

The above-outlined case-oriented view, in turn, naturally leads to, or perhaps more accurately derives from, the proportionality analysis animating Israeli judicial thinking [FN115]. As already discussed, the Israeli model focuses on scrutinizing the commensurability of the *means* chosen to achieve a given counter-terrorist objective, rather than the aim per se [FN116]. This practice of ensuring that the least restrictive or least harmful means are selected under the circumstances, thus facilitating *dialogue* [FN117] between the different branches of government, is not unfamiliar to Canadians, particularly in this highly delicate context [FN118].

*93 The benefits of this “proportionality-oriented” method with distinctions made between vertical and horizontal balancing [FN119] are thought to be threefold. First, in Hogg's words, focusing on means allows Parliament to enact new legislation that still accomplishes the same objectives as the legislation that was struck down, yet is preferable because it is more narrowly tailored and mindful of the human rights it may have neglected with its broad strokes first attempt.

This is all the more true in the national security context where the means chosen are more highly scrutinized, and there is greater deference given with respect to the purpose of the legislation. For, in times of crisis, courts have the unique “capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry” [FN120], whereas legislatures might impetuously cater to popular alarm. Thus, by encouraging and orchestrating meaningful debate on moral issues, judicial review constitutes a means of uplifting and revitalizing political and moral discourse in society” [FN121]. A “sober second thought” of sorts to borrow senatorial parlance.

What is more, this back and forth serves to precipitate a fruitful debate, particularly healthy for democracies in the national security context where debate tends to be stifled for fear of appearing “unpatriotic”. Democratic impulses are reawakened and willful blindness to abuses displaced. With specific regard to flexibility in the Israeli context it is said that:

In most of these cases, the court has left a wide margin of deference (what is called the margin of appreciation) to the executive to decide which counterterrorism measures to employ, when to use them, and to what extent. The underlying rationale for deference is the basic notion that the executive and legislative branches -- not the Court -- must deal with the terrorism problem.” The Court's role is, therefore, not to decide how to combat terrorism but rather to review the legality of the method chosen by other powers [FN122]. If the executive's method, by itself, is legal, the court will usually not intervene in the decision to use this specific method for counter- terrorism needs [FN123].

*94 (iii) *Principle IV: Minding the Spillover of Counter-Terrorism Adjudication -- Flexibility and Case-Oriented Analysis*

Given the indeterminate nature of proportionality analysis, its ambiguity and often speculative nature in the counter-terrorism or security context, the Israeli Supreme Court has, as noted, embraced ex post discretion, often in the form of “investigations” in support of that tool. [FN124]

Thus for instance, in what is often labeled the “targeted killings” case, Israel's then Chief Justice cautioned: [O]ne must proceed case by case, while narrowing the area of disagreement [FN125] This is particularly true given the indeterminate nature of proportionality analysis. [FN126]

Another salient attribute of the Israeli model is its “holistic” view [FN127]; an understanding that decisions that at first glance seem relegated to the realm of national security, are liable to unexpectedly trickle into various other areas of law, including electoral laws and private law, including torts [FN128]. Examining Israeli jurisprudence in revealing detail, Yigal Mersel incisively cautions: “It is important to note that the legal influence on counter-terrorism activities does not always concern cases of actual fighting or combating It is for this reason that the court prefers a flexible, *case-oriented* analysis” (emphasis added).

In his illuminating analysis of relevant Israeli caselaw, Mersel points specifically to several instances when the Court was called upon to address the State's civil liability for its counter-terrorism actions. For instance, while rejecting the government's blanket claim of automatic sovereign immunity, the Court found that counter-terrorist measures could nevertheless be housed within the definition of “war” and therein benefit under *certain* circumstances. Hence, the precise extent of the immunity allotted to the State for particular activities in this context, the Court opined, is best decided on a *case by case* basis [FN129].

For example, in the above-referenced ruling dealing with whether the tort standard of care must change in the National Security context, the Court held that *95 while the standard itself is mandated in times of terror, it must nevertheless be assessed contextually, in light of the dangers pertaining to the threat

[FN130]. It similarly refused to cling to an unbending rule whereby the state invariably bears the burden of proof [FN131] in tort cases arising from security-related matters. This again is illustrative of its preference for case-oriented analysis, on occasion leaving room for the possibility of *ex post* justification and defences for the state in future matters [FN132].

In summary, the twin principles that should be derived from these cases [FN133] for purposes of the above-exposed judicial framework are that of flexibility and case-oriented analysis. Rather than adopting a rigid rule, decisions in this context are reached on a case by case basis, thus allowing both the state, in its actions, and the courts themselves, in their review thereof, greater *marge de manoeuvre*” [FN134], cognizant that security cases can easily impact other areas of law. This contextual understanding is significant due to the aforementioned *spill-over effect* of counter-terrorist adjudication into other areas of law, a tendency of which the courts must be mindful.

(iv) Principle V: Mechanism of Flexible Remedies -- Suspension

This vision concretely translates into a flexible approach to the problem of *remedies*, a notoriously thorny issue in the counter-terrorism context because issuing an instantaneous remedy might engender grave security risks, as the Israeli experience illustrates:

... if the Court concludes that a certain administrative activity is illegal, it might not necessarily issue an immediate remedy. For instance, the court might find that the detention of a suspected terrorist was illegal since a certain procedure was omitted. In such a case, the immediate release of the individual might cause a significant risk to public safety. Hence, the court might postpone or suspend the execution of its own judgment for some time, thereby enabling the administration to use an alternative means that is legal [FN135].

Therefore, the *suspension of remedies* technique is routinely employed in the national security context. Similarly worth mentioning, the ensuing dialogue, which *96 is corollary to the Suspension remedy, plays a role in upholding the Separation of Powers doctrine and is of symbolic value in so far as the Court's legitimacy is often vulnerable in the counter-terrorism context [FN136].

This technique is familiar to Canadians, as it has been used in leading Charter cases such as *Reference re Manitoba Language* case and *Chaoulli* [FN137] *inter alia* [FN138]. In the security realm, this technique has been used most saliently in *Charkaoui* [FN139]. Succinctly, in that case, although the Supreme Court did strike down the *Immigration and Refugee Protection Act (IRPA)*'s procedure for the approval of certificates as inconsistent with the *Charter* because of the absence of full adversarial argument, it did not order the immediate release of the six men subject to the impugned procedure for fear that that would endanger national security. Instead, it chose to *suspend* the pronounced invalidity for one year from the date of the judgment to allow Parliament time to enact an alternative process for testing the certificates, which would respect minimum requirements of due process [FN140] and comport with security imperatives.

(v) The German Model

Illustrating the above-listed principles' relevance and recurrence, the German understanding of counter-terrorism adjudication and of the judiciary's role is especially noteworthy for several reasons, both legal and social.

Most evidently, Germany's past epitomizes the ultimate substantiation of democracy's fragility and the importance of substantive constitutional assurances. Anecdotally, Germany is particularly sensitive to being labeled a terrorist haven, as some of the 9/11 terror suspects had lawfully attended a German university [FN141]. Finally and relatedly, Germany was the first country to try an individual allegedly involved in the 9/11 terror attack [FN142].

*97 Substantively, the Post-War German dogma's pertinence derives from its extensive experience in relation to state of emergency constitutionalism. In effect, “combating terrorism raises questions for which the German patterns of argumentation, fine-tuned in the academic debate on the law of state of emergency, may provide a useful framework for discussion” [FN143]. More specifically for our purposes, and beyond concrete judicial tools, the German paradigm is remarkable for its distinctive *overarching philosophy or vision*. It is distinctive for, instead of adversarially pitting “human rights” against a vague notion of “state security”, the constitution or *Grundgesetz* uniquely recognizes the right to protection of life as the State's *affirmative duty*, preferring a positive construction of rights over a negative one in Berlinian terms. This

approach was more recently endorsed by Canada's former Justice Minister, Professor Irwin Cotler, in a most enlightening piece on point [\[FN144\]](#).

In the presence of the state's constitutionally enshrined *affirmative duty* to protect life as enumerated in Article Two of the *Grundgesetz* (GG -- Basic Law) [\[FN145\]](#), German courts see fit, and indeed are held, to optimize freedoms and rights with the protection of life and physical integrity, *itself construed as a human right* and as part and parcel of the right to dignity [\[FN146\]](#). This is most significant since counterterrorism adjudication, as Irwin Cotler eloquently decries, has been plagued by an unhelpful dichotomous approach, positioning “security” as the antithesis of human rights [\[FN147\]](#). This despite the fact that “collective security is not the enemy of individual*98 freedom -- nor must that misconception be allowed to become entrenched”, as former French Interior Minister Daniel Vaillant correctly noted [\[FN148\]](#).

Since the *narrative* or rhetoric predominantly animating judicial decisions is of primary importance to collective consciousness and, to be sure, judicial legitimacy [\[FN149\]](#), the German example might play a central role in prompting a shift away from this impugned dichotomy, a simplistic construction in this context [\[FN150\]](#).

Finally, the German approach to counterterrorism adjudication is illustrative of the principles exposed above, namely broad justifiability in the security realm, or “war within law”, proportionality, case-oriented analysis and *ex post* flexibility *inter alia*, as the sample below renders.

Having exposed some of the reasons underlying the German archetype's pertinence, let us proceed to a summary presentation of representative case law and the principles that may be properly derived there from. But first, two points of procedure must be clarified. Firstly, similar in many respects to the Israeli “High Court of Justice” Model, the German Constitution features a procedure, enshrined in Article 19IV of the *Basic Law*, whereby individuals who feel that their rights have been violated by public authorities may address their grievance to the court, with an important exception exceeding the scope of this present endeavor [\[FN151\]](#). Additionally, the constitutionally enumerated rights are themselves subject to *internal* limitation clauses [\[FN152\]](#) deemed “legislation-reservation” sections, whose purpose is to sanction justified infringements. Accordingly, in determining whether a violation is justified, the court will weigh competing values in view of proportionality, a technique known as *Abwägung*.

What arguably sets the German model apart in this vein is its emphasis not only on means but on purpose, a “deeper sense proportionality to the achievement of purpose the so called *Verhältnismäßigkeitsgrundsatz*. That is to say the “optimization”*99 of constitutional values [\[FN153\]](#) following proportionality, as distinguished from zero sum dichotomization (i.e. competing values). In view of that, in Germany the commensurability of infringements is specifically assessed by their *intensity*. “Understood as principles”, the argument goes, “constitutional values have a ‘radiating effect’ and are ubiquitous in all areas of law” [\[FN154\]](#). It follows therefrom that “all legislative measures are permissible so long as constitutional rights are sufficiently optimized” [\[FN155\]](#).

To better illustrate the application of these principles, let us now proceed to the relevant case law.

(A) *The Air-Transport Security Act Case*

In a landmark security decision, the Federal Constitutional Court declared a provision of a divisive German anti-terrorism law, §14(3) of the *Aviation Security Act* (*Luftsicherheitsgesetz-LuftSiG*), unconstitutional [\[FN156\]](#).

This case is of the utmost significance to counter-terrorism adjudication. It is illustrative of the overarching German approach alluded to above, one that “optimizes” the First and Second Constitutionally enumerated rights. That is to say, the right to Human Dignity under Article One and the right to Protection of Life, with the State's corollary duty to ensure protection, as per Article 2. Plainly put, and it bears repeating, instead of weighing human rights *against* national security, it can be argued that the German view, implicitly if not explicitly, is to consider security *as* a right itself, ancillary to the State's constitutional duty to safeguard its populace.

A few background facts are required prior to proceeding.

