Pécsi Tudományegyetem

Állam- és Jogtudományi
Kar

Doktori Iskola

Judicial Stay of Criminal Proceedings: Protecting the Basic Right to Fairness Without a Comprehensive Constitution - an Israeli Development to a British Idea

Researcher:

Judge (Ret.) Avi Zamir, LL.M, Adv., Tel Aviv, Israel.

Supervisors:
Dr. Judit Zeller, PhD / Dr. Gábor Mészáros, PhD

Pécs, 2023.

TABLE OF CONTENTS

DEDICATION

This thesis is dedicated to my late parents, Silvia and Issachar, who showed me the way; to the late Prof. Zeev Segal, who was not only a mentor but also like a brother and a dear friend of mine; to my beloved and incredible wife and daughters, Varda, Noga and Yael, my source of energy and inspiration.

ACKNOWLEDGMENTS

I would like to express my special appreciation to my Supervisors, dr. Judit Zeller, PhD and dr. Gábor Mészáros, PhD, for their professional, helpful and kind assistance; to the Law Faculty, for giving me the opportunity to participate in their program; to my dear friends, the Honorable Judges, dr. Tamás Túri and dr. Beáta Sámik, who made me feel at home in the beautiful city of Pécs and encouraged me along the way.

LIST OF MAJOR ABBREVIATIONS

AC - Appeal Cases (UK)

A-G – Attorney General

All E.R. – All England Reports (UK)

C.P.S. - The Crown Prosecution Service (UK)

Crim. L.R. – Criminal Law Reports (UK)

Cr. App. R. - The Criminal Appeal Reports (UK)

Crim. App. – Criminal Appeal (Israel)

D.P.P - Director of Public Prosecutions (England and Wales)

ECHR - The European Convention for the Protection of Human Rights and Fundamental Freedoms

EWHC - England and Wales High Court

F.C.H. – Further Criminal Hearing (Israel)

H.C.J. – High Court of Justice (Israel)

HRA – The Human Rights Act (UK)

IBA – International Bar Association

JSOCP – Judicial Stay of Criminal Proceedings

P.D. – "Piskei Din" – Israeli Printed Law Reports

R – The Crown (UK)

UKHL - United Kingdom House of Lords

W.L.R. – Weekly Law Reports (UK)

ABSTRACT

The basic right to a fair trial in criminal proceedings is, in many legal systems, one of the most basic constitutional rights, with a possible link to the principle of human dignity. The way to achieve it in a particular legal system might be to ensure a "favourable neighbourhood": Constitutional law that recognizes human rights; a tradition of judicial review; an independent judicial system that is willing to scrutinize acts and decisions of Parliament and Government; and specifically in our case – to review the discretion of the prosecution, and in some cases to stay, to dismiss, the trial. This doctrine is known in the United Kingdom by the expression of "abuse of process" that justifies "Judicial Stay of Criminal Proceedings". Israel "imported" the doctrine and has developed it uniquely. Conceptually, the doctrine corresponds with one of the most significant challenges of legal systems: the broader concept of the role of judges in a democracy as protectors of human rights. This example can examine and explain key elements in the British and Israeli legal systems. The power, which the prosecution holds, is one of the most significant powers of any administrative authority. There is, however, a difference between the judiciary stepping into prosecutors' shoes to discharge the duties that prosecutors should perform and the judiciary providing necessary supervision to prevent arbitrary and unjustifiable prosecutorial decision making. It, therefore, became essential to arrive at an arrangement, whether in legislation or in case law, which would balance the purpose of enforcing the law and ensuring that criminals were punished, against the preservation of fundamental values, including the presumption of innocence, the protection of human dignity, fairness, equality, and due process, in such a way as to prevent distortion of justice. Prosecutors must prosecute, not persecute. They must be consistent, fair, and objective. They may deal with particular individuals harshly or gently for political reasons; it is also possible that race, religion, or nationality may play a role in prosecutorial decision-making. Therefore, the exercise of prosecutorial discretion calls for accountability. It became necessary, in the United Kingdom and in Israel, to allow a defendant to raise before the court arguments to justify the request to stay (actually dismiss) the trial, such as delay in the criminal justice process; breach of promise not to prosecute; loss or destruction of relevant evidence; investigative impropriety; prosecution manipulation or misuse of process or power; selective discriminatory enforcement; entrapment; prejudicial pre-trial publicity, etc. The research aims to explore the relationship between fundamental elements in Constitutional law, judicial independence and legal theory, and the doctrine.

The paper shall present a hybrid overview of the necessary elements that stay behind it. It is

interesting to examine how legal systems with limited and partial constitutional “tools” handle this essential principle of protecting fairness.

ABSZTRAKT

A tisztességes eljáráshoz való jog a bírósági eljárásokban a legalapvetőbb alkotmányos jogok közé tartozik, az emberi jogokkal összefüggő, nemzetközi bírósági gyakorlatban széles körben elfogadott, hogy szoros kapcsolatban áll az emberi méltósághoz való joggal. Ahhoz azonban, hogy egy meghatározott jogrendszerben megfelelően érvényesüljön megfelelő jogi környezetet is biztosítani kell, önmagában az alapjogi bíráskodás nem feltétlenül elegendő hozzá. Vagyis olyan alkotmányt, amely nem pusztán elismeri az emberi jogokat és a bírói jogvédelem lehetőségét, hanem egy független bírói szervezetet is, amely képes alaposan és befolyástól mentesen felülvizsgálni a parlament és a kormány aktusait, valamint a témám alapjául szolgáló esetben, az ügyészségi mérlegelést is melynek eredményeként felfüggeszthető vagy berekeszthető a tárgyalás. Ez utóbbi helyzetet az Egyesült Királyságban az „eljárással való visszaélés” doktrínájaként ismerik, melyre hivatkozással indokolható lehet akár a bírósági eljárás felfüggesztése is büntetőügyekben.

Izrael adaptálta ezt az eljárásjogi jogintézményt, ugyanakkor sajátos módon továbbfejlesztette. Alapjaiban a doktrína összhangban van a demokratikus jogrendszerek legfontosabb feladatával, vagyis a bíróknak az egyéni jogok védelmezőiként betöltött szerepével. A példa elemzése egyúttal segíthet rámutatni a brit és az izraeli jogrendszer legfontosabb elemeire is. A hatalom, amellyel az ügyészség rendelkezik, egyike a legjelentősebbeknek a hatósági szervek közül. Mégis, különbség van aközött, amikor a bíróság átveszi az ügyészség szerepét és aközött, amikor csak a szükséges felügyeletet gyakorolja felette, ezzel megelőzve az önkényes és jogtalan döntéseket. Ezért elengedhetetlenné vált, hogy megállapodás szülessen arról, hogy melyik megoldás képes egyensúlyt teremteni a jog kikényszerítésének biztosítása, illetve a bűnelkövetők megbüntetése és az olyan alapvető értékek megtartása között, mint az ártatlanság vélelme, az emberi méltóság védelme, a méltányosság, a tisztességes eljárás és az egyenlőség: ezeket úgy alkalmazva, hogy megakadályozzák az igazságosság torzulását. Következetesnek, méltányosnak és objektívnek kell lenniük. Lehetséges, hogy az ügyészség keményebben, vagy éppen elnézőbben lép fel bizonyos személyekkel szemben politikai okok miatt, ahogy az is előfordulhat, hogy az illető rassza, vallása vagy nemzetisége befolyásolja az ügyészi döntéseket. Éppen ezért az ügyészi mérlegelési jogkörök elszámoltathatóságát

biztosítani kell. Az Egyesült Királyságban és Izraelben is szükségessé vált, hogy engedélyezzék, hogy az alperes felhozhassa az érveit a tárgyalás felfüggesztése (de valójában megszüntetése) mellett, hivatkozva például az eljárásbeli késedelmekre, nemperlési ígéret megszegésére, a releváns bizonyíték elvesztésére vagy megrongálódására, nyomozati helytelenségekre, manipulált ügyészségre, eljárással vagy hatalommal való visszaélésre, szelektíven diszkriminatív végrehajtásra, tárgyalás előtti hátrányos publicitásra, stb…

A kutatás célja felfedni a kapcsolatot az alkotmányjog alapvető elemei, a bírói függetlenség, a jogelmélet és eme doktrína között. A dolgozat egy hibrid áttekintést ad a háttérben meghúzódó lényeges elemekről. Érdekes megvizsgálni, hogy azon jogrendszerek, melyek limitált és részleges alkotmányos „eszközökkel" rendelkeznek, hogyan kezelik a tisztesség védelmének esszenciális elvét.

INTRODUCTION

Fairness. The basic right to a fair trial in criminal proceedings is one of the most basic constitutional rights, part and parcel of human dignity. The way to achieve it in a particular legal system is to ensure a favourable neighbourhood: Constitutional law that recognizes human rights; a tradition of judicial review; an independent judicial system that is willing to scrutinize acts and decisions of Parliament and Government; and specifically in our case – to review the discretion of the prosecution, and in some cases to stay, to dismiss, the trial.
This doctrine is known in the United Kingdom by the expression of "abuse of process" that justifies "Judicial Stay of Criminal Proceedings".[1] Israel "imported" the doctrine and has developed it uniquely.

Conceptually, the doctrine corresponds with one of the most significant challenges of legal systems: the broader concept of the role of judges in a democracy as protectors of human rights.[2] This example can examine and explain key elements in the British and Israeli legal systems.

In this light, we shall have a closer look at the topic of prosecutorial discretion and judicial review. In hearing criminal cases, the courts have absolute power to determine guilt or innocence. At the same time, in the United Kingdom and Israel alike, the legislator has refrained, in the past, from granting the court, by way of an explicit provision, the power to rule that an indictment filed by the prosecution is to be set aside. This applies even when the charge is obviously tainted with extreme unreasonableness or when the conducting of the trial is clearly in contrast to the public interest or is unfair. The legislator has done so and gave such power to the court only in minor offences (*de minimis*).

In many countries, subordinate to the Attorney General, who heads the prosecution, are many prosecutors who are competent to decide on the filing of an indictment and conduct a criminal proceeding against a defendant. The range of persons authorized to prosecute usually is vast; it may include the Attorney General's office staff, police and municipal prosecutors, private

[1] "Judicial", and not "Prosecutorial". For convenience, in this paper, the abbreviation JSOCP will be used to refer to the doctrine of judicial stay of criminal proceedings.
[2] Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006).

authorized prosecutors etc. Indictments are issued by district prosecutors, police prosecutors, and others without any prior judicial approval or pre-trial screening. In fact, the prosecutor controls the entire proceeding – filing the indictment, refraining from filing it, staying the proceedings, reaching a plea bargain in the course of the trial, filing an appeal, and so forth. In Israel, we follow Britain, by law, the expediency principle. Prosecutors ask first whether there is enough evidence to provide a realistic prospect of success in a case and then decide whether the prosecution is in the public interest.

This power, which the prosecution holds, is one of the most significant powers of any administrative authority. There is, however, a difference between the judiciary stepping into prosecutors' shoes to discharge the duties that prosecutors should perform and the judiciary providing necessary supervision to prevent arbitrary and unjustifiable prosecutorial decision making. In light of the broad powers of the prosecution, it was essential to arrive at an arrangement, whether in legislation or in case law, which would balance the purpose of enforcing the law and ensuring that criminals were punished, against the preservation of fundamental values, including the presumption of innocence, the protection of human dignity, fairness, equality, and due process, in such a way as to prevent distortion of justice.
Prosecutors must prosecute, not persecute. They must be consistent, fair, and objective. They may deal with particular individuals harshly or gently for political reasons; it is also possible that race, religion, or nationality may play a role in prosecutorial decision-making. Therefore, the exercise of prosecutorial discretion calls for accountability.

It became necessary, in the United Kingdom and in Israel, to allow a defendant to raise before the court arguments to justify the request to stay (actually dismiss) the trial, such as delay in the criminal justice process; breach of promise not to prosecute; loss or destruction of relevant evidence; investigative impropriety; prosecution manipulation or misuse of process or power; selective discriminatory enforcement; entrapment; prejudicial pre-trial publicity (“trial by the media”; “moral panic”); unique personal circumstances, etc.

Under British case law, the court has the inherent authority to set aside an indictment that constitutes “abuse” of the defendant under the circumstances of the case.[3] The approach adopted by English case law, which originated in the demand for “abuse” of the defendant by

[3] *A-G of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 935.

the prosecutorial authorities[4], subsequently imposed a broader test, according to which the defendant needed merely to indicate "gravely improper" conduct.[5]

In 2007, the Knesset (the Israeli Parliament) adopted the amendment to the Criminal Procedure Law (Amendment No. 51). This New Law added a preliminary argument to the arguments that the defendant is entitled to raise: *"... The filing of the indictment or the conducting of the criminal proceeding is in material contradiction to the principles of justice and legal fairness***.**"

At first glance, it seems that Parliament has thereby recognized a preliminary argument which exploits concepts of "justice" and "legal fairness" and the granting of pro-discretion to the Court, which may decide whether it is fitting and proper to conduct the trial against the defendant, even regardless the question of guilt or innocence, and even without examination of all the relevant facts.

This new law emphasized a unique evolution of the doctrine of JSOCP, a rare legislative action based on British tradition.

Indeed, Israel has one of the most interesting legal systems, as a *sui generis* mixed jurisdiction and a legal system with a unique Constitutional law. From a narrower point of view, when talking about a distinct group of hybrid systems, scholars often refer to jurisdictions in which the Romano-Germanic tradition of Civil law and the Anglo-American practice of Common law play a vital role. The "third legal family"[6] includes Quebec, Louisiana, South Africa, Scotland, Israel, the Philippines, Puerto Rico, Cyprus, and Malta.

Israel is an atypical mixed legal system.[7] First, it is the only mixed jurisdiction, not a former Civil law country that England or the United States later took over. Instead, it is a Common law system that step-by-step embraced Civil law. Starting in the mid-nineteenth century, the

---

[4] See *Connelly v D.P.P.* [1964] 2 All E.R. 401.

[5] See *R v Looseley* [2001] 4 All E.R. 897; the English case law subsequent to that ruling followed it, and mentioned by consent the more flexible test for the application of principles of fairness and justice. See e.g. *R. v Grant* [2005] EWCA Crim 1089; *R. v Beardall* [2006] EWCA Crim 577; *R. v Harmes* [2006] EWCA Crim 928. The House of Lords also ruled that the withdrawal, by the prosecution, from a decision or a promise not to prosecute was likely to be deemed to constitute an unfair proceeding, which would justify a stay of the proceedings or cancellation of the indictment by the Court. See *Jones v Whalley* [2006] UKHL 41.

[6] Vernon Valentine Palmer, Introduction to the Mixed Jurisdictions, in *Mixed Jurisdictions Worldwide: The Third Legal Family* (Vernon Valentine Palmer ed., 2nd ed., 2012) p. 3.

[7] Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, Loyola Law Review, Vol. 69, 2016, p. 660.

law in Palestine had a significant influence on French law. Still, during the thirty years of the British Mandate over Palestine (1917–1948), local law underwent a massive process of Anglicization. Therefore, Israel was established to a great extent as a Common law jurisdiction. Only during the 1960s and 1970s did Israel becomes a hybrid legal system. A few legal fields, private law and, later on, criminal law, gained more and more of the Civil law tradition. In part, this phenomenon followed the massive Jewish immigration from Europe and the Muslim world. Second, Israel's mixed legal system is unique as there is no single influence upon its laws. Israeli private law is based on various sources. It is a diverse legal system that "borrows" from several foreign systems: Italian, German, and French, as well as American and English. Of course, Israel's legislators and judges use foreign law only as a source of comparison and inspiration.

Israel also has an atypical constitutional law system.[8] The Declaration of Independence, back in 1948, stated that the State of Israel "will be based on freedom, justice, and peace… will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or gender… will guarantee freedom of religion, conscience, language, education and culture and will safeguard the Holy Places of all religions".[9] Yet, the Declaration is not a constitution; it even says that a constitution shall be adopted "not later than 1st October 1948". It never happened. The "Knesset" decided not to draft a constitution but to prepare Basic Laws - each to be a chapter in the future constitution. As of today, there are 13 Basic Laws in Israel. These basic laws deal with the formation and role of the principal state's institutions and their relations. A few of them also protect certain civil rights. While these laws were initially meant to be draft chapters of a future Israeli Constitution, they are already used daily by the courts as a kind of a constitution. As of today, the basic laws do not deal with all constitutional issues, and there is no deadline set to complete the process of merging them into one comprehensive constitution. Only a few Basic Laws have a "limitation clause," *e.g.,* Basic Law Human Dignity and Liberty, enabling the Courts to exercise judicial review upon legislation. However, the right to a fair trial is not explicitly mentioned.

The criminal procedure in Israel is an adversarial one based on the Anglo-American legal tradition. In Israel, a judge, or a panel of three judges in grave matters, of a first instance, sits

[8] Suzie Navot, *Constitutional Law in Israel* (2nd ed., Wolters Kluwer, 2016), pp. 23-24.
[9] An English version of the Declaration is available at:
https://main.knesset.gov.il/en/about/pages/declaration.aspx

as a tribunal of fact, without a jury or lay assessors (there are lay assessors only in Labour Courts), and must always provide reasons, which are also appealable. The parties are those who are responsible for bringing the evidence in any way they see fit (Pre-trial discovery of the evidence to the Court exists only in civil cases). When the trial begins, the tribunal sees only the indictment in front of it, not the evidence.

Purpose and relevance of the research – filling a gap – research questions

The British literature regarding the doctrine is quite limited. There are only several leading books dealing with it.[10] Those previously published studies are limited mainly to local British materials;[11] they usually map the case law in Britain not chronologically but according to the different examples of abuse.[12]

It seems that no previous study has investigated the chronological evolution of the doctrine. In addition, little discussion can be found about the justifications and the legal theoretical foundations for it. Also, far too little attention has been paid, in English or any other foreign language besides Hebrew, to the development of the doctrine in Israel.[13] Recent developments in the field may lead to a renewed interest in the core justifications of the doctrine.

The originality and importance of this paper are a new methodology and a new idea of hybridization. The research aims to explore the relationship between fundamental elements in constitutional law, judicial independence and legal theory, and the doctrine. The thesis shall present a hybrid overview of the necessary elements that stay behind it. It is interesting to examine how legal systems with limited and partial constitutional "tools" handle this essential principle of protecting fairness. Interestingly, both the United Kingdom and Israel lack a comprehensive constitution. There are some "trends" or "winds" of "constitutionalism," but both countries' "Constitution" is not complete. How does it affect the court's ability and willingness to implement its powers of judicial review and discretion upon prosecutorial

[10] See, mainly, Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, (2nd ed., Oxford Monographs on Criminal Law and Justice, Oxford, 2008).
[11] Colin Wells, *Abuse of Process,* (3rd ed., Oxford, 2017).
[12] David Young, Mark Summers, David Corker, *Abuse of Process in Criminal Proceedings,* (4th ed., Bloomsbury, 2015).
[13] The only comprehensive textbook in Hebrew is: Yisgav Nakdimon, *Judicial Stays of Criminal Proceedings,* (3rd ed., Nevo, 2021) [Hebrew].

decisions?

On the one hand, the dissertation will examine if, in the United Kingdom, the primary justification for using the doctrine is of a "procedural" nature, one of "due process", in order to avoid "abuse of process". On the other hand, the work will examine if the primary justification in Israel is a constitutional one of "material" nature, "human dignity".
The research highlights that the Israeli Basic Law Human Dignity and Liberty, 1992, also necessitate these justice and fairness principles. Even without a comprehensive formal constitution, and although this Basic Law generally speaks only about "liberty" and "dignity", we should wonder whether it is up to the courts to determine, on a case-by-case basis, what it means? Does it also mean due process and a fair trial? Do the tools of judicial review – including the causes of reasonableness and proportionality and the principle of equality – serve as criteria for examining the public interest in the indictment, just as they serve for the examination of any administrative act, whether individual or general? Is it possible to "constitutionalize" or "codify" the doctrine? If indeed the justifications vary, does it influence the tendency (or the reluctance) of the courts to use the doctrine? It seems that the justification or the source has less impact; more relevant influential factors are the independence of the judiciary, the general tendency to implement judicial review on governmental bodies, and the way that courts, in a given system, make the balance between contradicting interests. Paradoxically, this broad discretion, taken by the courts or given by the legislator to the courts, has not been utilized. Can we determine or foresee the courts' "enthusiasm" to use their authority? My interest in this topic developed while serving as a judge for seventeen years; my personal experience prompted this research.

Methodology and structure

This qualitative research focuses on collecting and analysing textual data: Books, articles, and judgments. It is mainly descriptive. The research will hold a conceptual analysis of the doctrine of judicial stay of criminal proceedings. Special attention will be paid to explaining the development of Israeli Constitutional law and fundamental relevant aspects of British Constitutional law.

This is not a quantitative study, and it is unable to encompass the entire scope of cases across all the judicial tribunals in the United Kingdom and Israel. Therefore, and not only due to

practical constraints, but it also does not provide a comprehensive or statistical review of the use of the doctrine in lower courts. The focus will lay on the higher instances' rulings, and it is hoped that this research will provide a deeper understanding of the doctrine, especially in the light of other legal institutions.

The dissertation is composed of seven themed chapters.
The first chapter describes the relevant aspects of the British Constitutional law, focusing on the British Human Rights Act, the linkage between constitutionalism and trust in the United Kingdom, the model for protecting human rights, and the judicial review under the Human Rights Act.

It will then go on, in the second chapter, to describe, chronologically, the development of the doctrine of JSOCP in the United Kingdom. The chapter has been organized into sub-issues: the Late 60's and the 70's of the twentieth century, the 1980's, the 90's (as the decade of the doctrine's expansion, the doctrine during the 2000s (far from conclusiveness), and the main justifications for implementing the doctrine (asking whether there is a rule of thumb?).

In order to establish proper grounds for understanding the legal tradition in which the doctrine exists, the third chapter is concerned with relevant essential elements of the Israeli legal system. Therefore, the chapter will give a brief history of Israeli law, present Israel as a unique mixed legal system, describe the court system and structure, and then will dive into two critical dimensions: judicial independence and the principle of judicial activism.

The fourth chapter will follow up with a description of the fundamental elements of the Israeli Constitutional law, including the Israeli structure of Government, the role of the Attorney General, the absence of a written constitution, the role of the Judiciary in defending civil rights, and the Israeli constitutional "revolution".

Chapter five will then examine, within this background, the move in which Israel "imported" the doctrine, firstly only by case law, with a solid linkage to terms like human dignity and the constitutional right to fair and due process. The chapter will then present the JSOCP as a constitutional remedy and describe the pre-legislative judgments of the Israeli Supreme Court in detail.

The sixth chapter holds a broad discussion of the unique "legalization" of the doctrine through a new law enacted by the Israeli Parliament in 2007. The chapter begins by mentioning the academic criticism regarding the doctrine, the committee discussions and the legislative-parliamentary History; it continues to describe the JSOCP Bill, the discussions at the Constitution, Law and Justice Committee and the Knesset Assembly; it suggests guidelines for interpreting the JSOCP Law and criticizes the outcome of "from misconceiving to ignoring" by the Supreme Court.

In the seventh chapter, I am briefly summarizing the theory of legal realism to find an explanation for what seems to be a casuistic case-by-case approach to the doctrine.

CHAPTER 1

RELEVANT BACKGROUND: ELEMENTS OF THE BRITISH CONSTITUTIONAL LAW

1.1 Introduction

The United Kingdom has an unwritten constitution. In other words, there is no single document (or series of documents) that is known as the constitution. The lack of a codified constitution also means that there is no set of rules that is antecedent to the state and government institutions and could therefore be said to form an act of foundation. The most characteristic feature of the United Kingdom constitution is that it lacks formal codification. Nevertheless, it displays the broad characteristics of what has been termed liberal democracy and achieves this without having guarantees set out as part of a set constitutional framework.[14]

Indeed, the concept of Parliamentary supremacy is deeply rooted in Britain's cultural and legal tradition.[15] Britain is well known for exporting parliamentary democracy to different countries and legal systems throughout the world, making it their rule of law.[16] The courts' incompetence to declare primary legislation void became part and parcel of the British legal system and Britain's social culture. Britain has traditionally painted the courts as disabled lawmakers and stressed their function as law-declarers. [17]

The British Human Rights Act 1998 (HRA) took effect on October 2, 2000.[18] The HRA assimilates the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or "Convention")[19] into British law. Some jurists and scholars consider the ECHR a pivotal factor in Europe's reaction to World War II, which created a new awareness

---

[14] Peter Leyland, *The Constitution of the United Kingdom – A Contextual Analysis* (Bloomsbury Publishing, 3rd ed., 2016), pp. 55,60.
[15] Anthony V. Baker, *So Extraordinary, So Unprecedented an Authority: A Conceptual Reconsideration of the Singular Doctrine of Judicial Review,* Duquesne Law Review., Vol. 39, 2001, p. 729; Albert V. Dicey, *The Law of the Constitution* (Oxford University Press, J.W.F.Allison, ed., 2013), pp. 27-50.
[16] For the history of Parliament see: Anthony W. Bradley, Cesare Pinelli, *Parliamentarism*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), pp. 650-652.
[17] Michael Curtis, *The Government of Great Britain,* in Introduction to Comparative Government (4th. ed., 1997) pp. 48-89.
[18] Available at: https://www.legislation.gov.United Kingdom/United Kingdompga/1998/42
[19] Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

of civil liberties and fundamental human rights.[20] One of the most crucial lessons the European countries learned from the Nazi Germany regime was to use constitutions and constitutional guarantees, which helped judicial review tools to restrain European governments' power and to prevent another 'Weimar-style' democratic backsliding. The HRA challenges the old British concept that Parliament can do no wrong. Scholars have noted that the HRA undoubtedly may become one of the most fundamental constitutional documents since the Bill of Rights, and that will cardinally affect the practice of traditional constitutional principles[21] and the whole British legal culture.[22]

Another pivotal element that plays a vital role in democracies is the element of trust. Trust is one of the most crucial foundations of political legitimacy.[23] In the United Kingdom, unlike in the United States, most people do not have a predominating mindset of distrust for their government; people do not obtain an inherent suspicion of the political authorities like Parliament and Government. Without such a mindset, it is quite understandable that there has never been a public exclamation for increased judicial review of primary legislation. It is particularly noteworthy that if one compares the British legal system with others in the United Kingdom, a more restrained judicial review of administrative actions has evolved. British judges are generally reluctant to limit the exercise of ministerial administrative power.[24] In this light, the absence of judicial power to strike down acts of Parliament in the United Kingdom, combined with a well-established tradition of Parliament's supremacy and public trust in it, has enabled a unique model for preserving basic rights. This model, which is anchored in British tradition and would not necessarily function well in other legal systems, does not focus necessarily on the judiciary as a guardian of human rights. That approach argues that Government and Parliament play leading roles in human rights protection. Conceptually, a culture of rights does not have to address mainly the courts rather than look for representative politics for solutions in order to value disputes and competing interests.[25] Instead, it revolves

[20] James Young, *The Politics of the Human Rights Act,* Journal of Law & Society, Vol. 26, 1999, p. 27.
[21] David Feldman, *The Human Rights Act 1998 and the Constitutional Principles,* Legal Studies, Vol. 19, 1999, p. 165.
[22] Murray Hunt, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession,* Journal of Law & Society, Vol. 26, 1999, p. 86.
[23] Barbara A. Misztal, *Trust in Modern Societies* (Polity Press, 1996), p. 245.
[24] Michael Curtis, *The Government of Great Britain,* in Introduction to Comparative Government (4th. ed., 1997) p. 89.
[25] Tom Campbell, *Human Rights: A Culture of Controversy,* Journal of Law & Society, Vol. 26, 1999, p. 6.

around Parliament and Govemment's elevated sensitivity to their traditional roles as the dominant protectors of human rights.

1.2 The Human Rights Act (HRA)

Simply put, the Parliament did not enact the HRA in 1998 due to a revolutionary moment. In fact, Parliament adopted the HRA through the regular procedure and not by a special constituent assembly. Moreover, even a special majority was not needed. Still, many regard the HRA as a legal and social revolution. [26] It constitutes a new system for protecting "Convention rights" contained in Section one of the Act. The Convention's rights include rights to liberty, freedom of expression, thought, conscience, religion, privacy, and a fair and public hearing in the determination of civil rights and obligations and criminal charges. The HRA follows Europe's pattern of adopting the European Convention on Human Rights instead of drafting a new set of constitutional rights from the very beginning. The HRA incorporates a substantive alteration of the judge's role in British society, giving the judiciary enlarged judicial powers. First, the HRA directs the courts to interpret laws in a compatible way with the European Convention, if possible. Second, the HRA empowers the courts to issue a "declaration of incompatibility" when domestic primary legislation contradicts Convention rights. The above-mentioned tool rejects the classical concept of judicial review; it formulates a unique model of incompatibility. Therefore, a British court can issue such a declaration whenever it cannot possibly interpret the relevant act more consistently with the Convention.[27] Such a declaration, especially by a higher court, may trigger the Parliament to amend the relevant law.[28]

Some jurists contend that the new Act has caused an undeniable power shift from Parliament to judges,[29] given the fact that judges theoretically have the authority to affect existing

[26] Ariel L. Bendor, Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model*, American University International Law Review, Vol. 17, 2002, p. 683.
[27] Geoffrey Marshall, *Two Kinds of Compatibility: More About Section 3 of the Human Rights Act 1998,* Public Law, Vol. 3, 1999, p. 377.
[28] Dean Spielmann, *Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), pp. 1234-1235.
[29] Keith. D. Ewing, *The Human Rights Act and Parliamentary Democracy,* Modern Law Review, Vol. 62, 1999, p. 79.

legislation by their declaratory powers; such a declaration would encourage Parliament to amend the law in question. However, the power to issue an incompatibility declaration departs considerably from the judicial power to strike down a legislative act, as is the case in the American judicial system. Under the unique approach adopted in Britain, an "unconstitutional" act will remain in force until Parliament amends it. Thus, Parliament has arguably kept its ultimate sovereignty over the court. The British model is consistent with the continuing centrality of the British Parliament as the core democratic institution. However, the British courts still have less power than the courts of other European countries, which have endowed their domestic courts with the authority to annul primary legislation.

1.3 The linkage between Constitutionalism and Trust in the United Kingdom

According to the Human Rights Act, the component of trust should not be ignored in evaluating possible developments. The Act, by its incompatibility option, clearly establishes that Parliament is not beyond scrutiny. Nevertheless, while the judiciary may declare an act of Parliament incompatible with the Convention, it fails to strike down the breaching primary legislation. To understand this markedly British model, one must also recognize the phenomenon of trust in the Government.

British culture does not have a deep-rooted ethos of distrust in Parliament or Government, unlike other places. The Parliamentary system in the United Kingdom does not draw a clear separation between the two. In comparison, the American governmental system requires the executive branch to maintain total separation from the legislative branch, for example, by prohibiting a member of Congress from becoming a judge. A rigid separation between the branches of government present within the United States aims to limit the powers of each. Although Americans may determine that separation contributes to safeguarding human rights, such a belief is not found in the British model. The American Constitution offers that all three branches of government, including the judiciary, are equal. The British judiciary also enjoys professional independence but nevertheless is entirely subject to the legislature's will. The British courts have the discretion to interpret acts of Parliament, but their power to do so is

limited.[30] There are a few noteworthy exceptions, but the general principle has remained clear even under the Human Rights Act: the clear language of an act "excludes a consideration of anomalies, i.e., mischievous or absurd consequences".[31] In fact, the law is what Parliament says it is. Indeed, even the judicial power to declare acts of Parliament incompatible with the Convention is quite remote from constituting absolute power over parliamentary actions. The concept of Parliament's supremacy, which can still be found in the Human Rights Act, reflects deeply ingrained cultural beliefs than it is a legal technicality. In fact, parliamentary supremacy mirrors a great deal of British political, social, and cultural views. It rules out the option of judicial review of primary legislation and, in the past, has also led to a rather constrained judicial review of administrative actions. Even though more vigorous judicial control over public bodies has developed in Britain in recent decades, the key attitude of self-restraint has survived due largely to the judiciary's trust in other governmental authorities. A firm presumption of legality still plays a key role in framing the boundaries of the courts' intervention in governmental affairs. [32]

It can be said that the British paradigm of restrained judicial review reflects the public's limited trust in the judiciary. Some researchers have even argued that British judges, who are pulled from a narrow social class, are the “enemy” of any reform.[33]

Judicial activism at large arguably requires a *conditio-sine-qua-non,* i.e., convincing judges of their power and responsibility to overturn governmental decisions without damaging their impartial status.[34] British courts' reluctance to interfere with matters that fall into the noman's land of law and politics, e.g., issues concerning political matters, might be due to the notion of their limited role in the legal system.

---

[30] David Williams, *The Courts and Legislation: Anglo-American Contrasts,* Indiana Journal of Global Legal Studies, Vol. 8, 2001, p. 323.
[31] *Stock v Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231, 239.
[32] Herbert M. Kritzer, *Courts, Justice, and Politics in England,* in Courts, Law, and Politics in Comparative Perspective (Yale University Press, 1996), pp. 81-100.
[33] Gareth Jones, *Should Judges Be Politicians?: The English Experience,* Indiana Law Journal, Vol. 57, 1982, p. 211.
[34] The term of judicial activism is often used to describe the willingness of a judge to strike down the action of another branch of government or to overturn a judicial precedent. See, for example: Brice Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007); Richard A. Posner, *How Judges Think* (Harvard University Press, 2008); Mark Tushnet, *Taking Back the Constitution: Activist Judges and the Next Age of American Law* (Yale University Press, 2020). There are others who decline to classify judges who decide cases based on their personal views of the world as activists. See, for example: Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006), pp.263-265.

1.4 The Model for Protecting Human Rights

This analysis of the link between constitutionalism and trust in the United Kingdom sets the stage for a background understanding of Britain's new judicial role vis-a-vis primary legislation. The British attitude is best outlined as a government-parliament oriented model for protecting human rights. To fully acknowledge this argument, one must remember that the British Parliament is perceived as the deviser of the law and as the protector and nurturer of common moral norms. It is an unwritten rule in Britain that there are certain things that Parliament will not do, including trampling on fundamental human rights.[35] Despite the lack of formal, written rules, British constitutional law is unique for its conventions, which have not deviated. Both Parliament and government share similar public trust in their sense of proportion and reasonableness.

Parliament must show preparedness to pass as legislation only bills that mirror a commitment to the Convention rights, as captured in the Human Rights Act. The basis of the Human Rights Act has been formed within the structure of this cultural background. The Government was expected to only introduce bills into the Parliament that were compatible with the letter and the spirit of the Act. Any breach by the Government or Parliament of these expectations may be classified as "certain things" that the latter should not do.

Whenever a court declares that an act of Parliament is incompatible with a right protected by the Convention, it is expected that a minister or Parliament will attach heavyweight to this judicial statement. Rejection by either the executive or legislative branch to re-evaluate the legislation involved might be considered misuse or abuse of authority, and it is expected that such conduct would not be tolerated.

However, following the British model, a declaration of incompatibility does not entail a duty to amend the law following the court's declaration. Parliament's supreme authority manifests in its ability to retain a law deemed by a court as incompatible with the Human Rights Act. However, such an exercise in authority is appropriate only when Parliament is confident that the legislation in question is, in fact, consistent with the Human Rights Act.

---

[35] Lord Irvine of Lairg, *Sovereignty in Comparative Perspective*, New York University Law Review, Vol. 76, 2001, p. 1.

Thus, the influence of the Human Rights Act on the day-to-day agenda of the British Parliament may be far greater than its impact on the judiciary's role in shaping daily life. Parliament can also uphold compatibility with the Convention by assuring that all legislation it passes is consistent with its rights. The mere fact that the British courts lack the power to nullify acts of Parliament may actually induce a willingness among the courts to issue declarations of incompatibility more frequently.[36]

The primary responsibility of the British Government and Parliament also enables them to refrain from amending an Act, despite a judicial declaration of its incompatibility. Notwithstanding the heavyweight of such a declaration and the possibility of an appeal to the European Court of Human Rights (ECtHR) in Strasbourg, the legislative and executive authorities preserve the prerogative of inaction. This policy, adopted by the Act, is not coincidental; it preserves the tradition of regarding Parliament as standing at the heart of British Constitutionalism. [37]

1.5 Judicial Review

The conception of separation of powers formulated in the Human Rights Act diverges from the conception that prevails in systems where courts are entitled to strike down primary legislation.[38] With Parliament retaining the upper hand, the British system cannot be classified as a "pure" judicial review system.

Legal systems that adhere to pure judicial review (such as Canada, Germany, Italy, Sweden, and the United States), and the British system, share the common feature of broad judicial discretion in deciding social, political, and ethical issues. This broad discretion is part of the

[36] But see: Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain,* Loyola of Los Angeles International and Comparative Law Review, Vol. 22, 2000, p. 357.

[37] United Kingdom courts are cautious in extending Strasbourg jurisprudence too far in marginal cases, but sometimes they anticipate the developments in circumstances where the ECtHR has yet to rule. It should be added that section 2 of the Human Rights Act does not displace the normal operation of stare decisis. Indeed, lower courts remain bound to follow the decisions of higher courts, even where they are inconsistent with subsequent Strasbourg authority. See: Dean Spielmann, *Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 1245.

[38] Juliane Kokott, Martin Kaspar, *Ensuring Constitutional Efficacy*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), pp. 797-798.

judge's power to balance conflicting rights and interests. Before the Act entered into force, strong judicial involvement was not totally unfamiliar to the British legal system; however, since its enactment, it is undoubtedly correct to suggest that this type of judicial involvement has been reinforced. This is true even though the British courts, unlike their counterparts in pure judicial review systems, lack the authority to strike down acts of Parliament unilaterally.

Given the power of the courts to furnish declarations of incompatibility, the British government-parliament-oriented model cannot be classified as completely lacking judicial review. The Act's specific provision relating to this extraordinary declaratory power constitutes what might be termed a “non-pure” judicial review model. This model enables the courts to extend more intensive protection to human rights.[39] At the same time, however, the model does not arm judges with what might be described as a "non-conventional" weapon of striking down acts of Parliament. Thus, with its non-pure judicial review characteristics, the Human Rights Act allowed Britain to edge cautiously forward into the age of constitutionalism without introducing chaos into the system by demolishing its tradition of trusting Parliament.

This unique constitutional framework of non-pure judicial review might encourage the courts, in the future, to take a more active role in Britain's new constitutional age. The limited power granted to the British courts might encourage them to overcome the natural reluctance to exert judicial power over primary legislation.

The role of the courts has been transformed in recent years. The government responded with important reforms. It decided to introduce a much stricter separation of powers but to keep sovereignty in the hands of Parliament. The ancient office of Lord Chancellor has been reformed. The Constitutional Reform Act 2005 introduced a new system of judicial appointments, placing the primary responsibility for appointments with an independent appointments commission. Serving judges have lost the right to be sitting members of the House of Lords in its legislative capacity. The Judicial Committee of the House of Lords has been replaced by a Supreme Court, with similar composition and powers to its predecessor.

By requiring public bodies to act lawfully, judicial review imposes legal limits on decision-making in the public domain. The grant of judicial review is discretionary in the sense that claims (formerly called applications) for judicial review are assessed by a judge who will consider whether they are sufficiently well-founded to proceed.

---

[39] Ian Leigh, Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act,* Cambridge Law Journal, Vol. 58, 1999, p. 509.

It is clear that the HRA 1998 establishes a new statutory type of illegality by requiring ministers and public officials at all levels to exercise their powers in ways that are compatible with Convention rights. Victims may take judicial review proceedings to contest any violation of Convention rights by a public authority. The standard of review which is applied in cases involving ECHR rights is proportionality (rather than unreasonableness or irrationality).[40] In essence, the administrative court must determine whether the interference with Convention rights has been proportionate.[41]

We may have reached a paradoxical situation where the courts' weakness in a non-pure judicial system may be a source of judicial activism. The fact that a court decision does not have the effect of striking down a law might encourage judges to exercise their limited powers to the fullest in interpreting existing laws in accordance with the liberal view drawn by the Human Rights Act. It also might help develop a legal culture more compatible with the spirit of human rights. Thus, judges in the United Kingdom might feel freer to assume an active role in protecting human rights than their colleagues in sheer judicial review systems after getting accustomed to their new role. Maintaining Parliament's supremacy might help the British courts overcome their reluctance to participate in the civil liberties arena, exercise their interpretative and declarative powers intensively over primary legislation, and scrutinize the discretion of governmental bodies. The Prosecution is one of them.

To take the wind out of the sails, one may argue that things might change due to the vote of 23 June 2016 to leave the European Union (EU) (The "BREXIT"). The Human Rights Act – the main instrument for protecting human rights in the United Kingdom – will expectedly not be directly affected. However, the formal disappearance of EU fundamental rights law from the United Kingdom legal order will lead to a disentrancement of human rights law more generally. This development is likely to lead to heightened uncertainty in this area, particularly if the Government decides to go ahead with plans to repeal the Human Rights Act.[42] It is open to debate whether this change will have any effect on the JSOCP doctrine or not.

[40] See, in depth: Aharon Barak, *Proportionality*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013), pp. 738-755.
[41] Peter Leyland, *The Constitution of the United Kingdom – A Contextual Analysis* (Bloomsbury Publishing, 3rd ed., 2016), pp. 263-288.

[42] Tobias Lock, *Human Rights Law in the UK After Brexit*, Public Law, Vol. Nov. 2017, p. 117.

CHAPTER 2
ABUSE OF PROCESS AND JUDICIAL STAY OF CRIMINAL PROCEEDINGS IN THE UNITED KINGDOM

2.1 The 60's and the 70's of the Twentieth Century

Known in British criminal law as the "Abuse of Process" principle, [43] the JSOCP (Judicial Stay of Criminal Proceedings) doctrine is well-established in the British law system. We may argue that the doctrine combines two main aspects presented above: taking human rights into account and exercising judicial review.

It was formed in 1964 in the House of Lords' judgment in the case of *Connelly*.[44] The case concerned a defendant who took part in an armed robbery during which a man was killed. Though found guilty of committing murder, the conviction was later overturned in an appeal court on the grounds that in the first instance, the judge misdirected the jury. Later, the defendant was retried on the same sequence of events for committing robbery. The defendant's claim that he was already tried for these events was overruled since the murder he was prosecuted for in the first trial is materially different from the robbery felony he was accused of in the latter.

Notwithstanding, the House of Lords raised the question of whether the second indictment against the defendant - issued for the same sequence of events he was already tried for - constitutes an "Abuse of Process" that justifies the second trial's dismissal. The House of Lords determined that the second trial does not constitute an Abuse of Process since the United Kingdom criminal proceedings at the time prevented combining murder and robbery crimes in a single indictment. Nevertheless, in this judgment, the House of Lords established the foundations of the "Abuse of Process" criminal law doctrine, titled in Israel as the "Judicial Stay of Criminal Proceedings" doctrine.

The head of the panel Lord Reid determined it should be within the criminal court's jurisdiction from now on to prevent judicial proceedings in case of an "Abuse of Process". Lord Devlin joined this view, mentioning that once an indictment was issued in the United Kingdom at the

[43] Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed., Oxford Monographs on Criminal Law and Justice, Oxford, 2008); David Young, Mark Summers, David Corker, *Abuse of Process in Criminal Proceedings* (4th ed., Bloomsbury, 2016); Colin Wells, *Abuse of Process* (3rd ed., Oxford, 2017).

[44] *Connelly v D.P.P.* [1964] 2 All E.R. 401.

time, the criminal court was required to conduct a trial unless one of four dismissal conditions applied: 1) the indictment was impaired; 2) the defendant's "I was already tried" claim was applicable; 3) the General Attorney delayed the proceedings; 4) The court lacked the jurisdiction to conduct the proceedings regarding the case.
Lord Devlin determined that the fifth condition for trial dismissal should be added, namely that the court may prevent conducting the procedure altogether if the circumstances indicate a "gross abuse of process". He based this rule on three arguments:
First, he mentioned that British criminal law has always acknowledged the court's jurisdiction to prevent injustice toward the defendant. This was evident over the years from the judicial discretion exercised by courts in the United Kingdom, securing justice for the defendant. Second, Lord Devlin indicated that in Civil law, the court's inherent jurisdiction to prevent abuse of process and adjourn minor and invidious procedures had been known for years, and the rationale behind it also applies to criminal law. Third, if no restrictions are put on the prosecution's power to break one criminal case into several indictments, the defendant may suffer injustice and abuse of process. It is appropriate and desirable that the court would deliberate a single factual case just once in order to maintain public trust. Lord Devlin added that the criminal court might not ignore its duty to ensure that any party's judicial proceedings were not abused, even if they represent the prosecution authorities.

This duty is laid upon the court, and it may not be dismissed and laid upon the prosecution. As stated emphatically by the British Justice: "Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort, there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused".[45]

In view of these principles, Lord Devlin came to the conclusion that once a defendant's double jeopardy claim is not accepted, then if the court finds that issuing a second indictment against him for the same case constitutes an abuse of process by the prosecution, the criminal proceedings against the defendant may be dismissed altogether. Similarly, Lord Pearce determined in this judgment that it is within the criminal court's jurisdiction to prevent multiple criminal procedures against a defendant for the same case even if an "I have already been tried"

[45] Lord Devlin in *Connelly*, at page 1354.

claim is not applicable, yet trying him again is unjust and constitutes an abuse of court proceedings.
Nevertheless, Lord Morris and Lord Hodson, two justices in the same panel, thought differently. Lord Morris negated the creation of another option for the dismissal of a criminal procedure. In his view, which Lord Hodson supported, feeling sorry for the submission of yet another indictment is not a sufficient reason to enable the judge to dismiss the procedure. Lord Hodson added that the court's jurisdiction in criminal proceedings should be narrowed to fewer material issues rather than the absolute dismissal of the proceeding.

This issue was raised again in 1976, twelve years later, in the case of *Humphrys*, [46]where a man was brought to trial for riding a motorcycle while his license was invalid. The defendant admitted his license was not valid at the relevant period of time but claimed he was not the one who rode the motorcycle on the date designated in the indictment. He further claimed he did not ride the motorcycle all that year. His claim was accepted, and he was acquitted. However, it was later found that the defendant did commit the offence he was tried for. As a result, he was retired for giving false testimony in his first trial. The first instance convicted him, but the appeal court later dismissed the judgment. The case reached the House of Lords, which - *inter alia* - raised the question of whether issuing the second indictment against the defendant constituted an abuse of court proceedings by the prosecution. They have determined that the answer to this question is no under the circumstances. Nevertheless, most of the panel justices agreed in principle with the judgments of Lord Devlin and Lord Pearce in the case of *Connelly* and acknowledged the judicial jurisdiction for a stay of proceedings.

Since the rulings in the cases of *Connelly* and *Humphrys*, the United Kingdom law ruling acknowledged the criminal courts' inherent jurisdiction to apply a stay of proceedings in case of abuse of the judicial process.
The circumstances in both cases concerned prosecuting a defendant more than once for the same sequence of events. Nevertheless, court ruling in the following years expanded the doctrine's application in many other situations, since the rationale that a court may dismiss proceedings in cases of abuse of process seemed appropriate in other cases, as seen in a variety of examples: it was mentioned in cases of impairments in the acts of the investigative authorities which may have damaged a defendant's ability to defend himself; it was

[46] *D.P.P. v Humphrys* [1976] 2 All E.R. 497.

implemented in indictments which were filed merely to prevent the application of the statute of limitation; it was pointed out regarding filing an indictment a very long time after the offences were allegedly committed, which could have impaired the defendant's right to defend himself; it was alluded to in situations where the authority was involved in the crime the defendant was accused of or entrapped the defendant to commit a crime; it was applied when the authority tried to withdraw an undertaking not to prosecute the defendant for a criminal act as well as in various other situations where prosecuting the defendant was unjust or concerns were raised regarding abusing his right for a fair trial.

2.2 The 1980's

One of the most important cases of this doctrine was ruled during the '80s. It concerned a long delay in filing an indictment against a defendant, though the statute of limitation had not applied yet. Namely, it regarded cases where a very long time passed from the event and the investigation until it was decided actually to file an indictment.
In 1984, a decision was reached in the case of *Brooks*.[47] The defendant was prosecuted in 1983 for fraud crimes committed in 1978 and 1979. The court determined that in order to rule a stay of proceedings, the defendant needs to prove that the time delay is unjustifiable and, in the balance of probabilities, damaged his ability to defend himself. The court added that if circumstances show that the delay in filing the indictment occurred due to the complexity of the investigation and preparing the file or the defendant's actions, then the delay is justifiable, and a stay of proceedings would not be applied. Later, it was determined that the delay did not cause damage to the defendant since he admitted to committing the offence at the outset. Consequently, the abuse of process was considered only while determining his sentence.

According to this judgment and others that followed, the more material the delay in filing an indictment is, the higher the probability that it is the prosecution's fault and that the defendant may unfairly be damaged by it. Moreover, the weaker the prosecution's explanation of the reason for the delay, the more likely it is that the prosecution was responsible for it. Nevertheless, when examining whether the delay of the trial was an abuse of process, these aspects are only part of the considerations taken into account. In addition to the reason for the delay, the court should examine whether the delay prevents due process from the defendant

[47] *R v Derby Crown Court, exp. Brooks* [1985] 80 Cr. App. R. 164.

due to, for example, difficulty in finding or restoring relevant evidence after such a long time or impairing the expectation interest of the defendant who thought the case had already been closed. As suggested, it is usually the defendant's burden to prove that trying him would do him injustice. This would be hard to prove if the case evidence is based on attainable documents, unlike a case where evidence is based on verbal testimonials and human memory, which fades with time. Still, the mere existence of a long material delay may suffice to conclude that due process for the defendant is not possible. However, the burden of proof would still be hardened if the relevant evidence were written documents.

In 1984, the *Anderson* case concerning a defendant who conducted a traffic offence in 1979 was brought to court.[48] The prosecution's attempts to send him the indictment by mail and a delivery service failed due to a wrong address. Only three years later, when he came to a police station to file a complaint on a different matter, the indictment was informed and provided to him. The court, by Lord Goff, determined that the prosecution caused the delay- either deliberately, due to lack of efficiency, or some other fault on its behalf- and the defendant has no responsibility for it. Therefore, if the defendant shows that the delay damaged his ability to defend himself, or if the court concludes such damage indeed occurred, the court will apply a stay of proceedings. The court continued that if it were found that the defendant's actions caused the delay, it would be difficult for the court to provide him with a remedy. In cases the court finds that the prosecution partly caused the delay and partly by the defendant, the court examines the contribution of each party to the delay. Under the circumstances of the Anderson case, the court determined that the prosecution's inefficiency has a significant part in the responsibility for the delay, and thus the court applied a stay of proceedings, and the trial was dismissed.

