

NATIONAL SECURITY V. THE RIGHTS OF THE ACCUSED: THE ISRAELI EXPERIENCE

INTRODUCTION

[A]bstract principles announcing the applicability of civil liberties during times of war and crisis are ineffectual when a war or other crisis comes along unless the principles are fleshed out by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security concerns.¹

U.S. Supreme Court Justice William J. Brennan, Jr.

The Israeli legal system lives in two time warps. In Israel proper, the rule of law stands on firm ground and Israeli citizens are endowed with the basic freedoms and rights inherent in a democratic society. Across the green line,² the military government is responsible for the civil administration of the Israeli Occupied Territories. When ordinary law is suspended, the local inhabitants are faced with the realities of martial law. Although not directly connected to the administration of the military justice system, the Israeli legal system bears alarming similarities to its counterpart in the Occupied Territories: the security laws used by the military as a means of suppression of the Palestinian population are identical to those security laws in force in Israel. The wide scale implementation of such laws in the West Bank and Gaza has demonstrated their brutal nature and their disregard for human rights.

The purpose of this Comment is to demonstrate that the mere existence of these security laws in the Israeli law books creates the potential for their wide scale application within Israel, and to illustrate that a future emergency could lead to the realization of this potential. In so doing, this Comment will demonstrate how this security legislation poses a serious threat to the civil liberties of Israeli citizens.

Section I will provide a general background of the Israeli legal

1. W. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, 18 *Is. Y.B. OF H.R.* 11, 19 (1988).

2. The green line is the recognized international border between Israel and the West Bank and Gaza, territories occupied by Israel in the Six Day War in June, 1967.

system. The first part of this discussion focuses on an axiom which constitutes the basis of the Israeli legal system: without a written constitution, the executive and legislative branches of the Israeli government are unrestrained in the enactment of laws. Because the judiciary is required to enforce all laws, it is the subordinate branch of government. The second part explains how the Israel Supreme Court has overcome this impediment and succeeded in establishing basic freedoms.

Section II shows that Israeli Criminal Procedure distinguishes between two types of offenses—typical criminal offenses and security offenses. Only those accused of typical offenses are provided with the procedural safeguards required for a fair trial. Those suspected of security offenses face obstacles depriving them of their procedural rights.

Section III explains the Emergency laws which can activate those procedural obstacles. Since these laws have rarely been used in Israel, an analysis of their utilization in the Israeli Occupied Territories will demonstrate their effect on the rights of the accused. This analysis is included in Section IV. In addition, Section IV discusses the recent Palestinian uprising and further demonstrates how a sudden emergency can lead to the widespread implementation of the harsh security measures sanctioned by these laws.

Finally, Section V questions whether in the absence of a detailed jurisprudence, Israeli law can protect civil liberties during a national emergency. Two recent trends concerning the Supreme Court of Israel can be identified. The first trend relates to the ascendancy of the Supreme Court in the balance of governmental power and its increasing role in scrutinizing the actions of the executive. However, the second trend, which concerns judicial interpretation of criminal law, concedes that even a strong judiciary can be influenced by the dictates of national security.

I. THE ISRAELI SYSTEM OF LAW

A. *The Origins of Israeli Law*

The Israeli system of law is eclectic. It absorbed the legal systems which preceded the establishment of Israel, and integrated the Jewish law tradition. The result is a legal structure founded upon an amalgamation of legal currents which meet the complex needs of the State's culture.

Palestine, which included the territories of Israel prior to its es-

establishment, was ruled by the Ottoman Empire until the end of World War I. It then fell into the hands of the British. Great Britain governed Palestine by military rule from 1918 to 1922, and then by mandatory authority until May 14, 1948, the date Israel was established.³

The complexities of Israeli law are a product of evolution. The Ottoman law which preceded both the British and Israeli legal systems was a mixture of the French Code and Islamic law.⁴ After the British takeover, English law was instituted in two ways: 1) through new legislation codifying English common law, and 2) by the enactment of Article 46 of the Palestine Order in Council, which established common law as legal precedent in Palestine.⁵

The establishment of Israel on May 14, 1948 did not erase the prior legal systems. Instead, Ottoman and English laws were retained in order to leave an interim legal structure and to provide a foundation for future Israeli law.⁶ As Israel progressed, the legislature endeavored to adapt the Ottoman and English laws to the particular needs of the country—those laws contradictory to Israeli legal requirements were replaced by new Israeli enactments.⁷ At present, most of the Ottoman rules have been invalidated. Nevertheless, some Ottoman elements remain in the current system.⁸

In 1948, the new Israeli Court relied on English common law precedents in place. While English common law continues to play a role in Israeli adjudication, it does not constitute "stare decisis." The Israel court may interpret and analyze the English precedents, but they are not binding on the court's decisions and judicial reasoning.⁹ However, the influence of the English system is prominent.

3. The British mandate over Palestine was established by Article 22 of the Covenant of the League of Nations. Accordingly, Great Britain became the trustee responsible for the administration of Palestine after the breakup of the Ottoman empire.

4. 16 AMER. J. COMP. L. 405, 406 (1968).

5. *Id.*

6. Law and Administrative Ordinance, § II, Laws of the State of Israel (L.S.I.) (1948). Section II of the Proclamation, a document enacted by the Provisional Government, stated:

So long as no laws have been enacted by or on behalf of the Provisional Council of State, the law which existed in Palestine on May 14, 1948, shall continue in force in the State of Israel, insofar as such continuance in form is consistent with the contents of this proclamation, with the future laws and with the changes arising from the establishment of the State and its authorities.

7. For example, Ottoman laws regulating marriage and divorce, which were based on Islamic law, were superseded by Jewish law.

8. Cohn, *The Spirit of Israeli Law*, 9 IS. L. REV. 456, 458 (1974). One example is the Evidence Ordinance law, which provides that a prior decision in a criminal cause of action is res judicata in a civil cause of action.

9. Judicial and Administrative Ordinance (amended 1972) 1948; S.H. No. 651, at 51.

One commentator has noted that the "manner of discussion, the mode of reasoning and general approach [of the Israeli system] are characteristics of the common law system."¹⁰ Due to changing social and economic conditions, the Israeli courts have also demonstrated a willingness to consider U.S. precedents. The opinions of Israeli judges, which are typically lengthy, often contain references to decisions made by the U.S. courts.¹¹

The origins of Israeli criminal procedure can also be found in the prior Ottoman and English law systems. The Ottoman Penal Code of 1858, a blend of French and Islamic law, was in force in Palestine until 1936.¹² In that year, the British enacted the Criminal Code Ordinances of 1936. This code repealed most of the Ottoman provisions, and was, in effect, a codification of English common law relating to criminal procedure.¹³ Although the Criminal Code Ordinances of 1936 were replaced by the Israeli Criminal Procedure Law of 1965, and the Criminal Procedure Law (Consolidated Version) of 1982, the 1936 Code greatly influenced the Israeli codes.¹⁴

Another significant similarity between English law and Israeli law is that Israel does not have a written constitution. Although this has resulted more from circumstance than through inheritance, the Israeli and English systems function in a similar way. In order

10. Friedman, *Infusion of the Common Law in the Legal System of Israel*, 10 *Is. L. REV.* 325, 327 (1979).

11. In a famous defamation case, the Israel Supreme Court utilized the rationale of *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), in order to strike a balance between the right to privacy and freedom of expression. *Ha'aretz Newspaper Publication Ltd. et. al. v. Israeli Electricity Corp. Ltd.*, 31 (II) P.D. 281 (1977).

Section 20(6) of the Basic Law Concerning Adjudication states: "A decision rendered by the Supreme Court is binding on all courts except the Supreme Court." *Basic Law: Adjudication S.H.* (1984) No. 1110. p. 78. Because the Supreme Court of Israel is not bound by its own precedents, it has the freedom to adopt the decisions of foreign courts.

12. Bach, *Development of Criminal Law in Israel During the Twenty-five Years of its Existence*, 9 *Is. L. REV.* 568, 569 (1974).

13. *Id.* at 568.

14. After May 1948, Israeli Criminal Procedure evolved through an unsystematic process consisting of 1) amendments to the Criminal Code Ordinances of 1936, and 2) enactments of new laws in areas not addressed by the Criminal Code Ordinances. *See*, Bach, *supra* note 11, at 569.

The Israeli Criminal Procedure Law of 1965, 19 L.S.I. 158, repealed the Criminal Code Ordinance of 1936. However, in substance, many of the procedures of the 1965 code are English in character: "Proceedings are accusatory rather than inquisitory and the judge takes little active part in their conduct. They are instituted by filing a statement of charge and conducted by police officers or attorneys of the State Attorney's Department. The accused enjoys the presumption of innocence and the right to remain silent, confessions are admissible only if made freely and voluntarily." *The Israel Criminal Procedure Law of 1965, reprinted in THE AMERICAN SERIES OF FOREIGN PENAL CODES* 2 (1967). The Criminal Procedure Law (Consolidated Version) of 1982, L.S.I. 1043, consolidated all prior enactments and amended laws concerning arrests and seizures.

to protect the civil liberties of their citizens, England and Israel rely on fundamental rights inherent in their own common law. "Protections are present as a result of the will of the people represented by the common law which the English courts have always . . . enforced and which the Supreme Court of Israel has . . . been enforcing in [Israel], without any Bill of Rights."¹⁵

B. Basic Freedoms Without a Written Constitution

Israel has failed to create a superior normative document which elevates fundamental rights over the actions of the government despite several attempts to do so.¹⁶ Such a failure is the result of Israel's precarious security situation and the difficulty of drafting a document acceptable to all segments of Israel's heterogeneous population.¹⁷

Israel's Declaration of Independence is the only document which sets forth constitutional principles. The Declaration states:

The State of Israel . . . will foster the development of the country for all its inhabitants; it will be based on freedom, justice and peace envisaged by the prophets of Israel; it will ensure complete equality of socio-political rights to all its inhabitants irrespective of religion, conscience, language, education and culture.¹⁸

In 1953, the Supreme Court of Israel determined that the Declaration of Independence was only a political document announcing Israel's democratic nature. Although not binding authority, it could be referred to by the courts when interpreting the laws of the state.¹⁹ The Declaration is an example of how "the basic political,

15. Lord Diplock, *On the Unwritten Constitution*, 9 Is. L. REV. 463, 464 (1974).

16. The first Knesset was a constituent assembly; however, with the immediate outbreak of the War of Independence, this assembly was empowered with legislative authority. Although hearings concerning the constitution were held, the original purpose of the first Knesset was not achieved. Instead, a compromise was reached whereby a committee was set up to draft what is called the Basic Law—chapters of a constitution, each of which was to be drafted separately, and were to constitute a basic (fundamental) law. So far, the Knesset has passed eight Basic Laws relating to the president, the Knesset, the government, the Army, state budgets and financing, state lands and Jerusalem. Previous failures to enact a written constitution were caused by conflicting ideologies concerning the nature of the state. Gavison, *The Controversy Over Israeli Bill of Rights*, 15 Is. Y.B.H.R. 113 (1984). Presently, there have been renewed efforts to draft a constitution.