The *Air-transport Security Act* (*Luftsicherheitsgesetz*), (hereinafter: the *100 Act) [\[FN157\]](#) was part of the so-called “security statutes” [\[FN158\]](#). With a September 11th scenario in mind, the impugned §14(3) of the Act empowered the German Defense Minister to order a passenger airplane be shot down, if s/he believed that the aircraft would be used as a terrorist weapon *and* if the downing was the only means of preventing this danger. Public upheaval soon followed. As Oliver Lepsius recounts, many asked: “may the

law empower an official to lawfully sacrifice the life of innocent people for the presumptive sake of the public's safety" [FN159]?

Not surprisingly, the provision's constitutionality was challenged soon after, posing that exposing citizens to the risk of being downed by the military and, in consequence, most likely killed or maimed, whenever airborne violated their constitutional right to Dignity under Article One and indeed [their right to] Life. The question before the Constitutional Court was therefore: Does the State's constitutional duty to protect life, enshrined in Article Two of the Basic Law, justify such a drastic measure and/or even vest it with such powers?

Answering in the negative, the Constitutional Court struck down the provision in question. Whereas this could have been achieved on grounds relating exclusively to Federalism as the subject matter was *ultra vires* [FN160], the judges saw fit to further censure the article's constitutionality following a "war within law", rights-based analysis, opining that the article violated Article One, as it was "incompatible with the fundamental right to life and with the guarantee of human dignity".

The reasoning underlying this decision is most instructive. The Court emphasized that although the State was under a constitutional duty to safeguard the Right to Life under Article Two, it could not violate the Right to Human Dignity under Article One, which was deemed to be of the first value of the highest order or of "prime constitutional value" [FN161], in order to meet that obligation [FN162]. The Court further rejected the argument that shooting down "death bound" passengers was permissible for that very reason, reiterating the sanctity of all life regardless of its *101 duration and the primacy of dignity in consequence [FN163]. The Court elucidated that:

[t]he duty to protect Human Dignity generally forbids ... making any human being a mere object of the actions of the State. Any treatment of a human being by the State that -- because it lacks the respect for the value inherent in every human being -- would call into question his or her qualities as a subject, her status as a subject of law- is strictly forbidden [FN164].

Principle: Recognizing the Violation of Human Rights by Acts of Terrorism

What is more, rather than engaging in conventional zero-sum balancing or an impoverished rights versus security discourse, the judges declared that the impugned provisions of the *Air-transport Security Act* violated the fundamental right to human life in Article Two of the Basic Law, *in addition* to the human dignity clause in Article One of the Basic Law. Importantly, and illustrative of the above described approach, in contradistinction to the view that rights and security are incongruous, the Court quoted the two provisions jointly [FN165] in the second part of its reasons, an example of optimizing rights. This arguably begs the question: is counter-terrorism adjudication truly a question of conflicting rights or is it merely the right to life in various manifestations, or is it a question of how best to constitutionally protect these rights using the least restrictive means?

However one answers that query, if at all, practically, it stands to reason that the latter view comports with the growing recognition attaching to victims' rights in both the domestic and transnational context, as recounted by International Law scholar Charif Bassiouni [FN166]. This is also congruent with the European Court of Human Rights (ECHR)'s approach to counter-terrorism adjudication, which does well to discard the outmoded security versus human rights canard, referred to above and outlined below.

Principle: Case Specific Analysis and Ex Post Flexibility

As noted in the Israeli context, this form of judicial review may further be understood as an integral part of the democratic process, whose role is not to quash or replace parliamentary decisions, but to *complement* them by engaging in a Hoggian*102 dialogue aimed at stimulating debate. It has been said that Courts aid the legislature in its representative function by effectively pointing out the weaknesses of means employed by legislation, which are often the result of knee jerk, ill-planned responses in the security realm, and their incompatibility with the State's basic values, compensating for political shortcomings rather than substituting their view for the Legislature's.

Therefore, in line with the values enshrined in the Canadian *Oakes test* and the similar Israeli approach, the German use of Proportionality as a test of the validity of government action imports three conditions: *First* the norm or policy must use narrowly tailored means. *Second*, the means in question must be the least burdensome available and therefore necessary; and *Third* the state action must be proportionate, "which means that its costs must remain less than the benefits secured by its ends" [FN167].

This deferential judicial approach is mirrored in Germany's counter-terrorist jurisprudence, which is deferential not in the sense of compliance with the Legislator's policy of choice, as per the House of Lords in its original Post 9/11 Jurisprudence, but rather in terms of an expressed preference for a case-oriented balancing mechanism that at the very least recognizes the State's affirmative duty to safeguard its population as a constitutional value and the right to life. In this case, the right to life is interpreted as the right to be free from life-threatening terror and is considered a primordial human right, as well as a countervailing value to be optimized..

Therefore, the Court implied that the result might differ in such instances in the future if the “attacks were directed at the elimination of the community organized within the state [as in the Israeli case] or at the elimination of the Rule of Law and Freedoms guaranteed by it” [\[FN168\]](#), reminiscent of the Israeli *ex post* approach,

This judicial “hint”, following Professor Nolte's incisive commentary on the case, leaves the political branches with two options: to announce that such attacks fall within the definition of an “armed attacks” as per Article 51 of the UN Charter and therefore fall under Federal jurisdiction or to amend the constitution to empower the military explicitly in this sense, requiring a two thirds majority. This is but a first step. Even an amendment would have to be crafted in such a way so as to respect human dignity, for any amendment that infringes upon this fundamental value is deemed void.

Of note, Nolte refers to the Israeli Supreme Court's above-cited judgment on targeted killings, observing that the German Court might follow the example of its Israeli counterpart and state that the imperatives of human dignity also apply to the law of armed conflict.

In this vein, he accurately stresses that:

the Court's judgment should perhaps be seen in the context of a mutually informed, international judicial reaction to certain excessive measures by *103 states in the fight against terrorism [\[FN169\]](#). In effect the ruling falls into a line of decisions in recent years by the British House of Lords, the U.S. Supreme Court, the French *Conseil constitutionnel* [\[FN170\]](#) and the Canadian Supreme Court that have set limits on security measures by invoking the rights of individuals- be they called civil, fundamental or human rights. The Supreme Court of Israel has done the same by applying the principle of proportionality under the law of war [\[FN171\]](#).

That in turn bodes well for case-oriented analysis, for “not unlike its Israeli counterpart, the German court too favours a case by case analysis in order to delineate the exact scope of the State's duty to respect human dignity *vis à vis* its obligation to protect human life in the national security context” [\[FN172\]](#). In fact, the Federal Constitutional Court has in various contexts referred to its flexible method as a “case-specific balancing” [\[FN173\]](#).

Therefore, like its Israeli counterpart, which finds favour in the possibility of *ex post* justification at relevantly exceptional times [\[FN174\]](#), “the German Federal Constitutional Court also suggested that the lack of *ex ante* authorization to shoot down a plane due to a terrorist attack might not prevent the absolution of a criminal liability arising under such circumstances” [\[FN175\]](#).

*104 (B) *Data Screening of Muslim “Sleepers” Case*

Yet another illustration of the use of the above-delineated principles (proportionality, case-oriented analysis, ex-post margin of maneuver) is the so called Muslim “sleepers” case. In a decision handed down on 4 April 2006 (1 BvR 518/02), the same *Bundesverfassungsgericht* (BverfG -- Federal Constitutional Court) ruled that the orders for *preventive* data screening [\[FN176\]](#) in the context described below are incompatible with the fundamental right of informational self-determination according to Article Two (I) in connection with Article One (I) of the *Grundgesetz* (GG -- Basic Law). This decision was based primarily on the fact that acquirement of personal data is only justified in the face of a *concrete* threat, and the authorities had interpreted the danger facing Germany too broadly. A looming *general threat*, constant in the Post 9/11 world, was judged insufficient, thus rendering the measures unnecessary in the strict sense of the third proportionality prong presented earlier.

A few details on point: the data in question was collected at universities and colleges, among other places, and was then forwarded to the Federal Criminal Police Office. It was subsequently aligned with files listing pilot license holders and kept on record, instead of resulting in immediate charges. Concisely for that reason, the Court decided in favour of the complainant, a Muslim Moroccan student, who argued that the anticipatory Data screening method, which the police used in advance on the mere *assumption* of an impending threat, was unconstitutional [\[FN177\]](#).

The judges further dismissed the vague notion of a *weitgehend wehrlos* or “widely helpless nation against impending terror” as cause for such potentially repressive measures. *A fortiori*, the judges found that the practice reeked of discrimination, as the data profiled was suspectly that of “male, aged 18 to 40, Islamic religious affiliation, native country or nationality of certain countries, named in detail, with predominantly Islamic population” [FN178]. Significantly, only the order relating to the particular data screening rather than the empowering law itself was struck down. This speaks to a flexible, case-oriented approach, focusing again on the least restrictive means whereby a decision might strike down broad, knee-jerk responses to perceived terrorist threats, all while leaving a “window” within which the legislature can operate notwithstanding the ruling.

*105 (C) *The Arrest Warrants Case*

Another example of the German model's approach to proportionality analysis is the so called Arrest Warrants case of 2005 [FN179]. In that instance, the Constitutional Court declared the European *Arrest Warrant Act* (*Europäisches Haftbefehlsgesetz*) void for encroaching upon freedom from extradition under Article 16.2 of the Basic Law (*Grundgesetz -- GG*), in a disproportionate manner “because the legislature has not exhausted the margins afforded to it” [FN180]. The Court therefore referred the matter back to the legislature for proportionality compliance. Moreover, the European *Arrest Warrant Act* was deemed to infringe on the right to access to justice, or the right to be heard by a court under Article 19.4 of the Basic Law, because the judicial decision granting extradition could not be challenged.

Reminiscent of principles of civil liability under Continental systems, the Federal Constitutional Court correctly prevented the lowering of the threshold of probability to the mere *possibility* of a terrorist attack, representing an anticipatory risk. The Court recognized the need for preemption but judged that the Government operated at an unacceptably low level of proof of threat [FN181].

Needless to say, this flexible approach is of particular import in the security context where failure to adhere to a certain measure of pragmatism might undoubtedly yield contraindicated results [FN182].

(D) *The “Cyber Spying” Cases*

In an effort to counter terrorism specifically, and various offences generally, Germany's Lower Saxony passed a law allowing police to maintain closer surveillance of “potential” or suspected terrorists in the region. The contentious statute permitted monitoring even in the absence of concrete evidence. Police were permitted to intercept phone calls, text messages and Internet connections of groups or individuals whom they suspected of plotting “crimes of considerable importance”, even in the absence of concrete evidence.

In a decision handed down on November 6th 2008 [FN183], Germany's Constitutional Court again invoked proportionality as its tool of choice, striking down the law for over breadth and instructing that the loss of constitutionally guaranteed *106 freedoms must not be “disproportionate to the aims served by the limitation of basic rights”. [FN184]

Significantly, not unlike its Israeli counterpart,

[t]he Court permitted exceptions. Under extreme conditions, and with permission of a judge, the police may monitor information technology systems. If there are factual indications of concrete danger to life, the foundations of the state or the freedom of people, then limited monitoring may occur. Steps must be taken to protect core data. Improperly collected data must be deleted and cannot be re-used. These maintain the requirement of proportionality [FN185].

Shortly thereafter, in March of the same year (2008) the same Court invalidated *parts* of a far-reaching, controversial Federal law relating to data collection that required German telecom companies to store telephone and Internet data “including email addresses, length of calls, numbers dialed and, for mobile phones, the location calls were made from,” for up to six months, as a counter terrorism measure [FN186].

In so doing, it held that data could only be collected when the stability or security of the country need to be defended; that is to say the “life, limb, and freedom of German citizens, in order to satisfy the imperatives of proportionality. Even then, “details may only be transferred to investigators in the event of inquires into serious crime and only with a warrant. In cases of less serious crime, investigating authorities may only access the data subject to a final decision by the top court” [FN187].

