Counter-Terrorism Law and the Rule of Law Under Extreme Conditions : Theoretical Insights and the Experience of Israel

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2016 was a record year of terrorism in Europe. Although other parts of the world have suffered more from terrorism, the number of terror attacks committed on European soil and the number of fatalities and casualties reached a worrying peak, where France was the prime target. The current threats of terrorism are greater than in the past because of globalization and technological development, or, more specifically, for three interrelated reasons : (1) Some of the organizations engaged with terrorism became transnational organizations, well-organized and well funded, with abilities to conduct much more sophisticated attacks ; (2) Technological developments extend the range and threats of terror activities to include not only physical attacks, but also the use of advanced technologies operated from far to inflict chaos and potential physical harm ; and (3) While some terror attacks are committed by such sophisticated organizations, increasing number of terror attacks are committed by "lonely wolves", who are captured by fanatic ideas which include inflicting violence on those who do not accept certain beliefs or way of life.

Europe had enjoyed the longest ever period of peace and security and the constitutional traditions and legal systems of European countries reflect these circumstances. How should European legal systems adjust to the new terror threatening reality ? The different legal responses of France and the UK provide an initial interesting field of inquiry : While France regards the new terror wave as an exceptional legal situation, meriting a declaration of emergency and enabling legal powers which do not exist during "normal" times, the UK discourse is about a new normality, meriting adjustment of the "regular" laws, as reflected by the statement

of David Anderson QC, the former Independent Reviewer of Terrorism Legislation, according to which there appears to be growing parliamentary, judicial and independent acceptance of the argument that the balance previously struck between security and human rights has had to be re-calibrated so as to ensure that security is given greater weight than before, and human rights less weight.[1]

In this short paper I will try to address the legal challenges on a theoretical level of the rule of law under extreme conditions, with some insights from Israel, that has lived with terrorism since its establishment, but nevertheless managed to maintain an uninterrupted democracy and ranks relatively high on the rule of law indexes.[2]

I. COUNTERTERRORISM LAW *VIS-À-VIS* THE RULE OF LAW

A. The Rule of Law

The rule of law is one of the fundamental concepts of the modern theory (and practice) of the state and has proven to be the best indicator (more than the level of democracy) for a countries success (economic and otherwise). It denotes that every member of the polity is subject to the law and hence it negates the idea that rulers are above the law (such as expressed by the theory of divine right, which was the dominant political theory before the Enlightenment). It also means governing by laws, as opposed to ruling case-by-case, a practice that can lead to arbitrariness, and it implies that all citizens are equal, as they are all subject to the same laws and their uniform enforcement.

The rule of law comprises two layers : formal and substantive. The formal layer means that, on the one hand, individuals are free to pursue any activity they wish, save those activities explicitly prohibited by law, and on the other hand, that governments and other authorities are not entitled to pursue any activity save those that they are explicitly permitted to undertake by law. Substantiation of this formal layer means that governments and other officials cannot prevent or sanction individuals' actions, save when they have violated the law, and, likewise, governments and other officials can only use the powers explicitly granted to them by law. Thus, prerogative powers, for example, which rulers assume in the course of extreme conditions, violate the rule of law. A structural condition for substantiating the formal facet of the rule of law is the establishment and operation of

1. See the website of the Independent Reviewer at [https://terrorismlegislationreviewer.independent.gov.uk].

2. E.g. the World Bank Rule of Law Index ranked Israel in 2015 on the 27th place, while France was ranked in the 23rd place. See [http://www.theglobaleconomy.com/rankings/wb_ruleoflaw/]

independent and efficient enforcement agencies, primarily prosecution agencies and courts, without which equal enforcement of the law cannot be achieved.

However, laws can impose far-reaching prohibitions on individuals, as well as endowing state authorities with extensive powers, all of this in full compliance with the formal facet of the rule of law. To prevent this, the substantive facet has to be incorporated. It denotes substantive limits to prohibitions on individual conduct and to the empowerment of state authorities or officials. While the formal facet of the rule of law only requires that prohibitions on individuals or the empowerment of government be anchored in a prospective, general, clear and equally enforced laws, the substantive facet requires that such prohibitions or empowerment do not violate various content-based values. One such substantive limit is a concept of individual rights, which constrain prohibitions on individuals as well as the extensive empowerment of the government. Another constrain is the doctrine of separation of powers, which may (by law) limit the delegation of powers from the legislature to the executive or other officials, and is meant to foster deliberation and prevent decision-making reflecting the preferences of raw majorities. A common mechanism to achieve the substantive facet of the rule of law is judicial review of legislation, either by a special constitutional court (the Continental European tradition) or by the general court system (the Anglo-American tradition). The independence (especially from the other branches of government), trustworthiness and quality of judges are, therefore, essential precondition for materializing the substantive layer of the rule of law.

