Counter-Terrorism Law and the Rule of Law Under Extreme Conditions: Theoretical Insights and Israeli Law and Jurisprudence

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2016 was a record year of terrorism worldwide. Although other parts of the world are suffering significantly 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.[2] The current threats of terrorism are greater than in the past because of globalization and technological development, or, more specifically, for three main 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. With increasing migration and more heterogeneous European societies the dangers of such individual acts of terrorism rise.

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 discourses in 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.[3]

In this short presentation I will try to address the legal challenges on a theoretical level of the rule of law under extreme conditions and elaborate on the Israeli experience, counterterrorism law and jurisprudence. This experience is interesting because Israel has lived since its establishment with similar terrorism that is striking nowadays Europe, but nevertheless managed to maintain an uninterrupted democracy and ranks relatively high on the rule of law indexes.[4]

2 According to Jane's Information Group (http://www.janes.com), 2017 saw a slight decrease of terror attacks and casualties

3 See the website of the Independent Reviewer at (https://terrorismlegislationreviewer.independent.gov.uk).

4 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.

1. Counterterrorism law vis-à-vis the Rule of Law

1.1. 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 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 independent and efficient enforcement agencies, primarily prosecution agencies and courts, without which equal enforcement of the law and invalidating governmental action outside 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 which in full compliance with the formal facet of the rule of law. To prevent this, the substantive facet has to be incorporated. It denotes limits to laws prohibiting individual conduct and or empowering state authorities or officials. While the formal facet of the rule of law requires only 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.

1.2. 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 crisis 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. However, it is under these circumstances that individual rights are under the greatest threats.

Terror acts can constitute an extreme condition, but not all terror attacks are such. An act of terror (at least according to definition of liberal democracies) is a criminal offence committed for ideological reasons and intended to create fear or alter 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 numerous small or individual terror acts might also constitute extreme conditions.

This suggested 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 relating to 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 is also important when different models of the rule of law under extreme conditions are considered and assessed.

From the perspective of the rule of law, the conditions that justify a departure from normality should include unpredictability, immanency 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".[5]

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, decision-making 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 crisis occurs and hence even (2) is not sufficient to take the 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). It also depends on the quality of the polity in terms of preparing for different scenarios and eventualities, which is connected to potential political economy failures – rational politicians who are interested to maximize their powers will have incentives not to prepare for extreme conditions which will enable them to assume more powers when such conditions occur. This last point emphasizes the importance of a good constitutional and legal framework that obliges the government to prepare for various eventualities.

5 *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.

The more problematic situation (which indeed prompted Carl Schmitt's and Giorgio Agamben's famous criticism[6]) is situation (3). The conditions that can justify it from the vantage 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 or comparative 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 powers to the state and its officials and thus increasing limitations on 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 layer of the rule of law should not be compromised even 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.

6 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.

1.3. Three paradigms of the rule of law under extreme conditions

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

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.[7] It is, for example, the prime model practiced in the UK. The Prevention of Terrorism Acts (1974, 1976, 1984 and 1989) and other recent statutes meant to combat terrorism are part of the regular legal scheme 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, as a temporary law which became permanent. 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 and temporary constitutional emergency powers avenue.[8]

2. Emergency constitution. – originating from the Roman model,[9] emergency constitution is common in many countries. The emergency constitution model ne-

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7 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.

8 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?

9 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 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, though 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.

gates the business as usual model, acknowledging, on the one hand, the unpre-dictable nature of extreme conditions, hence the inability to prescribe all the spe-cific 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 proce-dures/institutions for enacting additional legal norms, bypassing the regular leg-islative 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 swift and effective actions during extreme conditions and their unpredictable na-ture, and negating the desirability and/or the ability to prescribe ex-ante special de-cision-making procedures or a unique rule of law format tailored to operate under extreme conditions, maintaining a clear separation between normal times and ex-treme conditions, this model advocates effective measures outside the rule of law and their legalization or legitimation *ex-post*. This model originates from the pre-rogative 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 ex-ists 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 emer-gencies from the times of President Lincoln until present.[10] But one can also include in this category Article 16 of the French constitution, which basically grants 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 mecha-nisms for deliberation and checks and balances yielding the best rules to balance se-curity concerns with human rights, it suffers two major flows: first, reality under-mines theory and some extreme conditions are unpredictable. Lacking a real emer-gency mechanism may foster total departure from the rule of law. Second, accommodating laws for extreme conditions into the regular legal system may con-stitute 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 legis-lation in various liberal democracies (e.g. USA and UK and recently even France).