17. The vast majority of Israelis, who are Jews, are divided into many different ethnic groups. In addition, ideological differences between secular and religious Jews have led to public dissension. The minority of Israelis, approximately 700,000, consist of Muslims, Druze and Christians. Shetreet, *International Protection of Human Rights in Israeli Law*, ISRAEL REPORTS TO THE TWELFTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 332, 333 (1986).

18. Official Gazette, No. 1, 1 L.S.I. 3-5 (May 14, 1948).

19. Kol Ha'am v. Minister of the Interior, 7 P.D. 871 (1953). The court stated:

economic, social and cultural values of Israel were to be found within, and not above, its legal system."²⁰

In the absence of a written constitution, the Supreme Court of Israel cannot strike down a law: "[e]very law or part of a law which is passed by the Knesset must be enforced."²¹ In addition, the decisions of the Supreme Court are susceptible to circumvention through ex post facto legislation and administrative emergency legislation.²² Therefore, the judiciary is the subordinate branch of government.²³

Although the judiciary does not have equal standing with the Knesset, civil rights have not been seriously curtailed. Viewing itself as the sole guardian against governmental impropriety, the Supreme Court of Israel has prevented the erosion of civil liberties and kept the government in check.²⁴ It has accomplished this by internalizing the legal norms of a democratic society through judge-made law. For instance, in the *Ha'aretz Newspaper* case, the Supreme Court, sitting as the High Court of Justice,²⁵ acknowledged

The matters set forth in the Declaration of Independence—especially as regards basing the State "on the foundations of freedom" and securing freedom of conscience—mean that Israel is a freedom loving State. It is true that the Declaration "does not include any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws" but insofar as it "expresses the vision of the people and its faith". We are bound to pay attention to the matters set forth therein when we come to interpret and give meaning to the laws of the State. . . .

Id. at 871.

20. 16 AMERICAN JOURNAL OF COMPARATIVE LAW 405, 409 (1968).

21. H/C 188/63 Bazu v. Minister of Interior, 19 P.D. 337, 349.

22. Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT'L AND COMP. L.Q. 979, 981 (1984).

23. The Israeli government is based on a one house (the Knesset) parliamentary system. The executive consists of members of the Knesset from the leading party. "The Supremacy of the Knesset is the cornerstone of the legal system." Bracha, *The Protection of Human Rights in Israel*, 12 IS. Y.B.H.R. 110, 111 (1982). This is the result of (1) absence of a written constitution, (2) Section 1 of the Transition Law of 1949 which granted the constituent assembly legislative authority, and (3) the rule that the judiciary will not validate any rules which contradict the laws enacted by the Knesset. See Likhouski, *The Courts and the Legislative Supremacy of the Knesset*, 3 IS. L. REV. 345 (1968).

Since the Knesset is led by the executive, the governmental apparatus is designed to afford it the power to enact injudicial legislation via the Knesset. Therefore, civil rights are not beyond the reach of the government.

24. The independence of the Supreme Court is an established principle in Israel. This is accomplished by the selection committee in charge of nominating Supreme Court judges. The membership of the committee is designed to ensure objective and neutral selection and is composed of three Supreme Court judges, two lawyers, two members of Knesset, the Minister of Justice, and an additional Cabinet Minister. Judges are appointed for life with a mandatory retirement age of seventy. Judges Law of 1953, 7 L.S.I. 124.

25. The Israeli Supreme Court has two functions, Appellate Court and High Court of Justice. As High Court of Justice, the Court has the power to grant writs of habeas corpus, mandamus, certiorari and prohibition, as well as declaratory orders. Courts Law of 1957,

that even without a constitution, basic individual rights are inherent in the laws of Israel.²⁶ In another case, the Court asserted that freedom of expression belongs "to those unwritten rights which directly emanate from the democratic character of our country as a freedom loving State."²⁷

In *Kremer, et. al. v. Municipality of Jerusalem, et. al.*,²⁸ the Supreme Court elaborated on its function:

In our state, lacking a constitution which protects the individual's fundamental freedoms explicitly, this court, sitting as a High Court of Justice is obliged to guarantee these freedoms and to bestow the remedy applied for by the citizen when one of his basic rights was injured by an act of government.²⁹

Although the Knesset can override a special judicial decision and can interfere with the structure of the judicial branch by changing its authority, some legal experts believe that the lack of a written constitution adds to the Supreme Court's power.³⁰ Since Israeli judges are not restricted by a constitution, they have a wide range of freedom and are not open to a formal complaint for exceeding

sec. 7, 11 L.S.I. 157.

26. Ha'aretz Newspaper, *supra* note 11. The court stated:

The absence in the State of Israel of a single statutory enactment bearing a superior legal status and consolidating constitutional principles does not mean that we lack statutory provisions of a constitutional nature or that our system does not possess constitutional judicial principles, which define basic rights of the individual and citizen. The law in force in Israel embraces . . . basic rules concerning the existence and preservation of individual freedoms, and this is true even though the Basic Law: Rights of Man and Citizen Bill has not yet been made a Statute.

Id.

27. *Ulpanei Hasratat Be Israel, Ltd. v. Ger, and the Films and the Plays Censorship Minister of Interior*, 16 (II) P.D. 2407 (1962).

28. H/C 152/71, 2591 P.D. 767 (1971).

29. *Id.* at 782.

One legal expert used an Israeli Supreme Court decision and a U.S. Supreme Court decision to compare the similar view that courts have concerning their responsibility for safeguarding basic freedoms. Hausner, *The Rights of the Individual in Court*, 9 *IS. L. REV.* 478 (1974). The Supreme Court of Israel has stated:

This court is the most objective mainstay which the individual can have in his dispute with the authorities . . . there is not limitation on our task, whether substantive, procedural or remedial, other than the limits that the court, guided by its sense of proportion and responsibility, will impose on itself.

Id. quoting *Miron v. Minister of Labour*, 24 (I) P.D. 340 (1970).

The U.S. Supreme Court has stated: "While the unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon exercise of power is our own sense of self-restraint." *Id.* quoting *U.S. v. Butler*, 297 U.S. 1, 78-79 (1936).

30. Shetreet, *supra* note 22, at 979. Since there is no constitutional provision establishing the functions and limits of the Supreme Court, the power of the Court is derived from an evolutionary process consisting of the development of judiciary tradition and the role of the judiciary in relation to the executive and legislative branches.

their power. This contrasts with U.S. judges, who must act within the framework of the Constitution.³¹

The pressing political and geographical realities, which have caused the Israeli government to react by adopting stringent security measures, have caused a counterreaction in the judiciary—the liberalization of the legal system through its adherence to the basic freedoms found in written constitutions of Western nations.³²

The basic freedoms which have been granted by the U.S. Constitution have been granted to the citizens of Israel through the Israel Common Law and legislative process. “It is a prohibition and not a permission that requires a basis in law and all that is not expressly prohibited by the legislation is permitted.”³³ The Supreme Court of Israel has recognized and protected fundamental rights such as freedom of the press,³⁴ movement,³⁵ worship,³⁶ expression³⁷ and peaceful assembly.³⁸

II. ISRAELI CRIMINAL PROCEDURE

A. *Rights of the Accused*

Upon arrest, the Israeli suspect cannot look to a Bill of Rights for protection. Instead, procedural safeguards built into the Israeli Criminal Procedure Law provide the accused the basic rights needed to receive a fair trial. Such rights include:

- a. The right not to be tried twice for the same offense.³⁹
- b. The right to know the charge.⁴⁰
- c. The right to defend.⁴¹
- d. The right to examine the evidence.⁴²
- e. The right to be present and represented at trial.⁴³

31. Lecture given by Amos Shapiro, Associate Professor, Faculty of Law, Tel Aviv University (June 1989).

32. Bracha, *supra* note 23, at 110-111.

33. 16 AMER. J. OF COMP. L., *supra* note 20, at 409.

34. Kol Ha'am v. Minister of Interior, 7 P.D. 871 (1953).

35. El Chun v. Chief of Staff, 4 P.D. 34 (1950).

36. Peretz v. Council of Kfar Shmariyahu, 16 P.D. 2101 (1962).

37. Omar International v. Minister of Interior, 36 (I) P.D. 227 (1981).

38. H/C 148/79 Sa'ar et. al. v. Minister of Interior and Police, 34 (II) P.D. 169 (1980).

39. Israel Criminal Procedure Law (Consolidated Version) of 1982, L.S.I. 1043, § 5 [hereinafter Israel Criminal Procedure Law].

40. *Id.* § 143.

41. *Id.* § 159.

42. *Id.* § 74.

43. Egged Ltd. v. Sapir, et. al., 12 P.D. 739 (1957).

- f. The right to be presumed innocent.⁴⁴
- g. The right to remain silent.⁴⁵
- h. The right to deny or admit facts.⁴⁶
- i. The right to examine and present witnesses.⁴⁷
- j. The right to appeal.⁴⁸

1. *Trial in the Absence of a Jury*

Israel has never adopted the jury trial.⁴⁹ It was believed that the heterogeneous population—in particular, the political and social differences between Jews and Arabs—would not foster the concept of a jury trial. Courts of first instance have either one judge or a magistrate; felony trials have one or three judges depending on the severity of the offense; and appellate courts have three or more judges.⁵⁰ Judges in Israel decide factual as well as legal issues. The difference between questions of law and fact arise only upon appeal. In reviewing a lower court decision, the appeals court may only decide questions of law.⁵¹

An obvious weakness in the Israeli legal system is the possibility that a particular judge in a case will be influenced by inadmissible as well as admissible evidence. An Israeli district Court judge has pointed out that a judge's decision may be influenced by evidence which that judge previously ruled to be inadmissible.⁵² In spite of this, the Israeli public has a deep respect for the judge's expertise, and therefore gives greater value to the judge's decision than would be given to a jury made up of laymen.⁵³

Israeli Criminal Procedure dictates a passive role for a judge at trial.⁵⁴ In practice, the tendency has been for the judge to take a

44. *See supra* note 14.

45. *Id.* §§ 152, 161.

46. *Id.* § 152.

47. *Id.* § 174.

48. *Id.* § 198.

