

Protest and its Suppression in the Occupied Palestinian Territories and in Turkey

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Der folgende Beitrag untersucht die rechtliche Rahmung und exekutives Umgehen mit Protest in kritischen und konflikthafter Situationen. Im Zentrum der Analyse stehen die Gesetze und das tatsächliche Handeln der Exekutive in der Protestunterbindung und Strafverfolgung in den israelisch besetzten Gebieten und in der Türkei. Beide Fälle kennzeichnen ein extrem striktes staatliches Umgehen mit Protest. Sie verweisen somit auf die Grenzen der Legitimität staatlichen Handelns in diesem Bereich. Grundsätzlich zeigt die vergleichende Analyse, dass problematische Formen der Unterdrückung von Protest daran zu erkennen sind, dass Recht hier instrumentalisiert wird, um künstliche Grenzen zwischen erlaubtem und unerlaubtem Dissens zu ziehen. Darüber hinaus veranschaulicht der Beitrag die Konsequenzen einer Normalität außerordentlicher Mittel zur Aufrechterhaltung der öffentlichen Ordnung, wo Sicherheitsinteressen das Recht, zu protestieren, fortlaufend ausstechen.

This article provides an analysis of the legal framework and executive treatment of protest in contested social and political settings. In particular, it focuses on protest policing in the Occupied Palestinian Territories and inquiries into policing and prosecution of protest in Turkey. Both cases display extreme forms of state action against protest. Precisely because of their extreme nature, these cases shed light on the legitimate limits of state action in this respect. In short, the comparative analysis shows that problematic forms of protest control are those which utilize law in order to draw artificial lines distinguishing between legitimate and illegitimate dissent. It further illustrates the political consequences of a normalization of the use of extraordinary means to maintain public order, ultimately leading to the continuous trumping of the right to protest in favour of security interests.

1. Introduction

The past decade has seen a significant increase of protest and social unrest across the globe. Anti-austerity protests challenging the legitimacy of the economic order emerged in the West following the 2008 economic crisis; the ‘Arab Spring’ openly questioned the legitimacy of authoritarianism in North Africa; protests urging political regime change broke out in Ukraine and Hong Kong; and recently the United States experienced massive protest against police violence towards African-Americans. A study covering 843 protests in 87 countries shows that between 2006 and 2013 the quantity of protests has almost doubled.¹

Political participation, among others by protest, is constitutive of a functional democratic regime.² It is even described as the epiphany of democracy.³ Therefore, protest is not ‘problematic’ for democracy but for the stability and certainty of the state. For this reason, the aforementioned displays of social unrest have been met by state suppression to differing extents. Accordingly, the state’s conduct in dealing with political protest is a litmus test for all regimes aspiring democratic and inclusive politics. In this respect, the key question is: to what extent can the state control protest and still maintain its democratic integrity? We address this question from a socio-legal perspective, asking how law is utilized and according to what paradigms it is applied in the context of protest.

Our inquiry focuses on the policing of protest under the Israeli military regime in the Occupied Territories and under the strict executive regime governing protest in Turkey. These cases exemplify extreme curtailment of the right to protest in a social setting of constant unrest. Such restrictions are justified by interpreting the concepts of ‘public order’ and ‘security’ in an overly broad and inflationary manner and by tackling protest with a form of ‘military policing’. Pre-

cisely because of their extreme character, these cases shed light on the legitimate limits of state action against protest.

In the context of occupation, the right to protest is analysed along the three relevant normative frameworks, i.e., administrative orders issued under the military commander (contrasted to Israeli penal law), International Humanitarian Law (IHL) provisions which Israel applies *de-facto* without affirming the status of the area as an ‘occupied territory’ *de-jure*, and international human rights law. The part concludes that by applying distinct legal regimes to control of protests within the state of Israel and in the Occupied Territories and by suppressing protests in the latter through a ‘conduct of hostilities’ paradigm; the protected civilians’ right to protest is ultimately non-existent. In the Turkey case, we analyse the domestic legal framework and underscore in particular anti-terror legislation. The analysis demonstrates that by applying existing anti-terror laws and by proposing new strict security amendments, the right to protest is under grave threat in

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¹ I. Ortiz / S. Burke / M. Berrada / H. Cortes, *World Protests 2006-2013*, New York 2013. This study defines four categories of grievance that motivated the recent protests: economic justice and anti-austerity, failure of political representation and political systems, global justice, and rights of people, pp. 14-30. The study furthermore indicates a significant increase of protest, from 59 per year in 2006 to 112 until mid-2013 and compares the present period to eras of great transformation and change, e.g. 1848, 1917 and 1968, p. 5.

² J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main 1998; J. Cohen / A. Arato, *Civil Society and Political Theory*, Cambridge / Massachusetts 1992.

³ Henry David Thoreau even spoke of the duty of civil disobedience, see H. D. Thoreau, *On the Duty of Civil Disobedience*, Chicago 1849. See also J. Rancière, *Ten Theses on Politics*, in: *Theory and Event* 5 (2001).

Turkey. Finally, the conclusive comparison sets out to deduce how the analysis of the two cases contributes to the study of protest and its policing in an era marked by the dialectics of freedom and security.

2. The Law on Protest in the Occupied Palestinian Territories

2.1. Introduction

The fifty days of Operation Protective Edge⁴ took a heavy toll on the lives of citizens in the Gaza strip. Less mention has been made of the loss of civilian lives in the West Bank. During the operation Palestinians held strikes, rallies, processions and at times violent protests in support of the residents of Gaza and to protest against Israel's actions.⁵ According to B'Tselem, during the operation thirteen Palestinian were killed by security forces in the West Bank, most of them due to excessive force used to suppress demonstrations.⁶

These events call attention to the right to protest in the Occupied Palestinian Territories (OPT). Whereas in a functioning democratic setting, civilians have a right to protest, in the OPT it is questionable if such a right exists. Even if in principle it does, it is undeniably construed in a narrow manner that makes it negligible in practice. Both as a matter of law and fact, attempts of occupied civilians to protest are labeled as a 'threat to public order', a category which justifies the denial of the right to protest.⁷ This is accomplished by applying a different legal regime to Palestinian protests held within the OPT than that applied within the borders of the State of Israel⁸ and to Israeli citizens residing inside the OPT.

In Israel, protests are governed by a 'law enforcement' normative framework under the Israeli penal law. At first glance, it would seem that the right to protest in the OPT is also restricted by a 'law and order' framework, through penal measures set out by the relevant military order and supported by the occupying power's obligation to maintain public order. However, when placed within the context of IHL's lack of affirmative acknowledgment of the right to protest, the 'threat to public order' allegedly posed by protesting civilians is easily labeled a security threat. This allows for the application of the relevant military order guiding protest according to a 'conduct of hostilities' paradigm⁹ where security needs enjoy paramount consideration.

