THE ISRAELI CONSTITUTION AND THE FIGHT AGAINST TERRORISM

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INTRODUCTION

The obvious security difficulties in Israel also carry problematic political, economic and social consequences. The unique Israeli condition — as a young democratic state, whose mere existence is still not self-evident to all — also has legal implications. In Israel, the law and the courts of law are often involved in resolving political issues, including issues pertaining to foreign and security policy. This involvement is more intensive in Israel than in many other democracies.[1] That is why one might be interested in comprehending some legal aspects, especially those of constitutional law, that are present in the background of Israeli reality.

In this article I will discuss two issues which are at the centre of the legal and political Israeli agenda. The first issue is the unique Israeli Constitution. The mere existence of a constitution in Israel is controversial.[2] In this sense, the situation in Israel is idiosyncratic. I do not know of any other comparison. The other issue is the legal rules pertaining to the fight against terrorism, especially the relevant constitutional limitations. The two issues are obviously closely linked, in ways which I will try to illuminate by using some examples.

I

Some years ago, while visiting Canada, I told a Canadian friend that I taught constitutional law in Israel. My friend was surprised and asked: "Is it possible to have constitutional law in Israel, a state which does not have a constitution?" And the answer then — more than ten years ago — was that although Israel does not have a formal document titled "Constitution," Israel does have material constitutional law. Indeed, since its establishment in 1948, the prevailing Israeli master-narrative had been that Israel does not have a formal constitution, but rather material non-superior legal rules in constitutional matters. This narrative had crucial influence on the interpretation given to Isreal's "founding documents." The lack of "Constitution" narrative has gained a strong hold on the Israeli political and legal discourse.

But if my friend had asked the same question today, I would say that the question was based upon a popular fallacy. In many significant ways, Israel does have a formal written constitution, although unique in its nature and still not known by a large portion of Israeli citizens and even politicians. The old narrative has been subjected to a process of change over the last decade. In order to understand this, I will elaborate at least part of the relevant historical background.

The Israeli Declaration of Independence was accepted in May 1948, by a body called the "State Temporary Council." The Declaration itself did not presume to be the Constitution of Israel, but it stated a date for the election of a Constitutional Assembly that was supposed to compile Israel's Constitution. This Assembly was elected in 1949. It also took upon itself the powers of a legislature, and changed its name to the "First Knesset."

A dispute arose as to whether a constitution was desirable. The constitution opponents, headed by David Ben-Gurion, Israel's first Prime Minister, claimed that at that stage, when the young state was struggling with the prospect of millions of immigrants expected to arrive in the coming years, establishing a constitution with the current population would not be fair. Beyond that, at that time constitutional judicial review did not enjoy the best of reputations. Ben-Gurion, who was

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1 See Ariel L. Bendor, "Investigating the Executive Branch in Israel and in the United States: Politics as Law, The Politics of Law" (2000) 54 U. Miami L. Rev. 193 at 232–34.

2 See Ruth Gavison, "The Controversy over Israel's Bill of Rights" (1985) 15 Isr. Y.B. Hum. Rts. 113; Daphne Barak-Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective" (1995) 26 Colum. H.R.L. Rev. 309.

aware of the famous American *Lochner*[3] trauma, was reluctant to subject the government to judges. As a result, the Constitutional Assembly, at that time known as the First Knesset, reached a compromise, called the "Harrari Decision" of 1950.[4] In this decision it was written:

> The First Knesset is appointing its Constitution, Statutes and Law Committee to prepare a proposal of Constitution for the State. The Constitution will be composed chapter by chapter, so that every chapter will be considered a Basic Law by itself. The chapters will be brought before the Knesset when the Committee will finish its task, and the chapters altogether will be compiled into the Constitution of the State.[5]

At first, over almost eight years, nothing had been done according to the Harrari Decision. Later, and gradually, the Knesset enacted eleven Basic Laws.[6] These Basic Laws deal with almost all of the significant constitutional issues, such as the main branches of government and a great portion of basic human rights and civil liberties.

II

The Basic Laws were considered for many years to be regular statutes. The Knesset amended them or deviated from them through regular parliamentary statutes. Indeed, in four cases the Supreme Court declared void Knesset statutes that deviated from the electoral system set forth in *Basic Law: The Knesset* enacted without the special majority required in the *Basic Law*. Yet, the Court didn't accompany this decision with any substantial reasons. The issue of the Basic Laws' legal status remained rather peripheral until the beginning of the 1990s. I recall that when I started teaching Constitutional Law not much more than a decade ago, my syllabus included only one or two cases pertaining to this issue, and even those cases were intended for self-study.