A year later, in 1985, the case of *Bell* demonstrated that a stay of proceedings is appropriate in certain cases even if clear harm to the defendant's ability to defend himself was not indicated.[49] In that case, a defendant was prosecuted in Jamaica in 1977 for crimes of robbery and sabotage and sentenced to life in prison. The defendant filed an appeal, and at the beginning of 1979, the appeal court dismissed the sentence and ordered a retrial. The appeal court's administrative office reported the decision to the first instance in a written message, which reached its

[48] *R v West London Magistrate, exp. Anderson* [1984] 80 Cr. App. R. 143.
[49] *Bell v D.P.P. of Jamaica* [1985] A.C. 937.

destination only toward the end of the year. In the meantime, original copies of the evidence, which the prosecution was obliged to present to the defendant, were lost. The retrial started at the beginning of 1980, but its continuation was consequently postponed several times. By the end of 1981, the prosecution admitted it had no evidence against the defendant since it could not locate the witnesses who gave testimonies to the police at the time, but their testimonies were lost. Due to the circumstances, the court dismissed the restrictive conditions imposed on the defendant. At the beginning of 1982, the authorities arrested the defendant again. He claimed that continuing his trial violates his right, given by the Jamaican Constitution, to a fair trial within a reasonable time frame. Eventually, the case was presented to the Queen's Counsel. Lord Templeman determined that regardless of the Jamaican Constitution, the court's jurisdiction enables it to provide a remedy to the defendant under the circumstances. The judge determined that the longer the proceedings, the less likely it was that the defendant would get a fair trial. The court ruled that the delay is to be counted from the appeal court's judgment to retry the defendant, i.e., 32 months, and that law enforcement authorities should have executed the judgment immediately unless some delay was unpreventable. Given the fact that the defendant's retrial was already postponed three years after the appeal court's judgment and five years after his first trial, the court determined a stay of proceedings, dismissing the retrial altogether. Put differently, though the defendant's ability to defend himself was not damaged due to the elapsed time, the Queen's Counsel thought the delay in executing the retrial justified its dismissal.

In 1984, a trial was dismissed for a different reason than a delay in proceedings - abuse of process was determined, and the defendant was acquitted since the criminal indictment was based on a law that had not been enforced for a long time. The *R. v D.* case concerned a defendant who was prosecuted for contempt of court since he had violated a custody agreement by taking his young daughter outside the proper jurisdiction.[50] Though the appeal court accepted that the offence was indeed proven, it was stated that the last time anyone was prosecuted for such a crime was in 1902. The court further mentioned that though offences of contempt of court were committed over the years, the prosecution authorities did not find it appropriate to execute the law and prosecute a person for a criminal offence due to such felonies. The defendant's conviction was thus dismissed.

[50] *R v D* [1984] 1 All E.R. 574.

2.3 The 90's- the Decade of the Doctrine's Expansion

Several cases during the 1990s designated the doctrine's expansion. A notable one that demonstrates the impact of public opinion took place in 1991. The *"Birmingham Six*" case stirred public opinion in the United Kingdom and worldwide in the 1970s. Six men were prosecuted in 1973 for committing a terror attack on behalf of the IRA (Irish Republican Army) underground in Birmingham, United Kingdom, causing the death of 21 people. The six defendants claimed their confessions for committing the crime were improperly obtained by the police.

Nonetheless, they were convicted of murder. After years of public criticism against the convictions, the judgments ruled against the six were dismissed in 1991. The three British police officers who initially conducted the investigation were prosecuted for false testimony, obstruction of justice, and falsification of evidence. The police officers said that public opinion was hostile toward them due to the many articles and reports published by the media. They further claimed that this negative public opinion hinders them from being fairly tried by any jury.[51]

The court accepted their claim and overruled the counterclaim regarding a "fade factor" that has erased the publications from public consciousness. Though the police officers did not claim that the authority's procedures were impaired, the court determined the circumstances fall within the Abuse of Process doctrine, saying:

"There may be some 'fade factor' in the specific publicity, but the general public has snowballed rather than faded. However, none of these matters stands alone. A court has to look at all the facts and circumstances of the particular case, guided by the established principles of law, and ask itself, 'on the evidence and in the circumstances of this case, is it possible for these defendants to have a fair trial?' Or... 'Does it offend the Court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case?'

The court further mentioned that the "*Birmingham Six*" case had become a synonym for improperly obtained testimonies. Media publications following the conviction had created the impression that its dismissal resulted from the police officers' blame for falsified evidence and false testimony. According to the court, this impression could not be wiped out of public consciousness, nor can a trial jury with no biased or predetermined opinion be assembled. The court reached the conclusion that the defendants could not have a fair trial and thus declared a

[51] *R v Reade* (19.10.1993, Unreported).

stay of the proceedings.

In the 1995 case of the defendants, Kevin and Ian Maxwell (sons of the businessman Robert Maxwell) re-attempt to convince the court to apply a stay of proceedings due to public opinion was made.[52] The two defendants showed the court alleged hostile newspaper and TV publications against them. They have also conducted and showed the court findings of a survey that indicated negative public opinion about them. However, the court overruled their request for a stay of proceedings, which determined that no real reason hinders them from having a fair trial. The court nevertheless designated that hostile publications against a defendant preceding his trial may indeed justify a stay of proceedings. The court outlined a test in such circumstances according to which the court may order a stay of proceedings due to preceding publications if it were proven that their weight is likely to undermine the jury's discretion in convicting the defendant. The court added that this burden of proof is a difficult task.

It seems that the United Kingdom law is willing to consider a stay of proceedings due to media publications *inter alia* because a jury conducts most criminal judging in the first instance. Though the jury is assumed to ignore publications that may distort the judgment and is trusted to reach its decisions based on evidence alone, the jury has no legal training not overlooked. Since they are not trained, one cannot repudiate the option of being biased by external publications regarding the trial they are hearing.[53]

Ruling concerning delays in filing an indictment also evolved in the early 1990s. The appeal court reached an essential judgment in the case of *A-G's* (No. 1 of 1990) concerning a police officer who was involved in August 1987 in the arrest of two men suspected of disrupting public order.[54] Several complaints were filed against the officer's conduct during the arrests following the event. The officer was informed of the complaints, and the police submitted a corresponding mid-report in September of that year. In accordance with police procedures, the complaints' investigation was postponed until the end of the criminal proceedings against the defendants arrested during the event. In January 1988, the suspects were acquitted in a trial. In March, the police officer's investigation resumed. During May and June, he was investigated after being given Miranda warnings. In September, the police submitted a final elaborate report

[52] *R v Maxwell* (6.3.1995, Unreported).
[53] When discussing Israeli law, the paper will examine whether one can infer from the above on trials conducted by professional judges, which is the case in criminal cases in Israel.
[54] *A-G's Reference (No. 1 of 1990)* [1992] 3 W.L.R. 9.

regarding the complaints, supported by substantial evidence. The prosecution received the case in November and filed an indictment against the officer in March 1989. The case preliminary procedures lasted from May until October, and the trial began in December 1989. At the outset, the defendant claimed that conducting the trial constituted an abuse of process due to the extensive-time period between the alleged crime and the beginning of his trial.

Though the offences the defendant allegedly conducted were not statute-barred yet, the court found it appropriate to examine whether the Abuse of Process doctrine applies in this case. The court ruled that a criminal proceeding may be dismissed when a delay in filing the indictment causes damage to the defendant, even if the prosecution is not to blame for the delay. Nevertheless, the court wanted to restrict applying this doctrine in four limitations: First, a criminal proceeding will be dismissed – whether for a delay in filing the indictment or any other reason- only in rare cases; second, even if the delay in filing the indictment is not justifiable, a stay of proceedings should be an unprecedented act and not a commonly used one; third, a stay of proceedings will be applied even more rarely in cases neither the prosecution authorities nor the complainant is to blame for the delay; fourth, the court shall not apply a stay of proceedings in cases the delay is caused by the complexity of the file or the defendant's conduct. The court added that the defendant should prove- in terms of a balance of probabilities- that the severity of the harm caused to him by the delay prevents him from getting a fair trial and that conducting the trial against him would be an abuse of the legal process. When deciding whether the defendant proved this, the court should take into consideration two additional devices- other than a stay of proceedings- which may eliminate the abuse: the first device is the court's jurisdiction not to accept specific evidence; the other is the court's ability to consider the relevance of the delay when deciding whether the defendant's guilt was proved beyond any reasonable doubt. In the circumstances of the specific case, the court decided there was no room for a stay of proceedings as the delay in submitting the indictment was not unjustifiable and the defendant's ability to defend himself was far from being abused.

The 1993 judgment in the case of *Bennett*, ruled by the House of Lords, is another milestone in the evolution of the Abuse of Process doctrine.[55] The case involved a New Zealander staying in South Africa and whom the United Kingdom authorities wished to prosecute for fraud offences. The two states had no extradition treaty between them, and the United Kingdom authorities were reluctant to follow the conditions determined by the law in such cases. The

[55] *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All E.R. 138.

South African authorities arrested Bennett, claiming he would soon be deported to New Zealand, where he is a citizen. As he embarked on the plane heading to New Zealand, he suddenly realized that the plane would have a stopover in the United Kingdom. Bennett refused to embark on the plane and appealed to the court to prevent his deportation, but he was put on the flight before the legal proceedings took place. Sure enough, he was arrested by the United Kingdom police upon his arrival. During his trial, he claimed for a stay of proceedings because of the authorities' conduct. Admitting their conduct, the prosecution claimed they had taken these measures in order to ensure bringing Bennett to British jurisdiction. The prosecution further claimed that determining the legality of the authorities' conduct and examining its relevance is beyond the court's jurisdiction. The first instance accepted the claim, and the case was forwarded to the House of Lords, which considered expanding the abuse of process doctrine to encompass such circumstances. Ruling until that time applied the doctrine in cases the authorities' conduct might have prevented a fair trial from the defendant or when the criminal proceeding was so unjust that conducting it would be considered an abuse of process. In this case, however, it was neither claimed that the defendant would not get a fair trial in the United Kingdom courts nor that it was unjust to prosecute him- had he been tried according to the procedure determined by the law. So, apparently, the two categories for which the doctrine was applied by British ruling up to that time did not apply in Bennett's case.

Nevertheless, the House of Lords concluded that the doctrine should be applied in this case. Lord Griffiths determined that the judiciary is accountable for the rule of law, including *inter alia*, ensuring that the government authorities abide by the law. Applying judicial criticism to the authorities' conduct and preventing violation of individuals' fundamental rights is the judiciary's duty because of this accountability. Thus, the court has the authority to impede the law enforcement authorities from wrongdoing before submitting the indictment and abusing their power. Consequently, declaring the submission of the indictment against the defendant as an abuse of process and hindering the trial from being held is a realization of this jurisdiction. Lord Lowry joined this stand stating the court should defend legal proceedings from being abused. In order to realize this judicial defence, the court should have the authority to apply a stay of proceedings in case the authorities' actions contradict the rule of law. He further noted that these actions eradicate the moral basis of the court's jurisdiction to conduct criminal proceedings against the defendant. This same moral basis provides the court with the jurisdiction to examine the lawfulness of the means taken to bring the defendant to a criminal trial. Thus, the court should not accept a violation of the rule of law and damage the defendant's right by the authorities while they prosecute that defendant. Having said that, lord Lowry

emphasized that the court usually has to judge a defendant who committed a crime. The jurisdiction to apply a stay of proceedings in view of the doctrine should thus be used cautiously and uncommonly. Lord Bridge expressed a similar attitude determining that the court cannot ignore a violation of international law by the authorities who are responsible for bringing a man to trial. A dissenting opinion was stated by Lord Oliver, who thought the court should not engage in questioning the conduct of law authorities unless it is relevant for the trial's fairness or the ability of the defendant to defend himself against the indictment. He viewed the panel's majority opinion of applying the court's jurisdiction on procedures preceding the outset of the criminal trial as inappropriate. Eventually, and in accordance with the majority opinion, the House of Lords returned the file to the first instance for a retrial in view of the House of Lords' new ruling.

Since this ruling, a defendant's claim that he was brought to trial unjustly is examined by British courts, which eventually decide whether the claim justifies a stay of the criminal proceedings.

Following this rule, the appeal court dismissed the judgment in *Mullen's* case, which convicted a man for severe crimes of conspiracy to commit acts of terrorism, *inter alia* due to the fact that he was deported from Zimbabwe in order to bring him to British jurisdiction while an extradition proceeding could have been applied.[56] The court determined that the British authorities initiated the deportation from Zimbabwe to the United Kingdom and that this proceeding violated international law and the defendant's basic rights. The court further determined that deterring the authority from acting illegally outweighed the severity of the defendant's offence.

Although given a promise he would not be tried, the principal dilemma of trying a defendant was dealt with in a 1993 case concerning a man named Dean who tried to assist people who were murdered to conceal evidence.[57] Arrested by the police, Dean was misled to believe that he would not be tried to conceal evidence if he became a prosecution witness in the murderers' legal proceedings. As a result, Dean admitted the act and re-enacted it before the investigators. Nonetheless, the prosecution brought him to a criminal trial for concealing evidence claiming

[56] *R v Mullen* [1999] 2 Cr. App. R. 143.
[57] *R v Croydon Justices, exp. Dean* [1993] 3 All E.R. 129.

that the police were not authorized to commit a legal immunity on the defendant on behalf of it. The court accepted the defendant's claim that bringing him to a criminal trial was unjust under the circumstances. Justice Staughton determined that as far as the defendant was concerned, it did not matter whether the commitment, the promise, or the misrepresentation by the police were made with or without the prosecution's consent. He further stated that any reservations of the prosecution regarding the police's authority should be settled by tighter communication between the two authorities at an earlier stage of the criminal proceeding. The court viewed the reliance and consequent change for the worse as damaging the defendant's rights to a fair trial and considered the trial against him as unfair. It did not justify the damage caused to the defendant, who relied on the misrepresentation and changed his odds for the worse by admitting the criminal acts.

Two years later, in 1995, the pivotal case of *Phillip* was ruled, involving 114 members of a religious sect who took part in a mutiny to overthrow the government of Trinidad and Tobago.[58] The rebels took over the local parliament building and captured the prime minister and other senior officials hostage. Following negotiations, the state president granted them a pardon if they released the hostages. However, the rebels filled their part of the agreement, and they were nonetheless arrested and prosecuted. The Queen's Privy Council, which is approached with appeals from the colonies, determined that according to the local law, the pardon granted to the rebels was invalid, as it was contingent, yet accepted the rebels' claim that violating the agreement reached with them was unjust and thus the legal proceedings against them should be dismissed.

An additional significant judgment, though not in favour of the defendant, was given in 1996 in the case of *Latif*.[59] Initiated in Pakistan, the case concerned communication between the defendant and a secret agent of the American Drug Enforcement Administration to export 20 Kg of Heroin from Pakistan to the United Kingdom. The two agreed that the defendant would bring the drugs to the secret agent in Pakistan and then transfer it to Britain. According to their plan, the drug would be forwarded to the defendant in London, where he would distribute it. The secret agent reported the plan to the British police representative in Pakistan. The British police thus, with the help of Britain's customs authorities, transferred the drug to London. At

[58] *A.G. of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 93.
[59] *R v Latif* [1996] 1 All E.R. 353.

this stage, the secret agent travelled to the United Kingdom, where he informed the defendant that the drug had arrived in London. During this call, the defendant and the agent set to meet somewhere in Britain to transfer the drug from the agent to the defendant. A representative of the British authorities, impersonating as the agent's courier, came to the meeting with parcels that looked like the original drug parcels. The defendant was the one to initiate the plan, while the secret agent only acted as his courier for transferring the drug to the United Kingdom. The defendant was arrested during this encounter and later prosecuted and convicted. The House of Lords that heard the defendant's appeal determined the secret agent had not seduced the defendant nor persuaded him to commit the crime.

Though the offence would not have taken place the way it did without the cooperation of the authorities, they only allowed the defendant to export the drugs to Britain and consequently commit the crime. The House of Lords did not ignore that the defendant was brought to Britain by tricking him but indicated that he was not brought to Britain by force but instead driven by his wish to distribute the drug in the United Kingdom. Nonetheless, the House of Lords had decided to examine the case from the point of view of the "Abuse of Process" doctrine. The facts as they were indicated that the defendant would not have committed the offence unless the authorities' actions enabled it. These actions included criminal behaviour on behalf of the authorities, i.e., bringing heroin to Britain. The court faced a dilemma: refusing to apply a stay of proceedings may be interpreted as encouraging criminal behaviour among law enforcement authorities resulting in a loss of public trust in the criminal justice system. However, applying a stay of proceedings may raise the impression that the judiciary cannot defend the public from the severe offence committed by the defendant. The court thus had to exercise discretion and balance between different interests.

The House of Lords determined there is no concern as to whether the defendant received a fair trial, and thus the only question raised is whether the case circumstances justify dismissing the criminal proceedings. Phrased differently, the House of Lords had to decide whether the authorities' actions shocked the human conscience to the extent that submitting the indictment against the defendant constitutes an abuse of process, and the court is liable to apply a stay of proceedings in order to preserve the criminal justice system's integrity. The House of Lords further indicated that the case requires a balance between the public interest to prosecute defendants accused of severe crimes and the prevention of the impression that the end justifies the means. The House of Lords determined that in this case, the fact that the defendant was an active heroin dealer and he was the one to initiate the crime outweighs the authorities' conduct. It was ruled that the authority's actions were not hurting the public conscience, and thus, the

stay of proceedings cannot be justified.

In addition to examining the "subjective" attitude of the defendant toward committing the crime, it seems that the House of Lords also considered the "objective" actions of the law enforcement authorities and determined they were not severe to the extent that justifies a stay of proceedings.

Notwithstanding, the judgment indicates that had the case concerned a defendant who did not commit previous offences and was drawn to commit the crime only due to the authorities' actions, prosecuting him may have been considered an abuse of process that justifies a stay of proceedings. In this observation lies the importance of the case.

A year later, the appeal court gave its judgment in the case of *Beedie,* in which a defendant was prosecuted for the death of a woman due to gas poisoning in an apartment he owned.[60] The safety authority accused him of violating his lawful duty to ensure the safety of the apartment's heating system. He pleaded guilty and was fined. Shortly later, in other criminal procedures filed against him by the municipality, the defendant admitted other felonies concerning the property's heating gas system. A criminal investigation regarding the circumstances that led to the tenant's death was initiated between these two events. After completing the two above proceedings, the investigation was paused and resumed at a certain stage. During the investigation, the defendant was not given the Miranda warning and was led to believe that there was no material concern that he would be prosecuted due to the investigation as he was already prosecuted for the case. However, nine months after completing the second proceeding, an indictment was filed against him for a charge of killing. He confessed but filed an appeal for double jeopardy because of the specific circumstances. The appeal court determined that the double jeopardy claim is not justified due to the felonies' factual evidence difference.

Nevertheless, it was determined that, in principle, the court might exercise discretion for a stay of proceeding if the second proceeding is based on the same facts as the first proceeding. The court mentioned the Connelly case, in which the House of Lords determined that the prosecution must include all the charges concerning one sequence of facts in a single indictment and that any exceptions should be accepted only if the prosecution proves such exceptional circumstances exist. Exceptional circumstances, the court added, may be derived from the specific case's facts; for example, a judge orders separate trials even if the second trial evidence is included in the first proceeding indictment or a case in which the defendant did not

[60] *R v Beedie* [1997] 2 Cr. App. R. 167.

initially protest against the prosecution's division of indictments. In *Beedie*'s case, the court determined a misalignment between the law enforcement authorities for which the defendant should not suffer and does not justify renouncing the prosecution's obligation to include all charges in a single indictment. Therefore, the court ordered a stay of proceedings.

Another ruling of this decade concerning cases in which interrogation files held by the state were lost or destroyed. In the 1992 *Birmingham* case, defendants were prosecuted for disorderly conduct in and out of a nightclub and assaulting police officers called to the scene.[61] During the trial, it was found that a video camera had filmed part of the event and that the police had watched the film. However, by the time the trial started, the film was lost after returning to the club owner. Furthermore, the prosecution did not expose the film's existence despite the defence's explicit requests to receive every relevant evidence material. The court ordered a stay of proceeding based on impairing trial fairness. It was determined that the lost video was relevant to the defendants' defence both in documenting the events and in an alibi; some of them stated and would have enabled the defendants to identify relevant witnesses.

In the 1996 *Beckford* case, a man involved in a car accident was prosecuted because when driving a car with three passengers, he hit the road fence, causing the death of one of the passengers.[62] The car, held by the police, was destroyed sometime after the accident due to police negligence. The defendant was prosecuted for reckless driving under the influence of intoxicating liquor. The prosecution claimed that the accident occurred since the drunk driver fell asleep while driving. The defendant claimed that the accident occurred due to a technical failure in the car's steering system, and the car's destruction hindered him from proving so. The appeal court debated whether impeding the driver or someone on his behalf from examining the car and proving the alleged malfunction prevents him from having a fair trial. The court determined that though the police acted carelessly and even negligently, they did not act maliciously.
Furthermore, police experts examined the car before it was destroyed and found no evidence of the defendant's malfunction, but rather quite the opposite- the signs seen on the road after the accident indicated the defendant had not even tried to break the car. These circumstances brought the court to conclude that though the authority's negligent conduct should not be

[61] *R v Birmingham* [1992] Crim. L.R. 117.
[62] *R v Beckford* [1996] 1 Cr. App. R. 94.

repeated, the car's destruction does not prevent a fair trial. The court further mentioned that had the car been destroyed before the professional examination by the police, which was found reliable, the result may have been different.

The latter two cases indicate that a criminal court's jurisdiction enables it to examine the conduct of the investigation and prosecution authorities prior to the trial. As indicated by the House of Lords in the 1998 *Martin* case, the court shall order a stay of proceedings when it reveals "something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness".[63]

As indicated so far, the United Kingdom law applies the "Abuse of Process" doctrine in cases falling into two categories: firstly, in which the court concludes that conducting the criminal proceeding against the defendant is unjust due to the circumstances; secondly, in which the defendant may not have a fair trial. When examining whether submitting the indictment or conducting a criminal proceeding against the defendant constitutes an abuse of process, British courts exercise the rule of the "Principle of Judicial Legitimacy" coined by Choo in a comprehensive book he wrote on the subject. Choo thinks this principle is based on the view that a court's conduct is illegitimate unless it realizes its duty to defend the defendant from false conviction and maintains the moral integrity of the criminal justice system while considering the public interest in prosecuting perpetrators.

2.4 The Doctrine during the 2000's – far from conclusiveness

The 2001 *Looseley* case was ruled five years after Latif 's case judgment.[64] The House of Lords determined that entrapment circumstances in which the authorities seduce a defendant to commit a felony are an abuse of process and may thus justify the remedy of ordering a stay of proceeding for the defendant. The House of Lords ruled that a situation where the state - via its agents - seduces citizens to commit a crime and then prosecutes them for it is unacceptable, and such conduct is considered an ill-usage of power and an abuse of process.

The House of Lords acknowledged the complexity and difficulties of investigating drug abuse crimes and the like, where there is no entity to charge a complaint. Under certain circumstances, the police have no choice but to become the ones to report the crime while its secret agents are

[63] *R v Martin* [1998] 1 Cr. App. R. 347.
[64] *R v Looseley* [2001] 1 W.L.R. 2060.

involved in it. Nevertheless, there should be limits to such investigation techniques. In the 2007 *Jones* case, the House of Lords determined that each case should be examined whether the police did not just make a "regular" offer to the defendant to commit a crime. The secret agent who buys drugs from the drug dealer is not any different from a "regular" client and does not put the idea in the dealer's mind to commit the crime. Such a case does not constitute entrapment. However, additional criteria, other than the dealer's initial tendency, should be considered in order to examine the authority's conduct. Using this method of investigation should not be random nor arbitrary but rather exercised in cases in which it is plausible to suspect the subject was indeed involved in criminal deeds. The court should examine this criterion from several aspects: the first is the nature of the case under investigation, i.e., whether the way the criminal act is conducted and the complexity of the investigation necessitate the usage of secret agents. The second is that there is plausible suspicion that the investigation subject is involved in criminal activity or that such activity appears to happen at the investigated scene. To ensure that, the court should scrutinize whether the authority acted in good faith or not due to an interest in framing someone. The third refers to the extent to which the authority was involved in the crime. The higher it is, the more likely the court will tend to think the authority crossed legitimacy boundaries. The House of Lords determined that a stay of proceedings is an appropriate remedy in these cases: "A prosecution founded on entrapment would be an abuse of the courts' process. The court will not permit the prosecutorial arm of the state to behave in this way".

Despite that approach, in 2001, it was also determined that other means of incrimination might be allowed. In the *Bigley* case,[65] several individuals were arrested for drug offences. Each was interviewed under caution, and some incriminated the defendant during their interviews. Having done so, those individuals were then offered immunity in return for agreeing to become prosecution witnesses against the defendant. This offer was taken up. The defendant alleged abuse of power and unfairness. The Court of Appeal held that, as a matter of principle, it was acceptable for a prosecutor to decide not to prosecute those guilty of less serious offences in order to prosecute those guilty of more serious offences. In itself, the means here justified the end. The court attached great importance to dismissing the claim of improper inducement because before there was any consideration of whether anyone should be charged or not, each suspect had been formally interviewed and their version of events obtained. Accordingly, the

[65] *R v Bigley* [2001] EWCA Crim 3012, [2001] All ER 253.

versions were given without any promise of reward held out by the investigators. Only after this stage was there any discussion about inducements, i.e., assistance in return for immunity.

It was also made clear that the doctrine does not apply in "private entrapment" cases. In *R v Marriner*,[66] the defendants (members of a group of organized football hooligans convicted of committing a series of violent offences as part of that group upon evidence obtained by undercover journalists reporting for the program MacIntyre Undercover) were subjected to a level of flattery on the journalists' part that arguably surpasses any such technique seen in the police entrapment cases. The journalists themselves committed illegal acts and employed 'undoubted flattery, wheedling, falsehoods and the making of apparent offers of legitimate and illegitimate business' as part of a 'journalistic operation' through which the evidence was procured. Despite the 'elaborate trick' that had been played by the journalists, the Court of Appeal held that the trial judge correctly left the evidence obtained by them to the jury and dismissed the appeal brought on the ground that the prosecution should have been stayed as an abuse of process, noting that: 'The present case is not concerned with the conduct of the police or prosecuting authorities. The inducements to talk were applied in quite different circumstances and were of a quite different order. The judge was in the very best position to evaluate whether it was fair to allow the proceedings to go before the jury on their basis, and we consider that his decision to do so cannot be faulted.'

Admittedly, if the post-*Looseley* case law is notable for anything, it is the restrictive manner in which the courts have applied the principles laid down by the House of Lords. What follows is a practical summary of cases that have been decided since *Looseley* to guide the practitioner who attempts to have proceedings against his client stayed on this unusually fact-specific ground. The principle clearly still stands that entrapment of itself does not necessarily give rise to such an abuse of process as would require a stay of proceedings. The mere fact that an offence would not have been committed but for the actions of the police will not warrant a stay of proceedings. There has only been one successful appeal to the Court of Appeal on the ground of entrapment since *Looseley* was decided; in the *Moon* case[67], Moon was a vulnerable drug addict with no predisposition to dealing, who was targeted and approached by police and asked (persistently) to supply an undercover officer with a small quantity of heroin, which she was

[66] *R v Marriner* [2002] EWCA Crim 2855.
[67] *R v Moon* [2004] EWCA Crim 2872.

to obtain from her dealer. Upon so doing, she told the undercover officer that she [the officer] was never to approach her again and that she would never help her again. Moon was charged and successfully prosecuted for possession with intent to supply the drug, the judge at first instance having refused to stay proceedings as an abuse of process on the ground of entrapment following a voir dire. The Court of Appeal held that Moon had been entrapped, taking into account the fact that she had only ever held the status of a drug addict, against whom there was no evidence of any previous dealing in or supply of heroin, and that she had taken some persuading to commit the offence after taking sympathy on the undercover officer – who pretended to be an addict displaying the unfortunate physical consequences of drug withdrawal – such that she had been lured into committing the offence. While *Looseley* established that a defendant's predisposition to commit an offence of the type concerned would not negate or preclude any claim made by him to have been entrapped ('predisposition does not negative misuse of State power'), the Court in *R v Moon* confirmed that nothing said in *Looseley* would support a view that the absence of predisposition of a defendant to commit the crime in question is not relevant to the judge's consideration. While that observation is of benefit to the defendant of good character (or at least no previous convictions for offences of the same type as those for which he is to be tried) who makes a claim to an entrapment, *R v Moon* displays the gravity of circumstances that must otherwise fall in a defendant's favour before a claim of entrapment is likely to succeed.

In the *Jones* case,[68] the Court of Appeal considered the conduct of a person willing to offend. It held that a defendant had not been trapped into committing an offence of incitement to produce cannabis. The defendant was a shop owner selling smoking paraphernalia and hydroponics equipment, which could be used to produce cannabis. A police officer approached him on four occasions who had asked for advice on growing cannabis. The defendant told the officer that it was illegal to grow cannabis and that he could only talk about tomato plants. He then gave the officer advice about growing 'tomatoes'. He was charged with incitement to produce. The officer had been persistent, but the context of the officer's behaviour was that his inquiries would only have been made by a layperson who was prepared to break the law. The approach in *Looseley* had been correctly followed, and it had to be borne in mind that a dealer in drugs will not voluntarily offer drugs to a stranger unless first approached and that this approach may need to be and can be persistent without crossing the line.

[68] *R v Jones* [2010] EWCA Crim 925.

The application of *Looseley* was considered again in *R v M*[69] regarding the nature of appropriate police conduct during undercover operations. M was a drug addict with no convictions for supplying. Police had targeted him as part of an undercover drugs operation. An undercover officer had befriended M and gained his confidence. He had then asked, 'where can I get some white?' M had arranged for drugs to be delivered outside a public house to be delivered to the alleyway. M and the officer had gone to the alleyway together. The drugs (diamorphine) were delivered by car, and M had completed the deal for the officer as the latter was known to the dealers. He contended at his trial that he had been entrapped. The Court of Appeal acknowledged that the officer had cultivated a 'bond of trust and friendship' and that M was essentially helping out what he believed to be a fellow addict. The Court noted that *Looseley* emphasized that whether prosecution is an abuse of the process because of the defendant's entrapment depends on the facts of each case. In this matter, the court observed that the officer had not asked M to supply him with drugs but asked where he could get them. It was also 'particularly significant' that there was: 'No pressure or persuasion was used by [the officer], who offered no inducement to M to commit the offence'. The Court of Appeal noted that there might be a difficult line to draw between legitimate police conduct and improper entrapment. In general, however, conduct that is open to finding such entrapment as to render a prosecution improper involves some pressure or persuasion on the defendant to commit the crime. Providing the opportunity for the commission of the crime will not in itself lead to a finding of entrapment. It was 'an inherent aspect of any undercover police operation' that the undercover police officer insinuated himself into the confidence of those involved in the criminal conduct at which the operation is directed. This was not entrapment. The judgment confirms that something more than an opportunity is required: there must be pressure or persuasion from State agents.

The Court of Appeal took a similarly broad approach in the *Moore* case.[70] Here, the appellant claimed that undercover police officers had entrapped her into supplying cocaine after they had 'lured' her by supplying her with cheap goods that she could sell for profit. The police were undertaking a surveillance operation. Moore was not an authorized target, nor was she suspected of dealing drugs, although her father and stepfather were. She was asked whether

[69] *R v M* [2011] EWCA Crim 648.
[70] *R v Moore* [2013] EWCA Crim 85.

she knew if 'anyone round here' had any cocaine, responding that she could obtain some and then do so. The Court held that the assessment to be applied based on the principles laid down in *Looseley* is very much a fact-sensitive matter, and the court would not interfere with the trial judge's assessment of the facts unless there were a severe error. In *Moore*, Lord Justice Rix noted that the 'the key question, if it is possible to isolate any such question' was, (referencing Lord Nicholls in *Looseley*) whether the conduct of the police force or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. In considering this vital issue, the court approved an article by Professor Ormerod which identified five factors as of particular relevance: (i) reasonable suspicion of criminal activity as a legitimate trigger for the police operation; (ii) authorization and supervision of the operation as a legitimate control mechanism; (iii) necessity and proportionality of the means employed to particular police types of offence; (iv) the concepts of the 'unexceptional opportunity' and causation; and (iv) authentication of the evidence. Applying these detailed criteria to the facts, the court held that this was not 'random virtue testing' but that, following *Looseley*: 'there was plainly reasonable suspicion of drug dealing (and other criminality) in the Abbeywood area which justified the taking of covert policing operations. The fact that the defendant was not personally suspected in this context, nor a named target, is undoubtedly something to be taken into account: but as Lord Nicholls observed, having grounds for suspicion of a particular person is not always essential.' Additionally, Lord Rix held that the undercover officers' conduct was not brutal or improper to bring the administration of justice into disrepute, and there is no affront to the public conscience in these prosecutions.

The 2005 *Grant* case sets another example of how an appeal court gave weight to the authority's conduct and dismissed a conviction for conspiracy to murder after it was found that the police were eavesdropping on the conversations of the defendant with his lawyer at the police station's courtyard, even though no material justice distortion was caused.[71] In fact, the deliberate infringement of the specific and basic right of the suspect to the confidence of privileged communications with his solicitor severely undermined the rule of law. It justified a stay on the grounds of abuse, notwithstanding the absence of prejudice against the defendant.

During the same period, a significant further discussion took place regarding the issue of breach

[71] *R v Grant* [2005] EWCA Crim 1089, [2005] 3 WLR 437.

of promise in the *Abu Hamza* case.[72] Abu Hamza was the imam of a mosque, who had been convicted of various counts of solicitation to murder, using threatening, abusive, or insulting words or behaviour with intent to stir up racial hatred, and counts relating to his possession of various sound recordings and documents. The counts related to his public speeches at the mosque and in other places between 1997 and 2000. In March 1999, Abu Hamza was arrested on suspicion of involvement in a terrorist incident in Yemen in 1998. Upon his arrest, the police seized a large number of audio and video cassettes and ten volumes of an Afghani Jihad Encyclopaedia from his home. The police kept this material for some nine months before returning it to him in December 1999. He was told that no further action whatsoever would be taken against him. Several grounds of appeal were argued in the Court of Appeal, one of which related to the trial judge's rejection of an application for a stay on this discreet aspect of abuse of process. The defence contended that the actions of the police, in returning the material after scrutiny, naturally and reasonably created in the appellant the clear impression and an implied promise that the contents of the returned videos and the Encyclopaedia were not criminal. The police were said to have given the appellant a legitimate expectation that he would not be prosecuted for possessing these items. Against that background, it was contended to be an abuse of process five years later to prosecute him for possession of the same. The Court of Appeal disagreed and, in dismissing the appeal, found the specific facts relied on to fall a long way short of satisfying the 'criteria' required to succeed. While the Court was rightly critical of the delay in deciding to prosecute, it held that the fact the police had not done so for five years could not be taken as an assurance, let alone an unequivocal assurance, that they would not do so in the future. It was deemed to be significant that the context of the seizing of the materials related much more to the specific allegations of alleged involvement in Yemen, as opposed to some general investigation into his criminality. The court noted that the appellant had been aware of this distinction and held that there is no reason to conclude that the appellant placed any reliance on the reaction, or lack of reaction, of the police to the cassettes and the Encyclopedia when deciding to retain them in his possession; he was simply continuing a course of conduct that had commenced before the police had intervened.

Another example of the issue of promise is the case of *Dowty*.[73] The Court of Appeal held that reneging on promises concerning pleas was not an abuse of process. The defendant was informed that if he pleaded to two counts of sexual grooming of a young girl, two other charges

[72] *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] 3 All ER 451.
[73] *R v Dowty* [2011] EWCA Crim 3138.

of making indecent photographs would be dropped. However, after entering pleas, another prosecutor disagreed with his colleague's opinion and tried the defendant for the photographic offence. The defendant's argument that this was an abuse of process based on a breach of promise failed as he could not establish serious prejudice and apparent public interest issues at stake. The Court of Appeal referred to para 12 of the CPS Code for Prosecutors (2010), which states that occasionally there may be particular reasons why the CPS overturns a decision not to prosecute or when it will re-start a prosecution, mainly if the case is severe. The initial decision had not been wrong, and the judge had considered all the competing considerations. The judge had not erred and was entitled to reach the decision he had.

In the case of *Killick*,[74] the breach of promise authorities were considered in a case in which the defendant was told that his prosecution would be discontinued via an email to his solicitor. The decision was reversed over two years later on review. The Court of Appeal approved and applied *Abu Hamza* but found that the email was not an unequivocal representation because of the possibility for review. The Court held that the appellant's solicitors would have been well aware of the rights of complainants to seek a review, and the Court assumed they would have told the defendant of that possibility. There had been a certain postponement in the case that did not in itself amount to an abuse of process or cause prejudice or detriment. The Court of Appeal held evident strain, but it did not amount to prejudice or detriment. The court in *Killick* accepted that detriment was not always required. However, it could not be contended that the prosecution was an affront to the public conscience in this case. In their email, the police had said nothing concerning the possibility of the matter being reviewed. The decision rested on the assumption that the defendant's solicitor must be taken to have been aware of the various review rights and passed them on to the defendant, a significant inference that needed no evidence to support it. It became clear that not all broken promises would be sufficient to justify a stay.

The 2007 case of *Ali*[75] is an example of a decision where the Court had to consider the effect of missing evidence. The two appellants had been convicted for severe crimes of false imprisonment, rape, and aiding and abetting rape. As a result of a seven-year delay, several documents were missing, including a copy of one of the victim's applications to the Criminal Compensation Authority, the credibility of which had been questioned. The other victim

[74] *R v Killick* [2011] EWCA Crim 1608.
[75] *Ali v C.P.S.* [2007] Crim 691.

admitted to having lied in her application. In addition, a police notebook that contained details of a police interview with the two complainants was missing, as was the evidence of the victims' first accounts of the incident. Moses LJ found that the prejudice flowing from the loss of the evidence could not be cured by any Judicial directions at trial and allowed the appeals.

However, it is important to indicate that not each and every default might constitute abuse. Another example can be found in the case of *Cooper*[76] the Administrative Court allowed a prosecution appeal by case stated against a stay for abuse of process. The defendant was charged with possession of both diamorphine and criminal property, having been said to possess banknotes, which a prosecution forensic scientist said were overly contaminated with heroin. The Magistrates stayed the case in the light of two principal defence complaints: first, the fact that the scientist's treatment of the notes with the Ninhydrin spray rendered them useless for further testing, and secondly, due to the loss of a videotape which showed the various tests carried out by the scientist on the notes. Silber J., while acknowledging the defence was impeded to a certain extent by the missing evidence, nevertheless held that there were adequate alternate means to challenge the prosecution case, for example, by cross-examination of the scientist's methodology. The Court may well have been of the view that this was a defence argument based upon reliance on 'holes' in the prosecution case, where there was sufficient other credible evidence with which the case could be tried.

The approach in *Cooper* was also applied in *R v Taylor*[77] where on appeal, it was held that the judge was fully justified in refusing the application to stay the indictment. The nature of the 'error' in the assessment of the original prosecution case in 1980 in deciding not to pursue a prosecution then did not bear on the question of whether a fair trial could take place. While the considerable interval between the events covered by the indictment and the trial created disadvantages for the defendant, the trial process was nonetheless capable of making due allowance for those difficulties and, adequately directed, the jury was able, if appropriate, to reflect their judgment on those difficulties in their verdicts. Further, the absence of the trial papers from the court and the defence solicitors did not itself render the admission of that evidence unfair. The fairness of the proceedings before a jury would be secured by a judicial direction pointing out that where holes existed, the burden was on the prosecution to remove

[76] *D.P.P. v Cooper* [2008] EWHC 507 (Admin).
[77] *R v Taylor* [2013] EWCA Crim 2398.

any doubt created, which was the effect of the direction in the instant case on the impact of delay. This reinforces the original principle set out in Ebrahim that abuse of process would only be considered where a defendant could demonstrate on the balance of probabilities that it was no longer possible to conduct a fair trial.

The same approach can be found in the case of *Clay*.[78] It was reiterated that when a piece of relevant evidence had been lost, not due to the defendant's behaviour, the question was whether that disadvantage could be accommodated to ensure a fair trial. In the instant case, the defendant had been interviewed at the scene. He did not suggest that the victim (whose vehicle his HGV had crashed) had been driving erratically and said he had no explanation for the crash. However, the prosecution should have preserved the evidence (the victim's car) until the defendant had inspected it. It was undisputed that the victim made his way off the motorway because of a damaged tire. However, evidence from two drivers who had been overtaking the victim at the time of the collision was that the victim had slowed down 'quickly' and without brake lights. The defendant argued that he had been deprived of the opportunity to see if the tire had been safe and the brake lights had been in working order. It was not doubted that the police had acted in good faith, but the justices' had been wrong to find that the police had acted within the standard and reasonable practice in allowing the car to be destroyed. Nevertheless, the trial was able to cope with any disadvantage that arose from the loss of evidence.

A similar approach is to be found in *R v Khachik*.[79] There was, in that case, no challenge to the integrity of the evidence produced by a covert probe, which formed a fundamental part of the prosecution case against the applicant for conspiring to supply class A drugs. There was, however, a 'root and branch attack' upon the credibility and behaviour of the police officers, who gave evidence against the defendants at their trial in relation to the covert surveillance aspect of the case. The applicant argued that the proceedings should have been stayed as an abuse of process on the basis that the police had dishonestly created the application form under Pt II of the Regulation of Investigatory Powers Act 2000 for the authorization of the probe and intentionally flouted the rules relating to its use. The applicant contended that the police had thereby manipulated the process of justice such that the prosecution should have been stayed. The trial judge concluded that while the police officers had misbehaved, they had not been

[78] *Clay v Clerk to the Justices* [2014] EWHC 321 (Admin).
[79] *R v Khachik* [2006] EWCA Crim 1272.

dishonest (in the way in which the application form under RIPA had been completed) and had not set out deliberately to deceive. The Court of Appeal found that it could not go behind the trial judge's findings in that regard and, on the basis of the finding that they had not been dishonest, the police were entitled to the authorization they had sought in respect of the covert surveillance. As a result, the proceedings were rightly not stayed as abuse. Nonetheless, the Court observed that if the judge had found that the authorization had been obtained by deception, that would have been a proper basis for staying the proceedings as an abuse of process, even though no issue was taken with the integrity of the evidence obtained in itself.

The power to stay proceedings in such circumstances constitutes a broad discretion indeed. However, it must be remembered that this is an exceptional power and that an application to stay proceedings will have to cross a high threshold to be successful. The *Warren*[80] case similarly concludes that, where there is no evidence of error of law or fact or irrationality, the judge's decision will not be interfered with by appellate courts. This case emphasized judges' discretion in deciding whether to issue a stay for abuse of process to protect the system's integrity. In *Warren*, the defendants had been involved in a conspiracy to import cannabis worth millions of pounds from Holland to Jersey through Belgium and France. The Jersey police had asked the authorities in those countries for permission to track the defendants and to use an audio device attached to their Jersey-registered vehicle. The French, Belgian and Dutch authorities consented to the installation of the tracking device, but the French and Dutch refused permission for audio monitoring. The police proceeded to install the audio devices after receiving advice from their Legal Office that the evidence was unlikely to be excluded even if it had been obtained unlawfully. After it emerged that the defendants intended to hire a car in France, the French authorities permitted the Jersey authorities to liaise with the car hire firm about installing a tracking device. However, the Jersey authorities also installed an audio device on the pretext that it was a 'backup' tracking device. The conversations recorded while the vehicle was en route led to the arrest and prosecution of the defendants, who argued that they were entitled to a stay because of this prosecutorial misconduct. It was clear that 'but for' this unlawful misconduct of the police, the prosecution could not have succeeded evidentially. The Board recognized that the prosecutorial misconduct was extensive: it involved the planned deception of three foreign authorities and the Attorney-General. However, the Commissioner in Jersey had refused to stay proceedings, emphasizing that this was a case concerning a

[80] *Warren v the Attorney General of Jersey* [2012] 1 AC 22.

'serious and organized international drug trafficking conspiracy', so the actions 'were not disproportionate'. The Board condemned the police's behaviour, noting that the authorities were 'unquestionably guilty of grave prosecutorial misconduct'. Indeed, Lord Hope acknowledged: 'The line between effective policing and illegal conduct may be a fine one, and in some cases, it may be necessary for the police to work very close to the margin that divides what is legitimate from what is illegitimate…The margin between what was legitimate and what was illegitimate was well known, and it was crossed deliberately in defiance of the laws of the foreign states.' However, the Board upheld the Commissioner's refusal to stay proceedings as being within the reasonable bounds of judicial discretion as there were other significant factors to be balanced against the argument for a stay, including the urgency of the decision, the fact that the defendant was a convicted drug dealer, the poor advice given to the police by the Crown Advocate and the fact that the police had not attempted to mislead the Jersey Court about their actions.

Lord Dyson delivering the lead judgment, confirmed that there are two categories of cases in which a stay may be justified: (i) where a fair trial could not be held; and (ii) where continuing the proceedings would offend the court's sense of justice. The protection provided by the latter limb involved an act of judicial discretion. Lord Kerr set out the principles regarding the abuse of process protection which has emerged from recent jurisprudence as follows: the principal purpose of the examination, in the second category of cases, of the question of whether proceedings should be stayed, is to determine whether this is necessary for the protection of the justice system's integrity; A balancing of interests should be administered in determining if a stay is required to fulfil this primary purpose; The "but for" factor, where it is clear that the defendant would not have been charged but for executive abuse of power, is merely one of the different issues that will influence the result of the examination as to whether a stay should be administered. It is not necessarily conclusive that issue; a stay should not be ordered to punish or discipline prosecutorial or police misconduct. The focus must always be on whether the order to stay is required in order to shield the criminal justice system's integrity.

The court ruled that it was impossible to lay down hard and fast rules for the type of case that would give rise to a stay under this ground as it would be a matter for the judge in each case. It was further noted that the balancing test was not about ensuring the fairness of proceedings and it was about the integrity of the process itself.

A significant case dealt with the issue of proper representation. It was the *Crawley* case.[81] The

[81] *Crawley, Walker, Forsyth, Petrou and Daley* [2014] EWCA Crim 1028.

Court of Appeal recognized and examined the doctrine's applicability when issues of lack of legal representation arose. The judge sitting in the Crown Court stayed as an abuse of process a prosecution initiated by the Financial Conduct Authority for conspiracy offences to banking fraud, possessing criminal property, and other offences. The evidence was complex and substantial. The defendants had the right to state-funded legal aid representation. The Ministry of Justice had imposed a significant cut in the fees to be paid to counsel in high-cost cases. At the same time, the Public Defence Service began actively recruiting a pool of employed advocates. The judge decided to stay the proceedings as an abuse, as no suitable qualified advocates were available for the intended trial date, and an adjournment would not remedy the situation. The judge found that the pool of available advocates was insufficient to cover all the high-cost cases due to being tried and that the defendants were entitled to delay instructing an advocate in order to choose the best available advocate for the case. It was held that to try the defendants in those circumstances would be a breach of their Common law rights and contrary to Article 6(3) of the ECHR. The prosecution appealed the stay decision to the Court of Appeal. The decision was confirmed, as the court recognized the importance of high-quality representation.

It should be emphasized that the courts were reluctant to expand their jurisdiction beyond the "pure" criminal proceedings. In the *Clayton and Dockerty* case,[82] the appellants were prosecuted for failing to comply with an enforcement notice contrary to the Town and Country Planning Act by letting flats as long-term residencies rather than short lets. At the Crown Court hearing, the appellants submitted that the proceedings should be stayed as an abuse of process on two grounds. First, in bringing the prosecution, the local authority had known that the enforcement notice was invalid because when it was issued, the council knew that the property had been used as a permanent residence for more than four years. Second, the council had deliberately concealed its knowledge. The local authority was relying on its own unlawful acts. The Crown Court judge rejected the stay application. The judge held that by virtue of one of the sections of the above Act (saying that an enforcement notice should not be questioned in any proceedings, except by way of appeal), the court did not have any jurisdiction to deal with the stay application. The Court of Appeal agreed with the first instance judge. The enforcement notice cannot be challenged in criminal proceedings. The issue on appeal would be for the Administrative Court. Further, the fact that a local authority officer had not revealed relevant information was not in dispute; however, it would not render it in any way abusive for the

[82] [2014] EWCA Crim 1030.

council to prosecute for breach of an enforcement order adequately made. The wrongdoing of the official solicitor was independent of the effect on the enforcement order.

In the *Antoine* case,[83] an offender had been convicted of two firearms offences and nineteen days afterwards prosecuted for further, more severe firearms offences arising from the same facts. As per *Connelly*, the Court of Appeal dismissed the appeal against conviction for the later offences as particular circumstances made the subsequent trial just and convenient. This was not an escalation from minor to more severe charges but a move from misconceived to correct charges. The court's sense of fairness and propriety was not offended. Public confidence in the criminal justice system was not undermined; on the contrary, a stay would have brought it into disrepute. Even though serious mistakes were made, there was no bad faith, and the Crown Prosecution Service quickly rectified the mistakes; there had been no abuse of process.

2.5 Main Justifications for Implementing the Doctrine – is there a Rule of Thumb?

With all these examples and considerations in mind, we can determine whether there are clear justifications for using the doctrine.

It seems that the JSOCP is a procedural remedy by which the court halted the prosecution and prevented from proceeding on the grounds that the prosecution amounts to an abuse of process of the court. The court's authority to stay criminal proceedings on such grounds is known as the "abuse of process doctrine" or the "abuse of process discretion";[84] it derives from the general responsibility of the court to regulate proceedings.[85] Choo observes that in determining whether to stay the proceedings on the above basis, the court is effectively reviewing the exercise of prosecutorial discretion by the executive.[86] As we saw, in the landmark case of *Bennett*, Lord Lowry identified two categories of cases in which a court has the discretion to stay the proceedings on the basis that to try those proceedings will constitute an abuse of its own process: "either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be

[83] [2014] EWCA Crim 1971.
[84] Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed., Oxford Monographs on Criminal Law and Justice, Oxford, 2008), p. 1.
[85] In *R v Beckford* [1996] 1 Cr App R 94, the Court of Appeal even referred to this duty as "constitutional".
[86] *Ibid,* at p. 9.

asked to try the accused in the circumstances of a particular case".[87]

A stay of proceedings that falls within the first category of case in which a court has the discretion to stay the proceedings seeks to ensure that the accused does not suffer in any way from prejudice or disadvantage at trial with the result that he or she may be unable to conduct a proper defence. [88] In fact, this first category seeks to protect the accused from wrongful conviction. According to Rogers, it is regrettable that the first category has been labelled as a subspecies of abuse of process.[89] By contrast, a stay that falls within the second category of the case seeks to protect the integrity of the adjudicative process. It is concerned with considerations of extrinsic policy or public policy, and it seeks to protect moral integrity in general or, in other words, it concerns with "fairness to try". Fairness to try may mean that the question is whether it would be fair to try someone at all, even if they can be given a fair trial.[90]

Choo also explains that the courts are not coherent in their use of the term "abuse of process"; while it is commonly used as a label for procedures that should be stayed, courts have also used it as a label for particular pre-trial actions of the authorities, which should lead to stay.[91]

Although English courts have occasionally spoken of a stay as a remedy, and despite the vagueness, the usual justification for a stay is to protect judicial processes and the rule of law.[92] Accordingly, the courts have spoken of maintaining the "integrity of the judicial process", "fairness", "upholding the rule of law", keeping the "public confidence in the criminal justice system", etc.

It must be emphasized that the above expressions, especially the "fairness to try" terminology, have been subject to criticism. Choo wrote in this regard that: "It is confusing, to say the least, to use the term 'unfair trial' to connote a trial that has the potential to result in a factually incorrect guilty verdict and to say that it would be unfair to try a defendant in circumstances where, even if a 'fair trial' can be held, it will nevertheless be inappropriate to try the defendant because of considerations of moral integrity. To make matters even more confusing, the courts sometimes display lack of care in their use of these terms".[93]

---

[87] *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All E.R. 138.
[88] *Choo* at p. 18.
[89] Jonathan Rogers, *The Boundaries of Abuse of Process in Criminal Trials,* Current legal problems, Vol. 61 (1), 2008, p. 289.
[90] *Choo* at p. 16.
[91] *Ibid*, at p. 186.
[92] Colin Wells, *Abuse of Process* (3rd ed., Oxford, 2017), pp. 8-9.