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 pres-

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

dent or to 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 new legislation, bringing 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 compromises the theoretical advantages of each of the models, as will be apparent in the discussion of Israeli law in the following section.

2. 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 present 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. It has never resorted to "stepping outside the rule of law" model.

One can generalize that virtually all acts considered as "terror acts" in Israel have been related to the Israeli-Palestinian/Arab conflict. 1920 can be considered as the year in which the first act of terrorism by Palestinians against Jews took place, culminating in the 1929 massacre of 113 Jews.[11] As a response a group of Jews es-

11 In 1917 Palestine was concurred by the British Army from the Ottoman Empire which had ruled Palestine for 400 years. The first wave of terrorism erupted following the Balfour Declaration of the same year (1917), which recognized the right of the Jews for self-determination in Palestine. Six Jews were killed in several attacks in 1920 and this wave continued throughout the decade and culminated in 1929 with the murder of 113 Jews and the elimination of Jewish presence in Hebron.

tablished in 1931 an "underground" organization called Etzel (National Military Organization), which following the 1933-6 wave of Arab terrorism against Jews and against the British Mandatory regime (the "Arab revolt") began conducting 'retaliation' activities against Arabs and from 1939 also military activities against the British authorities.

These developments prompted the enactment by the British Mandatory authorities of the Defense (emergency) regulations 1939 that are in part still in force today. The eruption of WWII and the decision of Etzel to suspend military activities against the British authorities brought about the establishment of a split organization called Lehi (Israel Freedom Fighters, called by the British "The Stern Gang"), which continued to conduct terror activities against the British authorities, mainly after the end of the World War. Lehi's last alleged operation was the assassination of the UN envoy, Folke Bernadotte, which took place in September 1948, a couple of months after the establishment of the State of Israel, an operation which prompted the enactment of the Prevention of Terrorism Ordinance by the Provisional Council of the new born state, the declaration of Lehi as a terror organization, the arrest of its leaders and the actual elimination of the organization.

Arab terrorism commenced after the conclusion of the Independence War in 1949, mainly through infiltrators from Jordan and Egypt into the newly established state and the murder of around 500 Jews, activities which brought about the 1956 Sinai War. The establishment of the PLO (Palestine Liberation Organization) in 1964 as the roof organization of all Palestinian factions and the 1967 (Six Days) War in which Israel occupied Gaza and the West Bank, changed the mode of terror activity in the region and its expansion to hijacking of airplanes and terror against Israelis around the world (e.g. the murder of Israeli athletes at the Munich Olympic Games in 1972). Palestinian terrorism internationalized as the organizations' headquarters were located in neighboring countries (first in Jordan, following their expulsion in 1971 – Lebanon, and following the first Lebanon War, which erupted in 1978 in the aftermath of a deadly terror attack on Israeli buses – Tunisia) and the Palestinian organizations also began cooperating with other organizations, such as the German Bader-Meinhof and the Japanese Red Army, internationalizing terrorism.

Individual retaliation attacks by Jews against Arabs occurred sporadically and intensified in the 1980s after the establishment of new Jewish terror organizations such as the Jewish Underground, Terror vs. Terror, and the Lifta Gang that planned to explode the mosques on Temple Mount. Using the anti-terror legislation, most of the members of these organizations were arrested and brought to trial, virtually eliminating Jewish terror organizations by the mid 1990s. However individual attacks by Jews continued. The worse such attack ever was carried out in 1994 by Baruch Goldstein, killing 29 Palestinians in Hebron. Meanwhile, the first Intifada (Palestinian uprising) erupted in 1987 in which Islamic organiza-

tions (as opposed to secular Palestinian organizations) began taking part. 155 Israelis were killed between 1987-1992 in terror attacks. Ironically, terror activities intensified following the Oslo Accord signed between the PLO and the Israeli government in 1994, characterized by a new mode of operation – suicide bombers. This was the most deadly period of Palestinian terrorism, culminating in the second Intifada (2000-2005). Around 1000 Jews were killed during this period.

