

# DEFENDING CIVIL LIBERTIES WITHOUT A CONSTITUTION — THE ISRAELI EXPERIENCE

BY DR ASHER MAOZ\*

[The question of whether civil liberties should be safeguarded by a constitution stirs much controversy in many countries, including Australia. The main argument in favour of a Bill of Rights is that it is essential in order to enable the courts to enforce those liberties.

In this article the author analyses the means by which the Supreme Court of Israel succeeded in preserving individual rights and freedoms in the absence of such a Bill. He emphasizes the high standard of those rights in Israel in spite of its state of emergency and describes the techniques employed by the Supreme Court in achieving that goal.

In an addendum to this article the author presents a proposed Bill of Rights which forms a part of the proposed Constitution for the State of Israel, drafted by a group from the Tel Aviv University Faculty of Law, of which he was a member.]

In an International Symposium on Human Rights held in 1971, Professor Allan Dershowitz of Harvard Law School made the following remark:

Times of crisis test the depth of a people's commitment to civil liberties. Nations whose fundamental laws proclaim freedom during times of normalcy often see these protections virtually erased by the exigencies of external or internal danger.<sup>1</sup>

Borrowing Professor Dershowitz's words, it would be accurate to state that Israel has never experienced 'times of normalcy'. It would be wrong to describe Israel as having fought just six wars since its establishment forty years ago. Israel should instead be described as being in a state of constant war, with six major and endless smaller battles, for the last four decades.<sup>2</sup>

Just hours after its Declaration of Independence the young State was invaded by seven neighbouring countries. Israel is still surrounded by those confrontation States except on the Western border which is partly coastline and partly neighbouring with Egypt, the only Arab State to have signed a peace treaty with Israel. It is no wonder that one writer described the State of Israel as 'a democracy under siege'.<sup>3</sup>

How did Israel pass this 'test of the depth of [its] commitment to civil liberties'? To answer this question let us turn again to Professor Dershowitz. After thoroughly examining the Israeli arena *vis-à-vis* American history, from the suspension of the Bill of Rights by President Lincoln up to the confinement of all

\* LL.B., LL.M. (Jerusalem), M.Comp.L. (Chicago), J.S.D. (Tel-Aviv), Tel-Aviv University Faculty of Law; Editor, 'Tel Aviv University Law Review'. I wish to express my sincere appreciation to my colleagues at the Faculty of Law at Monash University. Their interest and cooperation during my sabbatical visit in 1987 were invaluable in the writing of this article.

<sup>1</sup> Dershowitz, A.M., 'Preventive Detention of Citizens During a National Emergency — A Comparison between Israel and the United States' (1971) 1 *Israeli Yearbook of Human Rights* 295.

<sup>2</sup> Cf. Rubinstein, A., 'State Security and Human Rights: The Israeli Experience' in *Human Rights: The Capetown Conference* (1979) 138; Angel, M., 'Constitutional Judicial Review of Legislation: A Comparative Law Symposium' (1983) 56 *Temple Legal Quarterly* 287, 292. On 21 May 1948 the Provisional State Council, the predecessor of the *Knesset*, proclaimed a state emergency; [1948] *Iton Rishmi — Official Gazette* (No. 2) 6. This proclamation is still in force.

<sup>3</sup> Bracha, B., 'The Protection of Human Rights in Israel' (1982) 12 *Israeli Yearbook of Human Rights* 110; cf. Meron, T., 'West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition' (1979) 9 *Israeli Yearbook of Human Rights* 106.

Americans of Japanese origin during World War II with the blessing of the then Attorney-General of California, Earl Warren, Professor Dershowitz concluded:

Indeed, what the world must come to realize is that no country throughout recorded history has ever exposed its wartime population to so much risk in the interest of civil liberties.<sup>4</sup>

Who deserves the credit for this unique phenomenon?

Not the legislature. The Israeli Parliament, the *Knesset*, has not done much in this area. Indeed, there is very little that parliaments all around the world do to protect civil liberties. The 'reasonable legislature' — if I may borrow an expression from another area of law — is mainly preoccupied with daily legislation. Such tasks call for the curtailment of individual rights rather than for their expansion.

To be precise, the *Knesset* did pass some significant beneficial legislation. As early as 1951 the *Knesset* enacted the Women's Equal Rights Law,<sup>5</sup> years before older democracies did so. It enacted equal opportunities laws,<sup>6</sup> children's protection laws,<sup>7</sup> social security rights,<sup>8</sup> the right to free education,<sup>9</sup> academic freedom,<sup>10</sup> the right to privacy,<sup>11</sup> the burden of the administration to reason its decisions,<sup>12</sup> the judicial scrutiny of State security privileged evidence,<sup>13</sup> the curtailment of the State's immunity in the domain of private law<sup>14</sup> and several other relevant enactments.

Yet in the main the area of civil liberties is still covered by oppressive English colonial enactments. It is hard to find any recognition of human rights in British Mandatory Ordinances. They rather deny such rights. Thus, under Mandatory enactments — still prevailing in the State of Israel<sup>15</sup> — basic rights, such as the

<sup>4</sup> Dershowitz, *op. cit.* n. 1, 321. Cf. Israeli, R., and Ehrenfeld, R., 'Between the Peak and the Pit. Human Rights in Israel' (1986-87) 13 *Syr. J. Int'l L. & Com.* 403, 412-3.

<sup>5</sup> 5 *L.S.I.* (Laws of the State of Israel: an authorized English translation of the *Knesset's* legislation) 171. See also Male and Female Workers (Equal Pay) Law, 1964, 18 *L.S.I.* 165, as amended in 27 *L.S.I.* 221; cf. 3/71 *Elite v. Lederman* P.D.A. (Labour Court Cases) 9, 225 and Raday, F., 'Equality of Women Under Israeli Law' (1983) 27 *Jerusalem Quarterly* 81; Benson, M., 'Equal Pay for Work of Equal Value' (1985) 15 *Israeli Yearbook of Human Rights* 66.

<sup>6</sup> Employment (Equal Opportunities) Law, 1988. *Sefer Hahukim* (Hebrew Official Statute Book) 38, following the Employment (Equal Opportunities) Law, 1981, 35 *L.S.I.* 350. See also the statutes cited *supra* n. 5.

<sup>7</sup> Apprenticeship Law, 1953, 7 *L.S.I.* 86 and Youth Labour Law, 1953, 7 *L.S.I.* 94.

<sup>8</sup> Welfare Services law, 1958, 12 *L.S.I.* 120; Severance Pay Law, 1963, 17 *L.S.I.* 161; National Insurance Law (Consolidated Version), 1968, 22 *L.S.I.* 114; Maintenance (Assurance of Payment) Law, 1972, 26 *L.S.I.* 114; Maintenance (Assurance of Payment) Law, 1972, 26 *L.S.I.* 103; Legal Aid Law, 1972, 26 *L.S.I.* 115; Assurance of Income Law, 1980, 35 *L.S.I.* 28.

<sup>9</sup> Compulsory Education Law, 1949, 3 *L.S.I.* 125; State Education Law, 1953, 7 *L.S.I.* 113.

<sup>10</sup> Council for Higher Education Law, 1958, 12 *L.S.I.* 217.

<sup>11</sup> Protection of Privacy Law, 1981, 35 *L.S.I.* 136 and Secret Monitoring Law, 1979, 33 *L.S.I.* 141. On these laws see Zaltzman, N., 'The Israeli Approach to Evidence Obtained in Violation of the Right to Privacy' (1983) 18 *Israel Law Review* 215; Zaltzman, N., 'The Consequences of Secret Monitoring in Criminal Proceedings' in Goldstein, S. (ed.), *Israeli Reports to the XII International Congress of Comparative Law* (1986) 368.

<sup>12</sup> Administrative Procedure Amendment (Statement of Reasons) Law, 1958, 13 *L.S.I.* 7.

<sup>13</sup> Evidence Ordinance (New Version) 1971, 2 *L.S.I.* (N.V.) 198, ss 44-6. See also Harmon, E., *The Law of Evidence* (1977) Part II, s. 19.3 (Hebrew); Ginossar, S., 'Can Political Agitation in the Dock be Stifled on the Ground of State Privilege?' (1974) 9 *Israel Law Review* 437; Rubin, Y., 'The Law of Evidence (Amendment) Law, 5728-1968' (1969) 1 *Mishpatin* (Hebrew University Law Review) 463, 465-8 (Hebrew).

<sup>14</sup> Friedmann, D., 'Independent Development of Israeli Law' (1975) 10 *Israel Law Review* 515, 532-3.

<sup>15</sup> Law and Administration Ordinance, 1948, 1 *L.S.I.* 9, s. 11 provides as follows:

The law which existed in Palestine on 14 May 1949 [i.e. the date on which the State of Israel was declared] shall remain in force insofar as there is nothing

exercise of free press,<sup>16</sup> and the right to demonstrate<sup>17</sup> as well as the right of peaceful assembly,<sup>18</sup> are subject to administrative licensing regulations. Suffice it to quote the proviso included in section 19(2) of the Newspapers Ordinance, 1933:

The Minister of the Interior, either with or without having caused the proprietor or editor of a newspaper to be warned . . . , may, if any matter appearing in a newspaper is, in his opinion, likely to endanger the public peace . . . by order, suspend the publication of the newspaper for such a period as he may think fit . . .