In sum, the primary judicial mechanisms gleaned thus far from the Israeli and German model in the security context are: proportionality analysis allowing for flexibility or holistic margin of appreciation [FN188], case-oriented analysis with the possibility of *ex post* appreciation, suspension of remedies,

particularly in the Israeli case, and a revised rights narrative featuring optimization of human rights [FN189] with *107 life *qua* dignity as arguably the start and end point [FN190], under the German model.

3. PART III: LEVELED CRITICISMS: AN OVERVIEW

As previously noted, it is far beyond the scope of this project to chronicle the wealth of criticism leveled at the use of foreign sources, or “judicial activism” generally, in any detail.

That having been said, it is nevertheless incumbent upon us to, at the very least, relay a concise overview thereof. It avers particularly fruitful to first focus our attention on the concerns raised specifically with respect to the use of comparative law, and to then highlight how a non-binding [FN191] Restatement in the security context might address some of these qualms.

(a) *Comparativism as a Non-Binding Judicial Resource*

As already observed, foremost amongst these fears, abounding mostly amongst American originalists, are those pertaining to judicial activism or “excessive creativity going beyond legal bounds”, culminating in the elision of state sovereignty [FN192].

Arguably most prominent amongst the critics are Justice Antonin Scalia of the United States Supreme Court [FN193] and Judge Posner of United States Seventh Circuit Court of Appeals [FN194]. Invoking the U.S. Constitution's immutability [FN195], Justice Scalia argues that to maintain the democratic character of judicial review, the Court must rely on “[t]he standards of decency of American society -- not the standards *108 of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views” [FN196]. Therefore, “the basic premise of the Court's argument -- that American law should conform to the laws of the rest of the world -- ought to be rejected out of hand [FN197]”.

Of course, these words were not uttered in the National Security context wherein democracies presumably do share the same values. Instead, cases involving public policy questions of a domestic order, such as the death penalty and sodomy, to name two recent high profile American cases, might resist external influences, let alone Restatement, to a greater degree, for obvious reasons [FN198]. Needless to say, cultural receptiveness similarly comes into play, as noted in Part I *infra*, as does the fact that, unlike its European and other counterparts who embrace proportionality, the American constitutional system “fiercely criticizes” even balancing [FN199]. That having been said, resistance to foreign sources, although most prominent in the U.S., is by no means limited to that country's courts.

Most recently, Justice Gleeson of the Australian High Court voiced concerns over borrowing the proportionality device from sister jurisdictions such as Canada in the matter of *Roach* [FN200], a case dealing with prisoners' voting rights. While the Australian High Court invalidated the restrictions on prisoner voting rights, deeming it disproportional citing the Canadian *Oakes* test *supra* and the case of *Sauvé v Canada (Chief Electoral Officer)* [FN201] as well as the ECHR's Case of *Hirst v The United Kingdom (No 2)*, Chief Justice Gleeson cautioned of the “danger that *uncritical* translation of the concept of proportionality from the legal context of cases such as *Sauvé* or *Hirst* to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action” [FN202] (emphasis added). He further stressed Australian particularity, noting that the Australian Constitution, unlike its Canadian and European counterparts, did not lend itself to proportionality analysis, a mechanism, which in his view, upset *109 the delicate balance between the judicial and legislative role.

(b) *Cultural Sensitivity*

There is no doubt that Constitutions serve as means for national self-expression, a function of which they must not be divested, nor is such as course of action even fathomed. *Uncritical* translation is by no means desirable, for context and political culture, although often responsible for sparking openness to foreign sources as noted above, must always be attentively heeded. There is no question that cultural particularity is determinant [FN203]. A proposed Restatement would not challenge or dispute the importance of the national experience. Instead, this entirely voluntary guide would simply help structure, rather than entrench, an existing practice and serve as a window into the experience of similarly situated courts engaging in judicial review of counter-terrorism initiatives, in order to allow them the opportunity to evaluate the pertinence or adaptability of such principles to their circumstances.

Indeed, as President Barak has called attention to on several occasions with inimitable eloquence: “... *First*, it is undisputed that comparative law is never binding. When such law is binding, it ceases to be comparative”. Justice Breyer of the U.S. Supreme Court predicates his use of comparative sources on the same distinction [FN204]. Leading constitutional scholar Mark Tushnet offers the same justification, as noted [FN205]. *Second*, according to Barak J:

the question is not about the weight which should be granted to comparative law. Even those who support consulting comparative law, like myself, do not view its weight as particularly great (...)For me, *comparative law acts as an experienced friend*. It makes me think better; it awakens in me the potential latent in my own system; it expands my thinking about possible arguments, legal trends and available decision-making structures. For me, comparative law serves as a mirror. It makes me understand myself better. But it never binds (...). *Third*, the question of consulting foreign law arises only in hard cases. It arises only when the judge has discretion” (emphasis added) [FN206].

*110 (c) *Curtailing Decontextualized “Cherry Picking”*

Foremost, systematically compiling the guiding principles derived from the relevant jurisprudence, which would no doubt include far more jurisdictions than those surveyed here, would act to address the unease regarding selective borrowing, voiced repeatedly in respect of comparative inquiry.

In addition to its adjudicatory function, the judicial process features an important educational value. Law, as communicated through court decisions, shapes the public narrative, which in turn fashions social consciousness respecting rights in “times of terror” [FN207]. Judicial narrative, in particular, is the object of heightened scrutiny in a world where questioning counter-terror measures is increasingly viewed with suspicion. While Courts should in no way bend to influences, internal let alone external [FN208], they can nevertheless benefit from access to a Restatement of principles to guide them through the perilous road of counterterrorism adjudication, acting not as binding rules but as contextual inspiration towards consistency. That, in turn, can promote stability in a lengthy global battle sorrowfully prone to knee jerk responses [FN209].

It has been argued that “[p]oliticians and judges allegedly pay no attention to comparative law because it is regarded as too complicated and theoretical for a generalist audience”. [FN210] Restating the main principles gleaned from pertinent models into an orderly compilation aspires to assuage these concerns as well.

4. CONCLUSION: RESTATING RECURRING PRINCIPLES FOR JUDICIAL CONVENIENCE AND COHERENCE

To recapitulate, this paper made two arguments: *First*, it exposed the judicial impetus for turning to foreign experience and highlighted *recurring themes* in counter-terrorism adjudication, focusing as a first step on two models deemed coherent*111 and experienced [FN211]: the German and Israeli models, which both, like Canada, draw on proportional analysis. The purpose was a first attempt at *distilling* the chief principles arising therefrom in order to establish a preliminary set of criteria for selecting sources *Second*, *this paper* advocated eventually compiling these and other relevant extracted judicial doctrines into a framework of analysis in advance of crisis; a “Restatement” of sorts that courts reviewing security matters can draw upon.

As an opening step towards that end [FN212], and as previously discussed, the features forming the basis of such a framework include, but are not limited to:

- Proportionality analysis reviewing the legality rather than the very wisdom of security measures;
- Flexible case-oriented analysis, mindful of security spillover into other areas of law;
- *Ex post* window or *margin of maneuver*;
- Suspension of remedies;
- Rights discourse disposing with the “security versus rights” canard;
- Optimizing, rather than conflicting rights.
- Affirming the right to life, the freedom to live free from terrorism and the positive duty to protect life *qua* part of dignity alongside the “negative” liberties, to use *Berlinian* parlance of Freedom to versus Freedom from.

Cognizant of these shared values and tools “[c]ourts may realize that the decision of a foreign court is persuasive and may adopt similar reasoning, not because the reasoning is contained in a judicial opinion,

but because of the reasoning itself” [FN213]. Undoubtedly, Canadian judges can both learn from and contribute to this comparative restatement of constitutional principles [FN214]. *Inter alia* because they are already familiar with many of the above-cited mechanisms, including proportionality techniques, contextual analysis [FN215], *ex ante* flexibility [FN216] and suspension of remedies*112 [FN217]. These, it was posited, are tools that enable and indeed encourage the legislator to go back “to the drawing board” without renouncing its place within the separation of powers, thus rendering painful restrictions more palatable [FN218].

In effect, legislative and executive compliance with judicial decisions in the national security context, as evidenced by the German and Israeli government reconsidering and adjusting the means they originally selected to fulfill security objectives so that they comport with constitutional imperatives [FN219], attests to the efficacy of the judicial tools systematically employed in the models surveyed [FN220]. Although it cannot claim to redress the profound deficiencies relating to counterterrorism adjudication, distilling and compiling the principles of comparative constitutional law in the security context is condign with optimizing democratic commitments*113 [FN221], reinforcing the relationship between the Courts and society [FN222], and indeed curtailing much maligned *ad hoc* or selective borrowing of foreign sources. The preceding has argued that placing case studies of coherent models, as above, in a broader theoretical context in an effort to clarify the recurring principles underlying counter-terrorist adjudication can assist judges in doing precisely that.

[FN1]. A. Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *Harv. L. Rev.* 16, 111 (2002).

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[FN1]. Anne-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191, 202 (2003).

[FN2]. *R. v. Oakes*, [1986] 1 S.C.R. 103. See *A (F.C.) v. S.S.H.D.*, [2004] UKHL 56. Lord Bingham's opinion is replete with references to comparative law, including American jurisprudence. Specifically, *inter alia*, paragraph 39 makes reference to Laforest J.'s decision in *RJR Macdonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199; paragraph 46 discusses discrimination with reference to American jurisprudence. As: “Constitution drafters and/or courts in South Africa, Hong Kong, India, Namibia, New Zealand, the U.K., among others, have referred to the Canadian Test of proportionality.” See V. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press, 2006); Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and the Interpretation of Human Rights Provisions*, 1 *U. Pa. J. Const. L.* 176, 186-87 (1998), *Om Kumar v. Union of India*, [2001] 1049 LRI 4, 34 (2000); *Kausea v. Minister of Home Affairs*, 1995 (11) BCLR 1540, 1995 SACLX 273 (Supreme Court of Namibia); *Royden v. Bourrough of Wirral*, 2002 WL 31523290 83 (QB Admin., Ct 2002); [2002] EWHC 2484 83; *No. Regl. Health Auth. v. Human Rights Commn.*, [1998], 2NZLR 218 (High Court Auckland 1997).

[FN3]. Expression attributed to Anne-Marie Slaughter. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191, 202 (2003).

[FN4]. See John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 *AM. J. COMP. L.* 545, 545 (1995) (“I remind students of the justification that was given them when they were asked to learn Latin in school: We study Latin to learn English. So with comparative law. American law students are not training to become lawyers or judges in Berlin or Paris. The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law.”)

[FN5]. The *Restatements of the Law* are books published by the American Law Institute as scholarly refinements of black letter law, to “address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was”. They were the first undertakings of the

Institute after its establishment in 1923 and were originally supported by grants from the Carnegie Corporation.) <http://www.ali.org/>.

[FN6]. More generally, see Lorraine E. Weinrib, “Constitutional Conceptions and Constitutional Comparativism” in Vicki C. Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, CT: Praeger Publishers, 2002) 3

[FN7]. David Beatty has dealt with one specific principle -- proportionality, which he deems universal. See David Beatty, “Proportionality as a principle of World Constitutionalism” from *The Ultimate Rule of Law* (160-64) (2004). Beatty speaks of universal judicial reliance on proportionality.

[FN8]. Borrowing the terminology from the *Restatements of the Law*; these are books published by the American Law Institute as scholarly refinements of black letter law, to “address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was.” (They were the first undertakings of the Institute after its establishment in 1923 and were originally supported by grants from the Carnegie Corporation.) Available at <http://www.ali.org/>.

[FN9]. See Part II *infra* for a more detailed discussion of the respective models' coherence and use of a three pronged proportionality test.

[FN10]. Frederick L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000). cited by Bijon Roy, “An [Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation](#)”, (2004) 62 U.T. Fac. L. Rev. 99-148.