The unilateral disengagement from Gaza in 2007, which brought about Hamas taking over by force the ruling of Gaza from the Palestinian Authority, prompted yet another change in terror activity – the launching of rockets from Gaza to the neighboring Israeli villages, which in turn lead to several operations of the Israeli Defense Forces (notably, operation Cast Iron in 2008-9 and operation Protective Edge in 2014). The most recent phase of terrorism – lone knifes attacks and cars running over by individual Palestinians – began in 2015 and lasts to date. Likewise, Jewish activities self-proclaimed as "Price Tag" (consisting of setting fire to mosques and Palestinians' homes) can characterize Jewish terrorism since 2008 to date. "Price Tag" was recently declared by the Israeli authorities as a terror organization.[12]

The Israeli counterterrorism law can be characterized as a combination of the "emergency constitution" and the "business as usual" models with a process of a gradual shift from the former to the later, accelerated with the new (2016) counterterrorism law. The legal framework provides for harsh punitive measures and draconic administrative powers to the authorities to combat terrorism. However, 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 USA.

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,[13] and since Israel in this respect belongs to the Common Law tradition in which there is one general courts system with a Supreme Court functioning 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. This feature stands in contrast to courts in many other countries who tend to defer or limit their review when security or emergency issues are on stake. In addition, the ability to apply

12 Declaration which has not been challenged in court and hence not properly discussed, where the interesting point here is whether an unorganized idea can constitute an "organization".

13 E. Salzberger, "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.

directly to the Supreme Court, sitting as a High Court of Justice, means a very effective and immediate judicial control, which is sometimes performed within hours and still during the enforcement operation.

While some of the Israeli counterterrorism law is contingent upon a specific declaration of a state of emergency, a growing 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.

2.1. 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,[14] 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:

1. It brings into force pre-existing legislation, which is not applicable during "normal times", such as The Supervision on Prices of Services and Products Law 1957, 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 regulation 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.[15] In 1990 the

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

15 Cr. A 156/63, *The Attorney General v. Ostreicher*, 17 PD 2088; 5 SJ (1963–65) 19.

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 was in force, the use of emergency regulations for that purpose was illegal.[16]

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 regulations 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 more 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 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, 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 counterterrorism 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 there.

16 HC 2944/90, *Poraz* v. *The Government of Israel*, 44(3) PD 317.

2.2. The Israeli specific counter-terrorism legislation and the shift from "emergency constitution" to "business as usual"

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. 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.[17]

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.

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 applied altogether. However, with the increasing activities of the PLO and other Palestinian organization, the Ordinance was amended in 1980 and the definition of "expressing support" was expanded 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.[18]

17 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 108.

18 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).

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.[19]

As most of the draconian powers of the *Prevention of Terrorism Ordinance* have almost never been applied, one cannot find case law regarding it. Judicial input can be found 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. Jabarin, an Arab-Israeli journalist, published a series of articles expressing support and encouragement for 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.[20]

A rare procedure of Further Hearing in front of an enlarged bench was ordered.[21] The focus of the discussion in the further hearing was diverted to an additional 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 article title, and the title of the section in question itself was: "Support for a 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, Jabarin was finally acquitted.

Following the decision, the Knesset in 2002 repealed Section 4 of the *Prevention of Terrorism Ordinance*, replacing it with a new section in the Israeli Penal Code (144D), which applies to incitement to terror activities even when it does not refer

19 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].

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

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

to support of a specific organization.[22] The new section 144D(2) 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. This was the beginning of the process of shifting counterterrorism law from "emergency constitution" to "business as usual".

Following the globalization and sophistication of terror activities and the adoption of the *International Convention for the Suppression of the Financing of Terrorism*,[23] the Knesset enacted in 2005 an additional 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 shifts 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 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 requested 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.

22 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.

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

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*, which Israel inherited when it was established. The new law 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 the legal tools of combating terrorism into normality and the focal Israeli approach regarding terror from "emergency constitution" to "business as usual" model.

In general, it can be stated that the 2016 law is less draconian than the repealed laws both in its penal section and in its administrative measures. 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 defines "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 of 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 power 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 an-

other 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 served as the bases for the declaration, save evidence, the disclosure of which can harm state security and where the damage of its disclosure outweighs the benefits for finding the truth and doing 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 and rules of evidence. Thus, some evidence can be not disclosed to the defendant (codifying a procedure developed by the courts themselves in the context of the British Defense Regulations – see bellow). 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 the 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 is extended from the 24 hours norm to 72 or 96 hours (section 46).