True, the administrative legal regime is subject to review by the Israeli Supreme Court¹⁰ and is normatively subordinated to international law, first and foremost to IHL and, to some extent, to International Human Rights Law (IHRL). However, by not providing a definitive right to protest to occupied civilians, IHL — which can be seen as the designated rule of law in occupied territories — makes deprivation of the right through harsh penal restrictions and fierce crowd control methods the norm.

2.2. The Legal Framework

The immediate law governing civil life in the OPT is composed of a patchwork of military orders legislated by the Israeli military since the beginning of the occupation in

1967.¹¹ These laws are administered by the military, applied by military courts¹² and are subject to review by the Israeli Supreme Court.¹³ The right of Palestinian civilians¹⁴ to protest in the OPT is governed by Military Order No. 101 (Order Regarding Prohibition of Incitement and Hostile Propaganda Actions) (the Order).¹⁵ Issued in 1967 and still in effect today, the order prohibits Palestinian congregations of more than ten people around activities concerning political affairs or activities that are considered political, without obtaining permission from the Military Commander of the area.¹⁶ This prohibition applies to public and private spheres.¹⁷

The Order prohibits waving of flags or political symbols without prior permission of the military commander.¹⁸ It also forbids the printing or publicizing of any document 'having a political significance' without obtaining a prior license.¹⁹

⁴ The operation was launched by the state of Israel on 8 July 2014 and came to an end with the announcement of an open-ended cease fire on 26 August 2014.

⁵ At some events, Palestinian protestors threw stones and Molotov cocktails at security forces and burned tires. At one demonstration, held in Qalandiya, protestors fired live ammunition. See B'Tselem, 13 Palestinians Killed by Israeli Security Forces in West Bank since Operation Protective Edge Began: Excessive Use of Live Fire Suspected, 29 July 2014, http://www.btselem.org/press_releases/20140729_13_palestinian_fatalities_since_gaza_operation_begun (all accessed on 11 January 2015).

⁶ *Ibid.*

⁷ R. Jaraisy / T. Feldman, *Protesting for Human Rights in the Occupied Palestinian Territory: Assessing the Challenges and Revisiting the Human Rights Defender Framework*, in: *Journal of Human Rights Practice* 5 (2013), p. 423.

⁸ We are referring to what is known as the '67 border', including East Jerusalem and The Golan Heights which Israel has annexed and to which domestic law (in contradiction to International Law) applies.

⁹ We explicitly use the term 'paradigm' to stress that we are not claiming that Israel strictly applies IHL provisions to policing of protests in the OPT, but rather that it implicitly deals with them with rhetoric and means taken from a conduct of hostilities legal framework.

¹⁰ D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, New York 2002.

¹¹ The documentary film "The Law in These Parts" by Ra'anan Alexandrowic gives a thorough account of the Administrative Military regime established in the OPT, <https://www.thelawfilm.com/eng#!/the-film>.

¹² For a critique of the inefficiency of the judicial review conducted by the military courts in respect to the military's response to protests in the OPT, see R. Jaraisy / T. Feldman, *supra* note 7, p. 424.

¹³ D. Kretzmer, *supra* note 10.

¹⁴ When discussing the right to protest in the OPT, it is crucial to stress both the space of the protest (the OPT) and the identity of the protestors (the Palestinian population) as contrast to the right of the Israeli population residing in the OPT. The latter are subject to Israeli law in all matters, including the right to protests. For the application of law in the OPT according to the subject's identity, see M. Karayanni, *The Quest for Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts towards the Palestinian Territories*, in: *Michigan Journal of International Law* 29 (2008), pp. 665-721.

¹⁵ Military Order No. 101, Order Regarding Prohibition of Incitement and Hostile Propaganda Actions, 27 August 1967, http://www.btselem.org/download/19670827_order_regarding_prohibition_of_incitement_and_hostile_propaganda.pdf.

¹⁶ *Id.*, Article 1.

¹⁷ For example, the home or a private establishment such as a coffee shop, see *id.*, Article 4.

¹⁸ *Id.*, Article 5.

¹⁹ *Id.*, Article 6.

Incitement to violating the Order is defined as an attempt ‘to influence public opinion in the region in a manner that is liable to harm public safety or public order’.²⁰ Offences under the Order are liable to up to ten years of imprisonment or a fine or both.²¹

What is evidentially missing in the Order is the recognition of an affirmative right to protest. Regardless of their nature, demonstrations in the OPT are almost always illegal.²² Even more to the point is a claim made by the Military Prosecution in a case concerning violations of the Order that ‘the residents of the Area are not at all entitled to the right to demonstrate’.²³ The court left the question as ‘requiring review’.²⁴ The right to protest in the OPT is further infringed by the Military commander’s power to declare an area as a ‘closed military zone’. This is authorized ‘when security needs, or the need to maintain public order requires the closing of the area. This strategy is frequently employed to disperse protests held against the construction of the separation barrier.’²⁵

In stark contrast, The Police Act [New Version] 5731-1971 (the Police Act), which consolidates the main part of the provisions concerning the right to demonstrate within the State of Israel, allows and protects freedom of protest. As a rule, assemblies do not require prior authorization. A permit is required only when an assembly is held in a public space, has fifty or more participants and includes a political speech or movement from one place to another.²⁶ The provisions of the Police Act differ substantially from those of the Order. According to the latter, ‘demonstration’ is defined in much broader terms. Furthermore, the maximum penalty for unauthorized protest according to the Police Act is one year of imprisonment, compared to ten years afforded by the Order.²⁷ Although formally, the Police Act’s applicability was not extended to Israeli citizens in the OTP; in practice, Israeli citizens holding unauthorized demonstrations in the OTP are brought to trial before Israeli courts according to the Israeli penal code.²⁸

In practice, the Order is not systematically implemented. As a matter of policy, the Military permits non-violent demonstrations that do not disrupt public order or pose a security threat.²⁹ However, this maintains a reality of uncertainty regarding the manner in which the law is implemented and in what circumstances. Furthermore, such practice provides the military commander with a wide margin of discretion to decide in each event what is deemed to be a threat to public order.³⁰ In this respect, one cannot overlook the problematic situation: the authority addressed through protest is the same authority that has the power to authorize or deny the request. Considering the several problematic aspects of the Order, we will proceed to evaluate it according to IHL obligations on the occupying power. Although Israel does not acknowledge its occupation of the OPT, it selectively applies IHL provisions from the Hague Regulations of 1907 and the Geneva Conventions of 1949 in the area. IHL does not address the right to protest. Though resistance and protest should be distinguished, it would be of help to interpret IHL’s stand concerning the occupied population’s right to resist occupation in order to draw conclusions regarding the right to protest. IHL also does not include a right to resist occupation. One could argue that this is due to the temporary character of oc-

cupation envisioned by IHL drafters and not to a deliberate exclusion. However, certain IHL provisions can actually be interpreted as precluding a right to resist occupation. For example, IHL gives an occupying power not only the right but the obligation to ensure public order, and it authorizes an extraordinarily wide range of powers to do so – including the right to detain people indefinitely without trial.³¹ Under occupation, civilians can be prosecuted for acts of resistance deemed disruptive to the security of the military administration.³²