[93] *Ibid,* at p. 187.

Lord Dyson was similarly critical: “It is unhelpful and confusing to say that this category [the second category of a case under the abuse of process doctrine] is founded on the imperative of avoiding unfairness to the accused. It is unhelpful because it focuses on what is fair to the accused rather than on whether the court’s sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined by the trial. It is confusing because fairness to the accused should be the focus of the first category of the case”.[94]
What complicates even more the effort to find a more precise test is the question of balancing. It seems that if the court concludes that a fair trial is not possible, the proceedings must be stayed without any further consideration or balancing. This refers to the first category of cases, the ability of the trial to determine the guilt or innocence of the accused correctly.[95]
However, if the court finds it impossible to hold a fair trial, it must consider whether to stay the proceedings based on broader considerations, often said to involve balancing.[96] “Balancing” means taking into account various factors as relevant to one or both of the competing interests: the seriousness of the offence, which is relevant to the public interest of law and order, and the seriousness of the authorities' conduct.

At the outset, it is fair to say that all those exercises in rhetoric do not assist in defining the relevant test; they even raise doubt on whether there is any relevant test. A workable test defined with precision, and stripped of vague value judgment, is probably an unrealistic goal. However, we must not be deteriorated by the use of all those vague expressions, such as “fairness”, “rule of law”, and “public confidence”; they do reflect sentiments that most people understand.
Moreover, we almost do not find the constitutional terminology; the discussion barely involves justifications concerning human rights, such as human dignity.

[94] In *Warren v Attorney General for Jersey* [2012] 1 AC 22, 35.
[95] *Choo* at p. 140.
[96] Kelly Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (Asser Press and Springer, 2018), pp. 204-205, 233-244.

CHAPTER 3
RELEVANT BACKGROUND: ELEMENTS OF THE ISRAELI LEGAL SYSTEM

During some of the mid-decades of the nineteenth century, the Ottoman Empire underwent several significant legal and administrative reforms. They are known as "*the Tanzimat"*. As part of these crucial reforms, Ottoman rulers enacted several codes (criminal, commercial and procedural) mainly inspired by French law. They also codified Islamic civil law. The reform of the law did not apply at all to family law; these fields of the law were governed by Islamic law or by the religious laws of the various minority communities in the empire. The Ottoman legal system was thus mixed, using norms taken from several systems and legal disciplines.[97]

The court system of the Ottoman Empire also had some mixed characteristics. The basic idea was to formulate a hierarchy of secular courts, at the apex of which stood a French-inspired Court of Cassation in Istanbul. Nevertheless, Islamic, Christian, and Jewish religious courts continued to function alongside these secular courts.

During the First World War in 1917, British troops conquered Palestine, the piece of land that we call today "Israel", back then, a part of the Ottoman Empire. The British ruled this territory – mandatory Palestine - under military powers during the first years. The League of Nations decided in 1922 to grant the land to Britain as part of the mandate system. As explicitly provided in its terms, the Mandate's purpose was to establish in Palestine "a national home for the Jewish people."

The British inherited, among other things, the legal system that had been practised in the country until then - Ottoman law. For centuries, Ottoman law was a non-western law practised side by side with Muslim law and the original legislation of the Ottoman sultans. Throughout the nineteenth century, however, Ottoman law underwent a process of change. In the middle of this century, the Ottoman rulers concluded that the only way to preserve the weakening power of the empire vis-à-vis the Western powers was through comprehensive reforms of the Ottoman system of government. As part of these reforms, the sultans also replaced the legal

[97] Assaf Likhovski, *The Ottoman Legacy of Israeli Law*, Annales de la Faculté de Droit d'Istanbul, Vol. 39, 2007, pp. 71-86.

system used in the empire. They adopted a series of law books - codes - based on western law, especially French law, and abolished extensive parts of the previous, predominantly Muslim law that ruled the empire until the mid-nineteenth century.[98]

There were also areas of law in which the sultans partially observed Muslim law. The most important of these was civil law, which continued to be based on Muslim religious law - Sharia even after the reforms. At the same time, a particular western influence was evident in this area since the Ottoman authorities grouped the civil norms of *Sharia* law in a western law book - the *Mejelle*. The structure of European civil codes partly influenced the external shape of the *Mejelle*, But the source of the norms in which was Muslim religious law. Other parts of pre-reform Ottoman law remained virtually unchanged, for example, in the field of family law, so the result of the reforms was a legal system used in a jumble of French, Muslim and Ottoman norms.

It is not apparent in which manner the reforms had a tangible impact on the inhabitants' daily lives of the peripheral areas of the Ottoman Empire, such as Palestine. The impact of the reforms may have been negligible because many residents living in Palestine in the nineteenth century did not seek help from the Ottoman governmental legal system but settled their legal disputes in non-governmental legal systems, such as the religious or consular courts of European powers. In any case, when the British occupied Palestine, they found in the country, at least formally, the Ottoman legal system, which underwent a partial process of westernization. What did the British do with this legal system? Palestine was not the first colony conquered by the British but one of the last places to join the empire when its process of decline had already begun. The British thus had extensive experience in conquests and dealing with local legal systems in the occupied colonies. They did not formulate a uniform policy for dealing with legal systems in the occupied colonies, but it can be said that certain elements characterized British legal policy throughout the empire.

In the late nineteenth and early twentieth centuries, the British policy was to preserve as far as possible the legal status quo in the British occupied colonies, especially in those colonies where a developed legal system existed before the British occupation.[99] The British had no interest in creating an antagonism towards their rule in the conquered population, an antagonism that

[98] Moshe Ma'oz, *Ottoman Reform in Syria and Palestine 1840-1861: The Impact of the Tanzimat on Politics and Society* (Oxford, 1968).
[99] Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London, 1962).

might have arisen by replacing the old law with a new law. At the same time, it cannot be said that the British completely preserved the legal systems they encountered during their conquests. The longer a particular colony was under English rule, the more the English law influenced the occupied colony. This process of penetration of English law, known as "anglicization", sometimes comes as a result of the proactive and planned activity of the English rulers in the colony or the Colonial Office in London; At times, however, the process was the product of accidental circumstances. Some local legal systems were more resistant to the intrusion of English law, and others were less resistant. In some colonies, the English established only one governmental legal system. However, sometimes, especially in African colonies, they created a "dual legal system". An institutional distinction was made between a governmental legal system that applied western norms and an indigenous legal system that applied local customs or at least what the British thought was local customary norms. All these factors made a considerable difference in the nature of the legal systems in the various British colonies and the extent to which English law penetrated them. As in the Caribbean, some colonies eventually formed legal systems very similar to the law in England's metropolis. There were colonies, as in Africa, in which English law had almost no foothold, certainly not in practice, and most disputes were resolved through customary courts backed by the British or within indigenous non-governmental systems that existed even before the occupation.[100]

The degree of importation of English law varied from colony to colony and between different branches of law within the law of a given colony. Two fundamental legal distinctions influenced the degree of substitution of domestic law for English law: first, a distinction between substance and procedure; And second, a distinction between the private and public sphere.

Let us begin by distinguishing between substance and procedure. The British were not happy to replace the material part of local law, such as property law, family law or contract law. On the other hand, they were interested in replacing the procedural part of the law - evidence law, the procedure in civil law and criminal law. The replacement of local law of evidence and procedure with British rules was a practical necessity, as in the judicial systems of the colonies, British judges and lawyers who were accustomed to the procedure and evidence of English law served. The change of procedure was also associated with increasing the efficiency of the judicial systems in the colonies, at least according to British thinking. Local legal systems, such

[100] Terence Ranger, *The Invention of Tradition in Colonial Africa*, in The Innovation of Tradition (Eric Hobsbawn, Terence Ranger, eds., Cambridge, 1992), pp. 211, 247-262.

as the Ottoman system, have often been described by the British and other westerners as corrupt. There were also Britons who argued that their contribution to law in the colonies was not in the change of local substantive law but mainly in the manner in which local law was enforced. The British, it was argued, provided the indigenous population with a legal system that enforced local norms; But unlike local systems, it did so efficiently and not corruptly. Thus we often find in British texts the idea that the British "cultivated" local law in the colonies through the concept of "the rule of law," a concept that was arguably unknown to the indigenous legal systems in which judges ruled at their discretion rather than strict rules.

It is complicated to determine to what extent the description of local systems as corrupt systems is correct and to what extent it is intended to legitimize British colonialism. It is also challenging to determine whether the British were indeed able to create in the colonies more efficient legal systems than those that existed before the occupation. Undeniably, there is no doubt that the British brought about a massive change in the laws of procedure and evidence in a considerable part of the territories they occupied.

Changing the norms of local substantive law was more difficult than replacing the indigenous procedure; Here, a process of anglicization took place. The areas of local law that were perceived as "private" or "religious" - such as family law, inheritance law and, to some extent also, property law - did not undergo a process of anglicization. An intermediate area of law, contract and tort law, was replaced by English rules, but the process sometimes took a long time. Finally, the "public" areas of law, criminal law and commercial law have often undergone a process of anglicization.[101]

It is worth mentioning that the importation of English law into the colonies was not always done intentionally in the first place. When new legal questions arose in the legal system of a particular colony, the English lawyers and magistrates in the colony naturally turned to English law to solve the problem; Thus, English law was imported into the colony in an unplanned manner. Therefore, the importation of English law resulted from a lack of orientation in local law.

The distinctions between the procedural and substantive spheres and between the private and the public spheres also influenced the anglicization of law in Mandatory Palestine. According to the known rules of international law, the occupier is obliged to maintain the legal *status quo*

[101] Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials* (Albany, 1975), p. 57.

in the occupied territory; Indeed, in the first years of British rule in the country, the British reduced new legislation. In 1922, however, the League of Nations granted Britain a mandate over Palestine. Since, under the terms of the Mandate, the British had to ensure the establishment of a Jewish national home in the occupied territory, they were forced to carry out a reorganization of the judicial system. Legislative and executive powers were both vested in the High Commissioner. Government courts have been established, and the religious courts of the various denominations have been authorized to adjudicate on some issues in the field of family and inheritance law. It was determined that the government courts implemented the Ottoman and Mandatory legislation. However, if this legislation does not solve the legal question before them, the government courts will use the "principles of Common law and the law of fairness" of English law, as long as they are suitable for the country's inhabitants' conditions.[102]

The British therefore anticipated two main mechanisms for the importation of English law. The first mechanism was to import this law through legislation of the High Commissioner; the other was the importation of English case law in cases where the legislation was lacking. In addition, the Mandatory legislative institution operated at all times. The British replaced in the 1930s the Ottoman criminal code and the Ottoman civil procedure code with legislation based on English law. Several other laws of a commercial nature were also enacted, such as the Mandatory Bankruptcy Ordinance. In the late 1940s, as British rule was nearing an end, a new wave of legislative initiatives began that dealt with regulating areas that British rulers had barely touched on until then, such as tort law.[103]

As stated, legislation was one way through which English law entered Palestine. Another way was anglicization through the ruling. This measure is expressed in different ways. Some of the mandatory ordinances had commentary clauses that explicitly referred the judges to English law to interpret ordinances; some of the mandatory ordinances included provisions that instructed the judges not only to interpret the ordinance through English law but also to fill in gaps in the particular legal field in which the ordinance dealt with by appealing to English law. Nevertheless, even in places with no such provisions, the Mandatory judges naturally turned to English law to interpret the orders.

---

[102] Uri Yadin, *Reception and Rejection of English Law in Israel,* International and Comparative Law Quarterly, Vol. 11, 1962, p. 59.

[103] Assaf Likhovski, *In Our Image: Colonial Dis*course *and the Anglicization of the Law of Mandatory Palestine,* Israel Law Review, Vol. 24, 1995, p. 291.

When the British left in 1948, they left behind a mixed system of governmental law - one part based on English law and the other part remaining Ottoman.

The Mandatory legacy influenced the shaping of many aspects of Israeli law. It is found first and foremost in the general characteristics of the method. The Israeli legal system inherited from the Mandatory law the respectful attitude to precedent; The notion that judges have an active and essential role in creating norms; The centrality of lawyers in the conduct of legal proceedings; The unified structure of the court system, and many other general characteristics. Even when a branch or several branches of Israeli law underwent partial processes of continentalization (for example, civil law that has been in a continuous process of codification in recent decades based on models taken from continental Europe), the Israeli legislature maintained a mandatory conception, mainly regarding the role of judges.[104]

The connection between Israeli law and Mandatory law is found in the more abstract levels of the Israeli legal system and the details. Entire areas of Israeli law are still based on mandatory legislation, although many patches and amendments have been added to this legislation over the years. For example, Israeli tort law is, for the most part in, a mandatory ordinance from the 1940s; The basic rules of the Israeli income tax system are based on a mandatory ordinance from 1941; Additional areas of Israeli commercial law are still regulated by mandatory ordinances (e.g. banknotes, trademarks, copyrights); The civil and criminal procedure in Israel, as well as the law of evidence, originate in Mandatory law, as does the Israeli Penal Code.

Certain areas of law are sometimes described as "original Israeli works," such as Israeli Constitutional law or labour law; however, it can be argued that these domains are based to some extent on British law. Israeli Constitutional and Administrative law was created mainly by one body - the Supreme Court sitting as the High Court of Justice - an institution that originated during the Mandate. The norms created by this court since the establishment of the State are, in part, original Israeli works, but in part, they were drawn from the administrative and Constitutional law created in Israel during the mandate period. Phenomena such as judicial review of primary legislation commonly described as original Israeli work or due to the

[104] Yoram Shachar, *History and Sources of Israeli Law,* in Introduction to the Law of Israel (Amos Shapira, Keren DeWitt-Adar, eds., The Hague, 1995), p. 1.

influence of American law on Israeli law also have mandatory precedents.[105] Similar things can be said about Israeli labour legislation. Labour legislation is usually attributed to the initiative of the founding fathers of the socialist State of Israel. However, labour legislation in Israeli law was not born in the 1950s. However, three decades earlier, in the 1920s, and was primarily not a product of socialist ideology but of a complex system of internal and international interests that led the British to enact protective legislation in their colonies in the early 1920s.

As mentioned, certain parts of the Ottoman heritage have not yet been abolished. This is mainly accurate in the area of family law. Prior to the British occupation, the various religious denominations in the Ottoman Empire enjoyed broad autonomy, and religious courts (Sharia courts, rabbis, and ecclesiastical courts) were empowered to handle many areas of family law, such as inheritance, marriage, and divorce. The British preserved in Palestine the autonomy of religious law, a phenomenon that continues, as is well known, to this day; After all, since the declaration of independence in 1948, the Israeli governments and the Israeli courts have followed the British and continued to respect the autonomy of religious law. This autonomy has indeed shrunk over time, mainly due to power struggles between the rabbinical establishment and the Supreme Court; But it did not disappear altogether, as might have been expected after the establishment of the State. Therefore, we have found that in the field of family law, the Mandatory legacy exists not only in the norms themselves but also in the fact that the Israeli legislature and courts, like their Mandatory predecessors, have chosen to limit their intervention in the field.

We may argue that the Israeli legislature and courts have replaced much of the Mandatory law that prevailed in Israel since 1948, especially since the 1960s, but there is no doubt that today's Israeli law still preserves some of the legacies it received from the Mandatory State.

Therefore, the absorption of the doctrine of JSOCP with Israeli law does not raise any wonder or difficulty.

[105] Yoram Shachar, *The Dialectics of Zionism and Democracy in the Law of Mandatory Palestine,* in The History of Law in a Multicultural Society: Israel 1917-1967 (Ron Haris, Alexandre Kedar, Pnina Lahav, Assaf Likhovski, eds., Dartmouth, 2002), p. 95.

3.2 Israel as a unique mixed legal system

As noted, under the powerful influence of its British legacy, Israel law shares many features with the Common law tradition. Until 1980, by force of Article 46 of the Palestine Order in Council, Israeli courts were bound to follow English judge-made law. This article was abolished in 1980, but the custom of following English and American traditions still prevails. The status of almost all members of the legal profession – judges, advocates, and legal scholars – is still far more similar to their counterparts in the United Kingdom and the USA than those in Germany, France, or Hungary. Legal process and legislation are based on Common law roots, despite the Civil law influence behind the codification of private law. Significant law fields still echo concepts and rules from the corresponding fields of English law. The Israeli system of government is a prime example of this phenomenon.

The structure of the legal system and its legal institutions is undoubtedly influenced by Common law tradition. Judicial decisions are considered a source of law, often referred to as "the Israeli Common law," and the principle of binding precedent governs the creation of judge-made law. The structure of the judiciary, its inner hierarchy, rules of evidence and procedure, and the status of judges all bear similarities to their corresponding systems in Common law countries. It is particularly noteworthy that case-by-case analysis and casuistic legal thinking are widespread. The Israeli contribution to its own legal system, starting in 1948, has been quite unique, focusing not only on filling the gaps left by former rulers. There has, for example, been a great effort to build two new systems of law, one governing private relations between individuals and the other controlling the rights of individuals in a democratic system, finding expression in the ongoing efforts to codify the private law concisely and to codify and reform the public law mechanism and the substance of public law. Both of these branches of law are influenced by different sources. The codification of public law has often relied on European legal concepts. The emergence of new Basic Laws dealing with human rights has been heavily influenced by the reasoning and wisdom of American justices and the Canadian model.[106]

Despite adopting some continental law concepts and the ongoing codification process, Israeli law's Anglo-American Common law characteristics remain significant. It has particular features. Legal thinking in Israel is still casuistic but tends more to generalizations than its

[106] Suzie Navot, *Constitutional Law in Israel* (2nd ed., Wolters Kluwer, 2016).

Common law counterparts. It also appears that Israeli law is more liberal concerning procedural and formal requirements. However, Israeli law is also clearly not a member of the continental law family and cannot be identified with the Roman tradition. These influences have created a mixed jurisdiction, although it is much closer to the Common law family than continental traditions.

To conclude, it is apparent that Israeli law belongs to a family of mixed legal systems. At this phase of its development, it is located between the Common law and Continental law traditions, although it maintains a closer link to the former.

3.3 The Court System in Israel

The Israeli court system comprises two types of tribunals - a general court system and several specialized courts. Interestingly, despite the British tradition, Israel has not inherited the option of a trial with a Jury.

There are three instances in the general system: The Supreme Court, district courts, and magistrates' courts ("courts of peace"). The Supreme Court functions as a high court of justice and also as a court of appeal. It has the authority to adjudicate administrative matters that are not subject to the jurisdiction of district courts sitting as courts for administrative issues. Special courts, such as labour courts, military justice courts, and religious courts, have particular jurisdiction in relevant fields.

Fifteen justices serve on the Supreme Court, sitting in Jerusalem. It usually does not sit en banc since the bench usually contains a panel of three judges. The President or the Deputy-President may direct a larger number on the bench or in further hearings (on matters it has already adjudicated). One judge hears petitions for temporary orders and other interlocutory decisions, and certain other proceedings.

District courts hold the jurisdiction over civil and criminal issues beyond the scope of the jurisdiction of the magistrates' courts. They also have general residual jurisdiction to hear any case that is not under the absolute power of other courts. A regular district court bench is composed of one judge in routine matters and three cases involving severe offences or specifically directed by the district court president or vice-president.

Magistrates' courts deal with criminal matters over most offences, which carry a maximum punishment of seven years. In civil matters, they basically deal with cases in which the monetary value of the claim is around 700,000 EUR. A decree may authorize certain magistrates' courts to serve as special tribunals, such as a family court or juvenile court.

Special courts include, among others, the labour courts, the traffic courts, the military courts, and the religious courts.

3.4 Judicial Independence

An independent judicial system is one of the most treasured valuables of a democratic state, and one might even call it the cornerstone, vital for protecting citizen rights from the State and other citizens. For this research, this element is a focal one because only an independent judiciary, with no fear of the Government or the prosecution, can even consider implementing the doctrine of JSOCP.

The theoretical basis of this asset is the doctrine of the separation of powers. In its modern meaning, this doctrine does not deem an absolute separation between governing powers but rather the presence of "checks and balances." According to this mechanism, the judiciary should be independent of supervising the other two authorities. Since this independence is not created of its own accord, it can be achieved via the balances determined by legislation, judicial decisions, and the formation of ideological perceptions. It is essential to present the status of the Israeli judiciary's independence culture. It is vital to indicate a few aspects concerning the independence of the judicial system from an institutional point of view, mainly through the process of appointing judges; the personal autonomy of judges concerning external factors which may impact their decisions; the collective independence of the entire system with respect to other government authorities; the internal independence of a single judge with respect to other judges.

3.4.1. Appointing judges

Practically, and primarily, probably the most important factor that impacts the judges'

independence is the way they are appointed, whether politically, professionally, in some combination of both, etc. Inspired by the method applied in France, Israel had adopted in 1953 a new groundbreaking method for appointing judges: a commission for electing judges that incorporates representatives from the three authorities, the legislature, the executive, and the judiciary, as well as professionals from the practice of law. Since then, this method has spread worldwide, and international organizations have recommended it as a suitable means to balance the principle of judicial independence and the democratic accountability of judges. These principles are based on the understanding that, in addition to the legal authorization to adjudicate, judges have an important role in protecting the state's fundamental values and human rights and impact the formation of the political, social, and economic policy. Since judges need the public's trust and legitimacy when ruling on such issues, the judiciary, and more specifically the process of appointing judges, is designed according to the two competing principles: independence and accountability. On the one hand, the process of nominating and promoting judges should ensure their independence from government authorities and enable them to rule professionally, independently, and in accordance with the law in order to prevent government authorities from violating human rights and the rule of law; on the other hand, especially in view of the understanding that the judge has an impact on forming the customary policy, the accountability of the judges towards the sovereign: the citizens. The Basic Law: The Judiciary determines that the president nominates judges in Israel according to the judicial selection commission's decision. [107] The commission comprises nine members: three judges: the president of the Supreme Court along with two other judges selected by the Supreme Court members; two ministers: the Minister of Justice, who is the head of the commission and an additional minister selected by the government; two members of the Knesset which it elects by secret ballot.[108] This format was adopted in 1953, as mentioned, following the transition which started taking place from the method of appointing judges by the executive authority to one that reduces their dependence on this authority. Pinhas Rozen, who was then the Minister of Justice, explained in a Knesset assembly that while the nomination of judges in Israel and around the world was formally done by the executive authority, he wanted to ensure the independence of judges and had thus decided to follow France and Italy's method. To a large extent, founding the judicial selection commission in 1953 was ahead of its time, and this

[107] Section 4 of the Basic Law: The Judiciary. An English version is available at: https://www.mfa.gov.il/MFA/MFA-Archive/1980-1989/Pages/Basic%20Law-%20The%20Judiciary.aspx (26.6.2021).
[108] Section 6(1) of the Courts Law [consolidated version], 1984 (hereinafter: "The court Act").

institution adheres to current trends of appointing judges in other democratic countries. Creating the judicial bureaucracy of the central government was an essential step in establishing the modern country. [109] In the modern era, the executive authority was responsible for appointing judges. In the European kingdoms of the late Middle Ages and the beginning of the modern era, appointing judges was considered the king's role and responsibility. Looking at the history of democratization, especially in the twentieth century, we can observe many attempts to separate the role of appointing judges from the executive authority.

The many methods applied today for appointing judges may be classified into four main classes:[110] direct election by the public (used, for example, in a few states in the USA and some cantons in Switzerland);[111] the nomination is conducted by one of the political authorities: the executive, the executive along with approval by the legislature or the legislature; appointment by a "judiciary commission" (similar in composition to the Judicial Selection Commission in Israel); appointed by the judiciary or representatives from the practice of law. Mixed methods exist, and different methods are used in the same country for nominating judges for different types of courts and instances. All method classes may thus be located on a continuum where the democratic accountability or the democratic legitimacy towards the citizens is on one end while judicial independence is on the other.

In classifying the methods for appointing judges, it is vital to discern between Common law vs Civil law traditions, applied in and outside Europe, mainly due to the significant difference in the nature of the judicial career and the judge's role as a "lawmaker". In the Common law method applied in countries such as Britain, Canada, New Zealand, and Israel, judges are elected among experienced lawyers. In contrast, in countries applying the Civil law method, such as Italy, Germany, Spain, France, and Sweden, being a judge is a career in the public service that starts after completing Law studies.[112] Since World War II, the Civil law tradition formed a mixed approach for appointing judges: politicians nominate the judges of the

---

[109] See, for example: Paul Brand, *The Making of the Common Law* (Bloomsbury, 1992); Steven Gunn, *Political History, New Monarchy and State Formation: Henry VII in European Perspective*, Historical Research, Vol. 82, 2009, p. 380.

[110] See: Kate Malleson, Introduction, in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Kate Malleson & Peter H. Russell eds., 2005), pp. 3-4.

[111] Tom Ginsburg, *Judicial Appointments and Judicial Independence* (Paper written for the US Institute for Peace, January (2009).
Available at: http://comparativeConstitutionsproject.org/files/judicial_appointments.pdf.

[112] Mary L. Volcansek, *Appointing Judges the European Way*, Fordham Urban Law Journal, Vol. 34, 2007, pp. 372-376.

Constitutional court, usually a two thirds or three-fifths qualified majority is required, with a broad political agreement between the coalition and opposition; the judges of the other instances are appointed by a "Judiciary Commission" where judges are the majority of members or have a crucial impact on the decision.[113] In law traditions exercised in Britain, Canada, Australia, and Israel, officials from the executive authority used to have a significant effect on judges' appointments. Occasionally, judges would be appointed by officials who held mixed positions in the executive power and the judiciary, such as the Lord Chancellor in England. In these judicial methods and pre-1953 Israel, the entity responsible for appointing judges used to consult with judges and representatives from the practice of law. This practice of informal consulting is critical since it provides a glimpse of the gap between the legal vs the actual procedures for appointing judges. Considering the custom of consulting with officials from the judiciary and the immense weight given to their opinion, one may conclude that in methods that provide the formal authority for appointing judges to public representatives, the actual nomination is highly influenced by judges' views. This observation regarding the informal weight given to the opinion of judges is accurate in both the Common law and the Civil law traditions.[114]

From the twentieth century onward, changes were made in these principal traditions in that the procedure for appointing judges was less dependent on the political authorities.[115] However, it seems that during the last decade, some countries withdrew from this trend. In other words, it may generally be pointed out that the trend around the world is to give increasing weight to professional consideration on account of the impact of political officials. [116] The political authorities appoint constitutional court judges in the Civil law tradition by a qualified majority. In contrast, those of other instances are selected by a special commission in which the judges are either the majority of their opinion is given significant weight. The "Judiciary Commission" model adopted in Israel in 1953 for appointing judges in all instances (the Judicial Selection Commission) was first adopted by France and Italy and gradually spread in Europe and

[113] Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2009), pp. 98-99, 103.
[114] Rachel Davis, George Williams, *Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia*, 27 Melbourne University Law Review, Vol. 27, 2003, pp. 819, 823-825.
[115] Lee Epstein, Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (Oxford University Press, 2005), p.5.
[116] Nuno Garoupa, Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015), p. 98.

worldwide.[117] In the beginning, this idea took hold in countries applying the Continental Law tradition to increase the independence of judges whose appointment was then governed - like in Israel - by political officials.[118] This way, judiciary commissions for appointing judges and disciplinary actions when required were established in France, Italy, Portugal, and Spain. From the 1980s, the judiciary commission model spread worldwide, including South America, East Europe, and Commonwealth countries such as South Africa, Malesia, Kenia, and the Caribbean. Giving major weight to the opinion of judges, this commission appoints judges or is consulted by the appointing entity, sometimes even concerning Supreme Court judges.[119] The judiciary commission became the dominant model in both Common law and Civil law traditions and is not restricted to countries with Constitutional courts.

International institutions also started recommending this model. De facto, many judges, sometimes a majority of judges, are members of these commissions, in line with the recommendations of international institutions.[120] Nevertheless, it should be clarified that the composition of these commissions may change from country to country. They usually comprise judges selected by their colleagues or the political authorities, representatives of the political authorities, lawyers, and others. As mentioned, this model is perceived as a suitable means for balancing between the judges' independence and their accountability towards the citizens.[121]

Here are two examples: the first relates to Britain. In a reform conducted in Britain in 2005,

---

[117] Wim Voermans, *Councils for the Judiciary in Europe*, Tilburg Law Review, Vol. 8, 2000, p. 121.
[118] Wim Voermans, Pim Albers, *Councils for the Judiciary in EU countries* (Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), Strasbourg, 2003).
[119] Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (The British Institute of International and Comparative Law, 2015).
[120] See *Budapest Resolution of the General Assembly of the European Network of Councils for the Judiciary* (May 21-23, 2008); Council of Europe, *Judges: Independence, Efficiency and Responsibilities* (Recommendation CM/Rec (2010) 12, November 17, 2010); The General Assembly of the European Network of Councils for the Judiciary, *The Sofia Declaration on Judicial Independence and Accountability* (June 2013); European Network of Councils for the Judiciary, *Independence and Accountability of the Judiciary and the Prosecution: Improving the Performance Indicators and Quality of Justice* (ENCJ Report 2015-2016, June 3, 2016).
[121] The criticism sometimes expressed in research literature against the judiciary commissions is less relevant for us for two reasons: firstly, it usually concerns judiciary commissions which started working in new Eastern European democracies while ignoring the existing judiciary culture, unlike in Israel who was the first to adopt this procedure out of a special sensitivity to the political- legal culture of the time. Secondly, this criticism refers to judiciary commissions handling the administrative management of the courts, not the appointment of judges. For exploring this criticism, see: Markus B. Zimmer, *Judicial System Institutional Frameworks: An Overview of the Interplay between Self-Governance and Independence*, 2011 Utah Law Review, 2011, pp. 121, 130-131; Michal Bobek & David Kosaˇr, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* (Research Paper in Law, College of Europe, 2013).

the authority to appoint judges was transferred from the Lord Chancellor, who was at the same time part of three entities: the executive authority, the legislature, and the head of the judiciary, to professional commissions where judges' opinions were given significant weight. As part of the reform, a new Supreme Court of the United Kingdom was founded. Its members are nominated by a commission comprising the Chief Judge of the Supreme Court, the Vice-Chief, and one representative from each commission for appointing judges for courts in England, Scotland, and Ireland. At least one of the representatives is not a judge. The commission includes neither a representative of the executive authority nor the legislature. The commission can recommend only one candidate to the Lord Chancellor- the equivalent of the Minister of Justice in Israel- who makes the actual nomination decision. He may postpone the nomination once and ask the commission to reconsider its recommendation. Commissions with a varied composition of judges, lawyers, and other members are responsible for appointing judges in the lower courts in England, Scotland, and Ireland. The English commission consists of fifteen members: seven judges, two lawyers, and six other members- who may be, for example, senior academy members, army and public service retirees, and human resources experts- out of which one is the head of the commission. Though the commission members are recommended by the Lord Chancellor and nominated by the crown, de facto, a binding recommendation is given by the commissions for locating candidates whose members are assigned in a complex process which gives great weight to the head of the judiciary or a council of judges.[122] One may thus conclude that judges and professional commissions independent of the political authorities have a crucial impact on the procedure for appointing judges in the United Kingdom.

The second example relates to Canada. In Canada, the prime minister had had the authority to appoint the judges of the Canadian Supreme Court, having, supposedly, the broad discretion to do so. However, the procedure for appointing judges had many informal rules, such as the dominance of professional consideration. The rule was that judges appointed to the Supreme Court were usually judges from lower instances. Moreover, Canada conducted reforms in the procedure for nominating Supreme Court judges. It adopted a model where these judges were appointed by a professional independent advisory commission, seemingly informal status and based on a government decision. The commission comprises seven members: four professional

[122] See Erin F. Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom*, International Journal of Constitutional Law, Vol. 14, 2016, p. 752.

members-an an ex-judge, two lawyers, and an academy member- and three members appointed by the Minister of Justice, out of which at least two are not supposed to be lawyers. The commission, which recommends three to five candidates based on their professional skills, is in line with the prevalent trend in the Canadian provinces and the lower federal courts since the 1960s, where the provinces' Ministers of Justice are authorized to appoint judges.

In contrast, the government is authorized, given the recommendation of the Minister of Justice, to appoint federal courts' judges in a procedure that involves independent professional commissions. The power of these commissions is diverse and includes providing consulting, sorting candidates, and providing binding recommendations. Their composition is also diverse, though most of their members are judges and lawyers.[123]

The trend to neutralize the politicization of the procedure for appointing judges by applying mechanisms involving independent professional commissions skipped the Constitutional courts whose judges are appointed by political officials. These courts, established in increasing numbers since World War Two, are the sole authority to scrutinize the congruity between legislation and the constitution judicially. The methods to appoint these judges seem less relevant in Israel since the Israeli Supreme Court is not a Constitutional court- most of its work is not constitutional in nature. It has no exclusivity on judicially criticizing legislation since other courts may do so well. Nevertheless, given the call of some people in the Israeli public to turn the Supreme Court into a Constitutional court or, alternately, the counter-call to narrow its power for judicial criticism because of the "democratic deficit" in the way its judges are appointed, it is worth mentioning that mechanisms for preventing partiality in appointing judges are also exercised in Constitutional courts. More than often means to give weight to judges, and the parliamentary opposition is applied in selecting the judges of Constitutional courts.

The three dominant mechanisms of appointing judges for Constitutional courts,[124] in all of which attempts were made to moderate the politicization of the appointment procedure, are as follows:

Appointing judges by the three state authorities: in Italy, Bulgaria, and United Kingdomraine, for example, the executive authority, the legislature, and the judiciary appoint the

[123] Peter McCormick, *Judging Selection: Appointing Canadian Judges*, Windsor Yearbook of Access to Justice, Vol. 30, 2012, p. 39.
[124] European Commission for Democracy Through Law (Venice Commission), *The Composition of Constitutional Courts* (1997).

Constitutional courts' judges, each nominating a particular lot of judges: one-third of judges are appointed by the president, one third by the legislature and one third by the Supreme Court. This composition ensures a balance and susceptibility to varied interests: the judiciary usually appoints incumbent judges; the president appoints judges from various sources: court judges, law professors, or highly experienced lawyers. This method creates a balance between the ideological and professional composition of the court.

Appointing by consensus between the coalition and the opposition: as mentioned above, the elected authorities appoint the Constitutional court judges in many European and non-European countries, but a qualified majority of two-thirds or three-fifths is required to give weight to the opposition's stand. This method is used in electing at least part of the judges of the Constitutional Courts in Italy, Belgium, Mexico, Spain, and Portugal. This mechanism has a positive impact as a broad consensus nominates judges, and their positions are accepted by various political parties rather than by just a specific political wing. Moreover, the judges are loyal to the constitution and law, not to a particular political ideology.

The collaborative model: applying this model necessitates collaboration between a few elected bodies. Being elected by the citizens, each body is bestowed an independent democratic legitimacy and reflects different political powers. For example, in Czechia and Belgium, the president proposes the candidate, and the legislature approves him or vice versa. A certain degree of broad consensus is required in this model, too, between the governing bodies. Applying this model in Belgium enables appointing judges by a broad consensus, including the opposition.

In addition to the different methods for appointing judges, the power of the regular courts in Europe in matters of judicial criticism of the legislation has been strengthened in recent years on account of the Constitutional courts. One reason for this is that nations that are signatories to the European convention for protecting human rights have subordinated themselves to the judicial criticism of the European Court of Human Rights (ECtHR) on these matters. England has additionally included the law for the protection of human rights, enabling its courts to apply the convention's human rights and even indicating an incongruence between parliament laws and the convention. The second reason for the rise of power of the regular courts is the subordination of the EU countries to the judicial criticism of the European Court of Justice, the central judicial institute of the EU. As a result, the signatory states subordinated themselves to the doctrine increasingly taking hold, which deems that the EU countries' regular courts should

interpret the local state laws according to the EU's laws- the "displacement doctrine." [125] The European Court of Justice ruled that ordinary courts of a country should do so- in cases an internal appeal is not possible- when they think a state law does not comply with the EU law, even if the state's Constitutional court objects to it. This trend adds to the increasing number of appeals of regular courts in European Union states to the EU's Court of Justice due to violations of human rights in their country. These trends combined signify that the ordinary courts in EU states- where judges are appointed in a non-political procedure that gives much weight to judges- have more and more power to criticize legislation on account of the Constitutional court's power judicially.

Observing the international trends over a long period of time indicates that the method for appointing judges in Israel is not exceptional but rather part of a worldwide trend of attempts to neutralize political considerations in appointing judges. Ensuring professional and independent judging along with preserving public trust in the judiciary by preventing its politicization are the primary goals of this trend. Nevertheless, and more so in the last decade, growing attempts have been made to reverse the trend and increase the government's involvement in several European countries as well as in Israel. In this sense, judicial independence is under constant threat.

The manner in which judges are elected, and their work terms (which release them from being supervised by the government with regard to their appointment, salary, immunity, suspension, dismissal, and the like) guarantee their personal independence.

3.4.2. The personal independence of the individual judge

After being nominated and in order to ensure their independence, the judges' tenure should be guaranteed by appointment for life or at least up to a certain age. Had the nomination been restricted for a limited period of time, their job security would not have been guaranteed, and the nomination of a "desired" judge may have been preferred over that of an "undesired" judge. That would have impaired their judicial independence. International standards determine that

[125] Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy*, International Journal of Constitutional Law, Vol. 12, 2014, p. 525; Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy: A Rejoinder*, International Journal of Constitutional Law, Vol. 15 (3), 2017, p. 815.

judges should be appointed, if not for life, then at least until the law's retirement age.[126] Nevertheless, judges are appointed for life only in a few countries; usually, there is a fixed age for retirement or different ages according to the judge classification. In Israel, the binding retirement age for judges in all instances is 70.

It is worth mentioning the procedure in Israel which enables the Minister of Justice, pending the approval of the President of the Supreme Court, to appoint a judge in office to a higher instance for a limited period of up to a year. This temporary appointment for a "trial period" is undesired and is usually invalidated by international standards.[127] The motives for such a temporary appointment may result from political or some other pressures and not from pure judicial interests. For this reason, such an appointment sets a problem in terms of personal independence and may appear to be inadequate.

Concerning the judges' salaries, the principle of personal independence necessitates that their salary is not decreased due to changes in the direct salary or the financial benefits. International standards enable impairing the judges' employment terms only if they are part of public financial measures in that state, i.e., not due to a policy that selectively damages the judicial sector.

An individual judge's material independence means that judges are subject only to the law and their own conscience in the judicial work. This ensures they are neutral, impartial, and free from any undesired influence. This principle is enshrined in section 2 of the Basic Law: The Judiciary [complete]. The prevention of irrelevant considerations in the judicial act serves two purposes: the first is the social interest of attaining the judges' neutrality and impartiality; the second is the appearance of justice and the public's trust in the courts, judges, and the procedure itself. This entails a requirement of rules that protect judges from any inappropriate influence. Part of the rules restricts the judges themselves, such as a rule prohibiting judges from holding any office in other government authorities or having business relationships. Different rules limit the manner judges are treated by others, such as the sub judice principle, and limit the parliament's criticism of judges.

[126] IBA Minimum Standards of Judicial Independence (Adopted 1982), Art. 22. Available at: https://www.ibanet.org/MediaHandler?id=bb019013-52b1-427c-ad25-a6409b49fe29
[127] The Montreal Universal Declaration on the Independence of Justice (10 June 1983), Art. 2.20. Available at: https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf

3.4.3. Collective-institutional independence

Collective-institutional independence refers to the judiciary in its entirety, and any intervention may impact the sense of independence of individual judges in the judiciary. Institutional independence of the judiciary- *inter alia*, supervision and control of human resources, court budgeting, and maintenance- is an essential measure for evaluating collective judicial independence.

The Minister of Justice is responsible for the court administration. With the approval of the Supreme Court President, the minister nominates the Director of the Courts, who is responsible for the administration of the courts and reports directly to the minister. Additional powers the Minister of Justice has included the power to establish courts and the power to enact rules that regulate the courts' administration and procedures. She or he also heads the commission for selecting judges and has the power to initiate disciplinary measures against judges, which may directly impact the independence of the individual judge. Additional abilities which require the approval of the president of the Supreme Court include: temporarily appointing a judge for a different instance, appointing presidents of the courts (except for the Supreme Court), etc. The judges' salary is determined by a committee of the Israeli parliament, the Knesset. Reform is urgently required in the broad powers given in the minister's hands and his responsibility for the courts' administration. The desired arrangement would be to give the responsibility for the administration of the courts and the power to determine administrative measures to the president of the Supreme Court or at least to the president and the minister conjointly.

3.4.4. Internal independence

Internal independence is required in order to prevent other judges' pressures or instructions from influencing an individual judge's judicial roles. This may refer to three responsibilities: the judge's administrative responsibilities such as managing files, scheduling hearings, expediting hearings, etc.; procedural accountability while the trial is conducted; material responsibility of ruling and decision-making.

A subtle balance is required between tight administrative control vs loose or lack of such

control- unrestricted administrative control in allocating files to judges may impair the independence of a nonconformist judge, for example. At the same time, lack of administrative control is also undesirable for efficiency reasons.[128]

3.4.5. The judiciary as an independent administrative-organizational power

A public committee in Israel examined and recommended this approach in the 1990s, yet the recommendations were rejected. The current problematic situation is especially criticized since independence *is* given to other state bodies: the president, for example, is not part of the executive power but rather an independent branch elected by the Knesset and budgeted separately from the government's budget. So are the National Bank and the State Comptroller. On the other hand, the courts' budget is part of the Ministry of Justice budget, and the Minister of justice controls the judicial system's administration. This situation is abnormal as in many legal proceedings; the State is a party, actually very frequently- in all criminal proceedings, most of the legislative and administrative proceedings, and in many civil law proceedings as well. The courts rule in a lot of proceedings where the state is a party and should consequently be free from any dependence or undesired interests. The judiciary's budget should thus be determined directly by the Knesset and not the government.

It is essential to clarify that an independent judiciary does not mean a "privatized judiciary". We refer to the independence of the judiciary, not to an independent power. Clearly, the judiciary should always remain an organic part of the state; the state employs its employees, and its acts are considered the state's acts. Moreover, the desired independence is from the executive power- the government. As for the budget, our approach does not imply budgetary independence from the legislative power, but quite the contrary- we wish to strengthen the Knesset's status relative to the government's. Phrased differently, we "rely" on the parliament more than on the government.

Once this model is applied, one may ask how the independent system should be administered and how it would make decisions. In the USA, for example, the judiciary is run by other judicial bodies like the judicial conference or the judicial council. The federal courts are not sub-units

[128] James Zagel, Adam Winkler, *The Independence of Judges*, Mercer Law Review, Vol. 46, 1995, p. 795.

of the executive branch. Neither the president nor the Minister of Justice has any power over the court system, and Congress determines the courts' budget.

3.5 The principle of judicial activism

With these considerations and elements of judicial independence in mind, we can advance to another important, not to say crucial, term to this paper's topic: judicial activism.

A court that often intervenes in determining the content of the policy to be exercised by various government authorities (legislators, administrative authorities) is sometimes seen as an "imperialist". The reason is that it exceeds its mandate and enters into fields that properly belong to other branches.[129] Those who come forward against judicial activism in the United States, for example, claim that judges should not adopt the approach that has the ability to deal with political or ethical issues; otherwise, it might be seen as ignoring the basic principles of democracy.[130] However, a court is at times considered excessively restrained and passive when it refrains from protecting individual liberties.[131]

The complication in defining the term "judicial activism" is well known. The expression "judicial activism" is undeniably vague and dubious; judges and scholars have suggested various interpretations of it, and no generally accepted definition has yet been found. Some emphasize that the concept of judicial activism refers to cases in which the court creates a new legal rule which had not previously existed.[132] This is a rule which is not explicitly anchored in legislation and does not constitute a continuation of the previous doctrine or a decision by another body. The court may form such a new rule while setting aside legal policy established in the past by another governmental entity or a former court ruling. Others note that the court is considered more activistic to such an extent if it takes upon itself a vast role, relative to that of other governmental branches, in determining the values which will prevail within the society

[129] Zeev Segal, *Judicial Activism Vis-a-Vis Judicial Restraint: An Israeli Viewpoint*, Tulsa Law Review, vol. 47, no. 2, 2011, p. 319.
[130] Jeremy Waldron, *Judicial Power and Popular Sovereignty,* in Marbury v. Madison: Documents and Commentary (CQ Press, 2002), p. 181.
[131] Kenneth M. Holland, *Introduction*, in Judicial Activism in Comparative Perspective (Palgrave Mcmillan, 1991), p. 1.
[132] Tom Cambell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish, 2004), p. 279.

and advancing the priorities of the resources' distribution by the society are to be designated.[133]

The notion of judicial activism in public law primarily deals with the court's involvement in territories initially assigned to the other branches of government and its intervention in the decisions and actions of those branches. This might be done by overruling a decision or turning it to the deciding authority for further deliberation. Judicial activism, in practical terms, is implemented when the court overturns a decision by another branch of government, regardless of the question of whether or not it was desirable to act in this manner. Therefore, a decision to avoid reverse a decision taken by another body intrinsically implies that the court has decided to be passive and stand on the sidelines, irrespective of whether it was appropriate to act that way.

Unlike judicial activism, the concept of self-restraint – judicial passivism – is expressed as a tendency for the court to allow the existing legal rule to stand and ponder, overturning a legal policy previously established by another branch or a decision of any decision of a governmental body within the framework of public law.

In analyzing judicial activism, we must keep in mind that the conventional starting point for the court's role is the compliance policy, according to which the court is not supposed to make decisions that are within the margin of another governmental entity. The idea of restraint is based on the traditional concept of separation of powers, which prefers passivism by the courts.

There are several reasons behind the deference principle. To begin, the role of making executive decisions comes under the executive branch's responsibility, and the determination of law comes under the responsibility of the legislative branch. Accordingly, the court's intervention in a field that does not properly belong to them contradicts the principle of separation of powers. Just as important, the court is not an elected branch by contrast to the executive and Parliament. Therefore, trespassing the court into the domains of the other branches stimulates a legitimacy problem. We, the citizens, elect the legislative and executive branches based on their declared policies, which those branches are supposed to implement. This means that there is *prima facie* no justification for judicial decisions in areas that "belong" to those branches, as the court's views may be utterly different. Moreover, judges do not have

[133] Menachem Mautner, *Law and the Culture of Israel* (Oxford, 2011), p. 54.

the professional knowledge, expertise, and appropriate tools for making such decisions.

Finally, and equally important, judges do not own a mechanism that enables them to obtain accurate and professional information. The judicial procedure is by nature limited and is not appropriate for making executive decisions. One might argue that within the structure of the judicial process, it is impossible to accumulate information or to monitor the impact of previous decisions in the field in question over time.

The implementation of judicial activism is versatile. Over the course of the years, the courts have departed from the traditional idea of judicial restraint and have begun to develop judicial activism in several judicial fields. One aspect is the review of the constitutionality of statutes; a second facet is the judicial review of administrative actions; a third is the influence of the courts in the framing of public policy. Regarding the latter, the narrative of separation of powers holds that public policy on subjects that affect the individual and the various rights of individuals and society is established by the legislature and the executive. The courts also exercise judicial activism in shaping public policy when certain rights are not expressly outlined in the constitution.[134]

The Israeli Supreme Court as well is not a forum for technical literal legal interpretation. Instead, it is a policy player which shapes policy in the matters decided by it. The Israeli Supreme Court is involved in forming rules of the political arena, shaping the relationships between the various government entities, shaping public administration duties, and determining the protection to be given to individual rights. The range of judicial interference in policies of other branches is based, to a great extent, on the court's policy and principally on the ideological views and perspectives of the judges. The supporters and opponents of activism hotly dispute the question of judicial involvement. The proponents of the activistic approach hold that the court's role is to review the constitutionalism of acts of the other branches, including laws enacted by the Legislature and policy decisions formulated by the Executive. All such decisions must be subject to objective legal criteria, such as compliance with the rule of law requirements, and must be compatible with human rights. Those who favour this approach believe that the separation of powers should not be viewed as a sacred value by itself. When a governmental authority acts unlawfully, it constitutes a risk to democracy, and accordingly, judicial intervention is justified. The opponents of the activistic approach hold that the court cannot

[134] Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review,* Texas Law Review, Vol. 82, 2004, p. 1895.

legitimately invalidate decisions that were accepted by the elected bodies. As they say it, any judge who does so is rolling in accordance with his or her subjective views on the matter in question, which is not necessarily preferable to the opinions of the elected branch, whose concepts reflect the will of the people.

In his approach, Barak interpreted statutes to "ensure that the law, in fact, bridges the gap between law and society".[135] In interpreting the law in the light of human rights, even in the lake of a formal constitution, we shall see that the Israeli Supreme Court narrowed the gap between law and society. Even if the price of judicial activism is sometimes high, it is worthwhile to ensure democracy in a diverse community.

[135] Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006), p. 17.

CHAPTER 4

RELEVANT BACKGROUND: ELEMENTS OF THE ISRAELI CONSTITUTIONAL LAW

4.1 Fundamental Elements of Israeli Constitutional Law

To an American or a European reader, the phrase “a Constitution without a Constitution” might seem impossible. Such a reader views the constitution as a formal written document, symbolizing the supreme law of the land.[136]

In the narrow sense, a written comprehensive constitution, usually defined as "rigid" and "formal", is not the only form that constitution might take. There are unwritten constitutions, such as are found in the United Kingdom and the State of Israel, that include basic laws and ordinary laws prescribing constitutional principles and landmark decisions of the Supreme Court. One may argue that written constitutions curb the supremacy of the legislature, while under unwritten constitutions, the legislature is supreme. However, unwritten constitutions might be deemed more flexible and better secure substantive due process and guarantees of civil liberties.

The system that develops in a country with an unwritten constitution and an unwritten bill of rights depends on the content of the laws prevailing in the country and on the interpretation of the laws by the judiciary. In the Israeli legal system, which has neither a written constitution nor an entrenched bill of rights, human rights guarantees are incorporated into the constitutional arena by a presumption developed by the Supreme Court.[137] This presumption ensures that civil rights will be upheld. In practice, based on decades' experience, this strong presumption enables the court to modify the ordinary meaning of statutory provisions so that they will be consistent with the concept of civil rights. According to the prevailing sentiment of interpretation, the legislature has no intention to curtail civil liberties or empower other public authorities.

---

[136] Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact,* Capital University Law Review, Vol. 21, 1992, p. 1.
[137] Dieter Grimm, *Types of Constitutions,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 106.

It should be noted that the presumption favouring civil rights could be overridden by an unequivocal expression by the legislature, unlike in a country with a written constitution.[138] This practice has allowed the Israeli Supreme Court, in numerous cases, to develop a body of law protecting civil rights as if a written bill of rights existed. Thus, a judge-made "Constitution" has grown in Israel without a written constitution, even in the face of legislation that seems hostile to civil liberties. In practice, Israeli citizens enjoyed, to a large extent, the same civil liberties as citizens of the United States; this is primarily due to the significant input of the Israeli Supreme Court. In its endeavour to protect human rights, the Israeli Supreme Court has based its landmark decisions, *inter alia,* on American Constitutional law as a source of inspiration while giving meaning to the existing laws in Israel.[139]

The Israeli Supreme Court has based its "background understanding" on the Israeli Declaration of Independence, which states that the country will be established "on the foundation of freedom". In doing so, the Israeli Supreme Court followed a model of interpretation which might be called the "Background Understanding Model". Under this model, which is similar to the interpretive theory in the United States, there is a general background understanding of civil rights, the rule of law, separation of powers, and other fundamental principles. According to this understanding, every provision in a written text - constitution and statute alike - is read in light of that general background understanding. The background understanding adopted by the Israeli Supreme Court is the understanding of a system founded on democratic values, recognizing a whole array of "unwritten rights", such as personal freedom, freedom of speech, freedom of religious worship, freedom of movement, freedom of association, and freedom of property. These vital principles included in the background understanding model also incorporate equality before the law, the dignity of the human being, integrity of the judicial process, the right to a fair trial, and many other rights recognized in a written bill of rights.[140]

---

[138] Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, Temple Law Quarterly, Vol. 56, 1983, p. 417.

