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THE MAGNA CARTA OF THE DEFENDANT ACCORDING TO THE NEW BILL OF RIGHTS IN ISRAEL — A COMPARATIVE STUDY

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A. INTRODUCTION.

The enactment of the Basic Law: Human Dignity and Liberty[1] has been defined as a "constitutional revolution."[2] The primary purpose of this article is to discuss the Basic Law's impact on criminal law and on defendants' rights, as well as address many questions that arise about the Basic Law's scope and its implications on various legal fields. Furthermore, this article will expose the problematic reality created when the new Basic Law interacts with the existing legislation and case law. Through a comparison to the Canadian legal system, it will point to possible new and progressive directions in the development of the Israeli legal system.

Prior to the enactment of the Basic Law, a defendant's basic rights in criminal law were anchored in Israeli legislation and case law. Procedural criminal law is now subject to the Basic Law and *filled with meaning* by its principles. The Basic

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[1] Israel has no written constitution. It has a series of basic laws which were meant to be temporary substitutes for a formal Constitution [hereinafter Basic Law].

In 1950, the Knesset (the Parliament) passed a resolution by which the formal Constitution would be drawn by a series of Basic Laws. The Knesset has since enacted sporadic Basic Laws establishing state institutions and authorities. For example, the Basic Law: The Knesset; Basic Law: The Judiciary; Basic Law: The Government; and Basic Law: The State Comptroller. Shoshana Netanyahu, *The Supreme Court Of Israel: A Safeguard Of The Rule Of Law*, 5 PACE INT'L L. REV. 1, 13-14 (1993).

[2] AHARON BARAK, INTERPRETATION IN LAW, PART III, CONSTITUTIONAL INTERPRETATION 313 (1994).

Law opened the way for interpretive changes of existing rules, thus, broadening defendant's rights in criminal law and allowing judicial review of future legislation. It is also very significant in shaping these rights in the future and to the establishment of minimal standards in order to prevent the limitation of the rights of the defendant. Moreover, today, it appears that the defendant can demand legislative involvement. According to section 4 of the Basic Law, when a defendant has a right unenforceable under a previous law, the defendant can petition the court for its recognition and special legislation for enforcement of that right.

The constitutional purpose of criminal law is to guarantee basic conditions for social existence. The defendant's rights in criminal law stand for the principle of an individual's freedom and human dignity. These rights are anchored in principles of liberal democracy and are based on the assumption recognizing the individual as a rational being with personal autonomy.

The draft law included the defendant's overall rights in criminal law which were not adopted in the Basic Law passed by the Knesset. This would seem to deny higher legislative status to these rights. However, the rights of the defendant stem from the rights to life, dignity and personal liberty. Once these rights have been incorporated into the Basic Law, it can be implied that the defendant's overall rights are also incorporated. Although this is the dominant view in legal literature, this issue has yet to be addressed by case law.[3]

The Basic Law was designed in large part according to the Canadian Charter.[4] In addition to the general rights to life, lib-

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[3] *See* Yehudit Karp, *The Criminal Law: Yanus of Human Rights*, 42 HAPRAKLIT 64 (1995). Sections 2,4,5 and section 1A (the Purpose) of the Basic Law may serve as a sufficient basis for anchoring procedural rights in criminal proceedings.

See BARAK, *supra* note 2, at 282, 432. "Alongside the legislation of these rights, they will stand on their own as particularly right. As long as they have not been legislated, they are protected in the framework of the principle of human dignity."

[4] *Compare with* § 2 of the Basic Law: Human Dignity and Liberty (1994) CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms), § 7 (protecting life, body, and dignity) [hereinafter the Charter]. *See also* § 8 of the Basic Law: Human Dignity and Liberty (1994) with CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms), § 1 (proscribing the reasonable limits of state violations of rights).

erty and personal security,[5] the Charter adopted specific rights which guarantee procedural justice for the defendant in criminal law. Therefore, this discussion will compare, examine and analogize the Basic Law and the Charter as they pertain to defendants' rights. Based on the Charter's life and liberty section, Canadian courts have broadened the rights of defendants beyond those established in other sections. For example, section 7 of the Charter served as the basis for guaranteeing both the defendant's right to silence in investigative proceedings and the right to legal aid. Nonetheless, section 7 qualifies and limits such rights. For instance, infringement on the right to life, liberty and bodily integrity is limited by the principles of basic justice.[6] In section 8, the protection against the violation of privacy by way of search and seizure is extended only to *unreasonable* search and seizure. Moreover, section 9 only protects the defendant against *arbitrary* detention or arrest.

It should be noted that there are substantive differences between the Canadian and Israeli legal systems. First, the Israeli Basic Law, as opposed to the Charter, does not specify the protected rights of the criminal defendant. Rather, these protections are implied from the rights of dignity and liberty. However, it is clear that these rights, as any other basic right, are not absolute, but rather relative. The qualifications and limitations are not anchored in the Basic Law itself, and must be inferred from the basic principles of the legal system, the existing legislation and the development of these rights in case law. Analogies from the Charter must be drawn carefully, adapting the rules to the particular conditions existing in Israel, the principles of its criminal law and the entire legislative framework. Second, a further substantive difference is found in section 1A, which adds the Jewish values of the state and the principles of the Israeli Declaration of Independence of 1948 to its democratic values. This addition is unique to the Israeli legal system and one should assume that it will leave its mark on the interpretation and ramifications of the Basic Law.

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[5] CAN. CONST.(Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

[6] The United States Constitution also proscribes the infringement of a persons life, liberty and bodily integrity. U.S. CONST. amend. IV.

A further preliminary question which arises in the context of the basic rights and the rights of the defendant is whether the former and the latter are relative to one another. Would it not be appropriate to grant the defendant basic guarantees of life and liberty through the recognition of absolute fundamental basic rights which do not "compete" in the balancing of other rights.

This question arises primarily when facing the fear of a serious infringement on the defendant's basic rights[7] by governmental authorities in the name of state security and public interest principles. Indeed, state security and public interest could be so important that they justify an infringement, and even denial, of one or another of the defendant's rights. However, the power inherent in state security and public interest raises a great fear that they will be used as a device for justification of such violations retroactively, thereby depleting any real meaning given to the defendant's rights.

The Israeli legal system has not yet recognized absolute rights. It has defined the limits of all the basic rights by balancing competing values and contrasting rights. The reason appears to stem from the recognition that any right deemed absolute is too rigid. This does not leave room to consider the unforeseen circumstances of a case which may justify the sacrifice of one right in the face of another.

B. The Right to Life, Liberty and Security

Section 7 of the Charter states that "[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Similar values are anchored in section 2 of the Basic Law: "There shall be no violation of the life, body or dignity of any person as such." In addition, section 4 of the Basic Law states that "[a]ll persons are entitled to protection of their life, body and dignity." A person's dignity and liberty have won special constitutional status. Taken literally, there are differences between section 7 of the Charter and the Basic Law's sections 2 and 4. While section 7 of the Charter protects liberty and personal security, the Basic Law refers to bodily integrity

[7] *See infra* section G.

and dignity, but does not refer to liberty and personal security. However, the difference is purely semantic, and it appears that on a substantive level they are identical terms. The purpose of "liberty" in section 7 of the Charter is to protect a person's autonomy, dignity and privacy.[8] Disturbance of bodily integrity or enjoyment constitutes a violation of the right to personal security. Some Canadian courts have also recognized the right to privacy and dignity as part of the right to personal security.[9] It is worth noting that the Basic Law does not make these values subject to the principles of basic justice. However, one can see such a condition as implicit in the restrictive language contained in section 8 of the Basic Law and derived from the values of Israel as a Jewish and Democratic state.[10]

Sections 8-14 of the Charter[11] protect specific rights of the defendant, such as: the right to counsel, the presumption of innocence and the privilege against self-incrimination. Any violation of these rights constitutes an infringement of the defendant's right to life, liberty and security and are not in accord with the principles of basic justice. The purpose of these provisions is to protect the fairness of the criminal process, even at the cost of diminishing its efficiency.[12]

Sections 8-14 of the Charter define specific rights which are inferred from the general right to freedom, life and security granted to the defendant in section 7.[13] These are only exam-

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[8] STUART JAMES WHITLEY, CRIMINAL JUSTICE AND THE CONSTITUTION 170 (1989).

[9] Regina v. Dyment [1984], 12 C.C.C. (3d) 551 (P.E.I.S.C.); RE K. v. Public Trustee [1985], 19 D.L.R. (4th) 255 (B.C.C.A.); Regina v. Mills [1986], 1 S.C.R. 863, 919-20. *See also*, Regina v. Beare [1987], 34 C.C.C. (3d) 193, 203 (Sask.C.A.)(the right to dignity as integral to the security of the person).

[10] *See* Karp, *supra* note 3, at 73.

[11] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 8-14.