[FN11]. Mary Glendon describes a “brisk international traffic in ideas about rights,” observing that “in Europe generally ... and in Australia, Canada, and New Zealand, national law is increasingly caught up in a process of cross-fertilization among legal systems.” Mary A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991) at 158. See also Christopher McCrudden, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights” in Katherine O'Donovan & Gerry R. Rubin, eds., *Human Rights and Legal History* (Oxford: Oxford University Press, 2000) 29 at 30.

[FN12]. Sujit Chodhury, “[Globalization in Search of Justification: A Theory of Comparative Constitutional Interpretation](#)” 74 *Ind. L.J.* 819 at 825-26. See also, Günter Frankenberg, Critical Comparisons: Re-Thinking Comparative Law, 26 *Harv. Int'l L.J.* 411 (1985) and Mary Ann Glendon, Abortion and Divorce in Western Law (1987) at 142.

[FN13]. Sujit Chodhury, “[Globalization in Search of Justification: A Theory of Comparative Constitutional Interpretation](#)” 74 *Ind. L.J.* 819 at 825-26. See also Ran Hirschl, “The [Question of Case Selection in Comparative Constitutional Law](#)” (2005) 53 *Am. J. Comp. L.* 125.

[FN14]. *Id.* See also H. Patrick Glenn, *Persuasive Authority*, 32 *McGill L.J.* 261, 294 (1987) observing that approximately 60% of the citations of Quebec courts are to sources other than Quebec decisions”. Not surprisingly then, as Sujit Choudhry observes, “Constitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication”. See, *Migration as a New Constitutional Metaphor*, in *The Migration of Constitutional Ideas* (Sujit Choudhry ed., Cambridge University Press, 2005).

[FN15]. Sujit Choudhry, who argues that “the legitimacy of universalist modes of comparative constitutional reasoning will constantly be put in question”, skillfully summarizes the dialectic between the traditional isolationist model (thusfar adopted by the U.S.) and the increasing appeal of comparative constitutional law: “The increased migration of constitutional forms stands at odds with one of the dominant understandings of constitutionalism -- that the constitution of a nation emerges from, embodies, and aspires to sustain or respond to a nation's particular national circumstances, most centrally, its history and political culture” S. Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 *Int'l J. Const. L.* 1 (2004).

[FN16]. See Roger P. Alford, *In Search OF a Theory for Comparative Constitutionalism*, 52 *UCLA L. Rev.* 639 (2005). See also David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. Rev.* 539, 551 (2001). According to Fontana, Justices Stevens, Kennedy, Ginsburg, and Breyer, and the recently retired Justice O'Connor, are all proponents of "ahistorical comparativism.". Thus for instance in *Atkins v. Virginia* 536 (regarding the death penalty for the developmentally disabled) U.S. 304 (2002). Justice Stevens noted: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" *Id.* at 316-17 (Stevens, J.) See Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005), in 99 *Am. Soc'y Int'l L. Proc.* 351, 355 (2005) [hereinafter Ginsburg ASIL Address]; see also *Roper v. Simmons*, 543 U.S. 551, 587 (2005). See also Justice Kennedy's opinion in *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003). For a more detailed discussion of the use of comparative sources by current U.S. Supreme Court Justices see David C. Grey, *Why Justice Scalia Should be a Comparative Constitutionalist.. Sometimes*, (2007) 59 *Stan. L. Rev.* 1249 (2007).

[FN17]. Keynote Address, 97 *ASIL PROC.* 265, 265 (2003) (quoting Ruth Bader Ginsburg & Deborah Jones Merritt, "Affirmative Action: An International Human Rights Dialogue", *Fifty-first Cardozo Memorial Lecture* (Feb. 11, 1999), in (1991) 21 *Cardozo L. Rev.* 253, 282. See also Roger Alford, *Misusing International Sources to Interpret the Constitution*, 98 *Am. J. Int'l L.* 57 (2004) and generally Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 *Colum. L. Rev.* 537 (1988).

[FN18]. In Anne-Marie Slaughter's words: "Justice Breyer's remarks on comparative constitutional law, if they had appeared in a law review article, would have been quite unremarkable As part of a judicial opinion, they were altogether remarkable. Why should that be? The reason is that if Justice Breyer's insertion into the case of comparative constitutional law materials had gone unchallenged, it would have been a step towards legitimizing their use as points of departure in constitutional argumentation ..." *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191, 202 (2003).

[FN19]. Referred to as "The American Anomaly" by the Harvard Law Review, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 *Harv. L. Rev.* 2049, 2064 (2001). See also Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *Tulsa L.J.* 15, 24 (1998).

[FN20]. See Ruti G. Teitel, *Comparative Constitutional Law in a Global Age*, 117 *Harv. L. Rev.* 2570 (2004). See Justice Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 15, 2002), in 96 *Am. Soc'y Int'l L. Proc.* 348, 349, 350 (2002); see also *Terrorism and Civil Liberties*, in *Global Constitutionalism: Privacy, Proportionality, Terrorism and Civil Liberties* (Paul Gewirtz & Jacob Katz Cogan eds., Supp. 2002); *Terrorism: Detention, Judicial Responsibilities*, in *Global Constitutionalism: Terrorism, Freedom of Expression, the Proposed European Constitution* (Paul Gewirtz & Jacob Katz Cogan eds., Supp. 2003). "Following the dialogical approach, the potential for comparative constitutional analysis goes beyond its uses in domestic constitutional adjudication. When engaged in by a transnational judiciary, comparativism offers the potential for global solidarity" See Anne-Marie Slaughter, *A Global Community of Courts*, *supra* note 108, at 218-19 (opining that transnational adjudication can contribute to a "global community of courts"). See also Kersh *supra*.

[FN21]. Saby Ghoshray, "'Outsourcing Authority?': Citation to Foreign Court Precedent in Domestic Jurisprudence: To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism and Consequentialism", (2006), 69 *Alb. L. Rev.* 709, pp. 741-742, 710. According to Ghoshray: <<Exploring the trajectory of foreign citation in the Court rests on an unambiguous understanding of the jurisprudential philosophy of the Justices>> at 714.

[FN22]. See Christopher McCrudden, "A Common Law of Human Rights? Transnational Judicial

Conversations on Constitutional Rights” in Katherine O'Donovan & Gerry R. Rubin, eds., *Human Rights and Legal History* (Oxford: Oxford University Press, 2000) 29 at 30.

See also Bijon Roy, “An [Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation](#)”, (2004) 62 U.T. Fac. L. Rev. 99-148, para 76.

[FN23]. Bijon [supra at 102](#). See Lorraine E. Weinrib, “Constitutional Conceptions and Constitutional Comparativism” in Vicki C. Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, CT: Praeger Publishers, 2002) 3.

[FN24]. For a more thorough discussion, see Ken I. Kersch, The [New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law](#), 4 *Wash. U. Global Stud. L. Rev.* 345, 353 (2005) citing Dworkin; See also Mark C. Rahdert, “[Comparative Constitutional Advocacy](#)”, 56 *Am. U.L. Rev.* 553, p.5.

[FN25]. Chaïm PERELMAN, <<Droit positif et droit naturel>>, dans Chaïm PERELMAN, *Le raisonnable et le déraisonnable en droit: au-delà du positivisme juridique*, Paris, L.G.D.J., 1984.

[FN26]. For a discussion of positivism please see Hans KELSEN, <<Allgemeine Theorie der Normen>>, French translation available: Christophe GRZEGORCZYK, Françoise MICHAUT et Michel TROPER (dir.), *Le positivisme juridique*, Bruxelles-Paris, Éditions L.G.D.J., 1992, p. 206. Another example would be the South African case, eloquently discussed in Dyzenhaus' *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1994).

[FN27]. See Vivian Grosswalt Curran, [Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law](#), 35 *Cornell Int'l L.J.* 101, 103 (2002): “In the post-war search to identify the culprit for the judicial betrayal of right and of law in Germany and France, judicial methodology became a target of attack in both countries. More specifically, the continental European tradition of viewing judges as essentially passive in the face of laws passed by a higher authority, and therefore as inclined towards judicial formalism or positivism, was blamed widely for the grave substantive injustice that the courts of Nazi Germany and Vichy France perpetrated through judicial decisions”.

[FN28]. *i.e.* procedural democracy.

[FN29]. See Vicky Jackson and Mark Tushnet eds., *Comparative Constitutional Law* (Foundation Press, 2006) at 295: “As Joseph Raz concludes: “to the extent that the validity of consent rests on the intrinsic value of autonomy it cannot extend to acts of consent that authorize another person to deprive people of their autonomy”. Thus, what began as an argument for consent as the ultimate legitimator has turned into an argument for a closely related but more fundamental value, that of human dignity..”.

[FN30]. Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 36-47 (1979). As Grey recounts (citing Elster). See David C. Grey, [Why Justice Scalia Should be a Comparative Constitutionalist.. Sometimes](#), 59 *Stan. L. Rev.* 1249 (2007): “Jon Elster analogizes the Constitution to the ship's mast during Odysseus's escape from the sirens. As his ships approached the *Sirenum scopuli*, Odysseus feared that he and his men would be lured to their destruction by the seductive melodies of the sirens' song. He ordered his men to stuff their ears with wax and had himself lashed to the mast of his ship so that he could hear their song without placing himself and his ship at risk. Weakened by the chorus, Odysseus begged his men to untie him. As ordered, however, they left him bound until they made safe passage. Elster suggests that the Constitution plays a similar role in our democracy”. Interestingly, Justice Scalia has a similar view, noting that the Constitution's “whole purpose is to prevent change -- to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.” Grey at fn 97 citing Scalia in Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws”, in *A Matter of Interpretation: Federal Courts and the Law* 3 (Amy Gutmann ed., 1997) at 41-42.

[FN31]. In Kersch's words: “the modern interest in deepening our comparative understanding of

constitutions began after the Second World War, when, following dark days, the free world's sovereign nations (including, in time, the newly de-colonized nations) manifested a commitment to constitutional self-government. See Kersh supra.

[FN32]. As David Dyzenhaus warns in *The Permanence of the Temporary: Can Emergency Powers be Normalized*, in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (R.J. Daniels ed. Toronto: University of Toronto Press, 2001).

[FN33]. David Held speaks to this changed reality, describing its noteworthy evolution in a difference context: "States today are locked into a world of multilayered authority and multilayered governance ... today, some of the most fundamental problems we face, are no longer issues that can be resolved by states or a people acting alone... We're in a world of 'overlapping communities of fate' where the fate of different peoples is interconnected ... Decisions made by other political communities impinge on one's own". See D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995).

[FN34]. See Y. Mersel, *Judicial Review of Counterterrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era* (2006) 38 N.Y.U. J. Int'l L. & Pol. 67. According to Mersel at 100 "the Court envisions the terrorist threat as an international -- rather than a solely domestic -- problem Accordingly, the standards for adjudicating counter-terrorism cases, as well those involving human rights and national security, are international standards"

[FN35]. By which I mean "the suicidal element and the desire for total destruction of the enemy without distinction between targets, be they civilian or governmental ..." See Andreas Sajo, *From Militant Democracy to the Preventive State*, 27 *Cardozo L. Rev.* 2255 (2006); Says Sajo: "Terrorism, in its essence, is an attempt to undermine democracy and the rule of law by acts so outrageous that democratic society is driven from the moderate center from where it normally governs itself to the extreme right or left from where it may develop authoritarian measures to defend itself". See also John Hedigan, *The European Convention on Human Rights and Counter-Terrorism*, (2005) 28 *Fordham Int'l L.J.* 392 (2005).

[FN36]. See Eyal Benvenisti, *United We Stand: National Courts Reviewing Counter-terrorism Measures*, in *Democracy and the Fight against Terrorism* (Andreas Bianchi and Alexis Keller, forthcoming 2007).