[139] Asher Maoz, *Defending Civil Liberties Without a Constitution-The Israeli Experience*, Melbourne University Law Review, Vol. 16, 1988, p. 815.

[140] The most important part in the Declaration of the Establishment of the State of Israel (known as the Declaration of Independence), which served the Israeli Supreme Court as a tool of interpretation, states: "*The State of Israel ... will be based on freedom, justice and peace envisaged by the prophets of Israel ... will ensure complete equality of social and political rights, to all its inhabitants irrespective of religion, race or sex ... will guarantee freedom of religion, conscience, language, education and culture ...*". The Supreme Court mentioned the Declaration of Independence as a source of recognition of civil rights, even though the Declaration is not a Constitution and an explicit law may override its statements. In the absence of an explicit law, the Supreme Court interprets the law in question in light of the values mentioned in the Declaration. Thus, Israeli judges uncover the basic values of Israeli Constitutional Law in the Declaration, which is a framework for the whole system.

4.2 Israeli Structure of Government: Allocation of Powers

Israel is a parliamentary democracy. Israel's Parliament, the Knesset, is the elected "House of Representatives of the State".[141] The electorate chooses among party lists of candidates whose representatives are elected as Knesset members for a period of four years. The Knesset is the Legislative Branch of the State, and all legislative power is vested in the Knesset, as it is the only legislative body. In the absence of a written constitution, there are no limitations on the Knesset's legislative powers, with one exception: a special majority, as provided by the Knesset itself, is required to amend several entrenched provisions in some of the Basic Laws.

The Government is defined as the "Executive Branch of the State."[142] It serves under the confidence of the Knesset. The executive powers are vested in the Government, subject to any law enacted by the Knesset that might put limitations on the Government's executive power.[23] The Knesset and the Government are two organs of the State, and, together with the courts, these branches constitute the three central authorities of the State through a system of checks and balances in their mutual relations.

Under Israeli Constitutional law, the Government is subject to the principle of legality, which is part of the doctrine of Government Under Law. This principle requires that the Government base its actions on a law empowering the Government to act. For example, the Government is not assigned to put any restrictions on civil rights unless authorized by an explicit law of the Knesset. The principle of Govemment Under Law, or the rule of law, as defined by the Israeli Supreme Court over the years as a guarantee of a democratic system. A legal source for vast Govemmental executive powers can be found in Knesset's legislation. This legislation states that the Government is empowered "to do in the name of the State, any act the doing of which is not imposed by law upon another authority".

In the absence of restricting legislation in Israeli Constitutional law, the executive branch enjoys a wide range of powers, such as signing international treaties, declaring war or signing

---

[141] See Basic Law: The Knesset. An English version is available at: https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheKnesset.pdf

[142] See Basic Law: The Government. An English version is available at: https://www.mfa.gov.il/MFA/MFA-Archive/2001/Pages/Basic%20Law-%20The%20Government%20-2001-.aspx

peace treaties, and selling weapons to foreign countries. Thus, national security and matters of foreign relations are under the Government's sole authority.

A significant departure from the doctrine of separation of powers lies in authority vested with the Government and its Ministers to make emergency regulations for the defence of the State, public security, and the maintenance of supplies and essential services. The exceptional legal power of the emergency regulations lies in the Government's capacity to suspend the effect of or modify any law and impose or increase taxes. An emergency regulation expires three months after its promulgation unless it is revoked earlier or extended by a law of the Knesset. The executive has not misused the power to make emergency regulations, but it is still argued that the Government's power should be limited in this area.

4.3 Safeguards to Secure the Substantive Rule of Law - The Attorney General

The principle of Government Under Law is a fundamental component of any democracy. In a country with a written constitution, the laws enacted by the legislative branch must be consistent with the constitution in order to be upheld by the courts. However, in a country with an unwritten constitution, the formal rule of law will be the legislature's will. Under these two constitutional models, the substantive rule of law (or substantive due process of law) requires procedural safeguards in order to secure the democratic values embodied in the system. Fundamental democratic values can be secured by a constitution, laws enacted by the legislature, and legal principles laid down by the highest court in the land.

In Israeli Constitutional law, the safeguarding of a substantive rule of law, including law and order and civil rights, in the absence of a written constitution, was achieved by an independent Attorney General and an independent judiciary and a broad scope of judicial review.

The office of the Attorney General in Israel has developed into a unique one compared to that of other countries. Under the Israeli system, the Attorney General is the legal advisor to the Government and oversees the State's criminal and civil litigation. The power to initiate criminal or civil proceedings on behalf of the State and represent the State as a defendant in proceedings against it is vested solely in the Attorney General. In Israel, it is a general concept that the Attorney General is a guardian of the rule of law, serving as the Government's lawyer and a "watchdog" over Government activities. Thus, the Attorney General's office constitutes an

important element in a system of checks and balances aiming to secure Government Under Law.

It is a longstanding tradition that the Attorney General must be a professional lawyer who is not affiliated with political circles. Unlike the situation in the United Kingdom and in the United States, the Attorney General in Israel is not a member of the cabinet, nor is he a legislative branch member. Substantively, the Attorney General and the State Attorneys serving under him are and should be wholly independent of the Government in exercising their discretion in criminal matters.

Thus, it is evident that the Attorney General holds a very powerful position that is not directly subject to daily supervision. Nonetheless, the Attorney General's decisions, including decisions not to initiate criminal proceedings, are not entirely immune to judicial review. The Supreme Court held that the discretion of the Attorney General is vast but that he is subject, as is any public official, to judicial review by the Supreme Court sitting as a High Court of Justice. In the 1990 *Ganor* case,[143] the Supreme Court annulled the Attorney General's decision not to indict certain banks and bankers for their roles in the Israeli stock exchange crisis. The Supreme Court found the Attorney General's decision unreasonable and contradictory to the manifest public interest in prosecuting those who were *prima facie* responsible for the crisis. Such Supreme Court interference with the Attorney General's discretion is rare. The significance of the Supreme Court's ruling is to subject the Attorney General's actions to a broad if infrequently exercised, the scope of judicial review. This decision reaffirmed that no public official is exempt from judicial review under Israeli Constitutional law.

4.4 The Absence of a Written Constitution: The Effect on the Legal System

The Israeli Declaration of independence, adopted on May 14, 1948, imposed upon the yet-to-be-elected constituent assembly the duty to draft a constitution for the state of Israel. The founding fathers meant by the term "Constitution," a written constitution in the American sense. When the constituent assembly was elected, it changed its name to the Knesset and dissolved

[143] H.C.J. 935/89 *Ganor v The AG,* 44(2) PD 485 (1990) [Hebrew].

itself before drafting a formal constitution. During arguments in the first Knesset, opponents of a written constitution advocated the postponement of a formal written constitution. The opponents argued that Israeli society comprised an evolving young community awaiting the ingathering of Diaspora Jews. Thus, they argued that a formal constitution would hinder the dynamism of the evolving State and ignore the potential creative contributions of the many expected immigrants.

Another argument raised by opponents was that the enactment of a Bill of Rights in the constitution might bitterly divide the new nation, especially over the question of separation of church and state. Additionally, some politicians opposed a written constitution, fearing that it would not only curb the supremacy of the Knesset but also that it would impede the efficient functioning of the executive.

Instead of adopting a formal constitution, the Knesset passed a policy decision known as the "Harari Resolution" on June 13, 1950. The Resolution provided that the first Knesset would charge the Constitutional, Law, and Justice Committee with preparing a proposed constitution for the State. The constitution was to be constructed in chapters in such a way that each chapter would be a Basic Law by itself. The chapters were to be brought before the Knesset as the Committee completed them, and all the chapters together were to be then combined into a constitution for the State.

It should be noted that the result of this decision was not to draft a written constitution or at least to postpone the adoption of a formal, rigid constitution. The Knesset has never clearly explained the notion of a "chapter" while it has enacted Basic Laws. However, the decision does not explain the possible special status of Basic Laws promulgated under the Harari Resolution's directive. Some commentators have argued that the Knesset intended for Basic Laws to stand superior to ordinary laws, and this, however, does not seem to be the case.

Basic Laws had no special constitutional status in Israel, and they could be altered by the Knesset passing an ordinary law by only a regular majority of the members of the Knesset participating in a vote. Since an ordinary Knesset majority is sufficient to enact Basic Laws, it could be well understood that Basic Laws, as such, can be amended by a regular majority. In the absence of a written Israeli constitution, a court has no judicial review of that amending statute once the Knesset alters a Basic Law. In principle, judicial review is essentially related to rigid constitutions. The ruling that the Knesset is supreme and that it can infringe on civil

liberties by operating an explicit, unequivocal law has been adopted by the Israeli Supreme Court.

4.5 Defending Civil Rights: The Role of the Judiciary

In the absence of a written constitution and an entrenched Bill of Rights, the Israeli Supreme Court has developed a presumption that civil rights have prevailed unless limited by an unequivocal expression of the legislature. The presumption favouring civil rights is the strongest presumption in Israeli Constitutional law, and it enables the Supreme Court to develop a judge-made constitution that recognizes human rights. In developing this judge-made constitution, the Supreme Court drew inspiration from the Israeli Declaration of Independence and American Constitutional law.

The Israeli Supreme Court's endeavour to secure civil rights is exemplified by the landmark decision of *Kol Ha'am* in the 1950s.[144] *Kol Ha'am* dealt with the Minister of Interior's power to suspend any newspaper from publishing material that is, in his opinion, "likely to endanger the public peace." In 1953, the communist paper Kol Ha'am severely criticized the Government for allegedly agreeing to send Israeli troops to Korea to fight on behalf of the United Nations. The allegations were false, and thus the criticism was unfounded. However, the Minister of Interior decided to suspend the newspaper's publication for ten days. The newspaper brought a petition for judicial review before the Supreme Court. The Supreme Court could have easily concluded that the petition should be rejected, strictly construing the statute's express language. However, the Supreme Court flexibly interpreted the statute, basing its ruling on the presumption of civil rights, under which every law should be interpreted. In following this reasoning, Justice Shimon Agranat transplanted a whole corpus of First Amendment jurisprudence into Israeli law. At the time of this decision, the prevailing First Amendment test for resolving the conflict between freedom of speech and national security was the "clear and present danger" test. Justice Agranat refrained from adopting that test and instead adopted the "near certainty of danger" test, which is a broader, more lenient standard than the "clear and present danger" test. In applying the "near certainty" test, the Israeli Supreme Court annulled

[144] H.C.J. 73/53 *Kol Ha'am v Minister of the Interior*, 7 P.D. 871 (1953) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior

the Minister of Interior's decision and created the legal principle of free speech in Israeli Constitutional law, which could be limited only under a probability of grave danger to the national security of the State. The impact of this decision on Israeli Constitutional law was to achieve a judge-made constitutional doctrine, much like the formal constitutional doctrine of the United States.[145]

Kol Ha'am introduced standards of freedom of speech into the Israeli legal system similar to the American standard of "clear and present danger". *Kol Ha'am* mandated that the right of free expression could be limited only when there is a clear probability of· danger to national security in the opinion of the Court exercising judicial review over executive actions. *Kol Ha'am* also influenced Israeli freedom of speech law in areas unrelated to national security. Regarding the right to demonstrate, the Supreme Court ruled that -permission for processions may be denied only if a near certainty of danger exists to public order.

The discussion of Israeli Constitutional law above shows, to a large extent, the impact of American Constitutional law in the area of free expression. The reflection of American constitutional values derives from common traditions of sharing democratic values. While laws in Israel cannot be declared "unconstitutional," the goal of securing civil rights is embodied in the Israeli Declaration of Independence and the American Constitution, as interpreted by the Israeli Supreme Court.

These two documents served as resources for the Israeli Supreme Court to develop freedom of speech jurisprudence. Development of law in this area became possible by the Israeli Supreme Court's divergence from a purely interpretive model and the acceptance of the Court's additional role as the expounder of fundamental national ideals of liberty and fair treatment, even when these ideals are not expressed in the existing laws of the land, many of which are hostile to civil rights. The creation of this conceptual attitude was the most important consequence of the *Kol Ha'am* decision, which had an impact reaching far beyond the interests covered by the principle of freedom of speech.

[145] Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 1340.

4.6 The Adoption of a Bill of Rights: A Challenge

Constitutions, including bills of rights, are usually drafted at a historical crossroads, such as attaining national independence or the revolutionary change of a regime. This was the experience in the United States when the Constitution was adopted shortly after independence was gained, and the Bill of Rights was adopted four years after the Constitution was signed. In Israel, the opportunity to adopt a formal constitution and a written bill of rights was lost due to various arguments raised in opposition to the statute authorizing the drafting of a written constitution.[146] Some of those arguments, especially those relating to religion and state, still continue today, illustrating a lack of consensus on other crucial problems, including emergency powers and majority-minority relations. A bitter debate over the subjects mentioned above prevented for decades the adoption of a formal written constitution and the adoption of an entrenched Basic Law of civil rights.

Several proposed bills of rights were submitted to the Knesset over the first four decades, but none ever succeeded in becoming law. The Knesset approved one of the comprehensive proposed bills of rights in a preliminary reading in November 1989. The proposed bill encompasses the classic liberal freedoms, including freedom of speech, equality before the law, the right to property, freedom of assembly, freedom of association, the presumption of innocence, the privilege against self-incrimination, and the right to appellate review, among others. The bill did not change the *status quo ante* regarding marriage and divorce or the status of religion in Israel. Nonetheless, the religious faction of the Government opposed this bill because the Supreme Court, sitting as a Constitutional court, would be empowered to declare future legislation invalid if it contradicted the adopted bill of rights and the "basic values of Israeli society". The religious faction feared that such authorization might lead to the annulment of future legislation benefitting the religious faction. Due to the power of the religious faction in the Knesset and the traditional participation of the religious faction in the Government, it was indeed improbable that this proposed bill would become law. Nevertheless, it took another three years, and in 1992 a huge change occurred.[147]

---

[146] Ruth Gavison, *The Controversy over Israel's Bill of Rights,* Israel Yearbook of Human Rights, Vol. 15, 1985, p. 113.

[147] Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements,* The American Journal of Comparative Law, Vol. 53, 2005, p 101.

4.7 The Israeli Constitutional Revolution

In March 1992, a significant event took place in the Israeli constitutional arena, and it also had a significant impact on "our" doctrine of JSOCP.

The Knesset enacted two new Basic laws: the *Basic Law: Freedom of Occupation*[148] and the *Basic Law: Human Dignity and Liberty.*[149] These laws, which formed a "Constitutional revolution" and "a constitution in miniature", created a new era in Israeli Constitutional law. They recognized fundamental rights — freedom of occupation, the right to property, the right to freedom, privacy, and human dignity — and provided that these rights could not be infringed save by legislation that meets certain specific criteria. This approach imposed restrictions on the power of the Knesset to pass any law it pleased.

The Canadian Charter of Rights and Freedoms significantly influenced the Israeli constitutional revolution. The Canadian Charter incorporated "limitation clauses" and "override clauses" in Israeli constitutional legislation. The "limitation clauses," which were included in both the *Basic Laws Human Dignity and Liberty* (section 8) and *Freedom of Occupation* (section 4), are of particular importance in the newly evolved constitutional structure. The provisions were intended to place constraints on future legislation enacted by the Knesset and thus deviate from the principle of "parliamentary sovereignty," which has characterized the Israeli legal system since the establishment of the State in 1948.

The "limitation clauses" provide that "there shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required". It seems clear that the very inclusion of the "limitation clause" created basic laws of a superior status: the Knesset is not empowered to infringe the rights recognized by the basic laws — in whatever way it sees fit — through its regular legislation.

Still, the precise legal status of such a Basic Law was open to discussion. One theory holds that

[148] An updated English version is available at (the 1994 version replaced the 1992 version): https://knesset.gov.il/review/data/eng/law/kns13_basiclaw_occupation_eng.pdf

[149] An updated English version is available at: https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx

Basic Laws enjoy a special status due to the fact that they form part of the future constitution of the state. It has thus been suggested that a provision in such a law may only be amended by another Basic Law (even though enacted by a regular majority), which explicitly affirms the validity of the amendment notwithstanding any provision of the original Basic Law being amended. A different approach holds that ordinary legislation may also supersede a "limitation clause", provided, however, that it declares explicitly that it is valid despite the provisions of the Basic Law. The first approach is to be preferred. It recognizes the absence of an entrenched provision, thus enabling a regular majority's deviation from the Basic Law. At the same time, it requires that the regular majority express its will in a Basic Law, affirming its validity notwithstanding the provisions of the Basic Law being amended. Such a requirement strengthens the status of a Basic Law marked by a "limitation clause".

In any event, it would appear to be accepted by the Israeli legal system that the mere existence of a "limitation clause" prevents the Knesset from infringing, on a whim, the fundamental rights of individuals. The new Basic Laws opened the door to judicial review of statutes to an extent previously unknown in Israel. Thus, the "limitation clause" made it possible for a court to annul a Knesset law if, in its view, it conflicts with the fundamental rights safeguarded by the Basic Laws and does not "accord with the values of the State of Israel" — an imprecise term of uncertain boundaries. [150]

The fact that legislation has not confined the power to annul laws to a particular constitutional court (such as in France, Germany, and Italy) has opened the gates to a phenomenon with which Israel is as yet unfamiliar. The legislature has been silent regarding whether the forum competent to annul legislation is not considered to preclude judicial review.[151]

This silence has resulted in a situation where every court can annul any law that conflicts with the basic laws relating to freedom of occupation and human dignity. The validity of law may arise in a lower court — Magistrate or District — where the contention is raised in civil or criminal proceedings that are competently brought before the court. Such an attack on the

[150] Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective,* Columbia Human Rights Law Review, Vol. 26, 1995, p. 309.

[151] The absence of a specific provision indicating the appropriate forum for constitutional scrutiny in the American constitution has not barred judicial review of statutes since the decision in *Marbury v Madison,* 5 U.S. 137 (1803). This approach is open to debate. When a Basic Law or Charter of Rights is amended in modern times, when questions of judicial review are under discussion, it seems highly advisable that the legislature should express its will explicitly. Nevertheless, the judicial review remains possible because of the existence of express limitations on legislative power, such as those found in a "limitation clause".

validity of legislation may be entitled an "indirect attack" as the validity of the law is not the primary cause of the legal proceedings. A lower court decision affects only the parties to the action and does not constitute a binding precedent for other cases. A direct attack on the constitutionality of a law of the Knesset, where it is the sole ground for the legal proceeding, may be initiated in a petition to the Supreme Court of Israel sitting as a High Court of Justice. Such a quest for judicial review may be described as a "direct attack." The Supreme Court sits then as a court of first and last instance.[152]

With the enactment of the Basic Laws regarding Human Dignity and Freedom of Occupation, the State of Israel entered into a new era. As a broad and all-embracing right encompassing the whole range of fundamental principles and specific rights, human dignity has evolved into a fundamental right in Israel. The climax of the constitutional revolution — which unfolded so quietly and without the promulgation of a comprehensive formal constitution — ensued with the possibility of annulling primary legislation because it was contrary to the values of the State of Israel. This formula, which has found expression in the "limitation clause," is both broad and ill-defined, and indeed, it is more far-ranging in scope than the mere annulment of a law that is contrary to any specific constitutional provision.

In addition to their power to annul specific laws, the Basic Laws have far-reaching implications for the interpretation of existing legislation and the delimitation of the authority of governmental agencies.

Recognition of human rights in the Basic Law Human Dignity and Liberty is general and all-embracing and may even evolve into a substitute for a constitution that expressly addresses fundamental rights such as equality or freedom of expression. Human dignity can encompass equality before the law, freedom of expression and assembly, the right to due process, and more.[153]

In any event, in enacting the new Basic Laws, the State of Israel has joined the family of nations that believe that limitations must be set on the right of a majority to derogate from fundamental human rights. In interpreting these Basic Laws, the Israeli judiciary will rely on the fact that the State of Israel is Jewish and democratic and is committed to equality for all its citizens, Jewish and non-Jewish alike. The hope was that the Israeli courts would draw upon the wisdom of other legal systems, which have allotted to the concept of human dignity its rightful place at

[152] We shall see later how those two options function while dealing with JSOCP.
[153] I shall focus later on this expression of human dignity more deeply.

the head of the hierarchy of human rights.[154]

Indeed, on November 9, 1995, the Israeli Supreme Court announced its decision – which entails hundreds of pages –, by an expanded panel of nine Justices, in the case of the *United Mizrahi Bank Limited* [155]— a decision which might be retitled the "Israeli *Marbury v. Madison*." It contains a wide-ranging analysis related to many aspects of Israeli Constitutional law, including, *inter alia,* the constitutional power of the Knesset to bind itself by a "limitation clause". The express recognition of such power in the judgment of the Court is of significant importance to Israel as a constitutional democracy.

The importance of the decision does not stem from the concrete decision that deals with a specific law. Instead, the primary importance which might be attached to this landmark case is that it represents the first Supreme Court pronouncement that every court in the country enjoys the power to declare laws unconstitutional and invalid. This is only true if the law violates basic rights, which the Basic Law recognizes, and goes beyond the exceptions specified in the limitation clause. Such a judicial pronouncement — especially in the absence of an express constitutional provision that recognizes the supreme status of the Basic Laws and the validity of judicial review of statutes — constitutes a "Constitutional Revolution" and a new era in Israeli Constitutional law.

The Supreme Court's decision presents a clear and robust majority view — with only one Justice dissenting on this point — that the Knesset enjoys the power to enact Basic Laws which are chapters in Israel's Constitution. These laws bind all public authorities, including the Knesset itself, and the Courts entertain the power to declare laws invalid. Prior to these constitutional developments, human rights in Israel were subject to the laws of the Knesset, but it now has become part and parcel of Israeli democracy that the laws of the Legislatures are subject to human rights as embodied in the two Basic Laws.

In his wide-ranging judgment, the President of the Israeli Supreme Court, Justice Aharon Barak, stressed the importance of judicial review of statutes in a democratic society. Justice Barak mentioned the American case of *Marbury* v. *Madison* as a source of inspiration for

[154] Gary Jeffrey Jacobsohn, *Constitutional Values and Principles,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), pp. 781-782.
[155] Civil Ap. 6821/93 *United Mizrahi Bank Ltd. v Migdal Cooperative Village*, 49(4) PD, p. 222 (1995) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village

recognizing the power of the Courts to declare laws unconstitutional despite the absence of an express provision in the constitution.

Once the power of the courts to declare laws unconstitutional was established, the Court focused on the extent to which this power could be used. This power is the essential aspect of any judicial system that recognizes the power to annul legislation. A court reluctant to use its power, even when the use of such a power is demonstrably justified in a democratic society, deprives judicial review of its prime objective of scrutinizing legislative acts to strengthen the foundations of democracy.

The Court has since taken a very active role in evaluating and invalidating actions of the Knesset as well as the executive, even in cases that involve security measures—an area previously considered beyond the reach of the courts. However, this has generated a significant backlash against the Court. In response to the Court's activism, the legislature and executive are attempting to weaken the Court, particularly its power of judicial review. Moreover, recent public opinion polls evince a substantial decline in public confidence in the Court. Consequently, the future potency of judicial review in Israel remains uncertain.[156]

Nevertheless, the basic laws concerning human rights led to the constitutionalization of Israeli law. These rights pulse through the arteries of all areas of the law, influencing their contents; every legal realm and legal norm must now adapt itself to the new constitutional "regime".[157]

With a direct connection to this research, this revolution opened a broader range of justifications for using the doctrine of JSOCP. The primary thought was that if courts can now implement judicial review on acts of the Knesset, they will surely be willing to do so regarding the Prosecution's discretion. It is essential to examine what happened in reality.

[156] Jenny S. Martinez, *Horizontal Structuring,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), pp. 570-571.
[157] Suzie Navot, *Constitutional Law in Israel* (2nd ed., Wolters Kluwer, 2016) p. 48.

CHAPTER 5
AN "IMPORTED" DOCTRINE INTO THE ISRAELI LAW

5.1 Human Dignity

A hot-button issue in constitutional law in our century is the principle of human dignity.[158] At the basis of this concept is the recognition that man is a free creature who develops his mind and body according to his will, and this is in the social framework with which he is connected and on which he depends. "Human dignity" extends to a wide range of human aspects.[159] In the modern sense, human dignity has three aspects: social value, constitutional value, and constitutional right. Human dignity as a social value reflects the place of human dignity in the values of a given society at a given time. With the development of constitutions - especially in the second half of the twentieth century - one can talk about the social value of human dignity and its constitutional value. This value focuses on the same aspect of human dignity as a social value that has found its expression - explicit or implied - in the state's constitution. By its very nature, the scope of constitutional value regarding human dignity is narrower than social value. This is because only those aspects of the social value of human dignity expressed and reconciled with the constitution's language and structure are included within the constitutional value of human dignity.[160] Of course, the constitutional right to human dignity is based on constitutional value, but it is not always explicitly recognized.[161]

The approach to examining the constitutional value of human dignity is holistic, and it is designed to reflect the complexity of the person as a person. The constitutional meaning of the value of human dignity is the protection of human humanity. The gaze is subjective (the person's inner feeling) and objective (perception as part of a family, group, or society).[162] An

[158] Catherine Dupré, *The Age of Dignity – Human Rights and Constitutionalism in Europe* (Hart, 2015); Understanding Human Dignity (Christopher McCrudden, ed., Oxford University Press, 2013).
[159] Matthias Mahlmann, *Human Dignity and Autonomy in Modern Constitutional Orders,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013), p. 370.
[160] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right,* in Understanding Human Dignity (Christopher McCrudden, ed., Oxford University Press, 2013), p. 361.
[161] Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights,* American Political Science Review, Vol. 76, 1982, pp. 303, 306.
[162] Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters,* in Israeli Constitutional Law in the Making (Gideon Sapir, Daphne Barak-Erez, Aharon Barak, eds., Bloomsbury, 2013), p. 267.

important contribution to understanding human dignity as man's humanity has been to Dupré, and she even emphasized the relationship between human dignity and democracy.[163]

Human dignity is a complex concept.[164] This complexity stems in part from a lack of agreement on the essence of this concept. Disagreement is mainly on three levels: the content of human dignity; The rationale underlying human dignity; The results required by human dignity.[165] The complexity of the concept of human dignity is not a sufficient basis to justify a negative attitude towards it. Equality, liberty, or proportionality are also complex concepts, the content of which, the underlying rationale, and their consequences, are controversial. This does not justify ignoring them.[166] The same is true of human dignity.[167] Its complexity does not make it useless. Truth, equality, liberty, or life are concepts that have been with us for centuries, while human dignity is a new concept in Constitutional law.[168] However, this innovation passes pretty quickly; The community is getting used to the new conceptuality for all its problems. What used to seem obscure and obscure becomes natural and acceptable.[169] Admittedly, in British constitutionalism, human dignity has remained mainly a judge-made principle, the substantive content of which has not been fully explicated. It seems that the first definitive construction of human dignity in the United Kingdom ruling can be found in the High Court ruling in the case of *A, B, X, and Y v East Sussex County Council.*[170] The case dealt with women who were looked after 24 hours a day by their parents in appropriate lodging, with additional paid assistance. They were entirely dependent on lifting for all personal care assignments

[163] Catherine Dupré, *The Age of Dignity – Human Rights and Constitutionalism in Europe* (Hart, 2015), pp. 25-27.
[164] Michael Meyer, *Dignity as a (Modern) Virtue,* in The Concept of Human Dignity in Human Rights Discourse (David Kretzmer, Eckart Klein, eds., 2002), p. 196.
[165] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights,* European Journal of International Law, Vol. 19, 2008, pp. 655, 712.
[166] Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply,* European Journal of International Law, Vol. 19, 2008, p. 931.
[167] Paolo G. Carozza, *Human Rights, Human Dignity, and Human Experience,* in Understanding Human Dignity (Christopher McCrudden, ed., Oxford University Press, 2013), p. 615.
[168] Neomi Rao, *Three Concepts of Dignity in Constitutional Law,* Notre Dame Law Review, Vol. 86, 2011, pp. 183, 190-192.
[169] Interestingly, Hungary played a leading role in the post-communist transition, and its constitutional court developed a rich and sophisticated dignity case law in the foundational years of the transition towards democracy. Hungary has proved to be a particularly valuable example for the study of human dignity in European constitutionalism, as it was the first EU member state to adopt a new constitution in the twenty-first century. Its Fundamental Law, in force since 2011, gives human dignity a prominent, yet disquieting, constitutional position. See: Catherine Dupré, *The Age of Dignity – Human Rights and Constitutionalism in Europe* (Hart, 2015), p. 9.
[170] *A, B, X and Y v East Sussex County Council* [2003] EWHC 167.

concerning their comfort. The undetermined matter in the case related to whether the local authority should have projected for care to include manual pick up or hoisting, or if a combination should have been programmed for, given the hardship, then how should the equilibrium between the means have been battered. The challenge began when the council maintained a 'no lifting' policy concerning care planning. However, before the hearing date, the council had revised its policy without considering that it had ever added up to a complete exclusion of manual lifting. Nevertheless, the court made it clear that a lifting policy was probably unlawful if practically it imposed a total ban on all manual lifting; or only allowed for manual lifting in life-threatening situations or where the use of a hoist was a physical impossibility.

The fundamental principles to emerge from the decision are that a balance must be implemented between the rights of service users, on the one hand, and those of carers, on the other hand. In fulfilling that balance, principles of respect and human dignity are highly critical for people in distress who are already depending on others. Therefore, there will be circumstances in this social care field where manual lifting, even though it entails a risk of injury to the worker, is essential when providing an appropriate adequate care package that accounts for service users' needs and human rights.

What is true of interest here is that the court constructed human dignity by referencing the post-war human dignity commitment.[171]

Besides the general principle, it is important to emphasize that there is a clear connection between the value of human dignity and criminal procedure concerning victims of crime - in case there are any - and concerning suspects and defendants.[172] Criminal law is a trial conducted between the state and the defendant. Despite recognizing the rights of the victim of the offence to be a partial partner in the criminal proceedings, he has no right to waive the violation. The criminal offence is assumed to constitute an injury to a specific victim and an injury to the objective human image belonging to all human beings. The purpose of the criminal proceeding in which the state prosecutes the defendant is to atone for the harm to the human image and to preserve the constitutional value of human dignity. A case in which another person harms a person without the society expressing its distaste for the act and condemning

[171] Catherine Dupré, *The Age of Dignity – Human Rights and Constitutionalism in Europe* (Hart, 2015), pp. 89-91.

[172] Tatjana Hörnle, Mordechai Kremnitzer, *Human Dignity as a Protected Interest in Criminal Law,* Israel Law Review, Vol. 44, 2011, p. 143.

the offender by prosecuting him expresses contempt for the value of human life and harms the constitutional value of objective human dignity.[173] One of the purposes of criminal law is to preserve the constitutional value of objective human dignity, restore the status of human dignity to its place, and ensure that human beings will no longer be harmed in the future.[174]

At the same time, the value of objective human dignity has another importance: it emphasizes the importance of the criminal procedure and the preservation of the rights of the suspect and the accused. The defendant in a criminal proceeding is suspected of violating the basic social code and violating the values of society and the state. Because of this, it is possible to be easily pushed out of the circle of those entitled to essential protection and fundamental rights. This constitutional value of human dignity ensures that all offenders will enjoy basic rights and a fair legal process, expressing their dignity as human beings.

5.2 The Constitutional Model in General

The constitutional model in Israel determined that JSOCP is a constitutional remedy provided to a defendant by a criminal court in case of violating the human rights defined in the Basic Law: Human Dignity and Liberty. In accordance with this basic law, the defendant has a constitutional right to a fair proceeding. This constitutional model enables the court to stop judicial proceedings in a case where prosecuting a defendant and conducting a legal proceeding unjustly impair his right to dignity, liberty, and due process. This right may be realized in Israeli law if the Limitation Clause of the Basic Law: Human Dignity and Liberty is applied. The limitation clause states that fundamental rights should not be harmed unless for right reasons that adhere to Israel's values and reasonable extent. The constitutional model is applied to determine the extent of the defendant's constitutional right, the extent to which this right should be protected under the circumstances, and the validity of the JSOCP doctrine in the case.

The court should therefore execute a two-phased balance process. In the first phase, the court will internally examine the balance between the defendant's and other basic rights. At the end of this phase, the court will determine whether any human right of the defendant was breached. If such a right were indeed breached, the court would conduct a second external phase of balance between the breach of human rights and the opposing values and principles that

[173] Miriam Gur-Arye, Thomas Weigend, *Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspective,* Israel Law Review, Vol. 44, 2011, p. 63.
[174] Miriam Gur-Arye, *Human Dignity of 'Offenders': A Limitation on Substantive Criminal Law,* Criminal Law and Philosophy, Vol. 6, 2012, p. 187.

constitute the public's interest in the case. At the end of the second phase, the extent of protection the defendant deserves will be determined. Suppose this extent justifies a stay of proceedings altogether. In such a case, the defendant will be entitled to JSOCP, and prosecuting him will be cancelled - since regarded as unconstitutional - either by an order stating the defendant should not be indicted (in case the hearing is conducted at the Supreme Court prior to submitting an indictment) or by applying the criminal court's authority to cancel the indictment (in case of the decision was made after the indictment was submitted).

5.3 The Constitutional Revolution in Israel and Criminal Law Lawfulness

The process of enacting the basic law: Human Dignity and Liberty, was indeed a constitutional revolution in Israeli law. It effectively turned Israel into a constitutional democracy in which the parliament is subject to judicial examination. Human dignity became a constitutional right in the constitutional democracy, outweighing other statutes. The basic law states that any human being is entitled to protect his life, body, and dignity and that harming them is forbidden. Explaining the essence of this basic law, Prof. Aharon Barak suggests that it acknowledges that men are free human beings with free will to direct their bodies and spirit. At the heart of human dignity are the consecration of human life and dignity, the autonomy of man's free will, freedom of choice and freedom of action, and the freedom rendered to human beings to shape their lives and develop themselves as they wish to. Human dignity assumes a free man who constitutes a goal in itself and not a means to achieve other individuals' or shared goals. Underlying human dignity is recognizing one's physical and spiritual integrity, humanity, and value as a human being regardless of the benefits others may gain from him.

Individuals deserve human dignity, but they are not detached from their social environment. Indeed, acknowledging others' human dignity is a key requirement in maintaining the individual's human dignity. Eventually, the balance between the human dignity of one and the other fulfils the right to human dignity. In addition to human dignity, another basic law determined the right to freedom as a constitutional right, stating that the individual's freedom should not be taken or limited by either an arrest, imprisonment, extradition, or other. Every man is free to leave Israel and to enter Israel if he is abroad. The right to freedom is the hardcore of basic human rights. The constitutional rights to human dignity and liberty are titled "framework rights" in the sense that they apply in various cases and not just specific human behaviours. In other words, the framework rights are not limited to protection from a well-defined list of behaviours. Their wide range enables constitutional protection in cases of

behaviours the law had not perceived as requiring protection from in the past. In addition to these framework rights, the basic human rights laws also incorporate "particular rights" concerning a specific range of behaviours, such as the right to leave the country, property, and freedom of occupation. Other rights may be derived from the basic law's framework rights - first and foremost, the right to human dignity - and evolve via judicial interpretation.

A limitation clause inside the basic law determines that the rights within the basic law cannot be violated unless done for an appropriate reason adhering to the values of the state of Israel and a limited extent or according to a law that explicitly authorizes it. The basic law also asserts that all state authorities are committed to complying with its rights.

The Israeli constitutional revolution has influenced every field and legal norm. One of the significant fields affected is criminal law - both substantial and procedural - since this law deals with opposing aspects: the defendant's liberty and dignity, the offence victim's basic rights, and the public's interest. It is not surprising that with the legislation of the basic law, criminal law- both substantial and procedural - was constitutionalized. Consequently, the implementation of criminal law by investigation authorities, the prosecution, the judicial system, and penalization are subject to the basic law's examination. The penal norms are required to comply with constitutional directives. Furthermore, the Basic Law: Human Dignity and Liberty promoted a new standard of appropriate procedures within the existing system and affected criminal law regulations to be derived from the defendant's rights. Judicial rhetoric that focused on authority, power, and administrative considerations shifted toward a discourse of rights and liberties.

5.4 The Constitutional Right to a Fair and Due Process

John Rawls characterized the due process as an essential element in the theory of justice. In his eyes, the rule of law requires it.[175] Herbert Packer presented two normative models, the "crime control model" and the "due process model".[176] A considerable debate erupted whether we are dealing with a zero-sum game or not and whether the concept of due process has succeeded in lodging itself internationally at the level of constitutional law.[177] Admittedly, the wording "due process of law" does not bear the same cultural significance as in the common law in

[175] John Rawls, *A Theory of Justice* (Belknap Press, 2003) p. 210.
[176] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).
[177] Richard Vogler, *Due Process,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013), p. 929.

continental Europe. The ECtHR hardly uses the term except for American case law.[178] Primary literature even does not refer in length to the idea of due process.[179]

In Israel, though the basic law does not list the suspect's human rights but rather generally defines the fundamental rights to dignity and liberty, it serves as a solid foundation for deriving novel human rights in criminal law, which previously did not exist in its procedural directives. Such is the right to a fair and due process, which incorporates: guaranteeing a fair hearing and ensuring fair procedures in all stages, including the investigation and the trial; Fostering a comprehensive perspective regarding considerations of fairness, justice, and preventing abuse of process. Many rights may be derived from the right to due process, which concerns the witness, suspect, and defendant, such as judges' neutrality and impartiality; a transparent public judicial process; conducting the procedure within a reasonable period of time; protecting the presumption of innocence and the right to confidentiality against self-incrimination; protecting the right of the defendant to present evidence that shows he is innocent, to scrutinize the prosecution's evidence and cross-examine its witnesses; the right of a suspect or defendant to know about judicial procedures which are conducted against him, etc. The right to due process applies directly in criminal law since the outcome of this law may harm an individual's dignity and liberty. Consequently, the right to due process dictates the procedure that is required to secure the defendant's fundamental rights. It necessitates that before a person's dignity and liberty are harmed, a preliminary procedure will determine whether the harm is justifiable under the case circumstances. In other words, the due process shall examine the purpose and the extent of the potential harm. In addition to being derived from the right to dignity and liberty, the right to due process is actually reflected in the basic law's limitation clause. Since it was legislated before 1992, the criminal procedure law is protected from scrutiny.
Nevertheless, it should be interpreted in the spirit of the basic law, including administrative powers determined by the law, like the power to indict. The State's actions in criminal law - be it constitutional, administrative, or judicial - are thus subject to the basic laws. The very act of prosecution substantially violates the individual's fundamental rights. Opening criminal proceedings violate the defendant's privacy, often damages his assets, and may harm his freedom of occupation. Once arrested, the defendant's freedom is denied, and the proceeding

[178] Nevertheless, international criminal tribunals are familiar with the concept of JSOCP, see: Kelly Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (Asser Press, 2018).
[179] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford, 2005).

may also damage his reputation.
Given that the defendant's rights in a criminal proceeding have been granted the high stature of basic constitutional rights, their infringement may only be executed after examining their necessity according to the directives of the basic law. Therefore, the defendant's rights to dignity and liberty cannot be violated unless done for a reasonable cause, in accordance with the values of the State of Israel and only to the extent required. Phrased differently, when the defendant's rights are violated unconstitutionally- i.e., when the proceeding that violates his rights is inappropriate- he should be provided with a suitable constitutional sanction.

With these guidelines in mind, the constitutional model serves as the foundation of JSOCP. As discussed, every stage of the criminal proceeding may deny the defendant's dignity and liberty. Furthermore, we have concluded that a violation of the defendant's basic rights that do not comply with the basic law's limitation clause should be prohibited. Consequently, it is required that the criminal investigation, the criminal prosecution, and the way the criminal procedure is managed comply with the basic law's limitation clause. This compliance means that the criminal investigation methods should be restricted according to constitutional directives; that the prosecution will adhere to a constitutional interpretation- abiding by the basic law restrictions- of the two conditions defined in criminal law- the accuracy of the evidence that led to the indictment and the existence of the public interest. The same goes for fairly managing the criminal procedure. The constitutional principles are applied to all stages of criminal proceedings.

5.5 Partial Protection of Constitutional Rights

As indicated, we are required to balance between rights, values, principles, and interests of all parties. The phrasing of the Basic Law: Human Dignity and Liberty refer to human rights in a comprehensive, "absolute", unlimited way. Having said that, the fundamental rights protected by the basic law are not "absolute" but rather "relative". The basic law concludes that fundamental human rights should be preserved and respected yet does not provide absolute protection. This relativity stems from the stature of the basic laws and the restrictions included in them rather than from the way the rights are defined in the basic law. Relativity ensures the rights of all human beings as well as public needs. One human right impairs a different human right, so our public and private law should preserve an internal balance. The relativity of these rights is realized, for example, when it is required to impair an individual's rights in order to

achieve social goals (an external balance).

Two aspects are considered with respect to the relativity of human rights: first, their scope, and second, the protection provided if the right was violated.
When examining the scope, we explore what is included in and what is excluded from the right. In the context of JSOCP, we analyze whether the situations the defendant copes with during the criminal proceeding violate the fundamental right to dignity or the fundamental right to liberty. This aspect may refer to the internal balance in a specific human right or the balance between different human rights. Determining the scope should consider the purpose of a specific right versus other human rights. For example, Constitutional law acknowledges the victim's rights: his life, body, and property, and the fundamental rights of suspects and defendants. If these rights collide, it is required to settle between them. The settlement shall create a balance, referred to as "an internal balance", between the scopes of the different fundamental rights. The balance will determine what is included in the scope of the right and what is excluded from it. For example, one may ask in certain cases if submitting an indictment against the defendant after a long delay harms his dignity or liberty. Alternatively, if the dignity or liberty of an individual is harmed once a commitment not to prosecute him was breached, and he worsened his state based on the commitment. These issues may be settled by balancing the scope of the defendant's constitutional rights and other relevant fundamental rights. The result of the balance analysis will determine whether the right to dignity and liberty includes, under the circumstances of the case, the right to be tried on time (in the first example) or not to be prosecuted at all when the state authorities committed not to do so, and the defendant has worsened his state based on the commitment (in the second example). Nevertheless, constitutional protection will not necessarily be provided to all elements of the constitutional right.

The second aspect of the relativity of constitutional rights examines the extent of protection the law provides these rights. It is an external aspect based on external balances. External restrictions imposed on constitutional rights are examined, and a balance is determined between human rights and conflicting values and principles. So, after an internal balance between human rights occurs, an "external balance", also referred to as "a vertical balance", is applied between human rights and public interest. In our context, public interest includes two elements: the values and interests that advocate bringing the defendant to trial. The second element includes the individual's interests which, in the case of JSOCP, refer to enforcing fairness and

trust by law enforcement authorities, preserving the defendant's fundamental rights, and protecting the victim's rights. These interests are viewed from the public's perspective, which does not always align with the defendant's point of view. Thus, the external balance considers the interests, values, and principles that justify violating a constitutional human right. This balance dictates the extent to which the right is protected and the extent of freedom provided to the authorities to violate this right. According to the basic law's limitation clause, Israel is permitted to violate a human right for the public's interest only if three conditions are met: (a) The violation is in accordance with the state of Israel's values as a democratic and Jewish state. (b) the violation is done for an appropriate purpose. (c) the violation's extent is proportional. There is probably a unanimous agreement that law enforcement for protecting the public interest and public safety aligns with the values of Israel as a Jewish and democratic state. However, though prosecuting offenders is a primary public interest in order to maintain a functional society, it should align with the democratic value of protecting each individual's right, be it a felony victim, a suspect, or a defendant. The Supreme Court perceives human rights as the highest value of a democratic administration. Rather than accentuating the public majority's role, democracy genuinely acknowledges that the majority is not permitted to violate any individual's dignity and liberty. Consequently, while protecting the victim, the defendant's basic rights should not be dismissed, and in some cases, democratic society may limit the interest of prosecuting the defendant if this interest violates a human right unconstitutionally. In other words, proportionality is required so that any measure taken by the state in order to fulfil public interest does not exceed the required extent. The reason for requiring proportionality focuses on the relations between purpose and measures, examining whether the measures taken by the state are rightfully proportional to the purpose. The measures should be adequate and not exceed the required extent. The Principle of Proportionality, which reflects the rule of the law and its legality, protects the individual from the state's rule and prevents the over-violation of his liberty. Following the principle, the state's measures should be carefully determined to fit the purpose.

The principle of proportionality is implemented de facto, conducting three tests: the appropriate measure test, the narrowly tailored measure test, and the proportional measure test. The appropriate measure test, also called the reasonable measure test, requires a reasonable proportion between purpose and measure. The state authority should thus select appropriate measures for fulfilling the law and refrain from taking inappropriate measures that are illegal or cannot practically achieve the purpose of the law. Applying this test in JSOCP would mean

that in cases where prosecuting and conducting a criminal proceeding cannot fulfil the purpose of the law in its broad sense- i.e., protecting the human rights of the victim and public interest without ignoring the rights of the defendant- indicating the defendant will fail to pass the appropriate measure test.

According to the second test of proportionality - the narrowly tailored measure - the authority should select the measure that harms the individual the least possible. If the state administration has several options for handling the case, it should choose the measure that fulfils the law's intended goal and causes minimal damage to the individual. In the context of JSOCP, this test may determine that prosecuting an individual is too severe, and a different approach should be taken, such as a warning, turning the case to welfare services, probation officer supervision, conditioned settlement, etc.

The third test - the proportional measure test - suggests that a measure is inappropriate if it disproportionally harms the individual relative to the benefit of fulfilling the law's purpose. Thus, the authority should not just settle with a minimally tailored measure, but it must also consider the public benefit versus the harm an individual will experience under the circumstances. The relations between the benefit and the damage should be proportional, i.e., the proportion should not exceed a reasonable extent. In a case where a certain measure, though appropriate and moderate, causes heavy damages to the citizen while the benefit to the public is minor, the right thing for the authority to do may be to refrain from taking this measure. In the context of JSOCP, in some cases, the benefit gained from prosecuting an individual or continuing criminal proceedings against him in court is not proportional to the severe damage he will bear. It should be thus concluded in such a case that prosecuting or continuing legal proceedings violate the defendant's constitutional rights beyond a reasonable extent.

The tests mentioned above shall thus determine the extent of protection the individual's human right is provided to ensure due process and the liberty the authorities are provided to violate it.

5.6 JSOCP as a Constitutional Remedy

The basic law: of human dignity and liberty does not incorporate directives regarding remedies provided to an individual whose constitutional rights are violated. Nevertheless, rights without remedies may become useless, and a remedy should follow wherever the law acknowledges a right. A practical interpretation of the right should usher the way to the provision of remedies to individuals whose constitutional right was violated. The court, whose role is to enforce those rights, should provide the remedies. The enforcement role of the court stems from two main

origins: the first is the court's general role of enforcing the law. The second is the specific duty of the court to follow the Constitutional directives of the basic law. Paragraph 11 of the basic law human dignity and liberty states that each authority institute must respect the basic law's rights. The Israeli Supreme Court determined that this directive applies to all state agencies: the legislative, executive, and judiciary; it applies to the central and local councils; it applies to every state council granted authorities by law; it establishes the direct legal application of fundamental rights to all state authorities; it projects the fundamental rights into the decision-making fabric of all government agencies.

The court's role is to reveal the truth and deliver justice in a criminal proceeding without disproportionally violating the defendant's rights. Thus, conducting legal proceedings that followed an unjust act that violated a defendant's constitutional right does not align with the duties of the judiciary. Prof. Aharon Barak discerns between a "normative violation" and a "physical violation" of a protected human right. An unconstitutional norm causes a "normative violation" of a human right, and an illegal act of the authorities causes a "physical violation" of a human right. Since JSOCP concerns a fair prosecution procedure, it seems that it copes with a "physical violation" of a human right caused by an act of state authority.

It should be noted that a "physical violation" is not necessarily caused by a "normative violation". As previously mentioned, constitutional norms direct the judiciary to subordinate prosecution and legal proceedings to the principles of the basic law's limitation clause and order to conduct a fair and appropriate procedure. Nevertheless, the remedy due to the physical violation may be found either in the normative or the physical fields. JSOCP that results in dismissing the indictment provides a normative and physical remedy. The normative remedy is provided when the court declares that the prosecution or investigation authorities acted unconstitutional toward the defendant. The physical remedy would be dismissing the indictment and ordering a stay of proceedings.

Though the basic law does not specify the remedies in a case where the state violates the rights protected by this law, the 2007 criminal law procedure amendment granted the court the jurisdiction to hear pre-trial motions raised by the defendant according to which the indictment or criminal procedure held against him contradicts the principles of justice and legal fairness, and if the claim is sustained - cancel the indictment. This constitutional remedy is external in the sense that it protects a basic law's right with a remedy that's not specified in the basic law itself. As a result, a legal procedure will be considered unfair or inappropriate if the actions leading to it are unconstitutional. In such cases, the way leading to an unconstitutional violation of a fundamental right should be immediately halted. The indictment should be dismissed, or

at least take other, less extreme measures such as reducing the indictment to a less harsh one or mitigating the punishment at the end of the procedure. Granting these remedies may be done in the framework of the JSOCP doctrine, which serves as a means for protecting the individual's constitutional rights.

It is important to note that sustaining a claim for JSOCP is not a light matter, and the claim is instead a broad framework that includes a wide range of circumstances. The court's jurisdiction to dismiss or correct an indictment due to "a fundamental contradiction to the principles of justice and fairness" grants it with substantial power and the ability to fill in a gap, according to circumstances, where directives were missing. The claim is very different from particular preliminary pre-trial motions, such as lack of jurisdiction, previous acquittal or previous conviction, immunity, the statute of limitations, exoneration, etc. By enabling a claim for JSOCP, the legislator intended to add a layer of justice and fairness considerations and granted the court jurisdiction to realize this intention.

A claim for JSOCP is similar in essence to a situation that enables a Supreme Court president to decide on a retrial due to a "genuine concern that the conviction caused the defendant a miscarriage of justice".[180] Both inject into criminal law principles of justice and fairness that are derived from the constitutional right to due process, a right which is part of the fundamental human right to dignity.[181] They urge the court to examine the case from a top view, hovering above the whole criminal procedure. The two create a "revolution of justice" in criminal law.

Sustaining a claim for JSOCP does not mean that the court must dismiss the indictment. The court also has the jurisdiction to take milder measures and fix the indictment.[182] The court is granted discretion regarding the remedy, which will be provided once the claim is sustained.

---

[180] This framework of reasons was added to paragraph 31 of the Courts Act [combined version], 1984 (hereinafter referred to as "the courts act") in the year of 1996. Added to the "classic" and specific reasons, according to this framework a retrial is permitted in a criminal case which was finalized with a sentence if the court determined that one or some of the pieces of evidence provided were false or based on a forgery, that new evidence or facts were presented that may change the trial outcome in favour of the defendant, or that in the meantime someone else was found guilty in committing the offence.

[181] See: Retrial Req. 3032/99 *Barranes v the State of Israel*, 354, 377 (14.3.2002) [Hebrew]. The text was written in view of the Basic Law: Human Dignity and Liberty.