49. Ben Itto, *The Rights of the Accused in Israel*, 12 Is. Y.B.H.R. 128, 130 (1982).

50. Harnon, *Criminal Procedure in Israel—Some Comparative Aspects*, 115 U. OF P. L. REV. 1091, 1092 (1967).

51. *Id.*

52. Ben Itto, *supra* note 49, at 134. "[T]he supposition, often reprinted, that professional judges are sufficiently in control even of their subconscious to be able to ignore information . . . has yet been scientifically tested." The author also has criticized the potential for bias in decisions: "There also exists the problem of habitual criminals with whom all judges in the community are familiar. Are we to say that they cannot get a fair trial?" *Id.* at 135.

53. Lecture given by S. Goldstein, Dean, Faculty of Law, Hebrew University of Jerusalem (Aug. 1989).

54. Harnon, *supra* note 60, at 1093. Israel Criminal Procedure Law, §§ 174 and 175,

more active role. This is because many defendants go unrepresented. Accordingly, judges feel obligated to play a more active role in order to ensure a fair trial.⁵⁵

2. *Right to Counsel*

The Israel Supreme Court has established that "it is the right of the accused to be represented before the court by an attorney versed in the law."⁵⁶ The Israel Criminal Procedure Law of 1982 obligates the court to provide defense counsel only if the defendant (1) faces a sentence of 10 or more years, (2) is under the age of 16, (3) suffers physical incapacity, or (4) suffers mental illness.⁵⁷ However, the court has the discretionary power to appoint counsel in nonobligatory cases.⁵⁸ In a large number of cases where the court is not obligated to appoint counsel, the court fails to do so.⁵⁹ Therefore, a large percentage of indigent defendants go through the legal process unrepresented.

The right to counsel attaches as early as the preliminary proceedings.⁶⁰ However, in those cases in which the court is obliged to appoint a defense attorney, the appointment occurs only at indictment. As already indicated, the judges take a more active role in cases where the defendant is unrepresented. In such cases, the Israeli judge questions the prosecution evidence and calls witnesses.⁶¹ Although the present situation for indigent defendants is unsatisfactory, the general view is that such a defendant is accorded a fair

which state:

174. A witness shall first be examined by the party who has called him; the opposite party may then cross-examine the witness, and thereafter the party calling the witness may re-examine him; the court may allow a party to put additional questions to the accused even after the close of his examination as aforesaid.

175. Upon the conclusion of the examination by the parties, the court may examine the witness and may also ask him questions in the course of the examination by the parties in order to clarify any matter raised therein.

Section 175 has been interpreted to acknowledge the passive role of the judge similar to the U.S. judge. However, judges have also viewed Section 175 to grant a more active role when the circumstances at trial require.

55. Ben Itto, *supra* note 49, at 133.

56. Egged Ltd. v. Sapir et. al., *supra* note 43, at 751.

57. Israel Criminal Procedure Law § 15.

58. *Id.* § 15(B).

59. The cases where the court is obligated to appoint counsel represent approximately 5-10 % of the total cases. Approximately 30% of the cases go unrepresented at the preliminary hearing stage and of those cases that make it to trial, 15% go unrepresented. Lecture given by R. Mann, Associate Professor of Law, Faculty of Law, Tel Aviv University (June 1989).

60. Ben Itto, *supra* note 49, at 133.

61. *Id.*

trial due to the intervention of the judge.⁶²

For reasons of public security, the police are authorized to postpone suspect-attorney communication through the first 48 hours of arrest.⁶³ The Israel Supreme Court has acknowledged that an attorney may be denied access to his client when, for justifiable reasons, the interrogation of the suspect necessitates his seclusion.⁶⁴ Section 14 of the Israel Criminal Procedure Law restricts the suspect's choice of counsel when security requires.⁶⁵

3. Discovery

Israel has adopted a defense-oriented approach to criminal discovery.⁶⁶ In *Tzinder v. Head of Police Investigation Dept.*,⁶⁷ the Israel Supreme Court held that the court may grant discovery of evidence relevant to the subject matter held by the prosecution when deemed reasonable. The Israel Criminal Procedure Law of 1982 states: "Where a statement of charge has been filed in respect of a felony or misdemeanor, the accused and his counsel . . . may at any reasonable time, inspect the material of the investigation in the possession of the prosecutor and make copies thereof."⁶⁸ This law does not include any rule in favor of the prosecutor for disclosure of evidence.⁶⁹

All requested evidence not submitted to the defense is inadmissible at trial.⁷⁰ The prosecution is required to deliver all materials contained in the police files, including evidentiary material not intended for presentation at trial.⁷¹ As a result of these rules, police files contain complete witness statements for all wit-

62. *Id.*

63. Israel Criminal Procedure Law, § 31.

64. *Yasin v. Attorney General*, 17 P.D. 1541, 1570 (1963).

65. Section 14 states:

Where the Minister of Defence certifies in writing that reasons of state security require such restriction, a suspect or accused shall not be entitled to be represented, either in the investigation of the offence or during proceedings before a judge or court, other than by a person authorized to act as defence counsel under section 318 of the Military Justice Law, 5715-1955.

66. Harnon, *supra* note 50, at 1101-1107.

67. H/C 147 10 P.D. 236 (1950).

68. Israel Criminal Procedure Law, § 74.

69. Harnon, *supra* note 50, at 1106.

70. Israel Criminal Procedure Law, § 77, which provides:

A prosecutor shall not produce any evidence in court nor call any witness, unless the accused or his counsel has been given reasonable opportunity to inspect and copy the evidence or the statement, if any, made by the witness in the investigation, except where the right to do so was waived by them.

71. Section 74 includes every statement made by the defendant during investigation, statements of witnesses and all police materials.

nesses interviewed and all materials discovered through investigation. In order to avoid discrediting the prosecution at trial, all evidentiary material that may weaken the prosecutor's case is also included.⁷² These liberal discovery rules demonstrate a strong policy which favors providing the defendant with sufficient information so that he may properly challenge the charge against him. These rules limit the possibility that prosecutorial evidence will take the defense by surprise at trial, and provide the defense attorney with all the facts needed to properly assess the strength of the prosecutor's case.

Despite this defense-oriented approach to discovery, defendants charged with security offenses may be deprived of their right to invoke these discovery rules. Where security considerations necessitate, Israeli law prohibits the disclosure of all evidence deemed sensitive to public review.⁷³

4. *Right to be Present at Trial*

Section 138 of the Israel Criminal Procedure Law provides: "Unless otherwise provided by law, no person shall be tried in criminal proceedings except in his presence." There have been very few cases in which the accused was tried *ex parte*. However, Section 138 does provide for that possibility. In the case *X. v. State of Israel*, the Supreme Court held that a defendant may be tried *ex parte* so long as the court believes that his absence does not detrimentally influence his case.⁷⁴

5. *Summary*

Criminal defendants in Israel have substantial rights which ensure that they receive a fair trial. Israel has adopted many of the procedures utilized by Great Britain and the United States to safeguard the rights of the accused. However, those defendants accused of security offenses may find themselves deprived of the procedural safeguards afforded to the majority of defendants. As previously mentioned, the defendant's rights to discovery, counsel and presence at trial all have security law exceptions.

72. Libai, *Twenty-five Years of Criminal Procedure in Israel*, 10 *IS. L. REV.* 225, 237 (1975).

73. Israel Criminal Procedure Law, § 78, which states: "The provisions of section 74 shall not apply to material, concealment of which is permitted or disclosure of which is prohibited by law."

74. 24 (1) P.D. 477 (1970).

The Penal Law Revision concerning state security⁷⁶ is an example of such an exception. Section 38 states:

Where the court is of the opinion that the security of the State requires the observance of security to such an extent as cannot be achieved by the means provided by any other law, it may order that the accused or his counsel shall not be present at a particular proceeding or shall not inspect certain evidence.⁷⁶

The defendant accused of a security offense such as treason may not have to wait until court proceedings to learn that he has been stripped of his rights; he usually faces this problem upon his arrest.⁷⁷

B. Arrests and the Detention Process

The Supreme Court of Israel has recognized that Israeli citizens have the right to freedom of movement and the right to resist unlawful arrest.⁷⁸ A suspect who is arrested without a warrant can be held for 48 hours before he must be brought before a judge.⁷⁹ At this point, the judge either orders the suspect to be released or orders the detention extended. The judge has four different independent criteria which can be used to justify extension of the detention: 1) to continue the investigation, 2) to avoid the obstruction of justice, 3) for preventive detention, and 4) based on severity of the offense.⁸⁰

If the judge bases the extension on one of the first three criteria, the suspect will be detained for a period of 15 days. At the end of this period, the detention can be extended by the judge for an additional 15 days. A suspect can have his detention extended a maximum of 30 days, after which an additional extension can only be obtained with the approval of the Supreme Court. After indictment, a new decision is made about whether or not the defendant should be detained further. If the detention is continued, the de-

75. The Penal Law Revision (Concerning State Security), 11 L.S.I. 186 (1957).

76. *Id.* § 38.

77. Mordecai Vanunu realized this when he was abducted by the Mossad (Israeli Intelligence) and coerced to return to Israel to face trial, which was held *in camera*. The former employee of the Israeli Nuclear Power Center at Dimona was charged with high treason after a foreign newspaper ran a story on Israel's nuclear capabilities based on information provided by Mr. Vanunu. Amnesty International Report 1988, at 240.

78. Al Karbatli v. Minister of Defense, 2 P.D. 5 (1949); El Chun v. Chief of Staff, *supra* note 35; Frenks v. Attorney General, 5 P.D. 1002 (1951).

79. Ben Itto, *supra* note 49, at 131.

80. *Id.*

fendant will be detained until the end of the legal process.⁸¹ It is common for defendants to be detained until the end of the legal process. For example, in 1983, of all defendants who were indicted in the District Court of Tel Aviv, approximately 50% were detained until the end of the process.⁸²

Severity of the offense is a highly criticized basis for the extension of a detention and is not used in the U.S. criminal justice system. A suspect whose incarceration is extended because he is accused of an offense so serious that public safety demands continued detention, is usually held until he is proven innocent.⁸³ Suspects who were not dangerous to the public have been detained until the completion of the trial only to be acquitted.⁸⁴ Because of harsh conditions in the jails, suspects who are innocent until proven guilty must bear unacceptable hardships.⁸⁵ Perhaps the best example of the need for reform of detention procedures in Israel relates to a problem common to many legal systems—case backlogs. As a result of a burdensome case load, the initial hearings after the first 48 hours are not granted the attention warranted and judges usually give a cursory review of the grounds for detention.⁸⁶ In this respect, the defendant may be denied a fair hearing, especially when the defendant is unrepresented.⁸⁷

Other arrest procedures have been widely criticized. Concerning police arrests, one Israeli commentator charged that “[t]he police seem to exercise the power of arrests too easily and not always with sufficient reasons. Only a small percentage of the persons arrested are eventually prosecuted.”⁸⁸ After claims demanding reform of brutal investigation practices were publicized, the Eitan Sirota Commission was established to address this problem.⁸⁹ The Commission recommended that a task force be set up and that the public be granted access to the Attorney General in order to lodge complaints of police brutality.⁹⁰ In spite of the government’s at-

81. From a lecture given by Robert Mann, Associate Professor, Faculty of Law, Tel Aviv University (June 1989).

82. *Id.*

83. Ben Itto, *supra* note 49, at 132; Israel Criminal Procedure Law, § 34, which provides that bail may be denied to those accused of committing an offense under the Penal Law Revision of 1957.