It is certainly no credit to the State of Israel, and to its legislature, that such laws are still included in its positive legal system. This is especially so with regard to the Defence (Emergency) Regulations, 1945. These regulations were bitterly criticized by the Jewish community in Palestine as 'a serious breach of the fundamentals of any orderly regime [which] undermines the very existence of the regime itself'.<sup>19</sup> Soon after the establishment of the State of Israel the *Knesset*, in a special resolution, condemned the Regulations as contravening the democratic regime in Israel and ordered its Constitutional Legislative and Judicial Committee to present a bill for their repeal 'within a fortnight'.<sup>20</sup> The Committee did so but the bill never passed the plenum of the *Knesset*.<sup>21</sup> As a result the huge body of these Regulations is still valid in Israel save for Regulations 111–112B, dealing with administrative preventive detention, which were replaced in 1979 with the more liberal Emergency Powers (Detention) Law, 1979.<sup>22</sup> Ironic as it may seem, it is perhaps the existing oppressive norms in Israeli Law which contributed, to a great extent, to the development and fortification of civil rights in the Israeli legal system, as will be demonstrated later.

The source to look for the protection of human rights is primarily a Bill of Rights. Israel lacks such an instrument. Indeed Israel lacks a formal constitution altogether. It has some legal instruments — the 'Basic Laws' — with some

therein repugnant to this ordinance or to the other laws which may be enacted . . . and subject to such modifications as may result from the establishment of the State and its authorities.

The Supreme Court gave a narrow interpretation to this proviso and consistently refused to implement mandatory oppressive legislation on the basis that it contradicts the democratic nature of the State: see H.C. 5/48 *Leon v. Gubernick* 1 S.J. (Selected Judgments of the State of Israel — an authorized English translation) 41, 52-3. Generally see Maoz, A., 'Between the Allenby Bridge and the Western Wall' (1973) 3 *Iyunei Mishpat (Tel Aviv University Law Review)* 200 (Hebrew); Klein, C., 'The Temple Mount Case' (1971) 6 *Israel Law Review* 257.

<sup>16</sup> Newspapers Ordinance, 1933, 2 *Drayton Laws of Palestine* 1225, and Defence (Emergency) Regulations 1945, 2 *Palestine Gazette (Supp. 2)* 1055, regs 86-101. See also Medzini, M., 'Censorship Problems in Israel — The Legal Aspect' (1971) 6 *Israel Law Review* 309; Chfets, Z., 'Press and Government in Israel' (1984) 14 *Israeli Yearbook of Human Rights* 134.

<sup>17</sup> Police Ordinance (New Version) 1971, 2 *L.S.I. (N.V.)* 158 and Zamir, I., 'The Freedom to Demonstrate' (1983) 18 *Israel Law Review* 511; Kretzmer, D., 'Demonstrations and the Law' (1984) 19 *Israel Law Review* 47.

<sup>18</sup> *Ibid.*

<sup>19</sup> 'Current Notes: Emergency Regulations' (1946) 3 *Hapraklit* (formerly the journal of the Jewish Bar Association of Palestine and now the journal of the Israel Bar) 1 (Hebrew); cf. 'Declaration of the Jewish Bar Association, 7 Feb. 1946' (1946) 3 *Hapraklit* 62 (Hebrew).

<sup>20</sup> (1951) 9 *Divrei Haknesset* (records of the *Knesset* proceedings) 1828-31.

<sup>21</sup> *Ibid.* 1966-8, 1975-6.

<sup>22</sup> 33 *L.S.I.* 89. For a comparison between this Law and the Regulations see Rudolph, H., 'The Judicial Review of Administrative Detention in Israel' (1984) 14 *Israeli Yearbook of Human Rights* 148, 151; Shetreet, S., 'A Contemporary Model of Emergency Detention Law: An Assessment of the Israel Law' (1984) 14 *Israeli Yearbook of Human Rights* 182; Shapira, A., 'Judicial Review Without a Constitution: The Israeli Paradox' (1983) 56 *Temple Law Quarterly* 405, 452-5.

constitutional flavor, which one day, so it is hoped, may constitute part of a written constitution. It is mainly because of the inability to agree on a Bill of Rights that the *Knesset* has been unable to produce a written constitution to date.

As a matter of historical fact Israel was meant to have a written constitution. The Declaration of the Establishment of the State of Israel<sup>23</sup> provided for elections to a Constituent Assembly, this Assembly being entrusted with the mission of adopting a constitution for the State of Israel to take place 'no later than the 1st October 1948.'<sup>24</sup> Indeed elections to the Constituent Assembly took place on 25th January 1949 in accordance with the Constituent Assembly Elections Ordinance, 1948.<sup>25</sup> Even before the elections to the Constituent Assembly intensive preparations for the drafting of a constitution took place.<sup>26</sup> A Constitution Committee was appointed by the Provisional Council of the State on 8th July 1948 and was charged with the task of bringing before the Constituent Assembly a draft Constitution. The Committee adopted a draft submitted by Dr Leo Kohn. This Draft included an abridged chapter on 'Fundamental Rights', including provisions for the preservation of the sanctity of human life and the dignity of man, the liberty of the person, the inviolability of privacy and of correspondence, the freedom of conscience and worship, the freedom of speech and the right of assembly and of association.<sup>27</sup>

The Constitution Committee conducted thorough deliberations and came up with substantial amendments to the Draft which were submitted to the Constituent Assembly. The latter body was not only unable to agree on the content of the proposed Constitution but even disagreed on the advisability of adopting a unified constitution. Instead, the first normative action of the Constituent Assembly was the adoption of the Transition Law, 1949<sup>28</sup>, which changed the name of that body to the First *Knesset* and declared that the legislative body of the State of Israel will be called the *Knesset*.<sup>29</sup> The heated controversy in the Constitutional, Legislative and Judicial Committee of the First *Knesset* and in its plenum ended in June 1950, with a compromise which reads as follows:

The first *Knesset* charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft Constitution for the State. The Constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the *Knesset* as the Committee completes its work, and all the chapters together will form the State Constitution.<sup>30</sup>

<sup>23</sup> 1 L.S.I. 3.

<sup>24</sup> Namely, 4½ months after the establishment of the State of Israel. This date is somewhat ambiguous. The literary reading of the Declaration might suggest that by this date elections to the 'elected regular authorities of the State in accordance with the Constitution' should have taken place.

<sup>25</sup> 2 L.S.I. 24.

<sup>26</sup> These preparations started prior to the establishment of the State of Israel and even before the General Assembly of the United Nations Resolution to establish a Jewish State in Palestine; G.A. Res. 181 (II).

<sup>27</sup> Kohn, L., *A Constitution for Israel — Draft and Explanatory Memorandum* (published by the Constitution Committee of the Provisional Council of the State of Israel, 1948) ss 12-25 (Hebrew)

<sup>28</sup> 3 L.S.I. 3.

<sup>29</sup> *Ibid.* s. 1 *Knesset* is the Hebrew equivalent of 'Assembly' and was adopted from the name of 'The Great Assembly' which ruled the Jewish State during the second Commonwealth: see Baron, S., *Social and Religious History of the Jews* (2nd ed. 1952) I, 368; cf. the Minister of Justice's remarks (1949) 1 *Divrei Haknesset* 15, and see *Israel Government Year Book* 5729 — (1968/69) 21.

<sup>30</sup> (1950) 5 *Divrei Haknesset* 1743.

Since the passing of this Resolution the *Knesset* has passed nine Basic Laws.<sup>31</sup> It should be mentioned that the First *Knesset*, as well as the Second, did not produce any Basic Laws.<sup>32</sup>

A controversy arose between constitutional law scholars as to whether the *Knesset* enjoys constituent powers.<sup>33</sup> This controversy was concluded, on the practical level, by the adoption of Basic Laws by the *Knesset* and by the entrenchment of some of their provisions.<sup>34</sup> The positive approach has been supported by the Supreme Court's recognition of the validity of such clauses and by the *de facto* repeal of laws which did not conform with them.<sup>35</sup> Yet the Supreme Court ruled that, save for the few entrenched clauses, Basic Laws do not enjoy any normative superiority over regular laws.<sup>36</sup>

No Basic Law dealing with human rights has yet been passed. Such a bill was introduced to the *Knesset* as early as 1973<sup>37</sup> but the *Knesset* has been unable to

<sup>31</sup> Basic Law: The *Knesset*, 1958, 12 *L.S.I.* 85; Basic Law: Israel Lands, 1960, 14 *L.S.I.* 48; Basic Law: The President of the State, 1964, 18 *L.S.I.* 111; Basic Law: The Government, 1969, 22 *L.S.I.* 257; Basic Law: The State Economy, 1975, 29 *L.S.I.* 273; Basic Law: The Army, 1976, 30 *L.S.I.* 150; Basic Law: Jerusalem, Capital of Israel, 1980, 34 *L.S.I.* 209; Basic Law: Adjudication, 1984, *Sefer Hahukim* 78; Basic Law: The State Comptroller, 1988, *Sefer Hahukim* 30.

<sup>32</sup> For a comprehensive historical survey see Rackman, E., *Israel's Emerging Constitution 1948-51* (New York, 1955); Freudenheim, Y., *Government in Israel* (1967) 8-37; Likhovski, E.S., *Israel's Parliament: The Law of the Knesset* (1971) 1-25; Sager, S., *The Parliamentary System of Israel* (1985) 34-44.

<sup>33</sup> For a positive view see Rubinstein, A., 'Israel's Piecemeal Constitution' (1966) 16 *Scripta Hierosolymitana* 201, 204-5; Rubinstein, A., *Constitutional Law of Israel* (3rd ed. 1980) 27-8, 276-8 (Hebrew); Klein, C., 'A New Era in Israel's Constitutional Law' (1971) 6 *Israel Law Review* 376.

