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**Terrorism and Access to Justice – A Comparative Approach
in the Field of Security Versus Liberty**

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Abstract

The paper analyses selected case law of the Israeli Supreme Court, the German Federal Constitutional Court and the German High Court of Justice dealing with access to justice/due process rights of persons suspected of terrorist offences. The analysis will address *inter alia* the courts' methods of balancing security interests of the state and human rights of suspects as well as their stance on dealing with secret evidence, security related information supplied by the branches of government, especially secret service authorities, and considerations of government authorities regarding potential dangers and threats to state and public security. In times of emergency and stress, all courts are rather reluctant to dismiss legal provisions curtailing due process rights as unconstitutional and to replace security related considerations of the executive branch by an own approach. Nevertheless in most of the analyzed cases they encouraged the state to keep on adhering to the rule of law and fighting terrorism within and not outside the legal order. Paying due attention to the right and principle of human dignity when exercising judicial review of government measures by balancing security and liberty may serve to guarantee a minimum standard of due process rights even in times of greatest peril.

Keywords

Supreme Court of Israel, Federal Constitutional Court of Germany, access to justice, due process rights, balance of security and liberty, human dignity

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I. Introduction

1. Security versus liberty as a challenge for democracies

In times of emergency and stress, human rights are at stake. Not only do terrorist individuals or groups jeopardize fundamental rights of the citizens by threatening their right to life and physical integrity. Also the state responding to a terrorist threat may infringe upon the basic rights of its own citizens by implementing security legislation. States are, on the one hand, obliged to take appropriate legislative and executive measures to protect their citizens from terrorist threat – a duty that derives either from constitutional provisions or directly from human rights law.¹ On the other hand, states are restricted in their response by adhering to the rule of law, to national and international human rights.

This paper will focus on the rights of those suspected or accused of having committed offences or acts commonly contextualized with terrorist activities. In contrast, due to the limited space, this paper does not intend to contribute to the controversial legal question of how to define the

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¹ STEFAN SOTTIAUX, TERRORISM AND THE LIMITATION OF RIGHTS. THE ECHR AND THE US CONSTITUTION, at 3 (2008).

terms “terrorism”² and “state of emergency” or simply “emergency”³. For here it suffices to quote the European Court of Human Rights (ECtHR) defining the term “*public emergency*” according to Art. 15 of the European Convention on Human Rights – which allows for derogations from obligations under the Convention to accommodate exigencies in exceptional circumstances – as “(...) *exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.*”⁴ Without raising claims to completeness nor affirming total adequacy for the issue treated in this paper, this definition helps ruling out those cases brought before the courts that are not related to terrorism and do not exceed a certain degree of severity.

2. Definitions

In order to be able to encompass various aspects of the rights of the suspect and the accused in the course of trial and punishment that I would like to address, the term “*access to justice*” in a qualified, broader meaning can be used to “*signify the right of an individual not only to enter a court of law, but to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice.*”⁵ For the compliance of a state’s measures against terrorist activities with standards of democracy, human rights and the rule of law, it is not only necessary to analyze a person’s right to bring a claim or to challenge a state measure before a court – regardless of her or his nationality – but rather the totality of rights including legal remedies in the pre-trial phase, the rights due to the accused in the course of a trial and, later, in the detention station. In the human rights discourse, this right is also referred to in an equally encompassing way as due process of law, especially in U.S. jurisdictional jurisprudence.⁶ The discussed issue is of utmost importance in the field of security versus liberty, since, as Oren Gross and Fionnuala Ní Aoláin put it, “*limitations on due process rights are often the first port of*

² Christian Walter, *Defining Terrorism in National and International Law*, in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 23 (Christian Walter et al. eds. 2004); Emanuel Gross, *Democracy in the War against Terrorism – The Israeli Experience*, LOYOLA OF LOS ANGELES LAW REVIEW 1161 at 1164-1167 (2002).

³ JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS 2-28 (1994); Fionnuala Ní Aoláin, *The Individual Right of Access to Justice in Times of Crisis: Emergencies, Armed Conflict, and Terrorism*, in ACCESS TO JUSTICE AS A HUMAN RIGHT 57 at 60-61 (Francesco Francioni ed., 2007).