84. *Id.* at 132.

85. *Id.* at 131-32.

86. *Id.* at 131.

87. *Id.*

88. Shetreet, *supra* note 17, at 314.

89. *Torture in the Eighties*, AMNESTY INT’L REPORTS 235 (1984).

90. *Id.*

tempt to reduce police brutality, the problem still exists.

Section 30 of the Israeli Criminal Procedure Law allows incommunicado detention when:

1) The Defense Minister believes that such a measure is necessitated by national security; or

2) The Inspector General believes that "secrecy is required for the sake of the investigation."⁹¹

In light of claims of police brutality, a procedure allowing a suspect to be detained incommunicado for 48 hours must be condemned. Since lawyers cannot meet with their clients during the first 48 hours, Section 30 has led to many investigation-induced confessions.⁹²

This section has discussed the basic rights granted to the accused by Israeli criminal procedure. Under certain circumstances, when the a suspect is accused of committing an offense deemed a threat to national security, the system strips the suspect of his procedural rights. The following section discusses these security laws which justify the violation of a suspect's procedural rights.

III. EMERGENCY REGULATIONS

Since 1948, a state of emergency has been proclaimed in Israel.⁹³ Six wars and repeated hostilities have brought about security demands which justify the continuing state of emergency. To assist the military, the Knesset has enacted three laws which grant them the power to exercise certain security measures when the situation requires:

1) The Defense (Emergency) Regulations of 1945⁹⁴ are security laws which were enacted by the British Mandatory Authority and were later adopted by Israel. These regulations empower the military to obstruct freedom of movement, disband unlawful associa-

91. Israeli Criminal Procedure Law, § 30, which states:

a) Where the Minister of Defense has certified in writing that reasons of state security require that the arrest be kept secret, or the Inspector General of Police has certified in writing that such secrecy is required for the sake of the investigation, then notwithstanding the provisions of section 27 or any other law, a judge of a District court may authorize that information of the arrest of a person for a felony shall not be communicated, or that it be communicated only to such person as the court may determine.

b) An authorization under this section shall be valid for a period not exceeding 48 hours; it may be extended from time to time, provided that such periods do not in the aggregate exceed seven days.

92. Ben Itto, *supra* note 49, at 132.

93. Official Gazette, No. 2, 1948, at 6.

94. 2 PALESTINE GAZETTE, No. 1442, at 1055 (1945).

tions and set curfews when security requires such actions.⁹⁵

2) Section 9 of the Law and Administration Ordinances of 1948⁹⁶ grants emergency powers to the legislature, allowing it to proclaim a state of emergency and to enact emergency regulations in order to protect state security.⁹⁷ In so doing, the legislature can derogate from any existing laws.⁹⁸ Such powers have been exercised mostly during times of war.⁹⁹

3) Emergency Powers (Detention) Law of 1979,¹⁰⁰ grants the Defense Minister the power to issue administrative detention for up to six months when he has reason to believe that a person poses a threat to national security.¹⁰¹ Such a procedure may only be exercised during a state of emergency. Although rarely used in Israel, such a law gives the government the statutory means to completely circumvent the criminal process in which a suspect must be accused of having committed a particular offense. The major justification for such an action is the avoidance of publication of classified information by way of the courtroom.¹⁰² The only judicial limitation on this power is that approval by a District Court judge must be obtained.¹⁰³

In *Kahane v. Minister of Defense*,¹⁰⁴ the Minister of Defense or-

95. These regulations were established by the British in order to exercise security measures over the Jewish and Arab population during the mandate period. The Jews had criticized these regulations in 1945 for the ambiguous and ad hoc manner in which they were exercised. The Defense (Emergency) Regulations of 1945 have been maintained by the government for two reasons: (1) the security situation required that power be given to the military in order to protect the country and (2) the Israeli government had found a convenient excuse for the abridgement of civil liberties in emergency regulations originating from the British. See Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defense (Emergency) Regulations*, 8 Is. Y.B.H.R. 296, 300 (1978).

96. Official Gazette, No. 2, 1948, Supp. A, at 1.

97. Section 9(a) states that the Knesset has the power to "declare that a state of emergency exists. . . and make such emergency regulations as may seem to be expedient to the interests of the defense of the state, public security and the maintenance of supplies and essential services."

98. Section 9(6), which states that emergency regulations "may alter any law, suspend its effect or modify it."

99. Bracha, *Addendum: Some Remarks on Israeli Law Regarding National Security*, 10 Is. Y.B.H.R. 289, 296 (1980).

100. L.S.I. No. 930, at 76. This statute replaced Regulations 111-112(b) of the Defense (Emergency) Regulations of 1945, which were considered intolerably stringent. Shetreet, *supra* note 17, at 317 n. 43.

101. 99 L.S.I. No. 930, at 76, § 2.

102. Shetreet, *Limits and Promises of International Norms and Procedures: The Transnational Protection of Human Rights*, ISRAEL REPORTS TO THE INTERNATIONAL CONGRESS OF COMPARATIVE LAW, 16-17 (1986).

103. Emergency Powers (Detention) Law of 1979, L.S.I. No. 930, at 76, § 4.

104. Appellate File 1/80, 35 (II) P.D. 253 (1981). Rabbi, Meir Kahane is the leader of the ultra-extremist Kach organization. A former member of Knesset, he was denied the right to run for reelection after the Knesset enacted a law which made political parties with racist policies illegal.

dered the defendant to be detained for six months after receiving information from Israeli intelligence that the defendant was a security risk. The defendant was also denied his right to appear and to be represented at the Supreme Court review of the evidence used to order the detention. The Supreme Court held that detention orders shall be granted only if "it is proven that the risk of security . . . is so serious that it is necessary to infringe upon the rights of the detained."¹⁰⁵ After examining the evidence, the Court determined that administrative detention was the only way of preventing a serious risk of danger to the public, and that protection of the sources of the evidence justified the denial of the defendant's right to trial.¹⁰⁶

The statutory restriction that all administrative detentions must be approved by the District Court has played an increasing role in limiting their use. This is due to the increased judicial scrutiny of security action.¹⁰⁷ In a May 1948 opinion, the Israel Supreme Court stated:

It cannot be disputed that despite the harshness which the use of these regulations sometimes involves, an orderly community in a state of emergency cannot exist without emergency regulations, which, in their very nature, place the interests of the public above the freedoms of the individual.¹⁰⁸

Since 1948, the Supreme Court has demonstrated increased willingness to scrutinize security action. The subsequent change in attitude of the Court to the continuous state of emergency and defense regulations is typified by Supreme Court Justice Haim Cohn, who has stated, "even in respect of all emergency laws and regulations, judicial control has at all times been, and will continue to be very zealous, and readily available to watch over the civil and military administration to insure that nobody exceed or misuse the authority vested to him by law."¹⁰⁹

This trend is apparent in *Electricity Corp., Jerusalem District*,

105. *Id.* at 257.

106. Under Section 4(c) of the Emergency Powers (Detention) Law of 1979, the District Court is to be provided with the evidence upon which security forces based their decision. However, in *Kahane*, the Supreme Court held that "the court will not place its consideration in place of the Minister of Defence" and that the court would "examine if the Minister had a reasonable cause for assuming that the conditions for issuing an order pursuant to Section 2(a) had been fulfilled, and this constituted an examination according to an objective test."

107. Shetreet, *supra* note 17, at 317-18.

108. *Leon v. Bubeznik*, H/C 5/48, 1 P.D. 58 (1948).

109. Cohn, *supra* note 8, at 457.

Ltd. v. Minister of Defense,¹¹⁰ in which the Court clearly defined the limits of rights violations for the sake of security:

The duties and powers of a military government are determined by its own military needs, on the one hand, and by the need to secure, as much as possible, the continuity of regular life of the civilian population; the military authorities are bound to respect existing laws and the vested rights of the population in the area under their control. This is in the spirit of Article 43 and 46 of the Hague Rules.¹¹¹

In *Dwikat v. State of Israel*,¹¹² the Court held that it will examine the decision making process leading to the exercise of security measures in order to determine if the measures taken were appropriate. This case represents a new trend and major change from the standard used in previous cases.¹¹³ Before *Dwikat*, the Court agreed to hear only those cases in which the appellant was challenging jurisdiction or process of administration.¹¹⁴

Amnesty International¹¹⁵ has always been critical of the use of administrative detention in Israel.¹¹⁶ That organization has expressed the following concerns about administrative detention:

- 1) Administrative detention is sometimes used when detainees do not pose a significant threat to national security. Instead, individuals are detained as "prisoners of conscience for nonviolent exercise of freedom of expression."¹¹⁷
- 2) Detainees' rights are subject to abuse due to the inadequacy of procedural safeguards. The major problem is that detainees and their lawyers are not provided with adequate information about the reasons for arrest. Even though a detainee's lawyer is able to question state evidence at the judicial hearing, adequate evidence needed to challenge the detention is rarely provided.¹¹⁸ In addition, security laws allow the judge to deviate from the normal

110. 1 P.D. 124 (1973).

111. *Id.* at 138.

112. 34 (II) P.D. 1 (1974).

113. See H/C 302/72 Hilu et. al. v. State of Israel, 27 (II) P.D. 169, which limited judicial review to the determination of whether or not the Military Commander acted in good faith.

114. Shetreet, *supra* note 17, at 319.

115. Amnesty international is a worldwide movement of people acting on the conviction that government must not deny individuals their basic human rights. The organization was awarded the 1977 Nobel Peace Prize for its efforts to promote global observance of the United Nations' Universal Declaration of Human Rights.

116. AMNESTY INTERNATIONAL REPORTS, 1986, 1987, 1988.

117. Amnesty International, *Israel and the Occupied Territories: Administrative Detention During the Palestinian Intifada*, June 1989, at 8 (hereinafter "Detention During the Intifada").