Furthermore, as the right to self-determination, upon which the right to resist is usually justified, is not among the non-derogable rights listed in Article 4 (2) of the International Covenant on Civil and Political Rights (ICCPR), it could be argued that the military commander’s right to ensure public order overrides the right of self-determination and subsequently the right to resist in its name. Thus, it seems that the only way for resisters to enjoy the protection of IHL is if their acts of resistance excel to the intensity of an armed conflict.³³

Considering that the sphere of resistance is construed as a dichotomy according to which there is either no right to

²⁰ *Id.*, Article 7A.

²¹ *Id.*, Article 10.

²² R. Jaraisy / T. Feldman, *supra* note 7, p. 428.

²³ L. Yehuda *et al.*, One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank, October 2014, p. 88.

²⁴ *Ibid.*

²⁵ *Id.*, p. 86.

²⁶ *Id.*, p. 82; The Police Act [New Version] 5731-1971, Articles 83-84.

²⁷ For a complete analysis of the differences between the laws, see Military Order No. 101, *supra* note 15, pp. 84-85.

²⁸ In an exceptional case, military law was applied to the Israeli organization ‘Breaking the Silence’ in order to prevent it from holding tours in Hebron, *id.*, pp. 82-83, also fn. 165, 166 there. Israel’s acknowledgment of the right to political protests of Israelis in the OTP is exemplified in an act passed in the Knesset subsequent to Israel’s unilateral disengagement from the Gaza strip in 2010. The act brings to a halt the execution of judgments of those convicted with offenses ‘related to opposing the Disengagement Plan’, unless a prison sentence that was not converted into community service was imposed upon this person. It also instructs to delete the related criminal records. See Knesset, Termination of Proceedings and Deletion of Records Related to the Disengagement Plan, Act No. 5770-2010.

²⁹ L. Yehuda *et al.*, *supra* note 23, p. 89. The order was commonly applied during the First Intifada. Its application decreased following the initiation of the Oslo process but increases again since early 2010, p. 84, fn. 168 citing N. Baumgarten-Sharon, The Right to Demonstrate in the Occupied Territories, Position Paper, Jerusalem 2010.

³⁰ L. Yehuda *et al.*, *supra* note 23, pp. 89-90.

³¹ The right to detain people indefinitely without trial is subject to a right of appeal and periodic review. See Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 78.

³² *Id.*, Article 64(3).

³³ According to Article 4(A)(2) of the Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, members of ‘organized resistance movements’ connected with one of the parties to the conflict are entitled to prisoner of war status, meaning that they cannot be prosecuted merely for having participated in hostilities. However, Jean Pictet of the International Committee of the Red Cross clarifies that this provision grants protection to individuals belonging to one of the belligerent parties, but it does not confer a general right to resist, see J. Pictet, Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva 1958.

resist or a right to be a ‘resisting combatant’, what can be concluded regarding protests which are not acts of resistance? For example, a protest held against seizure of private land, an executive act which is frequently carried out in the process of establishing the separation barrier.³⁴ Such protests occur often in democratic societies and are certainly not unique to the context of occupation. Since IHL is silent on the issue and considering that neither the right to self-determination nor the right to protest are among the non-derogable rights of IHRL,³⁵ it would seem that the occupying power’s right to maintain public order trumps the right to protest as well. Hence, the Order does not seem to be fundamentally in contradiction with IHL.³⁶

However, IHL is not the only international legal regime applicable to occupied territories and is not the only yardstick by which to evaluate the reasonableness of the Order. Although Israel denies the application of IHRL to the protected civilians of the OPT, the prevailing scholarly view holds that IHRL applies to times and zones of conflict, including belligerent occupation, along with IHL.³⁷ Thus, IHRL applies as a default, subject to the existence of a specific IHL norm governing the factual circumstances at hand.³⁸ Moreover, some hold that in situations of prolonged occupation, the role of IHRL becomes even more significant and should be interpreted as placing especially severe restrictions on the occupant’s use of power.³⁹

Accordingly, since there is no specific IHL provision on the right to protest, we should turn to IHRL. The right of peaceful assembly is prescribed in Article 21 of the ICCPR.⁴⁰ As it is one of the main fundamentals of IHRL, the International Court of Justice has confirmed that the ICCPR’s protections do not cease during wartime.⁴¹

However, there are several obstacles to implement human rights obligations in the OPT. First, Israel does not see itself obligated to extend the application of IHRL to the OPT.⁴² Additionally, it is questionable if Israel’s Basic Law: Human Dignity applies to the OPT.⁴³ Although the Supreme Court answered this question affirmatively in some cases, its rulings on the issue are inconsistent.⁴⁴ Anyway, the Basic Law does not include the right to protest.

Moreover, there seems to be an inherent weakness of IHRL discourse in its current proportionality dominated form. When calculated within proportionality tests, ‘human rights are protected by the laws of armed conflict but not to their full scope.’⁴⁵ In respect to balancing the rights of the Palestinian population of the OPT, proportionality is said to be instrumentalized in order to ‘regularize’ restrictions on human rights due to security concerns. Ultimately, IHRL is far from providing an efficient counter weight opposing the occupier’s security interests.⁴⁶

2.3. Means of Protest Suppression

The means Israel’s security forces use to suppress violent Palestinian protests in the OPT differ from those employed inside the state borders. For example, the Or Commission summoned after the October 2000 riots of Israeli Arab citizens prohibited the use of rubber coated bullets against violent protestors only within the borders of Israel.⁴⁷ The commission took a different stand concerning protests in the OPT:

‘The activity of the police is inside the borders of the state directed to its citizens, and no comparison can be made between here and there. Indeed, a large part of the activity in Judia and Samaria and the Gaza Strip is undertaken by the IDF in difficult circumstances, which more than once amount to war conditions. We mention this in order to clarify and underscore that not everything that is permitted in the context of military action is permitted in the context of maintenance of public order and disassembly of rioters.’⁴⁸

³⁴ I. Blank, *Legalizing the Barrier: The Legality and Materiality of the Israel / Palestine Separation Barrier*, in: *Texas International Law Journal* 46 (2011), pp. 309-343.