The administrative part of the law (sections 53-72) deals in detail 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 admin-

istrative court (sections 56-68). It also empowers a commander of a police district to prohibit activities of a terror organization (section 69) and empowers the chief of police, after conducting a hearing, to issue an order restricting activities in a venue that has been used by a terror organization and there is a reasonable suspicion that it will continue to be used for such a purpose (section 70). All these orders are subject to judicial review.

While the provisions of the new legislation replace much more draconian administrative powers regarding property related to terror, the law does not address (and this leaves intact existing legislation) the harsh administrative measures of detention, restriction of movement and alike, which exist in the British Defense (emergency) Regulations inherited from the British Mandate. The law applies to Israeli territory and not to the Occupied Territories in which the original British Defense Regulations (incorporated into the Jordanian legal system and inherited by Israel as the occupying power) remain in force, enabling also demolition of houses and deportations (which were abolished altogether within Israel). More significant from our general theoretical perspective is the shift from emergency contingent arrangement to a new normality in which some rights are more limited permanently. While some of the norms of the counterterrorism law may have a justification to be in force permanently, it can be argued that others (such as administrative measures and some procedural concessions) are justified only under extreme conditions. Such a distinction does not exist anymore.

2.3. The Defense (Emergency) Regulations and its offsprings

One cannot provide a comprehensive survey of Israel counterterrorism law without a reference to the Defense (Emergency) Regulations 1945, enacted by the British High Commissioner in Palestinein the wake of World War II and the emerging tensions between Jews and Arabs in Mandatory Palestine, inherited by Israel in 1948 (and its validity is not contingent on emergency declaration). They are the main legal tool Israel uses in the Occupied Territories. This legal instrument is also interesting in comparative perspective because very similar legislation was enacted in other former British territories (such as India and Cyprus) and in Norther Ireland and is still in force in many parts of the world. Some of the recent British legislation to combat terror adopted the core principles of these Regulations.[24] Along the years, many parts of these Regulations were abolished by the Knesset, most recently when the 2016 Counterterrorism Law was enacted, but parts of these Regulations are still in force, including harsh administrative measures.

24 For example: Terrorism Prevention and Investigation Measures Act 2011; The Justice and Security Act 2013, The Counter-Terrorism and Security Act 2015.

The original 1945 Regulations, empowered the High Commissioner to issue a deportation order (Section 112) if it is necessary to safeguard the public safety, the defense of the state, the public order or to frustrate revolt (Section 108 which sets the general conditions to apply various administrative measures). A military commander was empowered to issue an administrative detention order (Section 111) or movement restriction order (Section 109). In 1979 the Knesset abolished altogether the power to deport and enacted a new administrative detention law which is more balanced vis-à-vis human rights in comparison to Sections 111 and 112 of the Regulations, which were abolished.[25]

This new Law – The *Emergency Power (Detention) Law* 1979 – is only in force when declaration of emergency is operative (Section 1). It empowers the Minister of Defense to issue a detention order if he has reasonable cause to believe that reasons of state security or public security requires such detention (Section 2). The detention has to be reviewed by a President of a District Court within 48 hours, who can set aside the detention order if it has been proved to him that the reasons for which it was made were not objective reasons of state security or public security or that it was made in bad faith or for irrelevant considerations (Section 4). If the order was approved, a review by the Court has to take place every three months (Section 5). The decisions of the District Court President can be appealed to the Supreme Court (Section 7). The Court can depart from rules of evidence if the Court "is satisfied that this will be conducive to the discovery of the truth and the just handling of the case" (Section 6). As indicated above, the new law is valid only in Israel, while the original British Regulations are still valid in the Occupied Territories and indeed there they are being frequently used.

As early as 1949 the Supreme Court ruled, without any specific authorizing provisions, that measures taken on the bases of the powers conferred by the *Defense (Emergency) Regulations* are subject to judicial review, and it ordered the freeing of a man who had been detained according to regulation 111 because the military authorities had not followed the procedure set out in the regulations.[26] However, the Supreme Court was reluctant to exercise broad judicial review of the substantive discretion in issuing a detention order, limiting its review to an examination of questions of authority, integrity and due process.[27] This policy has changed in the last 40 years and the Court has broadened the scope of review to examine also the reasonableness of the discretion of the Military Commander. In the 1981 case of *Baransa*, for example, the Court was asked to review a restricting order issued against a person who was suspected of involvement with a terrorist organization (the order, in accordance with regulation 110, restricted the movement of the per-