B. The Rule of Law under Extreme Conditions

The ideal type of the rule of law and especially the balance struck by its substantive segment are prescribed for normal times and might require an adjustment under extreme conditions. When a major disaster (earthquake, fire, epidemic) occurs, when a war is launched against a state, or when a sudden fierce economic crises erupts, the regular laws, institutions and decision-making process might be ill-equipped to achieve a quick return to normality with minimal casualties and damage.

Terror acts can constitute an extreme condition, but not all terror attacks are such. An act of terror is a criminal offence committed for ideological reasons and intended to create fear or impact state policy. Sporadic, minor acts of terror by unorganized individuals do not differ from regular crime and the regular legal framework should be sufficient, prior, during and after such attacks. But terror can be on a large scale with the planning of a well-funded and sophisticated global organization and such acts, especially if they "succeed" in the number of casualties, damage and disruption to normal life, might indeed be parallel to a launch of a war and hence creating extreme conditions, requiring departure from the regular legal scheme (for dealing with the attack while it happens, as well as for the recovery

stage and in attempting to prevent it *ex-ante*). Likewise, a wave of many small terror acts might also constitute extreme conditions.

This offered distinction is similar to the differences between a local fire or a flood, which in a decent legal system can be dealt with effectively under the regular legal scheme, and a major disaster, which requires special legal tools. But in contrast to a natural disaster, the classification of a terror activity as an extreme situation is much more vulnerable to political and popular considerations. In this respect one can observe that the media plays a key role in affecting public perception of such incidents and, in turn, affecting the reaction of politicians. This point highlights a key issue of the resort by politicians to declare emergency, which in a good legal system should itself be checked and balanced and perhaps even reviewed by judges or other independent agencies. It also might be important when different models of the rule of law under extreme conditions (see below) are considered and assessed.

From the perspective of the rule of law, the conditions that justify a departure from normality should include unpredictablity, imminency and vast magnitude in terms of harm, population spread or geographical reach. The European Court of Human Rights ruled long ago that a legitimate public emergency, justifying derogation from commitment to respect human rights, should constitute "an exceptional situation of crisis or emergency, which afflicts the whole population and constitutes a threat to the organized life of the community of which the State is composed".[3]

Conceptualization of the analysis above might yield a distinction between three possible situations :

1) Normal times : Substantive norms as well as procedures and institutional design for collective decision-making to enact or amend norms and their execution, enforcement and adjudication, all designed for regular or normal times materializing the formal and substantive facets of the rule of law;

2) Times of emergencies : Specific — *sui-generis* — norms, procedures and institutional design tailored for various types of irregular or extreme conditions, where these conditions are envisaged *ex-ante* and hence the legal arrangements (both substantive and procedural) exist before the occurrence of the extreme condition, which only puts them into effect;

3) Times of exception : An option for a dramatic departure from (1) where a major non-envisaged crises occurs and hence even (2) is not sufficient to take the

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3. *Lawless* v. *Ireland*, (1961) 1 EHRR 15. The European Commission on Human Rights further developed the definition of legitimate "public emergency" which (1) must be actual or imminent, (2) the effects of emergency must involve the whole nation, (3) the continuance of the organized life of the community must be threatened and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

appropriate measures in order to mitigate the situation — the real state of an exception.

The *magnitude, spread and geographical scope* of the disaster are some of the key features that distinguishes between (1) and (2). The *predictability* of the situation might be the key element that distinguishes between (2) and (3), and this feature of predictability is of course different from polity to polity and depends on external circumstances (such as an area prone to natural disasters) and past experience (such as terror attacks or political crises).

The more problematic situation (which indeed prompted Carl Schmitt's and Giorgio Agamben's famous criticism[4]) is situation (3). The conditions that can justify it from the vintage point of the rule of law are the combination of non-predictability and urgency. In a situation that prompts a need for *swift* and *effective* measures to mitigate negative effects and restore normality, but the situation is predictable on the bases of past experiences, the norms granting powers to governmental authorities and/or limiting individuals' freedoms can be prescribed *ex-ante*, enjoying all the benefits of the regular collective decision-making procedures, including deliberation, striving to consensus, checks and balances and judicial review (corresponding to situation 2). When a polity is faced with an unpredictable threat, but this threat, even though it is so big that the mere existence of the polity is endangered, has no immediate effects, the regular parameters of the rule of law are again sufficient (corresponding to situation 1 and/or 2). Thus, a country prone to seasonal floods can prepare *ex-ante* specific legal arrangements and institutional set-up to engage in swift and effective measures for resorting to normality (situation 2). Global warming which can endanger the existence of states is not an immediate threat that constitutes a justification for a type (3) exception *vis-à-vis* the rule of law.