⁴ *Lawless v. Ireland (no. 3)*, European Court of Human Rights (ECtHR), judgment 1 July 1961, para. 56, thereby confirming the definition of the European Commission of Human Rights.

⁵ Francesco Francioni, *The Rights of Access to Justice under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT 1 (Francesco Francioni ed., 2007).

⁶ See for example ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM (2009).

call for states limiting rights protections in times of crisis.”⁷ It is in the way a state treats its “enemies” (though the author does not wish this term to be understood in a legal manner) that one can see whether it really abides by the rule of law and democratic principles in general. Or, put differently, terrorism “succeeds if it tempts us to abandon the core values of democratic society, such as due process and rights to a fair trial.”⁸ In the fight against terrorism, the recourse to acts limiting the rights of access to justice has not only often been the first step undertaken by a state facing this sort of threat, but also constitutes one of the most effective measures in a state’s arsenal of preventive security policies.

Instead of simply analyzing if rights of access to justice have been sufficiently enshrined in constitutional or non-constitutional provisions, it is necessary to check whether their implementation is guaranteed by a well-functioning and fair administration of justice. While answering this question, attention has to be paid to the highest courts and their human rights jurisdiction, since a well-known hypothesis among legal scholars asserts that the executive as well as the legislative branch of the state are more inclined to infringe upon human rights in times of crisis than the judiciary. Indeed, at a first glance, with its attested impartiality and independence especially from interference by politics or public pressure, the courts seem, from an institutional and structural point of view, to be the best designed to withstand temptations to just follow the rule of the majority with its natural interest in “solely” preserving security needs of the citizens.⁹ On the other hand, one could make the point that in states of emergency courts

⁷ OREN GROSS & FIONNUALA NÍ AOLAÍN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE*, at 290 (2006).

⁸ Geoffrey Robertson, *Fair Trials for Terrorists?*, in *HUMAN RIGHTS IN THE ‘WAR ON TERROR’* 169 at 170 (Richard Ashby Wilson ed., 2006).

⁹ Despite its obvious multilevel dimension, the *Kadi* judgment of the European Court of Justice (ECJ) (C-402/05 and C-415/05 P – *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 I-06351) might serve as an excellent example for a case law that can be described as rather “rights approached”/due process rights oriented. The Court stressed that its judicial review regarding fundamental rights (such as effective judicial protection) as integral part of the general principles of Community law also applies to Community acts that intend to give effect to a UN Security Council resolution (para. 286). At the same time, the ECJ underlined that it did not want to challenge the supremacy of international law by refraining from an examination of the compatibility of the resolution with international law or even *jus cogens* (para. 287-88). The Court, however, held that the examination procedure before UN bodies for individuals affected by lists entailing a freezing of financial assets does clearly not comply with the scheme of judicial protection of fundamental rights laid down by the EC Treaty (para. 322). Hence, the competent Community body is obligated to communicate to the persons affected the grounds on which their names have been included in these lists (para. 337-38). Then they must be heard in order to get an opportunity to argue against their inclusion (para. 339-49). See e.g. Enzo Cannizzaro, *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi case*, in: *YEARBOOK OF EUROPEAN LAW* 593 (2009); Federico Fabbrini, *The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, in: *YEARBOOK OF EUROPEAN LAW*, 664 at 687 (2009); Guy Harpaz, *Judicial Review by the European Court of Justice of UN ‘Smart Sanctions’ Against Terror in the Kadi Dispute*, in 14 *EUROPEAN FOREIGN AFFAIRS REVIEW* 65 (2009); Nikolaos Lavranos, *Judicial Review of UN Sanctions by the European Court of Justice*, in 78 *NORDIC JOURNAL OF INTER-*

should generally abstain from interfering with the executive branch since – due to a lack of time for “*the dispassionate consideration of evidence and the reasoned elaboration of judgment*”¹⁰ – the legislature’s approval of government measures might suffice to prevent executive arbitrariness, except for cases of an extreme abuse of power.

3. The selection of legal systems to be analyzed

The choice of legal systems to be analyzed in this paper is Germany and Israel. An emphasis will be put on the German system with which the author is most familiar. Germany, as part of the Civil Law family and with its written constitution and its extensive fundamental rights jurisdiction is well suited for a case study. Due to its unique experience with a multitude of terrorist attacks and the democratic character of its political system which it kept adhering to over the years despite all threats, Israel is of utmost importance to research carried out in this field of law.