25 The *Emergency Power (Detention) Law* 1979. For the full text see http://www.btselem.org/sites/default/files/1979_emergency_powers_law_detention.pdf

26 HCJ 7/49 *Alkarbutli v Minister of Defence* [1949] IsrSC 1 85.

27 E.g. HC 46/50 *Al-Ayubee v Minister of Defence* [1950], IsrSC 4 222.

titioner to his home town). The Supreme Court held that the use of such a measure is valid only as a preventive measure and not as a punishment or a substitute for criminal proceedings, and that the Court should be convinced that the evidence presented to it is sufficient to substantiate, according to an objective test, a danger to the security of the State.[28]

When broadening the judicial review to the merits of the order, the Court also adopted an activist approach in reviewing the evidence. In many cases the State argued for privilege of some evidence (based on the Evidence Law Ordinance), i.e. that some of the evidence cannot be disclosed due to state security reasons. The Court initiated a procedure, resembling an inquisitorial system, in which after the detainee's consent, the Court was handed the evidence for review without the presence of the detainee or his lawyer. This judicial practice was adopted by the Knesset when it enacted the 1979 Administrative Detention Law (and later, the Unlawful Combatants Law – see bellow – and the new 2016 Counterterrorism law). Section 6(b) of the law 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 found their way to the statutes' book.

The most significant decision of the Court with regard to administrative detentions was in the case of the Lebanese 'bargaining chips'. In 1986 an Israeli aircraft navigator was captured by an Islamic militia in Lebanon and was later handed over to Iranian elements. As part of the Israeli efforts to obtain information about his fate and that of other missing and captured Israeli soldiers, several Lebanese citizens belonging to the Hezbollah which had been involved in armed attacks against the Israeli Defense Forces, were taken from Lebanon to Israel and detained. Among them was Sheikh Abd Al-Karim Obeid – a Lebanese citizen who was a member of the leadership of Hezbollah and who had advocated and was also allegedly actively involved in the planning of terrorist activities. Israel never pursued criminal charges against those Lebanese, but held them in administrative detention – initially as essential 'bargaining chips' in negotiations for information and the release of Israel's captured and missing, and later on the ground that holding them was necessary in view of the direct danger which each of them would pose to state security were they to be released. Following a petition by the kidnapped Lebanese, the Supreme Court ruled in 2000, by a majority of six judges to three (an exceptional enlarged bench), that the prevailing laws of administrative detention did not permit the detention of persons where the purpose of their

28 HC 554/81 *Baransa v Commander of the Central Command*, IsrSC 36(4) 247.

29 For more details and analysis see: Itzhak Zamir, Human Rights and National Security, 23 *Israel Law Review* (1989) 375.

detention was to use the detainees as 'bargaining chips' in negotiations for the release of captured and missing soldiers.[30] Following the judgment Israel released the petitioners as well as five other persons taken from Lebanon who also had been held in administrative detention for a similar purpose.

As a result of the Court decision, the Knesset enacted the *Incarseration of Unlawful Combatants Law* (2002), which regulates the detention of combatants not entitled to the status of prisoners of war. It should apply in accordance with international humanitarian law (Section 1). Detention orders according to this law can be issued by the Army Chief of Staff, if he thinks the detention is necessary for state security (Section 3). The order has to be reviewed within 14 days by a District Court judge and subsequently every six months (Section 6). The applicability of this law is not contingent upon an emergency declaration.

One of the harsh administrative measures specified by Section 119 of the *Defense (Emergency) Regulations* empowers the Military Commander to order the demolition of any house that was connected to a person who, to the Commander's satisfaction, committed an offence according to the Defense Regulations. Until the late 1980s there were hardly any petitions against the use of this power, because it was taken instantly as a prompt response to terror acts and the person whose house was about to be demolished did not have the chance to approach the Court. This was the cause of the 1988 petition of the Association of Civil Rights in Israel. The Court ruled that, save in rare cases of operational military needs, the person against whom a demolition order is being issued should be given the right to appeal against the order to the Military Commander himself and, subsequently, to the High Court of Justice.[31] The decision was based on principles of Israeli administrative law, which, according to the Court, apply to any Israeli official, including his or her operation outside the state territory (including in the territories occupied in 1967).