[182] See: paragraph 150 in the Criminal Law Proceedings Act. Also see the case of *Nir Am*, in paragraph 5. There, the court, in the words of justice Grunis, emphasized the jurisdiction of the court that sustains a JSOCP claim to apply "mild and proportional" remedies which do not reach the stage of dismissing the indictment, such as dismissing specific charges or taking into account, if the defendant is found guilty and the sentence is determined, the impairments in the indictment. The judgment was given before the new law went into effect.

The remedy's nature- fixing the indictment or dismissing it altogether- depends, as can be expected, on all relevant circumstances.[183] As we will see, courts sometimes choose an even milder measure in which the indictment is neither dismissed nor fixed. Instead, the court considers the particular circumstances and mitigates the defendant's punishment if the trial ends with a conviction.

5.7 Pre-legislative Judgments

Familiarity with the period preceding the new law may illuminate the ecosystem that led to its evolution. Examining the legal and social background of this pre-legislative period, such as previous rulings or reports the legislator was aware of, may indicate the lacuna which the legislator wished to fix.[184]

The pre-legislative history shall be examined in several areas: the ruling preceding the law; the report of the committee for criminal procedures led by Supreme Court Justice Miriam Naor;[185] and the legal literature in Israel regarding JSOCP, which was available to the committee and the courts at pre-legislative period.

The first time a claim for JSOCP was mentioned in a judgment was in 1974.[186] In that case, the court discussed a claim of "double jeopardy" and briefly mentioned JSOCP as a claim that "was never claimed in Israel before" and that such a claim was mentioned in the British ruling. The claim, however, was not discussed in itself.[187]

The Supreme Court deliberated a claim for JSOCP for the first time in a comprehensive judgment in 1996. In that case, concerning *Yefet*,[188] the court deliberated on the conviction of

---

[183] Regarding the various remedies which will be provided if the right for a claim is violated, the right which constitutes a "fundamental principle in our law system", and are aimed at preventing the violation of the individual's rights and status, "without being given a fair and appropriate opportunity" to present his claims, compare: H.C.J. 3495/06 *The Chief Rabbi of Israel Yona Metzger v the Attorney General* (30.07.2007) [Hebrew] (hereinafter: "The Metzger Case"). Regarding the relative nullity doctrine and the factors that the court should take into consideration in such a case, see: H.C.J. 3486/94 *Massalha v the Committee for Planning and Construction* (6.11.1994) [Hebrew].

[184] Crim. App. 536/79 the *State of Israel v Kadosh* P.D. 84 34(2) 552, 556 (1980) [Hebrew].

[185] *Hereinafter* the "Naor Committee".

[186] Crim. App. 244/73 *Raber v the State of Israel***,** P.D. 28 (1) 798 (1974) [Hebrew].

[187] *Ibid,* page 803. The court mentioned that the claim is acknowledged by British law, according to which the court has an inherent jurisdiction to dismiss an indictment that, under the circumstances, is abusive toward the defendant. See: *Connely v D.P.P.* [1964] 2 All E.R. 401. Also see: Crim. App. 450/77 *Ba'al Taksa v the State of Israel***,** P.D. 32 (2) 152 (1978) [Hebrew].

[188] Crim. App. 2910/94 *Yefet v the State of Israel*, P.D. 50 (2) 221 (1996) [Hebrew].

the bankers involved in the "bank stock adjustment" case. It rejected the defence's claim that the criminal proceedings should not have been initiated in the first place for various reasons, including the authorities' own involvement in the share adjustment. The appellants argued that the indictment should be dismissed based on a claim for JSOCP based on the authorities' misconduct.

The majority opinion held that JSOCP is not applicable under the case circumstances.[189] Presenting the court's decision, Justice Levin said that, in principle, a claim for JSOCP would be used only in cases the authority "used its power in an exceptionally unfair and unjust way".[190] The court adopted the test of "an outrageous conduct by the authority that involves persecution, oppression, and abuse of the defendant… when it comes to cases the mind cannot tolerate, where conscience is shaken, universal sense of justice is gravely compromised, and the court is flabbergasted by".[191]

For years later, the *Yefet* test was a leading test which practically turned the claim for JSOCP into a "dead letter" in the Supreme Court's ruling. Due to this test, claims in the cases of *Olmert* and *Katz*[192] were rejected. An additional Supreme Court ruling indicated that the court is willing to acknowledge the claim for JSOCP as case law, but one that should not be ruled. This was especially obvious in the case of *Kogen,* which was ruled in 1997.[193] The case involved soldiers who took part in a military mutiny and were prosecuted despite an explicit promise of the state not to do so. The court refused to intervene in the state prosecution authority's decision, emphasizing the gravity of the matter and the public's interest.

Despite the reasons provided by the court, the violation of judicial justice and fairness principles toward the defendants is undeniable and may cause distrust of authorities' promises in future similar cases. It is worth noting here the ruling of the Privy Council in the case of *Phillip*.[194] In a 1995 ruling, the Privy Council accepted the claim of the coup leaders who seized the local parliament that they should be granted leave because of the injustice caused by violating the pardon they received during negotiations with them.

---

[189] Though a minority view, Justice Tzvi Tal believed that JSOCP was applicable in one of the indictments since the State knew about the share adjustment and even encouraged it. See on pages 491-492.

[190] See on pages 368-369.

[191] See on page 370.

[192] H.C.J. 1563/96 *Katz v the Attorney General*, P.D. 45 (1) 429 (1997) [Hebrew].

[193] H.C.J. 5319/97 *Kogen v the Chief Military Prosecutor*, P.D. 51 (5) 67 (1997) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/kogen-v-chief-military-prosecutor

[194] *A-G of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 935.

The first deviation from the "chains" of *Yefet*'s test was marked in the Supreme Court ruling in the case of *Hermon*[195] concerning a lawyer convicted of murder who has served his sentence. Thirteen years after committing the offence, the district committee of the Bar Association initiated disciplinary proceedings against him in order to discharge him from the association, though obviously, he has not been a Bar Association member for many years.

For the first time and most exceptionally, the Supreme Court accepted the claim for JSOCP. Justice Ayala Procaccia decided that the JSOCP principle applies in this case due to the substantial setback in conducting the expulsion procedure. She concluded that a considerable delay may practically justify JSOCP even if the statutory limitation period has not passed yet. Thus, in a case in which conducting the trial after a long period of time may significantly harm an individual's ability to defend himself or "profoundly contradicts justice and fairness principles of a due process", [196]the claim for JSOCP should be accepted.

Though Justice Procaccia appears to base her judgment on *Yefet*'s test, she actually embraces a far broader test, as seen in her words that "even a person subject to disciplinary proceedings is entitled to JSOCP if the procedure held against him saliently contradicts principles of justice and fairness".[197] It was ruled that in setting the right balance, in this case, between holding the disciplinary procedures for public interest vs the protection of the individual's right, the scale is tilted in favour of the individual's rights. Postponing the disciplinary procedures was "beyond reasonable justice" since it entailed a "salient lack of fairness and injustice" towards the defendant. [198]

The judgment in the case of Hermon paved the way for the new law, which formed a formula that enabled the court to stay in criminal proceedings or adjust an indictment if it posed a "material contradiction to the principles of justice and legal fairness". There is an apparent similarity between the things said in the *Hermon* judgment and the formula adopted by the new law, even though the judgment is not a prominent one neither in the pre-legislative history nor the parliamentary-legislative history of the new law.

A direct effect on the discussions of the Naor committee lay in the March 2005 Supreme Court judgment in the case of *Borovitz*.[199] The district court convicted, in that case, an insurance

---

[195] Bar Association App. 2531/01 *Hermon v The District Committee of the Bar Association*, P.D. 58(4) 55 (2004) [Hebrew].

[196] *Ibid,* pages 77-79

[197] *Ibid, Ibid.*

[198] *Ibid, Ibid.* It should be noted, though, that the judgment was based, *inter alia*, on the fact that the defendant no longer served as a lawyer and declared he has no intention to renew his bar association membership.

[199] Crim. App. 4855/02 *the State of Israel v Borovitz*, P.D. 59 (6) 776 (2005) [Hebrew].

company, its CEO, and two additional officers for offences concerning restrictive agreements they have formed in various insurance fields in contravention of section 4 of the 1988 antitrust law. The insurance company was fined, and the officers were subjected to actual prison sentences (in service work), probation, and fines.

Claiming for JSOCP, the appellants pleaded to dismiss the indictment and cancel the judgment against them based on their discrimination relative to others who formed restrictive agreements yet were not prosecuted. They claimed to be victims of a ban imposed by their agreement partners, who, as a result, joined the restrictive agreements only to mislead them. Additionally, they claimed impairments in the procedure of authorizing the private detectives who investigated the case and in conducting the criminal investigation procedure. On merit, the claim for JSOCP was rejected based on the observation that the criminal procedure conduct in the case of the appellants did not clearly harm the principles of justice and fairness in a way that justifies the stay of the proceedings or their acquittal.[200]

In the *Borovitz* case, the court expressed a central reservation concerning the narrow test, determined in *Yefet*'s case, for a JSOCP to be applicable. The court ruled, as stated by Justice Eliyahu Matza, that "it should not be dismissed that the harm in the sense of justice and fairness may be referred not solely to an outrageous act by the authorities but, for example, to their negligence or even to circumstances the authorities have no control over yet clearly bring to the conclusion that the defendant in a case cannot be fairly tried, or that the criminal proceeding itself will materially harm the sense of justice and fairness".[201] Thus, it seems that the claim for JSOCP should not be restricted to the authorities' conduct but instead viewed from a broad perspective which includes the case circumstances as a whole.

Having said that, it should be noted that the reservation the court expressed regarding the *Yefet* test is not an absolute one. *Yefet*'s case test was viewed by the court as a suitable one in cases of judicial estoppel and noted that in cases of a different nature, a different level of precaution might be taken, probably a lower one. The court also stressed that not every inadequate act of the authorities- be it the investigative, the judicial, or a different one- justifies a JSOCP. The court will prefer the public interest in holding the trial; will consider other means for addressing the flawed acts of the authorities before taking the radical measures of JSOCP, which should be taken only in "highly extreme cases" and after the defendant shows a clear causal relationship between the authority's misconduct and the violation of his rights.

[200] See on page 851.
[201] See on pages 807-808.

Applying JSOCP is supposed to reflect, according to the judgment, a proper balance between all the principles, values, and interests the criminal proceeding involves. Thus, a broad scope of aspects shall be considered: the interests involved in prosecuting the defendants and executing legal proceedings; revealing the truth; protecting public safety; protecting the rights of the victim; and, on the other hand- protecting the defendant's fundamental rights; revoking flawed measures taken by the authorities and deterring them from repeating these faults in the future; observing judicial proceeding integrity and public trust in the legal system.

The court clarified that applying JSOCP will be examined in three phases: In the first phase, the court will identify the flows in the procedure, regardless of the question of whether the defendant is guilty; in the second phase, the court shall examine whether- due to the flaws- conducting the criminal proceeding will "acutely damage a sense of justice and fairness". In this phase, the court is required to balance between different relevant interests and consider the proceeding's actual circumstances. It will consider the severity of the felony the defendant is accused of, the strength of the evidence, the personal circumstances of the defendant and the felony victim, the gravity of violating the defendant's rights, the extent of liability of the authority, and whether it acted maliciously or in good faith.

In the third phase, the court will consider remedies and whether, rather than dismissing the indictment altogether, the flaws identified may be fixed in mild and proportional ways, such as dismissing specific accusations, dismissing a piece of certain evidence, or reducing the punishment.

The Supreme Court viewed the case-law set in the case of *Borovitz* as an expansion of the previous precedent set in *Yefet*'s case. In the case of *Rosenstein*[202], the court ruled that JSOCP may be claimed not only in the narrow sense of a criminal proceeding but also in extradition proceedings, either as an "internal" claim in the extradition proceedings or an "external"- general one in court. As stated by Justice Edmond Levy, using the test for JSOCP- which may have led to rejecting the extradition request – was applicable since "there were serious concerns of violating either the principles of justice and legal fairness or the right for a due process".[203]

[202] Crim. App. 4596/05 *Rosenstein v the State of Israel* (30.11.2005) [Hebrew] (hereinafter: the "*Rosenstein* case"). An English version is available at: https://versa.cardozo.yu.edu/opinions/rosenstein-v-state-israel

[203] Ibid, section 10 of the judgment. The claim for JSOCP was rejected on merit since the appellant did not prove that the decision to extradite was discriminating.

In the case of *Hirschberg*[204], Justice Salim Joubran mentioned that the *Borovitz* guidelines expand the precedent set till then. Nevertheless, it seems that in this case, the court found it difficult to throw off the shackles of the *Yefet* test and was not willing to accept the claim for JSOCP unless in exceptionally rare cases. In this case, the Supreme Court rejected a request to appeal against a district court ruling. The district court ruling revised a magistrate's court, which acquitted a defendant due to the public authority's misconduct toward him. It seems that the Supreme Court based its decision on the strict criteria set by the court for accepting a claim for JSOCP.

The decade between the case law set in *Yefet*'s case in 1996 and the one set in *Borovitz's* case in 2005 has been prominent in parliamentary-constitutional history.[205] The explanatory section of the new bill mentions that its purpose is to enact the claim for JSOCP, "which was embraced by the Israeli judicial doctrine in the form of a ruled directive". It has been emphasized that in the case of *Borovitz*, "the court has substantially expanded the scope of the claim for JSOCP," transforming the existing case law formed in *Yefet*'s case. The bill describes the test set in Borovitz's case as "a test for a material violation of the sense of justice" and mentions it being "more flexible and lenient".[206]

Nevertheless, the *Borovitz* judgment has several facets. On the one hand, it provides a flexible and broad test for accepting a claim for JSOCP in case of "a material violation of the sense of justice", deviating from the narrow test set in *Yefet*'s case. As such, a claim may be accepted not only in extreme cases of violating principles of justice and legal fairness. The general attitude of the judgment is also evident from the legal literature references provided by the court, which advocate the broad approach. On the other hand, the judgment also incorporates, as clarified above, phrases that indicate a reluctance to implement the precedent in cases that are not exceptional and rare.

The test adopted by the legislator is similar to the comprehensive test set in *Borovitz's* judgment and later interpreted in the case of *Rosenstein*. The new law's test for accepting a claim for JSOCP examines whether there is a "material" contradiction to principles of justice and legal fairness. This requirement is similar in nature and level of intensity to the requirement of the test for "material" harm in the sense of justice and different from the requirement for an "extreme" or "severe" violation.[207]

---

[204] Crim. App. Req. 1498/07 *Hirscberg v the State of Israel* (18.3.2007) [Hebrew] (hereinafter: "the *Hirschberg* case").

[205] See the below discussion on this history.

[206] Criminal Law Bill (amendment 51) (JSOCP), 2007 (hereinafter: "the bill" or "the New Law").

[207] See the discussion below in the chapter on the interpretation of the law.

In order to get a complete picture of the legal ecosystem prior to the bill, it is essential to relate to other instances- the magistrates' courts, the district courts, and labour courts. Before the judgment in the case of *Borovitz*, a kind of a "silent revolution" took place in these instances, and claims for JSOCP were acknowledged, "bypassing" the strict case law determined in *Yefet*'s case. The Supreme Court itself referred to this approach in the case of *Borovitz,* saying that "not all scholars, and probably judges, agree with the criterion determined in *Yefet*'s case".[208]

After the judgment in *Borovitz's* case and before the new law was passed, the aforementioned instances were the evangelists of the "justice revolution," whose seeds were sown in the judgment. Such was done in the case of *Maccabi Kiryat Motzkin,*[209] where the district court in Haifa endorsed the magistrates' court judgment which dismissed an indictment against a non-profit organization and its managers- who failed to transfer deductions to the income tax authority- since an indictment was not filed in a similar and even graver matter. The claim for JSOCP was accepted based on selective law enforcement or filing an indictment only against part of the people involved. In the judgment of Keshet Hyper-toy[210], the Tel-Aviv labour district court dismissed an indictment against operating stores in public shopping malls on Shabbat, the weekly rest day, due to the fact that no indictment was filed against similar businesses for such acts. Selective enforcement was, thus, again, the cause for accepting a claim for JSOCP and dismissing an indictment. The court indicated that it had followed the footsteps of the Supreme Court judgment in the case of *Borovitz.*

In the case of *Mishkenot Hadar*[211], the Tel-Aviv district court accepted the request of a contracting company to dismiss an indictment for design and construction offences it allegedly committed, claiming it acted so due to the municipality's continuous misrepresentation. According to this misrepresentation, the municipality consented to the construction from the very beginning, though not all formal permits were issued. The court dismissed the indictment since it found the circumstances inappropriate for prosecuting the company.

In the case of *Bachar*[212], the Tiberias magistrates' court considered a defendant's claim for

---

[208] See in *Borovitz*, pages 805-806.

[209] Crim. App. (Haifa District court) 488/05 *the State of Israel v Maccabi Kiryat Motzkin* (9.7.2006).

[210] Crim. Case (Tel-Aviv district labour court) 112/01 *the State of Israel v Keshet Hyper-Toy* (2007) [Hebrew]. On revoking an indictment based on selective law enforcement see also: Crim .App. (district court in Haifa) 2400/07 *the State of Israel v Uzana* (23.10.2007) [Hebrew].

[211] Crim. App. (Tel-Aviv district court) 80034/04 *Mishkenot Hadar Ltd. v the State of Israel* (19.2.2007) [Hebrew].

[212] Crim. Case (Tiberius) 2309/04 *the State of Israel v Bachar* (8.6.2005) [Hebrew].

JSOCP, requesting to dismiss a judge who ruled against him. He was convicted of illegal possession of a firearm following his own confession of holding a gun without a permit at home. At the stage of hearing arguments for the punishment, the defendant summoned a police witness whose testimony indicated that the gun was submitted to the police following the police' promise to the defendant that no indictment would be filed against him. The court accepted the claim for JSOCP. Though the authority did not act maliciously, the court ruled that by making the promise to the defendant after which he submitted the gun to the police, the interest to protect his rights and restrain the power of the authority outweighs the public interest of prosecuting him. The court stressed that "The authority's denial of an explicit promise it made is a grave damage to the sense of justice and fairness".

In the case of *Halbi*[213], a magistrates' court in Haifa dismissed an indictment concerning construction work that was carried out without a permit since the defendants conducted this work following a request of the town mayor to conduct it. It was ruled that, without doubt, the town was to blame and that, under the circumstances, dismissing the indictment was the only possible means.

This ruling is sufficient to show that the instances positively accepted the *Borovitz* criterion on the eve of passing the new law. It may be noted that, to some extent, the ruling surpassed the Supreme Court's stand that a proportional remedy should be considered before taking the extreme measure of dismissing an indictment. The courts found that the cases discussed justify indictment dismissal's extreme and drastic measure due to the right to a due process violation.

[213] Crim. Case (Haifa) 1999/00 *the State of Israel v Halbi* (27.5.2007) [Hebrew].

CHAPTER 6
"LEGALIZING" THE DOCTRINE IN AN ISRAELI ACT AND ITS EVOLUTION

6.1 Academic Criticism Regarding the Doctrine

In *Borovitz's* case, the court indicated that not all scholars feel comfortable with the test determined in *Yefet*'s case. A few academic articles in Israel's legal literature related to the subject of JSOCP. The article of Boaz Okun and Oded Shaham[214] was published during Yefet's judgment. They suggested that in the framework of JSOCP, the court should examine whether initiating and conducting the criminal procedure is justifiable. The authors stressed the defendant's condition rather than just the authority's demeanour so that even if the prosecution acted entirely in good faith, the defendant might still be able to claim for JSOCP.[215]

Yisgav Nakdimon viewed the enshrining of JSOCP as an expansion of the court's role, which enables it to decide whether it is appropriate to prosecute or conduct a trial against a defendant under the case's specific circumstances.

After publishing *Borovitz***'s** judgment, Mordechai Levy, a military appeal court judge, published[216] an article indicating that the "labour contractions" of JSOCP have ended. Several issues are yet to be clarified, such as fundamental questions about the claim's essence, the "model" according to which the court may accept the claim, its limits, and the various channels in which it may arise. When considering the claim, he suggested taking a narrow approach and paying attention to the possible implications of approving the claim on the investigation of the truth, execution of the law, protecting the public interest, etc.

Part of the discussions at the Naor committee referred to the various scholars' approaches described above.

6.2 The Naor Committee discussions

---

[214] Boaz Okun, Oded Shaham, *Due Process and Judicial Stay,* Hamishpat, Vol. 3, 1996, p. 265 [Hebrew].

[215] See *Ibid,* page 278. Also see: Assaf Porat, *Judicial Stay of Criminal Proceedings in the Constitutional Era*, Kiryat Hamishpat, Vol. 1, 2001, p. 381 [Hebrew].

[216] Mordechai Levy, *More on the Substance of the Doctrine of Judicial Stay and on the Test for its Acceptance Before and After the Judgment in Borovitz,* Hamishpat Vol. 10, 2005, p. 353 [Hebrew].

Committees' reports are an inseparable part of the pre-legislative history, being known to the legislator and influencing the new legislation. Therefore, citing these reports is expected in court rulings that interpret the law.

A comprehensive report of a committee of experts headed by a Supreme Court justice expert on the subject will likely have a significant meaning. That is why the report of the criminal law expert committee headed by Supreme Court Justice Miriam Naor received particular attention in the discussions held before passing the law.[217]

In the first meeting, the committee discussed JSOCP - held on March 9, 2005 - most participants advocated including JSOCP in criminal law.[218] Justice Naor summarized the discussion by saying the committee should create several versions of the law phrasing. This meeting was held three weeks before the publication of the judgment in the case of *Borovitz*. Part of the meeting participants thought it right to provide a broader criterion for JSOCP than the one determined in the case of *Yefet*, which then reflected the common rule. This stand was expressed by attorney Yoav Sapir, the deputy of the Chief Public Prosecutor. The Attorney General's Deputy, Attorney Livnat Mashiach, expressed a different stand, saying that JSOCP should be applied only in "extreme injustice" cases.

The committee's final meeting held on May 4, 2005, examined the bill of MKs Gideon Sa'ar and Moshe Kahlon for enshrining the JSOCP doctrine in criminal law.[219] The meeting was held after the judgment in the case of *Borovitz* was already delivered. A request to reconsider the committee's decision to enshrine JSOCP in criminal law was made during the meeting by Attorney Yehoshua Lemberger, the State Attorney's Deputy, as well as by the legal counsel of the Ministry of Public Security, Deputy Commissioner Alinoar Mazuz. According to her, enshrining JSOCP in criminal law will entail "a substantial prolongation of all procedures since each case will incorporate a full examination of the authorities' demeanour". A counterclaim

---

[217] Also see below in the discussion about the legislative history. The Naor committee comprises of judges, academics, prosecution and defence authorities' members and representatives of the Ministry of Justice' counselling the legislation department.

[218] The State attorney, Eran Shender, expressed a different stand in the committee saying that JSOCP should not be added to the state's rulebook and remain subject to the court's discretion.

[219] The bill was first submitted to the Knesset in December 2004 as a private amendment proposal of criminal law, being initiated and phrased by the Bar Association's Criminal Forum Director Attorney Rachel Toren, following legal literature published on the subject at the time. See a discussion *below*. The bill proposed to acknowledge JSOCP as a pre-trial motion in cases where the authorities acted in extreme injustice toward a defendant or where filing an indictment was unreasonable or malicious. The bill was resubmitted to the 17th Knesset. See: criminal law bill (amendment no. 51) (JSOCP), 2007. The bill was submitted by MK's Gideon Sa'ar and Moshe Kahlon. See a discussion on the legislative-parliamentary history *below*.

was expressed by the representative of the Public Defender as well as by Attorney Yehudit Karp, the former attorney general deputy.

The committee voted to support enshrining JSOCP in criminal law. Nevertheless, a substantial part of the meeting was dedicated to the bill's formulation. Justice Naor suggested enshrining JSOCP in the form of a mere title "JSOCP" and leaving it up to the court to fill this framework in content, stressing that the correct balance between the system's requirements and the judicial proceedings should be deliberated in each case individually. Attorney Lemberger, representing the Attorney General, suggested that JSOCP will be applied in a case where the indictment or conducting the judicial proceeding "materially contradicts" principles of justice, stressing that the violation should be extreme or material in order to prevent its application routinely. Formulating the violation as either "extreme" or "material" should be left open, he said.

A formula suggested by Justice Naor stated that JSOCP should be applied when "filing an indictment or conducting the procedure is in extreme contradiction to principles of justice and due process". This stand, however, seemed too rigid to Committee member attorney Karp who proposed to convert the "extremity" requirement to one of a "material or real" contradiction to the above principles.

The term "extreme" contradiction was favoured by a majority of 6:5, yet it was decided to offer both proposals to the Knesset's Constitution, Law, and Justice Committee to discuss the bill submitted to the Knesset.[220]

6.3 Legislative-Parliamentary History

JSOCP was brought to the legislature due to several factors. The first was the ruling of the Supreme Court and rulings of other instances which gave way to this claim. Legal publications that advocated enshrining JSOCP in criminal law and relevant literature used by the committee also did their share. Additionally, many claims were raised by the Israeli public regarding unreasonable delays in getting to a decision to prosecute as well as selective enforcement of the law. These public claims promoted the interest in conducting fair procedures despite fighting crimes and convicting criminals.

The legislator had to select from a broad spectrum of options: leave JSOCP as a case law

[220] See *below* the elaborate discussion on the legislative history. Following a recommendation by the Ministry of Justice, the ministers' committee for legislation has decided to transfer the discussions on the subject to the committee of criminal law, as was indeed done. As clarified by attorney Rave, the criminal law committee's coordinator, the committee reaches final decisions in its meetings without recording the protocol.

without enshrining it in legislation; combine it in criminal law only in the form of a title, without providing the further court guidelines of application; enshrine it in criminal law in the spirit of *Yefet*'s Supreme Court judgment; enshrine it more broadly in the spirit of *Borovitz*' case law; enshrine JSOCP in an even broader sense than in the case of Borovitz as suggested by a part of the legal literature on the subject.

At this point, it is worthwhile to examine the parliamentary-legislative history, which sheds light on the purpose, scope, values, and goals the legislation wishes to encompass.[221] The historical background is an invaluable source of any interpretation and is routinely used, even in cases where the law seems rather straightforward and definite. More so, when it comes to JSOCP, which uses broad, vague terms, such as "principles of justice and judicial fairness".

Below, the legislative history review is conducted chronologically- from the bill's submission until it was passed by the Knesset- including the bill with elaborate explanations and discussions in the Knesset Assembly and the Constitution Law Justice Committee. The historical material shed light on the context close to the law's legislation and indicated the intentions of the various entities involved in the process. By comparing the bills submitted and the amendments added, we may learn about the legislator's intention.

6.4 The JSOCP Bill

In order to be able to follow the legislation's intention, we shall review the interpretation of the bill while in progress[222] and examine adjustments conducted during the legislation process. When the interpreted law uses the very same phrasing suggested by the bill, the bill is precious for the interpretative process. Such is the case in JSOCP. The criminal law bill (amendment 51) (JSOCP), 2007 was precisely copied to the new law, which was passed, with the exception that the title "Judicial Stay of Criminal Proceedings" was omitted.

The explanatory paragraphs of the bill stated that it aims to enshrine JSOCP, "which was adopted by the Israeli jurisprudence in the form of a ruled case law". The bill clarifies that its purpose is to enable the court to dismiss an indictment "because it cannot grant the defendant a fair trial, or because conducting the criminal procedure is impairing a sense of justice and fairness".

---

[221] See, *inter alia*: H.C.J. 47/83 *Air Tour (Israel) Ltd. v Chairman of the Supervisory Antitrust Council* (14.2.1985) [Hebrew]; H.C.J. 547/84 *Of Haemek Agricultural Society v. Ramat-Yishai Local Council* (20.1.1986) [Hebrew].

[222] See, for instance, Further Criminal Hearing (F.C.H.) 9384/01 *Alnassasra v. the Bar Association* (15.11.2004) [Hebrew] (hereinafter: "*Alnassasra* Case").

The bill reviews the test determined in *Yefet*'s case, mentioning the criticism that followed about its narrow attitude and the judgment in the case of *Borovitz*, where the court "substantially" expanded the scope of the JSOCP claim. The bill mentions that the court embraced "a more flexible and lenient test".

These explanations indicate that accepting a JSOCP claim by a court means that "regardless of the defendant's innocence or guilt, there is no room to prosecute him or conduct a criminal procedure against him". The bill suggests that the claim for JSOCP should be integrated with other precedents enshrined in criminal law. It further says that "as the JSOCP claims are by nature early and preliminary, they should be considered prior to the examination of the indictment".

6.4.1. The Discussions at the Constitution, Law and Justice Committee

On November 11, 2006, the Knesset assembly handed the bill over to the Constitution, Law, and Justice Committee.[223] 26 MKs from various parties supported this step, and one MK objected. The final meeting of the Constitution, Law and Justice Committee on the subject was held on May 8, 2007. MK Gideon Sa'ar, who was one of the initiators of the private bill, stressed that the concluding version states a requirement for "a contradiction which is material for principles of justice and legal fairness" since determining a more rigorous test would push back the case law, which has already been ruled. He further said that a comprehensive test should be endorsed in view of many criminal indictments and convictions to balance the individual's power when facing "strong systems".

Law enforcement authorities required a rigorous criterion for applying JSOCP. Attorney Etty Kahana, the State Attorney representative, claimed that a requirement for an "extreme" or "drastic" contradiction would better reflect *Borovitz*'s case law in the new state law. Military Advocate General, Colonel Liron Libman, supported her view, stating that a claim for JSOCP should be accepted only in a case of an "extreme" or "drastic" contradiction to principles of justice and legal fairness and that just a "material" contradiction is insufficient. However, Dr Guy Rothkopf, a senior consultant of the Ministry of Justice and the ministry's representative in the committee, stated that the stand of the ministry's Consulting and Legislation Department is that a "material" contradiction to the principles of justice and legal fairness should suffice

[223] The bill was handed over as a bill for criminal law (amendment- JSOCP), 2006. Later, the bill was discussed as a bill for criminal law (JSOCP), 2007.

for accepting a claim for JSOCP.

Attorney Inbal Rubinstein, the Chief Public Defender, expressed a different view than the enforcement authorities, saying that applying JSOCP only in cases of "drastic" or "extreme" contradiction would narrow the existing case law and contrast the broad criterion set in the case of *Borovitz*. Attorney Rachel Goren, the Bar Association representative, joined this approach, saying that a "material" contradiction should be sufficient for accepting a claim for JSOCP.

The committee's chairman, MK Menachem Ben-Sasson, advocated adopting the "material" contradiction criterion, clarifying that the word "material" is "the most accurate one to reflect the problematic situation as it means harming the heart of the matter". In general, the most debatable issue was the requirement for a "material" contradiction vs a more rigorous requirement for an "extreme" or "drastic" contradiction to principles of justice and legal fairness.

This debate regarding the criterion for applying JSOCP shows the importance of this matter. As expressed by the criterion that the legislator adopted, the dispute's resolution is an essential tool for the court when required to interpret the law. Once the broad criterion that a "material" contradiction is sufficient to accept a claim for JSOCP, the interpreter cannot ignore it.

By a majority of 11:1, the Constitution, Law, and Justice Committee has decided to accept that a "material" contradiction is sufficient for accepting a JSOCP claim. It is noted that the committee rejected a proposal that was put forward during its discussions to limit JSOCP claims to cases of minor offences.[224]

6.4.2 Discussions at the Knesset Assembly

Having a polemic nature and reflecting transient personal responses, discussions at the Knesset assembly have low significance for understanding the law's scope and purpose.

Nevertheless, the explanations of the relevant committee's chairman when presenting the law for a second and third approval are considered significant since they reflect the committee's views regarding the legislation's purpose. This is so even if his words reflect his own understanding, considering the fact that the committee does not submit a meeting report, nor does it endorse the information provided to the assembly by its chairman.

[224] In the committee's final meeting, MK Atniel Schneler proposed to discern between a sin, a felony and a crime when deciding to accept a claim for JSOCP. In his view, JSOCP should be applied only in cases of sin and felony, which are less severe, so as to prevent its application in cases concerning state security and enable fighting crime. MK Yitzhak Levy opposed this position since "one cannot do half justice". Atniel Shneler's proposal was rejected by a majority of 8:4.

When presenting the new bill to the Knesset's assembly for second and later third approval, the Constitution, Law and Justice Committee Chairman, MK Menachem Ben-Sasson, indicated that the *Borovitz* case law received several interpretations during the committee's discussions. He designated that law enforcement and prosecution authorities deemed the contradiction to principles of justice and legal fairness should be "drastic". In contrast, others- such as the representatives of the Ministry of Justice, the Public Defender, and the Bar Association- believe that the case law instead suggests that such a rigorous contradiction is not required and that a "material" contradiction is sufficient. According to lexical terminology, he mentioned that a "material" contradiction indicates violating the "principles' profound essence".

MK Sasson informed that the committee has decided to enshrine JSOCP, which may be claimed in cases of "a material contradiction to the principles of justice and legal fairness". He further designated that the law "touches the heart of the justice system", which is obligated to do justice when enforcing the law. The committee's members did not submit any reservations, and the law, supported by 23 MKs with no opponents of abstentions, was passed.

The parliamentary history reviewed above generally shows that the legislation's primary purpose is to "invigorate" criminal law by enabling the dismissal of a criminal proceeding based on a material contradiction to principles of justice and legal fairness. This intention provides the court with a broad scope of interpretation within the comprehensive framework the legislator enabled. The goal was to create a broad criterion, a sort of an indistinct checkbox that the courts fill in at their discretion, unlike other pre-trial motions in criminal law, which are mostly more specific and do not leave room for judicial interpretation.

6.5 Guidelines for Interpreting JSOCP Law

6.5.1 General Principles for interpreting the New Law

As with any other law, the legislation interpretation rules of the Israeli law are to guide us in interpreting the new law. The interpretive journey begins with the law's literal meaning. Clearly, an interpretation is wrong if it does not align with the law's wording. The fundamental rule for the commentator is "…to give the law a meaning it can explicitly align with".[225]

The legislative purpose is based on the literal meaning of the law. As discussed, every law has

[225] Crim. App. 77/88 *Zimerman v the Minister of Health*, P.D. 43(4) 63, 72 (1989) [Hebrew]; See also: Crim. App. 3899/04 *the State of Israel v Even Zohar* (1.5.2006), para. 14 [Hebrew].

a purpose, and a law without a purpose is futile. The meaning the commentator-judge gives the law should align with its explicit wording more than any other alternative meaning. This purpose incorporates the law's goals, aims, interests, values, policy, function, and span. A "formula of balance" is required to bridge between opposing considerations.[226] A purpose refers to both a subjective and an objective one. The subjective purpose reflects the real intention of the legislator and is inferred from the pre-legislative history as well as the legislative-parliamentary one.

The objective purpose constitutes the interests, goals, values, and aims the law manifests in a democratic society. It is determined by objective criteria, reflecting a reasonable legislator rather than the specific original legislator. Doubtlessly, the objective purpose of every law is to ensure human dignity.

When interpreting the law, the court must wisely balance between the different relevant purposes and determine the central purpose that will guide its interpretation. Once the central purpose is determined, it may assist in finding the balance between relevant interests and rights, such as judging criminals for their acts while protecting the fundamental rights of a defendant and maintaining criminal procedure fairness.[227]

When considering the individual's rights in the balancing process, the court should give particular weight to the Basic Law: Human Dignity and Liberty.[228] This constitutional right reflects diverse values and is highly relevant to defendants' and interrogees' rights.[229]

6.5.2 Literal- Linguistic Interpretation

JSOCP law interpretation starts with its wording. The law explicitly enables a defendant to issue a precedent claim that "submitting the indictment or conducting the criminal proceeding

---

[226] See the case of *Exelrod,* para. 9. See also: Crim. App. 6024/97 *Shavit v Kadisha Association in Rishon-Lezion*, P.D. 53(3) 600, 645, 649-650, 657-658 (1999) [Hebrew] (hereinafter: the *Shavit* case). An English version is available at: https://versa.cardozo.yu.edu/opinions/shavit-v-rishon-lezion-jewish-burial-society

[227] On balance between relevant interests determined in the Freedom of Information Act, see: Crim. App. 2498/07 *Mekorot Water Company Ltd. v Bar* (27.6.2007) (Justice Elyakim Rubinstein) [Hebrew].

[228] See in general: Crim. special request 537/95 *Gnimat v the State of Israel*, P.D. 49(3) 355, 412 (1995); A.C.H. 2316/95 *Gnimat v the State of Israel*, P.D. 49(4) 589, 648-649 (1995) [Hebrew].

[229] See: Crim. App. 5121/98 *Yissaharov v Chief Military Prosecutor*, P.D. 61(1) 461 (2006), Para. 20 (hereinafter: *Yissaharov*'s case) [Hebrew]. Nevertheless, justice Dorit Beinisch clarified that there are several alternative approaches regarding the questions of which criminal proceeding hearing rights are to be included in the Constitutional right for dignity and liberty and the extent of Constitutional protection to rights which are not explicitly designated in the Basic Law. An English version is available at: https://versa.cardozo.yu.edu/opinions/yissacharov-v-chief-military-prosecutor

is in material contradiction to principles of justice and legal fairness". Accepting the claim does not compel the court to dismiss the indictment, and it may choose to fix the indictment mildly.

Clearly, the decision of whether the claim applies highly depends on the interpretation of the term "material". According to the term's literal-lexical meaning, the subject for which there is a contradiction to justice or legal fairness should not just be a minor issue but rather a major and meaningful one.[230] MK Menachem Ben-Sasson suggested in the Constitution, Law, and Justice Committee discussions that the phrase "material" is "the most accurate one to reflect the problematic situation since it means harming the heart of the matter".

To conclude, a claim for JSOCP may apply if submitting the indictment or conducting the criminal proceeding are in significant contradiction to principles of justice and legal fairness and that this contradiction materially harms the work of the defence in a way that is not merely technical or one that immaterially hampers the work of the defence.[231]

It is worth noticing that the legislator used the term "material" in various laws without specifying its definition. In doing so, the legislator guides the court to diagnose whether the violation is minor and insignificant or rather a major one. Considering how to apply the claim will initiate only after the violation is classified as material and not merely technical.

In every case the legislator uses the term "material", the court is required to thoroughly examine the circumstances in order to decide on the violation's severity, even more so in significant cases such as repealing a law where the claimant needs to prove that the law significantly violates a fundamental right[232]as expected in this context.[233] The requirement is also expected in the case of a claim for JSOCP though the level of "materiality" is probably lower. The far-

---

[230] See: Avraham Even-Shoshan *The Hebrew Dictionary* (2000): "Materiality: quality, essence, the intrinsic content of something. Material: concerning materiality, rather than qualitative or quantitative". See also: Shoshana Bahat, Mordechai Mishor, *Present Dictionary* (1995); Shimshon Inbal, *English-Hebrew Dictionary for the 2000's* (1988), interpreting the terms 'substantial' and 'significant'.

[231] Such a distinction is demonstrated in the Criminal special request 19/06 *Anonymous v the State of Israel* (26.1.2006) [Hebrew]. In this trial, the defendants requested to receive recording copies of an investigation of a juvenile girl by a child investigator, usually restricted to only "special cases". It was ruled that transferring the recordings shall be permitted only if denying the transfer will cause a "material harm" in the work of the defence, unlike a harm which is merely for convenience.

[232] See: H.C.J. 3434/96 *Hoponong v the Knesset Chairman*, P.D. 50(3) 57, 68-69, 74-75 (1996) [Hebrew]; H.C.J. 6976/04 *Tnu La-Hayot Lihyot NPO v the Minister of Agriculture* (1.9.2005) (page 12, justice Esther Hayut) [Hebrew].

[233] Regarding the requirement for a "profound and fundamental" violation in a case of repealing a law, see: H.C.J. 366/03 *Commitment to Peace and Social Justice NPO v the Minister of Finance* P.D. 60(3) 464 (2005) [Hebrew] (para. 5 of Justice Mishael Heshin's opinion). An English version is available at: https://versa.cardozo.yu.edu/opinions/commitment-peace-and-social-justice-society-v-minister-finance

reaching consequences of repealing a law are pretty different from dismissing an indictment in a particular case.

Generally speaking, it is clear that from a literal-lexical point of view, a "material" harm is supposed to be milder than one which is "extreme" or "severe". This distinction appears in the elaborate discussion in the Constitution, Law, and Justice Committee when discussing JSOCP law. The committee preferred the criterion of a "material" harm rather than the criterion of an "extreme" or "severe" one.

6.5.3 Purposive Interpretation

JSOCP law is like a framework or skeleton that the court fills with content. The legislator was explicitly directed to create this new framework which makes the protection of justice and fairness principles inseparable from criminal law. The novelty of the legislator is to integrate principles of justice and fairness in criminal law, and the primary purpose is to conduct all possible legal steps against criminals.[234]

The legislator's directive puts up a "stop" sign to criminal law enforcement in cases where executing the law against criminals violates the principles of justice and fairness materially. According to the new legislation, one cannot ignore these values, which the legislator views as an inseparable part of criminal law. This is the new law's most important message and necessitates balancing between opposing purposes of criminal law regarding law enforcement.

The court faced a similar dilemma when interpreting the law that authorizes the Supreme Court president to decide on a retrial in a case where "there was a real concern that miscarriage of justice was committed with the defendant's conviction".[235] In the case of *Exelrod,* the president of the Supreme Court, Aharon Barak, deemed that in order to interpret the directive, the legislative purpose would be determined by a balance between two opposing considerations: on the one hand, doing justice to the defendant by fixing the mistake which did him injustice; on the other hand, achieving stability and security and finalizing the trial. The necessity to maintain balance led the court to seriously consider the concern that the conviction caused a miscarriage of justice and eventually decide on a retrial.

The above genuine concern may be viewed as similar in nature to the "materiality" of a contradiction to principles of justice and legal fairness and different from a "mere"

[234] See a similar context in the case of *Alnassasra*, para. 22.
[235] Para. 31 (a)(4) in the Courts Act.

contradiction. In the 2007 ruling in the case of *Teger*[236], made after the JSOCP law was approved, the Supreme Court, by justice Dvora Berliner, broadly analyzed the JSOCP before and after the law. Though not required in order to reach a judgment, the court noted that the criterion of "material contradiction" adopted by the law is close in nature to the actual harm criterion determined in the judgment of *Borovitz*; therefore, the amendment is not a revolutionary and reflects the state since the *Borovitz* case. However, the court acknowledged that the subject should be left open to interpretation.

It seems that enshrining JSOCP in an explicit law directive is, to a large extent, a "revolution of justice", integrating values of justice and legal fairness in criminal law. Even if the legislator chose a criterion close in character to one determined in a past ruling, after all, a judicial ruling which may change over time since the law does not protect it is different from the protection that is anchored in criminal law, which explicitly incorporates claims for JSOCP in the all pre-trial motions. The fact that the law requires interpretation does not weaken its constitutional power.

The amendment, it seems, changed the balance point. Though close to the "real harm" test, following this law, the court may conclude that there is a material contradiction to principles of justice and fairness in cases where the harm is done to the defendant is not "real" to him. The legislator created a broader and more comprehensive front for the protection of justice and fairness than the previous one, which stated that only a "real harm" done to the defendant could lead to the dismissal of the indictment or milder measures according to the circumstances. The law's phrasing uses the term "contradiction" rather than "harm," which weakens the requirement to prove actual harm done to a defendant in order to accept the claim for JSOCP.

In any case, each relevant interest will be weighed in order to reach a decision. Acknowledging that the values and principles are not absolute ones but rather relative is important for finding the balance, and their weight is relative to opposing principles and values.[237] The craft of balancing includes principle and ad-hoc balancing, which refers to the specific case circumstances. Evidently, the JSOCP claim requires considering both foundations.

The balance when considering JSOCP should reflect the venerable constitutional status of the right to due process. This status is derived from the right's acknowledgement in the Basic Law: Human Dignity and Liberty, especially the sections concerning the right to human dignity and

[236] Crim. App. 5672/05 *Teger v the State of Israel* (21.10.2007) (hereinafter: the *Teger* case) [Hebrew].
[237] See the case of *Shavit***,** pp. 649-650.

personal liberty.[238] The legislator's recognition of the right to JSOCP may be considered as the manifestation of the Basic Law in practice. Enshrining the right to JSOCP does not make it absolute but gives it substantial power to outweigh other rights when adequate.

The *Issaharov*[239] case provides an example where the principles of justice and due process outweighed the principle of executing criminal sanctions against offenders. "Basic laws' spirit and principles resonate in all legal fields and impact these fields' fundamental concepts and terms", said Justice Beinisch, adding that basic laws concerning human rights influence the interpretation of laws legislated prior to the legislation of the basic laws.[240] Clearly, more so in cases of laws, such as JSOCP, which were legislated afterwards.

The Supreme Court ruled, in *Issaharov*'s case, that it is within the court's discretion in criminal proceedings to revoke evidence that was not obtained legally, even if the law does not explicitly allow it. The court reviewed the conflicting interests in admitting evidence obtained illegally in its judgment. Though the central goal of a criminal proceeding is to determine guilt or innocence, the court noted, it is clear that a mis-conviction or mis-acquittal materially harm doing justice and, in some cases, is unacceptable.[241]

The court added that though factual truth is central to doing material justice in criminal law and fighting delinquency, revealing it should not violate an additional goal of the legal system- protecting human rights. The spirit cast by the basic laws of human rights, the court deemed, guides it to ensure an impeccable criminal proceeding and protect the defendant's right to due process while striving to reveal the truth and fight crime.[242]

The decision to apply JSOCP in a concrete case should consider relevant and often opposing interests. On the one hand, the fundamental purpose of criminal law is to reveal the factual truth and values of fighting crime, protect public order, and protect the victims' rights.[243] On

---

[238] Para. 2, 4 and 5 of the law. Para. 11 requires that all government authorities shall respect the rights listed in the law.

[239] The Supreme Court revoked a soldier's statement who admitted to maintain and use a dangerous drug, since the statement was taken without warning him, as the law requires, that he was entitled to consult a lawyer.

[240] Para. 31 of the judgment.

[241] *Ibid,* para. 43.

[242] *Ibid,* para. 44-47. See Justice Levine's words on page 368 on the case of *Yefet*, saying "the authority is forbidden from violating the defendant's rights in order to convict him at all costs, since an impeccable judicial process is a preliminary condition for the existence of a judicial system and without it such a system cannot exist". Also see Aharon Barak, *On Justice, Judgement and Truth*, Mishpatim, Vol. 27, 1996, pp. 5, 11 [Hebrew]; Nina Saltzman, *Factual Truth and Judicial Truth - Concealment of Information from A Court To Protect Social Values*, Iyunei Mishpat Vol. 24, 2001, p. 263 [Hebrew].

[243] On the rights of victims under the Law For Felony Victims Rights (2001) in relation to the rights of the defendants see: H.C.J. 2477/07 *Anonymous v. the State Attorney* (27.5.2007) [Hebrew]; H.C.J.

the other hand, the defendants' rights to justice and fairness, if ignored, may harm public trust and criminal procedure fairness. Protecting those principles as well as human rights is in itself a fundamental purpose of the legal system and shapes all legal fields.[244]

The balance between the aforementioned conflicting purposes changed with the legislation of the Basic Law: Human Dignity and Liberty. The Basic Law gives particular weight to the rights of an individual, be he an interrogee suspected of a crime or a defendant, to protect his dignity and to conduct his legal proceedings in due process. The change does not give supremacy to the interest of justice and fairness but instead puts it in the middle of the stage where the balance between this interest and the interest of revealing factual truth is achieved.

As explained above, the Basic Law is a "framework law" that requires further legislation to enable applying its general principles of human dignity and liberty. The 1996 Arrests Act which reformed arrest laws, is a good example.[245] Adding a reason for a retrial in a case where "there is real concern that convicting the defendant is a miscarriage of justice" demonstrates this well. The JSOCP law is part of this chain of justice and fairness legislation which the legislator intertwines in the enforcement of criminal law.

6.5.4 The outcomes of Affirming a JSOCP Claim: Balancing via Remedy

Several options are available for the court in case it identifies a material contradiction to principles of justice and fairness, which may justify a claim for JSOCP. It may dismiss the indictment altogether but may also choose a midway, such as correcting the indictment, converting some of the charges to lighter ones, or dismissing specific evidence. The court may also choose not to discuss the JSOCP claim at the outset but rather postpone it to a later stage. When the time comes, the court may dismiss the indictment, and the defendant would not be convicted or convicted but consider reducing his sentence due to the violation of justice and fairness.

Further Delays in discussing the claim for JSOCP increase the variety of remedies. Nevertheless, it should be noted that the legislator defined the claim for JSOCP as a pre-trial

5961/07 *Anonymous v. the State Attorney* P.D. 62(3) 206 (2007) [Hebrew]. On the problems of applying the law see: The State Comptroller, *Annual Audit Report* 57 (2) 311-334 (2007) [Hebrew].

[244] See *Issaharov*'s case, para. 45.

[245] See: Criminal Proceedings Law (enforcement authorities- arrests), 1996 [Hebrew]. The law's analysis and implications appear, *inter alia*, in Justice Dalia Dorner's article, *The Impact of The Basic Law: Human Dignity and Liberty on arrest laws*, Mishpat U-Mimshal, Vol. 4, 1997, p. 13 [Hebrew].

motion rather than choosing to define it as a limit on criminal liability.[246] Therefore, the court should not be deterred from discussing it at the outset, in the form of a "small trial", in case the defendant claims his confession during interrogation is inadmissible. Discussing the claim at the outset is the right thing to do due to the law's directive and practical reasons.

A substantial amount of judicial time may be saved as the trial will not occur if the claim is affirmed. A discussion at the outset is also recommended in cases that require hearing witnesses and clarifying facts, unlike a comprehensive review of all facts and legal issues. Nevertheless, it is clear that the defendant who claims for JSOCP must indicate alleged facts (such as unreasonable delays of selective enforcement) in order to convince the court that there is sufficient evidence to discuss the claim immediately.[247]

The balanced formula determined by the court, both principally and concretely, dictates the intensity of the remedy decided upon if the claim is accepted. The considerations include, *inter alia*, the severity of the material contradiction to principles of justice and legal fairness; whether the law enforcement's acts were conducted in good faith; the essence of the offence the defendant is accused of; weighing the damage caused to the defendant vs the social price if his sentence is reduced. One should be cautious from adopting a categoric approach saying JSOCP should not be applied in severe offences. Some felonies intensify the need for legal fairness before the defendant has to carry the high costs of his conviction.

The term "Relative Nullity Doctrine" was coined in Administrative law to describe a balanced approach to determining the remedy's intensity. This approach claims that the results of violating principles of natural justice are determined by various variables, such as the severity of the authority's misconduct. The court is thus to decide on the remedy according to circumstances.[248] This doctrine was applied in the case of *Issaharov*, balancing between the

---

[246] As done, for instance, by combining the claim of "minor matters" in the penal code chapter on putting limits on criminal liability. These limits differ from pre-trial motions and claims since they block the imposing of criminal liability. Limiting criminal liability ("defence") means that a criminal felony would have been formed if the act had been done in normal circumstances. See: Boaz Sangero, *Self Defense in Criminal Law* (Nevo, 2000), p. 20 [Hebrew].