II. Israel and Germany: Analysis of legal systems and case law

1. Germany

a) Constitutional Law

In Germany, the rights of access to justice are not guaranteed in one single “due process clause”, but in several provisions of its constitution, the so-called “Basic Law” (*Grundgesetz*). All basic rights shall bind the legislature, the executive and the judiciary as directly applicable law, according to Art. 1 para. 3 of the Basic Law. The instrument of constitutional complaint which is laid down in Art. 93 para. 1 no. 4a of the Basic Law allows everyone who was subject to a treatment by state authorities possibly violating fundamental rights to challenge this measure before the Federal Constitutional Court.

Art. 19 para. 4 of the Basic Law is one of the most important provisions in this regard. It states that, should any person’s rights be violated by public authority, he may have recourse to the courts. As a procedural right, it has as a precondition the existence of material fundamental rights guaranteed in the provisions before, and, at the same time, is a precondition for effective implementation of the aforementioned rights.¹¹ By virtue of this provision, everyone – German

NATIONAL LAW 343 (2009); Takis Tridimas, *Terrorism and the ECJ: Empowerment and democracy in the EC legal order*, in EUROPEAN LAW REVIEW 103 (2009).

¹⁰ BRUCE ACKERMAN, BEFORE THE NEXT ATTACK, at 102 (2006).

¹¹ BODO PIEROTH/BERNHARD SCHLINK, GRUNDRECHTE, STAATSRRECHT II, para. 1096 (2011).

citizens as well as alien residents and nonresidents¹² – who is able to claim plausibly to have been violated in their basic rights by a public authority is granted in principle access to a German court.¹³ There is no such thing in Germany’s legal order as the general denial of standing to sue for alien enemies seeking compensation for or a remedy against allegedly illegal actions of the state. Additionally, according to the findings of the Federal Constitutional Court, the provision also gives right to a de facto effective legal protection¹⁴ including an appropriate duration of the legal proceedings¹⁵ and a comprehensive examination of the legal and factual basis by the courts.¹⁶ Besides the constitutional warrant to deviate from the aforementioned guarantees in s. 3 of para. 4 there are further explicit provisions relating to fundamental rights restricting this German “due process clause” concerning the right of asylum (Art. 16 Basic Law) and the right to privacy of correspondence, posts and telecommunications (Art. 10 Basic Law).¹⁷ Other constitutional rights and principles in conflict with the rights of persons accused or suspected of having committed a terrorist offence have to be weighed against the latter to assure a balance between competing constitutional values.¹⁸

Further judicial and procedural guarantees can be derived from art. 20 para. 1 and 3 of the Basic Law. Laying down what within the German legal system is referred to as “*Rechtsstaatsprinzip*” (rule of law), it constitutes one of Germany’s major constitutional provisions, that, according to Art. 79 para. 3 of the Basic Law, is exempt from any constitutional amendment. By virtue of the established jurisdiction of the Federal Constitutional Court, departing from Art. 20, the Basic Law also grants basic principles of “*Justizgewährleistung*” (administration of justice) including such rights as fair trial (see also Art. 103 Basic Law¹⁹), equality before the courts (see also Art. 3 Basic Law²⁰), *habeas corpus* (Art. 104 Basic Law) and the principle of equal fighting chances.²¹ Furthermore, it is also well established that all fundamental rights laid down in the Basic Law have a direct impact on procedural provisions

¹² BVerfGE 35, 382 (401).

¹³ Michael Sachs, in GRUNDGESETZ KOMMENTAR, Art. 19, para. 134 (Michael Sachs ed., 2011).

¹⁴ BVerfGE 10, 264 (267).

¹⁵ BVerfGE 40, 237 (256).

¹⁶ BVerfGE 15, 275 (282).

¹⁷ See Sachs *supra* note 13 at para. 151-153.

¹⁸ ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, at 47-56 (2002); Peter M. Huber, in GRUNDGESETZ KOMMENTAR, art. 19 para. 372 (Hermann v. Mangoldt et al. eds., 2010).

¹⁹ Para. 1: In the courts every person shall be entitled to a hearing in accordance with law; para. 2: An act may be punished only if it was defined by a law as a criminal offence before the act was committed; para. 3: No person may be punished for the same act more than once under the general criminal laws.