118. *Id.*

rules of evidence of criminal trial to admit all evidence that draws light on the case.¹¹⁹

Administrative detention has rarely been used in Israel.¹²⁰ Hence, it may be claimed that stringent security measures are justified to deal with those few people who threaten national security. However, this claim is ill founded when one considers that in order to handle those few cases, the Israeli government has enacted elaborate security laws. The mere existence of such laws could, if national security demanded, lead to their increased use. The potential that severe security measures might be exercised on a wide scale poses a great threat to the Israeli public.

Since the outbreak of the Intifada in the Israeli Occupied Territories in December 1987, more than 130 Israelis have been detained.¹²¹ The purpose of the next Section is to examine the use of security laws in the Occupied Territories which are identical to those in place in Israel, in order to demonstrate the reality that there is the potential for their wide scale use in Israel proper as well as in the Occupied Territories.

IV. SECURITY LAWS IN THE OCCUPIED TERRITORIES

A. Background

The West Bank and Gaza Strip were occupied by Israel as a result of the Six Day War in June, 1967. On July 7, 1967, the Israeli Military Commander was vested with all the powers of government, legislation and administration of the West Bank and Gaza Strip.¹²² The Israeli military government administers these territories as a belligerent occupant. The administration of a belligerent occupant is designed to control the local population after a war until a political solution is reached between the parties of the conflict.¹²³ There are two international law treaties concerning belligerent occupancy: the 1907 Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land,¹²⁴ and the 1949 Geneva Convention IV Relative to The Protection of Civilian

119. *Id.* at 19.

120. *Id.* at 11.

121. *Id.*

122. Proclamation No. 2, § 3, June 7, 1967.

123. Dinstein, *The International Law of Belligerent Occupation*, 8 *Is. Y.B.H.R.* 104, 104-07 (1978).

124. Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

Persons in Times of War.¹²⁵

Two systems of law exist in the Occupied Territories: local and military.¹²⁶ The first system consists of the local law of Palestine which is administered by the local municipalities. The second system is that of Israeli Military Courts which hear cases concerning violations of security laws enacted by the Israeli Military Command.¹²⁷

Exclusive jurisdiction over all civil cases is granted to the local courts.¹²⁸ Concurrent jurisdiction is shared by the local and military courts for violations of criminal laws which were enacted by either local legislation¹²⁹ or Israeli military command.¹³⁰ The local courts have no jurisdiction over persons serving in the military, government or army.¹³¹

The Supreme Court of Israel has established that all military courts in the West Bank and Gaza must adhere to the basic legal principles followed by Israeli courts.¹³² Therefore, the military courts apply Israeli rules of evidence and procedure and have maintained such safeguards as the rule that the conviction of a suspect may not be based solely upon his confession.¹³³

The Hague Regulations established the guidelines for the actions of an occupying power. They endowed the occupier with the power

125. Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

126. COHN, HUMAN RIGHTS IN THE ISRAELI OCCUPIED TERRITORIES 93 (1985).

127. Article 66 of the Geneva Convention IV, *supra* note 125, which states: "[T]he occupying power may hand over the accused to its properly constituted, non-political military courts, on the conclusion that said courts sit in the occupied country."

128. Since the Regional Commander is empowered to enact new law where appropriate, such enactments are binding on the local courts. See *The Rule of Law in the Areas Administered by Israel*, THE ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS 23 (1981) [hereinafter *The Rule of Law*].

129. Reicin, *An Analysis of Measures Employed in Israel in the Administered Territories*, 8 CARDOZO L. REV. 515, 531 (1987).

130. Similar to Israeli law, local Palestinian law is made up of a conglomerate of legal theories of the Ottoman and British Empires. However, during the years 1948 to 1967, the West Bank was ruled by Jordan, and Gaza was administered by Egypt. Therefore, the major legal force in place in West Bank local law is Jordanian, while local law in Gaza mostly comprises Egyptian military law. Local law remains intact in both the West Bank and Gaza except for East Jerusalem which was annexed by Israel on July 30, 1980. Cohen, *Justice for Occupied Territories? The Israel High Court of Justice Paradigm*, 24 COL. J. INT'L LAW, 471, 489 (1986).

131. Dinstein, *supra* note 123, at 115.

132. Muhamed Mahmood Ali Elgaton v. Composition of Military Court in Gaza, H/ C 179/80, 34 (IV) P.D. 411 (1980).

133. Appeal No. 855/77 Sharf & Marrabin v. State of Israel, P.D. (III) 432 (1979). This is in conflict with Article 9 of the Security Provisions Order of 1967, which states: "As regards the law of evidence, military courts shall proceed according to the rules prevailing in military tribunals trying soldiers. However, a military court may deviate from the rules of evidence for special reasons which shall be recorded, if it deems it just to do so."

to take those measures needed to maintain the safety and order of the local population upon the condition that it acknowledged the laws of such population. The regulations state that the occupier should avoid enacting new legislation and amending local law unless prevented by security matters.¹³⁴ The generally accepted view is that where military needs require changes, the occupier may amend local law.¹³⁵ Changes or amendments to local law by the Israelis have amounted to approximately 12.5% of the local laws.¹³⁶

1. Right to Counsel Under the Security Laws

Palestinian suspects who are tried in military courts are granted the right to counsel with the stipulation that "there is no obstruction from the point of view of security to holding the meeting, and the meeting will not impede the course of the investigation."¹³⁷ In addition, military law obligates the military courts to appoint counsel to unrepresented suspects of serious crimes.¹³⁸

2. Right to a Fair Trial Under the Security Laws

In theory, the suspect tried in military court should receive the minimum procedure required by international law for a fair trial. In practice, this is not the case, because most suspects and their lawyers cannot be present when the military prosecutor presents his evidence. In *Alshueybi et. al. v. Military Supervisor of the Judea and Samaria Region*,¹³⁹ the Supreme Court held that privileged evidence may be concealed from the defense based on security considerations. The Court stated:

134. Article 43 of the Hague Regulations IV, *supra* note 124 states:

The authority of the power of the state, having passed de facto into the hands of the occupant, the latter shall do all in his power to restore and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.

135. Reicin, *supra* note 129, at 521.

136. Cohn, *supra* note 126, at 93. See also *Christian Society for the Holy Places v. Minister of Defense*, H/C 97, 72 P.D. 26 (1972), in which the Israel Supreme Court addressed the problem of maintenance of local law, as required by Article 43 of the Hague Regulations, while at the same time meeting the needs of changes due to prolonged occupation. The Court sanctioned amendments to local law by the Military Administration so long as the new law relates to economic and social conditions. The U.S. State Department has found that Israel has significantly changed local law. See U.S. Department of State, *The Occupied Territories*, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (1988).

137. Order Concerning Prison Installation, 1967 Order No. 29, C.P., Vol. 2, at 56. This ordinance is similar to the requirements of Article 72 of the Geneva Convention IV.

138. *Id.* § IV, at 14.

139. H/C 19/86, 40 (1) P.D. 219 (1986).

An application for disclosure of privileged evidence will be rejected if the Court is convinced that the competent authorities sincerely and in good faith fear that the disclosure of the evidence would entail revelation of information that might constitute a considerable security danger, or revelation of secret information sources; and this fear should not be unreasonable.¹⁴⁰

3. *Right to Appeal Under the Security Laws*

Military law provides that a defendant may appeal a military court decision by filing an application to the Regional Commander.¹⁴¹ However, in *Argov et. al v. Commander of I.D.F. Forces in Judea and Samaria Region et. al*,¹⁴² the Supreme Court of Israel held that the right to judicial review of military court judgments is not a basic right acknowledged by Israeli law. In addition, neither the Hague Regulations nor the Geneva Convention IV requires judicial appeal.

In 1968, the Israeli Attorney General authorized the jurisdiction of the Supreme Court over the Occupied Territories.¹⁴³ There is no historical precedent for the Supreme Court of an occupying power to exercise jurisdiction over its own military administration in an occupied territory. However, international law allows the Court's jurisdiction over the nation's military in occupied territories.¹⁴⁴ Israeli law extends this jurisdiction of the Supreme Court to the acts of Israelis in those territories.¹⁴⁵

This assumption of jurisdiction over the Occupied Territories by the Israel Supreme Court affords the local inhabitants the right to appeal to the Court. Such a grant to appeal to the High Court of the occupying nation is unprecedented in the history of belligerent occupation.¹⁴⁶ Between 5-10% of the annual petitions to the Supreme Court are brought by Palestinians.¹⁴⁷ In the absence of a right to appeal to the Israeli courts, the population of the Occupied Territories would have no remedy to challenge the administrative

140. *Id.* at 220.

141. Security Provisions Order of 1967, Article 43 states: "There shall be no appeal against judgment to a judicial instance, but the convicted person may make appeal and application to Regional Commander relating to the conviction of sentence."

142. H/C 87/85, 42 (I) P.D. 253 (1985).

143. For a detailed discussion of the assumption of jurisdiction over the Occupied Territories, see Cohen, *supra* note 130, at 474-78.

144. *Id.* at 476-78.

145. *Hilu v. Government of Israel*, 22 (II) P.D. 169 (1972).

146. Amnesty International, AMNESTY INTERNATIONAL REPORT 1984. 35 (1984).

147. *Id.* at 40-41.

acts of the Military Command. In addition, the assumption of jurisdiction over the actions of the military administration has restricted the Military Commander's power.¹⁴⁸ For appeals from the Occupied Territories, the Supreme Court reviews both military administrative law and military action based on: 1) international law, 2) local law, and 3) Israeli administrative law.¹⁴⁹

a. International Law—When a Palestinian petitions the Supreme Court for relief against the actions of the military administration, the Court will determine if the action is in compliance with applicable international law. For instance, in *Hilu et. al. v. Government of Israel*,¹⁵⁰ the Supreme Court stated that the needs of the Military Commander are “what is required for the achievement of public order and security in the territories [and what is] required for the needs of the army of occupation.”¹⁵¹ This ruling was based on the Court's interpretation of Article 43 of the Hague Regulations which states that the occupying force “shall do all in its power to restore and ensure, as far as possible, public order and safety.”

The Supreme Court has declined to acknowledge the applicability of the Geneva Convention IV to the Israeli Occupied Territories. Therefore, its review of the military administration has received little applause from international law experts.¹⁵²

b. Local Law—The Defense (Emergency) Regulations of 1945 govern security measures in the Occupied Territories as well as in Israel.¹⁵³ The Regulations of 1945 were enacted by the British

148. The Rule of Law, *supra* note 128, at 37.

149. Al Taliah Weekly Newspaper v. Minister of Defense, H/C 619/718, P.D. 323 (1979).

150. 27 (II) P.D. 119 (1971).

