Supreme Court Building

Banning Torture in Israel: A New Trend in Human Rights' Jurisprudence?*

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ABSTRACT: *In recent years, Israel's Supreme Court has been perceived as a bastion of liberal activism. Critics of the Court, however, pointed out that this activism fell short of granting protection to human rights of Palestinian residents of the West Bank and Gaza. Against this background, this article aims to assess the Supreme Court's involvement in the protection of human rights in Israel and the Occupied Territories, following a 1999 decision in which judges banned the use of torture in interrogation of security suspects. The decision is evaluated both within the framework of Israeli jurisprudence in the field of national security, and in a broader theoretical discussion of judicial policy-making and its ability to foster social change.*

Introduction

Israel's Supreme Court has been under attack for at least a decade now, mostly due to its liberal jurisprudence. However, while many criticized the Court

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for meddling too much in political matters and expounding a liberal and secular philosophy, left-minded liberals often accused the Court of "Green Line" activism, suggesting that the Court's liberalism was limited to Jews and to Israel proper. While the Court is widely acknowledged for its protection of civil rights, "... it seems that those achievements do not find expression in the workings of the Court in petitions of residents of the Territories"(Shelef, 1997: 758). This opinion, shared by other legal scholars (Segal, 1993:477-489),[1] makes the study of Israel's jurisprudence on the rights of residents of the Occupied Territories an interesting field to test the strengths and weaknesses of Israel's legal system in its treatment of the basic rights of a national minority, which stands at the periphery of the system of constitutional guarantees against state encroachment.

A recent decision by Israel's Supreme Court to ban the use of torture in interrogations of security prisoners (hence H.C. 5100/94)[2] has raised hopes for a more active role of Israel's judiciary in the protection of human rights of Palestinians. This article will assess the significance of this decision as a possible precedent for the expansion of the protection by the law for individuals located at the periphery of the constitutional system. In order to do so, two theoretical issues must first be addressed: the role of jurisprudence in promoting change, and the constraints that exist on courts in dealing with issues related to national security. This discussion will provide the basis for an evaluation of the torture case and its possible underpinnings.

Explaining Change in Jurisprudence

In order to evaluate the impact of a court's decision on the political process a premise is necessary. While it is an accepted notion in the literature on courts that the judiciary is a political actor (Dahl, 1957), the extent of its legitimate domain of intervention and interference is a matter of contention. Because courts lack the kind of democratic legitimacy provided by elections, their occasional interference in the political process is considered as raising an "anti-majoritarian difficulty". (Bickel, 1962). The anti-majoritarian difficulty refers to the clash between the elected (and hence accountable) branches of government, and unelected judges who occasionally defeat and overturn the will of people's representatives.

To reduce criticism to a minimum, and to fulfill their function without undermining their legitimacy, Courts usually act differently from other government agencies. Though the impact of judicial precedents can be critical, judicial policy-making tends to be interstitial because it is more vulnerable to

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[1] But see Shetreet, S. (1988) 37-38. Shetreet argues that a new willingness to enter the domain of national security could be detected in the Court's jurisprudence already in the early 1980s.

[2] H.C. 5100/94 *Public Committee against Torture in Israel et al.* v. *The State of Israel et al.* (official English translation available on Israel's Supreme Court's official website: www.court.gov.il).

reversal by the elected branches of government, hence, the judicial caution in making decisions with broad impact on the political process.

Three theoretical approaches seem relevant to the Israeli case, and will be considered for the present purposes. Martin Shapiro has suggested that unlike the elected branches of government, courts promote their political agenda on the basis of two principles: low visibility, and long-term implementation (Shapiro, 1998:13-15). This notion suggests that courts contribute to the establishment and entrenchment of constitutional principles within the political system by adopting an incremental approach designed to achieve landmark decisions after a long stream of low key decisions, which supposedly lead to a "ground breaker". This decision should take place at a time when, for various reasons, it would be difficult for society and other branches of government to reject its principles and overturn it. This qualification is important to understand the limits of a judicial decision. However, an immediate criticism should be raised: courts do not control the timing of cases that reach them, nor do they have a say on the nature of the cases submitted to them for adjudication. Therefore, the claim of judicial build-up toward landmark cases seems an *ex post facto* argument. Besides, emphasis on decisions does not necessarily take into account the actual impact that such decisions have had on subsequent policy making or social change.

This seems to be Ronen Shamir's key criticism of Shapiro's theory. Discussing Israel's Supreme Court, Shamir argued that the production of landmark cases does not even fit the pattern indicated by Shapiro (Shamir, 1990). According to Shamir, in several critical decisions over petitions arising from the territories, the Court challenged the government's policies in the field of national security, in order to uphold the rule of law or to defend human rights. However, these decisions failed to set a precedent for the development of later jurisprudence.[3] Of the five cases analyzed by Shamir, I will briefly discuss one to clarify his argument.

In 1979, the Court overruled a land confiscation order by the military authorities, which was made in order to build the *Elon Moreh* settlement.[4] The case could have become a precedent that would severely impair a future settlement policy. However, Shamir suggests that once the impact of the case is assessed on later settlement policy, and the actual decision is carefully read, its relevance is significantly reduced. More specifically, one must consider that according to the law, land confiscation in a regime of military occupation can

[3] *Ibid.* p. 786: "These cases unquestionably marked a direct confrontation between the government and the court concerning policies and actions in the occupied territories. By declaring certain governmental actions to be void, illegal, improper, the court publicly embarrassed the government and appeared to endorse alternative courses of action." However, "By placing these cases in a broader perspective and by reading the decisions more closely... the significance of these landmark cases... [becomes] primarily symbolic rather than substantive. The long-range outcome of these decisions legitimized governmental policies precisely because these decisions became symbols of democracy in action."

[4] H.C. 390/79 *Dawikat et al.* v. *The Government of Israel et al.*, PD 34 (1), 1.

take place only for security reasons to accommodate military, not civilian needs. In evaluating the circumstances of the case at hand, it appeared obvious that there was no security justification for the confiscation, also in light of an *affidavit* filed by the settlers' movement, in which it was forcefully argued that the only reason for the settlement was, in fact, ideological. In addition, the Minister of Defense also expressed opposition to the confiscation. In light of these facts, the Court sided with the petitioners (Shamir, 1990: 788). However, in no way did the decision reverse previous cases decided in favor of the government; nor did the decision become a precedent for later jurisprudence that would prevent settlement policy by making it illegal according to Israeli law and international standards. The case was rather an "isolated incident" in which the Court "strayed" from its path of self-restraint and deference to military authorities, and then only due to exceptional circumstances. Furthermore, the case provided guidelines for the government to implement a settlement policy that would pass judicial scrutiny.

If Shamir is correct, the Supreme Court's jurisprudence suggests the following: landmark decisions overruling government policies have a symbolic function and contribute to strengthening the image of the Supreme Court as an independent institution, the legitimacy of which stems from its willingness to challenge public authorities (ibid: 796). However, in terms of the Court's ability to cause systemic change, the record suggests that the Supreme Court sides with the government most of the time and in this sense it uses the occasional criticism on policies to gain legitimacy in those decisions where it supports the government.