²⁰ Para. 1: All persons shall be equal before the law.

²¹ Rupert Scholz, *Justizgewährleistung und wirtschaftliche Leistungsfähigkeit*, in GEDÄCHTNISSCHRIFT FÜR PROFESSOR DR. EBERHARD GRABITZ 727-730 (Dieter Wilke et al. eds., 1995); Huber *supra* note 18 at para. 352-358.

since procedure is conceived as essential precondition for an effective implementation of these rights, regardless of the fact that the Basic Law contains the aforementioned rights that relate directly to procedure.²²

b) Prominent cases of the 1970s

Unlike for example the United States that suffered from a major terrorist blow on September 11, 2001, Germany already faced left-wing extremism in the aftermath of the students' revolt of 1968, with the "*Rote Armee Fraktion*" (*Red Army Faction*) questioning the Federal Republic and its legitimacy as such. The back then relatively young state together with its public and legal scholars was for the first time confronted with a serious threat coming from inside the country and, still stamped by the violations of fundamental rights during the Nazi era, struggled hard with finding the right balance between national security interests and the basic procedural rights of defendants and detainees.²³ At that time, grounding on the position that terrorists should not be treated as ordinary criminals²⁴, the enactment and implementation of special legislation for terrorist suspects was being discussed among legal scholars. By bringing up the issue of an "extra-legal state of emergency", some of them eventually came to the crucial question of the survival of the state as a justification to suspend fundamental rights.²⁵ Later, this thought was theoretically based on the concept of a newly created "*basic right to security*" against which civil rights and liberties have to be balanced.²⁶

The Communication ban

Most attention probably attracted the so-called *Stammheim-trials* that were being held on the ground of *Stammheim* Prison outside Stuttgart in an especially erected bunker-like court building. The trials as well as the imprisonment of the Red Army Faction terrorist group's protagonists in this prison prompted the most controversial legal discussions and most criticized court rulings in the field of new anti-terrorism legislation.

In its famous *Kontaktsperre* (communication ban)-decision²⁷ of 1978, the Federal Constitutional Court was confronted with several constitutional complaints that challenged a provision

²² See ALEXY *supra* note 18 at 317.

²³ See MATTHIAS KÖTTER, PFADE DES SICHERHEITSRECHTS, at 85-105 (2008).

²⁴ Hans-Jochen Vogel, *Strafverfahrensrecht und Terrorismus. Eine Bilanz*, in NEUE JURISTISCHE WOCHENSCHRIFT 1217 at 1218 (1978).

²⁵ See CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT, at 145-146 (2000), see especially notes 58-62.

²⁶ JOSEF ISENSEE, DAS GRUNDRECHT AUF SICHERHEIT (1983).

²⁷ BVerfGE 49, 24.

of the *Law governing the constitution of the courts* (EGGVG) allowing for an interruption of all contacts among prisoners and between a prisoner and his defending lawyer. Such measures according to sec. 31 of the law were implemented during the so-called “*German Autumn*” when members of the Red Army Faction kidnapped a high-ranking representative of the German industry with the intention to force the German state to release imprisoned terrorists in exchange of the hostage. As preconditions for the legality of such a communication ban the law defined an imminent threat to life, physical integrity or liberty of a person, sufficient facts proving that this danger is likely to emanate from a terrorist group and, as a third point, the necessity to meet the danger with this means. In the genesis of the law the state suspected the defendants’ lawyers to serve not only as suppliers of weapons for the imprisoned terrorists, but also as their intermediaries transmitting information and orders to terrorists in possession of the hostage outside the prison.

Even though the Federal Constitutional Court admitted the existence of substantial encroachments on fundamental rights of the prisoners in its decision, it rejected the constitutional complaints against the legal provision and the measures based thereupon. Among those rights mentioned by the Court were the right to a fair trial, the right to a trial within a reasonable time as well as the procedural rights to a defendant in a pending trial.²⁸ From its constitutional point of view the Court classified the contested legal rule as unobjectionable way to balance the competing constitutional principles: the right to life and physical integrity of innocent citizens (as ultimate source of legitimacy for the very existence of the state) and the security of the state on the one hand, the defendants’ rights of access to justice on the other hand. According to the Court’s findings, the legal provision was also in accordance with the constitutionally guaranteed principle of proportionality, since it could not see other, less restricting but equally effective means to save the life of the kidnapped citizen. Additionally, it considered the provision to be *appropriate*,²⁹ which, according to the German legal system, requires that the restrictions on fundamental rights suffered by the detained terrorists do not exceed by far the positive effect on national security and basic rights of the kidnapped person as the aim behind the contested legal rule.³⁰ In its reasoning it especially emphasized the temporary nature of the communica-

²⁸ BVerfGE 49, 24 (55).