The abstract analysis above also provides a direction to what should we except situation (2) and (3) to be in terms of departure from the normal times rule of law. Urgency denotes a need for speedy decision-making and action. It can thus include some of these elements : a) granting to the executive rule-making powers, which usually are in the competence of the legislature ; b) granting more authorities to the state and its officials and thus limiting more individual freedoms in comparison to normal times ; c) reducing the democratic control (checks and balances, judicial review etc.) over the executive ; and d) shifting a greater weight in collective decision-making to experts in relations to politicians (including the assessment of whether extreme conditions exist). Most of these changes compromise the substantive facet of the rule of law, and indeed, some of the ingredients of the formal

4. C. Schmitt (1934 [2005]), *Political Theology : Four Chapters on the Concept of Sovereignty*, George D. Schwab, trans., University of Chicago Press ; G. Agamben (2005), *The State of Exception*, University of Chicago Press.

favor of the rule of law should not be compromised during extreme conditions. Such are public declaration of new norms with prospective application and equality in front of the law or equal enforcement of the law. Other components of the formal facet of the rule of law, such as governing by general norms, may be compromised, as the result of the uniqueness (unpredictability) of the situation and the need for a sui-generis swift action.

C. Three models of the rule of law under extreme conditions

One can distinguish between three basic models regarding the rule of law under extreme conditions, from both positive analysis (models that are in fact practiced by different countries) and normative analysis :

1. Business as usual. — no recognition in the need for emergency laws and procedures. The ordinary legal system and decision-making procedures provide the necessary answers to any potential crisis and can be adjusted according to the changing circumstances to incorporate and mitigate various extreme conditions. Accommodation of the new circumstances can be done by legislation and/or by interpretation of existing norms.

This model is of special interest as it characterizes the actual current practice of most modern democracies.[5] It is, for example, the prime model practiced across the Lamanche. The UK Prevention of Terrorism Acts (1974, 1976, 1984 and 1989) and other recent statutes meant to combat terrorism are part of the regular laws and enacted by the regular legislative procedures. So does the US PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act (2001) enacted by Congress following the 9/11 terror attack. But even in other countries where an emergency constitution does exist (e.g. Germany, Turkey and India), the emergency constitution route has hardly been employed and, instead, regular legislation providing more powers to the executive or to other authorities and allowing to curtail individual rights have been enacted, bypassing the special constitutional emergency powers avenue.[6]

2. Emergency constitution. — originating from the Roman model,[7] emergency constitution is common in many countries. The emergency constitution model

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5. J. Ferejohn and P. Pasquino (2004), "Law of Exception : A Typology of Emergency Powers, The Symposium : Emergency Powers and Constitutionalism", 2 *Int'l J. Const. L.* 210.

6. See *The Minerva Center for the Rule of Law under Extreme Conditions at the University of Haifa* (2014), *Law and Emergencies : A Comparative Overview*, Research Paper available at [http://minervaextremelaw.haifa.ac.il/images/Law_and_Emergencies-_A_Comparative_Overview-_March_27-2014-A.pdf].

7. The Roman Republic (509 BC-27 BC) had a complex system of government with various decision-making institutions and some forms of democracy and separation of powers. However, under

negate the business as usual model, acknowledging, on the one hand, the unpredictable nature of extreme conditions, hence the inability to prescribe all the specific substantive rules needed for such conditions, and, on the other hand, the need to enable efficient and swift decision-making during extreme conditions. A declaration of emergency brings into force special laws and/or special procedures/institutions for enacting additional legal norms, bypassing the regular legislative process. With the termination of the emergency the substantive laws and collective decision-making procedures of normality are reinstituted.

3. *Stepping outside the rule of law, or ex-post model.* — recognizing the need for a swift and effective actions during extreme conditions and their unpredictable nature, and negating the desirability and/or the ability to prescribe ex-ante special decision-making procedures or a unique rule of law format tailored to operate under extreme conditions, maintaining a clear separation between normal times and extreme conditions, this model advocates effective measures outside the rule of law and their legalization or legitimation *ex-post*.

This model originates from the Prerogative Powers theory, which can be traced back to the political philosophy of John Locke (1689). It asserts that even if the constitution does not grant the president or the executive specific powers to operate during extreme condition, these powers exists as derived from the very rationale of the establishment of the state or its social contract. This model can characterize the actual practice of the USA during emergencies from the times of President Lincoln until present,[8] but one can also include in this category Article 16 of the French constitution, which basically grant the President of the republic unlimited powers in times of exception, thus violating the requirements of the substantive as well as the formal facets of the rule of law.