Only few years later, a typical Israeli syllabus on Constitutional Law includes a considerable number of sources on the Basic Laws. Currently, Basic Laws are interpreted and applied by the courts on a daily basis as chapters of a constitution, and are used as a basis for judicial review. The Supreme Court has declared void statutes which contradict Basic Laws in eight cases thus far.[7] Many, and among them the Israeli Chief Justice, Aharon Barak, go even further, stating that Israel does have a formal constitution, and that the Basic Laws are it.

III

The trigger for this evolution — the "Constitutional Revolution" in Barak C.J.'s famous,[8] some would say notorious, idiom — was two Basic Laws on civil liberties enacted by the Knesset in 1992: *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*. These Basic Laws explicitly purport to limit the power of the Knesset to violate the rights and liberties anchored therein through regular statutes. Since issues connected to civil liberties arise quite often, the courts had no choice but to decide whether a violation of these Basic Laws was a cause for judicial review.

Yet, the Supreme Court of Israel, while discussing cases related to the new Basic Laws on human dignity and liberty and freedom of occupation, based its decisions on constitutional theory relevant to Basic Laws as such. The Court ruled that the Knesset enacts Basic Laws through its authority as the Constitutional Assembly, a power the Knesset has held since 1949. As a result, only Basic Laws can amend Basic Laws, and regular parliamentary acts cannot deviate from norms anchored in Basic Laws.

The Knesset can amend Basic Laws by using the same procedure as that for amending regular statutes, and most of the Basic Laws can be changed by an ordinary majority of the participating Knesset members. Even the Basic Laws that require a special majority for amendments suffice with a majority of Knesset members, which is sixty-one out of 120 members, a requirement that is not difficult to comply with. However, in practice the Knesset does not take

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3 See *Lochner v. New York*, 198 U.S. 45 (1905).

4 *Harrari Resolution* (13 June 1950), from the First Knesset debates.

5 *Ibid*.

6 These Basic Laws are: *Basic Law: The Knesset* (1958); *Basic Law: The Lands of the State* (1960); *Basic Law: The President of the State* (1964); *Basic Law The Government* (originally 1965; the current version, 2001); *Basic Law: Economy of the State* (1975); *Basic Law: The Army* (1976); *Basic Law: Jerusalem the Capital of the State* (1980); *Basic Law: The Judicature* (1984); *Basic Law: The Comptroller of the State* (1988); *Basic Law: Human Dignity and Liberty* (1992); and *Basic Law: Freedom of Occupation* (originally 1992; the current version, 1994).

7 See HCJ 98/69 *Bergman v. Minister of Finance*, 23(1) P.D. 693; HCJ 246/81 *Derech Erets Association v. The Broadcasting Authority*, 34(4) P.D. 1; HCJ 141/82 *Rubinstein v. Chairman of the Knesset*, 37(3) P.D. 141; HCJ 142/89 *L.A.O.R. Movement v. Chairman of the Knesset*, 44(3) P.D. 529; CA 6821/93 *Hamizrahi Bank v. Migdal*, 49(4) P.D. 221; HCJ 6055/95 *Tsemach v. Minister of Defense*, 53(5) P.D. 241; HCJ 1030/99 *Oron v. Chairman of the Knesset*, 56(3) P.D. 640; HCJ 212/03 *Herut v. Chairman of the Central Election Committee*, 57(1) P.D. 750.

8 The first appearance of the "Constitutional Revolution" was in a title of Barak C.J.'s article: see Aharon Barak, "The Constitutional Revolution: Protected Human Rights" (1992) 1 Mishpat Umimshal (U. Haifa L. & Gov't J.) 9 (Hebrew).

advantage of this easy possibility to change Basic Laws in order to bypass judicial review.

IV

As I mentioned before, the Basic Laws on human rights limit the Knesset's power to restrict the rights set out in them by regular statutes. Those rights are the right to life; to bodily safety and to human dignity; the right to liberty from imprisonment, detention, extradition and any other violation of liberty; the right of every person to leave the country and the right of citizens to get in; various rights to privacy; and freedom of occupation. Indeed, this list is not inclusive of all rights, but the Supreme Court's inclination has been to interpret the right to human dignity broadly, and as including central aspects of rights such as free speech and equality. In any case, rights that are not mentioned in one of these two Basic Laws are considered part of Israel's material constitution, and are entitled to judicial protection that in fact grants them a similar amount of protection to the protection given to the rights set out in the Basic Laws.