[FN37]. Saby Ghoshray, "'Outsourcing Authority?', Citation to Foreign Court Precedent in Domestic Jurisprudence: To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism and Consequentialism", (2006), 69 *Alb. L. Rev.* 709, pp. 741-742, 711.

[FN38]. See e.g. Lisa Sofio, "Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation", 2006, 30 *Hastings Int'l & Comp L. Rev.* 131, 138; "Terrorism is an international problem and other countries have labored over how best to fight it while still guaranteeing civil liberties. Foreign experiences with anti-terrorism laws may be (...) useful".

[FN39]. Id. "For example, when Breyer J. was reviewing a case involving the Establishment Clause and school vouchers, he was uncertain how much dissension this issue would cause in society. [Justice] Breyer looked to the experiences of Britain and France, which both subsidize private religious schools, to help predict how Americans would react to subsidies for religious schools here. While Americans are different from the French and British, their experiences still have predictive value to an American judge speculating on how his decision will affect society".

[FN40]. Id.

[FN41]. Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation", (2004) 62 *U.T. Fac. L. Rev.* 99-148, para 76.

[FN42]. Lisa Sofio, "Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation", 2006, 30 *Hastings Int'l & Comp L. Rev.* 131, 138.

[FN43]. As demonstrated time and again by the vast national security cases decided in whole or in part on the basis of domestic constitutional norms. See jurisprudence outlined in Part II *infra* for example.

[FN44]. See Anne-Marie Slaughter *supra* note 40 at at 126: “Communication requires a modicum of common ground. At a minimum, courts must perceive their interlocutors as courts, as institutions engaged in the application and interpretation of the law. Further, there must be tokens of recognition by which courts can recognize each other as courts and can ensure that they are operating on a similar conception of what it means to be a court. For the courts of liberal democracies, the evidence required will be evidence of commitment to, and understanding of, the rule of law. At a minimum, such courts must perceive that their interlocutors conceive of themselves as servants of the law-of rules and standards neutrally and uniformly applied-rather than as the direct instruments or agents of political masters” also citing Anne-Marie Burley, [Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine](#), 92 *Colum.L.Rev.* 1907, 1916-22 (1992).

[FN45]. Aharon Barak, “Constitutional Human Rights and Private Law” (1996) 3 *Rev. Const. Stud.* 218 at 242.

[FN46]. K. Eltis, *A More Nuanced Approach to Judicial Review and the Counter Majoritarian Dilemma* (with Layaliza Klein, unpublished, Jerusalem, 2000).

[FN47]. According to Justice Barak: “Although judicial independence is *sine qua non* to the judicial role, it constitutes a necessary but insufficient condition. In effect, the individual judge and the judicial branch cannot effectively function without public confidence. The public's confidence in the judiciary represents an indispensable precondition to the proper functioning of the judge's role. As the judge carries neither sword nor purse, he is dependant exclusively upon the public's trust ...”. See A. Barak, *The Role of the Judge in a Democracy*, *Justice in the World Magazine* (Online edition) Available at http://www.justiceintheworld.org/info/rj_barak.htm.

[FN48]. *The Value of Comparative Constitutional Law*, 9 *J. Marshall J. Prac. & Proc.* 685 (1976).

[FN49]. Term attributed to Canadian Supreme Court Justice Claire L'Heureux-Dubé (ret.), [The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court](#), 34 *Tulsa L.J.* 15, 24 (1998). See also 114 *Harv. L. Rev.* 2049 (2001) and Anne-Marie Slaughter, [A Typology of Transjudicial Communication](#), 29 *U. Rich. L. Rev.* 99 (1994). Anne-Marie Slaughter's argument regarding the influence of different courts on one another through their engagement in “judicial dialogues”. See also Laurence R. Helfer and Anne-Marie Slaughter, [Toward a Theory of Effective Supranational Adjudication](#), (1997) 107 *Yale L.J.* 273 (1997). See also K. Roach, [“Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience”](#) (2005) 40 *Texas International Law Journal* 537.

[FN50]. According to Louis Henkin: “Insofar as there is contemporary movement toward constitutional convergence, the movement occurs primarily in the area of international human rights, which one might characterize as the “law of humanity”. the most robust being transnational human rights law peremptory norms, elucidated in and by comparative law, structure a threshold rule of law across nations that operate as an unwritten constitutional regime for a global order. Substantial agreement among national constitutions and conformity with international conventions (p. 3) demonstrate a consensus on basic human rights” (see also on the “law of humanity,” Ruti G. Teitel, [Humanity's Law: Rule of Law for the New Global Politics](#), 35 *Cornell Int'l L.J.* 355 (2002).

[FN51]. K. Eltis, *The Democratic Legitimacy of the “International Criminal Justice Model”*: *The Unilateral Reach of Foreign Domestic Law and the Promise of Transnational Constitutional Conversation*, in *British and Canadian Perspectives on International Law* (Christopher P.M. Waters ed. London: Martinus Nijoff, 2005).

[FN52]. See, e.g., Justice Scalia's dissent in *Roper* objected to this transplant of foreign legal norms:

“More fundamentally, however, the basic premise of the Court’s argument -- that American law should conform to the laws of the rest of the world -- ought to be rejected out of hand.” [Roper, 543 U.S. at 624](#) (Scalia, J., dissenting).

[FN53]. Regarding their discretionary character see President Barak’s response to Justice Scalia’s assault on the use of comparative law. A. Barak, *Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia*, available at http://64.233.167.104/search?q=cache:4-YA5Xp5740J:www.fulbright.org.il/fileadmin/fulbright/editor/images/news/Documents_for_news/Barak_50th_symposium_speech.doc+barak+scalia+comparative+law+discretion&hl=en&ct=clnk&cd=1&gl=ca.

[FN54]. Brought to the highest level of abstraction.

[FN55]. A.M. Slaughter, [A Typology of Transjudicial Communications](#), 29 U. Rich L.Rev. 99 119 (1994).

[FN56]. Anne-Marie Slaughter, “[A Typology of Transjudicial Communication](#)” (1994) 29 U. Rich. L. Rev. 99 at 157. See also discussion by Bijon Roy *supra*.

[FN57]. See Ran Hirschl, Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend. *Canadian Journal of Law and Jurisprudence* (2002).

[FN58]. See Ostberg, Matthew W. Wetstein, Craig R. Ducat, <<Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precent by the Supreme Court of Canada>> *Canadian Journal of Political Science*, Vol.34 No. 2 (Jun., 2001), pp. 377-399.

[FN59]. See Aharon Barak, [Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy](#), 116 *Harv. L. Rev.* 16, 110-14 (2002).

[FN60]. Other European countries -- particularly France and the U.K. have tremendous experience with terrorism and will need to be examined in subsequent work towards the Restatement. For a relevant overview see Erik van de Linde et al., RAND Europe, Quick Scan of Post 9/11 National Counter-Terrorism Policymaking and Implementation in Selected European Countries 50 (2002) available at <www.rand.org/publications/MR/MR1590/MR1590.pdf> (visited Mar. 3, 2004).

[FN61]. Bruce Ackerman, [The Rise of World Constitutionalism](#) (1997) 83 *Va. L. Rev.* 771.

[FN62]. Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence”, *University of Toronto Law Journal* 57.2 (2007) 383-397: “Here the proportionality test has been applied since the late 1950s, whenever the Constitutional Court has had to review laws limiting fundamental rights, or administrative and judicial decisions applying such laws. From Germany the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe. Likewise, it is in use in the European Court of Human Rights and in the European Court of Justice. The German and Canadian proportionality tests differ slightly in their terminology but look more or less alike in substance”.

[FN63]. A. Barak, Proportionality, *University of Toronto Law Journal* 57.2 (2007) 369-382.

[FN64]. See Y. Mersel *supra* at note 31.

[FN65]. (<http://www.carleton.ca/cciss/justice.htm>).

[FN66]. In addition to the below-referenced, the Israeli model is also especially apt for the similarities between the Israeli Basic Law and the Canadian Charter, upon which it is in part predicated. Specifically, Israel has included a limitation clause and notwithstanding clause in its Basic laws, premised on the Canadian model. See Lorraine Weinrib, “Israel Debates Canada’s Notwithstanding Clause” *Law Times* (June 4th 2007). available at http://www.lawtimesnews.com/index.php?option=com_content&task=view&

id=2121&Itemid=82.

[FN67]. And or steps undertaken towards that end, regardless of purpose. See Professor Ruth Wedgwood's address at the International Conference on the Administration of Justice and National Security in Democracies (Ottawa, Ontario 10-12 June 2007).. See also Article 2(1)(b) of the Terrorist Financing Convention (an offence-defining provision):

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act

[FN68]. And can therefore be characterized as genocidal. See Irwin Cotler, "[Terrorism, Security and Rights: The Dilemma of Democracies](#)" (2002) 14 *Nat'l J. Const. L.* 13: "Moreover, these terrorist entities, by their own acknowledgement and assertion, publicly call for the destruction of a member state of the international community (Israel), and for the killing of Jews wherever they may be. Indeed, they have patented what I have referred to elsewhere as "genocidal bombing" -- terrorist suicide bombings that -- by the terrorists own covenant -- call publicly for the murder of civilians by reason only of their belonging to a national or religious group" [at p. 48](#).

[FN69]. In some ways similar yet in others distinct from the German model of individual referrals, touched on below and the Spanish *Amparo* writ (which for its part -- unlike the Israeli model -- cannot attack a law directly). For a thorough discussion of the procedure see Jackson and Tushnet *supra* Note 2 at 786 ff.

[FN70]. "Israel's Supreme Court issues more than 1,000 reasoned, detailed decisions a year, compared with about 80 a year by its American counterpart". Haaretz Editorial, "Supreme Court Supremacy" Haaretz Online edition, www.haaretzdaily.com (June 26th 2007).

[FN71]. See, e.g., *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al.* (1995), 49 P.D. 221, ¶98 *inter alia*.

[FN72]. As Yigal Mersel remarks *supra* Note 34 at 72: "The Israeli model is a coherent one ... for it boasts. special legal mechanisms for balancing human rights and public safety".

[FN73]. HCJ 7957/04.

[FN74]. As a pillar of International Law (citing J.S. Pictet, *Developments and Principles of International Humanitarian Law* 62 (1985) and of Israeli administrative law. It is also a constitutional principle enshrined in Article 8 of the Basic Law.

[FN75]. As per the Court (citing an earlier decision *Physicians for Human Rights*): "Judicial Review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of military activity".

[FN76]. Announced the Court: "According to the principle of proportionality, the decision of an administrative body is only legal if the means used to realize the government objective is of proper proportion. The principle of proportionality focuses therefore on the relationship between the objective whose achievement is being attempted and the means used to achieve it (citing the Canadian use of this technique). (...) The principle of proportionality applies to our examination of the separation fence".

[FN77]. The second fence ruling -- the Alfei Menashe case dealt with with the legality of the security fence in the area of Alfei Menashe. Alfei Menashe is an Israeli community in Samaria, southeast of the Palestinian town of Qalqiliya, approximately 4 km beyond the Green Line.

[FN78]. Pres. Barak's opinion paragraph 4 of the judgment.

[FN79]. *Id.*

[FN80]. *Id.* See Yigal Mersel *supra* Note 34 generally.

[FN81]. *Id.*

[FN82]. HCJ 5100/94, *Pub. Comm. Against Torture v. Israel*, [1999] 53(4) P.D. 817, available from the official Israel Supreme Court website: <http://elyon1.court.gov.il/eng/home/index>. and reprinted in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, Jewish Virtual Libr., ¶¶15-17, http://www.jewishvirtuallibrary.org/jsourc/Politics/terrorism_law.pdf.

[FN83]. Internal security agency; roughly equivalent to the FBI.