Each of the models has advantages and disadvantages. While the "business as usual" looks as the best model in which the regular decision-making process with deliberation and checks and balances mechanisms yield the best rules balancing security concerns with human rights, it suffer two major flows : first, reality undermines theory and some extreme conditions are unpredictable. Lacking a real

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extreme conditions, particularly in occasions of military threats, a dictator was appointed for a fixed period of six months. During this period he had all collective decision-making powers to issue decrees and orders, including infringement of people's established rights. With the end of the period the dictator had to step down and was not allowed to hold any official function and his decrees and decisions were nulled, restoring the legal situation to the one before his appointment. The model creates a sharp distinction between normality and extreme conditions and in our terminology allows a total departure from the rule of law during extreme condition, but limited in time and ensuring no leaks from the legal order during emergency to the legal order in normal times. The decision to declare emergency was in the hands of the Senate, whereas the Consuls had the authority to appoint the dictator, a mechanism that served to prevent abuse of emergency declarations.

8. O. Gross (2003), "Chaos and Rules : Should Responses to Violent Crisis Always Be Constitutional ?", 112 *Yale L. J.* 1011.

emergency mechanism may foster total departure from the rule of law. Second, accommodating laws for extreme conditions into the regular legal system may constitute a new normality in which there are more powers to the authorities and less rights to the individuals. This is indeed the consequence of counterterrorism legislation in various liberal democracies (e.g. USA and UK)

The "emergency constitution" model is veteran. It was practiced already by the Roman Republic, in which a dictator was appointed for six months in times of emergency. It is constructed on the basis of a clear separation between the rule of law under normality and under extreme conditions, enabling the delegation of some powers, most importantly law-making, to the executive (either to the President of the Cabinet), preserving some features of normal times rule of law. This separation can prevent a slippery slope departure from the rule of law in times of normality. However, its main drawbacks are the potential abuse of emergency declaration, the boldest example of which was the cause for the collapse of the Weimar Republic and the rise to power of the Nazis. Well known is Carl Schmitt critic that the one who can declare the state of exception is the sovereign. Another problem is the prolonging of emergency declaration for long periods, so it becomes a new normality, as is the situation in Israel.

Some scholars have argued that in light of the dangers of the aforementioned two models the preferred model is stepping outside the rule of law. Its supporters stress the post extreme condition process of deliberation and decision whether to legitimize the departure from the rule of law, but such legitimization might bring also legislation, bringing like in the other models to a new emergency normality, as might be argued is the US case. In addition, while non-democratic countries will not be able to conduct ex-post legitimation process, it is doubtful whether even democracies can conduct such *ex-post* scrutiny regarding the legitimacy of extra-legal measures taken during extreme conditions. The actual history of such *ex-post* practices does not reveal truly effective deliberation, monitoring and prosecution of those who took non-legitimate or excessive extra-legal measures.

In reality most countries practice more than one model (or a specific combination of them), which of course compromise the theoretical advantages of each of the models, as will be apparent in the discussion of Israeli law in the following section.

II. ISRAELI COUNTERTERRORISM LAW *VIS-À-VIS* THE RULE OF LAW

Terrorism is not a new phenomenon in Israel, and some types of terrorism that attack Europe today have been practiced in Palestine/Israel for the last hundred years. Most forms of terrorism, therefore, cannot be regarded as unpredictable situation justifying an exception from the rule of law. Indeed, despite an effective fight

against terrorism, Israel managed to maintain uninterrupted democracy since its establishment, and to uphold the formal facet of the rule of law effectively.

The Israeli counterterrorism law can be characterized as a combination of the "emergency constitution" and the "business as usual" models. The legal framework provides for harsh punitive measures and draconic administrative powers to the authorities to combat terrorism, but the model adopted by Israel is a legislative one, rather than an executive (i.e. prerogative or residual powers model) as is, for example, the situation in the US. In other words, Israel does not practice the "stepping outside the law" model.

A second important feature of Israeli counterterrorism law is the significant role played by the courts on all levels of norms creation and enforcement. From the very establishment of the state in 1948, the actual use of legal powers has been always scrutinized by the courts, which limited the overuse of powers and balanced them against the safeguarding of human rights. The Israeli judiciary on all levels enjoys a very high degree of independence,[9] and since Israel in this respect belongs to the Common Law tradition in which there is one general courts system with a Supreme Court which serves also as a constitutional court, the Israeli jurisprudence is fairly coherent and judicial scrutiny is performed on all decision-making levels, including in security related matters, in contrast to courts in many other countries who tend to defer or limit their review when security or emergency issues are on stake.

While some of the Israeli counterterrorism law is contingent upon a specific declaration of a state of emergency, another portion of counterterrorism law is part of the general, "normal times", legal system and is not contingent on such a declaration. The general theoretical criticism against the emergency constitution and the business as usual models is vindicated in the Israeli case, as will be elaborated bellow.