For a negative view see Likhovski, E., 'Can the *Knesset* Adopt a Constitution Which Will be the "Supreme Law of the Land"?' (1969) 4 *Israel Law Review* 61; Likhovski, E.S., *Israel's Parliament: The Law of the Knesset* (1971) 191; Horenstein, E., 'Rigid Provisions in Basic Law' (1969) 25 *Hapraklit* 648 (Hebrew); Nimmer, M.B., 'The Uses of Judicial Review in Israel's Quest for a Constitution' (1970) *Columbia Law Review* 1217, 1239-40.

<sup>34</sup> E.g. s. 4 of Basic Law: The *Knesset*:

The *Knesset* shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the *Knesset* Elections Law; this section shall not be varied save by a majority of the members of the *Knesset*.

Likewise s. 45 of that Basic Law provides that 's. 44 [providing that no emergency regulations may affect the Basic Law] . . . shall not be varied save by a majority of eighty members [i.e. two thirds] of the *Knesset*'.

<sup>35</sup> While the Court did not formally declare the Statute void, it ordered the executive branch to disregard it; H.C. 98/69 *Bergman v. Minister of Finance* 23 (I) *Piskei Din* (Law Reports of the Supreme Court) 693 (Hebrew. For an English translation see (1969) 4 *Israel Law Review* 559); H.C. 246/81 *Derekh Eretz v. Broadcasting Authority* 35 (IV) *Piskei Din* 1.

<sup>36</sup> H.C. 60/77 *Ressler v. Chairman of the Central Elections Committee* 31 (II) *Piskei Din* 556; H.C. 148/73 *Kaniel v. Minister of Justice* 27 (I) *Piskei Din* 794. And see Shapira, *op. cit.* n. 22, 415-6. See, however, Gavison, R., 'The Controversy Over Israel's Bill of Rights' (1985) 15 *Israeli Yearbook of Human Rights* 113, 120-1.

<sup>37</sup> Basic Law: Human and Civil Rights Bill, 1973, *Hatza'ot Hok* (Legislative Bills) 448. See: Klein C., 'On the Basic Law: Human and Civil Rights Bill — the Constitutional and Formal Aspects' (1973) 5 *Mishpatim* 696 (Hebrew); Livneh, E., 'Basic Law: Human and Civil Rights Bill' (1973) 5 *Mishpatim* 703 (Hebrew); Lahav, P., and Kretzmer D., 'The Israel Civil and Human Rights Charter: A Step Forward?' (1976) 7 *Mishpatim* 154 (Hebrew). In 1963 the *Knesset* voted against the Basic Law Bill: The Charter of Human Basic Rights proposed by M.K. Prof. H. Klinghoffer; (1964) 38 D.K. 798. Two decades later the *Knesset* passed, in Preliminary Reading a Bill proposed by M.K. A. Rubinstein, which is a revised version of the Klinghoffer Bill (1982-83 H.H. 111). The *Knesset* Subcommittee for Basic Laws presented in 1984 its version of the Bill to the Constitution, Law and Justice Committee of the *Knesset* (See *The Basic Court: Human Rights — Deliberations of the Committee for Basic Laws in the 10th Knesset* (Jerusalem 1984)). The Minister of Justice submitted to the Committee a version of his own which is by far less liberal than the one submitted by the Subcommittee. As of today the Committee did not complete the preparation of the Bill for First Reading.

unite behind an agreed Charter of Human Rights. Indeed the problem of accepting a Bill of Rights seems to be one of the main remaining obstacles to the completion of Israel's Constitution.<sup>38</sup>

Full credit for the high level of the protection of civil liberties in Israel should be accorded to its Supreme Court. Justice Haim Cohn, a retired Deputy President of the Supreme Court, noted, in one of his opinions, that a 'brave court' will interpret statutes curtailing civil liberties contrary to the legislature's assumed intention whenever the language used by it enables the Court to do so.

On the other hand, when the verbal meaning of the statute will lead to restriction of the individual's freedom, the Court will avoid this outcome by reverting to 'the legislature's assumed intention not to curtail civil liberties'.<sup>39</sup>

This statement may bring to mind Bishop Hoadly's assertion:

Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them.<sup>40</sup>

Thus, returning to s. 19(2) of the Newspapers Ordinance cited above, one finds that, as early as 1953, the Supreme Court declared, in the renowned decision of *Kol-Ha'am*,<sup>41</sup> that a standard close to the American standard of 'clear and present danger' should be met by the Minister of Interior before he may exercise his draconic authority to close a newspaper. In doing so the Supreme Court replaced the subjective test, adopted by the legislature, with rather objective standards. Moreover, it replaced the criterion of 'likelihood' to lead to undesirable results with the substantially more rigid approach of clear 'probability'. If one recognizes that this decision, prohibiting the suspension of the daily newspapers published by the Israeli Communist party, coincided with Senator McCarthy's persecutions and the not too glorious era of the United States Supreme Court,<sup>42</sup> the Israeli decision should be even more appreciated.

<sup>38</sup> Cf. Gavison, *op. cit.* n. 36, 146-61. The other obstacle lies in the inability to agree upon the degree of entrenchment of the Constitution and the extent of judicial review. Both these matters are dealt with by the Basic Law: Legislation Bill, 1978, *Hatza'ot Hok* 328, following a previous Bill 1975 *Hatza'ot Hok* 35. The changing appreciation of the feasibility of the *Knesset* adopting a Bill of Rights can be traced in Professor Shapira's writings. In an article, published in 1979, he mentioned 'the possibility (by now, the probability) of Israel adopting a Bill of Rights', Shapira, A., 'Legislative Judicial Law-Making Concerning Educational Liberty and Equality: Some Israeli Constitutional Law Perspectives' (1979) 9 *Israeli Yearbook of Human Rights* 181, 184, while four years later he speaks of 'the prospect of the proposed Bill of Rights becoming binding law . . . to be slim', Shapira, *op. cit.* n. 22, 438.

<sup>39</sup> H.C. 355/79 *Katalan v. The Prisons' Service* 34 (III) *Piskei Din* 294, 304.

<sup>40</sup> Hoadly, B., *Sermon Preached Before the King* (1717), quoted from Gray, J., *The Nature and Sources of the Law* (2nd ed. 1921) 125.

<sup>41</sup> H.C. 73/53 *Kol Ha'am v. Minister of the Interior* 1 S.J. 90. For an analysis of this decision see Lahav, P., 'American Influence on Israel's Jurisprudence of Free Speech' (1981) 9 *Hastings Constitutional Law Quarterly* 21 and Cantor, N.L., 'On Clear and Present Danger, Clear Probability and Free Speech Standards in Israel' (1986) 16 *Israeli Yearbook of Human Rights* 260, 271-6.

<sup>42</sup> In 1951 the Supreme Court of the United States affirmed the conviction of twelve leaders of the Communist Party of New York under the Smith Act; *Dennis v. U.S.* 341 U.S. 494 (1951). The majority reached its decision in spite of the fact that 'most observers would have had a difficult time to find a "clear and present danger" of overthrow of the government arising from the teachings of Marxism-Leninism by the Communist Party': Emerson, T.I., *The System of Freedom of Expression* (1970) 115. Indeed the Attorney-General Tom Clark was of the opinion that there was insufficient evidence on which to base a prosecution under the Smith Act, *Ibid.* 112. By sustaining the lower court's decision the Supreme Court denied 'any duty to review the constitutional judgement of the legislature and the executive', Rostow, E.V., 'The Democratic Character of Judicial Review' (1952) 66 *Harvard Law Review* 193, 223. The Court virtually sanctioned the suppression of political speech

Indeed, even when the cannons of war were virtually firing, the Supreme Court of Israel was active in protecting human rights. Thus, in 1948, in the midst of the bloody War of Independence, the only existing panel of the Supreme Court sat in the besieged city of Jerusalem to hear a *habeas corpus* petition filed by an Arab, detained under the Defence (Emergency) Regulations, 1945 on suspicion of espionage and sabotage. After a thorough hearing the Supreme Court ordered the release of the petitioner on what might seem rather technical grounds — a non-judicial advisory committee, which had to be established under those regulations to review the detention, did not exist at the time of the detention. The Court ordered the petitioner's release even though the committee was actually nominated before the Court's hearing.<sup>43</sup>

Even more far reaching seems the decision handed down by the Supreme Court one year later, in the case of *Al'khuri v. The Chief of Staff*.<sup>44</sup> The Court set aside a detention order issued by the Chief of Staff for the sole reason that, contrary to the wording of reg. 111(1) of the Defence (Emergency) Regulations, 1945, the order failed to specify the place of detention. In its decision the Supreme Court stressed the need to maintain a proper balance between the Military Commander's need to carry out his duty and the need to defend civil liberties.<sup>45</sup>

Compare these decisions with the confinement of all Americans of Japanese ancestry — 109,650 altogether, including some 70,000 American citizens by birth — following the Japanese attack on Pearl Harbour during World War II without any hearing or right of appeal!<sup>46</sup>

Even in present times the Supreme Court of Israel does not hesitate to scrutinize matters of high security and political sensitivity. Thus, it ordered the removal of a Jewish settlement, established at Eilon Moreh in Samaria in the 'West Bank', partially on private land owned by local Arabs. It did so in spite of the Chief of Staff's affidavit that the existence of the settlement at that specific location was of the highest military importance.<sup>47</sup>

which 'merely embarrassed the government or was unpalatable to the majority of the population', 'Note: Development in the Law — The National Security Interest and Civil Liberties' (1972) 85 *Harvard Law Review* 1130, 1136.