[247] See also: Kedmi, *above***,** page 894: "…such claims are better discussed as early as possible; quite many of them, if affirmed, seal the fate of the indictment, that determines whether it can be submitted altogether". The same goes for civil cases, when a claim for dismissing the lawsuit is raised at a preliminary stage of the trial, the court should not be deterred from discussing it and making a decision at that stage, if it sees that this may save the time of conducting the whole proceeding. See: Civ. App. 541/66 *Goldman v Goldman*, P.D. 21(2) 113, 119 (1967) [Hebrew].

[248] See: H.C.J. 2911/94 *Baki v the General Manager of the Ministry of Interior*, P.D. 48(5) 291, 306 (1994) [Hebrew]; Crim. App. 2413/99 *Gispan v The Military Prosecutor*, P.D. 55(4) 673 (2001) [Hebrew]; H.C.J. 7067/07 *Nethanel Ltd. v the Minister of Justice* (30.8.2007) [Hebrew], Para. 7 of Justice Elyakin Rubinstein's discussion; H.C.J. 3483/05 *D.B.S. Satellite Services (1998) Ltd. v the Minister of Communication* (9.9.2007) [Hebrew], where it was clarified, in the discussion of Justice

defendant's rights and opposing values concerning evidence admissibility.[249]

Knowing the constant tension in criminal law between different purposes, the Relative Nullity Doctrine should be used to decide on the outcomes of a JSOCP. Generally speaking, the intensity of remedy should be in accordance with the extent of contradiction to principles of justice and legal fairness. In some cases where the contradiction is material and real, only dismissing the indictment could adequately protect the defendant's rights and "educate" the authorities on how to behave in the future.

Dismissing the indictment altogether may be the right thing to do in cases where the defendant is seriously ill or where conducting a trial against him will constitute a material contradiction to principles of justice due to his personal circumstances. The court's jurisdiction adds to the broader non-defined authority of the prosecution to refrain from filing an indictment, as well as the Attorney General's to order a stay of proceedings after the indictment was submitted.[250]

Prior to the legislation of JSOCP, courts used creative ways to form a variety of remedies without taking the extreme measure of dismissing an indictment. In the case of *Kershin,*[251] the court deemed that- under the circumstances- filing several indictments against the appellant was wrong since all the events are interconnected. Emphasizing that the extreme act of indictment dismissal should only be used in exceptional cases, the court contented itself with reducing the appellant's sentence due to the "intense sense of unease resulting from the unnecessary split of indictments, aligning with the appellant's claim that the respondent did everything within her capacity to make things difficult for him to cope with…".

In the case of *Sharkawi*[252], the court considered the personal circumstances of a defendant who requested JSOCP. The defendant claimed that being a soldier, he has been prosecuted for holding a "dangerous drug"- a tiny amount of cannabis- for which he would not have been prosecuted in a civil court or recorded for a criminal offence. According to military law, the

---

Grunis, that a better name for this doctrine is "The Relative Result" (para. 24). See also: Yoav Dotan, *Instead of Relative Nullity*, Mishpatim Vol. 22, 1994, p. 587 [Hebrew]; Dafna Barak-Erez, *Relative Nullity and judicial discretion*, Mishpatim Vol. 24, 1995, p. 519 [Hebrew]; Itzhak Zamir, *The Administrative Authority, volume B* (1996) pp. 830-832 [Hebrew].

[249] *Issaharov* case, para. 62-74.

[250] Judicial intervention may be required in cases the Attorney General refuses to use his power to conduct a stay of proceedings as he seldom does so. See: *Directives of the Attorney General*, directive no. 4.3030 on a stay of proceedings (1984; updates: 2001, 2003), section 2 [Hebrew]: "A decision on a stay of proceedings will only be made in rare conditions which stem from special circumstances of the offence or special personal circumstances of the defendant. The power to conduct a stay of proceedings will rarely be applied…".

[251] Crim. App. (Tel-Aviv District Court) 80044/05 *Kershin v the State of Israel* (29.3.2007) [Hebrew].

[252] Military District Court- South, file 141/05 *Chief Military Prosecutor v Sharkawi* (29.3.2006; a judicial panel headed by Lieutenant Colonel Orly Markman) [Hebrew].

military court has decided to reduce the charge to not requiring a criminal record. The court stressed that "under the circumstances, convicting a defendant for an offence which entails a criminal record genuinely harms the sense of justice and fairness… and is unreasonable".[253]
In reducing the charge, the military district court diverged from the "classic" approach, which views the charges as the prosecution's prerogative. Since the court has the power to determine remedies, it concluded that reducing the charge is within its power and viewed it as a proportional remedy, less extreme than dismissing the indictment.[254]
Though the claim for JSOCP appears in the criminal law proceedings, which only acknowledge explicit remedies of dismissing or fixing the indictment, it is possible that the above stand would be taken after the law had been enshrined. This conclusion aligns with the relative nullity doctrine and judicial principles that reflect a proportional and reasonable approach and bring criminal law closer to Administrative law. As done in the Freedom of Information Law[255], the legislator sometimes chooses to designate the remedies' span the court may use explicitly. Still, in the criminal law proceedings, the legislator's directions do not prevent the court from providing a less drastic remedy than the legislator suggested.

6.5.5 The Message of the New Law

The JSOCP law carries an important message, integrating principles of justice and legal fairness in criminal law. The legislation explicitly acknowledges the court's power to dismiss an indictment on the basis of a material contradiction to principles of justice and legal fairness. The legislator revolutionized the justice system, which encouraged a new kind of discourse, combining the principles of convicting criminals and revealing the truth with principles of justice and fairness.
The Basic Law: Human Dignity and Liberty reinforced the principles of justice in criminal law. The JSOCP law completes it and further fortifies the protection of an individual's rights to due process. The legislator developed and expanded a case law, enabling a better ecosystem to protect justice and fairness in criminal law. The case law evolved before the legislation. It

[253] Also see on this matter: Lieutenant Colonel Avi Levy, *The Power of Military Courts to Convert Charges for Reasons of Justice*, Mishpat Ve'Tzava, Vol. 16, 2003, p. 505 [Hebrew].
[254] The military prosecution appealed the judgment. In the appeal, it was agreed that the conviction would remain on the reduced charge, while leaving the legal issue "for further review" (App. 52/06 *Chief Military Prosecutor v Sharkawi* (21.6.2007) [Hebrew].
[255] The Freedom of Information Law, 1998, para. 17 [Hebrew]. An English Version is available at: https://www.wipo.int/edocs/lexdocs/laws/en/il/il083en.pdf

started by acknowledging a JSOCP claim only in exceptional circumstances where the public authority's conduct is "outrageous, involving prosecution, oppression, and abuse of the defendant".[256] It continued in a more liberal approach, also applied in trial courts, saying it is sufficient that "conducting a fair trial to the defendant cannot be ensured, or that executing the criminal proceeding will genuinely harm the sense of justice and fairness"[257] in order to acknowledge the claim. This evolution resembled the British evolution, which started with setting a criterion of "abuse" by the prosecution authorities toward the defendant and later formed a broader criterion that says that the defendant's indication of "severe inappropriate misconduct" is sufficient.[258]

The ruling in Israel paved the way to legislate the JSOCP law, but as suggested above, the legislator developed and intensified the case law to enhance justice. The justice road the legislator walked on is a broad one, in which a material "contradiction" to principles of justice and fairness may lead to an indictment dismissal, even if no actual "harm" was done to the defendant.

Now that the legislation work is completed, the courts are the ones who need to interpret the law. The legislator's directive puts a "Stop" sign on law enforcement authorities. The message of this legislation is that criminal proceedings and the defendant's conviction should not be achieved at all costs. The rightful purpose of enforcing criminal law does not justify all means. In case there is a material contradiction to principles of justice and legal fairness, the legislator prefers these values to others. The core purpose of the legislation will not be realized if the courts refrain from internalizing it and acknowledging that justice and legal fairness are now, more than in the past, a prominent foundation in the proceedings of criminal law.

According to the JSOCP law, the court is somewhat required to step into the shoes of the prosecution and make a decision on refraining from an indictment or dismissing it due to principles of justice and legal fairness. The court was explicitly permitted to do so by the law and is obliged to realize the legislation's purpose while balancing it with other interests of criminal law. It is a subtle balance that requires the understanding that convicting criminals unjustly harms the personal interest of the defendant and contradicts public interest. Executing the JSOCP law requires a new mindset that the Basic Law promotes: Human Dignity and Liberty, which protects basic human rights even in serious crimes.

---

256 *Yefet* test.

257 *Borovitz* case.

258 See: *R v Looseley* [2001] 4 All E.R. 897.

6.6 From Misconceiving to Ignoring: The New Law and the Supreme Court

The first time the new law was referred to in the Supreme Court was in the 2007 ruling in the case of *Limor*[259], where a few defendants appealed for JSOCP based on claims of delay and selective enforcement. The Supreme Court eventually endorsed the district court's ruling and rejected the defendants' claims. Though laconically, the court noted that the *Borovitz* criterion would continue guiding the court after the law was passed.

Shortly after, in its ruling in the *Teger*[260] case, the Supreme Court comprehensively analyzed the JSOCP status before and after passing the law. Though the court was not required to, it noted, in the words of Justice Berliner, that "the material contradiction" adopted by the law is similar to the actual harm criterion determined in the *Borovitz* judgment. The court thus concluded that the ordinance was not a revolutionary one compared to the state existing before the *Borovitz* case.

Since then, one can identify inconsistencies and lack of uniformity in the Supreme Court's ruling. In the case of *Serenco,*[261] the defendant was accused of assaulting police officers, insulting a public employee, and executing an assault that caused damage. In his appeal, the defendant claimed that the indictment was filed before completing investigations of the complaint she filed against the police officers at the Department of Policemen Investigation. Justice Neal Handel noted that though the *Borovitz* ruling expands the scope of the Yefet test, it should be checked whether continuing the proceeding may severely damage the sense of justice and fairness (The court uses this expression as contrary to the letter of the law!). In contrast to the spirit of the law, the ruling further stated that "a claim for JSOCP should be carefully applied and only in rare and extreme cases".

The *Sfia*[262] appeal concerned an accusation of an attempt of murder, and the defendant claimed that an agent persuaded him to commit the crime. The Supreme Court ruled that no improper beguilement took place but added that in any case, the defendant did not prove the *Borovitz* criterion terms. Although mentioned in the judgment, no analysis of the new law and section 149 (10) appears.

"Ignoring" the new law and returning to *Yefet* terms appear in the extradition case of *Novak*[263]. Though the doctrine is recognized and applied in extradition cases, Justice Jubran determines

---

[259] Crim. App. 7014/06 *the State of Israel v Limor* (4.9.2007) [Hebrew].
[260] Crim. App. 5672/05 *Teger v the State of Israel* (21.12.2007) [Hebrew].
[261] Crim. App. 333/10 *Serenco v the State of Israel* (28.10.2010) [Hebrew].
[262] Crim. App. 1856/10 *Sfia v the State of Israel* (22.11.2010) [Hebrew].
[263] Crim. App. 7376/10 *Novak v the Attorney General* (16.5.2011) [Hebrew].

that: "Similar to criminal cases, the JSOCP doctrine should apply only in exceptional and extraordinary cases in which the prosecution acts in a clearly unjust arbitrary manner. When appealing to cancel a criminal procedure or an extradition procedure based on the doctrine, one should prove, at the initial stage, that the impairment in the procedure was so severe that 'our conscience is shaken and the universal sense of justice is damaged'… and this is no case here". On the one hand, one can identify quite a limiting approach. On the other, substantially different remarks are expressed, especially by Justice Meltzer. Justice Meltzer dissented from the majority opinion in the case of an anonymous person and remarked that: "JSOCP, which was enshrined in section 149 (10)…should be interpreted according to the *Borovitz* criteria. As a starting point. Nevertheless, JSOCP is expected to evolve in the future. This evolution will ensure that justice and legal fairness values are applied in criminal proceedings (including the decision to file an indictment) so that no material contradiction between these values and the necessity to prosecute and conduct legal proceedings."

In a further judgment, given in the case of *Thork*[264], Justice Meltzer elaborates and clarifies that, currently, two doctrines exist- a legislative one according to section 149(10) and a judicial one. The latter doctrine, which evolved in the past, may be used in various procedures: extradition, disciplinary, etc.; in continuing trial proceedings; when providing legal remedies which are milder than dismissal of the indictment, such as: dismissing specific charges, motions to check the validity of evidence and considerations related to the punishment. This approach was repeated in the case of *Wallace*[265].

This approach is advocated in the case of *Perlmutter*[266], which deals with a legal disciplinary proceeding (which the doctrine applies for, of course). A National Insurance Institute doctor was prosecuted for engaging in personal work without permission. Nevertheless, though he did not get a formal permit, his superiors had known he had been doing private work for twenty years, yet his requests to get an official permit were ignored. The disciplinary court instances acquitted him. Justice Rubinstein dismissed the state's appeal authority request. While doing so, he reviewed the procedure leading to the law ordinance, mentioned Justice Meltzer's comment in the case mentioned above of an *anonymous* person ("the starting point"), and accepted the proposition that now that legislation was completed, the court should interpret it, and that the message of the ordinance is that "the end goal for applying criminal law does not justify all means".

---

[264] Crim. App. 1292/06 *Thork v the State of Israel* (20.7.2009) [Hebrew].
[265] Crim. App. 10715/08 *Wallace v the State of Israel* (1.9.2009) [Hebrew].
[266] Crim. App. 2736/11 *the State of Israel v Perlmutter* (24.7.2011) [Hebrew].

Justice Rivlin and Justice Procacha joined Justice Meltzer's in-chambers opinion in the judgment determined in the case of *Jaber*[267]. The appellant was convicted of intentional sabotage and carrying a weapon. The main argument for the applicability of section 149 (10) concerned the conduct of police investigators, who "refreshed the memory" of a key witness. According to the Borovitz triple criteria and the new law's phrasing, the court determined that the appeal should be double-checked. In that specific case, the court determined that there was no material defect in the conduct of police investigators.

May this be considered the springtime of the new law where ruling incongruence is finally discarded? Quite doubtfully so, in view of the judgment in *Haladi*[268]'s case given only a month later. The offences: intentionally endangering human life in a transportation lane, assaulting police officers, and more; Defendant's claim: Exercising exceptional force at the time of detention and denying the right to consult a lawyer. Justice Jubran continues with the previous attitude: the "scandalous behaviour" test of *Yefet* and the triple test of *Borowitz*, and rules that the claim should be dismissed due to the severity of the offences. Not only is there no mention of all the rulings of recent years, but there is not even a mention of the law ordinance! (Justices Arbel and Rubinstein agreed with the judgment).

In the case of *Plotnik*[269], a different kind of attempt to "evade" JSOCP is found. The case concerned a driver prosecuted in a local affairs court for leaving his car in a public park. He was acquitted as the court found that it could not be determined whether the area where the car was left was indeed a public park since the municipality did not mark the area appropriately and many drivers left their cars there. The municipality appealed, and the district court accepted the appeal determining that the areas and paths between the plants constitute a "park". In his appeal to the Supreme Court, the driver argued that the municipality was deliberately failing innocent drivers to rake in as many fines as possible, and this conduct amounts to bad faith and raises a ground for JSOCP under the new law. Judge Eliakim Rubinstein accepted the claim that the municipality had failed the driver and did not provide clear marking of the forbidden area in the parking lot, acquitted him out of doubt while defining the matter as "a kind of a claim for JSOCP"; That is, the claim is not really sustained, but the only kind of; Though a creative solution, its legal anchoring is unclear.

In the following two cases, in which the press played an important role, the Supreme Court

[267] Crim. App. 5124/08 *Jaber v the State of Israel* (4.7.2011) [Hebrew].
[268] Crim. App. 7955/10 *Haladi v the State of Israel* (8.8.2011) [Hebrew].
[269] Crim. App. 1430/11 *Plotnik v the State of Israel* (23.3.2011) [Hebrew].

received the opportunity to clarify the doctrine status and the relevant parameters for interpreting the new law.

The first case was the *Katsav*[270] affair, the conviction of a former state president, Moshe Katzav, for sexual offences. One of his claims was that he did not receive a fair trial since the press and media had already convicted him and "shed his blood" during the trial. This claim of a "trial by the media" is not a new one, but in this case, it erupted in full force due to the intensity of the media's involvement in the affair.

In its 2011 ruling in Katsav's appeal following his conviction, the Supreme Court repeated the general statement that the doctrine enables the court to dismiss an indictment, whether the defendant is guilty or not, if it is convinced that its filing or inquiry violates the principles of justice and legal fairness. For this reason, the court mentions that some see the doctrine as an "unusual concept in the legal realm". Repeatedly, no analysis or interpretation of the new law is provided beyond this statement. Regarding the case, the Supreme Court emphasized that conducting the legal proceeding by the press is unfit and may damage the impartialness and public image of the legal proceeding. Phrased differently, the court stated that replacing the "legally sound truth" with that of the media is inadequate. Nevertheless, it was determined that the defendant received a fair trial since he himself vastly used the media during his trial and since a professional court can be trusted to consider the evidence presented and ignore the media's publications.

We see that the claim for JSOCP was, again, overruled, and the court missed an additional opportunity to analyze and interpret the new law. This is somewhat surprising in view of the fact that the leading opinion in the judgment was written by Justice Naor (who, as mentioned previously, chaired some of the committee's meetings and was thus familiar with the subject).

The second case, ruled by the Supreme Court in 2014, concerned the *Katii*[271] affair, where the media took the role of an investigative authority without acknowledging the police in advance. Channel 10 adult female investigators entered chat websites, introduced themselves as 13-year-old girls, conducted sex chats with the two defendants, and even coordinated a meeting with them. The defendants were convicted of attempted indecent acts and attempted sexual harassment offences. One of the claims raised was that channel 10 set a trap for them and practically seduced them to commit an offence. Thus, the claim for justice and fairness violation is applicable, similar to the entrapment claim widely accepted in US federal courts in

[270] Crim. App. 3372/11 *Katzav v the State of Israel* (10.11.2011) [Hebrew].
[271] Crim. App. 1201/12 *Katii v the State of Israel* (9.1.2014) [Hebrew].

cases a defendant commits an offence as a result of entrapment by a police agent.

Writing the leading opinion on the case, Justice Neal Handel repeated the claim's ritual exercised in previous judgments. He reviewed the ruling practised in the years preceding the new law; designated the legislation of the new law; mentioned Justice Meltzer's stand that there are practically two doctrines, but added that the relation between the judicial doctrine and the legislated doctrine was not settled yet. By this, he actually moves the discussion backwards and avoids setting any guidelines or criteria for the future, arguing that the new law is an "unsettled issue which needs interpretation".

The 2013 inquiry in the case of *Peretz*[272] raised a question regarding the correct positioning of the defendant's claim that filing the indictment only against him was discriminating in the sense that selective enforcement was applied. Should his claim be examined as a criminal case, meaning according to the new law, or is it a "regular" claim of inequality and discrimination where administrative and Constitutional law applies? The indictment of this case was filed against contractors and contractor companies for taking part in a binding arrangement. The district court decided to dismiss the indictment based on discrimination, determining that the state had decided not to raise charges against the involved parties in a case involving similar circumstances. The Supreme Court reverses this judgment and rejects the applicability of the claim for JSOCP under the circumstances.

Nevertheless, Justice Uzi Fogelman raises the option that by exercising judicial criticism on the decision to prosecute according to a "regular" administrative proceeding in the case of *Nir-Am Cohen*[273], an additional channel of a claim of selective enforcement was actually presented, in principle, in addition to JSOCP. This channel may be criticized- just as any other decision of administrative authorities- and enable intervention based on plausibility, proportionality, etc., without the necessity to relate it to tests determined for applying the JSOCP doctrine. Despite this interesting remark, Justice Fogelman chooses not to nail down the new law and examine the defendants' claims via the accepted prism of JSOCP, i.e., as a material contradiction to principles of justice and fairness.

Optimists may view Justice Fogelman's remark as a good indicator of a potential expansion of the judicial criticism of the prosecution's decision to file an indictment, where such criticism

[272] Crim. App. 6328/12 *the State of Israel v Peretz* (9.9.2013) [Hebrew].

[273] H.C.J. 9131/05 *Nir-Am Cohen v the State of Israel* (7.2.2006) [Hebrew] (hereinafter: *Nir-Am Cohen* case").

will apply acceptable Administrative law[274] practices. Others, however, may view his stand as an additional expression of the court's avoidance of using the new special weapon the legislator has entrusted in its hands, which may result from the fact that it necessitates interpreting vague terms such as "justice" and "fairness".

An additional 2013 judgment was given in the case of *Amara*[275] regarding his extradition from Israel to the USA. The indictment filed against him in a federal court stated that the appellant- a manager of the poultry department in an American factory at the time- was knowingly involved, along with other employees and managers, in employing migrant workers who held forged identification documents and work permits. He was accused of assisting and encouraging unauthorized workers to re-purchase forged documentation for their illegal employment in the factory. The USA has requested his extradition since he escaped to Israel. The appellant's request for JSOCP is based on concerns that he will be discriminated against relative to others involved in the case because he is the District Court rejected Muslim. The court determined that the appellant failed to prove that the US authorities' conduct against the other parties involved in the case was biased or impaired, and thus JSOCP cannot be justified. The court clarified that one's extradition does not mean he is guilty since the defendant's innocence or guilt is not determined by the extradition procedure. The primary purpose of the extradition law is to provide legal means to the international community to deal with the widespread crime in the various countries through mutual cooperation and assistance to the authorities. An additional purpose is to prevent criminals from evading the law and the state of Israel from becoming, to its detriment, a refuge for criminals. Finally, promoting the principle that a defendant should be prosecuted by the law system most natural for him under the case circumstances, i.e., the system dealing with most aspects relating the defendant to the felonies he has been accused of, is yet another purpose. Justice Arbel emphasizes that JSOCP may be applied when a defendant whom a foreign country asks to extradite claims that filing the indictment or conducting criminal proceedings against him materially contradicts the principles of justice and legal fairness. The defendant may do so as a pre-trial motion once the trial starts. This is so since the defendant has the right to a fair trial in such a proceeding in Israel as well as in the country that requests the extradition.
Nevertheless, no severe impairment which may justify an extradition refusal was found in the

[274] This idea was developed in a later ruling yet was eventually dismissed. An elaboration of this subject appears in a separate discussion.
[275] Crim. App. 459/12 *Amara v the State of Israel* (13.3.2013) [Hebrew].

discussed case. Consequently, it was determined that extraditing the appellant to the USA was proportional and that conducting the criminal proceeding there would not materially contradict the principles of justice and legal fairness. The appellant's claim that he should not be extradited since he was discriminated against relative to other defendants was rejected. The claim that the US authorities acted in a discriminatory manner out of interests that are not related to the criminal proceeding was not demonstrated or proven; in fact, it was found that criminal proceedings were conducted against people involved in the case, mainly for violating immigration rules, and some ended in imprisonment punishment.

Moving to 2015 to the *Shalby*[276] case, the facts in the indictment started with the defendant speaking on his cellular phone while driving. A policeman who noticed it had asked him to pull over, but the driver continued to drive toward the policeman, violently overtaking him while hitting the curb and continuing driving. Together with other police inspectors, the policeman started chasing the defendant, yet he continued driving, overtaking a scooter whose driver was forced to brake instantly. Later, when another traffic inspector tried to stop the car, the driver drove fast toward him, forcing him to escape to the side of the road. The chase ended only after he hit another curb and was forced to stop his car due to a traffic jam.

The defendant claimed that after being arrested, he was assaulted by a policeman with a taser and that the decision to prosecute him was not in accordance with the corresponding Attorney General's procedure. The claim was rejected, not only on its merits but also in principle, relating to the claim for JSOCP. Using strict phrasing, the court mentioned that one needs to ask whether holding the proceeding severely damages the sense of justice and fairness.

Deliberated that same year, the case of *Agbaria*[277] pertained to murder without a body. The appellant, convicted by the District Court for murder, claimed in his appeal, among other claims, that the sense of justice was damaged: Out of the three people involved in the crime and based on factual-circumstantial evidence, only the appellant paid the price. One of the three was acquitted by the Supreme Court from the main accusation and was sentenced to three years in prison, while another was exempt since he became a state witness. After examining the facts and circumstances, the Supreme Court decided to reject the appellant's claim.

In the case of *Shuly*[278], the appellant whom the District Court convicted for a blackmail felony, stated several claims in his appeal to the Supreme Court, namely: the prosecution, at the time, had decided to close the case and did not provide any evidence or explanations to justify its re-

[276] Crim. App. 959/15 *Shalby v the State of Israel* (10.2.2015) [Hebrew].
[277] Crim. App. 5975/14 *Agbaria v the State of Israel* (31.12.2015) [Hebrew].
[278] Crim. App. 1551/15 *Shuly v The State of Israel* (6.9.2016) [Hebrew].

opening; the approval of the Attorney General to re-open the case and file an indictment was not submitted; the prosecution did not inform the appellant that the evidence was transferred from the police to the prosecution for in order to compile an indictment and consequently hindered his right for a hearing; lastly, the prosecution's conduct toward him was discriminatory as no indictment was filed against an accomplice. The Supreme Court rejected the appeal, determining that the appellant failed to prove his claims about the impairments in the state's conduct, including the fact it retracted from closing the file; this fact in itself cannot justify dismissing the indictment since the prosecution has the authority to review the evidence and decide to re-open a case previously closed for numerous reasons. Regarding the discrimination claim, the court determined that prosecuting only part of the people involved in the crime may be legitimate partial enforcement. Viewing it as unjust selective enforcement, which justifies dismissing the indictment on the grounds of JSOCP, mainly depends on whether the authority acted in an arbitrary manner based on irrelevant considerations that severely shake and damage the sense of justice and fairness. However, in the discussed case, the appellant did not prove that it was justifiable to file an indictment against another involved party.

The complex and ramified *Godsdiner*[279] case, which was initially deliberated at the District Court, was discussed in the Supreme Court in 2017. The Chief Rabbinate of Israel issued thousands of high religious education diplomas to people serving in security forces- the IDF, the Israeli Police, and the Israel Prison Services. In order to receive the diploma, the students took part in Halacha studies in religious programs of colleges across Israel, which were created specifically for this purpose. The diploma recipients received significant employee benefits paid from public money. In order to fulfil the terms for receiving the diplomas and the corresponding employee benefits, the study program had to comply with a set of requirements. For this, documents were forged, and the authorities submitted false reports. The fraud entailed huge expenses and a heavy burden on the public treasury. At various levels of severity, the defendants took part in the fraud acts and in issuing false diplomas. The District Court convicted seven defendants, part of whom were sentenced to long periods in prison along with financial fines. The defence claimed that in view of the fact that the heads of the Chief Rabbinate- along with senior officials in the army and the police- recognized the study program and its terms, saw the issued diplomas, and gave the employee benefits anyway. In view of the fact that no charges were brought against these senior officials, the defendants are entitled to a JSOCP based on inappropriate selective enforcement. Moreover, holding the weak

[279] Crim. App. 7621/14 *Gotsdiner v The State of Israel* (1.3.2017) [Hebrew].

administrative sector responsible and exempting the senior management- while the fraud was known to all impairs the principles of justice and legal fairness.

In view of the case circumstances, Justice Neal Handel provided a profound review of the JSOCP doctrine, which, as discussed, began with the case of *Yefet* and continued with the case of *Borovitz*. In addition to its usage to monitor the prosecution's discretion in the mere act of filing the indictment, Justice Handel explained, the doctrine has been softened over the years and turned into a means the court uses to balance the proceeding with the criminal law principles of justice and fairness. By expanding the lens through which the court views the offence and the legal proceeding, the new perception of the doctrine enables the court to reflect on the moment prior to the crime and the criminal proceeding that would follow, even if the crime was thoroughly proven. When the circumstances around the moment the offence was committed are so significant, the doctrine in its new interpretation requires that these circumstances be considered even in the phase of examining the crime and determining the judgment and not only as a mitigating consideration when determining the punishment. When examining the offence, the criminal law at its core focuses on the felony scene alone. However, the JSOCP doctrine enables the court to look beyond the felony boundaries and examine what preceded it and what would follow. When considering a JSOCP, the court expands its scope and considers all the circumstances related to all stages of the proceeding, applying a standard that impedes a material contradiction to principles of justice and fairness in criminal law. Consequently, the JSOCP is not a mere pre-trial motion that allows the court to dismiss the indictment. The usage of JSOCP has become flexible and thus may be applied in all legal proceeding phases- be it a pre-trial phase, the deliberation towards a judgment, or the judgment itself.

Extending the doctrine scope enabled the court to use a different range of remedies. Whereas the court was limited to either endorse the indictment or dismiss it in the past, it may currently use more moderate and proportional means than dismissing the indictment altogether. For example, it may direct to dismiss specific charges or, when determining the judgment, consider the impairments that occurred in filing the indictment.

In this specific case, the defendants' claim of selective enforcement, since various officials knew the program in detail yet were not prosecuted, was examined in three sectors: Firstly, the Chief Rabbinate's senior workers who went ahead with the outline and even took an active part in providing the necessary certificates; secondly, various officials in the security forces, including their payroll departments, who knew about the program terms and still transferred benefits to the program participants; thirdly, administrative and rabbinical officials in the

colleges who were not prosecuted. After conducting the examination, the Supreme Court concluded that the proceeding was conducted soundly and no impairments were found in the State Attorney's decisions. Indeed, a sense of impaired justice and legal fairness arises since the senior officials were not prosecuted. However, in view of the offences the appellants were accused of, their status is different from the army and Chief Rabbinate officials since the appellants are the ones who forged and falsified, and they are liable for their acts. Additionally, whether the senior officials actually committed a criminal offence is far from being clear due to the case's complexity, and it seems complicated to reach any conclusion with a high level of confidence on whether an indictment should have been filed. It was thus ruled that the prosecution's claim that it was guided only by professional considerations when filing the indictment against the appellants and not filing indictments against others should not be distrusted.

Acquitting the appellants, the court emphasized, cannot be justified by the law nor by the JSOCP doctrine- in both its narrow and broad interpretation. The responsibility lies on the appellants and them alone based on each individual appellant's analysis. Nevertheless, things are quite different regarding the punishment, where damaging the sense of justice requires openly hearing the claim and even accepting it in the proper case and extent. Some reaction is required but without exaggerating. This conclusion is relevant to all the defendants, but the extent should be decided in each case individually. The JSOCP doctrine is thus expressed in the punishment but not in total dismissal, nor is it necessary that a particular sentence, such as imprisonment, should be avoided. Sometimes, the doctrine's impact will be in the extent of the punishment by, for example, quantifying the imprisonment period or the rate of a fine.

In other words, the unrest regarding the sense of justice did not materialize in dismissing the indictments yet eventually led to mitigating the appellant's sentence.

The case of *Zonanshvili*[280] was ruled in the Supreme Court that very same month. In a police operation involving undercover agents, the appellant had tried twice to import a total of 3.5Kg of dangerous MDMA drug from Belgium to Israel and trade in it. The appellant also had a machine for mass production of MDMA drug capsules and brokered cocaine and heroin. The appellant claimed that an undercover agent who was an ex-delinquent who spent a long time in jail and was a central figure, in this case, had induced him to commit the felonies. The appellant actually pleaded guilty to the core charge against him but claimed that had the police

[280] Crim. App. 307/17 *Zonanshvili v The State of Israel* (21.3.2017) [Hebrew].

agents, mainly that central agent, not induced him to commit the felony and entrapped him in other words, he would not have committed the felonies he was charged with. The Supreme Court clarified that since the Israeli law did not adopt the "entrapment" doctrine, the fact that he was induced to commit a felony does not dismiss him from criminal responsibility by acquitting him but may ensue some mitigation in the defendant's sentence.

Nevertheless, it was mentioned that, in general, the JSOCP doctrine enables the court to dismiss part of or all an indictment in cases where justice and fairness considerations require so, such as an agent suspected of inducing someone to commit a crime. In order to prove an entrapment and consequently enable a JSOCP claim, two tests should be passed: an objective test that examines whether the authority's conduct was severely impaired and a subjective test that examines the specific disposition of the defendant who committed the crime. In this sense, it was emphasized that the police should refrain from using an entrapment unless it has reliable information that casts suspicion that the defendant commits the investigated crimes habitually. As mentioned, the JSOCP doctrine will usually not be applied to dismiss the defendant from criminal responsibility but rather give weight to the entrapment when sentencing him. This mitigation, the court mentioned, is required for reasons of justice, and the stronger the police agent induced the delinquent to commit a criminal act, the larger the mitigation on the sentence of the entrapped delinquent; sentencing delinquents is indeed a pivotal public interest, but fairness to all and impartial enforcement proceedings is also an important one.

In that specific case, it was factually determined that the defendant was not remote from the criminal world and dealing with drugs and was not dragged unwillingly to re-enter this world. Rather, he was rooted in the criminal world and was, after being "recruited", a central figure in driving the criminal plan and its realization. The acts of the police indeed put him to the test, but he did not have any difficulty deciding what to do; he had joined the journey of importing the drug quickly and without any hesitation and even initiated additional 'journeys'. Consequently, his appeal was rejected.

In 2018, the Supreme Court ruled in the case of *Shirazi*[281] **,** who gave high-interest loans and, along with another man who became a state witness, used various business entities to camouflage the loans and the interests received and evaded paying income tax and VAT. The debtors received invoices from various business entities that falsely designated seemingly real deals. Moreover, the VAT included in the invoices represented all or part of the interest paid

[281] Crim. App. 486/16 *Shirazi v The State of Israel* (13.9.2018) [Hebrew].

for the loan so that the debtors would set off the fictitious invoices' VAT sum in their ledger, effectively meaning that the interest or part of it was paid from the state treasury. The District Court consequently convicted the appellant of a series of tax offences, money laundering, threats, and obstruction of justice.

The appellant's claim for JSOCP was rejected because the state witness status was settled in an alleged unlawful way. The court determined that the agreement reached with the state witness was rightful, in accordance with the Attorney General's directive, and that prior to conducting the agreement, the external evidence of the state witness testimony and the question of whether they may assist were deliberated. Though the District Attorney did not present a written approval of the agreement with the state witness, the court determined that it trusts the District Attorney to have acted within its authority and exercised discretion, as required. Regarding the appellant's claim that the state witness should not be recognized as such since he was the pivotal criminal in the case, the state determined that the central role of the witness does not annul the centrality of the appellant himself, as the criminal venture would not have taken place without him. Even if we assume that the appellant is not the central criminal in the case, the court added that public interest justifies the agreement signed with the state witness to prosecute the appellant since the latter was a state police target for many years. The Supreme Court emphasized that even if an impairment had been found in the prosecution authorities' acts, it would not have necessarily ensued the drastic act of dismissing the indictment since only rare cases of flawed acts by the authorities would validate a JSOCP for the defendant, while minor impairments in the prosecution's acts may be remediated with mild measures such as mitigating the sentence.

6.7 The court hinders an attempt to return the doctrine twenty years backwards and also expands the discrimination claim

Just a month later, in October 2018, the court ruled in the case of *Vardi*[282]. For the first time since the 2007 amendment, it seems, the court expanded the doctrine boundaries and made it more flexible while rejecting the state's attempt to narrow it. This was made possible since the head of the panel of judges was Justice Hanan Meltzer, who is known for his affirmative attitude to the doctrine.

The judgment dealt with two previous judgments ruled in district courts. In one case concerning

[282] Crim. App. 1611/16 *the State of Israel v Vardi* (31.10.2018) [Hebrew].

granting building permits by the Local Planning and Building Committee, a member of the planning institute acted against the law by giving or recommending to give a permit though he knew the permit contradicts an existing plan. The second case dealt with three teachers employed by the Ministry of Education who submitted false requests to recognize them as having a B.Ed. Degree in Education from a Moldavian University. They falsely stated that they studied at that university and attached, among other documents, forged degree diplomas and grade sheets, which they purchased for a large sum of money from a person who presented himself as the university's representative in Israel. The Ministry of Education doubted the reliability of the documents and the academic degree's validity, and consequently, the teacher's attempts to get the expected benefits associated with the academic degree failed. A JSOCP was claimed in both cases, and the appeals were deliberated together.

Justice Meltzer endorsed the ruling determined by the lower instances that the indictments in both cases should have been dismissed. Both cases raised a question regarding the doctrine applicability when the impaired conduct of the authorities caused discrimination in prosecuting those involved in the case: in the forged academic degrees case, the impaired conduct was a mistake made by the authorities; in the building permits case, the delayed initiation of the investigation and the prosecution along with other actions of negligence. The judgment is innovative as it was determined that the JSOCP doctrine might be applied when the enforcement and prosecution authorities do not act maliciously but rather make mistakes of negligence in good faith in a way that impairs the sense of justice. It was further stressed that the doctrine has turned into a powerful tool in the hands of the court, enabling it to criticize the conduct of the enforcement authorities and balance the values of justice, fairness, and rights of the defendant in a criminal process with the values, interests, and considerations at the core of the proceeding. The doctrine enables the court to apply this balance in each stage of the criminal proceeding- from before conducting the offence to the sentencing- and it need not focus on the authorities' conduct in the background of the criminal proceeding or on filing an indictment. Thus, the JSOCP principle may be applied in all trial stages rather than as a mere pre-trial motion. Once the court finds an impairment that justifies applying a JSOCP, it has a succession of means to remediate it proportionally while considering justice considerations in determining the sentence: dismissing specific charges or dismissing the indictment altogether. The court emphasized the multitude of remedies it may use when the defendant is entitled to a JSOCP- including dismissing the indictment- which serves essential values such as the human rights to dignity, equality, and a fair proceeding. This serves the public interest of strengthening the rule of law and helps materialize a unified enforcement policy that would gain public trust.

It was further determined that once the law amendment had come into effect in 2007, the JSOCP doctrine had turned from a ruling doctrine to an enshrined law. The law, which stated that JSOCP should be applied when: "filing the indictment or conducting the criminal proceeding materially contradict principles of justice and legal fairness", enabled the doctrine's broad application and fortified its integration into the Israeli law.

The court's emphasis is of great importance since the state's prosecution authority requested, in court, that the narrow test determined in *Yefet*'s case would be returned so that an "intolerable conduct of the authority" would be the only criterion for applying a JSOCP. The prosecution explained that its stand is the result of the over-expansion of the doctrine that might flood the courts with "atmosphere claims" in attempts to apply the doctrine. The State based its request on things said by the court during the trial, from which it wished to conclude that the connection between the cases of *Yefet* and *Borovitz* is not an evolutionary-dialectic one, but instead, one denies the other, and the court needs to choose between them. Justice Meltzer criticized this claim argued by the state, saying that the state's wish to re-apply the "intolerable conduct of the authority" test determined in *Yefet*'s case contradicts a succession of judgments which ruled that the test determined in the *Borovitz* case is not detached from but instead deepens the roots set in *Yefet*'s case and elaborates the doctrine in the framework developed in the Israeli criminal law.

After repeating the doctrine's evolution in Israeli law and hindering the attempt to dismiss twenty years of development in the courts' ruling, Justice Meltzer turned to examine the specific discrimination claim.

Discriminating in criminal prosecution occurs when negligence and other actions conducted by the authorities ensure that only part of the people involved is prosecuted, although they all acted in a way that justifies filing an indictment against them all. The term "selective enforcement" is sometimes used to describe the phenomenon, insinuating that the authority acted so intentionally, though it is not necessarily so. Sometimes, the actions of the enforcement authorities are in good faith but may entail that only part of the people involved is prosecuted without any justification. Even in such incidents, the authorities' responsibility should be divided between cases- on one side, cases where avoiding prosecution was caused by the authorities' negligence vs other cases where considerations of priorities, budgets, or workforce entailed the discriminatory result and cases where the genuine efforts made by the authorities to prosecute all the individuals involved did not avail. Like any form of discrimination, discrimination in prosecution is clearly amiss: it violates the principle of equality, damages public trust in the law enforcement system, and impairs an individual's ability to rely on the

professionalism and integrity of various authorities, be it law enforcement, investigation or prosecution.

As mentioned, Justice Meltzer determines that negligence by the enforcement authorities that ensues faulty discrimination in prosecution can, in itself, be a reason for a JSOCP regardless of the discrimination's motive. Requiring a motive or an unjust intention as a pre-requisite for applying a faulty discrimination claim may become an impenetrable barrier for the discrimination victims, consequently denying them any remedy. This attitude cannot be materially justified since discrimination is a wrong social phenomenon, regardless of the misconduct or malicious intent of the discriminator. Thus, permitting discriminatory enforcement in cases of mistake or negligence by the authorities damages the public interest of eradicating any form of discrimination.

In essence, the court recognized that an implausible delay in filing an indictment is a viable reason or a relevant consideration for claiming a JSOCP. The same goes for the actions of the administrators who chose to promote the planning procedures for the public, while other entities who should have monitored the planning status on-site refrained from doing so for a long time. Additionally, the state did not provide a convincing explanation regarding its apparent discriminatory decision not to prosecute fifteen people who were involved in the case of the forged degrees, even though the evidence against them was similar to that of the current defendants. This results in material damage to the sense of justice toward the defendants.

Justice Meltzer's legislative argument, namely that the essence of the JSOCP is a legislative remedy provided to the defendant whose legislative rights were transgressed, makes his judgment highly important. This legislative touch indicates that the JSOCP principle should be interpreted in a way that would lead to the manifestation of the principle of equality before the law and the realization of the defendant's right to a fair proceeding regardless of the motive. These fundamental values lead to a broad interpretation of this defensive principle to include a defendant who claims he was unjustly treated due to negligence of mistakes made by the enforcement authorities.

6.8 Post Vardi's judgment

It is still early to predict the effect of the judgment in the case of *Vardi* and whether the doctrine is heading toward an expansion or a reduction. Nevertheless, it seems that this expanding ruling has already made its impact in 2020.

In the case of *anonymous*[283], it was once more Justice Meltzer who wrote the main opinion. The appellants, in this case, have decided to enter a Palestinian area to attack its inhabitants. Along with four additional individuals, they got close to a field where a few Palestinians were working, threw stones at them, and later hit them with bats and sticks they had prepared in advance. Repeating his previous opinion, Justice Meltzer said that it is possible to dismiss an indictment based on a JSOCP even if the motive of the enforcement and prosecution authorities was not proven to be faulty. In cases of concerns of discrimination in prosecuting, such a pre-trial motion may be accepted, namely when enforcement actions were taken only against part of the perpetrators, while there is no justified reason to discern between them and other (alleged) perpetrators even if it was done in good faith. However, it was emphasized that this expansion of the JSOCP does not dismiss the right for Presumption of Legality, which the authorities can raise in case they are blamed for acting in a way that "materially contradicts the principles of justice legal fairness". The law's "material contradiction" phrasing shows the required caution in accepting a claim for JSOCP when the malicious intention of the authorities was not proven. Additionally, a pre-requisite for accepting a claim of discrimination in prosecution is the lack of any relevant disparity between the groups the authority allegedly discriminated between.
Such discrimination was not found in this case circumstances.

In a different judgment, this time in the case of *Cohen*[284] regarding an offence of submitting a false compensation claim to the state's compensation fund, a different Supreme Court panel positively quoted *Vardi*'s ruling. The appellant and a company he managed, who claimed that selective enforcement was exercised against them, were convicted of several forgery offences, fraudulently using a forged document and obtaining benefits. Justice Kara mentioned that the court had recognized selective enforcement as a valid reason for claiming a JSOCP when the enforcement authorities discern between similar individuals or conditions for a faulty purpose or when the principle of equality is violated due to irrelevant considerations or arbitrary conduct. Discrimination in prosecution is a state where only part of the individuals involved in the criminal act is prosecuted due to actions and negligence of the enforcement authorities. However, the similarity of their circumstances and actions justifies filing an indictment against them all.

[283] Crim. App. 2648/18 *Anonymous v the State of Israel* (19.3.2020) [Hebrew].
[284] Crim. App. 7391/19 *Cohen v the State of Israel* (25.8.2020) [Hebrew].

Furthermore, it was already determined that to claim a JSOCP on selective enforcement, merely on the basis of negligence or mistaken discretion of the authority- the existence of a wrong motive or a malicious intention of the authorities is not required. Nevertheless, if the authorities acted in good faith, the court would accept a claim for a JSOCP due to selective enforcement only in exceptional and rare cases. No discrimination was found in this case either.

The appellant also claimed that the indictment against him was filed after a long delay. While the offences he was charged with were conducted in 2004, the indictment was filed in October 2013 and corrected in 2015 to include the company as well. The Supreme Court emphasized that, indeed, such a delay raises difficulties and that a delay in filing an indictment may justify a JSOCP even if the authorities did not act maliciously. Nevertheless, the court emphasized that a JSOCP would be accepted only in rare cases where on top of the substantial time that elapsed since the offence was conducted, the defendant's defence was materially impaired for no plausible reason for authorities' conduct. It was determined in that specific case that the prosecution is responsible only for a short period of approximately three and a half years of the total delay entailing a possible remedy of punishment mitigation at most but not a dismissal of the indictment.

In December 2020, the Supreme Court ruled in the case of *Burkan,*[285] in which the defendant drove a car though he never passed a driving test nor held a driver's license. After spotting the defendant crossing a white dividing line, a traffic policeman called him to pull over. Instead, the driver drove backwards, started driving rapidly, turned while crossing a white dividing line, and continued driving at high speed while the policeman chased after him, calling him to stop. As he was driving, the defendant drove in the opposite lane while overtaking other vehicles and crossing a few crosswalks without slowing down in a way that was likely to endanger other vehicles, including those driving in the opposite lane. Later, he quickly entered an intersection from the opposite lane, crossing a separation area and running a red light, collided with another vehicle, which entered the intersection at a green light, then stopped, got out of the vehicle, and began to flee but arrested within minutes. He was prosecuted for the grave offence of intentionally endangering human life in a transportation lane. The defendant's pre-trial motion for a JSOCP focused on a selective enforcement claim arguing that he was charged with a severe felony while in far more severe cases, the state attributed to the defendants an offence of "reckless driving" or another relatively minor offence. The district court sustained his claim. He appealed to mitigate his sentence while the state appealed against the district court's

[285] Crim. App. 3507/19 *Burkan v the State of Israel* (3.12.2020) [Hebrew].

judgment that accepted the defendant's selective enforcement claim and requested that if its appeal is sustained, his penalty will be aggravated. The state's appeal was accepted. Justice Kara re-emphasized that selective enforcement may justify a JSOCP when enforcement, for no apparent reason, discerned between the individuals involved in the same case or different cases, even if no malicious motive lies at the basis of the selectivity. This main stand reflects the realization that selective enforcement may materially impair the proceeding's fairness and the sense of justice and should be explicitly manifested by either acquitting the defendant or mitigating his sentence. However, again, a reservation followed this lengthy declaration. The judge designated that a JSOCP based on selective enforcement should be exercised only in rare cases and- since the actions of the authority are deemed administratively sound- the defendant will need to distinctly prove it, beginning with laying an evidential infrastructure and continuing with showing that alleged discrimination between equals and was exercised. In this specific case, the Supreme Court identified a relevant difference between the states the district court referred to enforcement-wise and thus concluded, against the district court's ruling, that the difference does not reflect an enforcement policy that discriminates between equals, nor do the cases shown in the judgment demonstrate this. Similarly, the Supreme Court did not find any basis for claiming that the Attorney General's directive is not applied uniformly, consistently, and equally.

6.9 At the Same Time: The Rise and Fall of the Administrative Examination Doctrine[286]

A criminal court was not assumed to have the authority to scrutinize the administrative discretion of the prosecution to file an indictment and conduct a criminal proceeding. It was accepted that the Supreme Court has the unique authority to be the High Court of Justice. This assumption was weakened by the legislative development of the JSOCP doctrine, which enables a criminal court, *inter alia*, to dismiss an indictment. Nevertheless, to this day, the JSOCP claim, which mainly considers individual justice, is perceived to be in the nature of "grace", unlike the judicial scrutiny of the Supreme Court, which is based on many material justifications that are rooted in the administrative and legislative law, for procedural intervention. Such justifications include, *inter alia*, the prohibition of discrimination, reasonableness, and proportionality.

[286] Meaning judicial examination by the courts which is based on Administrative law.

As we already saw, an interesting judgment was ruled in 2006 in the case of *Nir-Am Cohen*. The Supreme Court decided to deny the defendants' appeal who wished to dismiss an indictment submitted against them due to administrative impairments which, in their opinion, occurred during its submission. The court determined that the proper way for the defendants to raise administrative claims against the enforcement authorities is not in the Supreme Court but rather in the criminal court, whether the claims concern the JSOCP doctrine or others. It seems that a new doctrine was determined by this, which may be termed as "the doctrine of administrative examination in criminal cases". The judgment was mentioned in 2013 in the case of *Peretz,*[287] in a similar, though slightly different name as the doctrine of "judicial examination on an administrative decision" while contrasting it with the old doctrine of the JSOCP. This judgment will be revisited from now on. Having said that, the courts handling criminal cases continued mixing between the doctrines and did not analytically discern between them. The Supreme Court, on its side, continued rejecting dozens of appeals against the enforcement authorities, stating that the criminal court hearing the case is the proper forum for raising such claims.

In other judgments, this rule was expanded to include other impairments in the authorities' actions concerning criminal law and even impairments that occurred at the preliminary stage preceding the indictment. In the case of *Mohtasab*[288], for example, the Supreme Court, in its role as a criminal appeal court (and not, in this case, as a high court of justice), was required to inquire about administrative and legislative claims (in addition to a claim for JSOCP) raised against a directive published by the General Attorney after the indictment against the appellant had already been filed. Though the claims were rejected in a substance due to the case circumstances, the Supreme Court designated that raising the claims, which are administrative law claims in nature - in a criminal court was justifiable since this is the right way to handle such claims.

The large variety of administrative and legislative claims that appellants brought to the Supreme Court and were rejected since - based on *Nir-Am Cohen*'s judgment - an alternative remedy existed, enables us to map the different public law claims that the Supreme Court concretely recognized as being suitable for deliberation under the administrative examination doctrine in a criminal court. In the above judgment, the phrasing used by the court makes it practically applicable in almost all types of administrative and legislative claims that

[287] Crim. App. 6328/12 *the State of Israel v Peretz* (10.9.2013) [Hebrew].
[288] Crim. App. 4562/11 *Mohtasab v the State of Israel* (7.3.2013) [Hebrew].

defendants may wish to raise in relation to their trial. Moreover, it seemed that in addition to defendants who may use the administrative examination doctrine, people who have not yet been charged might use it as well, i.e., suspects and detainees.

Despite the clear ruling of the Supreme Court (which apparently wished to take off the burden from the Supreme Court by transferring these matters to lower instances), the Public Defender's Office in Israel found that daily practice showed that some judges were reluctant to use the doctrine. Other judges do not know the doctrine, and the defence lawyers appearing in court do not always wish to bring it to their knowledge, whether because they themselves are not aware of it and its advantages, or they are not used to utilising it and thus do not feel the confidence to raise such claims.

Such a continuous situation is problematic. A whole and essential array of claims anchored in public law, which may improve the criminal proceeding and the demeanour of the authorities involved in it, may often be neglected and missed, though the Supreme Court deems it appropriate and relevant for deliberation in criminal courts.

Such being the case, it seems that integrating such a meaningful perceptive change takes time. All criminal law players should have gotten accustomed to thinking and speaking in the language of administrative law.

The idea at the core of the administrative examination doctrine was that as weighty value and public reasons, which underlie criminal law, justify investing considerable resources in litigation on the question of conviction or acquittal and even on the question of the level of punishment; Thus weighty value and public reasons, which form the basis of both administrative and criminal law, may justify the investment of reasonable litigation resources even in the question of dismissal of the charge or mitigation of punishment on the basis of the administrative law rules.