A. The Israeli emergency constitution

The Israeli "emergency constitution", which was laid down in the first statute enacted by the Provisional Council in 1948 and is currently entrenched in Basic Law : the Government,[10] is impressive on the books : it empowers the Parliament (Knesset) to declare a state of emergency for a period of up to one year, and if the Knesset is unable to do so as the result of the emergency, the Government can declare such a state for up to seven days until the Knesset can conduct a vote. Such a declaration has two major legal consequences :

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9. E. Salzberger, E., "Judicial Selection in Israel : Constitution, Law and Politics", in K. Malleson and P. Russell (eds.), *Appointing Judges in an Age of Judicial Power : Critical Perspectives from Around the World*, Toronto University Press, (2005), p. 241-260.

10. Article 9 of the Law and Administration Ordinance (1948), which was replaced in 1996 by articles 38-41 in *Basic Law : the Government*.

1. It brings into force pre-existing legislation, which is not applicable during "normal times", such as *The Emergency Powers (Detention) Law 1979* and until recently also *The Prevention of Terrorism Ordinance 1948*.

2. Emergency declaration also empowers the cabinet or individual ministers to issue regulations "for the defense of the State, public security and the maintenance of supplies and essential services" with the force to supersede any existing law. These emergency regulations can be in force for a maximum period of three months, unless enacted as regular law by the Knesset. In other words, upon a declaration of emergency, the Government (*i.e.* the executive branch of government) is granted legislative powers. However, emergency regulations can impose neither retroactive punishment nor violation of human dignity and they are subject to judicial review.

Indeed, the Supreme Court of Israel has not hesitated to conduct judicial review of emergency regulations. It ruled, for example, already in 1963 that emergency regulations should be treated by the Court as any other secondary legislation and its legality depends on its being required for a necessary action, which in normal times would be unjustified to regulate by secondary legislation.[11] In 1990 the Court struck down emergency regulations made by the Minister of Housing who attempted by the regulations to shorten the process of granting building permits in order to enable the immediate construction of some 3000 units for a huge wave of immigrants arriving from the Soviet Union. The Court held that the immigration wave does not constitute an emergency situation and thus despite the fact that declaration of emergency is in force, the use of emergency regulations for that purpose was illegal.[12]

The Israeli general constitutional framework regarding emergency periods seems reasonable *vis-à-vis* both facets of the rule of law (the declaration is made by the legislature for a fixed period, emergency regulation have substantive limits and are subject to judicial review). However, in practice declaration of emergency was made with the establishment of the State in a midst of the Independence war and was extended by the Knesset almost automatically every year since. This fact brought the mere question of the emergency declaration also under judicial review. In 1999 the Israeli Association for Civil Rights petitioned the Supreme Court against the prevailing extensions of the declaration of state of emergency. Following criticism of the Court (who kept the application pending for many years), the Government accepted the need to end the state of emergency but asked for time to adjust all the legislation which is contingent on the declaration (By 1999 there were many pieces of legislation the validity of which were tied to declaration of emergency). Until this day the adjusting process has not been completed and thus the Knesset renews every 6 months the declaration of emergency. This "adjustment" process means that some emergency laws are now re-legislated as

11. Cr. A 156/63, *The Attorney General v. Ostreicher*, 17 PD 2088; 5 SJ (1963-65) 19.
12. HC 2944/90, *Poraz v. The Government of Israel*, 44(3) PD 317.

regular laws for normal times, vindicating the general criticism of emergency becoming normality, or a shift from the "emergency constitution" to the "business as usual" model. The new 2016 Counterterrorism law (see below) is part of this process.

Having said that, since the 1990 Court ruling,[13] the legal tool of emergency regulations (norms promulgated by the executive) is hardly being exercised and no such regulations exist in the direct context of counterterrorism. The more extensive legal tool related to counterterrorism are the *Defense (Emergency) regulations*, which were enacted by the British Mandatory regime in the 1930s and 1940s and were incorporated into Israeli law like all legislation in force on the eve of the establishment of Israel. These are not contingent on emergency declaration. With the enactment of the new 2016 counter-terrorism law some of the British regulations were abolished, but not all, and these regulations are still in force in the Occupied Territories serving as the major tool to combat terrorism.[14]

