

Counterterrorism Law in Israel

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1. Introduction – History of Terror in Palestine/Israel

Terrorism is not a new phenomenon in Israel, and the type of terrorism that attacks Europe today has been practiced in Palestine for the last hundred years. 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.¹ As a response a group of Jews established 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 still in force today (discussed below). 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

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¹ In 1917 Palestine was conquered 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.

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*, 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 airplanes hijacking, 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 organizations (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 led 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 - Palestinians' knives attacks and cars running over by individuals - 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.

2. The Legal Framework

Israeli Counterterrorism law rests on three main pillars, on which this paper will elaborate:

1. The ability to declare a “state of emergency”, which brings into force several pieces of legislation allowing various preventive measures as well as punitive ones. Declaration of emergency also grants the Government the power to issue regulations overriding existing legislation.
2. The Defense (Emergency) Regulations 1939 and 1945, enacted by the British High Commissioner.
3. The Prevention of Terrorism act 1948 enacted by Israel’s Provisional Council, which is in force whenever a declaration of emergency is in operation.

In addition, in 2005 the Prohibition of Terror Financing Law was enacted, and various other sections in various laws (such as the general penal code and the Police Ordinance) should be viewed as part of Israeli counterterrorism law.

Before elaborating on each of these legal frameworks, let me summarize what I see as the main features characterizing the overall Israeli legal arrangements regarding counterterrorism:

1. The major components of counterterrorism legislation are old, dating back to British Mandatory law or Israel’s early days. No significant expansions were made to this legislation (save the recent legislation regarding finance of terrorism); on the contrary: with the years some

- of the draconian powers were limited by legislative amendments, decreasing the magnitude of potential human right violations.
2. The legal framework provides for draconic powers to the government to combat terrorism, but the model adopted by Israel is a legislative one, rather than executive (i.e. prerogative or residual powers model) as is, for example, the situation in the USA).²
 3. From the very establishment of the state, the actual use of the legal powers has been always scrutinized by the courts, which limited overuse of the powers and balanced them against the safeguard of human rights. Thus, the law in action, in the Israeli case, is different from the law in the books, as will be exemplified bellow.
 4. Counterterrorism law in Israel is comprised from punitive measures (special criminal law), as well as various administrative measures enabling special preventive measures. The distinction line between prevention and punishment is not always clear.
 5. While some of the counterterrorism law is contingent upon a specific declaration of a state of Emergency, another portion of counterterrorism law is part of the general legal system and is not contingent on emergency declaration.

3. General framework of “Emergency Constitution”

Israel is one of the only three countries (together with the UK and New Zealand) that do not have a formal written constitution. Elections for a 120 members Constituent Assembly were held in January 1949, but the newly elected body declared itself as a legislature entitled the Knesset and in 1950 it

² See Daphna Barak-Erez, Terrorism Law between the Executive and Legislative Models, 57 *The American Journal of Comparative Law* (2009), pp. 877-896

decided against the immediate construction of a constitution. Instead, it ordered the Knesset Committee for Constitution, Law and Legal Affairs to gradually prepare basic laws, which would eventually be amalgamated into a constitution.³ The first Basic Law was enacted in 1958 and dealt with the Knesset itself. Eight further Basic Laws were enacted between 1960 and 1988, dealing mainly with the various powers of government and the institutional elements of the State (the last basic law in this group – *Basic Law: The State Comptroller* – was enacted in 1988 and regulated the fourth branch of government). Following several failed attempts by Knesset members, mostly from the political centre-left parties, to enact a comprehensive basic law with an entrenched bill of rights,⁴ the tactics of the pro-human rights camp changed and in 1992 they succeeded to enact two laws – *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*, which cover several human rights, but cannot be regarded as a comprehensive bill of rights.⁵

The new Basic Laws refer for the first time to the Declaration of Independence. Thus, article 1 of Basic Law: Freedom of Occupation reads: ‘Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles

³ For the full text see DK (1950) 1743, also available at: www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm. For a description and analysis of the Harari Resolution, see G Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton: Princeton University Press, 1993) 106.