A different case could be made if the occasional reversal of policy would serve as a precedent signaling a systematic change. In this sense, landmark cases can be viewed as having a substantial impact if they serve as precedent-setting decisions (ibid: 797). If landmark decisions entail not just an occasional deviation from established doctrines to fulfill the symbolic function described before, but are instead precedents setting new and more stringent standards for government action, their significance is enhanced. However, even if one could successfully prove that landmark decisions constituted significant change, the question still remains open as to whether these decisions are the result of carefully planned jurisprudential developments.

Shamir's argument shares one premise with Shapiro's: it views the Court as a powerful political actor, whose decisions bear the potential for momentous social and political change. His criticism, therefore, targets the failure to display the potential inherent in the Court's power, hence, the negative evaluation attached to the Court's performance. For Shamir, the Court's function is primarily symbolic and aimed at legitimating the discourse of power promoted by the state's institutions, rather than fulfilling its duty as defender and promoter of justice and rights.

It is objectionable however to ascribe too much power to courts. The assumption that judicial activism invariably promotes a sweeping change has been questioned(Horowitz, 1977). Gerald Rosenberg (Rosenberg, 1991) identifies three powerful constraints on the judiciary's ability to promote change,[5] and makes it dependent on four conditions, which can be summarized as the requirement for political support (both popular and institutional) to accompany judicial decisions, if their impact is to be felt on policy (Ibid: 336). This argument confirms Dahl's understanding of the Court as a member of a coalition of national institutions and part of the public (Dahl, 1957). Only when, according to Dahl, the Court finds itself as part of the ruling coalition in a given political system, will its decisions bear an enduring legacy:

> The main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition. There are times when the coalition is unstable with respect to certain key policies... Probably in such cases [the Court] can succeed only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership; norms which are strong enough or are not distributed in such a way as to insure the existence of an effective lawmaking majority but are, nonetheless, sufficiently powerful to prevent any successful attack on the legitimacy powers of the Court (Ibid: 294).

This interpretation of the courts' role in the political process neither rejects nor wholly embraces Shamir's and Shapiro's theories, rather it reduces the level of legitimate expectation (and corresponding disappointment) one may have in judges' ability to promote change, if that implies going against the tide: no significant change will occur if public opinion overwhelmingly opposes it, or if state institutions do not subscribe to it. This drastic downsizing of confidence in judicial politics suggests possible reasons for explaining the timing and nature of a decision, as well as its significance.

An appraisal of the recent decision banning torture would, therefore, acknowledge the limits of judicial policy-making and try to assess it within the theoretical framework briefly outlined above. Before I proceed with this appraisal, an additional word of caution is necessary, given that in the field of national security courts traditionally tend to be even less inclined to interfere than in other matters. Especially in the wake of emergencies, courts are reluctant to discuss challenges to the decision-making process, lest the executive power's ability to face a threat be thwarted. However, Israel stands out as a special case, in that it is formally a democracy committed to the rule of law and human rights, but has remained in a state of emergency since the State's establishment in 1948.[6] Given that emergency regulations grant sweeping powers to the

[5] *Ibid.*, 35. These three constraints are (a) the limited nature of constitutional rights; (b) the lack of judicial independence; and (c) the judiciary's lack of powers of implementation.

[6] Traditionally, comparative literature on democracy includes Israel in the family of Western democracies; see most recently Lijphart, (1999). A recent debate among Israeli authors has challenged the assumption that Israel should be considered a democracy at all. See Dowty

executive, one must take into account this additional limitation in assessing Israel's Supreme Court's performance in the protection of human rights.

Emergency and Israel's Supreme Court Jurisprudence

Although it is beyond the purpose of this article to provide an in-depth analysis of Israel's Supreme Court jurisprudence in the field of national security, a brief discussion of this subject will provide useful background material for an evaluation of H.C. 5100/94. In Western democracies, emergency powers usually entail the restriction, limitation and suspension of basic freedoms in the wake of exceptional circumstances (Lee, Hanks and Morabito, 1995). The more dangerous the security threat, the less the willingness of courts to challenge the executive and military authorities (ibid: 182). The longer and more threatening the emergency to order, the higher the danger of civil and human rights violations. Hence, the extent of restrictions that a society experiences is directly proportional to the number of emergency situations it has to face, as well as to the nature of the emergency involved. The more episodic and circumscribed the emergency, the less room for suspension of the legal order is given to political power. The more systematic and widespread the threat, the broader and more pervasive the violation of the legal order will be (Brennan Jr., 1988: 11).

However, the idea of emergency in a constitutional state does not entail a systematic complacency towards arbitrary abuses of power. The underlying concept is that emergency poses a threat to order, and exceptional powers are granted to re-establish that order (Hofnung, 1994). But order in a constitutional state includes freedoms as fundamental principles. Derogation of these freedoms must, therefore, be limited, and it is usually regulated. In addition, the extent of derogation must be proportional to the immediacy and the magnitude of the danger involved. Both criteria function as a basis for judicial review of the derogation, and courts can challenge executive actions if the circumstances do not justify the measure being questioned.

According to this understanding of emergency, the only justification for infringement of rights is rooted in the immediacy of danger. It is the "critical hour" that justifies the "prompt and adequate measures". [7] As a rule, political power is, subject to the law, not above the law. However, in times of emergency, the law recedes to allow wider latitude of action to those agencies empowered to face and dispel the danger. A typical example of this mechanism can be found in many Western constitutions with reference to the declaration of a state of emergency, or a state of war.

Nevertheless, the circumstances of the emergency are pre-determined, and its management is subject to review even in times of extreme necessity. This

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,1999; Gavison, 1999; Ghanem, A., Rouhana, N. and Yiftachel, O., 1998; Dowty, 1998; Smooha, 1997.

[7] This terminology was used by the US Supreme Court in the first of the two WWII Japanese-American internment cases. See *Hirabayashi* v. *United States*, 320 U.S. 81.

means that declaring an emergency is subordinate to the existence of objective, verifiable circumstances that demand immediate action, lest permanent and irreparable damage is done. Once the notion of immediacy, which is built in the concept of emergency, is stretched to a reasonable expectation that something might develop into danger in the foreseeable future, limits for the use of emergency powers become very feeble:

> Do we require a more detailed expression of the condition that if not for the reaction, a greater harm would *immediately* be realized? This is the "immediacy" condition, even though the said provisions do not specifically employ the term. However, no express mention of the condition should even be required, since it is *inherent* to the situation of necessity as a sudden emergency situation which demands an undelayed, impromptu way out in order to prevent, with the same urgency, the materialization of a pending danger (Feller, 1989: 205-206).