[12] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 24(2) establishes the evidence obtained by serious infringement of the defendant's rights will not be accepted as admissible evidence in court. In such a case, authorities infringing on the defendant's privacy in § 7 may determine the outcome of the trial, where the central evidence on which the prosecution bases its case was obtained by infringement of the defendant's rights.

[13] In the United States, the Fifth and Fourteenth Amendments of the American Constitution are similar in substance and language to section 7 of the Charter. The said Amendments guarantee due process to the defendant and provide that no person shall be deprived of life, liberty or property without due process of law. U.S. CONST. amend. V and XIV, § 1.

ples of the violation of basic justice stated in section 7.[14] The rights detailed in sections 8-14 exemplify the general and abstract definition in section 7. They contain the appropriate balance between the interest of the state and the interest of the individual; a balance which has already been made by the legislature.

These sections do not exhaust the defendant's procedural rights and they may be supplemented by section 7. Thus, the Canadian Supreme Court used the framework of section 7 to recognize the right to silence of a prisoner during the course of a police investigation; a right not found among the Charter's specific sections.[15] Section 7 is broader than the specific sections which follow it, and its scope is not limited to the application of these sections.[16]

Although the right to life section in the Charter has explicit rights listed, the Israeli Basic Law contains only a general provision. This does not detract from the use of the Charter as a guide to interpret the Israeli Basic Law. In Israel, similar to the broad interpretation given by the Canadian courts to the Charter, the Basic Law does not enumerate specific rights, nor does it rule out an interpretation which infers specific rights from the general rights to life, personal liberty and human dignity. Indeed, Israeli case law has broadly interpreted basic constitutional provisions from a substantive, not a technical nor formalistic approach. According to this view, one must not infer

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[14] *See* WHITLEY, *supra* note 8, at 161-163, 165. *See* RE B.C. Motor Vehicle Act [1985], 2 S.C.R. 486, 494. Judge Lamer expressed this approach: Sections 8 to 14 address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of § 7. These sections are therefore illustrative of the meaning, in criminal or penal law, of principles of basic justice. They represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the charter as essential elements of a system for the administration of justice founded upon a belief in the dignity and worth of the human person and the rule of law. Regina v. Lyons [1987], 2 S.C.R. 309, 354, 373 (N.S.).

[15] Regina v. Herbert [1990], 2 S.C.R. 151, 57 C.C.C. (3d) 1 (S.C.C.); Regina v. Broyles [1991], 131 N.R. 118, 68 C.C.C. (3d) 308, 14 W.C.B. (S.C.C.); Regina v. Chambers [1990], 2 S.C.R. 1293, 59 C.C.C. (3d) 321, 11 W.C.B. (2d) 191 (S.C.C.); Robert A. Harvie & Hamar Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence And The Continuing Revision Of Criminal Law Under The Charter*, 24 OTTAWA L. REV. 39, 67 (1992).

[16] Martin L. Friedland, *Legal Rights Under The Charter*, 24 CRIM. L. Q. 430, 434 (1982).

from the positive legislated provisions, a negation of what has not been legislated.[17] This is in accordance with the superior status of constitutional provisions, and in line with their purpose of establishing a way of life.

Furthermore, the rights granted in the Charter, in addition to being prone to the principles of basic justice according to section 7, are also susceptible to the limiting language established in section 1 of the Charter. Accordingly, the rights guaranteed in the Constitution are subject to "such reasonable limits prescribed by law, as can be demonstrably justified in a free and democratic society."[18] The language of clause 1 of the Charter is similar to section 8 of the Basic Law which states, "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such Law."

Infringement of the defendant's rights, according to section 7 of the Charter, is subject to the principles of basic justice. The protection of rights rooted in the Charter is broader than that existing in the Basic Law because to legitimize an infringement on a right one must first proceed through the section 1 filter. If a specific right of the defendant is also inferred from the right to life and liberty section, then the infringement of this right contradicts the Constitution if it does not meet the standards of basic justice. Conversely, where a specific right stands on its own and is not inferred from section 7, then the infringement is not subject to the principles of basic justice test.

Principles of basic justice are the product of a proper balance between competing values. The nature, weight and balance of these competing values change from one legal system to another.[19] Interpretation of the Charter has been influenced by the rights of the defendant according to common law, as they

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[17] *See* BARAK, *supra* note 2, at 83-87; Karp, *supra* note 3, at 282; H.C. 428/86 Barzili v. The State of Israel, 40(iii) P.D. 505, 619; E.A. 2/84 Neiman v. Chair of the Central Elections Committee to the 11th Knesset, 39(ii) P.D. 225, 306.

[18] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

[19] *See* Re Motor Vehicle Act [1985], 2 S.C.R. 486. "[T]he principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system." *Id.*

were implemented in Canada prior to the Charter's enactment. Principles of basic justice are not limited to procedural justice.[20]

C. SEARCH

Section 8 of the Charter establishes that every person has the right to be protected from unreasonable search and seizure. The purpose of this section is to protect a person's property and privacy. Under Canadian case law, a reasonableness test[21] has been formulated establishing that if a private interest outweighs a state interest, in particular, the interest of enforcing the law, then the search and seizure is unreasonable.[22]

Canadian case law has established three principles used as measuring sticks for reasonableness of a search.[23] The first of these principles is that there must be a framework of lawful authorization. Generally, a valid warrant is a precondition for a valid search or seizure. The rule is that an unreasonable search is illegal. Canadian case law has recognized exigent circumstances as an exception to the warrant requirement. Moreover,

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[20] *See* WHITLEY, *supra* note 8, at 163, 181; Friedland, *supra* note 16, at 432. The principle of basic justice is similar to the principles of due process in the United States.

[21] The Fourth Amendment to the United States Constitution protects every person from unreasonable search and seizure, the test being the reasonableness of the search. The reasonableness is measured according to the circumstances of the case: the purpose, the justification, the manner and the place of the conduct of the search. The issue of whether conducting a strip-search of a person's body infringes on his or her dignity and privacy as a person, is also resolved according to this test. Using these tests, it has been ruled in the United States, that a search which entails the stripping of a detainee is reasonable, considering the special circumstances in the detention centers. Bell v. Wolfish, 441 U.S. 520, 559 (1979). So too will the search of a detainee in the street be examined according to tests of reasonableness and, in particular, the alternative of postponing the search and conducting it in the police station, the detention center or some other non-public place, will be taken into account. Illinois v. Lafayette, 462 U.S. 640, 644 (1983).

Pursuant to English law, the issue of the search of a person's body and the powers which stem from that search has been established in Police and Criminal Evidence Act, 1984, 2(9) & 32(1) and in Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search, 1984, 3.5. Accordingly, the power to search a person, whether during an arrest or not, does not include the power to strip him. However, the removal of outer clothing, such as a coat, jacket or gloves is permissible. According to guidelines established by virtue of that law, when it is necessary to search under a person's clothing, this must be done far from the public eye such as in a police vehicle or in a police station.

[22] Hunter v. Southam Inc. [1984], 2 S.C.R. 145, 159-60.

[23] *See* WHITLEY, *supra* note 8, at 190-191.

a search incidental to an arrest is permitted if the cause of the arrest itself was based on near certainty. In such a case, the power to search is contingent upon the power to arrest. One must distinguish between a search that is incidental to an arrest and the search of a prisoner. In the first case, in addition to the right not to be exposed to an unreasonable search, the detainee also enjoys the presumption of innocence. As opposed to the power to conduct a search, these two rights grant further validity to the detainee's right to privacy and make more stringent the requirements of reasonableness. This requirement is different in character in the case of a prisoner. It is dependent upon the type of offense with which the person is charged and the purpose of the search. For example, one must distinguish between a search for weapons and a search for property which is connected to a crime, in the latter case there usually is no urgency.

The second principle is that the source of power does not have to be a judge. However, it must be a person who is capable of exercising judicial authority within that milieu, for example, a university administrator. One additional exception is that one who is subject to a system of supervision, such as a license holder, impliedly agrees to reasonable enforcement.[24]

The third principle includes a reasonable basis test which is used for evaluating a search. The test must justify the belief that a crime has, indeed, been committed. The judge must be convinced that granting the power to conduct the search will advance objective justice and balance the enforcement of the law with the privacy interest of the individual. The interest of law enforcement cannot surpass that privacy interest based merely on the suspicion that a crime has been committed. Therefore, fishing expeditions for evidence will not be permitted. Rather, a reasonable basis that a specific crime has been or is about to be committed is required.[25]

In addition, the reasonableness of the search will be examined as to the conduct of the search and the reasonableness of the authorizing law. A legal provision which authorizes a search that does not meet the reasonableness standards is not

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[24] Chabot v. Manitoba Horse Racing Commission [1987], 26 C.R.R. 360, 366 (Man.), *appeal denied*, 4 W.W.R.L. lxvi (1987).

[25] *See* WHITLEY, *supra* note 8, at 195.

only unreasonable, but also illegal. If the provisions of the authorizing statute are invalid, the search was without authority.