Indeed, basic rights — whether enumerated in Basic Laws, regular statutes or the Israeli common law — are not absolute. But limitations of them must comply with the requirement, inspired by section 1 in the *Canadian Charter of Rights and Freedoms*,[9] set out in the "Limitation Clause." This clause reads:

> The rights conferred by this Basic Law shall not be infringed save where provided by a statute which befits the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required, or under an aforesaid statute by virtue of an explicit authorization therein.[10]

The last requirement, "an extent no greater than required" — a proportionality requirement — is the focus of the clause, and usually the law-makers, including the courts, put it at the centre of their analysis. This requirement was interpreted by the Israeli Supreme Court as including three sub-requirements. First, limiting a right must be compatible with the purpose it is degisned to achieve; that is, it must be rational. There is no room to limit basic constitutional rights if the limitation does not assist in achieving the public purpose that the authority seeks to achieve. Second, the limitation must be as minimal as possible in order to achieve the purpose. Third, there must be a reasonable proportion between the importance of the purpose and the severity of the limitation of the right. It is not permissible to severely violate an important right in order to achieve a public purpose with a limited importance.

This brings us to the question of fighting terrorism and the relation between this battle and human rights, as well as to the Basic Laws that entrench those rights. Fighting terrorism entails limiting human rights. On the face of it, limiting human rights should be practiced according to criteria set out in the Basic Laws, especially in the limitation clause. But that matter is not so simple. There are various reasons.

V

One difficulty stems from the fact that in Israel a significant portion of the fight against terrorism takes place in the occupied territories, which are not part of Israeli sovereignty. The law of Israel is not supposed to be applied in those territories, and Israel's courts are not supposed to adjudicate issues concerning them. Yet, in fact, the situation is different. The Israeli Supreme Court, sitting as the High Court of Justice — that is, Israel's central court in matters of constitutional and administrative law — deals routinely with petitions of occupied territory residents and those of others against the Israeli army. The Government of Israel — probably in order to gain legal, public and even international legitimacy — has never denied the authority of Israeli courts to deal with those petitions. The legal basis for this adjudication is that the army is an Israeli government authority, and as such is subject to Israeli courts even when operating outside the borders of the state. Indeed, the primary legal norms that bind Israeli authorities in the territories are those of international law. However, as an Israeli authority the army — even when acting in the occupied territories — is bound to the principles of Israeli constitutional and administrative law, while taking into account the situation of occupation and the security interests of Israel.

VI

Another issue pertains to the extent of the courts' involvement in the fight against terrorism. Unlike the situation in many other countries, the courts in Israel hardly acknowledge any limitation on judicial review — not of non-justiciable "political questions," and not of standing. Petitions against security acts of the authorities, including acts that are taken in the fight against terrorism, are essentially dealt with by the courts.

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[9] *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

[10] *Basic Law: Human Dignity and Liberty*, s. 8. See also *Basic Law: Freedon of Occupation*, s. 4.

And indeed, the dilemmas embedded in the relationship between democracy and the battles against terrorism are commonly presented through an institutional prism, which expresses a realistic legal outlook. The question that is often asked, both in Israel and in other countries, is, "What are the limits of the judicial intervention in the anti-terror policies of the government, the army and other national security entities?" To be more precise, the question is, "How should or could courts limit the means that other agencies employ in fighting terror?" Indeed, experience proves that although security authorities are purportedly responsible for protecting and preserving all aspects of democracy, including not only its existence but also those aspects concerning human rights, in reality the authorities are inclined, and not only in Israel, to favor security interests. This is particularly evident during emergency periods, when protecting human rights seems to those authorities to be subordinate to their responsibility to the physical existence and security of the citizens and residents of the state. This treatment can be explained not only by the fact that the government in a democratic state is accountable to the public, and the public itself tends during such times toward a rigid and uncompromising stance that favours national security, but also by the fact that security authorities are usually experts only in security. They consider themselves responsible for achieving optimal security while human rights considerations are, from their point of view, even if they are taken into some account, only "external" constraints. On the other hand, the court is actually the dominant guardian of human rights, at least in emergency times, and its role is to balance human rights and security considerations, and to ensure that the security considerations do not override human rights.