This approach of the Court, combined with the institutional structure according to which every petition can be launched directly to the Supreme Court, led to an unprecedented involvement on the part of the Israeli Supreme Court in various military measures. To the best of my knowledge, there is no equivalent judicial intervention in other jurisdictions, and this path involved the Israeli Supreme Court in some real-time military decision-making. In the case of house demolitions, from the end of the first Intifada (Palestinian uprising) in 1993 and until 2001, this measure had not been used, partly due the imposed legal hurdles. The Government decided to resort again to this measure following the eruption of the Second Intifada, but repeated decisions of the Supreme Court adopting the *Baransa* precedent and the due process requirements led the army to declare in

30 F H Cr 7048/97 *Plonim v Minister of Defence* PD 54 (1), 721.
31 HC 358/88 *Association for Civil Rights in Israel v Commander of the Central Command* IsrSC 43(2) 529.

2004 that it was changing its policy and that it would refrain from using this measure. The activist approach of the Court, despite the fact that there were hardly any cases in which it quashed a demolition order, led the Government and army to introduce significant changes in their military tactics. In recent years (from 2015), though, following the knifes attacks and the wave of individual acts of terrorism, the Government resorted to house demolitions. Several of these orders were quashed by the Supreme Court, with some interesting remarks by some of judges that the power to demolish houses might be unconstitutional and in contrast to international law altogether and merits a principled reconsideration, hinting for a poosible future rulling that will invalidate Section 119 of the Defense (Emergency) Regulations altogether.

A similar situation arose concerning the harsh measure of deportations. This measure was used widely as part of the Labour government's defense policy between 1967 and 1974, when about 1,400 Palestinians from the Occupied Territories were deported, mainly after completing a prison sentence for terror-related offences. The measure was abolished within Israel proper in 1979, but it has continued to be employed in the Occupied Territories. Court intervention was scarce because according to Regulation 112 there is a quasi-judicial advisory committee to which a person who is issued with a deportation order can appeal. But the Supreme Court changed its policy in the aftermath of the 1976 *Natshe* affair. The background was a controversial 'liberal' decision of the Defense Minister, Shimon Peres, to hold elections for local authorities in the Territories. When it became apparent that some candidates holding extreme views inciting to violence were likely to oust moderate incumbents, a deportation order was issued against two of them. A hearing in front of the advisory committee approved the orders and the two deportees petitioned the Supreme Court. When the justice on duty wanted to issue an interim injunction, the State Attorney informed the Court that the two applicants had already been deported, and that this deportation was authorized by the Attorney General, Aharon Barak, because the lawyer on the petitioners' behalf negligently failed to ask the High Court for an interlocutory injunction. In an angry-toned decision the Court criticized the authorities and instructed the Attorney General to conduct an investigation and report to the Court on how the deportation was allowed. A consequence of this case was that from this decision and until 1979, no deportation orders were issued, and the effectiveness of the measure as a quick and immediate response was eroded.

In 1980 the tension in the Territories was mounting and six Jews who returned from a prayer in the Machpela cave in Hebron were attacked and murdered. The response was a deportation order against the mayors of Hebron and Halhul and the religious leader of Hebron for incitement, which allegedly led to the murder. The Military Commander decided to carry out the deportation before the appeal process took place. The deportees' lawyers petitioned the High Court of Justice.

The Court, by a majority, rejected the petition to invalidate the deportation orders, but ruled that the deportees should be allowed back to plea their case in front of the advisory committee, rejecting the State's argument that their return could seriously endanger peace and security.[32] The Government followed the Court's order and the deportees were given the right to return and plea in front of the advisory committee, but the committee approved the deportation. The matter came back to the Supreme Court and the same panel denied the petition, by a majority of two to one. Although the petition was dismissed, the President of the Court recommended that the deportation should be re-examined at the government level, taking into account the peace-orientated declarations given by the deportees in front of the advisory committee.[33] This recommendation was widely criticized as trespassing of the Court into the executive's territory, but Prime Minister Begin promised to follow the Court's decision and recommendation. This specific affair, again, brought to a total halt of deportations for a period of five years, until Yitzhak Rabin became the Defense Minister.

In 1992 Rabin issued deportation order against 415 Hamas activists in, which was ordered following a surge of terror attacks by that organization. The deportation was based on Regulation 112 but also on an emergency decree issued by the Government and was meant to last for two years. No appeal rights were given to the deportees prior to the deportation. The Association for Civil Rights in Israel petitioned the Supreme court against this decree and the individual orders and the Court, sitting in an exceptional panel of seven justices struck down the decree but upheld the individual orders, holding that the right to appeal to the advisory committee had to be granted, but that it could be exercised after the deportation had been carried out.[34] Subsequent to this decision and fierce criticism against the Government and iundeed also against the Supreme Court, the deportation measure has not been utilized again.