⁴ See, e.g., Draft Basic Law: Bill of Fundamental Human Rights 1983. For the history of the failed proposals to enact civil rights in Israel see: R Hirschel, ‘Israel’s “Constitutional Revolution”: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order’ (1988) 46 *Am J Comp L* 427; A Shapira, ‘Why Israel Has No Constitution’ (1993) 37 *St Louis U L J* 283.

⁵ The full text of the Basic Law on Human Dignity and Liberty is reprinted in (1997) 31 *Isr L Rev* 21-25.

set forth in the Declaration of the Establishment of the State of Israel'. The Laws also state for the first time the character of the state of Israel as a Jewish and democratic state. Thus, section 1 of *Basic Law: Human Dignity and Liberty* reads: 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state'. Among the rights mentioned in this law are the rights to life, body integrity and dignity, the right to property, the right to liberty and freedom of movement, and the right to privacy and to intimacy. But the most innovative part of the two Laws are the limitation clauses (article 8 of the *Basic Law: Human Dignity and Liberty* and article 4 of the *Basic Law: Freedom of Occupation*), which read: "There 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 is required". This provision paved the way to judicial review of legislation (and of other statutory instruments and governmental decisions).⁶ The Supreme Court of Israel was already before the enactment of the 1992 basic laws a significant player in public decision-making, and these laws enhanced its impact even further. The law in Israel cannot be understood without the jurisprudence of the Court.

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The first law enacted after the establishment of the State of Israel by the Provisional Council (which served as an interim legislative body until the first general elections held in 1949) was the "*Law and Administration*

⁶ The Supreme Court ruled in the landmark case of Mizrahi Bank (CA 6821/93 *United Mizrahi Bank v Migdal – Communal Village* [1995] IsrSC 49(4) 221) that application for review of legislation can be launched to the Supreme Court sitting as a High Court of Justice (direct attack), but can be raised as a defense in any court of law (indirect attack), adopting the US model of judicial review of legislation, rather than the European one (of special constitutional courts).

Ordinance". This legislation, which set the basic structure and procedure of government and incorporated the law that existed in Palestine on the eve of the establishment of the state into the new legal system of Israel (thus adopting also the British *Defense (Emergency) Regulations*), also included an "emergency constitution". Article 9 of the Ordinance, which was replaced in 1996 by provisions in *Basic Law: the Government* (articles 38-41) empowers the 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.⁷ Such a declaration has two major legal consequences:

1. It brings into force pre-existing legislation (which are not applicable during "normal times", such as the *Commodities and Services (Control) Law 1957*,⁸ *The Emergency Powers (Detention) Law 1979*,⁹ and indeed *The Prevention of Terrorism Ordinance 1948*.

2. Emergency declaration also empowers the Government or individual ministers to issue regulations "for the defense of the State, public security and the maintenance of supplies and essential services"¹⁰ with the force to supersede any existing law. These 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) assumes legislative powers. However, when these powers were re-phrased in *Basic Law: The*

⁷ Article 38 of *Basic Law: The Government*

⁸ Article 2 of the Law specifies that it will be in force only when an emergency declaration is in force.

⁹ Article 1 of the Law specifies that it will be in force only when an emergency declaration is in force

¹⁰ Article 39(a) of *Basic Law: The Government*.

Government, the empowering clause also specified that emergency regulations can impose neither retroactive punishment nor violation of human dignity, that they cannot change *Basic Law: the Government* itself, and that they are subject to judicial review.