B. The Israeli specific counter-terrorism legislation

In September 1948, only a few months after the establishment of Israel, the UN envoy to the Middle East, Folke Bernadotte, was assassinated in Jerusalem allegedly by the Jewish terror organization Lehi (termed by the British "the Stern gang"). The existing criminal procedure and evidence law were not sufficient to arrest and indict the alleged perpetrators (who admitted guilt only in the late 1970s after the limitation period had passed). David Ben Gurion, ordered, therefore, to prepare a new legislation introducing new tools to counter terrorism and the result was the enactment of the *Prevention of Terrorism Ordinance* by the Provisional Council only six days after the assassination. The new Ordinance was to be valid only when emergency declaration is in effect. As such declaration was made during the war of Independence, the new law was swiftly used to eliminate the Lehi organization.[15]

The Ordinance included a penal section, adding to the general criminal law offences of activity in a terror organization (with a punishment of up to 20 years in prison), membership in a terror organization (up to 5 years) and expressing support to a terror organization (up to 3 years in prison). In addition, the law empowered the confiscation of property belonging to a terror organization, to be ruled by a District Court and the closing of a place serving the purposes of terror organization by administrative decree of the Chief of Police.

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13. *Ibid.*

14. For more details on the Defense (Emergency) Regulations see E. Salzberger, « La législation antiterroriste israélienne », *Archives de politique criminelle* 2016, 38, 189-226.

15. Lehi was declared a terror organization according to the legislation and 200 of its leaders and members were arrested. A legal proceeding attempting to challenge the declaration of Lehi as a terror organization failed see HC 16/48, *Baron v. the Prime Minister and the Minister of Defense*, 1 PD 109.

Until 1980 the *Prevention of Terrorism Ordinance* was utilized only against Jewish organizations, and after the stormy period of Israel's independence it was hardly used altogether. However, with the increasing activities of the PLO and other Palestinian organization, the Ordinance was amended in 1980 and expanded the definition of "expressing support" to include any publication of identification, encouragement, praise or sympathy with a terror organization, any monetary or other contribution to a terrorist organization, as well as allowing a terror organization to use premises or other property. In 1986 an additional amendment was made, expending Section 4 (expressing support) also to include meetings or unofficial negotiations with officials of a terror organization, save academic meetings, family meetings or journalist interviews. The purpose of this amendment was to prevent Israelis (mainly from the peace camp) to meet PLO officials and to penalize those who conduct such meetings.[16]

Indeed, in the same year, 1986, the Government declared PLO and other 19 Palestinian organizations as terror organizations and prosecuted several Israeli peace activists for conducting talks with PLO officials. The amendment was fiercely criticized as an unjustifiable violation of freedom of speech and other rights, and as a result, in 1992 it was repealed. In 1989 Hamas, Hezbollah and the Islamic Jihad were added to the list of declared terror organizations. In the 2000s, with the expansion of terror attacks around the globe, the number of organizations declared by the government as terror organization increased significantly and it included also organizations that do not operate or relate specifically to Israel.[17]

As most of the draconian powers of the *Prevention of Terrorism Ordinance* have almost never been applied one almost cannot find case law regarding it. We find judicial input mainly with regard to indictments of expressing support to a terror organization. A good example on hand is the Jabarin case from the early 2000s. Jabrin, an Arab-Israeli journalist, published a series of articles expressing support and encouragement of throwing stones and Molotov cocktails, for which he was convicted by the District Court for support of terror organization on the basis of Section 4 of the *Prevention of Terrorism Ordinance*. The appeal to the Supreme Court focused on the requirement of a causal connection between the publication and the danger of it leading to actual acts of violence. The Court dismissed the appeal ruling that there is no need for a probability connection for purposes of conviction.[18]

A rare procedure of Further Hearing in front of an enlarged bench was ordered.[19] The focus of the discussion in the further hearing was diverted to an additional

16. The Labor led Government, at the time, agreed to this amendment which was advocated by the right wing parties, in exchange for the right-wing support in amending the penal code, adding an offence of incitement to racism (Section 144A to the Israeli Penal Code).

17. For the list of declared terror organization by dates see : [http://web.archive.org/web/20101231071106/http://www.mod.gov.il/pages/general/pdfs/teror.pdf].

18. Cr.A. 4147/95, *Jabrin* v. *State of Israel*, 50 (4) P.D. 38.

19. Cr. F H 8613/96, *Jabrin* v. *State of Israel*, [2000] Isr SC 54(5) 193.

question — whether it was necessary for the praising of violence to be directly targeted at a specific terrorist organization. This interpretation was not born out by the language of the relevant statutory section, but by the fact that the section itself appeared in the *Prevention of Terror Ordinance*, in which the phrase "terrorist organization" appeared in almost every line, and the title of the section itself was : "Support for terrorist organization". Four judges as opposed to three broadened freedom of speech, limiting the applicability of the offense to supporting acts of violence only of a terrorist organization and maintaining the general principles of narrow interpretation of criminal law. Thus, Jabrin was acquitted.