In Israel, the potential for systematic violations of rights is enhanced by two factors. The extent of emergency powers and the degree of judicial self-restraint *vis-à-vis* security have been greater than in other Western democracies, where war and restriction of civil rights have been episodic rather than systematic (Dershowitz, 1989: 193). This is so because Israel marks an exception among Western democracies. In a formal state of war since its establishment in 1948, Israel has maintained in force, at least from a legal, formal point of view, a state of emergency. Emergency regulations (and the corresponding powers given to authorities) have consequently become an integral part of the constitutional order, rather than exceptions to the order. This means that special powers, overriding individual rights, are *always* there for the executive to use. These powers, rather than exceptions to the constitutional order, are an integral part of it, and courts must come to terms with them in their jurisprudence (Hofnung, 1994).

The second factor that marks Israel as an exception is the fact that a regime of military occupation has been in force in the West Bank and Gaza, since their occupation in 1967. Though not a part of Israel proper, these territories are under its military administration. Israeli law is applied to these areas for Israeli settlers, and Palestinian residents are given access to the Supreme Court to challenge decisions of the Military and the Civil Administration.[8] When Courts deal with cases arising from the Territories, they adopt a dual approach: if the applicants are Israelis they will treat the case as if the issues at stake occurred within Israel proper. If the applicants are Palestinians, they will be more inclined to second the authorities and use the security argument to avail the state's repressive policies (Barzilai, 1997).

[8] H.C. 302, 306/72 *Hilu et al.* v. *Government of Israel* 27(2) P.D. 169.

The concept of emergency, therefore, rises as a powerful normative constraint on the ability of Israel's Supreme Court to prevent legislative and executive encroachments on the Palestinians' civil and human rights. With emergency regulations broadening the scope of executive discretion, the Court has a much more difficult time, let alone willingness, to seek out a confrontation with the executive for the sake of civil liberties. Furthermore, when violations of rights target an individual who is associated (ethnically, nationally, religiously or ideologically) with the "enemy", the public's level of willingness to uphold his/her rights is lower (Shamir & Sullivan, 1983). This is the case in Israel: "Faith in the religion of security creates a situation whereby the Israeli public willfully accepts restrictions on individual freedoms and on democratic arrangements and procedures" (Peri, 1993:350). Judges are sensitive to public opinion; hence, in such cases, they show less willingness to defy executive decisions. But siding with the government may involve the risk of sliding from the judicial self-restraint that usually characterizes judicial behavior to judicial subservience to national security:

> The jurisprudence of the first decade expressed basically a view that preferred the common interest to the interest of the individual, if that stands against a decision of the competent authorities. This jurisprudence fundamentally expressed a collectivist ideology that viewed the state as a higher value... (Segal, 1999:238).

Given the lack of a judicially enforceable constitution and bill of rights, coupled with Israel's security predicament, Israel's Supreme Court traditionally limited its review to ascertaining whether the agency that issued the rule under review indeed had the authority determined by law to make such a decision. Beyond the formal question of jurisdiction the Court did not venture any further (Segal, 1999). Review was granted only on procedural grounds, and the Court usually refrained from questioning the contents of the measure being tested (Shetreet, 1988: 41). Certain areas in particular revealed a tendency to avail executive orders for security reasons. This was the case regarding house demolition,[9] deportations of residents of the Territories,[10] and use of "moderate physical pressure"[11] by security forces to extort information and confessions from terror suspects.[12]

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[9] See *The Israeli Association for Human Rights* v. *Commander of the Southern Command* (1990), 44 (4) P.D. 626.

[10] H.C. 5793/92, *The Association of Civil Rights in Israel et al.* v. *The Minister of Defense et al.*, official translation of Israel's Ministry of Justice.

[11] The term adopted by public authorities to refer to the practices used by the GSS for interrogation. Such practices are considered to fall within the category of torture by several human rights associations. The HCJ implicitly accepted this claim in its landmark decision of 1999. See H.C. 5100/94 *Public Committee against Torture in Israel et al.* v. *The State of Israel et al.*, p. 8.

[12] See *infra*.

The deportation of 451 members of *Hamas* in December 1992 provides a good example of the claim that in the clash between the Palestinians' human rights and the claims of national security, the Court gave a free hand to the executive. Following various terror acts in the territories and Israel-proper, the Israeli military authorities decided to deport 451 members of the Islamic militant organization, *Hamas* to Lebanon. In deportation cases, the law provides that from the moment the expulsion decree is issued, the deportee has 60 days to appeal. In addition, there must be a preliminary hearing before the order is carried out. In the case of the 451 *Hamas* members, the execution of the expulsion order was immediately carried out on emergency grounds. The Court issued a temporary injunction for a hearing, stopping the buses transporting the prisoners while enroute to Lebanon. In its decision, the Court authorized the immediate enforcement of the expulsion order and said,

> The question of the validity of the temporary provisions' order becomes devoid of practical legal meaning: the power to find that there is an exception in a specific concrete case, in which the compulsion of reality obliges immediate action before granting the right of hearing, is in any event inherent in the authority to exercise the power in respect whereof the right of hearing is sought.[13]

Not only did the Court acknowledge the power of the military authorities to deviate from the law in the case of an emergency, but it also accepted the claim that it is within their inherent power to determine when the situation at hand is one of emergency. Hence, the Court, in this instance, practically stretched the concept of emergency beyond the notion of an exceptional situation of objectively verifiable immediacy of danger. By recognizing the power of military authorities to decide not only what measures to adopt, but also whether the situation warranted a deviation from what the law requires in normal times, the Court bowed down to political power and gave legitimacy to a broad notion of emergency.

Other aspects of emergency situations warrant this interpretation, and not only in Israel. On many occasions, the very evidence that is necessary to determine whether the State is facing a danger that justifies the extreme measures being challenged is not revealed for security reasons (Lee, Hanks and Morabito, 1995: 184-186). In Israel, during a trial proceeding against a suspect, the Court may be faced with an executive claim which is usually based on a certificate of immunity issued by the Prime Minister. The certificate releases the prosecution from exhibiting incriminating evidence, due to the danger of disclosing classified information. By accepting such certificates, the Court grants legitimacy to the

[13] H.C. 5793/92, *The Association of Civil Rights in Israel et al.* v. *The Minister of Defense et al.*, official translation of Israel's Ministry of Justice.

measures advocated by the prosecution (or the military authorities) without determining whether the circumstances, in fact, invoke these measures.

While courts in Western democracies seem to recognize the claim that emergencies sometimes require the endorsement of otherwise questionable actions, it seems that courts are, nevertheless, committed to reviewing the issues at stake, and will not automatically show deference. The record so far reviewed suggests that Israel's Supreme Court would prefer to adopt judicial restraint, which leaves ample freedom of action to the executive in matters of national security. At the same time, one must point out that recently the Court has insisted that violations of human rights be justified on more stringent grounds, even in circumstances where national security is involved and emergency is invoked.