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

The Israeli general constitutional framework regarding emergency periods seems reasonable vis-à-vis the rule of law and the protection of human rights. It is a legislative model (rather than granting the executive unlimited powers), which guarantees a mechanism of checks and balances (declaration of emergency is made by the legislature or has to be ratified by the legislature within 7 days of the declaration, it is in force for maximum one

¹¹ Cr. A 156/63 *The Attorney General v. Ostreicher* 17 PD 2088; 5 SJ (1963-65) 19

¹² HC 2944/90 *Poraz v. The Government of Israel* 44(3) PD 317. See also *Medianwest Medical Center Hertzelia Ltd. V. The Minister of Health and others*, 44(1) PD 19, English Summary in *Isr. L.R* (1992) 65.

year, and emergency regulations can be in force for a maximum period of three months and are subject to effective judicial review). However, 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. 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, the Government accepted the need to end the state of emergency but asked for time to adjust all the legislation which is contingent on the declaration (By 1999 there were many pieces of legislation the validity of which were tied to declaration of emergency). Until this day the adjusting process has not been completed and thus the Knesset renews every 6 months the declaration of emergency.

Having said that, the legal tool of emergency regulations is hardly being exercised and no regulations exist in the direct context of counterterrorism. The more extensive legal tool related to counterterrorism are the *Defense (Emergency) regulation* which are not contingent on emergency declaration and the laws (primarily the *Prevention of Terrorism Ordinance*) which are in force only when declaration of emergency is in force. To these tools we turn now.

4. The Defense (Emergency) Regulations 1945

A major legal framework and tool dealing with terror and other security threats is the *Defense (Emergency) Regulations*, enacted by the British High Commissioner in the wake of World War II and the emerging tensions between Jews and Arabs in Mandatory Palestine. The Regulations were

enacted on the basis of a 1939 amendment to the *Palestine Order in Council* (equivalent to the Mandatory constitution) and after various versions, the ones which are in force date to 1945. These regulations were incorporated into Israeli law like other Mandatory legislation and they are valid also in territories occupied by Israel in 1967, since Egypt and Jordan adopted, similarly to Israel, the Mandatory law existing in 1948 and, like Israel, they have never repealed the Defense Regulations. In fact, down the years the Knesset has abolished some of the Regulations (e.g. the power to deport) and replaced others with its own legislation (e.g. administrative detentions), but these changes apply to Israel proper, as the Knesset has no legislative authority over the Occupied Territories. The draconian powers encompassed in the Regulations negated the need to enact further significant laws to counter recent surge in terrorism, in contrast to the position in many other countries.

The *Defense (Emergency) Regulations* include wide discretionary powers to employ various administrative measures, as well as a penal code dealing with security-related offences to be adjudicated upon by military courts. In the original Regulations there was no right to appeal the decision of the military court, but this was changed in 1963 by the Knesset, which established a Military Court of Appeal. However, this amendment was not part of the legal framework in the territories occupied by Israel in 1967 (as Jordan and Egypt had not introduced a similar amendment). In the last 40 years the Regulations have hardly been used in Israel proper, where terror-related offenders are indicted according to the general penal code and tried by the general court system. This is not the case in the Occupied Territories.

In 1985 the Association for Civil Rights in Israel petitioned the Supreme Court sitting as a High Court of Justice asking it to order the Military Commander to establish an appeal instance in the Territories, arguing that the right of appeal is a basic human right.¹³ Although the Court refused to issue an order against the Military Commander, it fiercely criticized the existing situation and recommended that it be changed.¹⁴ The Government followed the Court's advice and in 1989 such an appeal instance was established.

As to the penal part of the Regulations: many offences in the Regulations have equivalents in the general penal code, whereas the maximum penalties in the Regulations are usually much more severe than in the penal code (e.g. according to Section 59 to the Regulations possessing or manufacturing weapons illegally can carry the death penalty, while according to the general penal code the maximum punishment is 7 year in prison; wearing official uniforms illegally can carry according to section 60 of the Regulations life in prison, while according to the penal code the maximum penalty is three years in prison). In addition, there are special offences in the Regulations that do not have parallels in the general penal code. For example, according to Regulations 84 and 85, membership, activity or support in an association (or an organization) of individuals declared by the Minister of Defense as an illegal association (or an organization or association which aims to conduct terror activity, change the constitution using violence, incite against the government or destruct state property) is an offence.