For a critical survey of the Vinson Court's decisions in the area of civil liberties during the late forties and the early fifties, see McCloskey, R.G., *The Modern Supreme Court* (1972) 57-126.

<sup>43</sup> H.C. 7/48 *Al Carbutli v. Minister of Defence* 2 *Piskei Din* 5.

<sup>44</sup> H.C. 95/49 4 *Piskei Din* 34.

<sup>45</sup> Bracha, B., 'Restrictions of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945' (1978) 8 *Israeli Yearbook of Human Rights* 296, 309-17 and the articles cited *supra* n. 22.

<sup>46</sup> Derschowitz, *op. cit.* n. 1, *supra* 815, 307-9.

<sup>47</sup> H.C. 390/79 *Dweikat v. The Government of Israel* 34 (1) *Piskei Din* 1. For a detailed account of the Court's decision see (1979) 9 *Israeli Yearbook of Human Rights* 345. Commenting on the Court's decision the late Prof. Julius Stone regarded it as applying a rigid novel interpretation to what constitutes 'military needs' under the international law of belligerent occupation. According to this approach 'military needs, even if attested in good faith by the highest military authorities, will not qualify as such if it appears that historically the subjective motive of the officials initiating the requisition procedure was not predominantly military'. Prof. Stone applauded 'the bold independence of this judicial surveillance, implied in the distinction between objective military needs, and subjective motives of decision-makers', which is 'rather unique even in democratic policies' and wondered 'how practical it will prove in societies less committed than Israel to the independence of the judiciary'; J. Stone, 'Aspects of the *Beit-El* and *Eilon Moreh* Cases — Use of the Terms "Municipal Law", "International Law", "Justiciability", and "Military Needs"', (1980) 15 *Is.L.Rev.* 476, 490.

In a recent case,<sup>48</sup> twelve lecturers at Tel Aviv and Jerusalem Law Faculties, together with others, challenged the pardon conferred by the President of Israel, Chaim Herzog, to the Head of Israeli General Security Service and three of his senior assistants. This pardon followed the death of two Palestine Liberation Organization terrorists during a rescue operation of hostages captured in a public bus. Allegations were made that the President participated in a scheme to put an end to a police investigation, initiated by the Attorney-General, which might have led to findings of the personal responsibility of Prime Minister Shamir and by Minister of Defence Arens. The most senior panel of the Supreme Court made it patently clear that should such an investigation not be fully carried out, the Court would repeal the pardon and order a full police investigation. It should be noted that the pardoning powers of Israel's President equal those of the Queen of England and of the American President.<sup>49</sup> It should, moreover, be emphasized that Israeli law confers legal immunity upon the President of the State, in respect of any matter relating to his functions and powers.<sup>50</sup> Following the Court's decision a thorough investigation was carried out, under the supervision of senior legal officials, and both Shamir and Arens have been cleared of any suspicion. The four top officers of the security service, however, were forced to resign.

It is worth referring to Mr Justice Barak's concluding passage in the 105-page judgment of the Court. Referring to the President's privilege, Professor Barak recalled a debate between King James I and Chief Justice Coke, regarding the King's right to engage in judicial matters. Failing to persuade the King to abstain from doing so, due to the king's lack of legal expertise, Justice Coke stood up and declared: '*Quod nex non debet sub homine, sed sub deo de lege*' (The King is subject not to men, but to God and the Law). Justice Barak makes his view on the matter unequivocally clear by endorsing Chief Justice Coke's statement with the words: 'So be it'.<sup>51</sup>

One may have realized by now that the Supreme Court of Israel engages extensively in what is termed 'judicial activism'. Indeed, established common law rules of non-justiciability, administrative discretion and judicial restraint, as well as rules of *locus standi*, are largely disregarded by that Court when faced with denial of justice, deprivation of civil rights and infringement of the rule of law.<sup>52</sup> The Supreme Court willingly engages in trivial matters — such as licensing of a butcher's shop<sup>53</sup> — as much as in crucial matters of national security.

<sup>48</sup> H.C. 428/86 *Barzilai v. The Government of Israel* 6 S.J. 1.

<sup>49</sup> *Ibid.* 11-2, 20-1, 45 *per* Shamgar P., 52-5 *per* Ben Porat D.P. See also Cohn J.'s opinion in 'Symposium on Pardoning' (1985) *Mishpatim* 9, 14. But see Barak J.'s opinion in *Barzilai v. The Government of Israel* 6 S.J. 1, 79-84.

<sup>50</sup> Basic Law: The President of the State, s.13 and Shamgar P.'s opinion in *Barzilai v. The Government of Israel* 6 S.J. 1, 41-3. *Cf.* Barak J. at 70-2 and Bracha, B., 'The Constitutional Position, The Pardoning Power and Other Powers of the President of the State of Israel' (1979) 9 *Israeli Yearbook of Human Rights* 190, 216-9.

<sup>51</sup> 48 H.C. 428/86 *Barzilai v. The Government of Israel* 6 S.J. 1, 105.

<sup>52</sup> *E.g.* H.C. 217/80 *Segal v. Minister of Interiors* 34 (IV) *Piskei Din* 429, 440-4 *per* Barak J.; H.C. 1/81 *Shiran v. The Broadcasting Authority* 35 (III) *Piskei Din* 365, 372-6 *per* Shamgar P.; 48 H.C. 428/86 *Barzilai v. The Government of Israel* 6 S.J. 1, 43 *per* Shamgar P., 69-70 *per* Barak J.; H.C. 852/86 *Aloni v. Minister of Justice* 41 (II) *Piskei Din* 1120-32 *per* Shamgar P., 65-9 *per* Elon J. *Cf.* *Thorson v. A.G.* (No. 2) 43 D.L.R. (3d) (1974) 1; *Nova Scotia Board of Censors v. McNeal* 55 D.L.R. (3d) (1975) 632; Wade, H.W.R., *Administrative Justice* (5th ed. 1982) 583.

<sup>53</sup> H.C. 72/55 *Freidi v. Municipality of Tel-Aviv — Jaffa* 10 *Piskei Din* 734.



Trivial matters, petty as they may seem, are not less important to the preservation of human rights and dignity. Yet public attention is naturally attracted to such milestone decisions as the one enabling the participation of an ultra-fascist party, as well as a pro-Palestine Liberation Organization group, in national elections,<sup>54</sup> or the enjoining of the Speaker of the *Knesset* from preventing the submission of bills of extremist nature in the Parliament.<sup>55</sup>

One may wonder how come the Israeli Supreme Court extensively intervenes in the activity of the Executive, and even more so of the Parliament. This query arises as Israel's Parliament follows the Westminster model of Parliamentary supremacy.<sup>56</sup> Moreover, the judiciary is often described as the most vulnerable branch of government. Indeed, reasoning from English experience, Mr Justice Barak, at the time a young tutor at the Hebrew University Law School, saw it appropriate to warn the Supreme Court against exercising extensive jurisdiction over the administration, as the judiciary 'is liable to be struck down by a reciprocal act from the legislature'.<sup>57</sup>

It seems to me that the outcry about judicial vulnerability is, to a great extent, a myth cultivated by the judiciary itself. In any case experience has proven that neither the Executive nor the Parliament has struck at the judiciary, but rather accepted its rulings, harsh as they have been.<sup>58</sup>

The responsive attitude demonstrated by the executive and the legislature towards the Court's rulings warrants appreciation. However, most credit should be given to Israeli society at large. Contrary to views expressed by courageous justices, such as Lord Denning,<sup>59</sup> I am of the opinion that no court could introduce extreme liberal standards without wide public support.<sup>60</sup>

In carrying out its functions as High Court of Justice, the Supreme Court of Israel is assisted by the fact that it is the main reviewer of administrative decisions. The British rulers of Palestine entrusted the Supreme Court with such jurisdiction, rather than the lower District Courts, the equivalent of the English Queen's Bench, for not very noble reasons. They did so in order to protect themselves from having their actions scrutinized by local judges — Jews and Arabs — sitting in the District Courts.<sup>61</sup> Be that as it may, the fact that this jurisdiction lies with the highest court of the land substantially contributes to its

<sup>54</sup> Election Appeal 2/84, *Neiman v. Chairman of the Central Committee for the Elections to the 11th Knesset* 39 (II) *Piskei Din* 225. For an analysis of this decision see Klein, C., 'The Defence of the State and Democratic Regime in the Supreme Court' (1985) 20 *Israel Law Review* 397.

<sup>55</sup> H.C. 742/84 *Kahana v. Speaker of the Knesset* 39 (IV) *Piskei Din* 85.

<sup>56</sup> Likhovski, *op. cit.* n. 32, 73, 191.

<sup>57</sup> Barak, A., 'The Supervision of the Courts over Subsidiary Legislation' (1965) 21 *Hapraklit* 463, 468.

<sup>58</sup> Cf. Albert, J.M., 'Constitutional Adjudication Without a Constitution — The Case of Israel' (1969) 82 *Harvard Law Review* 1245, 1252; Zamir, I., 'Rule of Law and Civil Liberties in Israel' (1988) 7 *Civil Justice Quarterly* 64, 70-2.

<sup>59</sup> *R. v. Commissioner of Police: ex parte Blackburn (No. 2)* (1968) 2 W.L.R. 1204-7.

<sup>60</sup> Cf. Albert, *op. cit.* n. 58.