Section 8 and its rules established in case law have also been applied to the Secret Monitoring Law. The term secret monitoring has been interpreted to include search or seizure. In addition, section 8 has been applied to surveillance, whether by observation alone, filming or other technological means (i.e. hidden camera, undercover police officers).[26]

In Israel, the authority to search a person's things or body is founded on two primary legal provisions. The first, a provision in section 22 of the Criminal Procedure Ordinance, Arrest and Search, 1969, grants authority to conduct a search incidental to an arrest. The second, section 29 of the Ordinance grants the authority to search a person's body or things incidental to a search of the premises. Even before the enactment of the Basic Law, the Supreme Court ruled that the authority to search in or on a person's body does not include the authority to penetrate a person's body, such as by pumping the stomach, giving an enema or performing a blood test without their consent. Additionally, the Basic Law advances the interpretation of the Supreme Court ruling by forbidding a search of the inside of, as well as on, a person's body because it invades that person's dignity.[27] Penetration of a person's body constitutes a gross infringement of his or her dignity and privacy, "as a human being." An internal search is not permitted unless the legislature has allowed it in a clear and specific legal provision.[28]

Such a legal provision remains valid if it was legislated prior to the enactment of the Basic Law. However, if legislated after the Basic Law, the validity of the legislation will be examined in light of the limiting language in section 8 of the Basic Law. Protection of personal dignity and privacy is based on section 2, which establishes "[t]he life, body or dignity of any person shall not be violated." Section 7 states "all persons have the

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[26] *See* WHITLEY, *supra* note 8, at 194-198.

[27] *See* BARAK, *supra* note 2, at 433. The cutting of a person's hair or beard so they may stand in a line-up also infringes on one's dignity as a person. *See* BARAK, *supra* note 2, at 433.

[28] H.C. 391, 373, 370, 355/79, Katalan and others v. Prison Authority and others, 34(iii) P.D. 294; F.H. 9/83, The Military Court of Appeals and others v. Va'aknin, 42(3) P.D. 837, Cr.App. 527; 480/85, Kortam v. The State of Israel, 40(iii) P.D. 676, M.A. (Cr.); 2145/92, The State of Israel v. Gouata, 46(v) P.D. 704.

right to privacy and to intimacy" and subsection (c) of section 7 reads "[n]o search shall be conducted on the private premises or body of a person, nor in the body or belongings of a person."

In any event, the exercise of the power to search by the governmental authorities, regardless of whether this power was granted by law enacted before the Basic Law or after it, or whether it is a matter of an external or internal search of a person's body, it must nonetheless meet the requirements listed in the aforementioned section 8. Hence, the search must be conducted while protecting a person's dignity and privacy and must be within the balancing principle in section 8. In the *Gouata* case,[29] the Vice President of the Supreme Court, Justice M. Elon ruled:

> [S]haming of G-d's image as contained in man is permitted only when intended for an appropriate end, and when it is a matter of suspicion of commission of a criminal offense, which is to be prevented or discovered, and in a manner that does not exceed what is necessary, according to the circumstances of each and every case — for example, the purpose of the conduct of the search, the nature of the offence of which he was suspected, the existence of a state of emergency, the justification for the conduct of the search, the manner of its conduct, the place of its conduct and the like.[30]

It can also be inferred that once consent has been granted to carry out the search, a reasonable measure of fairness must be maintained in order to prevent trampling the dignity or privacy of a person subjected to the search. The abandonment of fairness is permitted only when it is required or necessary for the purpose of the search.

A "reasonableness" test arose from the aforementioned case law[31] that is introduced through section 8. It includes all aspects of reasonableness pertaining to the scope and conduct of the search. Unlike Canada, there is no provision in the Basic Law that relates specifically to the reasonableness of conducting a search. Therefore, we must act carefully when we re-

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[29] 2145/92, The State of Israel v. Gouata, 46(v) P.D. 704.

[30] *Id.* at 723.

[31] *See* cases cited *supra* note 28.

fer to the Canadian legal system as a model on how to conduct a bodily search.[32]

It is doubtful that an illegal search is an unreasonable search, although, such has been established in Canadian case law. The legality of a search and its reasonableness must be distinguished since these terms overlap. It is apparent that an illegal search is invalid when conducted without lawful authority.[33] On the other hand, a search which infringes on a person's dignity and privacy, but does not meet the requirements of section 8 of the Basic Law is unlawful. Thus, it is contrary to fundamental principles grounded in the Basic Law. Overlap between the terms of illegality and unreasonableness is possible where the legal provision that authorizes the search is unlawful because it does not meet the requirements of section 8. Accordingly, the search will be unreasonable because the legal provision which authorizes its conduct fails to meet the requirements of the limiting language. Therefore, it will be unlawful because it is not legally valid.

Section 11 of the Basic Law requires governmental authorities to honor human rights. The power to search remains with the governmental authorities, so that the individual exposed to an infringement will not be unreasonably searched. However, as Justice Barak held, the Basic Law also applies in the area of private law.[34] Thus, a search conducted by another person will also be subject to the principles of the Basic Law. In most cases, it is illegal for a private individual to conduct a search of another. Although a private individual may conduct an arrest, the search cannot be incident to that arrest. According to constitutional standards, that individual only has the authority to seize an obvious weapon.[35]

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[32] The United States Constitution specifically addresses search and seizure. U.S. CONST. amend. IV.

[33] *See* Criminal Procedure (Arrest and Searches) Ordinance (New Version), §§ 22(a), 25, 29, (1969) (Can.).

[34] AHARON BARAK, PROTECTED HUMAN RIGHTS AND PRIVATE LAW 433 (1992). Even if the Basic Law does not apply in the sphere of private law, the rulings which preceded the enactment of the Basic Law as to search of a person's body will also apply to a search conducted by another private individual. *See* BARAK, *supra* note 2, at 679-97.

[35] *See* Criminal Procedure (Arrest and Searches) Ordinance (New Version), § 21, (1969) (Can.).

D. Protection From Arrest and Detainment

Potential arrest is the most serious threat to a person's guaranteed right of liberty in sections 7 and 9 of the Charter and in section 5 of the Basic Law. Protection of liberty means limiting the power of the authorities who function in criminal proceedings, namely, police officers, investigators and prosecutors, while emphasizing their duty to apply their authority in a fair manner.

In Israel, limitations of a person's freedom by arrest can be done only by a law which represents the values of the state and is directed at an appropriate end. Even then, it can operate only to the extent that it does not exceed what is necessary. Therefore, criminal legislation must be suited to the values of Israel as a Jewish and Democratic state. The reference to the criminal code may be applied only when it is essential and necessary, likely to be useful and appropriate to obtain the object of the prohibition. A legal provision that fails to meet these tests is liable to be invalidated by the court. Criminal law is a social tool of last resort. It protects the most vital social interests against severe violations when there are no efficient, less severe measures for protection of these interests.[36]

Section 9 of the Charter rules out arbitrary arrest or detention. In contrast, section 5 of the Basic Law does not limit the prohibition to arbitrary infringement alone. In fact, the Basic Law does not establish limitations to this right beyond those established in section 8. It appears section 5 is broader in its scope than section 9 of the Charter. The Canadian courts refrain from interfering with lawful police activity. It appears that in Israel, to receive full protection of personal liberty, one should distinguish between the legality of the arrest and its constitutional validity. The question of the legality of an arrest or detention is outside the four corners of the Basic Law. It should be examined in light of the existence of legal authority to carry out an arrest or detention, otherwise it is unlawful. Only a legal arrest or detention will be examined in light of the additional filter in the Basic Law. A lawful arrest or detention may

[36] This article will not address which values are worthy of protection by means of the criminal process or what is the measure of the minimal infringement which justifies the defense of the criminal code.

be invalidated as unconstitutional if it fails to meet that criteria. Since section 5 of the Basic Law is broader in scope than section 9 of the Charter, the test should also be broader in Israel than in Canada, and should include the following four test factors: (1) was there valid authorization; (2) whether denying a person's freedom is the efficient and appropriate means under the circumstances; (3) was there just cause for the arrest or detention; and (4) whether the police applied reasonable judgement.

Canadian case law has established that section 9 is not limited to physical confinement alone. It also applies to the freedom of movement, for example, travel, which may deny access to an attorney as long as the individual reasonably believes that the option to act otherwise does not exist.[37] The test is subjective, taking into consideration age, mental ability and emotional state. One may adopt a similar interpretation regarding section 5 of the Basic Law. This section refers to arrest and detention as explicit means which infringe on the right to personal liberty. Moreover, nonphysical limitations can infringe on this right, for instance, stays of exit from the country, confinement, banishment, deportation or administrative detention.

In a criminal proceeding, the person's right not to be arrested or detained must be balanced at two stages. The first balancing occurs during the detention until completion of the proceedings, and the second takes place at the time of imprisonment following the conviction. Recent Israeli cases[38] have upheld detaining a person until completion of the proceedings to protect the safety of the public or the individual, and to guard against a reasonable fear that the proceedings will be disrupted. This is based on section 21(a) of the Criminal Procedure Law [Consolidated Version] 1982.