151. *Id.* at 121.

152. In *Sheik Sulieman Abu Hilu v. Israel*, H/C 302/75, 27 (II) P.D. 169 (1975), the Supreme Court determined that where Israeli law is inapplicable, customary international law will be applied. Therefore, insofar as the Hague Regulations were not contrary to local statutory law, and are part of customary international law, they are binding on the military administration. In *Ayyub, et. al. v. Minister of Defense et. al.*, 33 (II) P.D. 113 (1979), the Court denied a Palestinian petitioner the right to invoke Article 49 of the Geneva Convention IV in a complaint against the Military Commander. The Court held that because the Geneva Convention was a treaty, it could only be invoked by a party to the treaty. In *Dwikat v. Israel*, *supra* note 112, the Court held that the Geneva Convention IV was conventional law, and because the Israeli legislature has failed to adopt conventional law, it is not applicable to the West Bank and Gaza. This decision was recently upheld in *Ibrahim Sagida et. al. v. Minister of Defense*, H/C 258/85, App. H/C 323/88 (1988). See Tabari, *Humanitarian Law: Deportation of Palestinians from the West Bank and Gaza Strip*, 29 HARV. INT'L L.J. 555 n.21 (1988)(criticizing these Supreme Court decisions).

153. Official Gazette, No. 1442, Supp. 2, at 855.

Mandatory Council and applied to all of the British Mandate.¹⁵⁴ Because these regulations were not repealed by the Jordanians when they controlled the West Bank,¹⁵⁵ they continue to be a part of the local law and may be exercised by the Military Commander.¹⁵⁶ Israeli courts have consistently upheld the applicability of the Regulations.¹⁵⁷ The Israel Supreme Court has relied on previous Jordanian Supreme Court decisions which held that the British Defense (Emergency) Regulations were valid law.¹⁵⁸

c. Administrative Law—The Israeli legal system does not have jurisdiction over the West Bank and Gaza. However, in *Hilu v. Government of Israel*,¹⁵⁹ the Israel Supreme Court determined that it had jurisdiction over the acts of the government.¹⁶⁰ The Supreme Court has also held that Israeli law is applicable to the government of the Military Commander,¹⁶¹ and therefore, the Court has the power to review all enactments of law and measures taken in order to protect of human rights.

An occupying power's legal system will always be open to criticism because the underlying interest to be protected by the legal system is that of the occupying power, not that of the local population. As already discussed, the accused tried in a military court is afforded the minimum procedural safeguards sanctioned by international law, including the right to counsel and appeal. However, military ordinances allow the military judge to derogate from rules of evidence in order to avoid disclosure of classified evidence.¹⁶² In

154. Palestine Gazzette, *supra* note 94. The Palestine Gazette was the local magazine which announced the British orders. The West Bank and Gaza were included in the British Mandate.

155. The Hashemite Kingdom of Jordan was in control of the West Bank from May 1918 until June 1967.

156. Annexation of the West Bank Law, § 2 (1950) reported in 1 Jordanian Official Gazette 52 (1950). When Jordan annexed the West Bank in May 1918, this statute proclaimed that all prior law would remain in effect.

157. As recent as 1986, the Israel Supreme Court has held that the Defense (Emergency) Regulations of 1945 were established law in the West Bank prior to the Israeli occupation, and therefore, constitute valid local law. H/C 897/86 Jab'r v. I.D.F. O.C. Central Command and Minister of Defense, 41 (II) P.D. 522.

158. Qawasma v. Minister of Defense, 36 (I) P.D. 666 (1982), which cited Al Hadidi v. Inspector General, 1 Jordanian Bar 726 (1954). In this case, the Jordanian court held that the Regulations were retained by the Jordanians.

159. *Supra* note 150.

160. *Id.* at 172.

161. Ali Elgazawi v. Composition of Military Court, H/C 79/80, 34 (IV) P.D. 413 (1980). In this case the Court stated that the discretionary power to exercise security measures is required to conform to the administrative law of Israel.

162. Security Provisions Order of 1967, art. 9, *see supra* note 133.

such cases, the accused is deprived of his rights to receive sufficient information as to the grounds of the charge, to appear and to be represented in court. Since most offenders tried in military courts are charged with violations of security laws, many defendants fall victim to this reality.

B. *The Exercise of Administrative Detention*

The security laws provide the military commander with several measures which may be implemented in order to maintain public order and the security of the armed forces.¹⁶³ Since administrative detention is the only measure which is used in Israel to any extent, our discussion will be limited to this measure.¹⁶⁴

1. *International Law*

Administrative detention is provided for by the Geneva Convention: "If the occupying power considers it necessary for imperative measures of security to take safety measures concerning protected persons, it may, at the most, subject them to assignment or to internment."¹⁶⁵ Administrative detention occurs when a person is interned by the occupying power as a potential security threat.¹⁶⁶ The process consists merely of the issuance of an administrative decree; therefore, it circumvents the judiciary process.¹⁶⁷ Administrative detention is an administrative process which is preventative, as

163. *Supra* note 154.

164. The military commander has four principal measures at his disposal: 1) administrative detention; 2) curfews; 3) demolitions; and 4) deportations. Perhaps the reason why these other measures are not used in Israel is their brutal nature. However, these measures are widely used by the Israelis in the occupied territories. Consequently, Israel has been condemned by the international community. For a detailed analysis of curfews, demolition and deportations, see Reicin, *supra* note 129.

Supreme Court decisions relating to demolitions: A/C 361/82, Hamri v. Area Commander of Judea 36 (III) P.D. 439 (1982) and Mouzlan v. Minister of Defense 36 (IV) P.D. 610 (1982).

Supreme Court decisions relating to deportations: Shakin v. Minister of Interior 34 (I) P.D. 464 and Aggu Awad v. Regional Commander H/C 94/79, 33 (III) P.D. 309 (1979).

See U.N. Security Council Resolutions 607 and 608 respectively 5/Res./607 (1988) and Doc. 5/Res./608 (1988). See also Tabari, *supra* note 152.

165. Geneva Convention IV, *supra* note 125, art. 78.

166. "[A] belligerent may intern people or place them in assigned residence if it has serious and legitimate reasons to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage. . ." UHLER & COURSUR, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, INT'L COMMITTEE OF THE RED CROSS 258 (1958).

167. Dinstein, *supra* note 123, at 125-26. A detention decree is issued by the Military Commander and is based on information obtained by the Israeli Secret Services or General Security Services. The information concerns activities which conflict with the security policies of the administration. *Detention During the Intifada*, *supra* note 117, at 12.

compared to imprisonment, which is judicially imposed and punitive.¹⁶⁸

2. Israeli Law

The legal bases for the use of administrative detention are the Defense (Emergency) Regulations of 1945,¹⁶⁹ the Military Order 378 Concerning Security Provisions of 1970,¹⁷⁰ and the Emergency Powers (Detention) Law of 1979.¹⁷¹

Israeli laws concerning administrative detention clearly state that it is a preventative measure and not punitive.¹⁷² Therefore, the Military Commander must determine that the detainee poses a threat to security.¹⁷³ All detention orders are reviewed by a military judge within 96 hours of their issuance.¹⁷⁴ The judge is empowered to confirm, cancel or shorten the time period. There are two officers who have the power to issue a detention order. The District Commander may issue a detention order for a maximum of 96 hours. The Regional Commander may also extend all detentions issued by the District Commander for up to six months. All detention orders are subject to mandatory review every three months.¹⁷⁵

The detainee is given the right to appeal to the military court.¹⁷⁶ The detainee has the right to know the grounds of the detention, and must be informed of the right to appeal. The detainee also has the right to petition the Israel Supreme Court.¹⁷⁷

In 1980 an amendment was made to the existing detention laws

168. Dinstein, *supra* note 123, at 125-26.

169. *Supra* note 154, arts. 108 and 111.

170. Article 87 of Order 378 Concerning Security Provisions, Amendment No. 18, No. 815, (1970). Section 87(l) is similar to a provision of the Emergency Powers (Detention) Law of 1979, *infra* note 171, which allows the judge to prohibit disclosure of classified evidence.

171. L.S.I. No. 930, at 76. This law was enacted in Israel proper in 1979. In 1980, the military government applied the Emergency (Detention) Law to the Occupied Territories via administrative orders.

172. Article 87 of the Order Concerning Security Provisions, *supra* note 170, states: "[w]hen the Regional Commander has reasonable grounds for believing that the detention of a person is necessary for reasons of regional or public security."

173. The Attorney General of Israel has stated that administrative detentions are "generally invoked only in special circumstances and where there is corroborating evidence from two or more sources that the individual is engaged in illegal acts that involve direct danger to state security and to the lives of innocent people." In addition, such a measure was exercised only when "normal judicial procedures cannot be followed because of the danger to the lives of witnesses or because secret sources of information cannot be revealed in open court." Amnesty International Report 1987, at 350.

174. Article 87(6), Order Concerning Security Provisions, *supra* note 170.

175. Shetreet, *supra* note 17, at 328.

176. Order Concerning Security Provisions, *supra* note 170, art. 43.

177. Reicin, *supra* note 129, at 538.

requiring an objective standard of review.¹⁷⁸ This standard requires that the Military Commander show reasonable cause that the detainee poses a threat to security.¹⁷⁹ The objective standard increases the court's power to rule on the detention order because it allows the court to review the grounds for the detention. Under the prior subjective standard, the court could only determine if the Commanders's decision was made in good faith.¹⁸⁰

The Court's willingness to invalidate detention orders based on the objective standard is demonstrated in *Qawasma v. Minister of Defense*.¹⁸¹ Qawasma was tried and acquitted for past terrorist activities, but was subsequently detained by the army until an appeal was heard. The Court voided the detention order, holding that the grounds for the order were not allowed by law. Section 2(a) of the Emergency Powers (Detention) Law of 1979 states that if "the Minister of Defense has reasonable cause to believe that reasons of State or public security require that a particular person be detained, he may detain such a person. . ."¹⁸² The Supreme Court held that it was clear that the detention order had been issued for the object of holding the detainee until appeal. Because administrative detention is a preventative measure and not penal, he could not be detained for posing a future threat to security.¹⁸³

The Israeli Legislature and Judiciary have taken steps to curtail the abuse of administrative detention. In 1979, the Knesset enacted the Emergency Powers (Detention) Law, which amended the previous British Regulations by requiring automatic judicial review based on the objective standard and limiting the detention period to six months.¹⁸⁴ This enactment pressured the Military Commander to promulgate a similar law in the Occupied Territories.¹⁸⁵ This enabled the Israel Supreme Court to intervene in the military's exercise of administrative detention. One commentator has praised the combined efforts of the Knesset and the Supreme Court to restrict the discretion of the Military Commander in order to decrease the

178. Order Concerning Security Provisions, *supra* note 166, Amendment 18.

179. Bracha, *supra* note 99, at 297.

180. *Id.*

181. *Supra* note 158.