It is not disputed that the prosecution is obligated to weigh the relevant factors and these factors only. It must act in good faith, fairly, without discrimination, and within reason. For many years, the prevalent perception in Israel was that the authority to conduct an administrative examination of prosecution decisions to file an indictment, as well as other administrative decisions about criminal proceedings and for which judicial review was not regulated by specific legislation (such as arrest law, evidence law, etc.), is exclusively in the hands of the High Court of Justice (HCJ). The scope of examination and intervention was extremely limited, and law enforcement agencies were given an extensive range of exercise of discretion.

Starting from the mid-1990s, the old perception that only the Supreme Court is allowed to

exercise administrative examination on the enforcement authorities is losing its strength with adopting the JSOCP doctrine in *Yefet*'s case and later in its expansion in the case of *Borovitz*. It also seems that in 2007 when the new bill, which enables a criminal court to dismiss an indictment due to considerations of fairness and justice, was passed, the criminal court was granted the capability, either directly or indirectly, to scrutinize the administrative discretion of the prosecution which led it to file the indictment in the first place. However innovative and necessary the administrative-judicial examination of the JSOCP doctrine is, it has limited in nature relative to the examination based on the administrative law in general. The main drive of the doctrine is individual justice, which constitutes its strength but also its weakness. Indeed, at the first stage of the three-phase test of examining the JSOCP claim, the court is required to identify impairments in the case procedures and estimate their severity.

Nevertheless, the central part is yet ahead in the second stage, the phase of balancing between individual interests and public ones, in which the court needs to decide whether conducting the criminal procedure despite these impairments severely harms the sense of justice and fairness. In other words, at the centre of the JSOCP deliberation, the most critical question the court needs to ask itself is not whether filing the indictment opposes the administrative and legal rules the prosecution is obliged to follow but instead if it was unjust in a material way. This perception, regrettably, gives the notion that a doctrine is an act of "grace" rather than a granted right to the defendant as well as the whole public that the government authority should act lawfully.

One of the complex problems is that though the discussion on JSOCP concerning the defendant's narrow personal interest of individual justice is somehow accepted with understanding, the discussion of the broad public interest concerning the authorities' sound actions is not always "favoured" by the court. Even according to the broadest views regarding JSOCP, which are willing to see it as a particular branch of judicial examination concerning the demeanour of prosecuting and investigating authorities on the issue of charging and prosecuting an individual, this branch is still limited by the "super requirement" of the significant violation of justice and fairness. The attempt to integrate administrative improbability as a part of the JSOCP doctrine has not developed.

In the 2006 *Nir-Am Cohen* case, it seemed that substantial progress was made in the administrative examination of criminal proceedings. Appealing to the Supreme Court, the defendants wished to dismiss the indictment issued against them by the Ministry of Industry and Trade at the district labour court due to the abusive employment of foreign workers. They

claimed that their case should have been handled according to the administrative offence law rather than the criminal law. They further claimed that the way the prosecution made its decision to file an indictment was impaired: the prosecution did not provide the reasons for choosing to file a criminal indictment and did not include them in the investigation materials; it did not call the appellants for a hearing; it did not publish its policy on filing criminal indictments in cases involving administrative offences; lastly, its policy has changed after the date of the events listed in the indictment. Apparently, at least part of the claims is strictly administrative in character, and the "justice" element is not dominant relative to other elements- both procedural and administrative- from administrative law.

Given the above and the perception that prevailed until then, the appellants' decision to raise these claims in a criminal proceeding before the Supreme Court rather than the labour court is understandable. However, it was the state who, in its preliminary response to the appeal, rejected the appeal - without referring to the appellants' claim - in view of the alternative remedy of JSOCP in a criminal proceeding. In its response to the appeal, the state mentioned that JSOCP might be applicable, in principle, in any case of a flaw in the indictment - as long as the flaw is severe - which harms the sense of justice and fairness.

Moreover, the Supreme Court accepted the state's request to reject the appeal outright since an alternative remedy exists. It seems to be the first time the defendants' appeal was rejected outright. Until then, the Supreme Court had ruled on these kinds of appeals on their own merit. Nevertheless, unlike the state suggested, the Supreme Court avoided determining that the appellants' broad claims may be inquired under the JSOCP doctrine. Instead, the court determined it does not need to decide whether the mentioned flaws are applicable to the JSOCP doctrine since the claims- related or unrelated to the doctrine- should be raised in the court that hears the criminal case. The Supreme Court noted that the main issue that arises, in this case, concerns the competent court to examine the legality of the procedure that preceded the filing of the indictment. The appellants deemed that this question should be clarified before the High Court of Justice because only this court, so they understand, has the authority to exercise judicial examination on government authorities. The judges determined this claim is incorrect since a criminal court is also authorized to examine claims against the proceeding preceding the indictment, including the investigation and decision stages of filing a criminal indictment. The Supreme Court noted in its decision several reasons: in this way, the need to split the hearing and conduct two separate proceedings around related issues will be avoided. Such a split is not only undesirable for reasons of efficiency and for reasons of saving judicial resources, but it may also result in unnecessary procrastination and unreasonable lengthening

of criminal proceedings. Also, the question that often arises as to the legality or reasonableness of the decision to file an indictment involves various factual disputes. The criminal court has the appropriate tools to clarify factual questions, and from this aspect, it is superior to the High Court of Justice (which does not hear evidence). In addition, it was determined that it should be borne in mind that the court hearing the case has a variety of means at its disposal to deal with the defects that occurred in the filing of the indictment. The court can make use of moderate and proportionate remedies that do not go so far as to dismiss the indictment. For example, it may order the dismissal of specific charges or take into account the defects that occurred in the procedure that preceded the indictment filing at the stage of sentencing the defendant.

Therefore, it has not been found that, in this case, there is justification for opening the gates of the High Court of Justice to the appellants while they have an alternative route to raise their objections. At the same time, it was pointed out that if the allegations regarding the alleged defects in the prosecution's conduct are rejected, the appellants will be able to appeal this determination before the appellate court if they are convicted at the end of the day.

Therefore, it can be said that this ruling of the Supreme Court obliges the court to hear a criminal case to discuss and rule regarding administrative and constitutional claims of defendants against the decisions of the prosecution, the police, and the rest of the law enforcement agencies. In doing so, the court is supposed to exercise judicial examination on the actions and considerations of the prosecution. Such scrutiny should be exercised in accordance with the principles of constitutional and administrative law, which includes the full range of relevant public and private interests and does not focus specifically on considerations of individual justice.

It is important to note many broad administrative and constitutional law considerations in this context. Thus, for example, these considerations require that decisions made by the authorities be reasonable, proportionate, guided by a proper purpose, and subject to a duty of increased fairness and a requirement of good faith; They must take into account the public interests and private interests involved as a whole and balance them properly; Decisions must be made without extraneous considerations; they should not be arbitrary; they must be provided on the basis of a proper factual infrastructure; on the basis of overt and equitable criteria, embodied in internal administrative guidelines which are visible to the public; they should comply with the principles of natural justice, which include, *inter alia*, the granting of an appropriate right of hearing and the right of access; They must be given at the proper speed; They must comply with the requirement of administrative efficiency; etc.

It is important to emphasize that under such a broad approach, most of these considerations of administrative and constitutional law can be examined and applied not only with respect to individual law enforcement decisions concerning the specific defendant prosecuted but also with respect to general policy decisions affecting the specific defendant, such as guidelines of the Attorney General, the State Attorney's guidelines and police procedures, all of which should now be subject to the examination of the criminal court.

The relationship between the doctrine of administrative examination in criminal matters and the doctrine of JSOCP is not always clear, especially concerning the consideration of "public interest", which guides the prosecution in deciding to file an indictment. This consideration of the prosecution is of central relevance to the doctrine of administrative examination, as opposed to the doctrine of JSOCP. However, it can also be said that if the prosecution decides to file an indictment that has no public interest or benefit, then it also commits injustice towards the specific defendant.

The main difference is that administrative law examines the full range of public interests relating to the question of prosecution, not only those who support the enforcement of criminal norms whenever they appear to have been violated but also, for example, those who demand that enforcement be reasonable, proportionate and beneficial to society at large, as well as the whole administrative and constitutional rights conferred on the defendant by law. On the other hand, a discussion only according to the doctrine of JSOCP focuses mainly on the special conditions for this protection: on the one hand, the considerations of individual justice and fairness (which are usually narrower than the considerations of administrative and constitutional law as a whole); And on the other hand, the strict restrictions imposed on the scope of applying this doctrine by the Supreme Court. Under these limitations, it should be set aside for exceptional cases, at least in the context of the dismissal of the indictment, though maybe not so in considering mitigation of punishment.

In any case, the principle of equality is an important point where administrative examination and the JSOCP doctrine meet.

In the field of administrative and constitutional law, it is the duty of every governmental authority to act equally and not discriminate between individuals when there is no justification for distinguishing between them. This historical and essential duty, which developed long before the birth of the doctrine of JSOCP, should also apply to criminal prosecution; It should not discriminate between suspects or defendants.

As part of the doctrine of JSOCP, the concept of selective enforcement evolved, which is, in fact, aimed at a similar situation concerning prosecution considerations tainted with

discrimination. Therefore, it seems that discriminatory enforcement can be argued today in the Criminal Court both within the Doctrine of Administrative examination framework in criminal cases and under the Doctrine of JSOCP. This may be practically important since the test for applying JSOCP is ostensibly more rigid ("a serious defect ...") than the usual tests of equality of administrative law.

In general, it can be said that analytically, the factual basis of most of the other claims usually associated with JSOCP, such as improper investigation, delay in filing the indictment, breach of promise by the government, and more, is the rules of constitutional and administrative law and the broad principle of the rule of law, and not necessarily the substantial injustice was done to the defendant in the circumstances of the case. This is not only a distinction concerning the theoretical justification behind raising a claim by a defendant against the prosecution's conduct, but it is also of practical importance. From the defence attorney's point of view, there will usually be good reasons to argue in parallel, for the same facts, both according to the doctrine of administrative examination in criminal matters and according to the doctrine of JSOCP. This is due to the different focus of each of the doctrines (the broad public interest versus individual justice and fairness, as noted above), for which each may, in some cases, turn out to have a relative advantage over the other.

Conceptually, it is appropriate to create a hybrid in the sense that the doctrine of JSOCP will be based on the constitutional-administrative justification and will be extended so that it actually incorporates the principles of constitutional and administrative law, such as reasonableness and proportionality. Then, public law requirements will be included within the requirements of justice and fairness, and thus the stringent special tests for the doctrine of JSOCP will be removed.

In other words, the title of JSOCP, in the broadest sense, is preferable, in my view, to the title of the Doctrine of Administrative examination in Criminal cases.

So far, we have seen the rise of the doctrine of administrative examination as one of the tools provided to the court hearing a criminal case in order to examine the considerations and good faith of the prosecution. However, the Israeli Supreme Court hindered this idea within a relatively short period of 2020.

This relates to the case of *Rotem*[289], whose judgment was ruled in May 2020. Rotem, who for many years had been working as an Intelligence and Investigation officer at the tax authorities, claimed, at some stage, that he was exposed to a corruption case at his workplace. After investigating his complaint, the police closed the file, but he continued, for years, to wage a stubborn struggle to have his claims clarified in court and, while doing so, tried to convince various officials in the public service that his accusations were accurate and the individuals involved should be prosecuted. However, when officials he approached- including police officers, tax authority clerks, and attorneys at the Attorney General- refused to accept his claims or promote the file per his will, Rotem would insult, harass and denounce them either face-to-face, on phone calls, or text messages and sometimes even via a fax machine. In some of the cases, the complainants' family members would be present when the harsh insults were hurled. Rotem's continued these actions for five years while ignoring restraining orders issued against him to protect some of the complainants. Rotem was prosecuted for these actions and convicted for part of the charges against him.

The Supreme Court had to address the question of applying the administrative control doctrine. Several claims were argued by the state: that no evidence was provided showing there is a need to tighten control on the enforcement authorities; that tightening the control of the court would impair the principle of the separation of powers; and that it is challenging to apply administrative norms in a criminal proceeding as each proceeding has different legal procedures. Thus, expanding the administrative control will further complicate and prolong the criminal proceeding. The state added that current criminal law has the proper means to control the actions of the enforcement and prosecution authorities and the relations between these means and the new doctrine are unclear. Applying the administrative control doctrine will impair the intricate balance determined by the JSOCP doctrine. The state denied that the ruling in the case of *Nir-Am Cohen* created the administrative control doctrine in criminal cases, nor did a later adjudication ruled by the Supreme Court.

A panel of three judges- Justice Elron, Justice Stein, and Justice Solberg- conducted the trial, the latter writing the main opinion. In this opinion, Justice Solberg says that criminal prosecution may materially damage an individual's reputation, social status, job, source of income, family, mental state, etc., relying only on judicial control to protect from making wrong decisions about it is doubtful. One cannot justify requiring that a defendant goes through the whole aggravating criminal proceeding only to realize that the decision to prosecute him

[289] Crim. App. 7052/18 *the State of Israel v Rotem* (5.5.2020) [Hebrew].

was proven wrong and that the case should have been dismissed based on an administrative impairment. Justice Solberg thus concluded that mere judicial control during a criminal proceeding is insufficient and should include an administrative aspect. After concluding this, the court raised the question, what will be the proper deliberation framework to apply this administrative control? Should it be an appeal to the Supreme Court or rather raise administrative claims inside the criminal proceeding? Moreover, in the latter case, what control tools does the judge have for examining the prosecution's decision?

Justice Solberg reminds us that the JSOCP claim is a unique one in that, unlike other pre-trial motions, it does not address either the legality or properness of the indictment nor the authority to file it, but rather the fairness of the proceeding held against the defendant. This doctrine, imported to Israel from the English law, had been recognized for the first time in *Yefet*'s case and since then was present among us, evolving and growing. Nevertheless, it is difficult to make clear rules about distinct groups to which it should apply. Since the spectrum of states and conditions on which it may be applied is broad, the ability to define its boundaries is doubtful, and so is the propriety of such an action.

Having said that, Justice Solberg provides several examples of salient fields in which the doctrine was applied in adjudications of the Supreme Court: selective enforcement- enforcing the law against individuals while avoiding doing so against others; Severe delays in investigating or in filing an indictment; involvement of the authorities in either committing an offence, supporting or ignoring it; violating an administrative commitment not to conduct an investigation or prosecute, etc. It seems that the fundamental criterion that led the court to apply the doctrine was a violation of the fairness of the proceeding and the various aspects related to it.

Justice Solberg further emphasizes that the span of remedies the doctrine enables is broad and far more diverse than dismissing the indictment or fixing it. For example, when applying a JSOCP, the court may choose to leave the indictment as is, despite the identified contradiction to principles of justice and legal fairness but mitigate the defendant's sentence.

In other words, as part of the criminal proceeding, we have an administrative tool that controls the fairness of the proceeding conducted against the defendant as well as his rights and protects him from being abused by the authorities. This haven for protecting the defendant is widely spread from the onset of the proceeding till its final stage, and the remedies it enables vary from dismissing the indictment, fixing it, or mitigating the sentence. Justice Solberg further stressed that the JSOCP doctrine's premise is that when blaming a citizen and convicting him in a criminal offence, the authorities must act in good faith and that if they do not do so,

implications will follow. Once basic laws were legislated, and the right to a fair proceeding was recognized as a constitutional super-law, this premise became more evident: the court judging in a criminal case should thus carefully monitor if doing justice is done rightfully.

After clarifying the JSOCP doctrine's status as a means for controlling the fairness of the criminal proceeding, Justice Solberg moves to discuss the question of whether the criminal court can examine and scrutinize the prosecution's discretion in its decision to prosecute the suspect in accordance with the administrative courts' traditional criterion of reasonableness in which it examines whether the administrative authority balanced adequately between the considerations of the various parties. Justice Solberg mentions that some view Cr.A. *Nir-Am Cohen* as a case where a framework for administrative scrutiny in a criminal proceeding was established. From this point on, criminal law adopted all administrative law attributes, including examining the reasonableness to prosecute and the proportionality. In a later ruling following that, it was stated that the *Nir-Am Cohen* case opened a new channel that enables scrutinizing the administrative decision to file an indictment and conducting a judicial-administrative control, regardless of the tests determined in the JSOCP doctrine. Alternatively, others deem that scrutinizing the reasonableness of the prosecution's discretion and the proportionality of the decision to prosecute is already enabled by the JSOCP and that, subsequently, the court is allowed to take the role of the prosecution in deciding to avoid a charge or discard an existing one based on careful considerations of justice and fairness.

Justice Solberg disconnects criminal law from administrative law as they are separate disciplines with different purposes and means. Thus, he believes that a legislative-administrative proceeding cannot be transplanted into a criminal proceeding. In a criminal proceeding, the state blames a suspect for committing an offence, while in an administrative proceeding, the individual stands in front of the state and complains about its conduct and decision-making. Each proceeding has different laws and procedural directives. Actually, in the Anglo-American adversarial legal system applied in Israeli criminal law, the court that hears the case is not exposed to the materials the prosecution based its decision on- neither the investigation materials nor the criminal record. Thus, how can the court scrutinize the reasonableness of the prosecution's discretion without an evidential basis?

Moreover, embedding administrative law inside criminal law is not a mere blending of different fields, says Justice Solberg, but may create total disruption. After finding whether the defendant is guilty, the court suddenly has to examine the state's 'guilt' and scrutinize its conduct and decisions. Shifting the focus from finding whether the defendant is guilty and responsible for

the charges he is accused of toward examining the state's conduct will miss the essence of criminal procedures and prevent the social message from being conveyed to the defendant and society. Defendants will move from a stand of defence to that of offence, focusing their efforts on proving the state's fault while failing to recognize their crime and striving to rehabilitate themselves. Conducting a fair proceeding while carefully preserving the rights of the defendants and suspects is highly important but should not lead to a total reversal of criminal law order. The criminal proceeding can address only one prosecutor. The defendant has sufficient means to defend his rights; even without the 'Administrative law doctrine', instances that handle criminal cases have various means to respond to states in which holding a criminal procedure or convicting the defendant is erroneous or inappropriate, the first and foremost being the JSOCP. It is essential to emphasize that in the framework of the JSOCP, there is no room for considering the reasonableness of the prosecution's discretion in filing the indictment. Justice Stein supported this approach saying that the defendant has the right to complain that the indictment filing or conducting a criminal proceeding against him "are materially contradicting principles of justice and legal fairness". Such arguments are based on the JSOCP doctrine, which is now enshrined in criminal law. Thus, our law does not recognize the magistrate and district courts' jurisdiction to apply administrative law principles that were not integrated into the JSOCP doctrine, namely the principle enabling scrutinizing the indictment filing. Scrutinizing the prosecution's discretion in filing the indictment is not enabled by the JSOCP doctrine. In any case, this scrutiny is not feasible without considering and analyzing all the evidence that led to his prosecution and the one related to the defendant's rights. Since the court, based on the evidence it heard, may eventually choose to acquit the defendant (even if only based on doubt), there is no need at that stage to "dismiss" the filing of the indictment for unreasonableness or lack of proportionality. In acquittal judgments, the court may also criticize the conduct and decisions of the prosecution.

Though Justice Elron joined the resulting adjudication under the circumstances of the case, his view was fundamentally different. He deemed that scrutinizing the reasonableness of the decision to prosecute a defendant is an integral part of the considerations of a JSOCP and the justification to consider reasonableness as part of the JSOCP doctrine is, in many cases, higher in criminal law than in administrative law. This is so since the defendant, whose reputation and future are at stake in a criminal proceeding, especially needs comprehensive protection from the authorities' conduct impairments. He mentions that more than once, the Supreme Court was required, as part of the examination of a JSOCP, to scrutinize the reasonableness of the authority's decision to prosecute the defendant and that this approach is suitable and should

not be changed. The JSOCP should ensure the propriety of the criminal proceeding and protect the defendant in cases where, as phrased in the law, "filing an indictment or conducting the criminal proceeding materially contradict principles of justice and legal fairness". It covers a wide range of cases in which the indicated impairment in the enforcement and prosecution authorities' conduct is so severe and grave that it is rightful to dismiss the indictment altogether or, at least, mitigate the sentence. A JSOCP is not frequently applied. Naturally, these cases are exceptional. Justice Elron deems that a straightforward reading of section 149(10) in criminal law clearly indicates that the court has the power to scrutinize the process of filing the indictment; and that it is not limited to the right to a fair proceeding but further protects the defendant from various types of actions that materially contradict the principles of justice and fairness combined. Furthermore, the explanation provided in the bill of this section clarified that the section does not only wish to defend the defendant's right to a fair proceeding but also to ensure that the decision to prosecute him and the manner the criminal proceeding was conducted do not contradict the broad sense of the principles of justice and fairness. Referring mainly to the cases of *Vardi* and *Gotsinger*, Justice Elron adds that the JSOCP enables a broad view of the conduct of the authorities from the moment before the offence was conducted via filing the indictment all the way through to the course of the criminal proceeding; applying a JSOCP requires a comprehensive examination of the authorities' conduct and grants the defendant remedies when the authorities materially violated principles of legal justice and fairness.

Nevertheless, Justice Elron stresses that this does not mean that the authorities' discretion is replaced by the court's. Rather, determining that the authorities' decision to prosecute an individual was so unreasonable that it justified dismissing the indictment will be done only in extreme and exceptional cases in which the decision materially contradicts the principles of justice and fairness. For the most part, the prosecution authorities are given wide discretion in deciding to prosecute. The wide discretion stems from several considerations, which include: the fact that it is the prosecution authorities that need to allocate the resources for enforcing criminal law; they have the experience for investigation and weighing the relevant considerations involved in prosecuting an individual; they have the relevant data for deciding whether the circumstances justify prosecuting the suspect. Therefore, in cases where the prosecution authorities examined the circumstances and considered various alternative proceedings other than a criminal proceeding and finally came to the conclusion that the suspect should be prosecuted, it should not be a light matter to determine that the decision to prosecute the suspect is unreasonable and thus he deserves to a JSOCP. Justice Elron adds that

over-usage of the reasonableness doctrine may raise a substantial difficulty and create the impression that the court puts itself in the shoes of the administrative authorities, and that should be avoided. More so, in matters which are at the heart of the administrative authority's expertise, and when the authority's decision pertains to a horizontal policy, it wishes to apply. In such matters, the court is inferior to the administrative authority and should avoid intervening with its discretion. This is the reason why one should be very careful in examining the reasonableness of the administrative authority's decision. This care is also based on the separation of powers between the executive and the judicial, enabling the executive authority to work independently at its own discretion. However, though the usage of the reasonableness doctrine should be restricted, it seems to be required, especially in a criminal procedure, including scrutinizing the decision to prosecute the defendant. This is so because conducting a criminal proceeding against a defendant impairs his rights, as well as in view of the court's unique role in a criminal proceeding. When facing the prosecution authorities, the defendant is significantly in a stand of inferiority, making it difficult for him to defend his rights. These gaps in powers and the concern that the defendant's rights will be impaired unnecessarily were the reasons for the suggestion to enshrine the JSOCP in law and require that the court have various means to exercise judicial control in a criminal proceeding on the decisions of the authorities. As part of this judicial scrutiny, Justice Elron believes the court should be given the ability to examine whether the decision of the prosecution to prosecute an individual was gravely unreasonable in a way that unnecessarily impaired the principles of justice and fairness and even sometimes the fundamental rights of the defendant. Annulling the reasonableness doctrine with regard to the decision to prosecute the defendant may leave him with no material remedies against extremely grave and unreasonable conduct by the authority- since, due to the fact that a criminal proceeding is held against him in parallel, his ability to turn to the Supreme Court in its role as a high court of justice is limited. Naturally, judges who frequently handle criminal cases have gained significant expertise and a broad perspective in criminal proceedings, which provides them with a unique view of the conduct of the enforcement and prosecution authorities in a wide variety of cases. This broad perspective on how the enforcement and prosecution authorities operate also enables the court to compare the actions taken against different defendants in different cases. Additionally, the JSOCP wishes to protect the defendant from the impaired conduct of the prosecutor. The doctrine does not enable the court to examine the reasonableness of a prosecutor's decision not to prosecute an individual- but does enable, in extreme cases only, to revoke a prosecutor's decision to prosecute an individual in a singular case with unique circumstances, in order to preserve the principles of

justice and fairness. In any case, if a criminal court would find that the decision to prosecute a man is gravely unreasonable, it would not have significant implications on other cases with different circumstances. Restricting the examination of the reasonableness of the decision to prosecute an individual as part of the JSOCP doctrine to the specific circumstances of the case handled by the court and limiting it only to the question of whether the decision to prosecute him contradicts principles of justice (unlike the question whether others who were not prosecuted should be prosecuted, which the Supreme Court scrutinizes), significantly reduces the concern that the court may brutally intervene with the prosecution's discretion. Regarding the need to examine various evidence in order to deliberate on the defendant's claims, there should not impede doing so in every stage the court finds right.

The different judges' views express semantic differences and different perceptions regarding combining doctrines from the administrative law (reasonableness and proportionality) in criminal proceedings to examine the prosecution's discretion. Due to the material disagreement between Justices Solberg and Stein and Justice Elron, the Chief Justice of the Supreme Court, Justice Hayut, has decided to hold an additional hearing that includes a wider judges' panel. The final judgement was given lately by a panel of seven judges [290]. The result has not changed; it was unanimously ruled that subject to special legislative provisions in criminal law, the appropriate doctrinal framework for hearing the defendant's claims against the prosecution's decision to file an indictment against him or her is the doctrine of JSOCP, enshrined now in section 149 (10) of the Criminal Procedure Act. In a majority opinion (Vice President Handel, Justices Amit, Solberg and Stein, against the dissenting opinion of President Hayut and Justices Vogelman and Elron), it was ruled that there is no place to raise allegations of unreasonableness or disproportionality against the indictment. However, it can be argued that in the indictment, there is a "substantial contradiction to the principles of justice and legal fairness" within the meaning of section 149 (10) of the Criminal Procedure Law.

6.10 Ruling of the Military Court of Appeals

One of the significant cases in which an Israeli court accepted a JSOCP claim subsisted in 2013 in a military- rather than a civil- instance that tries suspects in terrorist acts in Judea and Samaria, and moreover, in a case of an indictment of especially severe offences.[291]

[290] Crim. Req. 5387/20 *Rotem v the State of Israel* (15.12.2021) [Hebrew].
[291] Appeal 2631/11 (the Military Court of Appeals) *The Military Prosecution v Haj* (6.5.2013) [Hebrew].

A member of the Palestinian parliament, Jamal Abd-El-Hamid Mohammad Haj, was prosecuted by the military court of Samaria. The severe indictment included 19 charges, including intentionally causing death (including planning a suicide bombing), conspiracy, trafficking in military equipment, shooting at a person, aiding in placing a bomb, and more. His main claim was that his name was removed from the wanted list following an agreement he reached with the Israeli Defence Authorities. In coordination with the Security Agency, the authorities explicitly promised him that he would not be prosecuted, and he returned to the area of Nablus to calm the area and settle order there. An indictment for his past actions was filed against him despite this promise. The first instance overruled his claim, convicted him for most of the charges, and sentenced him to 30 years in prison.

The military appeal court, headed by its president Colonel Aharon Mishniot, accepted the defendant's appeal, determining that the defendant proved, by several witnesses, that the agreement was fulfilled, while the prosecution did not present any contradicting evidence or proof that the defendant breached the agreement. The military prosecution is a government authority, and it was said that they must act in good faith and fairness even when the defendant is charged with criminal offences. Additionally, the scales clearly tilt in favour of the interests of the government's credibility and legal proceeding fairness, which have been severely harmed due to the State's decision to breach its obligations to the accused; these interests should be preferred to the completion of the criminal proceeding. Since an explicit commitment not to prosecute the defendant was brutally breached, the claim for JSOCP applies according to section 149(10) of criminal law, even though he is charged with highly severe offences and that dismissal of the indictment will hurt the terror victims' families.[292]

As suggested, this is an extreme and unique example of applying the JSOCP doctrine. Academically speaking, the offence severity created an acute frontal clash between conflicting interests; the doctrine trumped the severity in its "pure" form. One may debate the result, of course, but the analysis and rationale at the basis of this judgment are worth learning from.

[292] The court signed off the judgment with these words: "At the end of the judgment, we shall mention that we are aware of the great difficulty our judgment entails and our hearts are with the family of the late Rachel Charchy and all the rest of the victims who suffered due to the severe acts of the appellant, but we think that this result is inevitable… we shall not refrain from hoping that the appellant who has won his freedom will fulfil his side of the agreement and expectations from him to be a moderating figure who will use his influence to calm the atmosphere and reduce violence, and may that bring some comfort".

6.11 Meanwhile: Expanding the Prosecution's Discretion in Closing Files without Filing an Indictment

In August 2012, ordinance 66 of the Criminal Law was passed, incorporating the addition of article a (1) to chapter 4, which refers to "closing a case under a conditional arrangement".[293] This ordinance reflects a parallel trend of the legislator to close cases rather than pursue the truth in court. Exercising discretion, however, was entrusted to the prosecution rather than to the court. Ordinance 66 authorizes the prosecution to reach an arrangement with the defendant (an individual or a corporate) where s/he/they agree to admit the facts which constitute the offence and fulfil the terms agreed upon in the arrangement. In other words, in a conditional arrangement between the prosecution and the defendant, the latter admits to committing the acts which constitute his offence and undertakes the terms of the arrangement, while the prosecution commits to avoid filing an indictment and closing the case against the defendant. In suitable cases, this arrangement enables a suitable sanction without an indictment and a judicial proceeding with all its implications, including the defendant being stained by a criminal charge. Naturally, an additional goal is to reduce the workload from the prosecution and the courts and turn these resources to severer cases. The arrangement would also enable, *inter alia*, expanding enforcement on criminal cases, which otherwise are hard to justify because of the implications of human and time resources of a lengthy criminal proceeding in court and thus would have been closed due to "lack of public interest". Generally, the arrangement is meant to be used in light cases or offences committed under mitigating circumstances. These may be related to committing the offence or not, such as circumstances pertaining to the person who committed the offence. The ordinance is advantageous in relatively light yet prevalent offences since prosecuting the defendant in a criminal trial would significantly burden law enforcement authorities. Moreover, enforcing the offence via the conditional arrangement may, in some circumstances, be more efficient than by a criminal procedure.

Though not exercised in severe charges, this proceeding enables the prosecution to take into account the personal circumstances of the suspects, including their age, the potential harm which would be caused to them or their families, their positive demeanour and contribution to society, difficult life circumstances, the lack of previous charges, etc.

Several terms should be met in order to enable the conditional arrangement, *inter alia*: the foreseen sentence, in view of the prosecutor, is not imprisonment; the defendant has no criminal

[293] Hereinafter: ordinance 66.

records during the five years preceding the current offence; other than the facts related to the arrangement, no investigations or criminal trials are currently held by the police or other authorities against the defendant; sufficient evidence subsists for charging the defendant for the offence. The conditional arrangement may incorporate one or several terms, such as paying a capped amount to the state treasury or some other entity; capped compensations to each offence victim; undertaking not to commit such an offence; meeting the terms of a remedial or rehabilitative program, including public service, determined by a probation officer.

One may argue that this arrangement grants the prosecution with substantial power and expands its discretion over the court; from a different point of view, however, it may be argued that the arrangement enables suspects to handle their case without criminal records that a court intervention entail, and without violating their right for an entire judicial proceeding, if the prosecution chooses to do so, where they would be able to raise any claims or complaints they wish to. In any case, the interest of pursuing the truth is only partly met (pending the facts the arrangement parties agree upon), and so is the interest of justice and fairness, which may be considered for finalizing the arrangement.

As mentioned, this tool is only applicable in light offences, and furthermore, an indictment may be filed if the defendant does not fulfil the arrangement terms.

6.12 An additional instrument for protecting rights: Suppressing illegally obtained evidence

An additional doctrine in Israeli law protects the defendant's rights not by dismissing the legal proceedings altogether but by enabling the suppression of evidence that was not obtained legally. Though not part of this research, the doctrine will be discussed shortly henceforth.

The right for a just proceeding was reinforced by enacting the Basic Law of Human Dignity and Liberty, and consequently, the rights of suspects and defendants in criminal proceedings have been rigorously enforced since. As previously discussed, in 2007, the JSOCP doctrine was explicitly enshrined in a law section, but even before that, in 2006, a case law doctrine of the inadmissibility of illegally obtained evidence was determined in Issacharov's case. While the JSOCP doctrine relates to impairments in the indictment or the criminal proceeding, the doctrine of inadmissibility is preferred when the misconduct of the prosecuting authorities appears at the stage of gathering evidence. In addition to the two specific laws concerning prohibited eavesdropping and privacy violation, this doctrine developed in court rulings covers

a broad range of cases. If exercised and evidence is suppressed, the court cannot relate to any findings that are based on this evidence, i.e., the evidence and every fact that may be determined respectively are excluded.

In *Issacharov*'s case, the judges determined that the court is permitted to suppress illegally obtained evidence even if it may help discover the truth. The Supreme Court emphasized that relying on such evidence for convicting the defendant violates his right to a fair proceeding and may create the impression that the court turns a blind eye to the illegality and cooperates with the misconduct of the prosecution authorities. The verdict included a few newly formed tests to assist the court in examining whether the acceptance of the illegally-obtained evidence materially impairs the right to a fair proceeding: (a) the nature and severity of the illegal manner in which the evidence was obtained; (b) the impact of the flawed investigation means on the evidence; (c) the social damage vs advantage in suppressing the evidence. All three tests are divided into additional sub-tests involving various considerations. It was also determined that the doctrine of inadmissibility's scope includes all phases of a criminal proceeding, from investigation to ruling.

The court further examined various approaches which justify suppressing illegally obtained evidence: firstly, the educational- deterring approach, which goal is to deter the investigation authorities from conducting illegal deeds; secondly, the proactive approach, which aims at protecting the suspects' rights; and thirdly, the fair proceeding approach which aims at protecting the legitimacy of the judicial ruling. After analyzing each approach's practical implications, the court concluded that the fair proceeding approach is preferable, emphasizing that this approach aims to prevent future flaws in the fairness of the proceeding. The court explained that accepting illegally obtained evidence in a criminal proceeding as a basis for conviction damages the judicial decisions' legitimacy and, consequently, the public's trust in the judiciary. The court further explained that suppressing illegally obtained evidence promotes the morality of the criminal proceeding because a person convicted in such a proceeding bears a moral stigma on top of the punishment of either imprisonment or penalty. Using illegally obtained evidence may, in some circumstances, blemish the criminal conviction and its legitimacy. The court, *inter alia,* might be perceived as giving a hand to and legitimizing the illegal conduct of the investigators. Moreover, since the police investigation is a part of the justice system, accepting illegally obtained evidence in court may blemish the judicial proceeding's integrity and the public trust in the justice system. Suppressing illegally obtained

evidence, per this approach, protects the values of fairness and integrity of the criminal proceeding, promotes justice, and reinforces public trust.

The pivotal case of *Farhi*[294] sparked a discussion on "laundering evidence" and derived evidence. The state, in this case, could not submit DNA evidence taken from the suspect since the police investigators used the DNA sample illegally. Consequently, the police produced new DNA evidence that complied with the law this time. The court, however, suppressed the new evidence as well, explaining that, under the circumstances, qualifying the new DNA evidence means using a simple trick to 'launder' a material flaw in the investigation. Accepting the laundered evidence perpetuates the impairment caused by the initial evidence in the proceeding fairness, prevents the suspect from defending himself, and violates his right to privacy which applies to his personal identification. In spite of the court's stand, the defendant did not benefit from it. Though the suspect's DNA evidence was illegally used, it paved the way to solve sexual offence investigation files which remained unsolved for many years. The investigators did not settle for the inadmissible DNA evidence; they continued collecting evidence and investigating; they laundered the DNA evidence, tracked location using wireless communication, gathered notices under warning, etc. The court suppressed the original DNA evidence and the laundered DNA evidence.

Nevertheless, the other collected evidence remained admissible. Even assuming, for the moment, that had it not been for the first illegal action, the suspect could not have been summoned for investigation, and the wireless communication-based location finding would not have been executed, the court decided that the derived evidence would not be suppressed. Despite the causal-factual relation, it was determined that between the illegal actions conducted and the evidence collected, later on, the latter should not be disqualified since it is a piece of derived evidence. Under the circumstances, a causal-legal relation should be proven as well. In this sense, indeed, the appellant would not have been investigated, and his incriminating remarks would not have been collected. However, once they were said out of his own free will and after all his rights were explained to him, then, according to the 'free will' test, submitting his remarks to the court does not impair the fairness of the procedure. As for the evidence about the appellant's conduct after his arrest, i.e., his refusal to cooperate with the investigators and the beginning of confession concluded from his remarks, the court further determined that those were the appellant's own doings, at his own discretion and while he was legally presented.

[294] Crim. App. 4988/08 *Farhi v the State of Israel* P.D. 65(1) 626 (2011) [Hebrew].

Thus, there is nothing illegal about recording them. They sever the causal-legal relation between them and the initial evidence. The illegality of the initial evidence did not directly impact the content of the evidence, its attributes, or the mere possibility of obtaining it. The initial evidence impact is limited to the factual sense as it led to the appellant's arrest and nothing more.

Farhi's case effectively demonstrates a mere symbolic suppression of evidence when a piece of alternative evidence exists: the court suppresses one piece of evidence, but another competent evidence enables the court to reach the same factual conclusion. The existence of alternative solid evidence facilitates the court's suppression of the dubious one. For example, the court suppresses one defendant's confession due to the illegal manner it was obtained while accepting another defendant's confession, leading to the same factual conclusion. As seen, it may also occur when the suppressed evidence was used to obtain another evidence- the derived evidence- and in these cases, both the suppression and the protection of the suppression are symbolic.

While some advocate these suppressions since they convey a message to the investigation authorities, others see them as futile and meaningless in protecting human rights. To demonstrate this futility, the latter mention that even if the symbolic suppression leads to an acquittal, it will be accompanied by a conviction regarding other equally severe felonies. Even more problematic is the case where the court suppresses strong evidence and, as there is no solid alternative evidence, settles for weaker evidence to reach the same outcome. Realistically, once the court is exposed to suppressed evidence and is consequently convinced of an inevitable conclusion, it uses all the other evidence in order to justify its stand and explain how the other evidence led to the same factual findings. This is a realistic way to explain various rulings where the conviction occurred though some evidence was suppressed. We thus reveal a profound impairment in the idea of a suppression conducted for reasons of merit as well as the idea of suppression in general: in some cases, the mere exposure to the suppressed evidence may seriously impact the verdict. It is doubtful whether court judges, after being exposed to a piece of solid evidence and suppressing it for merit, truly erase its impact from their minds and neutralize its power. Saying that the suppression for reasons of merit disturbs the court from revealing the truth is thus inaccurate: the court reveals the truth yet cannot determine the valid evidence. Phrased more precisely, the court can determine the valid evidence which helped reveal the truth but is prevented from formally relying on it. As a result, it relies on it covertly

while overtly and formally relying on other evidence. Only when the suppression occurs in an appeal court may the conviction be cancelled due to its subjective impact on the judges.

In severe cases where evidence was illegally obtained, the Supreme Court eventually accepted part of the evidence and convicted the defendant. When it was initiated in 2006, one of the factors considered by the doctrine and later advocated by judges was the severity of the felony. Unlike when real doubt arises, it is difficult to find a severe case where key evidence was suppressed and where this suppression led to an acquittal. In accordance with the pessimistic forecast stated upon the doctrine's birth, it seems that the court avoids using the doctrine when the public interest is severely impaired. If those following two conditions are fulfilled, the court is not prepared to suppress the evidence: the suppression will lead to an acquittal in a severe felony and if the defendant is guilty.

However, if the court comes to a decision that the defendant is innocent, there is no real need to suppress the evidence, and the suppression doctrine is superfluous. It seems, then, that the doctrine provides the court with a highly flexible and convenient tool that enables and facilitates balancing. Unlike the basic laws, which were the initial excuse for the doctrine's birth, we get the impression that its true goal is to form an additional judicial power: with the doctrine, the court is able to dismiss criticism and gain a rhetoric profit- namely an appearance of protection of human rights and procedure fairness- but without being obliged to use it. The doctrine gives the court the power to convey messages to the public and individuals and may use it when and in whatever manner it wishes to.

It is important to note that the material suppression of merit dismisses a piece of crucial evidence at the court. Though overlooking police illegal actions during the collection of evidence is harsh, the opposite is just as harsh since, in many cases, judges cannot withstand and do not wish to bear the suppression of crucial evidence. The court, then, has to make a "tragic choice", *i.e.*, to choose between two imperfect alternatives. Suppressing a piece of material evidence for reasons of merit conveys a clear and important message against defective practices and advocates the values which were impaired, but at the same time prevents the court from revealing the factual truth and from protecting the values which are manifested in the relevant law. In contrast, accepting the evidence in spite of the faulty manner in which it was collected along with the judicial manoeuvre to reveal the factual finding which the evidence uncovered enables realizing the values reflected by the relevant law but comes to terms with the impairment of values caused by the way it was collected. Put differently, an intra- legal

conflict emerges between the criminal and material laws. Both options have good and bad aspects, and there seems to be no right way nor a strictly rhetorical way to achieve both goals of merit simultaneously.

A suppression for reasons of merit does not discard the initial impairment but wishes to dismiss dire legal implications and bring belated justice. However, this justice is confronted by the justice manifested by material law. These two types of justice are not complementary but rather one at the expense of the other: justice to the individual who was hurt or justice to the other party, be it the public or another individual. Injustice for the party hurt enables justice for the other party. The law and ruling in Israel offered several ways to cope with this dilemma, each comprising its own balances and manoeuvres. One may identify a judicial trend in all: material suppression for reasons of merit will occur only if the court faces a light matter. It seems that the judicial declarations on the defendant's rights and the penalty that should be paid for realizing them are hard to implement in this context and other criminal law contexts. Judges are as reluctant as the public to suppress evidence, and the ones that feel the urge to accept the evidence will find a way to do so. One may interpret the judges' approach in different ways: one is that the values regarding the manner of collecting evidence are weaker than the values of material law. A second way is that it is not the weaker values but rather the party that uses them to protect himself because this party does not seem to be an innocent victim but rather a criminal who pretends to be innocent. In fact, the identification of judges with him/her is sometimes a better predictor of whether his/her claim would be accepted than the content of the petitioner's claims.

Another often overlooked point to emphasize is the links between evidence law, criminal law, and human rights: when it comes to criminal law, a faulty police practice will not be exclusively examined if it were applied against innocent people. The court will not address an illegal police search of innocent people since the state does not have the incentive to investigate the search and justify it retroactively, and no framework enables the innocent victim to prosecute the state in a criminal proceeding. The police will not bring to justice Illegal eavesdropping conducted that resulted in the conclusion that the suspect is innocent, as it has no incentive to do so; Additionally, the suspect will not sue the police not only because there is no legal framework to do so but also because of the unawareness of the law violation against him or her. Injustice by the police against innocent or guileless individuals is an "untold story" that is excluded from the formal law and the courtroom. Since the victims have all the just arguments on their side,

it would not have been difficult to fight against the flawed practice judicially if it had been brought to justice.

Nevertheless, the court does not deal with the innocent victims or even see them. In the context of impaired police practices, the suspect may only see the authorities if they have decided to file an indictment against him. In fact, an individual's rights are significantly compromised if the court thinks the defendant in a criminal case is guilty since the court wishes to realize the goals of material criminal law and convict him/her. The great tragedy of suppression on the basis of merit is thus exposed: the defendants do not really benefit from it, and it cannot help the innocent ones nor enable acknowledging any faulty actions held against them. If the police produce strong "attractive" evidence using impaired practices, the practice cannot be genuinely scrutinized since a strong evidential incentive entices the court.

Illegal police practices may be heard in court in one of two proceedings: in preliminary proceedings against a suspect when the factual perspective s/he has is very limited; or in the central criminal proceeding, only after a piece of robust and compelling evidence was found by these practices. As we tend to focus on the felony that the case involves and the injustice it entailed, we take lightly illegal police practices, the damage they cause to whom we suspect is the villain and the injustice they manifest. The individual's cry against injustice seems to fade in comparison to the injustice s/he allegedly caused and is even perceived as cynical. Though the defendant was harmed, Judges do not feel compassion or sympathy towards him/her because they find it hard to identify with someone whom they suspect is the offender. With respect to merit, the judges have to compare injustice to injustice and choose to fight the more severe one. Acquitting a defendant- for whom the judge is particularly guilty- due to police violations of law is difficult for judges, especially in severe cases. Preferring an abstract message to a concrete act of value or an obscure future value contribution rather than a clear and concrete present goal is almost impossible compared to human nature.

In the conflict between the abstract and the concrete, the inclination of judges to accept illegally obtained evidence is actually the inclination to prefer the public interest to the rights of the individual defendant. Though this may seem surprising in constitutional discourse, it is not so in the realm of criminal law. With respect to abstract constitutional or academic aspects, "Human Rights" are exciting but much less compelling when harnessed socially to protect a criminal defendant. Being the least favourite branch of public law and where the violation of individual rights is the worst, criminal law clearly prefers the public interest.

Thus, we conclude that evidence suppression for reasons of merit has a limited impact on preserving rights and values and that its significance is merely symbolic and weak. It enables the court to create an adversarial and balanced impression and convey an academic rhetoric message that the journey is as important to the court as the material matter discussed.

Nevertheless, in Israel, a country with a professional and primarily fair law enforcement system, material suppression of merit is not that rare and actually covertly takes place: by the State Attorney. The suppression rules shed uncertainty on the enforcement authorities regarding the admissibility of evidence, which may prevent the police in advance from law violations, assuming that the police do not deem the suppression rules as weak. After all, if the law is violated, the prosecution may fear that the court will suppress the problematic evidence due to the way it was obtained and thus may avoid submitting it to the court or even filing the indictment altogether. Even though the suppression rules are not judicially enforced, they can still cool down the prosecution authorities' demeanour. Additionally, hearing the suppression arguments before the beginning of the trial may drive the prosecution to withdraw or reach agreements with the defence that would prevent the judicial discussion on the suppression. In order to establish such a reality, the courts must have a say and suppress illegally obtained evidence from time to time, even in severe cases.

In Israel, we have seen that merit suppression is exercised rather modestly or secretly. For those who feel satisfied by the situation- for example, because they deem revealing the truth is more important than the defence of merit- it may seem likely to go one step further and dismiss the suppression of merit altogether. The dismissal will minimize the gap between rhetoric and reality, prevent futile hearings in court, and increase the chance of revealing the truth in court. In contrast, those who are reluctant to sacrifice rights and values for the truth, as the truth itself serves rights and values, may look for other solutions that would fortify the protection of rights and values in the process of collecting evidence. They may suggest other practices than suppressing the evidence and taking the risk of the defendant's acquittal, like the practice of placing a price tag for the criminal proceeding, either disciplinary or financial, leading, in the most extreme case, to the prosecution of a policeman in a criminal proceeding due to law violation- *i.e.*, a legal sanction to the person who violated rights.

The advantage of such a practice is that a choice between two bad options need not be made anymore, and no one comes to terms with any kind of law violation. Instead of acquitting an

individual who has done harm or dismissing his misconduct due to lack of evidence, the individual and the one who collected the evidence illegally will both pay the price.

In any case, these dilemmas still exist, and Israeli law has not addressed them clearly and sufficiently yet.

CHAPTER 7
THEORETICAL EXPLANATION – LEGAL REALISM

The case-by-case approach can be explained by or seen as an expression of legal realism. Legal realism is a jurisprudential philosophy that attempts to contextualize law practice. Its supporters argued that a multitude of extra-legal factors—social, cultural, historical, and psychological—are at least as important in determining legal outcomes as the rules and principles by which the legal system operates. Oliver Wendell Holmes, Jr., whose book *The Common Law* was published in 1881, is regarded as the founder of legal realism. Holmes stated that to understand the workings of the law indeed, one must go beyond the technical (or logical) elements entailing its procedures or rules. The existence of the law is not only that which is incorporated in statutes and court decisions guided by procedural law. Law is just as much about the experience: about real flesh-and-blood human beings doing things together and making decisions. Holmes proposed that influences impinging on law from outside the system need to be considered more meaningful and systematic. The seminal position of Holmes heavily influenced both Pound's and Llewellyn's versions of legal realism. For example, Pound's famous distinction between "law in books" and "law in action"[295] is a recognition of the difference that exists between law as embodied in various codebooks and law as practised by a broad range of officials, including police, judges, attorneys, prison staff, and others. Llewellyn admired Pound's approach, yet he criticized him for not being experimental enough. For all of his pronouncements regarding the contextualization of law, Pound did not show much interest in the actual behaviour of judges and of others whose job was to apply the law. Llewellyn, in other words, was advocating for an even more positivistic, behavioristic form of legal realism. From his perspective, Pound never wholly escaped from the conventional, formal jurisprudence that placed great emphasis on legal order and wordiness. Instead, a fully formed legal realism insists on learning the behaviour of legal practitioners, including their practices, habits, and ways of action.[296]

[295] Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, Harvard Law Review, Vol. 24(8), 1911, p 591.
[296] Karl N. Llewellyn, *Jurisprudence – Realism in Theory and Practice* (1962; Transaction edition – 2017) (Introduction by James J. Chriss).

The commencement of legal realism is its critique of formalism, a critique that may be uniquely significant given the revival of legal formalism among some judges and scholars.[297] Classical formalism—culturally personified in the figure of Christopher Columbus Langdell of Harvard Law School—stands for the realization of law as an autonomous, comprehensive, and precisely structured doctrinal science.[298] In this view, the law is governed by a set of fundamental and logically demonstrable scientific-like principles.[299] In formalism, the law is "an internally valid, autonomous, and self-justifying science" in which the right answers are "derived from the autonomous, logical working out of the system."[300]

Law is created by rules and concepts. Legal rules, in turn, installed either in cases or in laws, are also capable of explaining reasonably legal answers. Induction can reduce the mixture of statutes and case law to a limited number of principles. Legal scientists can provide the correct answers to every case that may arise using rational reasoning: classifying the new case to these primary niches and assuming correct outcomes.[301] Because these legal terms characterize legal reasoning by logical terms, internal to it and independent of concrete subject matters, formalism recognizes legal reasoners as technicians whose aim and skill are somewhat "mechanical": revealing the law, declaring what it says, and applying it its preexisting remedy. Since these doctrinal means bring about determinate and internally valid, correct answers, lawyers need not—indeed should not—address social goals or human values.[302]

The realist project begins with a harsh critique of this formalist conception of law. Realists claim that the doctrinalism celebrated by the formalist enterprise does not describe adjudication. They extend this descriptive claim in a conceptual direction, maintaining that the indefiniteness and manipulability of the formalist methods for guessing the one essential meaning of legal concepts and induction, classification, and deduction as per legal rules, turn pure doctrinalism into a conceptual impossibility. Finally, these descriptive and conceptual claims give rise to

---

[297] Hanoch Dagan, *The Realist Conception of Law,* University of Toronto Law Journal, Vol. 57(3), 2007, p. 607.
[298] Christopher L. Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative,* Law & Society Review, Vol. 34, 2000, pp. 911, 944.
[299] Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge University Press, 1998) pp. 83-104.
[300] Richard H. Pildes, *Forms of Formalism,* University of Chicago Law Review, Vol. 66, 1999, pp. 607-609.
[301] John Dewey, *Logical Method and Law,* in American Legal Realism (William W. Fisher III, Morton J. Horwitz, Thomas A. Reed, eds., Oxford University Press, 1993), pp. 185, 188-189.
[302] Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and the Allocation of Body Parts,* Stanford Law Review, Vol. 55, 2003, p. 2113.

the realist normative criticism of legal formalism: the allegation of serving as a means for covering normative choices and inventing professional authority.