This realistic perception, maintaining that balance between the needs of the fight against terrorism and other constitutional principles, especially human rights, is applied primarily by the courts, is only partly a faithful description of reality. The actual situation — institutionally and substantially — is far more intricate. I would like to offer several examples. Each example illustrates a different aspect of this intricacy.

VII

One example deals with the legitimacy and constitutionality of using physical force by interrogators against suspected terrorists. Several years ago the Israeli Supreme Court granted an application against such measures because the interrogators were not authorized by law to take them.[11]

Nonetheless, the judgment states that the Court refrains from expressing an opinion as to what its decision would be if the Knesset were to enact a statute explicitly authorizing physical pressure in certain interrogations, for instance, in "ticking bomb" situations where an immediate danger to life exists should the terrorist withhold information. But when the issue came up, the Knesset rejected a proposition to enact such a statute. The reason for the rejection, apart from the moral dilemma, was mainly the fear that the statute would not comply with the constitutional demands of the *Basic Law: Human Liberty and Dignity*, and that such a statute might be damaging in the international arena.

Indeed, in practice, the influence of the human rights Basic Laws has not materialized through nullification of statutes by the courts — a step that has been rarely taken — but through restraint on the part of the Knesset from enacting unconstitutional laws. The Knesset has a legal advice mechanism for constitutional issues, and in almost every case in which the legal advisers have had doubts about the constitutionality of a suggested law, the Knesset has refrained from enacting it.

VIII

In certain cases in which the Court based its decision upon an existing law, the Knesset chose to amend the law after the decision. An example of this is the case of the administrative detention of about fifteen people — some of them members of terrorist organizations — captured by Israel in Lebanon in order to facilitate the negotiation for the release of Israeli captives, among them Ron Arad.[12]

The Israeli Supreme Court, in a further hearing, and after the Chief Justice changed his mind, annulled the detention, stating that detention of people for the sake of bargaining when the detainees do not create direct security risks is not permitted by the existing law.[13] In light of this judgment, most detainees were released. Two of them — senior members of Lebanese terrorist organizations — remained in custody after the

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[11] See HCJ 5100/94 *Public Committee against Torture v. Government of Israel*, 53(4) P.D. 817.

[12] Ron Arad was a navigator in the Israeli Airforce when he was captured by the Amal Militia on 16 October 1986.

[13] See CAH 7048/97 *John Doe et al. v. Minister of Defense*, 53(1) P.D. 721.

Knesset enacted the new statute, which validated the detention of members of terrorist organizations.[14]

IX

An interesting case that emphasizes the fact that a court will not always weigh human rights more heavily than security interests is a petition currently pending before the Israeli Supreme Court. The petition seeks to reverse judicial orders to prevent publication of material that endangers the security of the state and to direct such material to the military censor, an army officer. It seems that judges, who are reluctant to assume responsibility for endangering security through the publication of information, comply with almost all requests to order publication bans that stem from security concerns. In comparison, the military censor has a more controlled attitude, and prevents publication only in cases in which there is a concrete reason to believe with certainty that the publication will cause a security problem.

X

There has been frequent criticism claiming that the percentage of granted petitions submitted by residents of the occupied territories is considerably lower than the percentage of granted petitions submitted by Israeli citizens. It may be claimed that this fact illustrates the subordination of the Israeli Supreme Court to governmental security policy, even when this policy is barely legal. But it seems that such a depiction would not be very accurate because the percentage of petitions submitted by occupied territory residents who fully or partly achieve their purpose is higher than the parallel general percentage.[15] The reason is that in many cases the state, before the matter reaches a judicial determination, accepts the demands of the residents, sometimes after mediation by the judges. There are also cases in which the petition is formally rejected, but the court includes in its decision instructions that practically give way, at least partly, to the requests of the petitioners.

CONCLUSION

In spite of all this, the situation is far from being ideal. In certain issues, for instance, those concerning expulsion or demolishing houses of terrorists' families, there are doubts as to whether the rulings of the Israeli courts are compatible with international law, or even with some of Israel's own constitutional laws.[16] Yet the judicial involvement, even in questions of the struggle against terrorism, is of assistance.

There is a well-known saying that when the cannons speak, the Muses are silent. This statement does not reflect the Israeli attitude. Constitutional law, like law at large, is unable to solve all problems, but can, and actually is, to be of some important use.

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[14] See *Imprisonment of Illegal Fighters Act*, 2002.

[15] See Yoav Dotan, "Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada" (1999) 33 L. & Soc'y Rev. 319.

[16] See D. Kretzmer, *The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002).