Following the first Intifadah (1987-1993), the Supreme Court has steadily expanded the parameters of justiciability on security related issues as well, thus challenging, on occasion, the state's argument that certain practices had to be availed on grounds of security. On occasion, the Supreme Court struck down administrative acts related to security matters, if proven to be manifestly illegal or *ultra vires* (Edelman, 1994; Benvenisti, 1996: 376).[14] *In camera* hearings are now preferred over certificates of immunity. In such circumstances, and contrary to situations where a certificate of immunity released the prosecution from the burden of proof in front of the judges, the evidence must be disclosed. However, in closed-door hearings, defense attorneys are still denied access to the information on which the accusations against their clients are based.[15] In addition, prohibition against meeting with counsel is still frequently endorsed by the Supreme Court upon request of the security authorities.[16]

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[14] Benvenisti claims that "Though a remarkably persistent tendency, it is nevertheless a tendency. The Israeli Supreme Court has at times followed this line of reasoning, and in a few exceptions it has accepted the petitioners' claims against the Government's and the Military Authorities' position that security related issues could not be justiciable." See for example H.C. 390/79, *Dwaikat* v. *Government of Israel* (1980) 34 (1) P.D. 1, 13; *Electricity Co. for the District of Jerusalem* v. *The Minister of Energy* (1981) 35 (2) P.D. 673. See also *Miliadi Murkus* v. *the Minister of Defense, The Regional Commander of the West Bank, and the Regional Commander of the Gaza Strip* (1991) 45 (1) P.D. 467. In this case, the Supreme Court accepted the petitioners' argument, that the lack of distribution of protective kits against chemical warfare to the *Arab* population of the Occupied Territories (Jewish residents were provided with protective kits) could not be justified on security matters. The Supreme Court usually supports the military authorities; at the same time, "the Court's scrutiny is usually confined to an examination of whether the act is *ultra vires*, and whether the reasons for cited security measures are actually a cover for irrelevant or illegal considerations." (Benvenisti, 1996:376).

[15] Cf. H.C. 5318/95 *Hajazi* v. *The General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal).

[16] According to the Public Committee Against Torture, more than 40 petitions on behalf of *incommunicados* were filed between the September 1999 decision on banning torture and the outbreak of the al-Aqsa Intifadah in September 2000. Tellingly enough, the number of petitions on the same matter dramatically increased after September 2000, an indication of the use of emergency powers by the authorities and the unwillingness of the Court to curtail such powers despite the basic principle of right to counsel.

One must note, however, that this situation is not static. Although the rate of success of litigation for Palestinians is significantly lower than that of Israelis, there are important exceptions. If one evaluates the rate of success of Palestinians in the Court based on judicial decisions, the impression one gets is that the Court is truly siding with the government. However, Yoav Dotan (1999) proved recently that if out-of-court settlements are factored in, the rate of success is significantly higher. According to Dotan, the Court is encouraging out-of-court settlements that partially, or entirely, meet the demands of the petitioner; the government is often compliant (Dotan, 1999: 335).

As Dotan argues, one reason for the preference to settle out-of-court, at least as far as Justices are concerned, is related to the low visibility engendered for the Court in such instances. An openly confrontational approach with the government on such sensitive issues might draw both public criticism (given the public's lack of sympathy for the Palestinian plight) and ultimately undermine the Court's autonomy (ibid: 347). Dotan notes the growing discomfort of the Court during the first Intifadah when the number of petitions rose dramatically. Faced with defending human rights (on which the Court views itself as a champion) against the tide of public opinion and government policies, the Court's efforts to solicit out-of-court settlements stems from its acknowledging its limited capacity to influence and promote change. This confirms Dahl's and Rosenberg's arguments on judicial ability to promote change.

If, indeed, this is the case, an explanation is provided for the low rate of success of petitions filed by residents of the Territories once they reach the Court. At the same time, this explanation fails to account for the torture case, in which the Court was openly confrontational towards government policies and public opinion. The explanation must then take into account the climate in which the decision took place, and identify the existence of a possible set of conditions and political players who, jointly, provided the necessary support for issuing such a decision without permanently undermining the Court's standing.

In light of this brief review of the position adopted by the Court in Israel, the accusation of "Green Line" activism bears some meaning. Those who make this accusation of the justices argue that equal treatment before the law is replaced by judicial subservience to the defense establishment when the petitioner is a Palestinian resident of the Territories. In such instances, the argument goes, human rights standards befitting a liberal democracy are forsaken, and emergency measures against the "enemy" are upheld. Therefore, the importance of H.C. 5100/94 lies in the assessment of this argument: in light of the recent judicial decision, is the Supreme Court still treating the Palestinian petitioner as an "enemy" whose rights are to be disregarded in light of more compelling state interests of national security? In the remainder, I will address this question by analyzing the Court's decision and the series of precedents that led to it.

Testing the Torture Case

Before the 1999 landmark case, many judicial decisions suggested the existence of a double standard in the treatment of Palestinians. Consider, for example, the Court's decision to confirm the indictment of two GSS interrogators who were condemned in 1991 for the death of a prisoner during interrogation. In that circumstance, the Court confirmed the punishment sanctioned by a lower court – six months imprisonment– as a way to set an example for others.[17] The comparison between the harshness of the 1992 deportation of *Hamas* members, which the Court sustained, and the light sentence of the two interrogators, points out the problematic nature of the Supreme Court's jurisprudence during the conflict between Israel and the Palestinians. The difference is more striking if one compares the lax criteria of standing given by the Supreme Court in general in its pursuit for better standards of government (Zamir, 1991), and the strict criteria in matters arising from the territories.[18]

The decision issued by the Supreme Court on September 6, 1999 appears as a shift in the doctrine of matters concerning national security and the emergency powers held by the political branches of government. In the recent GSS decision, the Court has completely reversed previous rulings by addressing difficult substantive issues, and by declaring the existence of absolute limits to executive powers, which are based on the *Basic Law: Human Dignity and Liberty*.

Some have argued that the Supreme Court's jurisprudence did not change suddenly, but it is, as Martin Shapiro suggests, in the case with judicial policy making in general, the result of gradual development, which increased throughout the years.[19] If this is the case, then one must identify two causes:

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[17] H.C. 532/91, *Anonymous* v. *The State of Israel* (unpublished, courtesy of Adv. Andre Rosenthal).

[18] This is most evident in the idea of justiciability. Whereas many theoretical questions are addressed by the Court despite their mootness in matters of constitutional law (Cf. H.C. 428/86 *Barzilai et. al* v. *Government of Israel et al.* in *Selected Judgments of the Supreme Court of Israel*), when it comes to torture and other alleged human rights violations in security related matters the Court emphatically declared that "a theoretical debate is not the acceptable way [to proceed] for this Court." H.C. 70/95 *Omar Abd Karim Hasan Amr* v. *General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal).