182. L.S.I. 930, at 76.

183. Qawasma, *supra* note 158, at 668-69.

184. L.S.I. 930, at 76. *See supra* note 100. The six month period is renewable. *See infra* note 200.

185. Order Concerning Security Provisions, *supra* note 170, art. 87. These orders led to an immediate drop in the number of Palestinians detained. By the end of 1980, the year of their promulgation, only seven people were detained in the Occupied Territories. *Detention During the Intifada*, *supra* note 117, at 4.

chances of arbitrary detention.¹⁸⁶

As an added protection Israel has agreed to allow the International Committee of the Red Cross (ICRC) to interview detainees within 14 days after their arrest.¹⁸⁷ According to the ICRC, this is an exceptional grant. Regimes adhering to a policy of administrative detention rarely afford the ICRC such an opportunity.¹⁸⁸ In a 1987 report, Amnesty International conceded that ICRC access to detainees is a commendable gesture, however it felt that such contacts with detainees had limited effect since they do not provide a sufficient preventative measure against the harsh treatment of detainees.¹⁸⁹

Amnesty International has been extremely critical of the alleged effectiveness of the procedural safeguards. The effectiveness of judicial review is questionable because detainees are not given the evidence against them and therefore cannot challenge the grounds for their detention.¹⁹⁰ In addition, the refusal to disclose evidence and sources due to security concerns may be used too often and has led to imprisonment on the basis of anonymous testimony.¹⁹¹ The severity of administrative detention results not only in the deprivation of the detainee's freedom of movement, but also in the detainee's subjection to maltreatment: "some Palestinians from the Occupied Territories have been hooded, handcuffed and forced to stand without moving for several hours at a time for several days, and have been exposed while naked to cold showers or cold air ventilators for long periods of time."¹⁹²

The record of Israeli utilization of administrative detention in the Occupied Territories discloses a clear trend. With the onset of the occupation in June 1967, Israel exercised administrative detention on a wide scale in order to take control of the local population. In 1970, approximately 1130 Palestinians were interned in detention centers throughout the West Bank and Gaza.¹⁹³ As the occupation continued, increasing stability in the region led to a decrease in the exercise of administrative detention, and by 1978 only 20 to 30 de-

186. Reicin, *supra* note 129, at 543.

187. Goldring, *Treatment of Palestinians in Israeli Occupied West Bank and Gaza: Report to the National Lawyers Guild*, 1977 MIDDLE EAST DELEGATION 28.

188. *Id.* at 28, quoting Alexander Hay, ICRC President.

189. AMNESTY INTERNATIONAL REPORT 1987, at 351.

190. *Id.* at 350.

191. *Id.*

192. *Torture in the Eighties*, *supra* note 89, at 234.

193. *Detention During the Intifada*, *supra* note 117, at 3.

tainees could be counted.¹⁹⁴ In 1980, the announcement of military orders amending the procedural rules of administrative detention further diminished the number of detainees to 7.¹⁹⁵ Political pressures aroused by an intensification of terrorist activity generated a reversal in the Government's policy regarding this security measure. The use of administrative detention was stepped up to counteract the rise in terrorism. The result was that between mid-1985 to December 1987, more than 300 Palestinians were behind barbed wire fences.¹⁹⁶

The record shows that when the Israeli government is faced with terrorism, it resorts to administrative detention as a means of suppression, by the locking away of Palestinian activists. This dependency became apparent during the recent Palestinian Intifada.

C. *The Use of Administrative Detention During the Intifada*¹⁹⁷

In September 1988, nine months after the outbreak of the Intifada, Israeli Defense Minister Rabin was quoted as saying:

By using various means at our disposal—military presence and military operations, legal measures including the application of the Emergency Regulations, administrative and economic means—we are gradually achieving the results that the deployment of armed strength can achieve against a civilian uprising.¹⁹⁸

Since December 1987, approximately 18,000 Palestinians were arrested,¹⁹⁹ and greater than 5,000 have been held in administrative detention.²⁰⁰ The increased number of arrests was unexpected, and it rocked the administrative structure and swamped the military courts. The Military Commander broadened the scope of authority to issue detention decrees by granting this power to low ranking officers. Therefore, a procedural obstacle against arbitrary deten-

194. *Id.*

195. *Id.* at 4.

196. *Id.* at 5.

197. The Intifada, which means "uprising" in Arabic, began on December 9, 1987 and is still in progress. The Intifada is a direct challenge by the Palestinian population in the West Bank and Gaza to the Israeli occupation. This challenge is being made through outward resistance consisting of demonstrations, strikes, rock throwing and the use of molotov cocktails. LAWYER'S COMMITTEE FOR HUMAN RIGHTS, AN EXAMINATION OF THE DETENTION OF HUMAN RIGHTS WORKERS AND LAWYERS FROM THE WEST BANK AND GAZA, AND THE CONDITIONS OF DETENTION AT KETZIOT 1 (1988)(hereinafter "LAWYER'S COMMITTEE").

198. Jerusalem Post, Int'l Ed., Sept. 17, 1988, at 1.

199. LAWYER'S COMMITTEE, *supra* note 197, at 6.

200. *Detention During the Intifada*, *supra* note 117, at 1. Eighty percent of those detained were held for six months, and 20% were held for longer than six months.

tions was removed.²⁰¹ In July 1989, the newly appointed Regional Commander of the West Bank extended the period of detention from six months to one year. Due to the backlog experienced by the military courts, most arrestees were not immediately charged.²⁰² To alleviate the voluminous caseload, the Regional Commander issued military orders suspending automatic judicial review, which is mandated by law.²⁰³ Since the time lapse between a request for appeal and the judicial hearing ranges from a few weeks to several months, detainees may not be informed of the grounds for their detention.²⁰⁴ "Measures taken to crush the Intifada have caused the complete deterioration of an already unfair military 'justice' system. Sealed in the hands of the army, which arrests, interrogates, charges, tries and sentences Palestinians with no checks or balances, the system is little more than a travesty of justice."²⁰⁵

The shortage of judges and lawyers exacerbates the chaotic nature of these proceedings.²⁰⁶ Defense lawyers face many obstacles in dealing with these situations. Problems arise in determining where a client is being held. Lawyers are then afforded limited access to clients.²⁰⁷ Due to the burdensome case load, court hearings are cursory and are concluded relatively quickly.²⁰⁸ To vent their outrage and frustration, Palestinian and Israeli lawyers engage in periodic strikes.²⁰⁹ Perhaps the fact that many detainees are released without being formally charged best demonstrates the inadequacy of the system.²¹⁰

The Emergency laws in force in the Occupied Territories provide an effective weapon for suppressing the Palestinian revolt. Administrative detention is the favored tactic because it is efficient in re-

201. *Id.* at 6. Military Orders 1229 and 941 (for West Bank and Gaza, respectively) empowered all officers beginning with colonels and above to issue detention decrees. This abrogated Article 87 of the Order Concerning Security Provisions of 1970, which only granted this authority to Regional and District Commanders. Immediately after the announcement of these orders, the number of detainees rose dramatically.

202. DATA BASE PROJECT ON PALESTINIAN HUMAN RIGHTS, THE PALESTINIAN INTIFADA, 12-9-87 TO 12-8-88: A RECORD OF ISRAELI REPRESSION 63 (1989)(hereinafter "THE PALESTINIAN INTIFADA").

203. *Detention During the Intifada*, *supra* note 117, at 6. Article 87(6) of the Order Concerning Security Provisions of 1970 mandates automatic judicial review within 96 hours.

204. *Detention During the Intifada*, *supra* note 117, at 14.

205. THE PALESTINIAN INTIFADA, *supra* note 202, at 61.

206. *Detention During the Intifada*, *supra* note 117, at 15.

207. Lawyers are usually denied access to the detainee during the first eighteen days. However, if the authorities believe that access to the detainee would frustrate the investigation, it may be denied indefinitely. See U.S. Department of State, *supra* note 136.

208. INT'L HUMAN RIGHTS LAW, 1988 REPORT 45 (1988).

209. THE PALESTINIAN INTIFADA, *supra* note 197, at 61.

210. *Id.* at 32.

moving Palestinian activists and demonstrators from the streets with minimum violence. Its implementation by the Israeli military has led to the mass detention of thousands of Palestinians. The Intifada has revealed the latent potential for the widespread use of security laws. Identical security laws are in force in Israel. The next section examines whether the current Israeli system can counteract the government's propensity to resort to these laws which infringe on civil liberties.

V. HUMAN RIGHTS AND THE ROLE OF THE ISRAEL SUPREME COURT

The Knesset has enacted security laws which infringe on the civil liberties of Israeli citizens. One example is the Prevention of Terrorism Ordinance. The Ordinance is a law aimed at fighting terrorism, as its name implies.²¹¹ Article 4(h) prohibits any association with officials of terrorist organizations and carries a maximum penalty of three years imprisonment.²¹² Article 4(g) establishes as an offense all forms of public expression, which promote terrorist organizations.²¹³ This law, which restricts freedom of association and expression is applicable not only in the Occupied Territories, but also in Israel. In fact, Article 4(h) was enacted in order to deter Israeli peace activists from meeting with members of the Palestine Liberation Organization.²¹⁴ Article 4(h) is a direct attack at political opposition, while Article 4(g) is a statutory expression of the government's inability to solve political incitement. Both laws demonstrate that when the government fails to abate threats to security through other means, it resorts to the legal system.

Given the fact that all laws enacted by the Knesset must be enforced by the courts, how can this be reconciled with the judicial recognition of freedoms of association and expression? This situation raises the issue of whether or not the Supreme Court of Israel has the power to stave off security laws such as the Terrorism Ordinance, which infringe upon the civil liberties of Israeli citizens. To answer this question, two judicial trends must be examined. The first trend is one of increasing judicial intervention in the action of government. The second trend is the Supreme Court's movement

211. AMNESTY INTERNATIONAL REPORT 1988, at 240-41.

212. *Id.*

213. *Id.*

214. This year, Israeli peace activist Aby Natan was sentenced to six months in prison for violating article 4(h) after meeting with Yasser Arafat.

away from the principle of restrictive interpretation.