¹³ The jurisdiction of the Israeli Supreme Court over the Occupied Territories is a complex matter. In a nutshell, such jurisdiction was assumed in 1967. In absence of a State argument against it, the Court adopted an activist (and indeed a world precedent) position that Israeli public law applies to any Israeli official, even if he/she are operating outside Israel's borders. See Eli Salzberger, Judicial Activism in Israel, in Brice Dickson (ed.), *Judicial Activism In Common Law Supreme Courts* (Oxford University Press 2007), pp. 217-272.

¹⁴ HC 87/85 *Argum v Military Commander in Judea and Samaria* [1985] IsrSC 42(1) 353.

Furthermore, the Defense Regulations procedural rules, including maximum arrest period before judicial hearing, rules regarding the admissibility of confessions and even the judicial decision-making rules, deviate from the general criminal procedural rule and usually are much less attentive to the accused rights (one exception is the judicial decision-making rule, which according to the Regulations requires unanimity of the three judges rather than simple majority in the general courts). Having said this, since the establishment of the State, there have been very few criminal trials according to the Defense Regulations and hence very little jurisprudence regarding the conflicts between the general penal code and procedure and the penal section of the Defense Regulations.

The more problematic part of the Regulations is the one dealing with administrative measures such as detentions, deportations and house demolitions, as well as censorship (which I will not be able to address in this article). 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 the 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 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.¹⁵

The 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 from 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 provisions in the Regulation in this regard, 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

¹⁵ The *Emergency Power (Detention) Law 1979* . For full text see http://www.btselem.org/sites/default/files/1979_emergency_powers_law_detention.pdf

procedure set out in the regulations.¹⁶ 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.¹⁷ 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 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 petitioner 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.¹⁸

When broadening the judicial review to the discretion 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

¹⁶ HCJ 7/49 *Alkarbutli v Minister of Defence* [1949] IsrSC 1 85.

¹⁷ E.g. HC 46/50 *Al-Ayubee v Minister of Defence* [1950], IsrSC 4 222.

¹⁸ HC 554/81 *Baransa v Commander of the Central Command*, IsrSC 36(4) 247.

the 1979 Administrative Detention Law (and later, the Unlawful Combatants Law – see below). 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.¹⁹ 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 plane navigator was captured by 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 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 prosecutions 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. On a petition by the kidnapped Lebanese, delivered in April 2000, the Supreme

¹⁹ For more details and analysis see: Itzhak Zamir, *Human Rights and National Security*, 23 *Israel Law Review* (1989), 375.

Court ruled, 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 detention was to use the detainees as ‘bargaining chips’ – hostages – in negotiations for the release of captured and missing soldiers.²⁰ Following the judgment Israel released the petitioners as well as five other persons taken from Lebanon who too had been held in administrative detention for a similar purpose.

As a result of the Court decision the Knesset enacted the *Detention of Unlawful Combatants Law* (2002), which regulates the detention of combatants not entitled to the status of prisoners of war in accordance with international law (Section 1 to the law). 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).

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

²⁰ F H Cr 7048/97 *Plonim v Minister of Defence* PD 54 (1), 721.

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.²¹ 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 in 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 until 2001, this measure was hardly ever 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 2004 that it was changing its policy and that it would refrain from using this measure at all. 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 months (2015-16), though, following the knives attacks and individual acts of terrorism wave, the Government resorted to house demolitions. Several of these orders were

²¹ HC 358/88 *Association for Civil Rights in Israel v Commander of the Central Command* IsrSC 43(2) 529.

quashed by the Supreme Court, with some interesting remarks by some of judges that the power to demolish houses might be unconstitutional altogether and merits a principled reconsideration.²²

A similar situation arose concerning the harsh measure of deportation. This 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 since been 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 *Natshé* 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 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

²² complete

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.²³ 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. But although the petition was dismissed, the President of the Court, Moshe Landau, 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.²⁴ 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 the use of

²³ HCJ 320/80 *Kawasma v Minister of Defence*, IsrSC 35(3) 113.