[19] See Zamir, 1989, p. 404: "[I]t appears that the Court has recently turned in this direction in a gradual and modest move, and has begun to slightly tighten the review of the discretion of the security forces. Perhaps it reflects a general tendency on the part of the court to increase judicial review of all governmental authorities in all areas. This tendency has led, among other things, to greatly increased flexibility in the doctrine of justiciability (or as it sometimes called, the doctrine of political questions) which previously was invoked from time to time by the court in order to refrain from the review of security matters."

1) A pattern of incremental change in the way the Court developed its decisions through subsequent cases;

2) The existence of political conditions within society and public opinion to support such a change, or at least not oppose it.

In evaluating the torture case, I would like to claim that the record suggests the second cause is more relevant. This reading is more in line with Dahl's and Rosenberg's arguments on the impact of judicial decisions on the political process.

Nobody would dispute that support still existed for the use of torture both at the political level and among the public, as some reactions in the media following the decision attested to (Harel, 1999; Margalit, 1999a; Margalit, 1999b; Pappo, 1999). But I wish to argue that the existence of a political climate that would enable the decision to stand up against possible attempts to reverse it, would allow the Court to speed up the process of reversal of previous cases. A change in this climate equally suggests that attempts by the legislature to reverse the Court's decision might ultimately prove successful.[20]

H.C. 5100/94 has declared the use of torture during interrogations illegal. According to the defenders of the practice, the purpose of so-called "physical pressure" was to obtain vital information in the war against terror, in order to prevent terrorist attacks and save human lives. It was claimed that the urgency of the situation justified the recourse to exceptional measures in the interrogation process. These measures were supposedly regulated following two scandals that brought about severe criticism of the GSS during the 1980s. The lack of control over interrogation practices, and the systematic pattern of perjury of GSS agents in court proceedings, invoked inquiry and regulation.[21] The result was the *Landau Commission of Inquiry Report*, which gave legitimacy to the use of "moderate physical pressure" in exceptional circumstances of extreme and impending danger (Reinfeld, 1999). Ordinarily the law employs force to extract information and confessions from a suspect of a criminal offence.[22] Under Section 22 of the Penal Code, the use of force is justified only under the concept of "defense of necessity" that relates to a situation of emergency.[23] One of the problems faced by investigators stems from the criteria required determining

[20] See PCATI's press release on March 23, 2001 on the current status of the bill *Private Law Proposal: Proposed Criminal Procedure (Powers and Special Interrogation Methods for Security Offenses) Law, 1999.*

[21] A significant portion of the Landau Report was made public and can be read in its official English translation in *Israel Law Review*, 23, 2-3, Spring-Summer 1989, special issue on the Landau Reports.

[22] Penal Law, 1977, Section 277.

[23] Penal Law, 1977, Section 22: "A person may be exempted from criminal responsibility for an act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honor or property or on the person, honor of others whom he was bound to protect or property placed in his charge: Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided."

whether the circumstances justify the use of unconventional means of investigation. The Landau Report addressed this problem, and found a solution by expanding the notion of "defense of necessity":

> According to this version, then, the defense of necessity is not applicable, except when, because of the time factor, the danger is liable to be realized immediately, and THEREFORE it is essential to get the information immediately from the suspect. *This is not our opinion...*
> As regards the question under discussion: the harm done by violating a provision of the law during an interrogation must be weighed against the harm to the life or person of others, which could occur sooner or LATER.[24]

This reading of necessity stretches the notion of immediacy beyond what liberal democracies would usually accept to justify a violation of human rights (Kremnitzer, 1989: 238). In a liberal democracy, the understanding of emergency is linked to a notion of necessity, where "The 'necessity' defense lacks content absent an immediate, concrete danger that can even be estimated correctly". (Feller, 1989: 206) According to the version adopted by the Landau Report, the danger no longer needed to be impending. In addition, the Report argues, "Everything depends on weighing two evils against each other. The correct test for this is what the doer of the deed reasonably believed, and not what the situation actually was".[25] By giving necessity a subjective component as determined by the investigator, and by allowing a weak correlation between preventive measures and the actual danger, the connection between the suspect and the danger also becomes much more tenuous, and the consequent violation of rights is disproportionate (Feller, 1989:204-205).

In early August 1995, Israel's late Prime Minister, Itzhak Rabin, during a question-and-answer period in the *Knesset* following the death in custody of a prisoner, admitted that 8,000 suspects sustained shaking during interrogation. This statement pointed at or indicated the excessive use of force by interrogators, beyond the needs dictated by the emergency.[26] According to a report recently issued by the Public Committee against Torture in Israel, of the approximately 1,000 Palestinians interrogated by the GSS every year, 850 were subjected to

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[24] *Landau Commission Report, op. cit.*, p. 171 (Italics mine).

[25] *Landau Commission Report, op. cit.*, p. 174.

[26] The information appeared in various daily newspapers following a debate caused by the death in custody of Abd A-Samar Harizat. See Ben-Yair (1995). In an interview with this author, the Director of the Israeli human rights organization B'tselem, Eitan Felner indicated that approximately 23,000 Palestinians had been taken into custody on grounds of Hostile Terrorist Activity (HTA) and underwent interrogation at the hands of GSS agents. A rough estimate given in the course of the interview puts 10 to 15 percent of them as not having undergone any form of physical pressure. That means that 85 percent of the suspects were subjected to physical pressure.

torture.[27] These numbers suggest that force was not a questionable, but rather a necessary means of dispelling danger: it had turned into an end in itself, the scope of which was intimidating and repressive. This impression is strengthened by a governmental source: the recent publication of a report of the State Comptroller on the GSS for the years 1988-1992 confirms abusiveness on a wide scale. The report sharply criticizes the GSS for persisting in its violation of the law even after the Landau Report. The report, written in 1995, was significantly kept classified (against a request by then State Comptroller Miriam Ben-Porat) until after the September 1999 case (Alon, 2000a).[28]

By stretching necessity from a situation of pending danger based on concrete evidence, to a subjective impression of future danger, the Report provided much broader protection for the GSS investigators under Section 22 of the Penal Code (Feller, 1989: 207). Consequently, the Landau Report allowed agents to use violent means much more often than a strict definition of emergency would have allowed. Ultimately, the argument on the meaning of the 'defense of necessity' became one about the necessity of defense for otherwise indefensible practices. The consequences of such conclusions were that the GSS used interrogation techniques, including physical and psychological pressure that went beyond the limits allowed by the need to balance the interests of the state in uncovering information, and the suspect's rights. This systematic breach was due not only to the nature of the methods involved. Linking necessity to a loose concept of imminence of danger, the time span of which stretched way or far beyond immediacy, turned the indiscriminate use of force to obtain information into the rule rather than the exception. Criticism of the report was instant. The Court did not reverse it until more than a decade later, despite the existence of domestic and international legal sources that could have provided a basis for challenging the Report.[29]

In fact, in at least one case, the Court explicitly refused to discuss the validity of the Landau Report.[30] In *Salhat*, an argument was made that the "defense of necessity" existed only *ex post facto*, not *ab initio* as the Landau Report seems to indicate. The Court rejected the argument and did not take any stand as to the legal validity of the Landau Report. It never sanctioned torture as a legitimate means of interrogation; rather, it always refrained from addressing the question of whether the methods allowed by the Landau Report, in fact,

[27] Information available on a PCATI's e-mail newsletter, sent on March 15, 2000.