³⁵ J. Waldron, *Post Bellum Aspects of the Laws of Armed Conflict*, *Loyola of Los Angeles International and Comparative Law Review* 31 (2009), pp. 35-36.

³⁶ An argument could be made that public order should be maintained first and foremost for the benefit of the occupied population. Since it could be argued that resisters do not necessarily represent public interest, they are not only a threat to the occupying power but also to the general population, and thus there is more justification to suppress them in the name of maintaining public order than there is justification to suppress protesters. For a discussion about the diversity of forms of resistance, see K. Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, in: *International Review of the Red Cross* 94 (2012), pp. 267-315.

³⁷ Whereas in the past, IHL and IHRL were perceived to be mutually exclusive legal regimes – IHRL applying in times of peace and IHL in times of hostilities –, it is currently held that the two legal regimes are complementary. See O. Ben-Naftali, *Introduction: Pas de Deux*, in: O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, New York 2011, pp. 3-13.

³⁸ This approach was affirmed by the International Court of Justice, thus acknowledging that the ICCPR is applicable outside of a state’s territory to acts of an occupying state committed in the exercise of its jurisdiction. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 104, 2004. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 226, 1996. For a critique of the *lex specialis* principle’s capacity to resolve conflicts between IHL and IHRL, see M. Milanović, *Norm Conflicts*, *International Humanitarian Law and Human Rights Law*, in: O. Ben-Naftali (ed.), *supra* note 37, pp. 95-129.

³⁹ O. Ben-Naftali / Y. Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, in: *Israel Law Review* 37 (2004), pp. 97, 105.

⁴⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>.

⁴¹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 38.

⁴² It should be mentioned that Israel is not alone in this approach. The US consistently argues that the ICCPR does not apply outside of the territory of a state party. This stands in contradiction with the UN Human Rights Committees stance on the issue, see K. J. Heller, *Does the ICCPR Apply Extraterritorially?*, <http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially>.

⁴³ For an analysis of the issue see Y. Ronen, *Applicability of Basic Law: Human Dignity and Freedom in the West Bank*, in: *Israel Law Review* 46 (2013), pp. 13-40, 135-165.

⁴⁴ *Ibid.*

⁴⁵ M. Koskenmiemi, *Occupied Zone-A Zone of Reasonableness?*, in: *Israel Law Review* 41 (2008), p. 36.

⁴⁶ See Y. Shany, *Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context*, in: *Israel Law Review* 41 (2008), p. 6.

⁴⁷ Or Commission Report, *Report of the State-Mandated Panel of Inquiry into the Clashes between Security Forces and Israeli Civilians in October 2000* (in Hebrew), <http://elyon1.court.gov.il/heb/veadot/or/inside4.htm>.

⁴⁸ *Id.*, Article 57.

The commission's recommendations were adopted by the government, for example the prohibition on the use of rubber coated bullets to suppress protests does not apply to the OPT.⁴⁹ This distinction stands to this day.⁵⁰ As matter of frequent practice, demonstrations in the OPT are dispersed with great force⁵¹ and excessive use of force by soldiers is often not subjected to proper investigation or prosecution.⁵²

Israel, therefore, employs different standards regarding protesters within its spatial and national borders and outside it,⁵³ grounded in the need to protect security forces in the OPT.⁵⁴ We argue that Israel adopts a predominantly 'law enforcement' paradigm toward protesters within its borders and a 'conduct of hostilities' paradigm toward Palestinian protesters in the OPT. The application of an IHL conduct of hostilities paradigm to Palestinian protests in the OPT is reflected in the perception that every demonstration (including non-violent) is, by default, outweighed by the need to protect the security forces. This allegedly legitimizes the adoption of a wider arsenal of restrictions on protestors than those that are permitted by human rights standards.⁵⁵

Protection of police officers is observed in suppression of protests everywhere. It is not unique to the context of occupied territories. However, by enhancing the significance of the security of soldiers facing protests and by depicting policing of protests as a 'warlike' scenario, Israel habitually interprets 'public order' to the disadvantage of the civilians' welfare,⁵⁶ thus breaching the obligation of Article 43 of the Hague regulations and the notion of trust inherent in the law of occupation.⁵⁷

It is argued that due to the complex security situation pertaining in occupied territories, the distinction between conduct of hostilities and enforcement of law and order is difficult to uphold.⁵⁸ However, protest does not necessarily equal resistance. By implementing a blanket restriction on all forms of protest, Israel pushes protestors into the category of illegal resisters, thus denying them the protection of IHL.

3. The Law on Protest in Turkey: Rigid Policing and Prosecution

3.1. Historical Context

Turkey has seen massive political protest in the past two years: In summer 2013 the Gezi demonstrations and protests, in May 2014 following the Mine accident in Soma and in October 2014 in Southeast Turkey as ISIS attacked the Kurdish Syrian city Kobanî. Initially, the latest protests were motivated by the reluctance of the Turkish government to support the Kurdish fighters in Syria. But the police's brutal suppression of the protests provoked even more unrest. According to news reports, more than 30 protesters were killed, more than 350 wounded and over 1000 persons detained for involvement in the protests.⁵⁹

Several demonstrators of the Gezi protests 'face possible life imprisonment if convicted.'⁶⁰ In this regard, two trial proceedings opened recently against protesters: 35 members of the Beşiktaş Istanbul supporters Club 'Çarşı' stand trial for establishing a terrorist organization and planning a coup d'état, and several members of the civil society network

'Taksim Solidarity' are charged with establishing a terrorist organization and refusing to disperse from an unauthorized demonstration.⁶¹ These cases illustrate the state practice of handling social protest by anti-terrorist laws, a practice familiar from the prosecution of protest in the Kurdish regions.⁶² However, only few police officers were investigated, less were prosecuted, and even those who were convicted received lenient sentences.

As a consequence of the public unrest that has swamped Turkey recently, the AKP government proposed amendments to a number of laws in order to control protest more efficiently. If passed, this amendment package could result in marginalization of the only challenging opposition: citizens that are not necessarily organized but willing to participate in politics.

⁴⁹ Association for Civil Rights in Israel and B'Tselem, Stop Firing Rubber Bullets at Protestors in the West Bank, 31 July 2013, http://www.btselem.org/press_releases/20130730_stop_using_rubber_coated_bullets_against_demonstrators.