[FN84]. As distinguished by the so called “enhanced” interrogation methods employed by U.S. agents, involving for example, water boarding, as described by an ABC news report: “The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt”. available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>. See also, Andrew Sullivan, ““Verschärfte Vernehmung” The Atlantic Online, available at http://andrewsullivan.theatlantic.com/the_daily_dish/2007/05/verschfte_verne.html controversially describing American <<enhanced interrogation methods>> and those employed by the Gestapo.

[FN85]. Opined the Court at para. 37: “If the state wishes to enable GSS investigators to utilize physical means in interrogations it must enact legislation for this purpose ...”.

[FN86]. See Mersel *supra* Note 34 at 82.

[FN87]. *Id.* ¶¶33-35.

[FN88]. [2005], available at http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.pdf.

[FN89]. *Id.* at 14.

[FN90]. HCJ 769/02_ *The Public Committee against Torture in Israel v. The Government of Israel*

[FN91]. The Court highlighted the emphasis placed on proportionality in International law pertaining to armed conflict (*para* 42) Action may only be undertaken in the face of acute danger (President Barak gives the example of a sniper shooting at civilians who may be shot at by the military). Deadly force may not be used if less harmful means such as arrest is available.

[FN92]. According to Justice Beinisch of the Supreme Court of Israel (as she then was): “Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it”.

[FN93]. See R. Schodorf, *Extra State Armed Conflict: Is there need for a New Legal Regime?* 37 J. Int’l. L. & Pol. 1 (2007). citing decision *Ibid.*, at §40.

[FN94]. At Para. 25: “a new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality (*see Jami’at Ascan*, at p. 800; *Ajuri*, at p. 381). In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants”.

[FN95]. For instance because they do not comply with the laws of war as do combatants. Citing U.S. jurisprudence:

25. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. The Chief Justice of the Supreme Court of the United States, *Stone C.J.* discussed that, writing:

“By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful” (*Ex Parte Quirin*, 317 U.S. 1, 30 (1942); see also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

[FN96]. “The Basic Principle: Civilians Taking a Direct Part in Hostilities are not Protected at Such Time they are Doing So” This is a fundamental principle of customary international law expressed in Article 51(3) of the 1977 Additional Protocol 1 to the Geneva Convention: “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take direct part in hostilities”. See R. S. Schondorf’s analysis, citing the Court: iv) terrorists acting against Israel are not combatants under the definition of that term in international law. but rather civilians; (v) there is no third legal category of “unlawful combatants” under The Hague Regulations, the Geneva Conventions or customary international law; and (vi) although civilians are not to be harmed due to their status as civilians, this protection is not granted to civilians taking direct part in hostilities, in accordance with Article 51(3) of Additional Protocol I (API), which was said to represent customary international law. In interpreting Article 51(3), which provides that “[c]ivilians shall enjoy [protection] unless and for such time as they take a direct part in hostilities”, the Court adopted a relatively expansive interpretation of (a) “taking part in hostilities”; (b) “taking direct part”; and (c) “for such time”. (footnotes omitted). R. Schondorf, “Are ‘Targeted Killings’ Unlawful? The Israeli Supreme Court’s Response: [A Preliminary Assessment](#)” (2007) 5 *J. Int’l Crim. Just.* 301.

[FN97]. As per Mersel *supra* Note 34. Opined the Court: “a civilian bearing arms (opened or concealed) who is on his way to the place where he will use them ... is a civilian taking direct part in hostilities. So are those who decide on terrorist acts or plans them ... on the other hand, civilians who offer general support for hostilities ... such as logistic or financial aid. take indirect part in hostilities”.

[FN98]. HCJ 769/02_The Public Committee against Torture in Israel v. The Government of Israel

[FN99]. *Id.*

[FN100]. See Schondorf *Ibid.*, at §40.

[FN101]. And at para 45: The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests (see *Beit Sourik Village Council v. Government of Israel* [2004] HCJ 2056/04, at p. 850; HCJ 7052/03 *Adalah -- The Legal Center Arab Minority Rights in Israel* (unpublished, paragraph 74 of my judgment, hereinafter *Adalah*). It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. In one case I stated:

“Basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy” (HCJ 8276/05 *Adalah -- The Legal*

Center for Arab Minority Rights in Israel v. The Minister of Defense (unpublished, paragraph 30 of my judgment; see also ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002)).

[FN102]. Argues Mersel *supra* Note 31 at 92: “Judges have a duty to balance national security and human rights, in times of peace and of war. Terrorist actions and counter-terrorism activity are not exceptions to the rule, but rather a more difficult case, as the terrorists do not respects the laws of war”.

[FN103]. HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* (online English translation at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf at Para 61.

[FN104]. H.C.J. 3451/02 [2002], *Almandi v. The Minister of Def.*, 56(3) P.D. 30, P 9 (Isr.), available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>.

[FN105]. See HCJ 7015/02 [2002], *Ajuri v. IDF Commander in the West Bank*, 56(6) P.D. 352, P 41 (Isr.), available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> (quoting HCJ 168/91, *Morcos v. Minister of Def.*, 45(1) P.D. 467, 470).

[FN106]. See HCJ 7015/02 [2002], *Ajuri v. IDF Commander in the West Bank*, 56(6) P.D. 352, P 41 (Isr.), available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> (quoting HCJ 168/91, *Morcos v. Minister of Def.*, 45(1) P.D. 467, 470).

[FN107]. See Aviad HaCohen, “Law and Morality in Wartime” (2007) 44 *Justice* 4: “the Torah commands the king to carry a Torah scroll with him when he goes forth to war ... the teaching implied in this commandment is that all the laws and commandments are binding on the king and his people even in times of war” (citing Maimonides, *Mishne Torah*, Laws of Kings 3:1. See also, A. Hacohen “Morality and War -- a Selected Bibliography” in *Arakhim beMivhan Halchima* (Morality in the Test of Battle [Hebrew]) 252-56 (1983); A. Sherman, “Halachic Principles in Wartime Morlaity” 9 *Techumim* 231-40 (1988) [Hebrew]. E. Gross, *The Struggle of Democracy Agaist Terrorism- The Legal and Moral Aspects* (2004) *inter alia*.

[FN108]. Citing English Judge Scrutton, quoted by Israeli Supreme Court President Agranat in HCJ 73/53 *Kol Ha'Am v. Minister of the Interior*, 7 P.D. 871, 880.

[FN109]. Perhaps inadvertently, since it formally draws only from secular sources but is inspired by both “Jewish and democratic values” in synergy ...

[FN110]. In HCJ 3451/02 *Almadani et al. v. Minister of Defence*, 56 (3) P.D. 30-34 *inter alia*. That oft quoted statement is echoed in various opinions, including that of Deputy President Mishael Cheshin: “We will not falter in our efforts for the rule of law ... Even when the trumpets of war sound, the rule of law will make its voice heard” HCJ 1730/96 *Sabia v. IDF Commander in Judea and Samaria*, 50 (1) P.D. 369.

[FN111]. Remarks of the Right Honourable Beverley McLachlin, P.C. Judicial Independence May 11, 2001 Available at: http://www.sccsc.gc.ca/aboutcourt/judges/speeches/independence_e.asp.

[FN112]. Paragraph 5.

[FN113]. (6 August 2004), [2004] HCA 37, [219 CLR 562](#), [208 ALR 124](#), [78 ALJR 1099](#). Available at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2004/37.html?query=barak>

[FN114]. Available at: <http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/0ebea260ed5209a680256ccc003b0676?OpenDocument&Highlight=0,barak>

[FN115]. “The principal (sic) -- nearly ubiquitous- judicial tool of which the Court availed itself in this quest is balancing, guided by considerations relating to proportionality” see Mersel *supra* Note 31.

[FN116]. See Jackson and Tushnet *supra*. citing Professor Gelpe: “According to Professor Gelpe different

versions of proportionality review are in use: one “is review to see if the administrative authority chose the method of obtaining the goal that causes the minimal injury to individuals” an approach that looks only to the means chosen by the authority and not to its goals and resembles the ‘narrow tailoring requirement found in U.S. caselaw involving fundamental rights [that is only partially true of the Israeli model that, while focusing on means, does at times examine the propriety of the objective, although to a far lesser extent]. The other version also asks “whether there is an appropriate relationship between the utility of the administrative action and the injury it causes” which is “much more invasive” because “it allows the court to perform not only a cost-benefit analysis (weighing the good it will do against the bad), but also a rough sort of marginal cost-benefit analysis (asking whether an incremental action designed to achieve a greater good justifies the incremental injury it causes”.

[FN117]. See Hogg and Bushnell's now famous argument in “The Charter Dialogue Between Courts and Legislatures” (1997) 35 *Osgoode Hall L.J.* 75-124.

[FN118]. See Gregoire Webber's critique of the use of balancing and proportionality techniques “The Cult of Constitutional Rights Reasoning” at the VIIth World Congress of Constitutional Law in Athens organized by the International Association of Constitutional Law on June 14, 2007 available at [http://www.enelsyn.gr/en/workshops/workshop15\(en\).htm](http://www.enelsyn.gr/en/workshops/workshop15(en).htm): “despite the pervasiveness of balancing and proportionality in Constitutional scholarship, it is not clear that recourse to these ideas is helpful in resolving the difficult questions involved in limiting rights and other components of a free and democratic society. The discourse of balance and proportionality camouflages the judiciary's thinking underlying the conception of rights and the approach to specifying their content ... The way in which the principle of proportionality generates or leads to precise or particular conclusions is hard to discern”.

[FN119]. See Aharon Barak, *Purposive Interpretation in Law* (Princeton Univ. Press 2005). at p. 180: “Horizontal balancing occurs between values or principles of equal status ... Vertical balancing formulas set the conditions under which certain values or principles prevail over others”.

[FN120]. In A. Bickel's words.

[FN121]. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada*, Agincourt, Ont.: Carswell, 1987 at 86.

[FN122]. “In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted ... our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld”. See Mersel *supra* Note 31.

[FN123]. *Id.* at 107.

[FN124]. See, e.g. Amichai Cohen “The [Principle of Proportionality in the Context of Operation Cast Lead](#)” 35 *Rutgers Law Record* at 32.

[FN125]. *Public Committee*, *supra* note *, at para. 46.

[FN126]. See Amichai Cohen & Yuval Shany, A [Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case](#), 5 *J. INT'L CRIM. JUST.* 310, 317 (2007).

[FN127]. See Yigal Mersel *supra* Note 34 generally.

[FN128]. *Id.* at 94: “The Court's answer in one case will influence how it decides others. If the Court decides, for instance, that soldiers have a duty of care in torts for injuries to bystanders during operational counter-terrorism activity, that ruling may directly affect how the army functions in future operations. As a result, the Court must adopt a coherent jurisprudence regarding the different aspects of counter-terrorism. Following the assumption that terrorism and counter-terrorism have many different ramifications, the Court

must develop a holistic approach to all of these problems”.

[FN129]. See, e.g., CA 1071/96 [2004] *El-Abed v. State of Israel* (unpublished decision) (Isr), available at <http://elyon1.court.gov.il/files/96/710/010/p04/96010710.p04.pdf>; CA 6521/98 [2000] *Buatna v. State of Israel* (unpublished decision) (Isr), available at <http://elyon1.court.gov.il/files/98/210/065/a11/98065210.a11.pdf>. See, e.g., *El-Abed* P 11; CA 1354/97 [1997] *Mahmud v. State of Israel* (unpublished decision) (Isr.), available at <http://elyon1.court.gov.il/files/97/540/013/a07/97013540.a07.pdf>; CA 5964/92 [2002], *Uda v. State of Israel*, 56(4) P.D. 1, 9 (Isr.).

[FN130]. CA 2176/94 [2003], *State of Israel v. Tabanja*, 57(3) P.D. 693, 700 (Isr.).

[FN131]. CA 5604/94 [2004], *Hamed v. State of Israel*, 58(2) P.D. 498 (Isr). *El-Abed* §17.