[28] The report was finally published at the beginning of February 2000.

[29] Israeli law prohibited force as a means to extract information. In addition, Israel signed and ratified (in 1991) the International Covenant on Political and Civil Rights, which includes a section banning torture and other cruel and degrading treatment, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[30] H.C. 2581/91 *Salhat et al.* v. *The Government of Israel et al* (unpublished, courtesy of Adv. Andre Rosenthal).

constituted torture.[31] In doing so, it avoided accepting or rejecting the argument made by the State that, in fact, the interrogation methods used by the GSS did not constitute torture, but merely "moderate physical pressure", which, though violent, was still within the boundaries of the permissible in extreme (i.e. emergency) circumstances. One reason cited for this response was that the Report weighed heavily on the Court's jurisprudence.[32]

In the period following the publication of the Landau Report, the Court kept in line with the political echelon and carefully avoided making any decision on the issue of special methods of interrogation. *A-Tun*,[33] decided at the end of 1994, involved sleep deprivation and tight handcuffing. Following the conviction of the appellant, his defense attorney, Andre Rosenthal, requested a report on the allegations of mistreatment during the interrogation period, which was granted four months later. In turning down Rosenthal's petition to examine interrogation methods, the Court relied on procedural grounds and refused to address the substantive issue of methods, since the original petition did not ask it to do so.

In *Al Zagal*,[34] decided in 1996, an *order nisi* was refused "in light of the statement given by the representative of the Attorney General". In this case, as in many others, evidence was either shown to the Court in closed-door debates to which the defense attorney had no access, or evidence was simply refused based on a certificate of immunity signed by the Prime Minister.[35] The Court dismissed the petition saying, "We are satisfied that in the present conditions – *whose details we cannot report in light of the immunity certificate* – there is no basis for our involvement".[36] Other cases were dismissed on similar grounds, including cases where the Court accepted the State's argument that the GSS did not employ physical means.[37]

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[31] See Ministry of Justice & Ministry of Foreign Affairs, *Combined Initial and First Periodic Report Concerning the IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, submitted in 1998 to the United Nations Human Rights Committee. The Court accepted the State's argument that the methods used for interrogation did not amount to torture or other forms of cruel, inhuman or degrading treatment that were prohibited under international treaties. This position was confirmed to this author during an interview with Adv. Shai Nitzan, of the Ministry of Justice, on 23 December 1999.

[32] Interview with Adv. Shai Nitzan, 23 December 1999.

[33] F.H. 6165/94 *Ahmed A-Tun* v. *Head of the General Security Service et al.* (unpublished, courtesy of Adv. Andre Rosenthal).

[34] H.C. 2210/96 *Ziad Mustafa Al Zagal* v. *The General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal).

[35] Cf. H.C. 2837/96 *Mujahad et al.* v. *The General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal).

[36] H.C. 2210/96 *Ziad Mustafa Al Zagal* v. *the General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal), emphasis added.

[37] Cf. H.C. 5578/95 *Hijazi* v. *General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal).

In *El Hasan*,[38] decided in 1995, the Court dismissed the petition because the issue was moot, although it advised, "in light of the seriousness of such complaints", that the competent authority check them. In *Bilbeisi*,[39] ruled in January 1996, the Court annulled an interim injunction granted previously, while the petition was under discussion. In light of new circumstances presented by the State, the Court rejected the appellant's petition to deny permission to use methods of interrogation such as shaking the suspect. Again the Court refrained from addressing the question of principle on specific methods, although it was fully aware of their nature. In *Hamdan*,[40] also decided in 1996, the Court similarly annulled an interim injunction, and emphatically claimed that this did not "constitute permission to take during the interrogation of the appellant measures, which are not in accordance with the law". At the same time, the Court refrained to specify what interrogation measures would in fact be in accordance with the law and what would instead constitute an illegal practice. In *Mubarak*,[41] decided in November 1996, the Court rejected the petition and accepted the state's arguments regarding the use of certain means of interrogation in light of the circumstances. However, a discussion on the methods themselves began to formulate in the Court's decision. Of the various practices discussed, the Court dismissed the argument that putting a sack on the suspect's head is equivalent of torture. The three Justices wrote that

> We are satisfied that this measure is used in a reasonable manner for the purposes of interrogation, and it does not deprive the suspect of proper ventilation and normal breathing, and it does not, either by its intention or its actual practice, cause pain which constitutes torture.[42]

In light of the position taken by the Court in *Hamdan* on this measure, H.C. 5100/94 appears as a true reversal of principles. On September 6, 1999 the Supreme Court emphatically stated,

> In the cases before us, the State declared that it would make an effort to find a "ventilated" sack. This is not sufficient. The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited.[43]

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[38] H.C. 7246/95 *El Hasan et al.* v. *The General Security Service* (unpublished, courtesy of Adv. Andre Rosenthal).

[39] H.C.-V.R. 336/96 (H.C. 7964/95) *Abd al-Halim Bilbeisi* v. *The General Security Service* (unpublished, courtesy of *B'tselem*).

[40] H.C. 8049/96 *Abd al-Aziz Hamdan* v. *The General Security Service* (unpublished, courtesy of *B'tselem*)).

[41] H.C. 3124/96 *Mubarak et al* v. *The General Security Service* (unpublished, courtesy of *B'tselem*).

[42] H.C. 3124/96.

[43] H.C. 5100/94.

Regarding sleep deprivation, the Court remained consistent with its previous decisions: sleep deprivation is still justified, in light of the circumstances, as a side effect of interrogation. However, "The above described situation is different from those in which sleep deprivation shifts from being a 'side effect' inherent to the interrogation, to an end in itself".[44] In other words, sleep deprivation is accepted if the emergency does not allow time for the suspect to rest. It is the critical hour that justifies the measure, and it is the immediacy of the danger, in this case, that grants legitimacy to a measure, which, under normal circumstances, would not find justification. However, sleep deprivation employed as a technique for breaking a suspect's will, and not for obtaining vital information in a fight against time to save human lives, is prohibited.

When it comes to the practice of forcing a suspect to listen to loud music, the Court changed its mind. In *Mubarak* the Court wrote:

> The appellant adds that while he waits for interrogation loud music is sounded. It becomes clear from the statement by the Attorney General's Office that the music is sounded in the interrogation facility while the suspect waits for interrogation with others, and this is done in order to prevent the suspects waiting for their interrogation from communicating with each other. According to this explanation the music is heard by everyone present in the area, including the security personnel.[45]

Then the Court accepted the State's claim. In H.C. 5100/94 the Court reversed itself: "Powerfully loud music is a prohibited means for use in the context described before us".[46]

This reading of H.C. 5100/94, against the background of various precedents on torture, which were mentioned by the Justices in their ruling, is important. It suggests that the Court's reticence to address the substantive issue of whether it is permissible to use certain measures in the course of an interrogation gave way to a sudden willingness to provide a legal answer. Under some rubrics the Court could find the binding strength of previous rulings. In other instances, the Court felt free to disregard previous decisions and made no recourse to its proverbial self-restraint.