⁵⁰ *Ibid.*

⁵¹ L. Yehuda *et al.*, *supra* note 23, pp. 90-91. For more information on the use of excessive force to suppress demonstrations in the OPT, see R. Jaraisy / T. Feldman, The Status of the Right to Demonstrate in the Occupied Territories, Position Paper, October 2014, pp. 36-38.

⁵² Some argue that sub-investigation and prosecution is a matter of state policy. See O. Ben-Naftali, Pathological Occupation: Normalizing the Exceptional Case of The Occupied Palestinian Territory and Other Legal Pathologies, in: O. Ben-Naftali (ed.), *supra* note 37, p. 132.

⁵³ In this respect it must be mentioned that recent documented events point to the conclusion that although the prohibition on the use of rubber bullets also applies to East Jerusalem (since Israel formally annexed it and applies Israeli law to it), in reality, rubber balls are apparently used to suppress protests and riots held by Palestinians residing in East Jerusalem. Recent Cases where such use has been claimed are currently under investigation by the police. See G. Levy / A. Levac, Eyeless in the West Bank: When Palestinian Boys Play Cat and Mouse with Israeli Police, Haaretz, 3 January 2015, <http://www.haaretz.com/weekend/twilight-zone/premium-1.634943>.

⁵⁴ Or Commission Report, *supra* note 47, Article 57.

⁵⁵ M. Sassòli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, in: European Journal of International Law 16 (2005), pp. 663, 665; S. Bazrgan, Proportionality, Territorial Occupation, and Enabled Terrorism, in: Law and Philosophy 32 (2013), pp. 435-457.

⁵⁶ This is not a new trend in Israel's interpretation of its obligations according to IHL. The Supreme Court affirmed that when taking under consideration the civilians interests in the OPT, the Military Commander is entitled to weigh also the interests of Israeli civilians living in the area. See, for example, Israeli High Court of Justice, Yoav Hess *et al.* v. The Commander of IDF Forces in the Judea and Samaria *et al.*, 2004, HCJ 10356/02, 58(3) PD, p. 443; Israeli High Court of Justice, Bethlehem Municipality *et al.*, v. Ministry of Defence *et al.*, 2005, HCJ 1890/03, 59(4) PD, p. 736.

⁵⁷ O. Ben-Naftali, *supra* note 37, p. 145.

⁵⁸ K. Watkin, *supra* note 36, p. 295.

⁵⁹ See for example L. Kemal, Situation in Southeast Appears to Be Out of Everyone's Hands, Today's Zaman, 1 January 2015, <http://www.todayszaman.com/newsDetail.action?jsessionid=+SaoWslrdnHk7dhLOshl6K+X?newsId=368623&columnistId=0>.

⁶⁰ Human Rights Watch (HRW), Turkey's Human Rights Rollback, September 2014, pp. 25-26.

⁶¹ Amnesty International, Çarşı on trial, <http://humanrightsturkey.org/2014/12/16/carsi-on-trial-turkeys-war-on-dissent-takes-a-tragicomic-turn> (accessed on 11 January 2015).

⁶² HRW, Protesting as a Terrorist Offense, The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey, November 2010.

Turkey's political history throughout the 20th century has been violent. Following extreme political fights in the 1970s, the Military assumed power in 1980.⁶³ In the 1990s, public order was on the verge of breakdown as the Kurdish party *Partiya Karkerên Kurdistanî* and its independence project were developing into a problem for society. At present, unresolved social conflict and deep fragmentation still characterize Turkish society.⁶⁴ This can account for the fact that state institutions and political organs are consistently occupied with maintaining public order, and it further suggests an explanation for their willingness to employ extraordinary means to control social order.

Upon this backdrop, the recent state violence and harsh prosecution of protesters should be understood as a continuity of state action. Even though Turkey has a constitutional tradition, every group that comes to power aims at controlling the state. Institutions are utilized in the interests of the ruling group, opposition is silenced and society patronized. Turkuler Isiksel has described the political system as 'authoritarian constitutionalism'.⁶⁵

Our assessment might be understood best if the top-down revolution and modernization of Turkey is put into perspective. Similar to the Bolshevik Revolution, Atatürk's modernization of the Turkish nation was organized by the elite.⁶⁶ The secularization of society, to point out one example, was a struggle against the majority Muslim identity. To this day, political conflict emerges around the constitutional principle of *laiklik* (*laïcité*).⁶⁷ The majority identity created with the revolution is 'Turkishness', and until its amendment in 2008, the Turkish Criminal Code (TCK) even penalized offences against 'Turkishness'.⁶⁸ The utilization of legal means to sanction actions and identities that fall outside the majority shows that 'othering', and the binary construction of identity (insiders v. outsiders), is facilitated in Turkey by law.⁶⁹

Generally speaking, law has an inherent tendency to create strict distinctions (right / wrong, legal / illegal).⁷⁰ But with a functioning separation of powers and rule of law regime, the hegemonic character of law can be restrained to some extent. In Turkey, the rule of law regime seems to be extremely flawed concerning the ability to encompass protest that threatens the hegemony.

3.2. The Legal Framework

The Constitution of 1982 grants Turkish citizens 'rights and freedoms to assembly'.⁷¹ Similar to other constitutional regimes, the particularities are further stipulated by law.⁷² In addition, the TCK includes offenses against public peace and offenses against constitutional order and operation of constitutional rules.⁷³ The actions of executive organs are regulated by the laws on the police.⁷⁴

As a rule, people are allowed to organize in protest, subject to prior registration and announcement to the relevant authorities. Often, the executive can decide whether or not a protest may be held. Even though in most states, executive agents, for example the police president, the city council, or Major, have the right to grant and decline permission for protest, in Turkey the situation seems to be more problematic, for the executive traditionally has a great margin of discretion.

Due to the conflict around the Kurdish self-determination project, we can describe a tradition of dealing with dissent in terms of terrorism.⁷⁵ In 1991, the Parliament enacted the Law on Fight against Terrorism.⁷⁶ In order to grasp the wide margin of discretion, this law opens for prosecution of basically

⁶³ F. Tschau / M. Heper, *The State, Politics, and the Military in Turkey*, in: *Comparative Politics* 16 (1983), pp. 17 f.

⁶⁴ B. Kanra, *Islam, Democracy and Dialogue in Turkey: Deliberating in Divided Societies*, Farnham 2009.

⁶⁵ T. Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, in: *International Journal of Constitutional Law* 11 (2013), p. 725.

⁶⁶ J. W. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, New York 2011, p. 43 f.