²⁴ HCJ 698/80 *Kawasma v Minister of Defense and others*, IsrSC 35(1) 617.

deportations for a period of five years, until Yitzhak Rabin went to the Defense Ministry.

One of the lowest points of Rabin's term and a low point of the history of the Supreme Court as well, was the deportation of 415 Hamas activists in 1992, which was ordered by the Government 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 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 criticized 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.²⁵ Subsequent to this decision the deportation measure has been hardly ever utilized.

5. The Prevention of Terrorism Ordinance

As mentioned above, the *Prevention of Terrorism Ordinance* was enacted in 1948 by the Provisional Council only six days after the assassination of the UN envoy, Folke Bernadotte, allegedly by the Jewish terror organization Lehi, and it was used to eliminate this organization.²⁶ The Ordinance is in force only when declaration of emergency is in effect.

²⁵ HC 5973/92 *Association for Civil Rights in Israel v Minister of Defence*, IsrSC 47(1) 267).

²⁶ 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 vs. the Prime Minister and the Minister of Defense*, 1 PD 109.

The law defines a terror organization as “a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence” (section 1 of the Ordinance). A finding of an organization as a terror organization can be reached upon proof in final verdict of a court (Section 11), but the Government can also declare an organization as such, a declaration that has to be published in the official records in order to be effective, and it can be disputed in legal proceedings (Section 8). In other words, a declaration shifts the onus of proof.

The law includes a penal section. Activity in a terror organization can result with up to 20 years in prison, membership in a terror organization – up to 5 years and express of support – up to 3 years in prison.²⁷ Originally the jurisdiction to trial an accused according to the law was in the hands of military courts, but in 1980 the Ordinance was amended and the jurisdiction was handed over to the general courts system. In addition, the law empowers the confiscation of property belonging to a terror organization, to be ruled by a District Court (Section 5) and the closing of a place serving the purposes of terror organization by administrative decree of the Chief of Police (Section 6).

Until 1980 the *Prevention of Terrorism Ordinance* was utilized only against Jewish organizations, and after the stormy period of Israel’s independence it was hardly used altogether. However, with the increasing activities of the PLO and other Palestinian organization, the Ordinance was amended in 1980 and besides shifting the jurisdiction to the general court it also expanded the definition of “expressing support” in terror organization to include any publication of identification, encouragement, praise or sympathy with a

²⁷ Sections 2, 3 and 4 of the Ordinance respectively.

terror organization, any monetary or other contribution to a terrorist organization, as well as allowing a terror organization to use premises or other property (Section 4 of the Ordinance). In 1986 an additional amendment was made, expanding Section 4 (expressing support) also to include meetings or unofficial negotiations with officials of a terror organization, save academic meetings, family meetings or journalist interviews. The purpose of this amendment was to prevent Israelis (mainly from the peace camp) to meet PLO officials and to penalize those who conduct such meetings.²⁸

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. As a result, in 1992 the amendment from 1986 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 a government as terror organization increased significantly and it included also organizations that do not operate or relate specifically to Israel.²⁹

Similarly to the judicial role regarding the other pieces of counterterrorism law, the Supreme Court in his jurisprudence limited to some degree the draconian powers specified in the *Prevention of Terrorism Ordinance*, but

²⁸ The Labor led Government, at the time, agreed to this amendment which was advocated by the right wing parties, in exchange for the later support of the right-wing to amend the penal code, adding an offence of incitement to racism (Section 144A to the Israeli Penal Code).