An analysis of the relevant precedents shows that with regard to some aspects of torture the Court reversed itself in a dramatic fashion, whereas when it came to other measures, the Court respected its case law and showed consistency with previous decisions. With the exception of two practices – tight hand-cuffing, which the Court had already sanctioned as unacceptable, and sleep

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[44] *Ibid.* p. 20.
[45] H.C. 3124/96.
[46] H.C. 5100/94.

deprivation, which is still allowed as a side effect – all other methods of interrogation had escaped review or had been declared acceptable by the Court.

The September 1999 ruling shows, then, how revolutionary the Court's decision was to sanction absolute limits on the powers of the GSS to interrogate security suspects. The decision was revolutionary for several reasons. First, because it addressed petitions which in the meantime had become moot. The excuse used by the Court a decade earlier in order to avoid an abstract debate was ignored in the ruling. Secondly, because H.C. 5100/94 sanctions absolute limits to certain practices, based on the 1992 Basic Laws. Thirdly, the ruling declares that even if legislation were passed by the *Knesset* granting the GSS special interrogation powers,[47] the law itself would be subject to review following the standards set in this ground breaking precedent: "… [T]he required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty "befitting the values of the State of Israel" is enacted for a proper purpose, and to an extent no greater than required (Article 8 of the Basic Law: Human Dignity and Liberty)".[48]

Finally, the novelty of the decision lies in the meaning that the Court attaches to the "defense of necessity", which has important bearing on the meaning of emergency powers. With reference to the Landau Report, the Court declared that,

> [T]he "necessity" defense, which, according to the State, is available to the investigator, is not relevant to the circumstances in question. In any event, the doctrine of "necessity" at most constitutes an exceptional *post factum* defense, exclusively confined to criminal proceedings against investigators. It cannot, however, by any means, provide GSS investigators with the pre-emptory authorization to conduct interrogations *ab initio*. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the Legislator pertaining to the use of such methods and conforming to the requirements of the Basic Law: Human Dignity and Liberty. There is no purpose in engaging in a bureaucratic set up of the regulations and authority, as suggested by the *Commission of Inquiry's Report*, since doing so would merely regulate the torture of human beings.[49]

This is precisely the argument that petitioners had made in *Salhat*, and that the Court had rejected.[50] The ruling thus limits the notion of necessity in line with what is said in the 1992 Basic Laws: restrictions are allowed "to an

[47] Something that, in the absence of a Constitution parliament can do.
[48] H.C. 5100/94, p. 26.
[49] H.C. 5100/94, p. 8.
[50] Cf. footnote 24.

extent that does not exceed necessity, or under an aforesaid Law by virtue of an explicit authorization of it".[51]

Hence, the Court's position on the question of emergency powers is one that is inclined to limit executive discretion and executive prerogatives. The outcome of this case has been to severely curtail the access to the "defense of necessity" for investigators *henceforth*. Necessity is not, in other words, to be viewed as a general source of authority, but only as a possible defense in criminal proceedings against investigators, provided they can prove force was justified by very extreme and concrete circumstances.[52] In addition, the Court has also sanctioned absolute prohibitions against the adoption of certain methods, which cannot be used even in situations of necessity.[53] This further curtails the power of executive authorities to decide *when* the circumstances justify their recourse to unconventional means.

The decision reverses previous trends: rather than reaching an out-of-court settlement, rather than confining the discussion to the contingencies of the case, the Court took a collision course with the State and handed down a ruling the possible future underpinnings of which are momentous. What gave the Court the political leverage and confidence to hand down such a decision?

Having addressed the contents of the decision, as well as its likely impact on future behavior of the executive and of security authorities, it is important to address the second factor that was mentioned in explaining the Court's decision, namely, a favorable political climate.

An indication of change in the political climate surrounding the issue of torture can be found in a comparison with the 1995 debate on special powers granted to GSS investigators. Following the death of a detainee as a result of shaking, the Attorney General, the Ministry of Justice and the Minister of the Environment[54] supported a suspension of such methods of interrogation. However, the position of the Prime Minister[55] and the security situation at the time both prevented any change from being endorsed. In the summer of 1995, there were several terrorist attacks on Israeli targets. The public was deeply divided on the ongoing Oslo process; there were mounting tensions within the public opinion. In this climate, a perceived weakening of the state's power to respond to terror was perceived as negative and highly unpopular. This element suggests that a decision taken at that time by the Supreme Court would have found firm opposition within both the political establishment and society.

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[51] Basic Law: Freedom of Occupation, section 4, and Basic Law: Human Dignity and Liberty, section 8.

[52] H.C. 5100/94, p. 24.

[53] H.C. 5100/94, pp. 17-20, 26-27.

[54] All members of the Ministerial Committee on GSS special powers.

[55] In a statement quoted in *Ha'aretz* (Ben Yair, 1995), the late Prime Minister Ytzhak Rabin said that 8,000 Palestinian prisoners were interrogated using the method of shaking, and just one died from it, "and because of just one case, there is no reason to give up an interrogation method that can save the life of many innocent people."

One could argue that the security situation improved in the two years prior to the decision (1997-1999), with a significant reduction in successful terrorist attacks. This might be a reason why the Court adopted the view that torture could no longer be presented as mere physical pressure or justified by necessity. However, lacking evidence on the rate of success of GSS's preventive activity against terrorism, this kind of argument could go in either direction, since it could be claimed that it is precisely due to special methods of interrogation that important information was obtained or extracted, enabling the GSS to neutralize terrorist attacks.[56] If this argument is not convincing enough, other factors must be taken into account.

According to Eitan Felner of *B'Tselem*, the international pressure of human rights organizations on the Court mounted, and its influence, in particular on its Chief Justice Aaron Barak, was determinantal.[57] Andre Rosenthal, who represented several suspects on behalf of the Public Committee against Torture, suggested that the steady flow of cases on the Court's docket made the difference.[58] Human rights activists simply did not allow the issue to fade, and reminded the Court, at an average rate of a case every three days, that an answer must be given to the question of legality of the use of force in interrogations.[59]

Other political circumstances also played a part. Although none of those interviewed by this author seemed to support this interpretation, the change of government in May 1999 might have facilitated, if not the decision, then certainly the fact that those who accessed power would make it difficult to reverse it. While then Prime Minister, Ehud Barak, only grudgingly accepted the judgment, key individuals in various positions seemed to provide formidable obstacles to any attempt to reverse the Court's ruling. Former Minister of Justice Yossi Beilin,[60] former Law, Justice and Constitution Committee Chairman MK Amnon Rubinstein,[61] Foreign Affairs and Defense Committee Chairman MK Dan Meridor are all deeply committed to Western notions of human rights and opposed to "physical pressure"(Dayan, 1999). Their insistence on upholding the ruling had the upper hand while they held key positions and there is little doubt that this coalition of powerful political players discouraged attempts to reverse

[56] Benvenisti (1999) mentions the argument presented by Israel to the UN Commission against torture, where it was claimed that "90 large-scale terror attacks" had been prevented thanks to special interrogation methods.