⁶⁷ *Laiklik* is the Turkish concept of secularism, i.e. the strict separation of religious and state affairs. To date, the Constitutional Court annulled all laws or amendments aiming at abolishing the headscarf ban, e.g. *Anayasa Mahkemesi, 'Headscarf Ruling'* E. 2008/16 – K. 2008/116, *Resmi Gazete* 27032, 22 October 2008. See S. Benhabib, *The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey*, in: *Philosophy & Social Criticism* 34 (2010), pp. 451-471. In addition, a number of political parties were closed by the Court for violating the laicism principle, e.g. *Anayasa Mahkemesi, 'The AKP Case'* E. 2008/1 – K. 2008/2, *Resmi Gazete* 27053, 13 November 2008; O. Celeb, *The Political Causes of Party Closures in Turkey*, in: *Parliamentary Affairs* 67 (2014), pp. 371-390.

⁶⁸ The first TCK regulated 'insulting Turkishness' in Article 159, (TBMM, *Türk Ceza Kanunu*, Kanun No. 765, *Resmi Gazete* 320, 13 March 1926). In the new TCK it is regulated under Article 301 (TBMM, *Türk Ceza Kanunu*, Kanun No. 5327 *Resmi Gazete* 25611, 12 October 2004). Until amendment in 2008, this article stipulated: "Public denigration of Turkishness (...) shall be punishable by imprisonment of between six month and three years." The amendment "Turkishness" was replaced with "the Turkish Nation" and the maximum penalty was reduced to two years.

⁶⁹ J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, New York 1990; Z. Bauman, *Modernity and Ambivalence*, Oxford 1993; S. Hall, *Representation: Cultural Representations and Signifying Practices*, London 1997.

⁷⁰ D. Litowitz, *Gramsci, Hegemony, and the Law*, in: *Brigham Young University Law Review* 2 (2000), pp. 515-551.

⁷¹ The Constitution of 1982 regulates the relevant rights in Article 33, i.e. freedom of association, and Article 34, i.e. the right to hold meetings and demonstration marches (TBMM, *Türkiye Cumhuriyeti Anayasası* 1982, Kanun No. 2709, *Resmi Gazete* 17844, 18 October 1982). Both former Constitutions also rendered protest and demonstration: the Constitution of 1924 together with freedom of speech, press and other fundamental rights in Article 70 (TBMM, 1924 *Anayasa*, Kanun No. 491, *Resmi Gazete* 71 24 May 1924); the Constitution of 1961 in Article 28, i.e. the right to congregate and march in demonstration, and Article 29, i.e. the right to form associations (TBMM, *Türkiye Cumhuriyeti Anayasası*, Kanunu, Kanun No. 334, *Resmi Gazete* 10859, 9 July 1961).

⁷² The right to protest was specified under the Constitution of 1961 in Law No. 171 (TBMM, *Toplantı ve Gösteri Yürüyüşü Hürriyeti Hakkında Kanun*, Kanun No. 171, *Resmi Gazete* 11337, 18 February 1963); it is governed under the Constitution of 1982 in Law No. 2911 (*Toplantı ve gösteri Yürüyüşleri Kanunu*, Kanun No. 2911, *Resmi Gazete* 18185, 8 October 1983).

⁷³ TCK, Section 5: Offenses against Public Peace (Article 213-222), and Section 15: Offenses against Constitutional Order and Operation of Constitutional Rules (Article 307-336). HRW recommended to abolish Article 220 (6)-(7), which enables prosecution of people supposedly supporting criminal acts, for these paragraphs are mainly applied to prosecute Kurdish protest as a terrorist activity, HRW, *supra* note 62, pp. 7-8.

⁷⁴ Law No. 2559 on the Duties and Powers of the Police regulates the conduct of the Turkish police, 4 July 1934 (TBMM, *Polis Vazife ve Salâhiyet Kanunu*, Kanun No. 2559, *Resmi Gazete* 2751).

⁷⁵ HRW, *supra* note 62, p. 7.

⁷⁶ This is the Law on Fight against Terrorism, 2 April 1991 (TBMM, *Terörle Mücadele Kanunu*, Kanun No. 3713, *Resmi Gazete* No. 20843).

any kind of organized ‘crime’, it is enough to inquire into the first two articles defining ‘terrorism’ and ‘terrorist’.

‘Terrorism’ is defined as any criminal action by an organization aiming: to change the basic principles of Turkey, for example republicanism, laicism, nation without division; to overthrow the government; to eliminate basic rights or to damage security, public order and health. ‘Terrorists’ are people belonging to an organization trying to realize the aims through criminal acts, regardless if they themselves commit the terrorist crime or are only members of the organization. In addition, people committing crimes in the name of an organization are also terrorist offenders. Consequently, once people damage security or public order, they are deemed terrorists. Further, it is sufficient that a crime is undertaken in association with the aims of an organization deemed to be of terrorist kind in order for the crime itself to fall under the heading of a terror act.⁷⁷ Apart from the striking over-inclusiveness of these definitions, in practice, a protester speaking out his opinion against the state and in case of clashes with the police acts to defend himself, is vulnerable to charges of terrorist crimes as the events can easily be termed ‘threatening to public order’.

The aforementioned amendment package demonstrates continuity of strict legal regulation of protest.⁷⁸ The key amendments will increase the power of the state to control protest and diminish the already limited rights of protesters. Among others, they enlarge the regional governors’ and the Ministry of Interior Affairs’ margin of discretion to define emergency situations. In such situations, the governors will be authorized to oversee and control operations of the police, which were previously overseen by the judiciary. Hence, the amendment shifts the review of police operation from the judiciary to the executive. The amendment further stipulates that the police shall have the power to detain people without prior authorization of a prosecutor or judge, that the police may hold people in custody for 48 hours and extend the period up to four days with permission of a governor. Viewed from this point, the amendment is troubling, for it aims to reinstall the power of the police to detain, which was abolished in 2004.

Furthermore, sentences for protesters, including the penalty for destruction of private and public property (one to six years at present), will be increased dramatically. The draft law foresees severe punishment up to twelve years for Molotov cocktail throwers and up to three years for protesters using fireworks. Interestingly, Molotov cocktails shall be explicitly defined as weapons according to law, thus enabling police forces to shoot once they are attacked by them without a prior warning shot.⁷⁹

3.3. Policing and Prosecution of Protest

In the early days of the Republic under Atatürk, the army and not the police were responsible for internal security issues. It was not until the 1980s that the police was professionalized as a civilian force. The Kurdish insurgency in the southeastern part of the county and a sudden rise in terrorist attacks at that time ‘provided the opportunity for the police’s cooperation with the army, whose strict military professionalism kept it from deploying troops where it was not legally sanc-

tioned after the termination of martial law and emergency rule.’⁸⁰ The tight historical ties between the police and the military are crucial for understanding why the executive security regime in Turkey is especially rigid.