[FN132]. As the “interrogations” and “preemptive assassinations” cases dealt with below illustrate. This is familiar to Canadians specifically in the security context from Suresh *infra*.

[FN133]. And many others in this vein. For more detail, see Mersel *supra* Note 34.

[FN134]. According to Mersel *supra* Note 34 at 88-89: “The Court declined to adopt a rule holding that the state always bears the burden to prove that the shooting was justified. In a more recent case the Court ruled on the relevant standard of care that must be taken in a negligence case during counter-terror and war activity”.

[FN135]. Mersel, *supra* note 34.

[FN136]. See Mersel *supra* Note 34. It had also recognized, by this suspension, the primary role of the other branches in effectively combating terror” at 98.

[FN137]. *Chaoulli and Zelotis v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35.

[FN138]. See Lorraine Weinrib's critique of the suspension remedy. L. Weinrib, “Suspended Invalidity Orders out of Sink with Constitution” *Law Times* 21 August 2006, available at http://www.lawtimesnews.com/index.php?option=com_content&task=view&id=716&Itemid=82.

[FN139]. *Charkaoui v. Canada*, [2007] S.C.C. 9. See Ip *supra*.: “IRPA's security certificate process was “of no force or effect.” However, the Court suspended its declaration for one year in order to allow the Canadian Parliament to devise a new regime that would pass constitutional muster”.

[FN140]. For a more detailed discussion of the case see K. Roach, “Northern Rights: Canada's Supreme Court Rules on Indefinite Detention” *JURIST FORUM* 2007. Available at: <http://jurist.law.pitt.edu/forumy/2007/02/northern-rights-canadas-supreme-court.php>.

[FN141]. See Gabriele Kett-Straub, “Data Screening of Muslim Sleepers was Unconstitutional” 7 *German Law Journal* No. 11 (2006).

[FN142]. See Christoph Safferling, “Terror and Law -- Is the German Legal System able to deal with Terrorism? The Bundesgerichtshof (Federal Court of Justice) decision in the case against El Motassadeq” *Journal of International Criminal Justice* (2006). Mounir El Motassadeq charged with with (1) abetting murder in 3066 cases and (2) with being a member of a terrorist organization. He was found not guilty in February of 2004. The public prosecutor has appealed against the acquittal to the Bundesgerichtshof BGH. For an in-depth discussion of the saga and its implications -- both social and juridical.

[FN143]. There is a wide corpus of literature on Emergency derogations, a discussion of which far exceeds the scope of this present endeavor. See for instance Andras Jakab, “German Constitutional Law and the Doctrine of ‘State of Emergency’ Problems and Dilemmas of a Traditional Continental Discourse” 7

German Law Journal No 5 (2006) available at <http://www.germanlawjournal.com/article.php?id=725>.

[FN144]. I. Cotler, "[Terrorism, Security and Rights: The Dilemma of Democracies](#)" (2002) 14 *Nat'l J. Const. L.* 13.

[FN145]. See landmark abortion decision 39 BVerfGE 1 (1975) available at <http://www.hrcr.org/safrica/life/39bverfge1.html>. See also *West German Abortion Decision: A Contrast to Roe v Wade* (1976) 9 *John Marshall J. Prac & Proc.* 605.

[FN146]. Said the Court Id.: "The duty of the state to protect every human life may therefore be directly deducted from Article 2, Paragraph 2, Sentence 1, of the Basic Law. In addition to that, the duty also results from an explicit provision Article 1, Paragraph 1, Sentence 2 of the Basic Law since developing life participates in the protection which Article 1 Paragraph 1 of the Basic Law guarantees to human dignity". Quoted by Vicky Jackson and Mark Tushnet eds. *Comparative Constitutional Law* (Foundation Press, 2006) at 115.

[FN147]. To our chagrin therefore, "the complex dilemmas confronting democracies facing terrorist threats -- be they imminently existential or ultimately menacing the foundations upon which democracy rests -- are framed in rhetorically expedient terms. They speak of preserving human rights versus upholding national security. Indeed, talk of rights versus security has become an unchallenged mantra, which inevitably places the proponents of an effective fight against terrorism on the uncomfortable defensive". See I. Cotler, "[Terrorism, Security and Rights: The Dilemma of Democracies](#)" (2002) 14 *Nat'l J. Const. L.* 13.

[FN148]. BBC news website, "France Adopts New Terror Law" (October 31 2001) available at <http://news.bbc.co.uk/1/hi/world/europe/1630864.stm>.

[FN149]. As Georg Nolte observes in his edifying comparative article on preventative killings (written prior to the Israeli Supreme Court case): "Terminology prepares for results" See G. Nolte, "[Preventative Use of Force and Preventative Killings](#)" (2004) 5 *Theoretical Inquiries L.* 111.

[FN150]. As Professor Avineri of Hebrew University astutely observes: "the terms they use have a force of their own. He who controls the terms controls the debate" (in Haaretz editorial "The Lie of Post-Zionism" (June 2007) available at Haaretz.com) Mindful of the fact that identifying the "public good" of security is as nebulous as it is diffuse ...

[FN151]. There is an important exception to the above mentioned procedure: *Suit may be brought on the individual's behalf by a special Parliamentary committee, rather than the Court 10 II 2 when the violation is unknown to him or her (i.e. in the case of covert electronic surveillance, for instance)*. Id.

[FN152]. Contrary to American scrutiny tests, which distinguish between first order and second order rights; the higher the interest, the higher level of scrutiny, oft leading to a preset result. Retired Israel Supreme court Justice Dahlia Dorner has written on point.

[FN153]. Term coined by German scholar Robert Alexy. See Robert Alexy, "Constitutional Rights, Balancing and Rationality", *Ratio Juris* 16 (2), 131-140 (2003) and Alexy "[Balancing, Constitutional Rights and Representation](#)" (2005) 3 *Int'l J. Const. L.* 572.

As Grégoire Webber explains in his critique of proportionality: "one must seek to realize each constitutional right within its own value-structure and not for the purpose of maximizing another external value ... one is directed to optimize both a constitutional right *and* a competing principle". Webber discusses the concept in greater detail and criticizes it particularly as it relates to incommensurability and the judiciary's moral preferences coloring the proportionality technique. E.g. "Constitutional Rights must be understood as values [as distinguished from rules] They must be realized to the greatest extent possible, depending on what is legally and factually possible". See G. Webber "The Cult of Constitutional Rights Reasoning" at the VIIth World Congress of Constitutional Law in Athens organized by the International Association of Constitutional Law on June 14, 2007 available at <http://www.enelsyn.gr/papers/w15/Paper%20by%20Gr%20Gr%20CC3%20CA9goire%20C20%20N%20Webber.pdf>.

[FN154]. Id.

[FN155]. Id.

[FN156]. Press Release, Bundesverfassungsgericht, Authorisation to Shoot Down Aircraft in the *Aviation Security Act* Void (Feb. 15, 2006), available at <http://www.bundesverfassungsgericht.de/en/press/bvg06-011en.html>.

[FN157]. Enacted by the Bundestag in June 2004 and came into force in entered into effect on 15 January 2005.

[FN158]. BT-Drs. 15/2361; BT- Plen.Prot. 15/10536-10545; BR-Drs. 827/03, 509/04.

[FN159]. O. Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New *Air-Transport Security Act*", (2006) 7 *German L.J.* 761, available at <http://www.germanlawjournal.com/article.php?id=756>.

[FN160]. The Federal legislature did not have jurisdiction over such matters, which are the province of the Lander.

[FN161]. See Oliver Lepsius, "Liberty, Security and Terrorism: The Legal Position in Germany" (2004) 5 *German Law Journal* 435, http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_435-460_special_issue_Lepsius.pdf (concerning other counterterrorist measures according to German law).

[FN162]. Id. "The Court pointed out that the state was not permitted to violate human dignity (Article 1) when acting to promote the right to life (article 2) but also acknowledged that the state had a duty to protect human life" (para. 19-120).

[FN163]. See Para. 132.

[FN164]. See Para. 121

[FN165]. See Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 305 (1989) observing: "The human dignity clause is almost always read in tandem with the general liberty interest secured by the personality, inviolability, and right-to-life clauses of Article 2. The relationship between Article 1 and Article 2 is symbiotic; all of their provisions nourish and reinforce one another".

[FN166]. According to Charif Bassiouni: "the United Nations has adopted two General Assembly resolutions dealing with the rights of victims: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. See "[International Recognition of Victims' Rights](#)" (2006) 6 *Hum. Rts. L. Rev.* 203.

[FN167]. See Nolte, "Aerial Security Case Law Comment" *Am. J. Int'l L.* (forthcoming 2007). See also Lepsius *supra*.

[FN168]. (para 135) See Nolte commentary *supra*.

[FN169]. Citing Eyal Benvenisti, *United we Stand: National Courts and Counter-terrorism measures in Democracy and the Fight Against Terrorism* (Andreas Bianchi and Alexis Keller, forthcoming 2007).

[FN170]. Argued blanket criminalization of assistance to unlawful aliens violates the constitutional principle of human dignity and similarly violate Article 8 of the declaration of human and civil rights, which requires that criminal penalties be statutorily enshrined.

[FN171]. See Nolte *supra*.

[FN172]. Para 121, 122. See also Klaus “only a case-oriented approach would disclose whether an action violated Article 1’s protection of human dignity” as the “exact content of the State’s duty to protect human dignity was not obvious in all situation”.

[FN173]. BVerfGE 86, 1, 11.

[FN174]. See Yael Aridor Bar-Ilan, “Justice: When Do We Decide?” (2007) 39 *Conn. L. Rev.* 92. Bar-Ilan elaborates on the underlying philosophy: “Aristotle in *Nicomachean Ethics* notes that all universal laws made up in advance are going to be defective in addressing particular decisions Aristotle identifies three important features that lead to the limits of universal rules: first, a system “set up in advance is mutable because it can encompass only what has been seen before.” Second, a system set up in advance is characterized by indeterminacy, because it cannot set beforehand all relevant considerations for fitting one’s choice to the complex requirements of a concrete situation, taking all of its contextual features into account. Finally, advance determinations often lack particularity. As Aristotle suggests, a concrete ethical case may simply contain “some ultimately particular and non repeatable elements”. Such cases are by their very nature simply not repeatable and therefore usually unanticipated *ex ante*”.

[FN175]. See Israeli interrogations case discussed *supra*. For a thorough discussion of *ex ante* versus *ex post facto* measures with specific attention to torture see Yael Aridor Bar-Ilan, “[Justice: When do We Decide?](#)” (2007) 39 *Conn. L. Rev.* 923.

[FN176]. See Gabriele Kett-Straub “Data Screening of Muslim Sleepers was Unconstitutional” (2006) 7 *German Law Journal* No. 11: “Data screening is a special method of profiling using electronic data processing. Police authorities acquire individual-related data sets from private or public places, which are collected *for completely different purposes*. The information is then screened automatically for certain criteria and compared (matching/screening). The aim of the project is to detect a group of people to which a certain profile can be applied.

[FN177]. According to Gabriele Kett-Straub: “He was attending the university Duisburg-Essen when the so called dragnet investigations were conducted, and was therefore eyed by the investigators”. See “Data Screening of Muslim Sleepers was Unconstitutional” *supra*.

[FN178]. See Bundesverfassungsgericht (BVerfG -- Federal Constitutional Court), 59 *Neue Juristische Wochenschrift* (NJW) 1939 (2006), (for criteria in detail) and Amtsgericht Wiesbaden (AG -- Regional Court), *Datenschutz und Datensicherheit* (DuD) 752 (2001).

[FN179]. Summarized in English at [http:// www.bundesverfassungsgericht.de/en/press/bvg05-064en.html](http://www.bundesverfassungsgericht.de/en/press/bvg05-064en.html).