<sup>61</sup> The High Court of Justice during the Mandatory era was composed of two English judges, occasionally with the addition of a local judge: Bentwich, N., 'The Legal System of Israel' (1964) 13 *International and Comparative Law Quarterly* 236, 238.

efficiency. It should be added that the judiciary is highly regarded by the people of Israel a tradition which has its roots in Judaism.<sup>62</sup>

The fact that the number of prerogative writs issued in Israel is ten times greater than the number in England<sup>63</sup> reflects deep trust in the Israeli High Court of Justice. To fully appreciate this phenomenon one must realize that the population of the State of Israel consists of no more than 8½% of the population of England. It is worth mentioning that 13% of the petitions submitted to that Court through 1986 were filed by Arab inhabitants of the occupied territories.<sup>64</sup> The recourse to the High Court of Justice conferred on those petitioners by the State of Israel is beyond any standard prescribed by international law and is without any historical precedent.<sup>65</sup> It may further be mentioned that followers and sympathisers of the Palestine Liberation Organization as well as of other Arab terrorist organizations, avail themselves of this right in spite of their official non-recognition of the existence of the State of Israel.

How does the Supreme Court carry out its functions in safeguarding civil rights?

It is possible to find in opinions of the justices of the Supreme Court expressions familiar to jurists all over the globe, e.g.:

After a law has been enacted by the *Knesset* . . . we [i.e. the judges] must bow before it and not doubt its provisions, instructions and directives.<sup>66</sup>

Yet, such expressions are merely lip service not to be taken at face value. Thus, returning to the *Kol Ha'am* freedom of the press case, Justice Agranat explained that he accepted the probability test as this represented the 'legislator's . . . clear . . . intention'.<sup>67</sup> Not only does the verbal meaning of the Ordinance point to the opposite direction, it is even obvious that this verbal meaning

<sup>62</sup> Cf. *The Babylonian Talmud*, *infra* n.86, Tractment: *Shabbat* at 10a, 'Every judge who judges with complete fairness even for a single hour, the Writ gives him credit as though he had become a partner to the Holy One, blessed be He, in the Creation.' The respect for the judiciary in Israel is moreover a legacy of the common law: Bentwich, *op. cit.* n. 61, 242.

<sup>63</sup> The yearly average number of petitions to the High Court of Justice in recent years was close to 800, comprising close to a third of the total number of cases brought before the Supreme Court: Landers, I., (1987) *Israeli Democracy* Vol. 1, No. 2, 29, 31.

<sup>64</sup> Ehrlich, A., '“Bagatzim”: Petitions to the High Court — A Statistical Portrait' (1987) *Israeli Democracy* Vol. 1, No. 2, 33.

<sup>65</sup> *Amnesty International Report, 1984* (1984) 35; Natan, E., 'The Power of Supervision of the High Court of Justice Over Military Government' in Shamgar, M., *Military Government in the Occupied Territories Administered by Israel, 1967-1986 — The Legal Aspects* (1982) 109; 'Israel National Section of the International Commission of Jurists' in *The Rule of Law in the Areas Occupied by Israel* (1981) 35-42; Gerson, A., *Israel, The West Bank and International Law* (1978) 119, 132-3; Shamgar, M., 'The Observance of International Law in the Administered Territories; (1971) 1 *Israeli Yearbook of Human Rights* 262-73; Shetreet, S., 'International Protection of Human Rights in Israeli Law' in Goldstein, S. (ed.), *Israeli Reports to the XII International Congress of Comparative Law* (1986) 307, 322-9. For an overall evaluation of the effectiveness of the High Court of Justice in safeguarding human rights in the occupied territories, see Cohen, E.R., 'Justice for Occupied Territory? The Israeli High Court of Justice Paradigm' (1985-86) 24 *Colum. J. Transnat'l L.* 471.

<sup>66</sup> H.C. 188/63 *Batzul v. Minister of Interior* 19 (I) *Piskei Din* 337, 349 *per* Berinson J.. See also his opinion in C.A. 228/63 *Ezuz v. Ezer* 17 *Piskei Din* 2541, 2547. Cf. Landau, M., 'Rule and Discretion in the Administration of Justice' (1969) 1 *Mishpatim* 292, 235 (Hebrew): 'We have never doubted the supremacy of the legislature from whose dictates the judge is not free to deviate'.

<sup>67</sup> H.C. 73/53 *Kol Ha'am v. Minister of the Interior* 1 S.J. 90, 108.

corresponds to the colonial legislature's intention to curtail the freedom of the press.<sup>68</sup>

One may contend that this technique is plausible only where the language used by the legislator is equivocal;<sup>69</sup> but, then, who will decide when it is not so? An unequivocal, oppressive meaning of a statute hardly presents an impossible barrier for a liberal judge.<sup>70</sup>

This technique, undoubtedly familiar to all common law lawyers, presents a challenge to the Court. Justices of the Supreme Court refer to 'super-statutory constitutional norms'.<sup>71</sup> Indeed, in one or two cases, some justices referred to what might be understood as principles of natural law.<sup>72</sup> This could hardly be conceivable with the supremacy of the *Knesset*. An attractive way of reconciling both concepts was suggested by President Shamgar in the renowned *Ha'arezt* case:

The absence in Israel of a singular legislative measure of a superior normative status, incorporating the State's constitutional principles, hardly means that . . . our legal system is devoid of constitutional legal principles which define the fundamental rights of the individual and the citizen. The law applicable in Israel encompasses . . . basic rules concerning . . . individual freedoms . . . Such freedoms are anchored in our underlying juridical conception and they form an integral part of the law prevailing in Israel. The incorporation of those rights into our law results from the political governmental system adopted by us . . . yet the duty to preserve them is not merely political or socio-moral in its essence but is also of a legal nature.<sup>73</sup>

This approach has been further developed by Justice Barak in his opinion in the *Neiman* case.<sup>74</sup> According to this view the so-called 'extra-legal' principles are woven into the Israeli legal system and are part and parcel of it. Therefore it does not contradict Parliamentary supremacy to apply them alongside the *Knesset* legislation. As a matter of fact, the legislator himself must be presumed to be aware of their existence. Indeed, this approach has its roots already in the *Kol Ha'am* decision. Justice Agranat pointed out that 'it is a well known axiom that the law of a people must be studied in the light of its national way of life'. This principle proves 'the fact that this is indeed a State founded on democracy'.<sup>75</sup>

<sup>68</sup> Professor Zamir explains that, rather than examining the intention of the original legislature of the Press Ordinance, the Court looked at the presumed intention of the Israeli legislature upon its adoption of the Mandatory Law: Zamir, *op. cit.* n. 58, 68.

<sup>69</sup> 'Resort to interpretative result is legitimate as long as there is anything in need of interpretation. When a law is patent and clear, there remains, so it seems, nothing for the judge to do but to apply it as it stands, straightforwardly, to the matter before him': Shapira, A., 'The Status of Fundamental Individual Rights in the Absence of a Written Constitution' (1974) 9 *Israel Law Review* 497, 503. Cf. Shetreet, S., 'Reflections on the Protection of the Rights of the Individual: Form and Substance' (1977) 12 *Israel Law Review* 32, 36.

<sup>70</sup> Shetreet *loc. cit.* n. 69, refers to a specific decision when a couple attempted to perform a marriage ceremony in a form that was not subscribed by law: C.A. 450/70 *Rugozinski v. State of Israel* 26 (I) *Piskei Din* 129, 136. Cf. Shapira, *loc. cit.* n. 69.

<sup>71</sup> Shapira, *op. cit.* n. 22, 421-3; Albert, *op. cit.* n. 22, 1247; Bracha, B., *Administrative Law* (1986) Part I, 44-52 (Hebrew).

<sup>72</sup> E.A. 1/65 *Yardor v. Chairman of the Central Election Committee* 19 (III) *Piskei Din* 365, 389-90: Sussman J. refers there to 'extrastatutory legal norms, standing not only above an ordinary law but also above the Constitution'. For a criticism of his approach see Guberman, S., 'Israel's Supra-Constitution' (1967) 2 *Israel Law Review* 455, 458-60. See also H.C. 29/62 *Cohen v. Minister of Defence* 4 S.J. 160, 163 *per* Witkon J..

<sup>73</sup> C.A. 723/74 *Ha'arezt v. Israel Electricity Company* 31 (II) *Piskei Din* 281, 294-5. For an English summary of the decision see (1982) 12 *Israeli Yearbook of Human Rights* 290. See also President Shamgar's opinion in H.C. 337/81 *Miterani v. Minister of Transportation* 37 (III) P. D. 337, 355-356.

<sup>74</sup> Election appeal 2/84, *Neiman v. Chairman of the Central Committee for the Elections to the 11th Knesset* 39 (II) *Piskei Din* 225, 320-1.

<sup>75</sup> *Supra* n. 41, at 105. Cf. Shamgar, M., 'Legislation, Adjudication and Civil Rights' (1986) 37 *Hapraklit* 5.9 (Hebrew); Barak, A., *Judicial Discretion* (1987) 361-6 (Hebrew).

Where are the 'super-constitutional principles' derived from?

One may find constant reference to the Declaration of Independence.

This declaration provides that

The State of Israel . . . will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

Long ago it has been established that 'there is nothing in [the Declaration] of a constitutional law which determines the effectiveness of the enactment of other laws and ordinances or their invalidity'.<sup>76</sup> Yet, it was also said there that 'it expresses the vision of the people and its faith'. It is this aspect of the Declaration which served as a source of ascertaining what President Agranat called 'the law of the people' referred to in the *Kol Ha'am* case.<sup>77</sup>

Another invaluable source of principles consists of doctrines of Jewish law and teachings. Not only are they referred to in the Proclamation of Independence, they actually serve as a positive legal source according to the Foundations of Law, 1980,<sup>78</sup> which refers the Court to 'the principles of freedom, justice, equity and peace of Israel's heritage'.