The European Court of Human Rights has commented that the Turkish police are unable to handle protest situations without violence. This general remark was made in the *Izci v. Turkey* case.⁸¹ The plaintiff in the case argued that, following the dispersal of a demonstration, she was beaten up by police forces, leaving her severely injured and semi-conscious.⁸² The government objected to the claims of the plaintiff, arguing that the security forces acted in accordance with the legal framework in order to maintain public order.⁸³ The Court rejected the government’s claims, ruling that the use of force was disproportionate.⁸⁴ Furthermore, it found that at the time of the event the police forces were not guided by explicit regulations on how to use tear gas without harming protesters.

The policing of the Gezi protests reveals a similar modus operandi. Human Rights Watch reported that during the protests, there was ‘widespread excessive use of force by police against demonstrators and improper firing of teargas canisters directly at protesters, leading to scores of protesters receiving serious head injuries and eleven being blinded.’⁸⁵ The report further found that ‘one year on from the Gezi protests, very few police officers have been investigated for excessive use of force or improper firing of teargas.’ Furthermore, it concluded that ‘there have been numerous flaws in the trials of police accused of killing three of the demonstrators who died.’⁸⁶

These findings are not surprising. Prosecution and trial of state agents have been a central problem in Turkey;⁸⁷ but by not holding police officers accountable for the use of excessive force, they are implicitly granted a wider margin of dis-

⁷⁷ *Ibid.*

⁷⁸ The amendment package has been accepted by the Commission of Interior Affairs of the Turkish Grand National Assembly. Now it has to be submitted to approval of the General Assembly and must go through the normal legislative implementation process. The amendments have not been enacted yet, but the draft is available, 24 November 2014 (Türkiye Büyük Milletli Meclise Başkanlığına, Kanun Tasarısı ‘Draft Proposal’ No. 31853594-101-1051-4665). General assembly debates were opened on February 17, 2015. As of March 13, 2015, sixty-seven articles were approved by parliament.

⁷⁹ *Ibid.*; for the proposal is not available in English, see G. Üstütağ, Gov’t-led Security Package Creates Fears of Police State, *Today’s Zaman*, 12 October 2014, http://www.todayszaman.com/national_govt-led-security-package-creates-fears-of-police-state_361398.html; see also A. Albayrak, Opposition Slams Security Bill that Will Put Turkey under State of Emergency-type Regime, *Today’s Zaman*, 9 January 2015, <http://www.todayszaman.com/newsDetail.action?jsessionid=O8p+zdNome5pJEONqgNPNy58?newsId=369387&columnistId=0>.

⁸⁰ L. Piran, *Institutional Change in Turkey: The Impact of European Union Reforms on Human Rights and Policing*, New York 2013, p. 4.

⁸¹ European Court of Human Rights, *Izci v. Turkey*, Application No. 42606/05, 23 July 2013, para. 67.

⁸² *Id.*, para. 8.

⁸³ *Id.*, para. 52.

⁸⁴ *Id.*, para. 56.

⁸⁵ HRW, *supra* note 60, p. 25.

⁸⁶ *Id.*, p. 26.

⁸⁷ C. Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, in: *Law & Society Review* 40 (2006), pp. 653-692.

cretion in maintaining public order. However, the strict prosecution of protesters reveals where the motivation of the state lays in respect to rights protection. In the prosecution of protest in relation to the Kurdish self-determination project, terrorist charges are often employed to bring protesters to trial.⁸⁸ The aforementioned trials against citizens involved in the Gezi-Protest show that this practice is now transferred to other groups and identities dissenting from the majority construction of society.

During the 2014 protests in Southeast Turkey, citizens and police officers died but the number of casualties was much higher on the side of protestors and rioters. It is too soon to draw conclusions concerning prosecution for these events. However, many citizens have been detained, meaning that several trials may follow. In this regard, on 8 January 2014, the Van Juvenile Court accepted a case against fifteen children who participated in the protests; the prosecutor is seeking for juvenile prison sentences up to six years.⁸⁹

The parliamentary opposition has already announced that the amendment package will be submitted to constitutional review. But can the Court act as a guardian of fundamental rights? The case law of the Court shows that both laws of assembly were already subject to review. In 1977, it annulled legislation that granted the executive authorities too much power to decide about the holding of demonstrations. In 2008, it rejected the judicial referral of a lower court asking for review of the law on assembly on the grounds that protest could be prosecuted to easily as a criminal act.⁹⁰ The Court recently took a rights-protecting stance, for example by ruling the deactivation of Twitter and YouTube as unconstitutional in early 2014. Ceren Belge shows in her study of the Turkish Court that during the 1970s, the court demonstrated judicial activism and applied counter-weight to balance executive power by protecting fundamental rights.⁹¹ Given the recent activism of the court, those opposing the strict legislation against the right to assembly in Turkey may hope that the court acts as a guardian.

4. Comparative Conclusion

Dissent and protest can be strong driving forces of democratic change. Due to the crucial role protest plays, its restriction ought to be construed in a minimalistic manner. IHRL and laws of democratic states respect and protect the right to protest and the rights related to it, primarily freedom of speech, expression and assembly. To a limited extent, they also acknowledge the suspension of these rights in times of exceptional circumstances and for a limited period.

Curtailment of protest is usually done in the name of maintenance of public order. At times, it is also coupled with the need to guard the polity from an external threat posed to its security. Following 9/11, the ‘security paradigm’ was frequently called to the flag to legitimize infringement on rights and play down its devastating effects on personal liberties.⁹² Concerning the right to protest, security is much more than a rhetorical device. Protesters taking part in the 2011 ‘Occupy Wallstreet’ demonstrations, where subjected to anti-terror methods and intelligence surveillance by a security alliance consisting of the FBI, Homeland Security, local police and private security contractors.⁹³

IHRL conforms to the liberal conceptualization that there exists an inherent tension between public order and security on one hand, and personal liberties and rights, on the other hand. Accordingly, a legitimate sphere of protest is demarcated by striking a balance between the two competing interests. Yet, the relation between security and liberty is not a zero-sum game.⁹⁴ Surprisingly, an historical account of the binary conceptualization of security v. liberties reveals that liberalists have consistently given up the defense of liberties in favor of a ‘society of security’. What stands at the heart of liberalism according to this account is not liberty, but rather security.⁹⁵

By systematically subordinating the right to protest to internal/external security needs, the Israeli and the Turkish cases lift the veil over this “balancing myth”.⁹⁶ This is not to say that balancing is always analogous to drawing a circle around the target after the arrow has already been shot. However, recent years have shown that all over the world states that define themselves as democracies committed to human rights (and that act as democracies in most respects) override the right to protest based on public order and security needs. In this respect, they are not so far apart from the pathological treatment of protest in Turkey.