A. *The Ascendancy of the Israel Supreme Court*

Political and geographical realities have induced the Israeli government to enact stringent security legislation. In turn, the government's mishandling of these realities has led the Israeli public to enlist the assistance of the Supreme Court in scrutinizing governmental actions.²¹⁵ The Israel Supreme Court has responded to the public outcry by stepping up its review of the administration in two ways: judicial review of administrative action and Commissions of Inquiry.²¹⁶

1. *Judicial Review of Administrative Action*

The Supreme Court has become more persistent in its review of "collateral proceedings challenging the validity of statutes which are contrary to entrenched basic laws."²¹⁷ This can be seen in *Bergman v. Minister of Finance*.²¹⁸ In that case, the Supreme Court acknowledged that the Basic Law was binding authority which can restrict the Knesset.

The Court's willingness to review administrative action is also seen in its open criticism of governmental circumvention of judicial decisions.²¹⁹ In *Qawasma v. Minister of Defense*,²²⁰ Justice Landau attacked the executive for the deportation of three West Bank mayors before the Supreme Court could hear their petition. Landau asserted that "In times of hostilities about us, this Court . . . has insisted on scrupulous observance of the rule of law even in times of emergency."²²¹ The Court held that the government had unlawfully deprived petitioners of their right to appeal.²²² In *Dwikat v. State of Israel*,²²³ the Supreme Court determined that the erection of a new settlement in the West Bank was not based on absolute military needs, and therefore ordered an injunction against further

215. Shetreet, *supra* note 22, at 981.

216. *Id.* at 980-81.

217. *Id.* at 980. Regarding the basic laws, see *supra* note 16.

218. 23 (1) P.D. 623 (1969). The Court determined that a new financing law was contrary to the principle of electoral equality established by Section 4 of the Basic Law Concerning the Knesset.

219. Shetreet, *supra* note 22, at 981.

220. *Supra* note 158.

221. *Id.* at 670.

222. *Id.* at 671.

223. *Supra* note 112, at 983-90.

building.²²⁴ All of these cases demonstrate the increased willingness of the Supreme Court to intervene in administrative action.

2. *Commissions of Inquiry*

The Commissions of Inquiry Law of 1968²²⁵ provides for the establishment of Commissions of Inquiry to probe government scandals and problematic issues on the national level. Supreme Court Justices are appointed to head these Commissions.²²⁶ The influence that these Commissions have had on the government is due to the important subject matter addressed and public advocacy for the government's acceptance of their nonbinding recommendations.²²⁷

Three Commissions in particular have had a pronounced affect:

- a) The Agranat Commission. This Commission investigated the military's failure to detect the surprise attack at the outset of the Yom Kippur War. Its findings unleashed public pressure which eventually led to the resignation of Prime Minister Golda Meir.²²⁸
- b) The Cahan Commission. The recommendations of this Commission led to another resignation of a high ranking government official. Defense Minister Ariel Sharon was forced to relinquish his post after the Commission found the Israeli Defense Forces indirectly responsible for the Sabra and Shatalia massacres.²²⁹
- c) The Landau Commission. In 1987, former Justice Landau recommended that the Israeli Secret Services be subject to greater governmental scrutiny. The Commission revealed to the public that for more than 10 years the security services had falsified prosecutory evidence used to convict security offenders.²³⁰

Increased judicial review and Commissions of Inquiry have significantly challenged the authority of the executive and legislative branches of Israeli government. The effect has been the ascendancy of the Supreme Court.²³¹

B. Broad Interpretation of Criminal Laws

Will the Supreme Court be able to preserve the civil rights of the accused during a national emergency? In light of the findings of

224. *Id.* at 5.

225. L.S.I No. 548, at 28 (1969).

226. Shetreet, *supra* note 22, at 989.

227. *Id.* 983-90.

228. *Id.* at 984.

229. *Id.* at 985.

230. *Detention During the Intifada*, *supra* note 117, at 21.

231. Shetreet, *supra* note 22, at 980.

one Israeli legal scholar, the outlook that the Supreme Court will fulfill such a function is bleak.²³² Mordecai Kremnitzer examined a recent trend in the Supreme Court's interpretation in criminal law:

In recent years a new trend has appeared in decisions of the Supreme Court concerning the interpretation of criminal prohibitions. According to this trend, a penal statute must be interpreted in the same way as every other statute, there being no rule of restrictive interpretation particular to criminal law. The interpreter must choose that interpretative option which best realizes the objective of the legislation, even when the option is based on the irregular and secondary meaning of the words. The legislative objective is often identified by the court as the broadest possible defense of the social interest protected by the norm.²³³

Mr. Kremnitzer has written that Israeli courts have traditionally applied the rule of restrictive interpretation. According to this rule courts interpret criminal statutes in a way that favors the defendant's freedom of action.²³⁴ This is usually achieved by the court's adherence to the plain meaning of the words contained in a statute.²³⁵ The new trend allows a statutory interpretation that corresponds to the intent of the legislature even if such an interpretation deviates from the plain meaning of the words. Without a written constitution, the court cannot strike down a law for being too vague. Therefore, it may feel free to interpret a statute in a flexible manner in order to best achieve the legislative objective underlying the statute.²³⁶

The following example demonstrates the influence nonrestrictive judicial interpretation will have on proceedings involving security offenses. The Secret Monitoring Law of 1979 prohibits "unauthorized secret monitoring."²³⁷ However, secret monitoring may be authorized when the Prime Minister or Defense Minister "is satisfied that it is necessary to do so for reasons of state security."²³⁸ Such a justification is undeniably vague and lends itself to a broad interpretation encompassing many reasons which may not be direct threats to state security. If a court was free to interpret this statute in a way that best fits the legislative intent, it would probably not

232. Kremnitzer, *Interpretation in Criminal Law*, 21 *IS. L. REV.* 358 (1986).

233. *Id.* at 358.

234. *Id.* at 365.

235. *Id.*

236. *Id.* at 371.

237. Secret Monitoring Law of 1979, L.S.I. (No. 938) 118.

238. *Id.*, § 4A.

review the minister's reasons for secret monitoring. Therefore, a defendant accused of committing a security law offense based on evidence obtained by a wire tap would find no remedy in judicial review. Because nonrestrictive judicial interpretation allows a broad interpretation of the words "necessary to do so for reasons of state security,"²³⁹ the court would be less willing to review the discretion of the defense minister by substituting its own discretion in order to examine if the use of a wire tap was justified.

Under the traditional theory of restrictive judicial interpretation, the court could review the decision-making process, requiring that the minister's decision be based on necessity. Such an interpretation would correspond to the plain meaning of the words of the statute (i.e. that the minister's decision be based on absolute security reasons).²⁴⁰

The Supreme Court's partial abandonment of restrictive interpretation will lead the court away from heightened judicial review of governmental security actions. During a national emergency, the Supreme Court can opt to give a broad interpretation to the security laws. Thus, the Supreme Court has in effect removed the last obstacle between the government and the accused: itself.

CONCLUSION

Since its inception, Israel has faced repeated threats to its existence and yet, has miraculously succeeded in establishing a working democracy amid the chaos of the Middle East. The principles and freedoms of enlightened western democracies are also deeply embedded in the Israeli system of law. Despite its handicaps, the Supreme Court of Israel has counterbalanced the dictates of national security through the liberalization of Israeli law. The result of this liberalization is the predominance of civil liberties in Israeli law. Israeli citizens, who are known cynics of all political institutions, have a deep respect for the Israeli Supreme Court and have encouraged increased judicial scrutiny of the Israeli government. The willingness of the Court to review the actions of the military administration in the occupied territories is the outcome of the public

239. *Id.*, § 4A.

240. In *Dwikat v. State of Israel*, *supra* note 112, the Supreme Court reviewed the administrative acts of the government. The court held that the action was not justified because it was not based on "absolute military necessity". The Court adhered to the theory of restrictive interpretation by giving a narrow interpretation to the words contained in the statute.

support and is to be commended.

The dynamics of this unstable region have generated pressures not faced by most legal systems under normal circumstances. Just as the tenuous political situation has led the military government to promulgate harsh security orders in the Occupied Territories, it has also provided impetus for the enactment of identical security laws in Israel, even though the character of these laws contradicts the democratic principles of the State. The fact that these laws have latently been in force in Israel since 1948 raises the concern that they will one day also be widely exercised in Israel. This concern is exacerbated by Israeli criminal procedure, which is designed to comply with the circumvention of its procedural safeguards. As our examination of the Israel Procedure Law of 1982 has demonstrated, when criminal proceedings involve security offenses, Israeli law plays the role of chameleon and changes its liberal skin: the suspect is deprived of his rights to a fair trial in order to facilitate the government's efforts to combat threats to national security. Such laws reflect an affinity to the system of martial law in the Occupied Territories; one that seriously undermines the prestige of Israeli law and its protection of civil liberties.

Enactments of oppressive security laws which derogate from the ordinary rules of law are not predestined to vanish in the pages of voluminous law books; they will eventually be used. The Intifada has proven the inexorability of this eventuality.

During a national emergency, the interests of state security normally outweigh the rights of the individual. However in hindsight, not all threats are justifiable grounds for the government's infringement of civil rights. According to U.S. Supreme Court Justice Brennan, U.S. history demonstrates that "perceived threats to national security that have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded."²⁴¹ Unfortunately, Israel has neglected to erect a system of procedural safeguards designed to preserve civil liberties during "perceived threats to national security." Instead, Israeli law leaps to deprive those suspected of security offenses of the right to a fair trial. The Supreme Court of Israel has in the past proven to be an effective watchdog against the improprieties of government. However, absent a detailed jurisprudence granting the judiciary unconditional authority to review the government's justification for exec-

241. Brennan, *supra* note 1, at 19.

utive implementation of emergency laws, the judiciary will be subordinate to the executive and coerced to comply. Under the present conditions, there exists the possibility that suspects accused of committing security law violations will be subject to administrative detention, or convicted without due process based on ambiguous security considerations.

Perhaps the true test of a democratic nation is how that nation treats its minorities, ethnic and political, during periods of national crisis. The potential that perceived threats to the government will lead to the wide scale utilization of these security laws in Israel exists as long as these antiquated laws remain in force. Therefore, the author of this Comment recommends their abolishment.

This recommendation is made with the understanding that under the present system of government, even if the security laws were abolished, the Knesset could reactivate them whenever it deemed necessary. In the absence of a constitution, these laws will always remain an option to the Israel government. However, even a constitution is not a panacea. As history demonstrates, the U.S. Constitution prevented neither the suspension of habeas corpus during the civil war nor the internment of American citizens of Japanese descent throughout World War II.²⁴² Therefore, any future Israeli Constitution must contain provisions which establish a system of procedural safeguards designed to protect civil liberties during a national emergency.

*Joseph M. Wolf**

242. *Id.*

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