Following the decision, the Knesset in 2002 repealed Section 4 of the *Prevention of Terrorism Ordinance*, replacing it with a new section (144D) in the Israeli Penal Code, which applies to incitement to terror activities even when it does not refer to support of a specific organization.[20] The new section 144D2 reads "If a person publishes a call to commit an act of violence or terror, or praise, words of approval, encouragement, support or identification with an act of violence or terror (in this section : inciting publication) and if — because of the inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years imprisonment". As can be noted the new article also includes a probability test, and, as part of the general penal code it is in force permanently and not only when emergency declaration is operative.

Following the globalization and sophistication of terror activities and the adoption of the *International Convention for the Suppression of the Financing of Terrorism*,[21] the Knesset enacted in 2005 an additional original comprehensive Israeli counterterrorism law, focusing on financing of terror activity — *The Prohibition of Terror Financing Law* 2005. Its penal section included two main offences : carrying a transaction in property meant to facilitate, promote or finance terror activity or reward those who carried it out, with a maximum penalty of 10 years in prison ; and carrying such transaction in property which facilitates terror activities or rewarding those who carried it out, which can result with up to 7 years in prison. While the former requires a *mens rea* of intent, the latter requires only knowledge, but the law specifies various presuppositions that can bring even negligent behavior within the scope of the offence and shift the onus of proof from the prosecution to the defendant. It also imposes an active duty to report on such transactions.

One of innovations of the law was that on top of the criminal sanction the adjudicating court was empowered also to order the forfeiture of the property. Five chapters of the law dealt with the terms for such an order and its scope. For

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20. See D. Barak-Erez and D. Scharia, "Freedom of Speech and Support for Terrorism : A Case Study of Global Constitutional Law", 2 *Harvard National Security Journal* (2011) 1.

21. The Treaty was adopted by the UN General Assembly in 1999, entered into force in 2002 and ratified by 187 States, including Israel.

example, the law holds that the level of proof required for such an order is a civil law level rather than a criminal law one and that such an order can be applied for in a civil procedure in the District Court even in absence of criminal proceedings. The law also provides for administrative measures. Thus the Minister of Defense can order confiscation of property, which expires if within 21 days an application to the court to issue a forfeiture order has not been launched.

On June 23rd 2016, the Israeli parliament approved a new comprehensive counterterrorism law, which came into force on November 1st, 2016 (*Counter-Terrorism Law 2016*). The law is the most significant input by the legislature since 1948. It includes more than 100 articles and it replaces the 1948 Ordinance, the 2005 Financing of Terrorism law and some of the British *Defense Regulations*. It is in force independently from a declaration of emergency and thus it is indeed in line with the Government's obligation to the Supreme Court to conduct a comprehensive revision, which will allow lifting the continuous state of emergency. However, it shifts emergency into normality and the focal Israeli approach from "emergency constitution" to "business as usual" model.

In general it can be stated that the law is less draconian than the repealed laws both in its penal section and in its administrative measures section. It also specifies (section 1) that its provisions should be applied in accordance with international law regarding terrorism, on the one hand, and Israel's obligation to respect human rights in accordance with international law, on the other hand. However, it "captures" broader activities as associated with terror, in comparison to the repealed legislation. Thus, the definition of a terror organization was expanded to include also organizations that significantly or continuously support, financially or otherwise, a declared terror organization. Likewise, the definition of membership in a terror organization was expanded to include also individuals who expressed their consent to join a terror organization, even before they actually acted in its framework (section 2).

The law define "Act of terror" as an offence conducted with national, religious or ideological motivation and is meant to create fear or panic among the public or in purpose to compel the government or other authority to take or refrain from taking particular action (section 2). Using this technique, on top of the specific offences defined in the counter terrorism law itself (see below), any regular offence can be regarded as an act of terror and the special procedural rules and rules of evidence will apply.

The law includes very detailed provisions regarding declaration of an organization as a terror organization. It empowers the Minister of Defense to issue such a declaration, following the recommendation by the Director of the General Secret Service and the approval of the Attorney General. Such a declaration can be made only after a warning was issued against the organization and nevertheless it continued its activities. The Minister of Defense or the Prime Minister can delegate the declaration to the Cabinet or to a committee of ministers (section 3). The law also empowers the committee of ministers to apply a declaration of an organization as a

terror organization made by the UN or by another authorized foreign entity (section 11).

Organizations declared as terror organizations can appeal to an advisory committee appointed by the Minister of Justice, chaired by a retired Supreme Court justice appointed in consultation with the President of the Supreme Court, and another two members — a jurist qualified to serve in the District Court and a security expert nominated by the Minister of Defense (section 14). The appellant can obtain all the relevant materials which were the bases for the declaration, save evidence the disclosure of which can harm state security and where the damage of its disclosure outweigh the benefits for finding the truth and conducting justice (section 9).