Although the Military administrative regime governing the OPT does not conform to democratic principles, within its recognized borders, Israel, as a rule, conforms to democratic standards. As such, it can be expected to comply with IHRL in respect to all those under its direct effective control, including Palestinian civilians in the OPT. Yet, for reasons that can be explained along several lines, Israel does not do so. What is more important for our current purpose is Israel’s capacity to maintain a self-perception of a democratic state, while applying an undemocratic legal regime in the OPT. In the context of protest, since we witness a weakness of democracies to contain counter-hegemonic voices, the artificial line Israel draws to protect its democratic community from unwelcomed ‘external’ threats sheds light on artificial borders that other democratic communities draw internally to delegitimize certain voices.

⁸⁸ HRW, *supra* note 62, pp. 7-8.

⁸⁹ See Today’s Zaman, Indictment Against 15 Children Accepted in Kobani Case, 8 January 2015, <http://www.todayszaman.com/newsDetail.action?jsessionid=BMReTZH-cAQsTP5ebnQ4Ewv2?newsId=369235&columnistId=0>.

⁹⁰ Anayasa Mahkemesi, E.1976/27 – K. 1976/51, *Rezmi Gazete* 15939, 16 May 1977; and Anayasa Mahkemesi, E. 2004/90 – K. 2008/78, *Rezmi Gazete* 26927, 5 July 2008.

⁹¹ C. Belge, *supra* note 87, pp. 680 ff.

⁹² See B. Buzan / L. Hansen, *The Evolution of International Security Studies*, Cambridge 2009, pp. 213-214.

⁹³ M. Verheyden-Hilliard / C. Messineo, *Out from the Shadows. The Hidden Role of the Fusion Centers in the Nationwide Spying Operation against the Occupy Movement and Peaceful Protest in America – Report of the Partnership for Civil Justice Fund*, <http://www.bigbrotheramerica.org/report>.

⁹⁴ J. Waldron, *Security and Liberty: The Image of Balance*, in: *Journal of Political Philosophy* 11 (2003), pp. 191–210.

⁹⁵ M. Neocleous, *Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics*, in: *Contemporary Political Theory* 6 (2007), pp. 131-149.

⁹⁶ *Id.*, p. 133.

The Israeli case shows two ways in which the right to protest is restricted: First, by applying two distinct legal regimes to control dissent and protest inside and outside the spatial and national borders of Israel. Inside Israel and for Israeli citizens in the OPT, human rights standards, incorporated in Israeli law and developed through case law, are applied. Whereas, in the OPT protest is governed by administrative military law and in contradiction to IHRL. Secondly, by applying two different legal paradigms to frame and suppress protest. Inside Israel and in respect to Israeli citizens in the OPT, protests are handled according to a ‘law enforcement paradigm’, by police officers. In the OPT, Palestinian protesters are as a de-facto default deemed illegal resisters and accordingly suppressed by means afforded by a ‘conduct of hostilities’ paradigm, by soldiers. In praxis, this distinction amounts to a difference in the proportionality of means used to control protests.

The depicted limits of protest of the Palestinian population demonstrate that the right is in fact non-existent. This is due partly to IHL’s lack of response to occupied civilians needs under prolonged occupation, but primarily to a denial of its application by the governing power. Even though the occupier has a right to maintain public order, interpreted in light of the Geneva Conventions’ purposes, public order should be kept primarily for the benefit of the occupied population and not used against it to undermine its ability to organize collectively in protest in defense of rights.

The manner and extent to which protest is restricted in Turkey displays the distance between state and society: instead of opening a channel of dialogue with the protesters, or at least enabling the existence of a legitimate sphere of protest, the state excludes protesters from within its ‘imagined’ borders by prosecuting them under anti-terror laws. The systematic application of such an extraordinary legal regime merges the protester and the terrorist, both allegedly posing an external threat to society. Every protest is in potential an act aiming to overthrow the social and political order. Although the proposed security amendments are harshly criticized by Human Rights groups, the government persists to justify them as being in conformity with IHRL and EU Law. Government officials even argued, and rightly so, that the increase of police powers is not uncommon, but in fact very similar to the legislation in effect in Germany for example.⁹⁷

If the amendments are similar to those that are already in effect and applied as a matter of norm in other states, why, then, do critics argue that the proposed changes may create an exceptional state of affairs in Turkey? The answer to this question lays in the fact that in the Turkish case we can reconstruct a continuous pattern of excessive police violence toward protesters, state-centered prosecution of dissent, and strict interpretation of rigid laws by courts. Thus, we can expect that once harsher laws come into force, dissent will be policed and prosecuted with even more force. Future aggressive state action against protest will enjoy a facade of legal legitimacy even though not fully legitimate from a democratic and human rights point of view. For dissent and protest in Turkey this may have a chilling effect on potential protesters, for the law basically communicates: If you don’t play, you can’t lose.

Whereas, the act of externalization, or ‘othering’, of dissent by suspending its right to protest is usually framed as an exception,⁹⁸ in Turkey the proposed security amendments are rather in continuity with existing state praxis. This can only be fully understood by taking under account the specific historical tradition of Turkish governments’ dealings with dissent. However, since the rhetoric of exceptionalism has become the norm for tough suppression of protest in many democratic states, the Turkey case invites a further critical analysis of the normalization of means previously perceived as extraordinary. ■

⁹⁷ Indeed, the police in Germany have the right to provisional arrest during protest according to § 127 of the Criminal Procedure Code, see *Strafprozessordnung, Bundesgesetzblatt (BGBl) I, Nr. 24, 7 April 1987*. Moreover, Molotov cocktails are in Germany prohibited weapons according to the Law on Weapons, see *Gesetz zur Neuregelung des Waffenrechts, Anlage 2, Abschnitt 1, Nr. 1.3.4, BGBl I., Nr. 49, 19 September 2003*. Finally, Article 129 of the German Criminal Code regulates membership in terrorist organizations, see *Strafgesetzbuch (StGB), BGBl I, Nr. 1, 7 January 1975*. The German definition of membership in a terrorist organization has been criticized continuously, for it gives the authorities the power to investigate based on initial suspicion any crime associated with the support of a criminal association. See B. Kretschmer, *Criminal Involvement in Terrorist Associations: Classification and Fundamental Principles of the German Criminal Code Section 129a StGB*, in: *German Law Journal* 13 (2012), pp. 1016-1036.

⁹⁸ K. L. Scheppele, *Legal and Extralegal Emergencies*, in: G. A. Caldeira / R. D. Kelemen / K. E. Whittington, *The Oxford Handbook of Law and Politics*, Oxford 2008.