The prevention of danger to public safety or the disruption of court proceedings is not to be used as a reason to detain a defendant in prison, when a limitation of liberty, not a total denial, is possible, such as house arrest. The right to personal lib-

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[37] Regina v. Therens [1985], 18 C.C.C. (3d) 481, 505 (Alta.S.C.C.). *See* WHITLEY, *supra* note 8, at 208.

[38] 2169/92, Suissa v. The State of Israel, 46(iii) P.D. 338, M.A. (Cr.); 3734/92, The State of Israel v. Azazami, 46(v) P.D. 72, M.A. (Cr.).

erty is the most basic right.[39] Neither repulsion inspired by the offense, nor concern for the efficiency of the criminal proceeding can justify denial of a person's liberty and keep him under lock and key.[40] These considerations are also relevant for choosing modes of punishment for one who has been convicted, although, the objects of arrest, individual deterrence and rehabilitation of the offender, are broader. It must always be taken into consideration whether the object of the arrest can be achieved through an alternative which limits, rather than denies personal freedom. Whether the matter involves a defendant or a suspect, the court must also weigh the conditions of the arrest. The tendency of the court to choose an alternative to incarceration will increase when the conditions of the arrest include degradation and infringement of human dignity.[41]

E. Rights Which Stem From Arrest or Detention

Section 10 of the Charter recognizes the following rights which stem from arrest or detention:

1) the right to know the reason of detention;

2) the right of a prisoner/detainee to consult an attorney and obtain from him guidelines without delay and to receive notice of the existence of this right; and

3) the right to challenge the legality of the detention by means of Habeas Corpus and to be freed if the arrest/detention is found to be illegal.[42]

Similarly, Canadian case law has recognized these rights as also stemming from section 7 of the Charter.[43]

The right to know the reason of the arrest or detention means the accused has the right to be informed of the charge. The duty of notice does not arise where the circumstances are clear, such as when a person is caught while committing a crime. The Canadian courts have ruled that a literal interpretation is not required, but rather a substantive explanation of

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[39] 3734/92, The State of Israel v. Azazami, 46(v) P.D. 72, M.A. (Cr.).

[40] 2169/92, Suissa v. The State of Israel, 46(iii) P.D. 338, M.A. (Cr.).

[41] 3734/92, The State of Israel v. Azazami, 46(v) P.D. 72, M.A. (Cr.).

[42] Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 10.

[43] *See* Whitley, *supra* note 8, at 211-12.

the guilt.[44] The duty of explanation does not exist when the defendant, by obstructing justice, prevents the police from fulfilling their duty.[45] The Israeli Supreme Court adopted similar rules prior to the enactment of the Basic Law.[46]

F. The Right to an Attorney

Section 10(b) of the Charter grants the defendant the right to consult with an attorney, but it fails to mention the duty to appoint an attorney to an unrepresented defendant, or to an indigent detainee.[47] The Canadian courts recognized that the defendant must be advised of his right to legal representation. Martin Friedland notes that the right to legal aid stems from the right to a fair trial according to section 11 of the Charter.[48] In certain cases, the court must appoint an attorney for the defendant.[49] However, such a right apparently does not exist during the various stages of the investigation.[50]

If the defendant does not understand his or her rights, such rights will be meaningless. Thus, immediate access to an attorney is necessary. However, the right to an attorney is qualified and not absolute. It has been ruled that the right to an attorney does not have to precede a legal and reasonable search stemming from an arrest. For example, when there is a suspicion that the detainee is holding some weapon, and the search is urgent such a right is not available.[51]

Canadian case law has established the following rules for applying section 10:[52]

1. The police must provide the defendant with a reasonable opportunity to make use of the right to receive legal advice without delay.

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[44] *See* Whitley, *supra* note 8, at 214.

[45] Regina v. Kelly [1985], 17 C.C.C. (3d) 419 (Ont. C.A.).

[46] *See* C.A. 40/56, The Attorney General v. Kdoshim, 10 P.D. 972.

[47] It should be noted that such a duty exists in the United States. U.S. Const. amend. VI.

[48] *See* Friedland, *supra* note 16, at 440; Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 10.

[49] *Id.*

[50] Symposium, *The Canadian Constitution*, 45 Law & Contemp. Probs. 1, 233 (1982).

[51] *See* Regina v. DeBot [1986], 54 C.R. (3d) 120, 141-43 (Ont. C.A.).

[52] *See* Whitley, *supra* note 8, at 219.

2. The police must stop asking questions or any other attempts to gather evidence from the suspect until he or she has been given a reasonable opportunity to consult with an attorney (unless the suspect explicitly gives up this right).

3. Preventing the suspect's attorney from entering the interrogation room until the conclusion of the interrogation, constitutes a violation of section 10.

In Israel, a case dealing with the right of a detainee to meet with his attorney recently came before the Court.[53] The suspected terrorist was denied the right to meet with his attorney during the course of his interrogation. The Court held that the suspect's right to counsel was denied for national security reasons, although, the right of a detainee to meet with an attorney is founded in criminal procedure law.[54] Moreover, the Vice President of the Court, Justice M. Elon, held that the right to counsel is fundamental and anchored in section 5 of the Basic Law; another aspect of the right to silence. However, the right to meet with an attorney, similar to other rights, is not an absolute right, and must be balanced with competing rights and interests.[55]

In this situation, the legislature undertook the task of balancing those competing rights. It established that, with respect to regular offenses, infringement of the right to counsel is justified only when it is necessary to the interest of the investigation, the protection of state security, the protection of human life or the prevention of a crime. With certain security offenses in mind, the legislature established only two grounds which may justify the delay of meeting with the attorney; state security and the interests of the investigation. Thus, it can be concluded that the right to counsel is much greater when dealing with security offenses.

The decision of the Court in *Soufian v. The Military Commander*,[56] may lead one to conclude that the Supreme Court, by means of the Basic Law, extended the right of a detainee to

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[53] H.C. 3412/91, Soufian v. The Military Commander in the Gaza Strip and Others, 47(ii) P.D. 843.

[54] *See* Criminal Procedure Law [Consolidated Version], § 29, (1982) (Can.).

[55] *See* BARAK, *supra* note 2, at 432.

[56] H.C. 3412/91, Soufian v. The Military Commander in the Gaza Strip and Others, 47(ii) P.D. 843.

meet with an attorney. However, raising this right to a constitutional level grants it additional importance.

When balancing between the right to an attorney and other interests such as: the interests of the investigation, protection of state security etc., one must give great weight to the right to an attorney. Even if the nature of the interests have not changed, their weight has. It is possible that previously considered borderline cases will today tip the scales to favor the right to counsel. Thus, it is appropriate to place a heavier burden of proof on the one who claims the existence of limitations on the right to counsel.

A certain increase in demands had been placed on those responsible for the interrogation. In *Soufian v. The Military Commander*,[57] the Court held that the interrogator must periodically re-examine any decision that prevents the detainee from meeting with his attorney. The moment the investigation ends the interrogator must permit the detainee to meet with counsel.

Additionally, the authorities have the duty to inform the detainee of his basic right to meet with an attorney; a right which is not explicitly written in the law. The right of notification has been recognized in the Supreme Court case *Soufian v. The Military Commander*.[58] Justice Elon stated that:

> [o]ne who does not know of the existence of the right cannot try to realize it. In particular when it is a matter of a person who has been arrested and his or her mind is disturbed, and he may not know how he is to act and what he must do. Therefore the detainee has the right, and the authorities are obligated, to be notified of his right to meet with a attorney.[59]

The right to be notified of the infringement of this right has also been recognized.

The duty of notification evolves from a case by case basis and is dependent on the nature and length of the police investigation. The police are not obligated to constantly remind the interrogated person of his or her right to meet with an attorney. However, when the investigation carries on for days or weeks, it

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[57] *Id.* at 846.
[58] *Id.*
[59] *Id.* at 850.

is appropriate to remind the detainee of his or her right to counsel.[60]

The comparison to Canadian law raises issues of whether the defendant has the right to meet with an attorney, the right to an appointment of an attorney and the corresponding duty of the authorities to appoint an attorney for the detainee. The interpretation of the Basic Law and the derivation from the general rights include specific rights of the defendant. One must distinguish between two cases. The first case holds that the specific right was established in a law prior to the enactment of the Basic Law. In this case, the question becomes whether it is possible to derive specific rights for the accused from the Basic Law beyond those established in the prior law. Since the Basic Law calls for the preservation of prior existing laws, the prior law remains valid. In this case, there is a place for a double interpretation: It can be argued that this situation broadens the rights granted by the prior law which may go beyond what the legislature intended. The second case establishes that when the prior law is silent, it does not establish any specific right. Then, is this a matter of a lacuna which must be filled?