The new law includes a better mechanism of checks and balances (such as the approval of the Attorney General and an independent appeal committee) in comparison to the old Prevention of Terrorism Ordinance, to prevent the "politicization" or abuse of powers in declaring an organization as a terror organization, but once such declaration is approved, the penal and administrative measures available to the authorities are vast.

The penal part of the law (sections 20-40) includes the offences of heading a terror organization (maximum penalty — 25 years in prison and if the organization is involved in committing murders — life in prison), managing the operation of such an organization (up to 15 years in prison), membership in a terror organization (up to 5 or 7 years according to the actual activity of the organization), providing services or funds to a terror organization (up to 7 years) and expressing support in a terror organization (up to 2 to 5 years in prison, according to different categories of expressing such support). A decision of the Attorney General is required for indictment for the latter offence of expressing support (in order to safeguard freedom of speech and striking the right balance between state security and human rights). In addition, the law also includes new offences, among which are : failing to inform the authorities about a planned terror attack (up to three years in prison — section 26) and training members of a terror organization (up to 9 years in prison — section 29).

The law includes also "concessions" from the regular criminal procedure rules and rules of evidence. Thus some evidence can be not disclosed to the defendant (codifying a procedure developed by the courts in the context of the British Defense Regulations). Likewise, the court may accept hearsay (in contrast to regular criminal proceedings), if its source left Israel to an enemy country and cannot be summoned to court (section 42), and limitation period is lifted for offences for which the maximum punishment is over 20 years (section 44). In addition, the maximum period of custody of suspects in terror activity before a judicial hearing can be extended from the 24 hours norm to 72 or 96 hours (section 46).

The administrative part of the law (sections 53-72) deals in details mainly with property and funds related to terror activities. It empowers the Minister of Defense to confiscate any property that was connected to facilitating *(ex-ante)* a terror activity or rewarding *(ex-post)* it. The order is subject to a review by an administrative court (sections 56-68). It also empowers a commander of a police district to

and self-restraint characterizing the parallel English case law which examined the exercise of similar powers in England".[27]

More generally, the Court specified explicitly in the 1989 case of Schnitzer (an application to struck down censorship of an article revealing details about the Mossad) that : "Judges are not bureaucrats, but the principle of separation of powers obliges them to review the legality of the decisions of bureaucrats... As much as the judges are able and obliged to review the reasonableness of professional discretion in every area, so they must do in the area of security. This leads to the position that there are no special limits on the power of judicial review in matters of state security".[28]

When broadening the judicial review to the merits of the issues, the Court also adopted an activist approach in reviewing the evidence. In many cases the State argues for privilege of some of the evidence (based on the Evidence Law Ordinance) *i.e.* that some of the evidence cannot be disclosed due to state security reasons. When reviewing detention orders, the Court initiated a procedure, resembling an inquisitorial system, in which after the applicant's consent, the Court was handed the evidence for review without the presence of the applicant or his lawyer. This judicial practice was adopted by the Knesset when it enacted the 1979 Administrative Detention Law (which is still in force contingent on emergency declaration) and indeed the Counterterrorism law 2016, which allows the court to admit evidence without the detainee or his representative being present and without disclosing the evidence to them if, after studying the evidence or hearing submissions, even in their absence, it is satisfied that disclosure of the evidence to either of them may impair state security or public security.[29] It is an interesting example how judicial-made rules in specific context of administrative detention, attempting to enhance protection of rights, found their way to the statutes' book and to other legal procedures. On the one hand, the Knesset followed the rights protection motivated approach of the Court. On the other hand it extended it to other types of proceeding (for which it is in fact curtailing of existing rights), and implanted an arrangement made in context of emergency to be a norm during "normal" times.

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The Israeli experience shows that on the one hand counterterrorism activity can be conducted within the boundaries of the law and without the need to step outside the rule of law. However, a real separation between emergency and normality is much more difficult to achieve. Israel's counterterrorism activity is by now part

27. HC 554/81, *Baransa* v. *Commander of the Central Command*, IsrSC 36(4) 247.
28. HCJ 680/88, *Schnitzer* v. *Chief Military Censor*, 42(4) PD617 (1989).
29. For more details and analysis see : I. Zamir, "Human Rights and National Security", 23 *Israel Law Review* (1989), 375.

of the normal operation of democracy. Counterterrorism law became so entrenched in Israeli law (including judgments) that it has become very difficult to differentiate between the times of emergency and "normal" times. While judicial review over the use of emergency measures is quite strict, certain legal measures are used in Israel on a daily basis, which would have not been conceivable in other democracies, save perhaps in times of actual emergency. It is yet to be seen if European countries, for which terrorism is a new phenomenon, will follow the same path.