Jewish heritage is an indivisible part of the culture of Israeli society as well as of the members of its Courts. This is a most fortunate reality considering the high value placed in Jewish tradition on the individual, his dignity and rights.<sup>79</sup> Suffice it to quote *Genesis* 1:26-27, that man was created in the very image of God: 'And God said, Let us make man in our image after our likeness . . . So God created man in His own image, in the image of God created He him; male and female created he them'. Therefore, one should treat one's fellow person with utmost dignity and decency.

Commenting on these verses Thomas Paine wrote: '[If] this be not divine authority, it is at least historical authority, and shows that the equality of man, so far from being a modern doctrine, is the oldest upon record'.<sup>80</sup> A similar conclusion was drawn by Ben Azzai, one of the early Jewish scholars: 'This — says the Bible — is the book of the generations of Adam: On the day that God created man, in the likeness of God made he them'. From this passage Ben Azzai inferred that all descendants of Adam — regardless of religion, race or colour — bear the imprint of divine creation and divine likeness, and must be treated accordingly.<sup>81</sup> It is appropriate to mention here a traditional commentary as to why God created Adam alone: 'Therefore each one ought to say: "It is for me

<sup>76</sup> H.C. 10/48 *Ziv v. Gubernick* 1 S.J. 68, 71 per Smoira P. In 1980 the *Knesset* rejected a private bill aimed to accord the Declaration of Independence a status of an entrenched Basic Law. In his explanatory notes M.K.M. Virshursky made it clear that his initiative stemmed from the lasting delay of the *Knesset* in adopting a Bill of Rights; (1980) 90 D.K., 1064.

<sup>77</sup> H.C. 73/53 *Kol Ha'am v. Minister of the Interior* 1 S.J. 90.

<sup>78</sup> 34 L.S.I. 181.

<sup>79</sup> See President Herzog's address in the Middle Temple Hall, England: Herzog, C., 'Judaism, Law and Justice' (1984) 14 *Israeli Yearbook of Human Rights* 9, and see Cohn, H.H., *Human Rights in Jewish Law* (1984); Cohn, H.H., 'On the meaning of Human Dignity' (1983) 13 *I.Y.H.R.* 226, 247-51. Konvitz, M.R. (ed.), *Judaism and Human Rights* (1972); Silberg, M., 'Law and Morals in Jewish Jurisprudence' (1961) 75 *Harvard Law Review* 306.

<sup>80</sup> Paine, T., in *The Rights of Man* (1791), quoted by Cohn, *op. cit.* n. 79, 149.

<sup>81</sup> *Sifra* (an ancient collection of interpretations to the Book of Leviticus); portion *Kedoshim* 4:12.

alone that the world was created". The practical application of this idea may be found in the warning administered by Jewish Religious Courts to witnesses in criminal cases. The Court must warn the witnesses not to give hearsay or speculative evidence: 'Man was created single to teach you that whoever destroys one human life Scriptus imputes to him as though he had destroyed the whole universe and if a man saves alive a single soul, Scriptus imputes it to him as though he had saved alive the whole world'.<sup>82</sup> Another interesting conclusion from the fact that man was created single follows the previous passage: '... that no one may be heard to say to another: "My father was greater than yours"'.<sup>83</sup> This may remind us of another statement to be found in the Old Testament: 'Have we not all one father? Hath not one God created us?'<sup>84</sup>

This is not a mere philosophical point as God commanded the Children of Israel: 'One law and one manner shall be for you and for the stranger that sojourneth with you'.<sup>85</sup>

The rule of law and equality before the law play a significant role in Judaism. This is emphasized in an episode, reported in the *Babylonian Talmud*<sup>86</sup> involving one of the most powerful kings, Alexander Yannai. The King was summoned to Court in a tort case of vicarious liability for his slave's action. The King rejected the summons and when he finally appeared in Court he insisted on remaining sitting. The president of the Court, Rabbi Shimon Ben Shatach, reprimanded the King and said:

Stand up and listen to the evidence against you. It is not before us that you will stand but before God himself, as it is written in the Bible: 'Then both parties to the controversy shall stand before the Lord.'

Immediately — so we are told in the *Babylonian Talmud* — King Yannai rose to his feet.<sup>87</sup>

God Almighty is himself subject to the rule of law. The *Jerusalem Talmud*<sup>88</sup> states:

It is the universal custom that when an earthly king issues a decree, at his will he observes it himself, and at his will only others are bound to observe it. But it is otherwise with the Holy One Blessed Be He, for He is Himself the first to observe all His decrees. This is deduced from the text 'And ye shall observe that which I observe, I the Lord'. That is to say, I, the Lord, am the first to observe the commandments of the Torah.<sup>89</sup>

Jewish Rabbinical sources were cited in litigations in English courts back in the 16th century and were consulted by the English Legislature.<sup>90</sup> Some basic

<sup>82</sup> *Mishna* (a codification of post-Mosaic Jewish Law compiled *circa* year 200); tractment *Sanhedrin* IV, 5. Cf. the version in *Code of Maimonides: Book of Judges* 16b. See also Kirschenbaum, A., "'The Good Samaritan" and Jewish Law' (1976) 7 *Dine Israel* 7.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Malachi* 2:10.

<sup>85</sup> *Numbers* 15:16. See also *Exodus* 12:49.

<sup>86</sup> A collection of commentaries and expositions on the *Mishna* compiled in Babylon *circa* year 500.

<sup>87</sup> Tractment *Sanhedrin* 19b.

<sup>88</sup> Known also as the *Palestinian Talmud*, concluded in the second half of the fourth century.

<sup>89</sup> Tractment *Rosh Hashana*, Chapter 1, 57a. Cf. Silberg, *op. cit.* n. 79, 309-11.

<sup>90</sup> 'Proceedings Against James Nayler and Charles II' in Corbett's Collection *State Trials* (1565); cf. Abrahams, I. and Sayle, C.E., 'The Purchase of Hebrew Books by the English Parliament in 1647' (1918) 8 *Jewish Historical Society of England: Transactions* 63.

principles of justice were derived by English Common Law from the Old Testament and from Jewish Law.<sup>91</sup> Indeed, it was noted, in the nineteenth century, that 'it is at least an historical fact that in the great majority of instances early Protestant defenders of civil liberty derived their political principles chiefly from the Old Testament'.<sup>92</sup>

An illuminating example of reliance on Jewish Law, in order to defend human dignity, may be found in an Israeli case of 1980.<sup>93</sup> A Jewish husband, accused of raping his wife, submitted, in his defence, the well established common law rule, that, by the marriage contract, the wife is under duty to cohabit, an essential part of which is to consent to sexual relations. A husband could not, therefore, be convicted of raping his wife, as this offence is committed if one has sexual intercourse with a woman without her consent.<sup>94</sup> The Supreme Court rejected the common law defence — based on ecclesiastical law — as inapplicable to Jews in Israel. The Court based its decision on Jewish Family Law which applies to Jewish couples under Israeli law.<sup>95</sup> Under this law, although a wife is under marital obligation to have intercourse with her husband, the common law doctrine of the husband's 'domain' over his wife and of the wife's 'submission' to him is totally unacceptable and the husband is prohibited from forcing himself upon her. To use Maimonides' words: 'The wife is not a captive taken by sword to please her master's desires'.<sup>96</sup>

The editor of the *Australian Law Journal* who reported this case<sup>97</sup> used the revolutionary Israeli decision to urge upon the Australian legislators to put an end to the 'outrageous' common law doctrine, something which they have since done.<sup>98</sup>

A source frequently tapped, in the area of human rights, is American Supreme Court decisions. The Israeli courts do so in spite of the fact that American Law is

<sup>91</sup> Such as the rules of natural justice: *R v. Chancellor Masters and Scholars of the University of Cambridge* 1 Strange 557, 567; 93 E.R. 704; and the rule against self-incrimination: Mandelbaum, S., 'The Privilege Against Self-Incrimination in Anglo-American and Jewish Law' (1965) 5 *American Journal of Comparative Law* 115; Braz, I., 'The Privilege Against Self-Incrimination in Anglo-American Law — the Influence of Jewish Law' in Rakover, N. (ed.), *Jewish Law and Current Legal Problems* (1984) 161. Indeed, Jewish Law was cited as authority in two landmark decisions of the Supreme Court of the United States dealing with the validity of confessions: *Miranda v. Arizona* 384 U.S. 436, 458 n. 27 (1966) and *Garrity v. New Jersey* 385 U.S. 493, 497 (1967).

<sup>92</sup> Lecky, W., *History of the Rise and Influence of the Spirit of Rationalism in Europe* (Rev. ed. 1871) II, 168. For Jewish Law origins of common law principles in general see Auerbach, C., 'The Talmud — A Gateway to the Common Law' (1951) 3 *Western Reserve Law Review* 5, 8.

<sup>93</sup> C.A. 91/80 *Cohen v. The State of Israel* 35 (III) *Piskei Din* 281.

<sup>94</sup> Hale, M., *The History of the Pleas of the Crown* (1773) I, 629. Cf. Further Hearing 37/80 *Cohen v. The State of Israel* 35 (I) *Piskei Din* 371, 373 per Cohn D.P. For a comprehensive survey of this defence in England and in the different British Colonies, see Shachar, Y.H., 'Lawfully Raped?' (1982) *Iyenei Mishpat* 649, 673-89 (Hebrew).