²⁹ Also referred to as „*proportionality in a narrow sense*“.

³⁰ See PIEROTH/SCHLINK, *supra* note 11 at para. 299-307; BVerfGE 100, 313 (375-376).

tion ban and the also limited suspension of pending trials and expiring deadlines related to other procedural guarantees.³¹

The reasoning of the Federal Constitutional Court regarding the balance of the competing constitutionally protected rights and principles stayed rather abstract. It lacked a firm discussion about the impact of such a measure, especially on the inmates' psyche. The complainants' claim that the prisoners were treated as "objects" rather than as subjects was rejected in one single sentence by hinting at the temporary character of the measure.³² This can only be considered as a step backward, since in its earlier jurisdiction the Court had already made a connection between the rights of the accused during a trial and human dignity.³³ According to the Federal Constitutional Court's approach to define the scope of the protection of the right to human dignity, known as "*theory of object*", the state violates human dignity when it treats persons as mere objects; still, every case needs to be judged on its merits.³⁴ Barring a detained person from any contact to other prisoners and to his lawyer would have required a substantial reasoning about why the inviolable³⁵ principle of human dignity was not breached. Furthermore, when challenging the measure, the detained person is not entitled to seek legal assistance and is not informed about facts and circumstances that could jeopardize the purpose of the measure in the adjoining hearing.³⁶

Further measures taken against suspects, detained persons and defense lawyers

Some years prior to the "German Autumn", one lawyer defending an imprisoned member of the Red Army Faction was excluded from defense during preliminary proceedings by the investigating judge at the Federal High Court of Justice (*Bundesgerichtshof* – BGH). His decision was later confirmed by order of the High Court. The act of exclusion was based on the suspicion that he had transmitted messages from inside the prison to those terrorists acting outside of it. The state authorities feared that the establishment of a considerable information system comprising all members of the Red Army Faction would increase the probability of crimi-

³¹ BVerfGE 49, 24 (63).

³² BVerfGE 49, 24 (38, 64).

³³ BVerfGE 9, 83 (85).

³⁴ Eckart Klein, *Human Dignity in German Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 145 at 149-152 (David Kretzmer & Eckart Klein eds., 2002).

³⁵ See Art. 1 para. 1 of the Basic Law: Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

³⁶ It deserves mentioning that the Federal High Court of Justice in *his* reasoning solely based the contested communication ban on the *defense of necessity* argument even though the measure violated existing procedural rights of the detained persons, at a time when the law introducing the new measure of a cut-off had not yet been passed in the Bundestag and thus had not yet been in force: BGHSt 27, 260.

nal actions of the terrorist group outside the prisons and thus the threat for public institutions and the population caused by it. In its order,³⁷ the Federal Constitutional Court declared unconstitutional the (confirming) decision of the Federal High Court of Justice, thereby underscoring the neutrality and independence of a defense lawyer as an organ of the administration of justice. That Court had approved the exclusion of the lawyer even though it could not base the decision on an explicit section of the *Code of Criminal Procedure*, but created a new legal basis by teleological interpretation of multiple sections of the law and stated that it was part of a “pre-constitutional customary law”. The Constitutional Court, however, rejected this legal reasoning, with a statement that according to the rule of law principle such strong infringement upon the basic rights of the lawyer and the defendant’s right to a fair trial requires a statutory provision regulating preconditions of the exclusion as well as the assignation of the competent body to decide on it.³⁸ By emphasizing that the right of the defendant to choose his defense lawyer freely is essential for him not to become an “object” of the state authorities and their actions, the Court even made reference to its “theory of object” without explicitly mentioning the principle of human dignity.