²⁹ For the list of declared terror organization by dates see:
<http://web.archive.org/web/20101231071106/http://www.mod.gov.il/pages/general/pdfs/terror.pdf>

mainly regarding the “peripheral” powers dealing with express of support to a terror organization. A good example on hand is the Jabarin case from the early 2000s. Jabrin, a journalist, published a series of articles expressing support and encouragement of throwing stones and Molotov cocktails, for which he was convicted by the District Court for support of terror organization on the basis of Section 4 of the *Prevention of Terrorism Ordinance*. The appeal to the Supreme Court focused on the requirement of a causal connection between the publication and the danger of it leading to actual acts of violence. The Court dismissed the appeal ruling that there is no need for a probability connection for purposes of conviction.³⁰

A rare procedure of further hearing in front of an enlarged bench was ordered.³¹ 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 line, and the title of the section itself was: "Support for terrorist organization". Four judges as opposed to three broadened freedom of speech, limiting the applicability of the offense to supporting acts of violence only of a terrorist organization. Thus, Jabrin was acquitted.

Following the decision, the Knesset in 2002 repealed Section 4 of the *Prevention of Terrorism Ordinance*, replacing it with a new section (144D)

³⁰ Cr.A. 4147/95 *Jabrin v. State of Israel*, 50 (4) P.D. 38. The Courts previous jurisprudence required a proof of “near certainty” needed to curtail freedom of speech. See Fania Oz-Salzberger and Eli Salzberger, *The Tradition of Freedom of Speech in Israel, Law, Society and Culture* 2006, pp. 27-70

³¹ Cr F H 8613/96 *Jabrin v State of Israel* [2000] Isr SC 54(5) 193

in the Israeli Penal Code, which applies to incitement to terror activities even when it does not refer to support of a specific organization.³² The new section 144D2 reads “If a person publishes a call to commit an act of violence or terror, or praise, words of approval, encouragement, support or identification with an act of violence or terror (in this section: inciting publication) and if – because of the inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years imprisonment”. As can be noted the new article also includes a probability test, and, as part of the general penal code it is in force permanently and not only when emergency declaration is operative.

6. The Prohibition of Terror Financing Law

In 2005 the Knesset enacted a new original comprehensive Israeli counterterrorism law, focusing on financing of terror activity. As opposed to all other legal instruments discussed above, which date back to the British Mandate or the early days of the State of Israel (although amended by the Knesset along the years), the *Prohibition of Terror Financing Law 2005* is an extensive (54 articles) original Israeli legislation, enacted following the adoption of the *International Convention for the Suppression of the Financing of Terrorism*,³³ and in order to anchor in municipal law Israel's obligations according to the Treaty. The law was amended already several times, lastly in 2014.

³² See Daphna Barak-Erez and David Scharia, Freedom of Speech and Support for Terrorism: A Case Study of Global Constitutional Law, 2 *Harvard National Security Journal* (2011) 1

³³ The Treaty was adopted by the UN General Assembly in 1999, entered into force in 2002 and ratified by 187 States, including Israel

The law treats terror organizations as those declared as such according to the *Defense Regulations* and the *Prevention of Terrorism Ordinance*, but it also empowers (Section 2) a ministerial committee to add to the list organizations which were declared as terror organizations by the UN Security Council or by other states. Such a declaration can be challenged before a three members panel, chaired by a retired District Court or Supreme Court judge (Section 4), and if the appeal was denied, the panel has to reconsider its decision every 4 years (Section 5), if the declaration had not been repealed earlier by the ministerial committee (Section 6). As in other counterterrorism legislation, the law includes a penal section and an administrative one.

The penal section includes 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 (Section 8); 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 (Section 9). While Section 8 requires a *mens rea* of intent, Section 9 requires only knowledge, but the law specifies various presuppositions that can bring even negligent behavior within the scope of the offences and shift the onus of proof from the prosecution to the defendant. It also imposes an active duty to report on such transactions (Sections 10 and 11).

One of innovations of the law is that on top of the criminal sanction the adjudicating court can also order the forfeiture of the property. Five chapters of the law (Sections 12-30) deal 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 (Section 17) and such

an order can be applied for in a civil procedure in the District Court even in absence of criminal proceedings (Section 22). Appeal on a forfeiture order can be launched as a civil appeal to the Supreme Court (Section 28). Similarly to other counterterrorism laws, in proceedings according to the *Prohibition of Terror Financing Law*, the Court is permitted to deviate from the general rules of evidence (Section 35).