<sup>95</sup> Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953, 7 *L.S.I.* 139; Maoz, A., 'Execution of Judgements and Means of Enforcement Available to Religious Courts' in Goldstein, S., (ed.) *Israeli Reports to the XII International Congress of Comparative Law* (1986) 230.

<sup>96</sup> Maimonides, *Hilkhot Ishut*, 14:9. More generally, Rakover, N., 'Coercion of Conjugal Relations' in Rakover, N. (ed.) *Jewish Law and Current Legal Problems* (1984) 137. The rule of C.A. 91/80 *Cohen v. The State of Israel* 35 (III) *Piskei Din* 281 has been applied to a Muslim couple in an unreported decision of the District Court of Beer-Shebbra.

<sup>97</sup> (1981) 55 *Australian Law Journal* 59.

<sup>98</sup> So also did the *Knesset* recently in an amendment to s. 345 of the Penal Law, 1977; 1987 *Sefer Hahukim* 62 (The Penal Law itself was published in a special volume of the *Laws of the State of Israel*).

not referred to in any of its laws, and despite the fact that Israel lacks a Bill of Rights which serves as the backbone of those decisions.

It was observed, as early as 1966, that 'apart from the courts of the United States, the Israeli Supreme Court possibly makes more frequent use of American jurisprudence than any other court in the common law world'.<sup>99</sup> One may find several American precedents dealing with civil liberties quoted in a typical Israeli case. Needless to say, this is an indispensable contribution to the development of civil liberties which are not to be found in the Israeli Statutes Book.<sup>1</sup> In the same manner Israeli Courts refer to other jurisdictions and absorb into Israeli law the most liberal attitudes in this area. Indeed one writer described the Israeli law as 'a melting pot willing to accept the best principles of the different legal systems'.<sup>2</sup>

The Israeli Supreme Court dwells upon the human heritage of Western civilization in general. This source draws from doctrines of Christian beliefs as refined and developed through the Renaissance era. The Court relies on teachings of philosophers and of political and behavioural scientists. Indeed, some of the Supreme Court's decisions are social essays of the highest quality.<sup>3</sup>

Returning to our starting point, it may well be said that civil liberties are cherished and guarded with care in Israel not in spite of its being in a state of war but rather because of its being so. Realizing that the emergency state is a constant phenomenon of Israeli life, Israel's justices were faced with the dilemma of either ignoring civil liberties and human dignity, as was the case in many democracies, or striving to preserve such precious values. The realization that this state of affairs is not temporary influenced the Court in choosing the second alternative. Moreover, as human rights are constantly threatened by the war-like situation, the Supreme Court took a courageous stand in favour of civil liberties.<sup>4</sup>

Ironically, oppressive mandatory legislation in the area of civil rights encouraged the courts to fight the letter of the statutes. It is of significance that the Israeli press itself rejected the replacement of the outrageous Press Ordinance of 1933 by an Israeli Act. Anything less than a statute enacting absolute freedom of expression may prove less advantageous to the press than the present oppressive ordinance which is largely circumvented.<sup>5</sup>

<sup>99</sup> Apelbom, A., 'Common Law à l'Americaine' (1966) 1 *Israel Law Review* 1194; Lahav, *op. cit.* n. 41.

<sup>1</sup> It should be noted that American ideas, in the area of civil liberties often have their roots in Jewish Law: Konvitz, M., *Judaism and the American Idea* (1978); Meislin, B.J., *Jewish Law in American Tribunals* (1976) 1-37; Schwartz, H., *Justice by the Book: Aspects of Jewish and American Criminal Law* (1976). See also *supra* n. 92.

<sup>2</sup> Jacobson, D., 'The Legal System of Israel' (1954) 40 *American Bar Association Journal* 1067, 1068.

<sup>3</sup> Professor Zamir writes that the State of Israel inherited the tradition of democracy from the democratic nature of the institutions of the Jewish Communities in the Diaspora, especially in Europe, and of the Zionist Movement: Zamir, *op. cit.* n. 58, 65.

<sup>4</sup> Cf. Rubinstein, *op. cit.* n. 2, *supra* 815.

<sup>5</sup> Goren, D., *Secrecy and the Right to Know* (1979) 116. Cf. the government's failure to replace the Defence (Emergency) Regulations 1933, as on the one hand the current situation prevents their total abolition, and on the other hand we should abstain from 'tarnishing the Israeli statute book with home-made legislative measures which curb the basic rights of the individual': Shapira, *op. cit.* n. 22, 451; Rubinstein, *op. cit.* n. 2, *supra* 815, 138.

The absence of a Bill of Rights likewise encouraged the Supreme Court to do its utmost to preserve civil liberties. Justice Etzioni explained the role of that Court in one of his opinions as follows:

In our country in the absence of a Constitution which expressly protects the basic rights of the citizens, this Court, sitting as the High Court of Justice, is charged with the duty of safeguarding these rights and giving the requested remedy to a citizen, when one of his basic freedoms is infringed by governmental acts.<sup>6</sup>

The prevailing attitude in the Supreme Court with regard to the status of civil liberties *vis-à-vis* national security was stated by Justice Cohn as follows:

In a law-abiding State, no security, political, ideological or any other consideration may justify violation of the law by the authorities. In a law-abiding State, no governmental organ may deny the individual any of his legal rights unless expressly authorized to do so by law . . .

The moral might and material justness of the authorities' struggle [against enemies of the State] are wholly dependent upon the authorities' obedience to the law of the land . . . The importance of the moral weapon is second to that of no other weapon . . . and there is no moral weapon equal in effectiveness to the rule of law. It should better be known that the rule of law in Israel will never succumb to its foes.<sup>7</sup>

It is such an attitude that enabled an expert on Israeli constitutional law to summarize the standard of preserving the rule of law in Israel with the following positive conclusion:

In judging ourselves, we do not invoke or rely upon legal measures taken by other countries in times of war. Upon reading the decisions of the Israeli Supreme Court, one realizes that the standards invoked by the Court are not only taken from democratic countries such as England and America, but usually rely upon principles evolved by peaceful communities. It is only when we take these standards as our criteria that we can, and should, both compliment ourselves and occasionally criticize ourselves.<sup>7</sup>

#### ADDENDUM: A PROPOSED BILL OF RIGHTS

In 1987 a special team of the Tel Aviv University Faculty of Law<sup>9</sup> published a proposal for *A Constitution for the State of Israel*. Chapter C sec. 5–35 of the proposed Constitution deals with *Human Rights*.<sup>10</sup> It provides as follows:

#### C. HUMAN RIGHTS

##### *Human Value and Dignity*

5. The State of Israel is founded upon a recognition of human worth and the sanctity of human life. It is incumbent upon all State authorities to protect and to hold inviolate man's value and dignity. A person shall not be subjected to abuse or degradation.

<sup>6</sup> H.C. 152/71 *Kremer v. Jerusalem Municipality* 25 (I) *Piskei Din* 767, 782.

<sup>7</sup> H.C. 320/80 *Kawassma v. Minister of Defence* 35 (III) *Piskei Din* 113, 124-5. For an English summary of the decision see (1981) 11 *Israeli Yearbook of Human Rights* 344. Cf. H.C. 428/86 *Barzilai v. The Government of Israel* 6 S.J. 1, 39-40 *per* Shamgar P., 103-5 *per* Barak J.

<sup>8</sup> Rubinstein, A., 'War and the Rule of Law: The Israeli Experience' (1971) 1 *Israeli Yearbook of Human Rights* 322, 326.

<sup>9</sup> Chairperson: Dean Uriel Reichman. Members and participants: Baruch Bracha, Ariel Rosenzvi, Amos Shapira, Daniel Friedmann, Baruch Susser, Kenneth Mann, Asher Maoz, Avigdor Klagsbald.

<sup>10</sup> A proposed Bill of Rights was drafted also by Prof. B. Akzin *Project of a Constitution for the State of Israel* (Tel-Aviv, 1965) (Hebrew). Prof. I. H. Klinghoffer, whose proposed Charter of Basic Human Rights is still pending in the Constitution, Law and Justice Committee of the *Knesset* through M.K. Rubinstein's bill (*supra* n. 37) published a revised version of the Bill: Klinghoffer, I.H., *The Charter of Human Rights — The Stalemate in Legislation* (Tel-Aviv, 1981) 31 (Hebrew).



*Exclusion of Capital Punishment*

6. (a) There shall be no capital punishment in Israel.
- (b) Notwithstanding the said prohibition, the death penalty may be prescribed by Law for an act amounting to the crime of genocide or other crime against humanity.

*Equality Before the Law and Non-Discrimination*

7. (a) All persons are equal before the law.
- (b) No person shall be discriminated against on grounds of race, sex, ethnic background, community, country of origin, religion, personal outlook, personal or social status, political affiliation or upon any other extraneous ground.
- (c) The provisions of this paragraph shall not affect any law which confers upon Jews the right of return and citizenship pursuant thereto.
- (d) A provision of law which renders Israeli citizenship a precondition to the enjoyment of rights or to the holding of a public office, shall not be deemed discriminatory.

*Human Liberty*

8. (a) A person is entitled to the enjoyment of personal freedom.
- (b) A person's freedom shall not be restricted by imprisonment, detention, or in any other manner except in accordance with a provision of law, in proceedings pursuant thereto, and subject to judicial review.