Other state actions were also criticized as unconstitutional. However, they were not or they could not be brought before a court: Secret wiretapping in the homes of suspected persons as well as of confidential conversations between detained terrorists and their lawyers (without a legal basis authorizing the state authorities to such measures), and a prisoner swap in exchange for freeing a kidnapped politician from West-Berlin. The core of the theoretical legal debate relating to these issues was the question whether the legal concept of defense of *necessity*³⁹ is applicable to actions of the state that are not based on legal provisions (*defense of extra-legal necessity*⁴⁰). State actors that found themselves in circumstances of a quasi-state of exception first responded promptly to the new imminent threats by implementing measures lacking an explicit legal basis. This recourse, according to them, should stay an exceptional event, based on the legal concept of extra-legal necessity which was being transferred from criminal law

³⁷ BVerfGE 34, 293.

³⁸ BVerfGE 34, 293 (301, 302).

³⁹ Laid down in the German Criminal Code, sec. 34: A person who, faced with an imminent danger to life, limb, freedom, honor, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.

⁴⁰ MATTHIAS JAHN, DAS STRAFRECHT DES STAATSNOTSTANDES, at 273-427 (2004); Ernst-Wolfgang Böckenförde, *Der verdrängte Ausnahmezustand*, in NEUE JURISTISCHE WOCHENSCHRIFT 1881-1890 (1978).

into public law. In contrast, other legal scholars opposed this view, advocating the introduction of new constitutional provisions which set the preconditions for declaring a state of exception and for the repartition of exceptional powers to be exercised during such state of exception among the state organs.⁴¹ This stance, however, was heavily and justly criticized by more liberal legal scholars dismissing any attempt to create exceptional powers for the executive branch without amending the Constitution or passing new laws, mainly in fear of a return of Carl Schmitt's legal spirit.⁴²

Conclusion

The “transgressions”, especially the one of the Federal High Court of Justice regarding the communication ban⁴³, are comprehensible when taking into account the state-of-exception-like situation of state and society during the “*German Autumn*”. However, they are elusive from the perspective of democratic values, especially the rule of law. New legislation aimed at saving the life of innocent people and at regulating one specific situation, such as the law introducing the communication ban, contradicted the dominant assertion that the struggle against terrorism should take place within laws *generally* aimed at prosecuting criminals and not within a specially created field of law solely established for fighting terrorists as enemies of the state.⁴⁴

c) Fighting terrorism in the post 9/11 world

A second era of German counter-terrorist activities dawned after the attacks of September 11 when a new generation of anti-terrorist legislation was passed as a response to a new religiously motivated Islamist terrorism. While in the 1970s a focus of legislative activities was on a reform of the Code of Criminal Procedure, enlarging the competences of the law enforcement agencies and curtailing the rights of the accused during a criminal trial, new security legislation which became effective shortly after the attacks in New York City relied more on restrictions of the right to data protection and privacy.⁴⁵

⁴¹ Böckenförde *supra* note 40 at 1888-1890.

⁴² Gertrude Lübke-Wolff, *Rechtsstaat und Ausnahmerecht. Zur Diskussion über die Reichweite des § 34 StGB und über die Notwendigkeit einer verfassungsrechtlichen Regelung des Ausnahmezustandes*, in ZEITSCHRIFT FÜR PARLAMENTSFragen 110 (1980).

⁴³ See *supra* note 36.

⁴⁴ See Vogel *supra* note 24 at 1217-1228.

⁴⁵ See JAMES BECKMANN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM*, at 100-111 (2007); PHILIPP H. SCHULTE, *TERRORISMUS UND ANTI-TERRORISMUS-GESETZGEBUNG*, at 181-222 (2008).

The El Motassadeq-Case

Nevertheless, issues related to the rights of access to justice came up in trials against suspects in the aftermath of 9/11. Of special interest in this regard is the case of *Mounir El Motassadeq*, a Moroccan citizen who was charged with and eventually sentenced for being an accessory to the homicide of 3000 people in the attacks on America by the Higher Regional Court of Hamburg. His appeal for not receiving a fair trial was successful before the Federal High Court of Justice.⁴⁶ As for the factual background of the case before the Regional Court, the United States had not allowed a witness of the defense to testify in trial. Furthermore, the American authorities contradicted the use of documents containing parts of a testimony which was in the hands of German security services. As a consequence, the German authorities refused to provide the court with the aforementioned information.⁴⁷ The Federal High Court of Justice stated that the decision rendered by the Higher Regional Court of Hamburg constituted a violation of fair trial (art. 20 para. 3 and art. 2 para. 1 GG, art. 6 para. 1 ECHR) since when considering the evidence before it, the Regional Court hadn't sufficiently taken into account that the decision of US and German branches of government to ban certain means of evidence lead to a curtailment of the rights of the accused. In essence the Federal High Court of Justice did not challenge the right of the government to classify certain evidence as secret and ban it from the courts enshrined in the Code of Criminal Procedure, but that this curtailment needs to be taken into account while rendering a decision – even if this may end in the application of *in dubio pro reo*. The interest of the state in keeping certain evidence secret must not be to the detriment of the accused.