The right to appoint defense counsel does not have to change or broaden beyond what is established by law.[61] Although it appears that the Basic Law was not intended to broaden existing rights defined by specific provisions in the law, it was intended to protect the rights of the accused. One can learn from the establishment of the right and its qualifications that a negative arrangement may exist. However, it is possible to derive from the right to legal aid, the right to be notified of this right and the conditions under which a defendant is entitled to receive legal aid.

The Basic Law was intended to protect the rights of the accused. However, it appears that it was not intended to broaden existing rights where they are defined by specific provisions in the law. One can learn from the establishment of the right that a negative arrangement may exist. It may be appropriate to de-

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[60] *Id.* at 852.

[61] *See* Criminal Procedure Law [Consolidated Version], § 15, (1982) (Can.). (Establishing an arrangement for mandatory and permissible appointment of a defense attorney for the defendant, and as too the mentally ill); The Treatment of Mentally Sick Persons Law, § 18, (1981) (Can.).

rive from the right to legal aid, where it exists according to the law, the right of the defendant to be notified of such right and of the conditions under which he or she is entitled to receive legal aid.

G. The Right to a Fair Trial

Section 11 of the Charter establishes an array of rights that guarantee the accused a fair trial in criminal proceedings. Unlike section 10 of the Charter, section 11(a) establishes the right of the defendant to know, without unreasonable delay, the specific offense with which he or she is charged.[62] The question of time is a substantive question and should be examined according to the circumstances of each case. One must also consider whether the accused is held under arrest or not.

Section 11(b) of the Charter establishes the right to be tried within a reasonable period of time. The rule states that delayed justice is no justice.[63] Canadian case law has established several considerations to examine the speed of the proceedings under section 11(b):[64]

1. The delay of justice caused to the defendant as more time passes between the charge and the ruling (the test for delay of justice is subjective).

2. A delay caused by the defendant will not be taken into account when determining the reasonableness of the delay.

3. The requirements of a reasonable time may change according to the nature of the matter. This test is objective and depends on what is customarily practiced in accordance with the type of issue.

4. The limited resources of the penal justice system are to be taken into account. It should be emphasized that delay in this context is limited to a delay, after the indictment is brought against the defendant. Until the indictment is brought, one can

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[62] *See* Whitley, *supra* note 8, at 222-23; Friedland, *supra* note 12, at 442.

[63] In the United States, the speed of the proceedings depends on the degree of delay, the reasons for delay, whether the defendant has been denied a right or whether and to the degree injustice has been caused to the defendant. The Canadian Constitution implicitly includes these criteria for the reasonableness requirement. *See* Whitley, *supra* note 8, at 225-27.

[64] Mills v. Regina [1986], 52 C.R. (3d) 1, 64 (S.C.C.).

infer a defense against such a delay if it is unreasonable from section 7 of the Charter.

In Israel, the defendant has the right to a trial within a reasonable amount of time, and the expectation that there will be no delay of justice. One must weigh the heavy caseload of the courts with the limitations on the judicial system to establish a reasonable period of time. This is also a part of the defendant's human dignity.[65] For example, in *Israel v. Azazami*,[66] the court considered the delay of justice to the defendant as a factor in determining an alternative to detention until completion of the proceedings. In this case, house arrest was chosen as the alternative.

The court must consider different circumstances and interests when balancing the reasonableness of any delay. The judge should pay particular attention to any delays from the beginning of the investigation to the indictment stage, and the period from indictment to trial when the defendant is free or incarcerated. When the defendant is incarcerated, the reasonableness of delay is dependent on the nature and circumstances of the case. Therefore, it is appropriate to distinguish between the prosecution delaying an indictment because of a lack of public interest in the charge, and when there is difficulty in gathering evidence against the defendant. The rights of the defendant must be given greater weight while incarcerated. Once the charge has been brought, the sword of conviction hangs above the defendant's head. The criminal accusation by nature, carries social, economic, familial and other ramifications of great impact on the defendant's life. It is clear that after the charge is brought a delay of justice caused to the defendant has greater impact on such defendant. When the defendant is incarcerated pending the completion of the proceedings, it is appropriate to carefully guard the defendant's right to a speedy trial, and to treat the prosecution sternly regarding delays.[67]

In Canada, the minimum requirement for a fair trial is the demand for an objective and unbiased judge, who bases his or her ruling on evidence and logic. The objectivity and indepen-

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[65] *See* BARAK, *supra* note 2, at 281.

[66] 3734/92, The State of Israel v. Azazami, 46(v) P.D. 72, M.A. (Cr.).

[67] Criminal Procedure Law [Consolidated Version], §§ 51, 52, 53 (1984) (Can.).

dence of the judge are necessary, not only to guarantee justice in specific cases, but also to ensure the faith of the public and the individual in the legal system.[68] Without such a guarantee, the system cannot command the obedience and respect which are necessary for the functioning of the courts. The test for lack of judicial objectivity is a defendant's reasonable fear of bias, whether or not that bias exists in reality.[69]

The fairness of a trial will be determined according to accepted principles of Canadian law, such as the right of the defendant to be heard; granting of sufficient time to prepare the defense; the right of the accused to be present at his or her trial and the right to cross examine.[70] The duty of a fair trial extends to both the police and the prosecution.[71] Thus, the discretion of the investigating and prosecuting authorities is subject to a test of reasonableness as to any delay.[72]

The Canadian Supreme Court held that the defendant has the right to review relevant evidence and materials of the investigation.[73] Sections 11(d) and 7 of the Charter secure those rights within the defendant's right to a fair trial. The defendant's right to a full defense includes the right to cross examination. For example, in a sexual offense case, the Canadian Court struck down a provision which prohibited cross examination of a complainant with regard to her sexual history.[74] This provision threatened the fairness of the criminal proceeding because it denied the admissibility of evidence which might have been

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[68] H.C. 732/84, Tzaban v. The Minister for Religious Affairs, 40(iv) P.D. 141: ". . .[T]hat is the faith of the public in that the judicial authority does justice according to law. That is the faith of the public that the judging is done in a fair and neutral manner by giving equal treatment to the parties without a shred of personal interest in the result. That is the faith of the public in the high moral level of the judging. . ." *See* AHARON BARAK, JUCICIAL DISCRETION 292 (1983).

[69] Regina v. Valenta [1985], 49 C.R. (3d) 97 (S.C.C.); RE Fleming and Regina [1985], 24 C.C.C. (3d) 264 (Nfld.T.D.); Regina v. Magee [1988], 3 W.W.R. 169, 180 (Atla.Q.B.).

[70] *See* Freidland, *supra* note 16, at 445; *see* WHITLEY, *supra* note 8, at 238.

[71] Regina v. Ittoshat [1970], 10 C.R.N.S. 385 (Que.S.C.); Regina v. Simons [1975], 34 C.R.N.S. 273, 277 (Ont.C.A.); Boucher v. Regina [1955], 1 S.C.R. 16, 23; Rothman v. Regina [1981], 1 S.C.R. 640 (Ont.S.C.); *quoted in* WHITLEY, *supra* note 8, at 238.

[72] Mills v. Regina [1986], 52 C.R. (3d) 1, 64 (S.C.C.); Regina v. Young [1984], 40 C.R. (3d) 289.

[73] Regina v. Stimchcombe [1991], 8 C.R. (4th) 277 (S.C.C.).

[74] Regina v. Seaboyer [1991], 7 C.R. (4th) 117 (S.C.C.).

relevant to the defense. In light of this, the Court determined that cross-examination as to sexual history must be permitted where the purpose is worthy and the probative value of the examination surpasses its prejudicial consequences.[75]

The guarantee to a fair trial also encompasses trial publicity. Such publicity protects the defendant from arbitrariness, injustice and oppression involved in a "secret" trial. It also serves to inform the public that justice has been done.[76] However, since trial publicity may implicate morality and national security, its values must be balanced with competing factors such as, human dignity and privacy.

Currently, press coverage of a trial is prohibited unless the court specifically permits it.[77] On one hand, press coverage serves the interest of conducting a fair trial, but on the other hand such coverage could infringe on the dignity and privacy of the individuals involved. The conflict between the public and private interests necessitate retreat from the principle of free press coverage and subjects media to judicial supervision. The court must balance these conflicting interests according to the circumstances of the case.

Justice Barak, opines that the right of a defendant to a fair trial is part of basic human dignity.[78] The right of the defendant to know the charges, the reason for the arrest and the ability to effectively defend oneself is part of basic human dignity. It appears to be more convincing to derive these rights from the right to personal liberty and from the presumption of innocence.