[57] Interview with the author, 20 December 1999.

[58] Interview with the author, 20 December 1999.

[59] In the year 1998 alone, Rosenthal's Office filed 78 petitions for alleged use of physical pressure. According to Rosenthal, that same year the number of petitions filed was 144, or 12 a month, with an average of a petition every 2 and a half days. Even if the number is reduced to 78, that makes a petition every four and a half days.

[60] His successor, Meir Shetreet MK from Likud is said to be similarly opposed, see PCATi's press release from 21 March 2001, *Report on the Current Status of MK Rubi Rivlin's Private Law Proposal Proposed Criminal Procedure (Powers and Special Interrogation Methods for Security Offenses) Law, 1999.*

[61] Now replaced by Ophir Pines-Paz MK, from Labor, who is no less opposed to torture.

the decision (Alon, 2000; Melman, 2000). However, as MK Reuven Rubi Rivlin (Likud) said in an interview, any successful terrorist attack in the future could easily change that and help pass his legislative proposal to reverse the Court ruling.[62] The outbreak of the Al-Aqsa Intifadah in October 2000 might be one such situation. Security forces could feel more inclined to break the new rules set by the Court, and the Court might be less inclined to listen to petitions for suspects who are associated – in their minds and in the minds of the public – with the enemy.

Attorney Shai Nitzan's interpretation of the reasons that produced the ruling reinforces the impression that the decision was facilitated by a favorable political climate.[63] For more than two years the Court waited for the political echelons to legislate on the issue of GSS powers and thus to address, by legislation, the question of principle once and for all. Legislation would have provided the Court with a statutory basis to evaluate GSS practices. As petitions on alleged human rights violations crowded the Court's docket, the Government failed to turn proposals into law. The Court finally decided to discuss the issue in January 1999, as soon as new elections had been called, when it had become obvious that no law would be legislated for at least another year. This situation had kept the debate surrounding the GSS Draft Law on the public agenda. Given the reticence of politicians to act upon an important and pressing issue, the Court could step in and claim that it had to decide because the situation had become intolerable and politicians were not doing their bit.

The Court engaged in a dialogue with the political branches of government between the Landau Report and the 1999 decision. Though at all costs it tried to avoid discussing the question of principle, it hinted in many decisions that it might. In addition, the Court solicited the State to ensure that investigations are conducted in accordance to the law, and it admonished the State to check the allegations, in light of their grave nature. As international and internal pressure became increasingly embarrassing, and it was clear that no political solution was in sight, the Court seized the opportunity to address the issue when the political climate was conducive to a decision to be made, which would not be reversed or rejected by the public and other state authorities.

There is another element, which contributed to this climate. All this could not have happened in 1995, although the legal instruments to construct a similar decision were already available. In September 1999, an atmosphere of renewed optimism reigned in Israel with regard to the peace process, with talks of withdrawing from Lebanon, and the resumption of serious talks with both Syria and the Palestinian Authority toward comprehensive peace treaties, creating a sense of diminished security threats. While the distinction between Israel proper and the Territories remains very much in place for the Court, its language makes very little reference to the otherwise frequently mentioned

[62] Interview with the author, 24 December 1999.

[63] Interview with the author, 23 December 1999.

existential threat to the country. The Green Line remains the border between Israel and an occupied area, but the relations with its inhabitants – as well as with the neighboring countries – does not seem to be dictated by conflict any longer.

This impression is reinforced by two other cases decided a few months later by the Court, where security concerns,[64] or established patterns of land allocation that favored Jews over Arabs,[65] were challenged and even discarded. The security issue and the existential threat to Israel fail to appear as prominent concerns in the Court's decisions. Though a measure of criticism was met, the Court felt confident enough to handle these decisions, as international opinion, domestic support and the changing regional environment all suggested that the Court could stand the pressure and see these decisions established as binding on Israeli society. A change in the political climate caused by the Al-Aqsa Intifadah might halt and even reverse this trend.[66]

Conclusion

It remains to be seen if this landmark case will have an impact on other categories of litigation arising from the territories. Another test is *incommunicado* detention, to which civil rights organizations are now giving much attention, by bringing a steady stream of petitions to the Court's docket.[67] In a press release on April 4, 2000, PCATI stated, in relation to a specific detainee, that "Five petitions to allow him to meet [his Attorney] were rejected by the Supreme Court".[68] The strategy adopted on this matter is the same used against torture, but it has not borne results at the time of this writing.

Meanwhile, the Government's plans to abolish the state of emergency that has been in force since the establishment of the state were halted by the breakdown of the Oslo process and the renewal of conflict in the Territories. Had that step been taken, it would have brought constitutional provisions, which are of relevance to the conflict with the Palestinians, in line with the general principles of a constitutional democracy.[69] This fact alone is a reminder of the minimal power in the hands of the Court to influence change, if political climate and conditions are not ripe to accept it and endorse it. H.C. 5100/94 remains an important decision, reflecting a process that was lengthy, painful and ridden with

[64] F.H. 7048/97 *Anonymous* v. *The Minister of Defense* (available on the Supreme Court's internet site at www.court.gov.il).

[65] H.C. 6698/95 *A'adal Ka'adan et al.* v. *Israel Land Administration et al.* (not yet published).

[66] See PCATI's Press Release from 18 March 2001, where allegations of renewed torture and mistreatment of prisoners are raised.

[67] The Public Committee against Torture has filed more than 40 petitions for individuals held incommunicado by the GSS in the year 2000.

[68] Press Release, The Public Committee against Torture to the UN Commission on Human Rights, April 4, 2000.

[69] Deputy Attorney General, *Summary of the Law for Validity of Laws (abolition of Declaration of State of Emergency), 5760-1999*, Ministry of Justice internal document 2-2124 (courtesy of the Ministry of Justice).

halts, controversies and second thoughts. The Court has done its share, although many would like to see it take more swiftly. Ultimately though, its decisions will hold if the political echelon and society at large join in. What the events of the Al-Aqsa Intifadah have suggested is, that as long as a conflict persists between Israel and the Palestinians, circumstances are bound to reduce Israeli society's willingness to support equal treatment of Palestinians before the law. This, in turn, reduces the Court's effectiveness in promoting change. Palestinians detainees and suspects today remain at the periphery of Israeli discourse on human rights, and the constitutional protection of their human rights can, in the final analysis, be guaranteed only once the conflict is finally resolved politically.

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