In the wake of the Motassadeq case a legal discourse occurred on the consequences of the denial of the executive to disclose secret information to the courts and its impact on the defendant's rights within the trial. Unlike in the US, there is no “political question doctrine” that would allow a German court to refuse a legal decision of a case in order not to interfere with the political sphere.⁴⁸ Nevertheless, the Motassadeq case has shown very clearly the influence of secret service agencies on German criminal trials since it is up to them to decide whether and which parts of the requested “secret” information can be used in court or not. Consequent-

⁴⁶ BGHSt 49, 112.

⁴⁷ According to sec. 96 of the Code of Criminal Procedure which reads as follows: Submission or delivery of files or of other documents officially impounded by authorities or public officials shall not be requested if their superior authority declares that the publication of these files or documents would be detrimental to the welfare of the Federation or of a German Land (...).

⁴⁸ See also Rainer Griesbaum, *Justizgewährung*, in DEMOKRATIE UND RECHTSSTAATLICHKEIT 165-169 (Kurt Graulich & Dieter Simon eds., 2007).

ly, to safeguard a fair character of the trial, the jurisdiction of the Federal High Court of Justice outlined that in these cases courts have to ensure that the state's interest in a well-functioning prosecution must not outweigh the defendant's right of access to justice.⁴⁹

Conclusion

In these rather rare cases related to defendant's rights of access to justice after 9/11, the Federal High Court of Justice unambiguously strengthened the rights of defendants, being well aware of the fact that in the aftermath of the attacks the exertion of influence of public authorities on the outcome of criminal trials is a potential threat to the rule of law principle.

2. Israel

The State of Israel can look back on a long history of terrorist threats as well as wars that has accompanied its development from its foundation. As Menachem Hofnung once put it, "*in a comparison research of democratic states (...) one cannot find many examples of states which had succeeded to preserve a democratic regime while acting within a long-lasting emergency declaration (...). In that perspective Israel is an exceptional case study.*"⁵⁰

a) Constitutional Law

In contrast to Germany, the Israeli legal system does not have a written constitution. Due to the imminent problems that accompanied the foundation of the State of Israel and the early years of its existence, the Knesset decided on a gradual enactment of a constitution for the Jewish State in 1950. Since then, the Israeli Parliament has enacted a number of Basic Laws on several subjects.⁵¹ By the time of the enactment of all Basic Laws, they should be unified in one single document, the Constitution of Israel.

The two Basic Laws enshrining Human Rights are *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*, both enacted in 1992.

Whereas Germany is part of the Civil Law family, the legal system of Israel can be described as a mixture of both the Common Law and the Civil Law system, even though the influence of

⁴⁹ This reasoning is supported by Art. 6 sec. 3 d) of the European Convention on Human Rights which reads as follows: Everyone charged with a criminal offence has the following minimum rights: (...) (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (...).

⁵⁰ Quoted from Gershon Gontovnik, *Country Report on Israel*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 381 at 382 (Christian Walter et al. eds., 2004).

⁵¹ YAACOV S. ZEMACH, *THE JUDICIARY OF ISRAEL*, at 22-23 (1993).