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[75] *Id.*

[76] Regina v. Squires [1986], 23 C.R.R. 31 (Ont.Prov.Ct.). *See also*, Aharon Barak, *Freedom of Expression and its Limitations*, 40 HAPRAKLIT 5, at 7 (1993). ("[W]hen everything is revealed and everything is exposed truth will win over lies'."); 334/81, Haginzar v. The State of Israel, 36(i) P.D. 827, 832, M.A. (Cr.) ("It is a great rule in law that the court will judge in public. This principle is. . .one of the more important means, which are directed at guaranteeing the conduct of a fair and unbiased trial. By force of this principle the court stands in its activities exposed to the public eye and judgement in what is connected to the conduct of the trial objectively, with judging ability and discretion."); 353/88, Vilner v. The State of Israel, 45(ii) P.D. 444, 450, M.A. (Cr.); LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 43 (1914) ("[S]unlight is the best purifier and the lamplight is the most efficient policeman.").

[77] Courts Law [Consolidated Version] § 70 (1984) (Can.). It appears that were § 70 not so entrenched, it would still meet the requirement of section 8 of the Basic Law.

[78] *See* BARAK, *supra* note 2, at 432; Karp, *supra* note 3, at 74.

H. The Presumption of Innocence

Section 11(d) of the Charter establishes the rule that a man is presumed innocent until proven guilty. According to section 7, this right is also integral to the protection of life, liberty and security.[79]

By combining the provision in section 11(d) with section 7, the Canadian courts established the duty of the prosecution to prove the accused's guilt beyond any reasonable doubt for each of the elements of the offense. In light of this principle, the court examines the validity of the legal provisions which place the burden of proof on the defendant. The validity of a law which reduces the prosecution's burden of proof and transfers that burden to the defendant will be examined in light of section 1 which bestows rights and freedoms subject to reasonable limits. It makes no difference if the transfer of the burden relates to an essential element to the offense,[80] to the defense[81] or to another element, external to the offense which can reduce the defendant's criminal liability. Even the dropping of an element of the offense, means that the prosecution is exempt from proving that element, and therefore, it stands contrary to the principles of the Charter. It should be noted that in distinguishing the presumptions which transfer the burden of proof, the disqualification of the legal provision which eliminated an element of the offense was decided based on the right to life and liberty, and the principle of basic justice in section 7 of the Charter.[82]

The Canadian courts have applied this basic principle in a series of cases.[83] The Canadian Supreme Court established

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[79] D. Morton, Special Lectures of the Law Society of Upper Canada 147 (1955).

[80] Regina v. Vaillancourt [1987], 39 C.C.C. (3d) 118; Regina v. Whyte [1988], 2 S.C.R. 3, 42 C.C.C. (3d) 97, 5 W.C.B. (2d) 141.

[81] Regina v. Nagy [1988], 45 C.C.C. (3d) 350 (Ont.C.A.); Regina v. Downey [1992], 72 C.C.C. (3d) S.C.C. 1; RE Regina v. Keegstra [1990], 61 C.C.C. (3d) 1, 1 C.R. (4th) 129 (S.C.C.); Regina v. Chaulk [1990], 2 C.R. (4th) 1 (S.C.C.) (the Supreme Court in Canada ruled that transfer of the burden of proof to the shoulders of the accused in the insanity defense does not contradict the Charter, because the defense of insanity is not a vital element of the offense and is not a "real" defense.); *See* Harvie and Foster, *supra* note 15, at 86-87.

[82] *See* Regina v. Vaillancourt [1987], 39 C.C.C. (3d) 118; Regina v. Whyte [1988], 2 S.C.R. 3, 42 C.C.C. (3d) 97, 5 W.C.B. (2d) 141.

[83] Regina v. Oakes [1986], 1 S.C.R. 103, 24 C.C.C. (3d) 321; RE Boyle and The Queen [1983], 5 C.C.C. (3d) 193, 35 C.R. (3d) 34 (Ont.C.A.).

that a presumption which allows for the conviction of a defendant, despite the existence of a reasonable doubt, stands in contrast to the principles of the Charter. Presumptions which transfer the burden of proof to the defendant were disqualified for being contrary to the presumption of innocence. Thus, it was established that the presumption does not meet the requirements of section 1.[84] Section 11(d) further establishes that the rebuttal of the defendant's innocence must be done in a fair and public trial by an independent and unbiased court.

In Israel, any law enacted after the enactment of the Basic Law is subject to judicial review in light of the criteria in section 8, the limiting clause. Hence, the limiting clause applies if the law includes 'lightening' the burden of proof placed on the prosecution, or if it includes a transfer of this burden to the defendant. The question remains whether eliminating an element of the offense will be considered such 'lightening,' as it exempts the prosecution from proving that element.

Striking down a law which allows the legislature to eliminate an element of an offense is problematic. Such a limitation stifles the legislature's authority, and freezes the social and moral development of criminal law. However, the "sieve" in section 8 of the Basic Law, which allows one to legitimize a harsh provision if it is intended for an appropriate end, may imply that limiting the legislature's authority is appropriate.[85]

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[84] *Id.* The United States Supreme Court disqualified a legal provision which transferred the burden of proof to the shoulders of the defendant. In contrast to Canadian case law, the U.S. Supreme Court chose not to disqualify a punitive provision which eliminates an element of the offense or which transfers the burden of proof to the one asserting a liability defense. (Patterson v. New York, 432 U.S. 197, 215 (1977)). It is possible that the change in the stance of the courts, in Canada and the United States, from the reliance on the Canadian courts, not only on the presumption of innocence (which is specifically anchored in both nations' constitutions) but also on section 7 of the Charter. *See* Karp, *supra* note 3, at 144.

[85] It is worth mentioning two legal provisions which have recently been passed by the Knesset. (PENAL LAW (Introductory Part and General Part) amend. 39, § 34(Q)(a) (1994) (Israel)). Section 34(Q)(a) establishes that an offense must be proven beyond any reasonable doubt. It should be noted that in the original draft law the following concluding phrase was recommended: "unless established otherwise in a contradictory provision." This phrase was dropped during the discussions in the subcommittee of the Law and Constitution Committee, because of an apparent lack of constitutional justification according to which one may convict despite the existence of reasonable doubt. *Id.* The legal provision, provided for in § 34(Q)(b), establishes that the person claiming the applicability of a defense carries the preliminary burden of raising reasonable doubt as to its existence, and

In contrast, Justice Barak, of the Israeli Supreme Court, argues that human dignity does not include the right to cross examination.[86] This opinion is inconsistent with the premise of this article. The primary goal of cross examination is to challenge the witness' version of the truth. Cross examination is the best tool a defendant has to defend against perjurers and false allegations.

Cross examination plays a central role in the guarantee of a fair trial. The Israeli courts have, on several occasions, reiterated the importance of cross examination as an efficient tool for revealing the truth. Denial of this right may cause an injustice which may disqualify the testimony. Thus, the right to cross examination must also be recognized as a basic right because it is part of human dignity.[87] In Israel, a person's right to personal liberty, as established in section 5 of the Basic Law, includes the presumption of innocence. Accordingly, a person is innocent until proven guilty.[88]

Justice Barak opines that the concept of human dignity is based on the assumption that society has the will to protect it. A person's right is not to be infringed upon without due process, such as, the opportunity to be heard. The right of the defendant to a fair trial is part of his or her human dignity. It is presumed that a person is innocent until proven guilty.[89]

I. THE PRINCIPLE OF LEGALITY

Section 11(g) of the Charter states that a person may not be convicted for an act or omission which did not constitute an offense at the time it was committed. In addition, section 11(g) of

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once he or she has raised such a doubt the prosecution must remove such doubt. Thus, the prosecution has a heavier burden of proof. Since cases involving the justification to deny the criminality of the act are rare, and the prosecution still has a heavier burden, the defendant's burden is not to be regarded as contrary to the principles of the Basic Law. *Id.*

[86] *See* BARAK, *supra* note 2, at 285.

[87] Justice Elon supports this proposition: "the right to cross-examination, similar to the right of the defendant to meet with his attorney, is derived from his right to personal liberty." F.H. 4390/91, The State of Israel v. Husam ven Mujhad Haj Yihyeh, (May 7, 1993).

[88] 2169/92, Suissa v. The State of Israel, 46(iii) P.D. 338, 432, M.A. (Cr.); 3734/92, The State of Israel v. Azazami, 46(v) P.D. 72, 76, M.A. (Cr.).

[89] *See* BARAK, *supra* note 2, at 281; P. HOGG, CONSTITUTIONAL LAW OF CANADA 857, 1100 (3rd ed. 1992).

the Charter contains an exception to the principle of legality. Section 11(g) establishes that a reduction in the sentence founded in the law will apply retroactively. The reason for this lies in the fact that the amendment reflects society's view as to the seriousness of the offense: if the seriousness of the offense has lessened in the eyes of the public then the defendant should enjoy a lighter sentence.

Canadian courts have held that the provision should be applied proportionally in order to guarantee that such provision will be significant in every case where a sentence is reduced by law.[90] This means the sentence imposed must be reduced in a manner directly related to and proportional to the sentence.

This principle is basic and central to Israeli law which was recognized long before the enactment of the Basic Law.[91] The exception which allows the defendant to benefit from a reduction of a sentence established in the law was recognized in Israeli case law[92] for these same reasons. Justice Barak states that the imposition of criminal liability on behavior which did not constitute an offense at the time it was committed, infringes on human dignity.[93] Therefore, a law which retroactively establishes that certain behavior constitutes a criminal offense, will be disqualified by the court if it fails to meet the requirements of section 8.