The law also provides for administrative measures. Thus the Minister of Defense can order confiscation of property (Section 41), which expires if within 21 days an application to the court to issue a forfeiture order has not been launched (Section 44).

7. The Judicial input to Israeli Counterterrorism Law and concluding remarks

We visited the main statutory instruments that comprise Israeli counterterrorism law. There are of course other sections in various laws (such as the general penal code) that are relevant as well, but towards the conclusion of this survey I want to emphasize again the significant role played by the courts in shaping Israeli counterterrorism law.

An important example is the decision of the Israeli Supreme Court regarding the interrogation methods used by the Israeli General Secret Service (GSS) towards suspected terror activists. The Court was called to decide the issue in 1994 following a report by a Commission chaired by the former President of the Supreme Court, Justice Landau. The Commission concluded that light physical pressure was allowed in extreme circumstances, such as ‘ticking bombs’, and that the legal test that ought to apply is that provided by the

criminal law defense of necessity. It called for the enactment of legislation that would authorize the forms of interrogations by the GSS. Such legislation has not been enacted. A petition by several human rights organizations against the Commission's recommendation and the GSS practice was allowed. In the ruling handed down in 1999 the Court held that the principle of 'necessity' cannot serve as a basis of authority. It proceeded to examine the actual techniques used by the GSS (imported from the British security forces) – inclining the chair, blindfolding by a sack, playing loud music – and found them to be injuring the bodily integrity, rights and dignity of the suspect beyond what was necessary; they were therefore declared illegal. The only interrogation methods allowed, the Court ruled, are those of the Police.³⁴

There are many other examples to the interventions of the Supreme Court shaping the law in action and, as far as I know, there is no other court in the world that is involved in terror and national security issues like the Israeli Supreme Court. Its significance is boosted also due to the instant intervention it can prompt. Every individual can apply directly to the Israeli Supreme Court sitting as High Court of Justice and in urgent matters the Court can issue injunction on the same day of application. Thus, we can find examples for the Court's intervention in the midst of military operation. Such was the 2002 case of Almadani. Israeli forces were chasing terror suspects, who in the course of the chase found shelter in the Nativity church of Bethlehem that was full of clergy and worshippers. The Israeli forces surrounded the church. The Palestinian Governor of Bethlehem petitioned the Supreme Court asking it to

³⁴ HCJ 5100/94 *Public Committee Against Torture in Israel v State of Israel* [1999] IsrSC 53(4) 817, English translation available on the website of the High Court of Justice. For further analysis and comparison with the English debate on the same interrogation techniques see E Gross, *The Struggle of Democracy Against Terrorism: Lessons from the United States, the United Kingdom and Israel* (Charlottesville: University of Virginia Press, 2006).

order the Israeli forces to supply food, water and medical supplies to the individuals in the church and within hours such a decision of the Court was issued.³⁵

One can sum-up the activist 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 in President Barak's writings, much of which is taken from his judgments:

...*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 state operates within the boundaries of the law. The terrorists contravene the law...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

³⁵ 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' (2006) 29 Hastings Int'l & Comp L Rev 51.

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

To conclude, Israel adopts a legislative model of counterterrorism law and does not recognize a general executive prerogative or stepping outside the rule of law. However, the various statutes provide the authorities with draconian administrative and punitive powers, most of which originate in the British Mandate and the early days of the State. With the years, the courts have been playing increasing role in restricting the usage of these powers to meet human rights standards. Thus the law in action is different from the law in the books.

In 2011 the Government published a new draft bill of a comprehensive counterterrorism law, which is meant to replace the current laws (including the recently enacted *Prevention of Terror Financing Law*). This law is also meant to enable lifting the emergency declaration, according to the commitment of the government to the Supreme Court.³⁸ The new law is still debated in the Knesset committees and will merit, if and once it is finalized and voted in, a new article.