3. Conclusion

Israeli democratic success owes a great deal to its public legal institutions, primarily the Attorney General (which is a unique position encompassing the functions of legal advisor to the government, the head of all executive branch legal advisors and the head of the prosecution) and the Supreme Court, which serves as a final appeal instance in civil, criminal and public law litigation, as well as a constitutional court. The independence of these institutions (reflected principally by the method of judicial appointments and judicial tenure until mandatory retirement age of 70) made them the main check on governmental powers. Unlike equivalent

32 HCJ 320/80 *Kawasma v Minister of Defence*, IsrSC 35(3) 113.
33 HCJ 698/80 *Kawasma v Minister of Defense and others*, IsrSC 35(1) 617.
34 HC 5973/92 *Association for Civil Rights in Israel v Minister of Defence*, IsrSC 47(1) 267).

courts in other countries, any person with grievance against any public authority can launch an application directly with the Supreme Court, and the Israeli Supreme Court is not hesitant to intervene also in matters of security. Since the Supreme Court has an original jurisdiction as a High Court of Justice, its intervention can be very swift, even in midst of actual operations or crises.[35]

The jurisprudential approach of the Israeli Supreme Court, especially when compared with the approach of other top courts, notably the United States Supreme Court in the post 9/11 era,[36] is reflected in the following words of its former President *Aharon Barak*:

> "... *first* the struggle against terror cannot be conducted 'outside' the law. The struggle against terror must be waged 'within' the law using the tools, which the law makes available to a democratic state. This is what distinguishes the state from the terrorists... The statement attributed to Cicero to the effect that '*in times of war the laws fall silent*' reflects neither reality nor what is desirable. *Second*, the normative framework was established on the basis that a democracy's fight against terrorism is grounded on a delicate balance between the need to preserve the safety of the state and its citizens and the need to safeguard human dignity and liberty... This balance must be based, in the nature of things, on appropriate restrictions both on the fighting force of the democratic state and on the freedom of the individual. An appropriate balance is not maintained when state security is fully protected, as if human rights do not exist. In a democracy's fight against terrorism not every measure is permissible. Often a democracy will fight with one hand tied... *Third*, the courts are available to decide conflicts relating to a state's struggle against terrorism. When it is contended that human rights have been infringed, there is no room to close the doors of the court. When a law exists by virtue of which war is waged against terror, a court exists which will determine what is permissible and what prohibited".[37]

During the early days of the state the Court limited its interventions to maintaining the formal facet of the rule of law. This policy has changed in the last 40 years and the Court has broadened the scope of review so as to examine also the reasonableness of the discretion of authorities, both with regards to individual sanctions and with regard to general policy issues, as was exemplified above by the 1981 *Baransa* case.[38] The Court stated there that it " will examine scrupulously the exercise of this power, and hence this Court no longer acts with the limitations and self-restraint characterizing the parallel English case law which examined the exercise of similar powers in England".

35 A notable example is the intervention of the Court when terror suspects found refuge in the Church of Nativity in Bethlehem and army forces surrounded the Church. See HCJ 3541/02, *Almadani* v. *The Minister of Defense*, 56 (3) PD 30.

36 For such a comparison see A. Guiora and E. Page, "Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism", 29 *Hastings Int'l & Comp. L. Rev.* (2006) 51.

37 A. Barak, forward in E. Gross, The Struggle of Democracy Against Terrorism: Lessons from the United States, the United Kingdom and Israel, Charlottesville: University of Virginia Press, 2006.

38 Supra note 28.

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".[39]

The Israeli experience shows that 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 law is by now part 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.

39 HCJ 680/88, *Schnitzer* v. *Chief Military Censor*, 42(4) PD617 (1989).

SC Mag. Dr. Mathias Vogl: Thank you very much, *Univ.-Prof. Dr. Salzberger*, for the very interesting overview of Israeli anti-terrorism law. We have seen, I want to stress it once more, the important role of independent courts.

Herr *Univ.-Prof. DDr. Pfersmann*, ich freue mich schon auf Ihre Ausführungen zur französischen Situation.