Yehudit Karp states that the principle of legality in criminal law is anchored in the opening phrase of section 8 of the Basic Law; "[t]he rights according to this Basic Law shall not be infringed except by a statute . . . ."[94] This principle is based on the idea that the criminal code must supply a clear guideline as to what is permitted and prohibited, and thereby, enable each person to plan their actions in advance.

Recently, the prohibition of retroactive punishment was based in section 3 of the Penal Law.[95] The Penal Law establishes that a law which creates an offense will not apply to an act done before the day of its legal publication, or the day of its

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[90] McCutcheon v. Toronto [1983], 41 O.R. (2d) 652, 657-68 (Ont.H.C.).

[91] *See* S.Z. FELLER FOUNDATIONS IN CRIMINAL LAW 1, 3-21 (1984); YUVAL LEVI & ELIEZER LEDERMAN, PRINCIPLES IN CRIMINAL LIABILITY 62-127 (1981).

[92] *See* 63/89, Mizrahi v. The State of Israel, 43(iv) P.D. 388 M.A. (Cr.).

[93] *See* BARAK, *supra* note 2, at 281.

[94] *See* Karp, *supra* note 3.

[95] PENAL LAW (Introductory and General Parts) amend. 39, § 3 (1994) (Israel).

coming into force, whichever is later. Moreover, a law which establishes a harsher sentence than the one existing at the time an offense was committed, will not apply to an act committed prior to the day of its legal promulgation, or the day of its coming into force, whichever is later. The amendment also added to the Penal Law, provisions which qualify the principles as to the cancellation of an offense after its commitment,[96] and as to the amendment of legislation after the commission of an offense. The amendment is more lenient on the defendant[97] which was practiced in Israeli case law before the amendment.

The Canadian courts derived the doctrine of vagueness from the principle of legality. A vague law does not meet the requirements of reasonableness in section 1 of the Charter.[98] The vagueness doctrine does not require that the law be absolutely clear. The use of general terminology and the existence of various interpretations of the law are unavoidable in any act of legislation. However, the court will declare a law to be unconstitutional if it does not provide sufficient guidance or draw sufficiently clear standards as to what is prohibited and how an individual is to behave. A vagueness defense was accepted by the Canadian Supreme Court when the law infringed on the principles of basic justice and the right to liberty.[99]

Similarly, the Israeli Supreme Court[100] criticized the offense of public mischief found in section 105 of the Criminal Code Ordinance[101] for being undefined, unbound, and clearly contrary to the legality principle in criminal law. It appears that this section would not meet the requirements of section 8. If brought before the court for judicial review according to the Basic Law, it would be invalidated for failing to provide sufficient guidance. Therefore, it would contradict the principle of legality.

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[96] *Id.* at § 4.

[97] *Id.* at § 5.

[98] RE Regina v. Nova Scotia Pharmaceutical Society [1992], 93 D.L.R. (4th) 36, 70 C.C.C. (3d) 289 (S.C.C.).

[99] *See* Regina v. Morales [1992], 77 C.C.C. (3d) 91, 17 W.C.B. (2d) 580 (S.C.C.); Regina v. Robson [1985], 19 C.C.C. 137 (B.C.C.A.).

[100] *See* 53/54, Eshed, Mercaz Zmani Letahbura v. The State Attorney, 8 P.D. 785 M.A. (Cr.).

[101] *See* Criminal Code Ordinance § 105 (1936), amended by § 198 (1977) (Israel).

Yehudit Karp argues[102] the term "law" in section 8 of the Basic Law is not to be interpreted literally, but rather by its substantive meaning, referring to any public act of legislation, phrased in clear and concise language. The requirements of publicity, clarity and certainty were intended to provide guidance for the behavior of the individual in advance of and not after the fact. The realization of this goal denies the creation of offenses by judicial legislation. This opinion carries considerable weight, and therefore, a substantive test of the legality principle should be adopted. It is unfair to demand a person act with certainty without enabling him or her to know clearly and with advance warning which behavior is prohibited. In order for the penal code to fulfill its task of directing and guiding behavior, the prohibitions must be publicized.

J. Double Jeopardy

Section 11(b) of the Canadian Charter establishes that a person is not to be charged more than once for something he or she has done and no more than one sentence may be placed on the defendant for the same action. A similar provision exists in Israel in section 5 of the Criminal Procedure Law.[103] This section establishes that a person is not to be judged for an action if he or she has been acquitted or convicted for an offense included in that action. As an exception to this rule, the concluding phrase of section 5 states that if such an act caused a person's death, he or she can be tried for that act even if already convicted for another offense resulting from that action.[104] A defendant's right not to be tried twice for the same act may be derived from his or her right to liberty according to the Basic Law. Trying a person twice endangers his or her liberty beyond a reasonable degree. Once the defendant's criminal liability has been examined by the court, there is an assumption that justice has been served. However, in the face of that right stands the right to life which causes the principle of double jeopardy to retreat. It appears that a similar result would stem from the terms of section 8 in the Basic Law.

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[102] *See* Karp, *supra* note 3, at 21 of the draft.

[103] Criminal Procedure Law [Consolidated Version], § 5 (1982) (Israel).

[104] *Id.*

K. Freedom From Cruel and Unjust Punishment

According to section 12 of the Charter, the defendant has the right not to be subject to cruel unjust treatment or punishment.[105] Canadian case law interprets this right as a constitutional protection from unusual treatment or punishment, which translates into such being exaggerated or humiliating.[106] This right will be examined in light of the nature of the punishment and its influence on the sentenced person.

The punishment is cruel or unjust if the punishment supersedes standards of decency. The judge must examine the circumstances of the case, the severity and specific circumstances of the crime and the characteristics of the defendant. Then, the judge must decide the appropriate punishment in consideration of actual punishment, rehabilitation or individual deterrence.[107]

On the basis of the section 12, which prohibits cruel and unjust punishment, and in combination with the tests established in section 7, the Canadian courts developed rules for disqualifying a punitive provision due to the unsuitability of the punishment. The punishment will be considered cruel and unjust under the following circumstances:[108]

1. The punishment is of a character which outrages public conscience or injures human dignity.

2. The principle of relativity — the punishment exceeds what is necessary to achieve the social interest protected by the prohibition, in relation to the purposes of the legitimate punitive goals and other alternatives sufficient to achieve these goals.

3. A punishment which is administered arbitrarily and not based on approved standards. This section will also apply in the context of legislation which relates to mental health or to practices of forced treatment.[109]

Subsequently, the court prohibited physical punishment, lobotomies and castrations, as well as punishments which are

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[105] A parallel provision appears in the eighth Amendment of the American Constitution. U.S. Const. amend. VIII.

[106] Regina v. Smith [1987], 5 W.W.R. 1 (S.C.C.).

[107] *See* Whitley, *supra* note 8, at 261.

[108] See Regina v. Smith [1987], 5 W.W.R. 1 (S.C.C.).

[109] *See* Whitley, *supra* note 8, at 263.

clearly disproportionate to the offense. In this framework, the court did not uphold a minimum punishment of seven years for a drug trafficking offense, without considering the circumstances of the offense.[110] It was established that because of the multiplicity of possible circumstances for committing the offense, such a serious minimum punishment was disproportionate to the severity of the crime. Accordingly, the courts upheld the legality of a mandatory twenty-five year sentence for murder.[111]

In the opinion of Justice Barak, the death penalty, a life sentence without parole, torture, humiliation, physical blows, confiscations and forced labor all stand contrary to human dignity.[112] Also, humiliating conditions of arrest or detention infringe on human dignity.[113] Human dignity is a minimum guarantee of human existence; material and spiritual punishment[114] which is totally disproportionate to the offense committed infringes on human dignity.

One can derive the prohibition against cruel and unusual punishment from section 8 and its condition that one not exceed that which is necessary. The Basic Law can be used as a guideline for examining punishments established in laws passed after the Basic Law. The conditions of section 8 are not only guidelines, but a "normative umbrella" which covers every piece of legislation, balances the values and examines the reasonableness of all government actions. It places a limitation on the courts when sentencing and requires that punishment must fit the crime. The degree of injury in the punishment will be examined in light of the substance of the matter, the circumstances of the case and the desired end with particular attention to the appropriate means for obtaining the goal.

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[110] In re Smith v. The Queen [1987], 58 C.R. (3d) 193 (S.C.C.) 85; Karp, *supra* note 3, at 21.

[111] Regina v. Luxen [1990], 79 C.R. (3d) 193 (S.C.C.).

[112] *See* BARAK, *supra* note 2, at 280; H. Cohn, *The Values of a Jewish and Democratic States: Matters in the Basic Law: Human Dignity and Liberty*, 9 HAPRAKALIT 28 (1984).