*No Slavery or Compulsory Labor*

9. (a) A person shall not be subjected to slavery or forced labor.
- (b) A duty to work pursuant to a provision of law within the framework of military service, national service in lieu of military service, state of emergency services, or services at a time of disaster which threatens a community's existence and welfare, as well as labor imposed on prisoners or prisoners released on parole — shall not be deemed forced labor.

*Freedom of Movement*

10. (a) Every person lawfully in Israel is entitled to freedom of movement. This right shall only be restricted by law and in order to protect the security of the State, the public welfare and health, or the rights of others.
- (b) A citizen of Israel has the right of entry into Israel and shall not be removed beyond its territorial borders against his will. This provision shall not affect extradition according to the Law.
- (c) A person who is not a citizen of Israel but who has legally entered the State, shall not be removed beyond the territorial jurisdiction of the State save under a provision of law and in proceedings pursuant thereto.

- (d) A person shall not be prevented from leaving the territorial jurisdiction of Israel, except upon a detention order issued by the court upon a ground fixed by law.

#### *Rights of an Arrested Person*

11. A person who has been arrested shall immediately be informed, in a language understood by him, of the reasons for his arrest, and shall be brought before a court as soon as possible, but not more than 48 hours after his arrest. An arrestee is entitled to have the fact of his arrest made known promptly to a person specified by him, and also has the right forthwith to meet with legal counsel of his choice. The right to such notification or meeting with legal counsel may be suspended pursuant to provision of law and upon a court order issued for the purpose of protecting the security of the State or human life.

#### *Habeas Corpus*

12. Anyone who claims that a person has unlawfully been deprived of his freedom may apply to a court for an order of Habeas Corpus and the release of that person.

#### *Recourse to the Courts*

13. Every person has the right to recourse to judicial institutions for the realisation and protection of his rights.

#### *Fair Trial*

14. (a) Every trial shall be public and fair and be conducted before a judicial institution established according to law.
- (b) Nothing in this paragraph shall preclude a provision of law whereunder a judicial institution may direct that the hearing be conducted in camera in special cases, in order to protect the security of the State or to prevent any impairment of its foreign relations, in order to protect the interests of a minor, or a complainant or accused as to a sexual offence, or when the hearing concerns a matter of marital relations, or when publicity of the proceedings may deter a witness from testifying.

#### *Presumption of Innocence*

15. Every person is presumed to be innocent until convicted according to law.

#### *No Self-Incrimination*

16. Every person is entitled not to incriminate himself.

#### *Defence Against a Criminal Charge*

17. A person who has been criminally charged before the court, shall be served with a statement of the charge and be given an adequate opportunity to

prepare his defence, including the engagement of legal counsel. A person without means who is charged with a felony shall have legal counsel engaged on his behalf by the State, which shall bear the cost of the defence.

*No Retroactive Incrimination or Punishment*

18. (a) A person shall not be held criminally responsible for an act or omission that was not legally an offence at the time of such act or omission and no more severe punishment shall be imposed than the punishment liable to have been imposed under the law in force at the time of commission of the offence.
- (b) This provision shall not extend to any law dealing with punishment for an act which constitutes the crime of genocide or a crime against humanity.

*Right to Privacy*

19. (a) Every person is entitled to personal privacy.
- (b) The privacy of one's personal life, conversations, letters and communications shall not be violated except upon a court order issued upon a ground prescribed by law for the protection of the security of the State, the prevention of crime, and the detection of offenders.
- (c) A violation of personal privacy for the purposes prescribed in subsection (b), without issue of a prior court order, may also be authorised by law in special circumstances of urgency which so warrant, provided the matter be brought before a court for approval as soon as possible.

*Private Domain*

20. (a) Every person is entitled to the protection of his private domain.
- (b) A person's private domain shall not be entered without his consent, and no search shall be conducted there except by virtue of a court order issued on a ground prescribed by law for the protection of the security of the State, the welfare of a minor or the public health, for the prevention and detection of crime, for the protection of a person's life or property, or for effecting a lawful arrest.
- (c) A violation of the right of private domain for the purposes prescribed in subsection (b), without issue of a prior court order, may also be authorised by law in special circumstances or urgency which so warrant, provided the matter be brought before a court for approval as soon as possible.

*Bodily Search*

21. (a) A person shall not be bodily searched save as provided in section 19, *mutatis mutandis*.
- (b) An individual's personal effects shall not be searched save as provided in paragraph 20, *mutatis mutandis*.

*Freedom of Religion and Conscience*

22. (a) Every person is entitled to freedom of religion and conscience.
- (b) A person shall not be prejudiced in his occupation on account of observing the precepts of his religion.
- (c) A person shall suffer no deprivation of rights, imposition of obligations or enforcement of prohibitions against him on grounds of religion.
- (d) Nothing in this section shall—
1. preclude the State or public authorities from supporting religious institutions, or from providing religious services or religious education, all on a basis of equality;
  2. preclude recognition of a religious marriage or divorce of the parties' choice, or affect any provision whereunder a person's choice of religious marriage subjects him to the laws of divorce of that religion;
  3. affect any provisions of law substantively sustainable on independent grounds unconnected with religion;
  4. affect the show of consideration for the interests of a religious public and the need of such a public to maintain its way of life or to fulfill the precepts of its religion, all on a basis of equality and a proper balance between that public's and the interests of the rest of the public.
  5. affect any provisions pertaining to the ritual fitness (kashrut) of food in the Israel Defence Army or in public institutions.

*Freedom of Opinion and Information*

23. (a) Every person has the right to freedom of opinion.
- (b) Every resident has the right to obtain information for the shaping of his opinion.
- (c) The right to obtain information shall not be restricted except by law for the protection of the security of the State, the public peace, the rights of others, the good name and reputation of others, or to ensure the integrity of the judicial process.

*Freedom of Expression*

24. (a) Every person has the right to freedom of expression.
- (b) Freedom of expression shall not be restricted except by law for preventing destruction of the democratic regime, protecting the security of the State, the public welfare, the rights and good name and reputation of others, and to ensure the integrity of the judicial process.
- (c) Nothing in subsection (b) shall render the publication and distribution of newspapers, books, plays, films or other publications and their public performance conditional on the obtaining of a license from the authorities, or subject to any prior scrutiny other than prior scrutiny prescribed by law with a view to safeguarding the security of the State.

- (d) Nothing in this section shall preclude the regulation by law of the licensing and operation of radio and television broadcasts, provided that freedom of expression be maintained for such broadcasts.

*Freedom of the Arts, Science and Research*

- 25. (a) Every person is entitled to freedom of artistic and scientific creativity and research.
- (b) This right shall not be restricted except by law for the protection of the security of the State, the public health, human life or the rights of others.

*Freedom of Assembly, Procession and Demonstration*

- 26. (a) Every person has the right to organise and participate in peaceful meetings, processions and demonstrations.
- (b) This right shall not be restricted except by law for preventing destruction of the democratic regime, protecting the security of the State and the public peace, or for ensuring the integrity of the judicial process.

*Freedom of Association and Organisation*

- 27. (a) Every resident has the right to freedom of association and organisation.
- (b) This right shall not be restricted except by law for preventing destruction of the democratic regime, or protecting the security of the State and the public peace.
- (c) Membership in an association or organisation shall not be imposed on any person except by law aimed at maintaining professional levels and standards of service provided to the public by those persons engaged in such professions.

*Freedom of Occupation*

- 28. Every resident is entitled to engage in any work, business, profession and occupation, subject to arrangements prescribed by law and necessary for the public good.

*Protection of Private Property*

- 29. (a) Every person is entitled to enter into contractual ties, and to acquire, hold and bequeath property.
- (b) Every person may use his property at will, subject to the provisions of law for the protection of the public good and the rights of others. It may be prescribed by law that State residents alone shall be entitled to acquire rights of ownership and lease in immovable property.
- (c) No property shall be expropriated except in accordance with law, for public purposes and in return for equitable compensation which, in the absence of agreement between the parties, shall be determined by a court.

*Workers' Rights*

30. Workers have the right to organise themselves in trade unions for the advancement of their working conditions as well as their economic and social interests. Workers have the right to strike to this end, without resort to violence. Employees and their unions have the right to enter into collective work agreements with individual employers as well as with employer associations.

The right to strike shall not be restricted except by law for safeguarding the security of the State, the public health, or the functioning of an essential public service.

*Means of subsistence*

31. A resident who is unable to provide for himself for reasons of unemployment, disability, old age, minority or other like reason, shall be entitled to an allocation of means sufficient to ensure him humane conditions of existence.

*Right to Education*

32. (a) Every child resident in Israel is entitled to free public education until completion of the ninth grade.  
(b) The study curriculum in the public educational institutions shall be determined with consideration given to the extent practicable to the language of the parents and their religious as well as cultural outlook.  
(c) The State shall not prevent the establishment of private educational institutions designed for pupils from the tenth grade upwards, but such institutions shall be subject to State supervision.

*The Right to Medical Treatment*

33. Every resident is entitled to receive necessary medical treatment within the territorial limits of the State, and if he be unable to finance such treatment, he shall be given the treatment gratis subject to the arrangements prescribed by law.

*Reservation as to Security Services and Law Enforcement*

34. The provisions of this chapter notwithstanding, the operation of sections 10(a), 24, 25, 26, 27, 28 and 30 may be restricted by law in respect to persons serving in the Israel Defence Army, the Police Force, the Prisons Service, and the Intelligence Organisations of the State of Israel, provided this be necessary for the discharge of their imposed duties.

*Non-Deviation from Democratic values*

35. The limitation of a human right pursuant to any provision in this chapter shall be conditional upon such limitation being consistent with the democratic character of the State of Israel.