³⁷ A Barak's foreword to E Gross, note 34 above.

³⁸ See the last paragraphs of section 3 above.

Post-script

After the completion of this article, on June 23rd 2016, the Israeli parliament approved a new comprehensive counter-terrorism law, which will come into force on November 1st, 2016 (*Counter-Terrorism Law 2016*). The law is the most significant input by the legislature since 1948. It includes more than 100 articles and I will not be able to analyze it here in details. Nevertheless, in order to keep the reader informed, here are the main initial insights regarding the new legislation:

1. The new law repeals (and replaces) the 1948 *Prevention of Terrorism Ordinance*, the 2005 *Prohibition of Terror Financing Law* and some of the British *Defense Regulations*. It will be 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.
2. In general it can be stated that the law is less draconian than the repealed laws both in its penal section and in its administrative measures section. It also specifies (section 1) that its provisions should be applied in accordance with international law regarding terrorism, on the one hand, and Israel's obligation to respect human rights in accordance with international law, on the other hand. However, it "captures" broader activities as associated with terror, in comparison to the repealed legislation (some examples will be given below), and as indicated above, it is meant to be in force as part of the regular - normal times - legal order.
3. 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).
4. "Act of terror" is defined 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.

5. The law includes very detailed provisions regarding declaration of an organization as a terror organization. It empowers the Minister of Defense to issue such a declaration, following the recommendation by the Director of the General Secret Service and the approval of the Attorney General. Such a declaration can be made 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 decision to the Cabinet or to a committee of ministers (section 3). The law also empowers the committee of ministers to apply a declaration of an organization as a terror organization made by the UN or by another authorized foreign entity (section 11).

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

It can be concluded that the law, in comparison to the old Prevention of Terrorism Ordinance, includes a better mechanism of checks and balances (such as the approval of the Attorney General and an independent appeal committee) to prevent the “politicization” or abuse of powers in declaring an organization as a terror organization.

6. 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 freedom of speech). 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).
7. The law includes also “concessions” from the regular criminal procedural rules and rules of evidence. Thus some evidence can be not disclosed to the defendant (codifying the test developed by the courts on which I elaborated in the article). Likewise, the court may accept hearsay (in contrast to regular criminal proceedings), if its source left Israel to an enemy country and cannot be summoned to court (section 42), and limitation period is lifted for offences for which the maximum punishment is over 20 years (section 44). In addition, the maximum period of custody of suspects in terror activity before a judicial hearing can be extended from the 24 hours norm to 48 or 72 hours (section 46).
 8. The administrative part of the law (sections 53-72) deals in details mainly with property and funds related to terror activities. It empowers the Minister of Defense to confiscate any property that was connected to facilitating (ex-ante) a terror activity or rewarding (ex-post) it. The order is subject to a review by the administrative 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 (section 70). The orders are subject to judicial review.

While the new provisions above replace much more draconian administrative powers regarding property related to terror of the

Prevention of Terrorism Ordinance and the Defense Regulations and it also repeals the sections in the Defense Regulations addressing newspapers licenses requirements (regulations 94-96), the law does not address (and this leaves in tact existing legislation) the harsh administrative measures of detention, restriction of movement and alike. The law applies to Israeli territory and not to the Occupied Territories in which the British Defense Regulations remain in force, enabling also demolition of houses and deportations.

To conclude, the new legislation provides a homogeneous and updates definition of terror organization and terror activity, which were defined differently in previous laws, also incorporating international and transnational declarations. Although, it adds new offences and administrative measures, the law does not amount to a paradigmatic change. The Israeli model remains a legislative one (in contrast to other systems which enable some prerogative or undefined executive powers) in which harsh measures can be applied, maintaining (and perhaps even enhancing) a complex system of checks and balances. The acute administrative measures, which are specified mainly in the Defense Regulations, has not been touched; it seems that it is easier for the Israeli Government and legislature to maintain the “responsibility” for these measures on the British-Mandatory legislature.