[113] *See* BARAK, *supra* note 2, at 280; 3734/92, The State of Israel v. Azazami, 46(v) P.D.72 M.A. (Cr.).

[114] *See* H.C. 161/94, Atri v. The State of Israel, (not yet published): "the petitioner's dignity as a person necessitates care for minimal existence as a human." *See* BARAK, *supra* note 2, at 280; Cohn, *supra* note 112, at 29.

The question is whether, in the framework of the conditions of minimum injury, the court must examine the existence of alternative means outside the framework of the criminal proceedings, for example, administrative fines. Under this interpretation, the courts may end up with much more power than the legislature intended to grant. Consistent with this interpretation, is the possibility that a person who committed a crime will not carry a criminal stigma, despite the clear declaration of the legislature that such an act does indeed justify criminal stigma. It is not appropriate for the court to determine what constitutes a crime, but only to determine the nature and degree of the punishment.

L. The Privilege Against Self Incrimination

Section 11(c) of the Charter grants the criminal defendant the right not to testify against him or herself. The fact that the defendant does not testify will not be weighed against him or her. Section 13 of the Charter grants every witness the right not to give any evidence which will incriminate him or her in any other proceeding. A witness' testimony cannot be used against him or her, with the exception of later testimony for perjury. In accordance with this rule, the cross-examination of a defendant also cannot relate to the previous testimony of such defendant given in a preliminary, or in an earlier trial for the same charge.[115] According to Canadian case law, a defendant can be cross-examined as to testimony given in a previous trial when the purpose of the investigation and its results relate to the reliability of the witness and not to the content of the previous testimony. The claim is that such a cross-examination does not infringe on the defendant's privilege against self incrimination and advances the pursuit of the truth.[116]

Section 13 of the Charter recognizes the defendant's right to remain silent. However, a prisoner/detainee is not entitled to the warning that anything he or she says may be used against him or her in court. The right to remain silent can also be found

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[115] Regina v. Yakeleya [1985], 20 C.C.C. (3d) 193 (Ont.C.A.); Regina v. Sophonow [1984], 12 C.C.C. (3d) 272 (Man.C.A.).

[116] Johnstone v. Law Society of British Columbia [1987], 40 D.L.R. (4th) 550, 15 B.C.L.R. (2d) 1 (C.A.); R. v. B. (W.D.) [1987], 45 D.L.R. (4th) 429, 38 C.C.C. (3d) 12 (Sask.C.A.).

in section 7.[117] If the police unfairly deny a person's right to remain silent, it will be considered a violation of section 7.[118]

The right to remain silent is part of human dignity because a defendant cannot be forced to give his or her version, but the inference of adverse conclusions from that silence does not contradict human dignity.[119] Indeed, to date, this is the position which Israeli case law has adopted. However, since the right to silence is based in the Basic Law (and if in fact, the right constitutes a part of human dignity; as an expression of a free, autonomous being, with freedom of choice, will and action), greater weight must be given to the defendant's right to silence, or it becomes devoid of meaning. Once the defendant has been granted this right, it is appropriate that its exercise not be held against her, as though that right were not granted by law. In light of this, we need to make a new examination of the existing rulings since this basic right has been elevated to constitutional status. It will be further noted that the right to remain silent may be derived from the assumption that a person is presumed innocent until proven guilty. This presumption is part of personal liberty and the right to dignity.[120]

Israeli case law has rejected the practice of obtaining evidence by infringing on the privilege against self-incrimination, the fruits of the poisonous tree. Excluding evidence obtained in an unlawful manner is possible only under the Secret Monitoring Act and the Protection of Privacy Act.[121] In cases where evidence was obtained by severe infringement of the privilege against self incrimination, it is appropriate to exclude that evidence, otherwise, the defendant's right will be emptied of meaning. It may be appropriate to distinguish between a technical injury to the privilege, and a severe and outright infringement. It may also be appropriate to adopt a test which changes according to the circumstances, and does not apply the doctrine of the fruits of the poisonous tree without distinction. Another possibility is to broaden the interpretation of the term "other harass-

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[117] Regina v. Herbert [1990], 2 S.C.R. 151, 57 C.C.C. (3d) 1 (S.C.C.); Regina v. Broyles [1991], 131 N.R. 118, 68 C.C.C. (3d) 308, 14 W.C.B. (S.C.C.); Regina v. Chambers [1990], 2 S.C.R. 1293, 59 C.C.C. (3d) 321, 11 W.C.B. (2d) 191 (S.C.C.).

[118] Rothman v. Regina [1981], 1 S.C.R. 640, (Ont.S.C.).

[119] *See* BARAK, *supra* note 2, at 433.

[120] *See* BARAK, *supra* note 2, at 280.

[121] *See* WHITLEY, *supra* note 10, at 197.

ment" in the Protection of Privacy Act, to include any infringement of human dignity.[122]

M. Remedies

Section 24(1) of the Charter establishes that any person whose rights have been infringed or denied may turn to the court and request a remedy that is appropriate and just under the circumstances. The term "appropriate remedy" is a vague and limited term in the criminal context. Remedies of acquittal or retrial may be appropriate under certain circumstances.[123] In addition, section 24(2) establishes that the Court will exclude evidence if it was obtained in a manner which infringes on individual rights.[124]

To determine whether evidence obtained in violation of the Charter should be excluded, one must examine all the circumstances of the case, as well as the manner in which the evidence was obtained. This includes the extent and severity of the injury to human dignity and social values, precipitated by the obtaining of the evidence, the severity of the case, the importance of the evidence, the good faith of the one who infringed on the Charter and the existence of circumstances which justified the action. For example, urgent action intended to prevent the destruction of evidence may be a factor that persuades the court not to apply section 24(2).[125] There do not appear to be many cases in which the doctrine will be applied in Canada. It will only be applied in cases of gross or deliberate infringement, but not in cases of technical infringement of the Charter or infringement in good faith.[126]

The Basic Law does not include remedies for breach of a right. It would be appropriate for Israel to adopt the Canadian

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[122] *See* F.H. 9/83, The Military Court of Appeals and Others v. F. Va'aknin, 42(iii) P.D. 837.

[123] *See* Symposium, *supra* note 45, at 243-4.

[124] This provision is more limited than the doctrine of the fruits of the poison tree which is applied in the United States. This automatically excludes all evidence obtained illegally, even when it is a matter of only a technical infringement and when the authorities who acted illegally did so in good faith. U.S. v. Leon, 468 U.S. 897, 898 (1984). These considerations will be taken into account when applying the discretion granted the Canadian Court.

[125] *See* Symposium, *supra* note 45, at 243.

[126] *See* Symposium, *supra* note 45, at 243.

approach. The Canadian Supreme Court has established three criteria for the disqualification of evidence obtained in breach of the Charter[127]:

1. If the evidence may affect the fairness of the trial, such as an admission obtained by trickery or a statement obtained in breach of the defendant's right to consult with an attorney. However, the Court tends not to exclude evidence when it does not constitute an infringement of the privilege against self-incrimination. Real evidence will be excluded only when obtained by gross breach of the Charter. The Court has excluded most evidence that breached section 10(b) which provides the right to counsel.

2. The severity of the breach of the Charter and whether the infringement was done in good faith and on reasonable grounds.

3. Whether excluding the evidence will detrimentally affect the court system. For example, when it is clear that a crime has been committed, particularly a serious crime. Where the submission of the evidence will affect the fairness of the trial, the severity of the offense will not outweigh the submission of the evidence.

N. Conclusion

This article examined the significance and implications of the Basic Law. The true scope of the criminal defendants' rights will be clarified over time as they are discussed and honed in criminal law.

The comparison of the Canadian Charter with the Basic Law illustrates the significant differences between them. The Canadian Charter details the rights of the accused in sections 8-14, beyond what is established in the dignity and freedom section, a detailing which does not exist in the Basic Law. This difference requires caution when operating under the Canadian legal system, particularly because of the interpretation given to the Canadian Charter by the Canadian courts. It is evident to all that the terms "human dignity and liberty" cannot include in them every single right. Boundaries must be established for the extension of these terms, and these boundaries may necessitate

[127] Regina v. Collins [1987], 1 S.C.R. 265, 33 C.C.C. (3d) 1.

the conclusion that a certain right, which is granted the defendant according to the Canadian Charter, does not constitute a part of human dignity and liberty. Therefore, it is not granted to the criminal defendant under Israeli law. One can only hope that this lacuna, will be filled soon by way of legislation.

A further issue which arises from the discussion of the rights of the defendant in criminal law deals with the relationship between the rights anchored in the Basic Law, the limitations on their breach and the law which was previously in force. The Basic Law does not change or override any previously enacted legislation. Cases may arise in which the previous law does not guarantee the defendant's rights in the same degree as the Basic Law. The right of the defendant may be legally breached although the same breach would be considered illegal according to the tests of the Basic Law. Therefore, it is appropriate to subject the previous law to the same judicial review as the Basic Law.