Realists claim that the formalist description of law's present (or legal reality) as synonymous with an autonomous system of concepts entailing necessary meanings and logically interconnected rules is misguided. Therefore, they also reject positivist theories which portray "the standard judicial function [as] the impartial application of existing determinate rules of law in settlement of disputes,"[303] and thus conceptualize law as if it were a self-regulating system of concepts and rules, a machine that in run-of-the-mill cases runs itself.[304] For legal realists, a credible conception of law must allow the people who make it to occupy centre stage. Law, in short, must be understood as a going institution rather than a disembodied entity.[305]

This claim does not deny the existence of rules or quarrels with the presence of law, and it also recognizes that law is a reasonably determinate terrain. Thus, notwithstanding his scepticism about the ability of any given case to serve as the sole premise for legal outcomes, Llewellyn states that case law as a whole does give some "leads," some "sureness." The context in which we read a particular case, he explains, colours the language used in the opinion, thus giving "the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted."[306]

Llewellyn's prescription for looking at case law as a whole cannot be reasonably interpreted as referring to legal doctrine in its entirety: the aggregation of rules, sub-rules and exceptions. After all, the multiplicity of legal rules in any given doctrinal fabric is, by Llewellyn's account, the ultimate source of the indeterminacy of law in its formalist rendition. Llewellyn must therefore imply that law's determinacy derives from something else, something that goes to the most fundamental characteristics of law. However, what can this "something else" be?

This question sums up the quintessential challenge of legal realism. The slippage between doctrine and outcomes, Anthony Kronman correctly claims, raises two problems, to which he

[303] H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Nobel Dream,* Georgia Law Review, Vol. 11, 1977, pp. 969, 971.
[304] Roger Cotterrell, *The Politics of Jurisprudence* (University of Pennsylvania Press, 1989), pp. 99, 110-112.
[305] Karl L. Llewellyn, *My Philosophy of Law,* in My Philosophy of Law: Credos of Sixteen American Scholars (Boston Law Book Co., 1941), pp. 183-184.
[306] Karl L. Llewellyn, *The Bramble Bush - Some Lectures on Law and Its Study* (Oxford University Press, 1930), p. 48.

refers as intelligibility and legitimacy.[307] First, identifying the sources of the "felt law"—once sheer doctrine is no longer a viable candidate—is crucial to explain past judicial behaviour (render it intelligible) and predict its future course. Second, and even more significantly, these sources should have redeeming qualities if the law rehabilitates its legitimacy. Once the formalist myth of law as a set of agent-independent concepts and rules has been effectively discredited, these alternative sources must be capable of constraining judgments made by unelected judges and justifying their authority.

Echoing Holmes' separation thesis, legal realists claim that the fact that law's endorsement of specific rules and values "reaches beyond the *normation* of oughtness into the *imperative* of mustness" and tends to produce "a sense of rightness, a claim of right,"[308] must affect the tone of law's justificatory discourse. Realists appreciate the risks of habitual reaffirmation and approach their normative inquiries in a critical and pluralistic spirit. They conceptualize justice as a "perennial quest for improvement in law, functioning as a symbol representing the need for constant criticism and constant adaptation of law to the changing society that it articulates." Legal realists perceive human values as "pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative". [309] Llewellyn expresses the same idea very clearly, saying: "I put my faith rather as to substance, in a means… in that on-going process of check-up and correction which is the method and the very life of case-law".[310]

This sense of acute responsibility helps explain why legal realists, who are by and large careful not to disregard radical alternatives, reject moral scepticism or relativism. Because "the process of responsible decision… pervades the whole of law in life"—because lawyers' everyday business requires "choice, decision, and responsibility"—legal realists find the use of "moral insights" indispensable to law.[311] Legal reasons refer to ideals of justice and, as Hessel Yntema claims, not every ideal will do: "ideals of justice not related to human needs are not true

[307] Anthony T. Kronman, *Jurisprudential Responses to Legal Realism,* Cornell Law Review, Vol. 73, 1988, pp. 335-336.
[308] Karl L. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method,* Yale Law Journal, Vol. 49, 1940, pp. 1355, 1364, 1368.
[309] Hessel E. Yntema, *Jurisprudence on Parade,* Michigan Law Review, Vol. 39, 1941, pp. 1154, 1169.
[310] Karl L. Llewellyn, *On the Good, the True, the Beautiful in Law,* in Jurisprudence: Realism in Theory and in Practice (1962), pp. 167, 211-212.
[311] Harry W. Jones, *Law and Morality in the Perspective of Legal Realism,* Columbia Law Review, Vol. 61, 1961, pp. 799, 801, 809.

ideals".[312] While always inviting challenges to law's most accepted commonplaces, realists bracket out sceptical doubts that undermine any possibility of both justification and criticism. Realists always engage in a constructive reexamination of law's existing rules and of the values they promote.[313]

It is important to emphasize that the realist prescription for a contextual inquiry is mistaken for advocacy of ad-hoc judgments in every particular case. Indeed, a few realists do endorse this nominalistic approach.[314] Most realists, however, take a very different position.[315] They realize that the law's use of categories, concepts, and rules is unavoidable and even desirable. Nevertheless, they recommend that to benefit from the unique situation sense of lawyers, legal categorization should be critically examined, and legal categories should be relatively narrow.[316]

The realist commitment to reason and its complex plan for accommodating scientific and normative insights within legal professionalism premised on institutional constraints and practical wisdom imply that the existing doctrine is—and indeed should be—the starting point for analyzing legal questions. Realists, however, are always suspicious about the law's power and refuse to equate law with morality. For this reason, they do not essentialize existing doctrine and do not accord every existing rule overwhelming normative authority. In the realist conception of law, the appeal to existing doctrine is not, and should never be, the end of the legal analysis. For legal realists, then, the notion of legal evolution—the accommodation of tradition and progress—is not merely a sociological observation of the law. For realists, legal evolution is part of the law's answer to the tension between power and reason and the challenges of intelligibility and legitimacy. Accordingly, the realist conception of law is profoundly dynamic. Realists reject the legal positivist attempt to understand the law in static terms by sheer reference to such verifiable facts as the authoritative commands of a political superior or the collection of rules identified by a rule of recognition. The positivist quest for an

---

[312] Hessel E. Yntema, *The Rational Basis of Legal Science,* Columbia Law Review, Vol. 31, 1931, p. 925.
[313] Edwin W. Patterson, *Jurisprudence: Men and Ideas in the Law* (Brooklyn: The Foundation Press, 1953) pp. 552-553.
[314] Fred Rodell, *Woe Unto You, Lawyers!* (New York: Reynal & Hitchcock, 1939) pp. 169-174, 201-202.
[315] Andrew Altman, *The Legacy of Legal Realism: A Critique of Ackerman,* Legal Studies Forum, Vol. 10, 1986, pp. 167, 171-172.
[316] William W. Fisher III, *The Development of American Legal Theory and the Judicial Interpretation of the Bill of Rights, in* A Culture of Rights (Michael J. Lacey & Knud Haakonssen eds. 1993), pp. 266, 272-273, 275.

empirical pedigree is hopeless because the law is "a social process, not something that can be done or happen at a certain date."[317] In the realist conception, the law is "a going institution" that includes a host of people "running and ruling in courses somewhat channelled, with ideas and ideals somewhat controlled."[318] Therefore, rather than identifying the content of doctrinal rules at any given moment, a viable conception of law must focus on the dynamics of legal evolution.

In summarily dismissing the question of whether judges find the law or make it "meaningless," Llewellyn argues that "judges, in fact, do both at once." As noted, adjudication for Llewellyn is necessarily creative, at least in the sense of "the sharp or loose phrasing of the solving rule" and its "limitation or extension and… direction." However, this creativity is considerably constrained by the "given materials which come to [the judges] not only with content but with organization, which not only limit but guide, which strain and 'feel' in one direction rather than another and with one intensity rather than another and with one color and tone rather than another." Thus, the story of the law (at its best) is one of "on-going renovation of doctrine, but touch with the past is too close . . . the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform." For this reason, judicial decisions are "*found* and recognized, as well as *made.*"[319]

More specifically, Llewellyn describes an adjudicatory phenomenon he calls "the law of fitness and flavor." He observes that cases are decided with "a desire to move in accordance with the material as well as within it… to reveal the latent rather than impose new form, much less to obtrude an outside will". Llewellyn is *not* talking about following precedents, as he is careful to explain that no specific case generates this sense of flavour and fitness. Instead, it is the case law *system* that generates "a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration." The instant outcome and rule must "fit the flavor of the whole"; it must "think with the feel of the body of our law" and "go with the grain rather than across or against it."[320]

---

[317] John Dewey, *My Philosophy of Law,* in My Philosophy of Law: Credos of Sixteen American Scholars (Boston Law Book Co., 1941), pp. 73, 77.
[318] Karl L. Llewellyn, *My Philosophy of Law,* in My Philosophy of Law: Credos of Sixteen American Scholars (Boston Law Book Co., 1941), pp. 183-184.
[319] Karl L. Llewellyn, *Law and the Social Sciences,* in Jurisprudence: Realism in Theory and in Practice (1962), pp. 361-362.
[320] Karl L. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960), pp. 190-191, 222-223.

Indeed, the realist conservativism about the law—its acceptance of the legal past as both central and authoritative to the legal present—responds to the challenges of predictability and legitimacy. Thus, although judicial creativity is not limited to borderline cases but is instead "every day stuff, almost every-case stuff," tradition-determined lawyers can solve new cases in a way "much in harmony with those of other lawyers," as they are all trained to bring the solution to the new case into conformity with "the essence and spirit of existing law."[321] This "juristic method" rather than the formalist syllogistic reasoning from preexisting doctrinal concepts or rules constrain judges and explains how the bulk of the legal materials is predictable.

Moreover, the law cannot be understood merely by reference to its static elements (concepts and rules) for legal realists. Law is a doctrinal system in movement, "developed and interpreted and in continuous flux." Therefore, a viable conception of law must include "also those elements that direct and propel legal development."[322]

Legal realists give two reasons for incorporating and studying this dynamic dimension. The first follows their critique of the formalist idea of deriving solutions to new cases from preexisting concepts and rules. Realists recognize that the existing legal environment always leaves considerable interpretive leeway. They understand that as the shape of legal doctrines "is made and remade as its narrative continues to unfold… even apparently surprising lurches can be integrated seamlessly."[323] They thus accept Pound's claim that legal ideals inevitably play a "highly significant"—indeed an essential—role in the unfolding legal narrative "as the criteria for valuing claims, deciding upon the intrinsic merit of competing interpretations, choosing from among possible starting points of legal reasoning or competing analogies, and determining what is reasonable and just." [324]

As usual, it is Llewellyn who best sketches the dynamic dimension of the realist conception of law. For Llewellyn, the law involves "the constant questing for better and best law"; a relentless "reexamination and reworking of the heritage." Judges have the responsibility to move forward: the "duty to justice and adjustment," which means an "on-going production and improvement of rules." While these new rules are "to be built on and out of what the past can

[321] Karl L. Llewellyn, *The Case Law System in America* (Paul Gewirtz ed. Michael Alsandi trnsl. 1933, 1989), p. 77.
[322] Roger Cotterrell, *The Politics of Jurisprudence* (University of Pennsylvania Press, 1989), pp. 153-156.
[323] Don Herzog, *Poisoning the Minds of the Lower Orders* (Princeton University Press, 1998), p. 18.
[324] Roscoe Pound, *A Comparisons of Ideals in Law*, Harvard Law Review, Vol. 47, 1933, pp. 1, 2-3.

offer," they must also be forward-looking: they must be decided "with a feeling, explicit or implicit, of willingness, of readiness, to do the like again, if, as, and when a like case may arise."[325] Indeed, "blindness and woodedness and red tape and sheer stupidity… distortion to wrong ends [and] abuse for profit or favor" are part of the life of the law.

Nevertheless, these are always deemed to be disruptions, which are "desperately bad." And against them, there is "in every 'legal' structure… [an implicit] recognition of duty to make good"; not necessarily in every detail, but at the level of "the Whole of the system in net effect and especially in net intent." The law makes "necessary contact with justification" of itself at this level. This quest for justice—the demand of justification—is not just "an ethical demand upon the system (though it is [also] that)." Instead, it is "an element conceived to be always and strongly present in urge"; one that cannot be "negated by the most cynical egocentric whoever ran" the legal system.[326]

Indeed, the realist conception of law is both backwards-looking and forward-looking, constantly challenging the desirability of existing doctrines' normative underpinnings, their responsiveness to the social context in which they are situated, and their effectiveness in promoting their contextually-examined normative goals.

[325] Karl L. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960), pp. 36, 38, 217.
[326] Karl L. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method,* Yale Law Journal, Vol. 49, 1940, pp. 1355, 1385.

CONCLUSION

Common Law Wins, or: Legal Realism Prevails

We went on a long journey, both in time and in place. When it ended, it seems that the doctrine of "abuse of process" or "judicial stay of criminal proceedings" remained somewhat vague. The findings of this study suggest that the trial to "codify" or "constitutionalize" the doctrine – failed, both in the United Kingdom and Israel.

One might think that we could have expected such a result in the "homeland" of Common law (the United Kingdom) and less in a mixed legal system that pretended to move towards codification and constitutionalization (Israel). It is somewhat surprising that the judgments ruled on the matter in both systems share a commonality: most of them lack a theoretical and principal discussion that may become solid and deep foundations for the doctrine. It will be complicated for the doctrine to evolve and develop without these foundations. The "job" was left for the judges, on a case-by-case basis, a typical approach of the Common law, mainly based on legal realism.

It can thus be suggested that the constitutional "language" is almost entirely absent in Britain as a basis or a justification for using the doctrine.

In Israel, after "importing" the British doctrine as such, a serious effort has been made to give it a more legislative and even constitutional justification, using terminology taken from the constitutional theory of protecting human rights (especially human dignity) or from Administrative law. The present study raises the possibility that those efforts failed.
The years following the new JSOCP law's entry into force in Israel reveal a rather peculiar picture. When the legislator sets new norms, one may usually identify in the years that follow different periods and layers of reference and legal interpretation in the Supreme Court's ruling. However, in our case, the Supreme Court seems to have remained in the "period of ignoring", almost totally avoiding interpreting and analyzing the content and meaning of the new law and its legislative history.

The peculiarity is even more enhanced since the new law grants the court a vast and powerful jurisdiction in criminal cases, enabling it to exercise judicial discretion regarding the prosecution's considerations. Moreover, it turns the court into a more inquisitorial and meaningful player in the criminal proceeding, one that is able to decide whether the trial against the defendant is just and fair altogether. However, the court does not wish to take it even if the law grants it. How can that be, in view of the Israeli court's bold attitude in the past, a court that was not deterred from exercising strict judicial activism, including wide judicial criticism of government bodies, even though the law did not explicitly grant it this authority? When the legislator entrusts a powerful weapon to the court's hands, why is the court reluctant to use it? Would a possible answer be that the court has not made the required conceptual leap? It maintained the old conservative concept that deems the prosecution as the sole authority to decide whether a person should be prosecuted according to criminal law, and only once it has decided to do so, the court's role is to inquire and rule whether the defendant is innocent or guilty?
This answer does not seem right, as the new law wished to change precisely this old concept and set new legal standards concerning the defendant's human rights.

A second answer may be that the court prefers the "Law and Order" attitude, prioritizing fighting crime and defending society and its normative individuals. This state of mind may be prevalent among many judges, *inter alia,* due to the public and media's "buzz" or panic on "crime surge" and "rising crime levels".[327] However, this answer does not justify the fact that the new law and the legislator's intention are practically ignored.

[327] Such hysteria or panic is hardly justified since the data published annually in the last decade by the police and the Central Bureau of Statistics in Israel show that crime levels dropped in most offences despite population growth. For possible sociological explanations to the panic, see: Stanly Cohen, *Folk Devils and Moral Panics* (3rd ed., Routledge, 2002); Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd ed., Wiley-Blackwell, 2009). Moral panic is created following the definition of certain events as threatening the values of the society or the common interests of its members. The target audience is usually given partial, inaccurate, and even false information sensational and trending. Therefore, this phenomenon is developing among the public around a specific behaviour perceived as immoral and threatening society's basic values. In many cases, there is no empirical basis for the same hysteria, and the public response to the same behaviour is excessive and disproportionate in many cases. Panic is fueled by the media, which has a key role in raising awareness of risks and creating waves of fear and anxiety. This put pressure on both the legislature and the courts. This pressure can lead to biases and mistakes and reactions to the extension of criminal responsibility, over-enforcement, and aggravation of punishment. It can be said that any legal system is not immune from the phenomenon, and in Israel and the United Kingdom, the consequences of a moral-public panic around certain offences can also be identified. There is, as mentioned, an inherent danger in a panic that will lead to the result of excessive criminality.

A third answer may suggest that the court prefers an inquiry to find the truth over vague "justice and fairness" considerations; after all, it is the court's core role to hear witnesses, examine the evidence, and rule accordingly. This, I believe, is a narrow perception of the court's role and the interpretation of the term "truth". The court also serves general social goals, and if it concludes in a certain case that the defendant was wronged or that it would be unfair to conduct the trial against him or her (for reasons of discrimination, delay, breaching a commitment, etc.), it has the jurisdiction to dismiss the charges. For the prosecution, and more so for the felony victim (if the felony concerns a specific victim), the result will seem unjust in this individual case, and it is hard to deny this subjective feeling. However, injustice toward the victim may be waivered in order to do justice to the defendant. Similarly, essential values of justice and fairness for the defendant may outweigh the injustice caused by the fact that the factual truth of the case would not be revealed since the realization of these values conveys an essential social message regarding, *inter alia*, advisable norms of the authorities conduct, or a humane behaviour that respects the value of human dignity.

Even if we adopt the utilitarian approach, the power given to the court to exercise discretion more decisively and clearly should be advocated. Such an attitude will increase the public's trust in a prosecution whose considerations are subject to the court's scrutiny. Phrased differently, if the court itself decides that filing an indictment and conducting a criminal proceeding adhere to principles of justice and fairness, the whole procedure will be perceived as more legitimate. If the trial does not occur eventually and the court does not inquire into the case, we shall not say that the truth has lost. Instead, that a different truth has prevailed - that of the defendant. This truth sheds light on a different narrative, showing the injustice and unfairness caused to the defendant (and, more broadly, to common essential values).

Nailing down the JSOCP claim in an explicit law provision is, in some way, a "justice revolution" since it integrates values of justice and fairness into criminal law, even if the legislator chooses to do so by setting a test which is similar to one determined in previous judgments.

The constitutional status of the right to a fair proceeding should be reflected in the balance between opposing interests. This status will be derived from the fact that this right is acknowledged in the basic law: Human Dignity and Liberty, especially the human rights to dignity and personal liberty. The legislator's recognition of JSOCP is tantamount to the *de-*

facto fulfilment of the basic law. The power of the right to JSOCP does not turn it into an absolute right, but it gives it a heavy weapon to fight for primacy when required.

Nobody denies that the value of revealing the truth is acknowledged as a pivotal purpose of the criminal proceeding. Fighting crime, protecting public safety, and maintaining offence victims' rights are added to this value. On the flip side, there are values of justice and fairness toward suspects and defendants, the disregard of which may infringe on fundamental rights and cause serious harm to the public's trust in criminal proceedings fairness.

As seen, the doctrine had been evolving in the United Kingdom and later on in Israel before any law was passed. Initially, willingness to acknowledge JSOCP claims was presented only in exceptional cases, when the authority's demeanour was "a scandalous behavior that involves discrimination, oppression, and abuse of the defendant."[328] It continued in a more liberal approach which settled for recognizing the claim when it could not be ensured that the defendant would get a fair trial, or when the criminal proceeding would substantially harm the sense of justice and fairness".[329] The ruling evolution adhered to the British ruling approach, which started with the demand to prevent the defendant's abuse by the prosecution authorities and created a broader test that settles for the defendant's indication of "severely improper behaviour".[330]

The JSOCP doctrine requires, to some extent, that the court puts itself in the shoes of the prosecution in deciding to avoid an indictment or dismiss an existing one due to broad considerations of justice and fairness.

However, there is no reason for the court to refrain from doing so. The court was granted explicit permission to do so and had the duty to fulfil the purpose of the legislation while wisely balancing other interests of criminal law. This intricate balance should be based on the understanding that fulfilling the law without doing justice harms the defendant's personal interest and opposes the general public interest.

Executing the JSOCP doctrine necessitates a change in the mindset and past rooted fixations.

[328] The aforementioned *Yefet* test.
[329] The aforementioned *Borovitz* test.
[330] The aforementioned British case of *Looseley*.

Sometimes, the value of revealing the truth, in its classic meaning, should withdraw in the face of justice and fairness values.

I hope that this study adds to our understanding of the doctrine.

***

BIBLIOGRAPHY

Books (English)

Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006).

Paul Brand, *The Making of the Common Law* (Bloomsbury, 1992).

Tom Cambell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish, 2004).

Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, (2nd ed., Oxford Monographs on Criminal Law and Justice, Oxford, 2008).

Stanly Cohen, *Folk Devils and Moral Panics* (3rd ed., Routledge, 2002).

Roger Cotterrell, *The Politics of Jurisprudence* (University of Pennsylvania Press, 1989).

Brice Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007).

Catherine Dupré, *The Age of Dignity – Human Rights and Constitutionalism in Europe* (Hart, 2015).

Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2009).

Albert V. Dicey, *The Law of the Constitution* (Oxford University Press, J.W.F.Allison, ed., 2013).

Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London, 1962).

Lee Epstein, Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (Oxford University Press, 2005).

Nuno Garoupa, Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015).

Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd ed., Wiley-Blackwell, 2009).

Don Herzog, *Poisoning the Minds of the Lower Orders* (Princeton University Press, 1998).

Peter Leyland, *The Constitution of the United Kingdom – A Contextual Analysis* (Bloomsbury Publishing, 3rd ed., 2016).

Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials* (Albany, 1975).

Karl L. Llewellyn, *The Bramble Bush - Some Lectures on Law and Its Study* (Oxford University Press, 1930).

Karl L. Llewellyn, *The Case Law System in America* (Paul Gewirtz ed. Michael Alsandi trnsl. 1933, 1989).

Karl L. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960).

Karl N. Llewellyn, *Jurisprudence – Realism in Theory and Practice* (1962; Transaction edition – 2017) (Introduction by James J. Chriss).

Moshe Ma'oz, *Ottoman Reform in Syria and Palestine 1840-1861: The Impact of the Tanzimat on Politics and Society* (Oxford, 1968).

Menachem Mautner, *Law and the Culture of Israel* (Oxford, 2011).

Understanding Human Dignity (Christopher McCrudden, ed., Oxford University Press, 2013).

Barbara A. Misztal, *Trust in Modern Societies* (Polity Press, 1996).

Suzie Navot, *Constitutional Law in Israel* (2nd ed., Wolters Kluwer, 2016).

The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013).

Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

Edwin W. Patterson, *Jurisprudence: Men and Ideas in the Law* (Brooklyn: The Foundation Press, 1953).

Kelly Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (Asser Press and Springer, 2018).

Richard A. Posner, *How Judges Think* (Harvard University Press, 2008).

John Rawls, *A Theory of Justice* (Belknap Press, 2003).

Fred Rodell, *Woe Unto You, Lawyers!* (New York: Reynal & Hitchcock, 1939).

Israeli Constitutional Law in the Making (Gideon Sapir, Daphne Barak-Erez, Aharon Barak, eds., Bloomsbury, 2013).

Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge University Press, 1998).

Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford, 2005).

Mark Tushnet, *Taking Back the Constitution: Activist Judges and the Next Age of American Law* (Yale University Press, 2020).

Colin Wells, *Abuse of Process,* (3rd ed., Oxford, 2017).

David Young, Mark Summers, David Corker, *Abuse of Process in Criminal Proceedings,* (4th ed., Bloomsbury, 2016).

Books (Hebrew)

Yisgav Nakdimon, *Judicial Stays of Criminal Proceedings,* (2nd ed., Nevo, 2009) [Hebrew].

Boaz Sangero, *Self Defense in Criminal Law* (Nevo, 2000) [Hebrew].

Itzhak Zamir, *The Administrative Authority, volume B* (Nevo, 1996) [Hebrew].

Periodicals/Articles (English)

Andrew Altman, *The Legacy of Legal Realism: A Critique of Ackerman,* Legal Studies Forum, Vol. 10, 1986, p. 167.

Anthony V. Baker, *So Extraordinary, So Unprecedented an Authority: A Conceptual Reconsideration of the Singular Doctrine of Judicial Review,* Duquesne Law Review., Vol. 39, 2001, p. 729.

Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right,* in Understanding Human Dignity (Christopher McCrudden, ed., Oxford University Press, 2013), p. 361.

Aharon Barak, *Proportionality*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013), p. 738.

Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective,* Columbia Human Rights Law Review, Vol. 26, 1995, p. 309.

Ariel L. Bendor, Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional*

Culture, a New Judicial Review Model, American University International Law Review, Vol. 17, 2002, p. 683.

Anthony W. Bradley, Cesare Pinelli, *Parliamentarism*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 650.

Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and the Allocation of Body Parts,* Stanford Law Review, Vol. 55, 2003, p. 2113.

Tom Campbell, *Human Rights: A Culture of Controversy,* Journal of Law & Society, Vol. 26, 1999, p. 6.

Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply,* European Journal of International Law, Vol. 19, 2008, p. 931.

Paolo G. Carozza, *Human Rights, Human Dignity, and Human Experience,* in Understanding Human Dignity (Christopher McCrudden, ed., Oxford University Press, 2013), p. 615.

Michael Curtis, *The Government of Great Britain,* in Introduction to Comparative Government (4th. ed., 1997) p. 48.

Hanoch Dagan, *The Realist Conception of Law,* University of Toronto Law Journal, Vol. 57(3), 2007, p. 607.

Rachel Davis, George Williams, *Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia*, 27 Melbourne University Law Review, Vol. 27, 2003, p. 819.

Erin F. Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom*, International Journal of Constitutional Law, Vol. 14, 2016, p. 752.

John Dewey, *My Philosophy of Law,* in My Philosophy of Law: Credos of Sixteen American Scholars (Boston Law Book Co., 1941), p. 73.

John Dewey, *Logical Method and Law,* in American Legal Realism (William W. Fisher III, Morton J. Horwitz, Thomas A. Reed, eds., Oxford University Press, 1993), p. 185.

Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights,* American Political Science Review, Vol. 76, 1982, p. 303.

Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements,* The American Journal of Comparative Law, Vol. 53, 2005, p 101.

Keith. D. Ewing, *The Human Rights Act and Parliamentary Democracy,* Modern Law Review, Vol. 62, 1999, p. 79.

David Feldman, *The Human Rights Act 1998 and the Constitutional Principles,* Legal Studies, Vol. 19, 1999, p. 165.

William W. Fisher III, *The Development of American Legal Theory and the Judicial Interpretation of the Bill of Rights, in* A Culture of Rights (Michael J. Lacey & Knud Haakonssen eds., 1993), p. 266.

Ruth Gavison, *The Controversy over Israel's Bill of Rights,* Israel Yearbook of Human Rights, Vol. 15, 1985, p. 113.

Dieter Grimm, *Types of Constitutions,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 106.

Steven Gunn, *Political History, New Monarchy and State Formation: Henry VII in European Perspective*, Historical Research, Vol. 82, 2009, p. 380.

Miriam Gur-Arye, Thomas Weigend, *Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspective,* Israel Law Review, Vol. 44, 2011, p. 63.

Miriam Gur-Arye, *Human Dignity of 'Offenders': A Limitation on Substantive Criminal Law,* Criminal Law and Philosophy, Vol. 6, 2012, p. 187.

Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 1340.

H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Nobel Dream,* Georgia Law Review, Vol. 11, 1977, p. 969.

Kenneth M. Holland, *Introduction*, in Judicial Activism in Comparative Perspective (Palgrave Mcmillan, 1991), p.1.

Tatjana Hörnle, Mordechai Kremnitzer, *Human Dignity as a Protected Interest in Criminal Law,* Israel Law Review, Vol. 44, 2011, p. 143.

Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters,* in Israeli Constitutional Law in the Making (Gideon Sapir, Daphne Barak-Erez, Aharon Barak, eds., Bloomsbury, 2013), p. 267.

Murray Hunt, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession,* Journal of Law & Society, Vol. 26, 1999, p. 86.

Lord Irvine of Lairg, *Sovereignty in Comparative Perspective*, New York University Law Review, Vol. 76, 2001, p. 1.

Gary Jeffrey Jacobsohn, *Constitutional Values and Principles,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 781.

Gareth Jones, *Should Judges Be Politicians?: The English Experience,* Indiana Law Journal, Vol. 57, 1982, p. 211.

Harry W. Jones, *Law and Morality in the Perspective of Legal Realism,* Columbia Law Review, Vol. 61, 1961, p. 799.

Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, Loyola Law Review, Vol. 69, 2016, p. 660.

Juliane Kokott, Martin Kaspar, *Ensuring Constitutional Efficacy*, in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 797.

Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy*, International Journal of Constitutional Law, Vol. 12, 2014, p. 525.

Jan Komarek, *National Constitutional Courts in the European Constitutional Democracy: A Rejoinder*, International Journal of Constitutional Law, Vol. 15 (3), 2017, p. 815.

Herbert M. Kritzer, *Courts, Justice, and Politics in England,* in Courts, Law, and Politics in Comparative Perspective (Yale University Press, 1996), p. 81.

Anthony T. Kronman, *Jurisprudential Responses to Legal Realism,* Cornell Law Review, Vol. 73, 1988, p. 335.

Ian Leigh, Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act,* Cambridge Law Journal, Vol. 58, 1999, p. 509.

Assaf Likhovski, *In Our Image: Colonial Dis*course *and the Anglicization of the Law of Mandatory Palestine,* Israel Law Review, Vol. 24, 1995, p. 291.

Assaf Likhovski, *The Ottoman Legacy of Israeli Law*, Annales de la Faculté de Droit d'Istanbul, Vol. 39, 2007, p. 71.

Karl L. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method,* Yale Law Journal, Vol. 49, 1940, p. 1355.

Karl L. Llewellyn, *My Philosophy of Law,* in My Philosophy of Law: Credos of Sixteen American Scholars (Boston Law Book Co., 1941), p. 183.

Karl L. Llewellyn, *On the Good, the True, the Beautiful in Law,* in Jurisprudence: Realism in Theory and in Practice (1962), p. 167.

Tobias Lock, *Human Rights Law in the UK After Brexit*, Public Law, Vol. Nov. 2017, p. 117.

Matthias Mahlmann, *Human Dignity and Autonomy in Modern Constitutional Orders,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013), p. 370.

Kate Malleson, Introduction, in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Kate Malleson & Peter H. Russell eds., 2005), p. 3.

Asher Maoz, *Defending Civil Liberties Without a Constitution-The Israeli Experience*, Melbourne University Law Review, Vol. 16, 1988, p. 815.

Geoffrey Marshall, *Two Kinds of Compatibility: More About Section 3 of the Human Rights Act 1998,* Public Law, Vol. 3, 1999, p. 377.

Jenny S. Martinez, *Horizontal Structuring,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 570.

Peter McCormick, *Judging Selection: Appointing Canadian Judges*, Windsor Yearbook of Access to Justice, Vol. 30, 2012, p. 39.

Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights,* European Journal of International Law, Vol. 19, 2008, p. 655.

Michael Meyer, *Dignity as a (Modern) Virtue,* in The Concept of Human Dignity in Human Rights Discourse (David Kretzmer, Eckart Klein, eds., 2002), p. 196.

Vernon Valentine Palmer, Introduction to the Mixed Jurisdictions, in *Mixed Jurisdictions Worldwide: The Third Legal Family* (Vernon Valentine Palmer ed., 2nd ed., 2012) p. 3.

Richard H. Pildes, *Forms of Formalism,* University of Chicago Law Review, Vol. 66, 1999, p.

607.

Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, Harvard Law Review, Vol. 24(8), 1911, p 591.

Roscoe Pound, *A Comparisons of Ideals in Law*, Harvard Law Review, Vol. 47, 1933, p. 1.

Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain,* Loyola of Los Angeles International and Comparative Law Review, Vol. 22, 2000, p. 357.

Terence Ranger, *The Invention of Tradition in Colonial Africa*, in The Innovation of Tradition (Eric Hobsbawn, Terence Ranger, eds., Cambridge, 1992), p. 211.

Neomi Rao, *Three Concepts of Dignity in Constitutional Law,* Notre Dame Law Review, Vol. 86, 2011, p. 183.

Jonathan Rogers, *The Boundaries of Abuse of Process in Criminal Trials,* Current legal problems, Vol. 61 (1), 2008, p. 289.

Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact,* Capital University Law Review, Vol. 21, 1992, p. 1.

Zeev Segal, *Judicial Activism Vis-a-Vis Judicial Restraint: An Israeli Viewpoint*, Tulsa Law Review, vol. 47, no. 2, 2011, p. 319.

Yoram Shachar, *History and Sources of Israeli Law,* in Introduction to the Law of Israel (Amos Shapira, Keren DeWitt-Adar, eds., The Hague, 1995), p.1.

Yoram Shachar, *The Dialectics of Zionism and Democracy in the Law of Mandatory Palestine,* in The History of Law in a Multicultural Society: Israel 1917-1967 (Ron Haris, Alexandre Kedar, Pnina Lahav, Assaf Likhovski, eds., Dartmouth, 2002), p. 95.

Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, Temple Law

Quarterly, Vol. 56, 1983, p. 417.

Dean Spielmann, *Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, ed., 2013), p. 1234.

Christopher L. Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative,* Law & Society Review, Vol. 34, 2000, p. 911.

Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review,* Texas Law Review, Vol. 82, 2004, p. 1895.

Wim Voermans, *Councils for the Judiciary in Europe*, Tilburg Law Review, Vol. 8, 2000, p. 121.

Richard Vogler, *Due Process,* in The Oxford Handbook of Comparative Constitutional Law (Michael Rosenfeld, András Sajó, eds., 2013), p. 929.

Mary L. Volcansek, *Appointing Judges the European Way*, Fordham Urban Law Journal, Vol. 34, 2007, p. 372.

Jeremy Waldron, *Judicial Power and Popular Sovereignty,* in Marbury v. Madison: Documents and Commentary (CQ Press, 2002), p. 181.

David Williams, *The Courts and Legislation: Anglo-American Contrasts,* Indiana Journal of Global Legal Studies, Vol. 8, 2001, p. 323.

Uri Yadin, *Reception and Rejection of English Law in Israel,* International and Comparative Law Quarterly, Vol. 11, 1962, p. 59.

Hessel E. Yntema, *The Rational Basis of Legal Science,* Columbia Law Review, Vol. 31, 1931, p. 925.

Hessel E. Yntema, *Jurisprudence on Parade,* Michigan Law Review, Vol. 39, 1941, p. 1154.

James Young, *The Politics of the Human Rights Act,* Journal of Law & Society, Vol. 26, 1999, p. 27.

James Zagel, Adam Winkler, *The Independence of Judges*, Mercer Law Review, Vol. 46, 1995, p. 795.

Markus B. Zimmer, *Judicial System Institutional Frameworks: An Overview of the Interplay between Self-Governance and Independence*, 2011 Utah Law Review, 2011, p. 121.

Periodicals/Articles (Hebrew)

Aharon Barak, *On Justice, Judgement and Truth*, Mishpatim, Vol. 27, 1996, p. 5 [Hebrew];

Dafna Barak-Erez, *Relative Nullity and judicial discretion*, Mishpatim Vol. 24, 1995, p. 519 [Hebrew].

Dalia Dorner, *The Impact of The Basic Law: Human Dignity and Liberty on arrest laws*, Mishpat U-Mimshal, Vol. 4, 1997, p. 13 [Hebrew].

Yoav Dotan, *Instead of Relative Nullity*, Mishpatim Vol. 22, 1994, p. 587 [Hebrew].

Avi Levy, *The Power of Military Courts to Convert Charges for Reasons of Justice*, Mishpat Ve'Tzava, Vol. 16, 2003, p. 505 [Hebrew].

Mordechai Levy, *More on the Substance of the Doctrine of Judicial Stay and on the Test for its Acceptance Before and After the Judgment in Borovitz,* Hamishpat Vol. 10, 2005, p. 353 [Hebrew].

Boaz Okun, Oded Shaham, *Due Process and Judicial Stay,* Hamishpat, Vol. 3, 1996, p. 265 [Hebrew].

Assaf Porat, *Judicial Stay of Criminal Proceedings in the Constitutional Era*, Kiryat Hamishpat, Vol. 1, 2001, p. 381 [Hebrew].

Nina Saltzman, *Factual Truth and Judicial Truth - Concealment of Information from A Court To Protect Social Values*, Iyunei Mishpat Vol. 24, 2001, p. 263 [Hebrew].

Statutory Instruments

Basic Law: Freedom of Occupation (Israel). An English version is available at: https://knesset.gov.il/review/data/eng/law/kns13_basiclaw_occupation_eng.pdf

Basic Law: The Government (Israel). An English version is available at: https://www.mfa.gov.il/MFA/MFA-Archive/2001/Pages/Basic%20Law-%20The%20Government%20-2001-.aspx

Basic Law: Human Dignity and Liberty (Israel). An English version is available at: https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx

Basic Law: The Judiciary (Israel). An English version is available at: https://www.mfa.gov.il/MFA/MFA-Archive/1980-1989/Pages/Basic%20Law-%20The%20Judiciary.aspx

Basic Law: The Knesset (Israel). An English version is available at: https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheKnesset.pdf

The Courts Law [consolidated version], 1984 (Israel) [Hebrew].

The Declaration of Independence (Israel). An English version is available at: https://main.knesset.gov.il/en/about/pages/declaration.aspx

The European Convention on Human Rights: https://www.echr.coe.int/Documents/Convention_ENG.pdf

The Freedom of Information Law, 1998 [Israel]. An English Version is available at: https://www.wipo.int/edocs/lexdocs/laws/en/il/il083en.pdf

The Human Rights Act 1998 (UK):
https://www.legislation.gov.United Kingdom/United Kingdompga/1998/42

Court cases (UK)

A, B, X and Y v East Sussex County Council [2003] EWHC 167.

A-G's Reference (No. 1 of 1990) [1992] 3 W.L.R. 9.

A-G of Trinidad and Tobago v Phillip [1995] 1 All E.R. 935.

Ali v C.P.S. [2007] Crim 691.

Bell v D.P.P. of Jamaica [1985] A.C. 937.

Bennett v Horseferry Road Magistrates' Court [1993] 3 All E.R. 138.

Clay v Clerk to the Justices [2014] EWHC 321 (Admin).

Clayton and Dockerty v R [2014] EWCA Crim 1030.

Connelly v D.P.P. [1964] 2 All E.R. 401.

Crawley, Walker, Forsyth, Petrou and Daley [2014] EWCA Crim 1028.

D.P.P. v Cooper [2008] EWHC 507 (Admin).

D.P.P. v Humphrys [1976] 2 All E.R. 497.

Jones v Whalley [2006] UKHL 41.

R v Abu Hamza [2006] EWCA Crim 2918, [2007] 3 All ER 451.

R v Antoine [2014] EWCA Crim 1971.

R. v Beardall [2006] EWCA Crim 577.

R v Beckford [1996] 1 Cr. App. R. 94.

R v Beedie [1997] 2 Cr. App. R. 167.

R v Bigley [2001] EWCA Crim 3012, [2001] All ER 253.

R v Birmingham [1992] Crim. L.R. 117.

R v Croydon Justices, exp. Dean [1993] 3 All E.R. 129.

R v D [1984] 1 All E.R. 574.

R v Derby Crown Court, exp. Brooks [1985] 80 Cr. App. R. 164.

R v Dowty [2011] EWCA Crim 3138.

R. v Grant [2005] EWCA Crim 1089.

R. v Harmes [2006] EWCA Crim 928.

R v Jones [2010] EWCA Crim 925.

R v Khachik [2006] EWCA Crim 1272.

R v Killick [2011] EWCA Crim 1608.

R v Latif [1996] 1 All E.R. 353.

R v Looseley [2001] 4 All E.R. 897.

R v M [2011] EWCA Crim 648.

R v Marriner [2002] EWCA Crim 2855.

R v Martin [1998] 1 Cr. App. R. 347.

R v Maxwell (6.3.1995, Unreported).

R v Moon [2004] EWCA Crim 2872.

R v Moore [2013] EWCA Crim 85.

R v Mullen [1999] 2 Cr. App. R. 143.

R v Reade (19.10.1993, Unreported).

R v Taylor [2013] EWCA Crim 2398.

R v West London Magistrate, exp. Anderson [1984] 80 Cr. App. R. 143.

Stock v Frank Jones (Tipton) Ltd. [1978] 1 WLR 231, 239.

Warren v the Attorney General of Jersey [2012] 1 AC 22.

Court cases (Israel)

Crim. App. 5975/14 *Agbaria v the State of Israel* (31.12.2015) [Hebrew].

H.C.J. 47/83 *Air Tour (Israel) Ltd. v Chairman of the Supervisory Antitrust Council* (14.2.1985) [Hebrew].

Further Criminal Hearing (F.C.H.) 9384/01 *Alnassasra v. the Bar Association* (15.11.2004) [Hebrew].

Crim. App. 459/12 *Amara v the State of Israel* (13.3.2013) [Hebrew].

Criminal special request 19/06 *Anonymous v the State of Israel* (26.1.2006) [Hebrew].

H.C.J. 2477/07 *Anonymous v. the State Attorney* (27.5.2007) [Hebrew].

H.C.J. 5961/07 *Anonymous v. the State Attorney* P.D. 62(3) 206 (2007) [Hebrew].

Crim. App. 2648/18 *Anonymous v the State of Israel* (19.3.2020) [Hebrew].

Crim. App. 450/77 *Ba'al Taksa v the State of Israel***,** P.D. 32 (2) 152 (1978) [Hebrew].

H.C.J. 2911/94 *Baki v the General Manager of the Ministry of Interior*, P.D. 48(5) 291 (1994) [Hebrew].

Retrial Req. 3032/99 *Barranes v the State of Israel* (14.3.2002) [Hebrew].

Crim. App. 3507/19 *Burkan v the State of Israel* (3.12.2020) [Hebrew].

Military District Court- South, file 141/05 *Chief Military Prosecutor v Sharkawi* (29.3.2006) [Hebrew].

App. 52/06 *Chief Military Prosecutor v Sharkawi* (21.6.2007) [Hebrew].

Crim. App. 7391/19 *Cohen v the State of Israel* (25.8.2020) [Hebrew].

H.C.J. 366/03 *Commitment to Peace and Social Justice NPO v the Minister of Finance* P.D. 60(3) 464 (2005) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/commitment-peace-and-social-justice-society-v-minister-finance

H.C.J. 3483/05 *D.B.S. Satellite Services (1998) Ltd. v the Minister of Communication* (9.9.2007) [Hebrew].

Crim. App. 4988/08 *Farhi v the State of Israel* P.D. 65(1) 626 (2011) [Hebrew].

H.C.J. 935/89 *Ganor v The AG,* 44(2) PD 485 (1990) [Hebrew].

Crim. App. 2413/99 *Gispan v Chief Military Prosecutor*, P.D. 55(4) 673 (2001) [Hebrew].

Crim. special request 537/95 *Gnimat v the State of Israel*, P.D. 49(3) 355, 412 (1995) [Hebrew].

A.C.H. 2316/95 *Gnimat v the State of Israel*, P.D. 49(4) 589 (1995) [Hebrew].

Crim. App. 7621/14 *Gotsdiner v The State of Israel* (1.3.2017) [Hebrew].

Civ. App. 541/66 *Goldman v Goldman*, P.D. 21(2) 113, 119 (1967) [Hebrew].

Crim. App. 7955/10 *Haladi v the State of Israel* (8.8.2011) [Hebrew].

Bar Association App. 2531/01 *Hermon v The District Committee of the Bar Association*, P.D. 58(4) 55 (2004) [Hebrew].

Crim. App. Req. 1498/07 *Hirscberg v the State of Israel* (18.3.2007) [Hebrew].

H.C.J. 3434/96 *Hoponong v the Knesset Chairman*, P.D. 50(3) 57 (1996) [Hebrew].

Crim. App. 5124/08 *Jaber v the State of Israel* (4.7.2011) [Hebrew].

Crim. App. 1201/12 *Katii v the State of Israel* (9.1.2014) [Hebrew].

H.C.J. 1563/96 *Katz v the Attorney General*, P.D. 45 (1) 429 (1997) [Hebrew].

Crim. App. 3372/11 *Katzav v the State of Israel* (10.11.2011) [Hebrew].

Crim. App. (Tel-Aviv District Court) 80044/05 *Kershin v the State of Israel* (29.3.2007) [Hebrew].

H.C.J. 5319/97 *Kogen v Chief Military Prosecutor*, P.D. 51 (5) 67 (1997) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/kogen-v-chief-military-prosecutor

H.C.J. 73/53 *Kol Ha'am v Minister of the Interior*, 7 P.D. 871 (1953) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior

H.C.J. 3495/06 *The Chief Rabbi of Israel Yona Metzger v the Attorney General* (30.7.2007) [Hebrew].

Crim. App. 2498/07 *Mekorot Water Company Ltd. v Bar* (27.6.2007) [Hebrew].

Appeal 2631/11 (the Military Court of Appeals) *The Military Prosecution v Haj* (6.5.2013) [Hebrew].

Crim. App. (Tel-Aviv district court) 80034/04 *Mishkenot Hadar Ltd. v the State of Israel* (19.2.2007) [Hebrew].

Crim. App. 4562/11 *Mohtasab v the State of Israel* (7.3.2013) [Hebrew].

H.C.J. 7067/07 *Nethanel Ltd. v the Minister of Justice* (30.8.2007) [Hebrew].

H.C.J. 9131/05 *Nir-Am Cohen v the State of Israel* (7.2.2006) [Hebrew].

Crim. App. 7376/10 *Novak v the Attorney General* (16.5.2011) [Hebrew].

H.C.J. 547/84 *Of Haemek Agricultural Society v. Ramat-Yishai Local Council* (20.1.1986) [Hebrew].

Crim. App. 1430/11 *Plotnik v the State of Israel* (23.3.2011) [Hebrew].

Crim. App. 244/73 *Raber v the State of Israel*, P.D. 28 (1) 798 (1974) [Hebrew].

Crim. App. 4596/05 *Rosenstein v the State of Israel* (30.11.2005) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/rosenstein-v-state-israel

Crim. Req. 5387/20 *Rotem v the State of Israel* (15.12.2021) [Hebrew].

Crim. App. 333/10 *Serenco v the State of Israel* (28.10.2010) [Hebrew].

Crim. App. 1856/10 *Sfia v the State of Israel* (22.11.2010) [Hebrew].

Crim. App. 959/15 *Shalby v The State of Israel* (10.2.2015) [Hebrew].

Crim. App. 6024/97 *Shavit v Kadisha Association in Rishon-Lezion*, P.D. 53(3) 600 (1999) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/shavit-v-rishon-lezion-jewish-burial-society

Crim. App. 486/16 *Shirazi v the State of Israel* (13.9.2018) [Hebrew].

Crim. App. 1551/15 *Shuly v the State of Israel* (6.9.2016) [Hebrew].

Crim. Case (Tiberius) 2309/04 *the State of Israel v Bachar* (8.6.2005) [Hebrew].

Crim. App. 4855/02 *the State of Israel v Borovitz*, P.D. 59 (6) 776 (2005) [Hebrew].

Crim. App. 3899/04 *the State of Israel v Even Zohar* (1.5.2006) [Hebrew].

Crim. Case (Haifa) 1999/00 *the State of Israel v Halbi* (27.5.2007) [Hebrew].

Crim. App. 536/79 the *State of Israel v Kadosh* P.D. 84 34(2) 552, 556 (1980) [Hebrew].

Crim. Case (Tel-Aviv district labour court) 112/01 *the State of Israel v Keshet Hyper-Toy* (2007) [Hebrew].

Crim. App. 7014/06 *the State of Israel v Limor* (4.9.2007) [Hebrew].

Crim. App. (Haifa District court) 488/05 *the State of Israel v Maccabi Kiryat Motzkin* (9.7.2006) [Hebrew].

Crim. App. 6328/12 *the State of Israel v Peretz* (9.9.2013) [Hebrew].

Crim. App. 2736/11 *the State of Israel v Perlmutter* (24.7.2011) [Hebrew].

Crim. App. 7052/18 *the State of Israel v Rotem* (5.5.2020) [Hebrew].

Crim .App. (district court in Haifa) 2400/07 *the State of Israel v Uzana* (23.10.2007) [Hebrew].

Crim. App. 1611/16 *the State of Israel v Vardi* (31.10.2018) [Hebrew].

Crim. App. 5672/05 *Teger v the State of Israel* (21.10.2007) [Hebrew].

Crim. App. 1292/06 *Thork v the State of Israel* (20.7.2009) [Hebrew].

H.C.J. 6976/04 *Tnu La-Hayot Lihyot NPO v the Minister of Agriculture* (1.9.2005) [Hebrew].

Civil App. 6821/93 *United Mizrahi Bank Ltd. v Migdal Cooperative Village*, 49(4) PD, p. 222 (1995) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village

Crim. App. 10715/08 *Wallace v the State of Israel* (1.9.2009) [Hebrew].

Crim. App. 2910/94 *Yefet v the State of Israel*, P.D. 50 (2) 221 (1996) [Hebrew].

Crim. App. 5121/98 *Yissaharov v Chief Military Prosecutor*, P.D. 61(1) 461 (2006) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/yissacharov-v-chief-military-prosecutor

Crim. App. 77/88 *Zimerman v the Minister of Health*, P.D. 43(4) 63, 72 (1989) [Hebrew].

Crim. App. 307/17 *Zonanshvili v The State of Israel* (21.3.2017) [Hebrew].

Court cases (USA)

Marbury v Madison, 5 U.S. 137 (1803).

Other sources/Miscellaneous

Michal Bobek & David Kosaˇr, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* (Research Paper in Law, College of Europe, 2013).

Budapest Resolution of the General Assembly of the European Network of Councils for the Judiciary (May 21-23, 2008).

Council of Europe*, Judges: Independence, Efficiency and Responsibilities* (Recommendation CM/Rec (2010) 12, November 17, 2010).

Directives of the Attorney General, directive no. 4.3030 on a stay of proceedings (1984; updates: 2001, 2003) [Hebrew].

European Commission for Democracy Through Law (Venice Commission), *The Composition of Constitutional Courts* (1997).

European Network of Councils for the Judiciary, *Independence and Accountability of the Judiciary and the Prosecution: Improving the Performance Indicators and Quality of Justice* (ENCJ Report 2015-2016, June 3, 2016).

The General Assembly of the European Network of Councils for the Judiciary, *The Sofia Declaration on Judicial Independence and Accountability* (June 2013).

Tom Ginsburg, *Judicial Appointments and Judicial Independence* (Paper written for the US Institute for Peace, January (2009).
Available at: http://comparativeConstitutionsproject.org/files/judicial_appointments.pdf

IBA Minimum Standards of Judicial Independence (Adopted 1982), Art. 22:

https://www.ibanet.org/MediaHandler?id=bb019013-52b1-427c-ad25-a6409b49fe29

The Montreal Universal Declaration on the Independence of Justice (10 June 1983), Art. 2.20: https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf

Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (The British Institute of International and Comparative Law, 2015).

Wim Voermans, Pim Albers, *Councils for the Judiciary in EU countries* (Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), Strasbourg, 2003).