[FN180]. *Id.*

[FN181]. For further analysis of the German perspective see Christoph J.M. Safferling, “[German Responses to 9/11](#)” (2006) 4 *J. Int’l Crim. Just.* 1152.

[FN182]. As Bruce Ackerman observes: “Without a minimum of internal security against external threats towards constitutional institutions and individuals, neither the necessary effectiveness of a constitutional order or legislation can be guaranteed”. He speaks of “security as a constitutional principle” Echoed by B. Ackerman, “The [Emergency Constitution](#)” (2002) 113 *Yale L.J.* 1029.

[FN183]. 1 BvR 370/07; 1 BvR 595/07. See German Court’s official press release [in German] available at: [http:// www.bverfg.de/pressemitteilungen/bvg08-022.html](http://www.bverfg.de/pressemitteilungen/bvg08-022.html). Translated extracts and media reaction available at <http://news.bbc.co.uk/2/hi/europe/7266543.stm>. See also <http://www.spiegel.de/international/germany/0,1518,542398,00.html>, [http:// news.bbc.co.uk/2/hi/europe/7305636.stm](http://news.bbc.co.uk/2/hi/europe/7305636.stm).

[FN184]. Id.

[FN185]. See EPIC's analysis of the case, EPIC Alert Volume 15:05, March 7, 2008. Available at http://epic.org/alert/EPIC_Alert_15.05.html.

[FN186]. 1 BvR 256/08. Decision [in German] available at: http://www.bverfg.de/entscheidungen/rs20080311_1bvr025608.html Official Court Press Release [in German] available at: <http://www.bverfg.de/pressemitteilungen/bvg08-037.html>.

[FN187]. Id.

[FN188]. “Proportionality analysis is a more disciplined and demanding process than open-ended balancing of rights and security because it addresses whether rights violations will actually increase security and whether less drastic measures can be used to prevent terrorism.” See K. Roach “[Must We Trade Rights for Security? The Choice Between Smart, Harsh and Proportionate Responses in Canada and Britain](#)” 27 *Cardozo L. Rev.* 2151 (2006): “In addition, proportionality analysis can consider the distributional consequences of violating the rights of minorities in an attempt to increase security” citing Ronald Dworkin, “The Threat to Patriotism”, 49 *N.Y. Rev. Books* 3 (2002). See also Jeremy Waldron, “Security and Liberty: The Image of Balance”, 11 *J. Pol. Phil.* 191 (2003); Lucia Zedner, “Securing Liberty in the Face of Terror: Reflections from Criminal Justice”, 32 *J.L. & Soc’y* 507 (2005).

[FN189]. As distinguished from an “adversarial” rights model.

[FN190]. See Konrad Lachmayer, “A Comparative Analysis of Security as an Element of Constitutional Design: Is Global Terrorism Changing the Conditions of International Constitutional Law?” Available at <http://www.enelsyn.gr/papers/w8/Paper%20by%20Dr.%20Konrad%20Lachmayer.pdf>.

[FN191]. Mark Tushnet, “The [Possibilities of Comparative Constitutional Law](#)” (1999) 108 *Yale L.J.* 1225. Tushnet sees no legitimacy problem with non-binding use of foreign sources.

[FN192]. As discussed by Sujit Choudhry, “Migration as a New Constitutional Metaphor” in Sujit Choudhry ed, *The Migration of Constitutional Ideas* (Cambridge University Press, 2005).

[FN193]. As Alford writes: “[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle -- constitutional supremacy -- that can trump the democratic will” According to Justice Scalia “comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one” (in [Printz v. United States](#), 521 U.S. 898, 921 n. 11 (1997)). For a thorough discussion of Scalia J.'s opposition see David C. Grey, “[Why Justice Scalia Should be a Comparative Constitutionalist.. Sometimes](#)” (2007) 59 *Stan. L. Rev.* 1249.

[FN194]. See Posner's critique of Barak and his above-cited book *The Judge in a Democracy*, for example. Richard A. Poner, “Enlightened Despot” *The New Republic* (April, 23, 2007) available at <https://ssl.tnr.com/p/docsub.mhtml?i=20070423&s=posner042307>.

[FN195]. Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in *A Matter of Interpretation: Federal Courts and the Law* 3, 38 (Amy Gutmann ed., 1997).

[FN196]. Justice Scalia's comments in [Printz v. United States](#), 521 U.S. 898, 921 (1997) respecting distinctive American federalism are similarly instructive.

[FN197]. [Roper v. Simmons](#), 543 U.S. 551, 624, Scalia, J., dissenting (2005).

[FN198]. Supporting comparativism and rejecting Scalia J's criticism, Harold Koh has argued that similar

language is used in the U.S. constitution and contemporary human rights documents thereby rendering them eligible for reciprocal comparison. See Harold Hongju Koh, [International Law as Part of Our Law](#), 98 *Am. J. Int'l L.* 43, 54 (2004).

[FN199]. For a more detailed discussion of American resistance to balancing or exceptionality on point see Richard Fallon, *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1264, 1333 (2007) and a discussion by I. Porat and M. Cohen-Eliya, *American Balancing and German Proportionality: The Historical Origins* (2008) available at <http://ssrn.com/abstract=1272763> (copy of full text with author).

[FN200]. See *Roach v. Electoral Commissioner*, [2007] HCA 43. The case deals with the contestation of certain provisions of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* and the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* with respect to prisoners right to vote.

[FN201]. *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at 585.

[FN202]. *Roach v. Electoral Commissioner*, [2007] HCA 43.

[FN203]. “Aharon Barak, President of the Supreme Court of Israel, argues that the “national experience” is the single most important source by which judges come to learn the basic values that must be expressed in their interpretations of the law and the constitution”, Bijon Roy supra citing Aharon Barak, “The Role of the Supreme Court in a Democracy” (1999) 33 *Isr. L.R.* 1 at 3).

[FN204]. See Justice Breyer's reply in Antonin Scalia & Stephen Breyer, *Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005) [hereinafter *Scalia-Breyer Debate*] (transcript available at <http://www.freerepublic.com/focus/f-news/1352357/posts>).

[FN205]. Mark Tushnet, “The [Possibilities of Comparative Constitutional Law](#)”, (1999) 108 *Yale L.J.* 1225.

[FN206]. See *inter alia* A. Barak, “Comparativism, Originalism and the Role of a Judge in a Democracy: A Response to Justice Scalia” (50th Symposium Talk, Fulbright Convention 2006).

[FN207]. As has been repeatedly noted and made tangibly obvious with respect to the former Soviet Union's constitution or worse yet that of South Africa under Apartheid. It perhaps is for this very reason that the great Alexander Bickel viewed courts as “a great and highly effective educational institution”, as did Martin Luther King Jr. Through their reasons, courts nurture and reinforce the all-important culture of rights, without which constitutions are meaningless.

[FN208]. Not populism. As the Israeli Supreme Court observed in the *Public committee Against Torture* case *supra*: “, the Court is aware of the effect its rulings might have on the effectiveness of counter-terrorism measures. Nevertheless, it prefers to pay this price in order to achieve and preserve more important values -- the rule of law and democracy” Price cannot be public confidence (for the judge carries neither purse nor sword ...”.

[FN209]. See generally Mark Tushnet, “The [Possibilities of Comparative Constitutional Law](#)” (1999) 108 *Yale L.J.* 1225, 1285-1301.

[FN210]. See Basil Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-five Years* (Oxford: Hart, 2003) at 61-62 and Basil Markesinis, “Comparative Law -- A Subject in Search of an Audience” (1990) 53 *Mod. L. Rev.* 1; Basil Markesinis, *Foreign Law and Comparative Methodology* (Oxford: Hart, 1997) at 3 cited by Matthias Sims, “[Legal Origins: Reconciling Law and Finance and Comparative Law](#)” (2007) 52 *McGill L.J.* 55.

[FN211]. Many more will eventually need to be examined for inclusion in the Restatement. Namely, the the

U.K. model, French, Australian and of course Canadian. Suffice it to say at this juncture that the leading case of *A (F.C.) v. S.S.H.D.*, [2004] UKHL 56 *supra* echoes the above-stated principles garnered from the German and Israeli examples, most notably proportionality.

[FN212]. Needless to say, additional research needs be conducted in order to gather and compile all pertinent principles and doctrines systematically.

[FN213]. R.Y. Jennings, “The Judiciary, International and National, and the Development of International Law” (1996) 45 *Int'l & Comp. L.Q.* 1, 9: “There are two ways of referring to a previous judgment: as with juridical opinion it can be used in order to quote a passage which seems to put something rather well; but this is quite different from citing the decision as something having those other qualities which make up a precedent”.

[FN214]. As Jackson and Tushnet *supra* Note 2 observe: “Among domestic constitutional courts, Canadian constitutional law has been particularly influential”.

[FN215]. See Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 (*Attorney General*) opining that the Charter rights must be analyzed in accordance with the *contextual principle*.

[FN216]. As in *Suresh v. Canada*, [2002] 1 S.C.R. 3, ¶78.

[FN217]. See *Charkaoui supra*.

[FN218]. See Benvenisti *supra*: executive unilateralism is being challenged by national courts in what could perhaps be considered a globally coordinated move. Courts have embarked on this challenge by relying on techniques that allow them to ratchet up or down their level of intervention in the political branches exercise of power. They prefer to affect outcomes using the least restrictive, lowest profile methods possible and thereby engage the executive and legislature in ongoing institutional negotiations that encourage the political branches to reconsider their policies As an example, Yigal Mersel *supra* Note 31 at 106 observes: “the Court will rarely intervene in actual, operational decisions made by the executive. The Court has noted repeatedly that it will not substitute its own discretion for the executive's decisions about the way to conduct counter-terrorism activities. It intervenes only in cases of extreme unreasonableness or clear illegality”.

[FN219]. See for instance the Israeli means of interrogation case discussed above. Similarly, in the UK, the House of Lords decision in *A v. Secretary of State* forced the Blair government to change course and created new detention regime. The government's post-A approach was to seek to deport non-citizen terrorist suspects and to obtain diplomatic assurances from receiving states to satisfy human rights requirements. (see John Ip, “[Comparative Perspective on the Detention of Terrorist Suspects](#)” 16 *Transnat'l L. & Contemp. Probs.* 773 at fn 173).

[FN220]. For example in the Supreme Court of Canada's decision in *Suresh*. See *Suresh v. Canada*, [2002] 1 S.C.R. 3, ¶78. The Court left open the possibility of justifiable deportation to torture in unspecified exceptional circumstances.

[FN221]. David Cole's expression in a different context. See D. Cole “How to Skip the Constitution” *New York Review of Books* (November 16, 2006) available at http://www.nybooks.com/articles/article-preview?article_id=19595 According to Cole: “The genius behind the Constitution is precisely the recognition that “pragmatic” costbenefit decisions will often appear in the short term to favor actions that may turn out in the long term to be contrary to our own best principles. Just as we may be tempted to smoke a cigarette tonight despite the fact that in the long term we are likely to suffer as a result, so we know collectively that in the short term we are likely to empower government to suppress unpopular speech, invade the privacy of “dangerous” minorities, and abuse suspected criminals, even though in the long term such actions undermine the values of free speech, equality, and privacy that are necessary to a humane democratic society. If we were always capable of rationally assessing the costs and benefits in such

a way as to maximize our collective well-being, short-term and long-term, we might not need a Constitution. But knowing that societies, like individuals, will be tempted to act in ways that undermine their own best interests, we have committed ourselves to a set of constitutional constraints on open-ended pragmatic balancing”.

[\[FN222\]](#). See Jackson and Tushnet *supra* Note 2 at p. 241: “The experiences of several countries also suggest that the very existence of democratic institutions can play a role in promoting cultural change. In India for instance, Krishna concludes that there is a ‘dialectic’ or mutually reinforcing relationship between democratic institutions and political culture”.

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