Common Law tradition must be considered as stronger mostly due to the impact of Anglo-Saxon legal sources during the British Mandate which lasted from 1917 to 1948. Up to present day, in the jurisdiction of the Supreme Court of Israel references are far more often made to British (or American) cases than to those of continental legal systems – despite a huge influence of legal scholars of German origin on the judiciary in the early years of the young state.⁵² The right to due process is not contained explicitly in one of the Basic Laws. Nevertheless, basic rights of the defendant were developed from the *Basic Law: Human Dignity and Liberty*: the right to representation by defense counsel and the right to silence. The right to human dignity contravenes interrogational measures amounting to what is sometimes referred to as coercive interrogation.⁵³

Regarding the right to personal liberty, the same Basic Law states in sec. 5 that there “(...) shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.” Sec. 8 lays down the conditions that have to be met when a law guaranteed in this Basic Law is being violated and, at the same time, enshrines proportionality as a constitutional principle: “*There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.*”

b) The Israeli Supreme Court

The Israeli Supreme Court plays an important role in weighing the population’s interest in national security and fundamental rights of those suspected or accused of having committed a terrorist offence. According to sec. 15 (d) (2) of the *Basic Law: The Judiciary*, everyone challenging administrative decisions or other acts carried out by state authorities for being allegedly unlawful, or because the assertion is made that discretion has not been exercised properly, can file a petition to the Supreme Court sitting as High Court of Justice.⁵⁴ Unlike Germany, the petitioner does not need to have a personal interest when filing a complaint, and even NGOs

⁵² Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, in ISRAEL STUDIES 159-192 (1998).

⁵³ SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL, para. 593 (2007); See also Mordechai Kremnitzer, *Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?*, in ISRAEL LAW REVIEW 215-279 (1989).

⁵⁴ It states that the Supreme Court shall be competent “(...) to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting; (...)”. Furthermore, by virtue of s. 15 (d) (3), the Supreme Court exercises supervision over the whole judicial system of Israel.

have standing before the Court. Especially human rights organizations such as B'Tselem, the Association of Civil Rights in Israel (ACRI) or the Public Committee against Torture in Israel take advantage of their right to bring petitions related to human rights issues, most notably from the Occupied Territories.⁵⁵ Thus, as highest authority within the Israeli judiciary, the court has become a key factor in adjudicating security measures by rendering final decisions on legally contested cases that imply restrictions on basic rights of detainees and suspected persons in the fight against terrorism. Due to divergent political situations and different degrees of the severity of threats in the two countries, the cases brought before the Israeli Supreme Court necessarily differ from those before the German Federal Constitutional Court. The pivotal question of how to weigh the state's interest in national security and effective remedies in the fight against terror against fundamental rights of (potential) terrorists, however, stays the same.

c) Prominent (detention) cases

Many terrorism-related cases decided by the Israeli Supreme Court attracted wide-spread attention by giving due weight to fundamental rights and limiting the discretion of administrative or secret service agencies – most of the times accompanied by harsh criticism from within the political sphere and by strong public pressure.⁵⁶ Like in other countries fighting against a terrorist threat, the courts in this kind of cases struggle hard to withstand temptations to just follow and accept the discretion exercised by state authorities. Among the most famous cases decided by the Israeli Supreme Court the one dealing with the legality of methods of interrogation exercised by the Israeli General Security Service certainly ranks first.⁵⁷

Since the beginning of the occupation of the West Bank in 1967, prisoners and detainees of Palestinian origin have been held in administrative detention either on Israeli territory or in facilities in the West Bank. As opposed to criminal proceedings or pre-trial detention, administrative detention is a security means conceived as a preventive measure, ordered by an administrative authority and aimed at preventing a person classified as a threat to state security or public security from infringing on human rights of others.⁵⁸ Administrative detention orders issued by Israeli authorities are being based on three different legal sources: two laws and a military

⁵⁵ AHARON BARAK, *THE JUDGE IN A DEMOCRACY*, at 190-196 (2006).

⁵⁶ Compare the *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, available at http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism_law.pdf.

⁵⁷ HCJ 5100/94, *Public Committee against Torture in Israel v. The State of Israel*.

⁵⁸ See Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy have the Right to hold Terrorists as Bargaining Chips?*, in *ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 721 at 752-754 (2001).

order.⁵⁹ The major legal problems related to administrative detention that have been discussed in recent years are the potentially indefinite duration of the measure and the intertwined question of the scope of judicial review and of the right of defense as well as the secrecy of information used by the competent court as evidence proving the potential threat the detained person poses to state or public security. Thus, the administrative detention cases brought before the Supreme Court address all the key issues related to the right of access to justice in times of emergency.

The *Administrative Detention Order* for the West Bank, which infringes upon the detainees' rights to liberty and access to justice to a greater extent than the *Emergency Powers (Detention) Law*, provides that in the detention proceedings the judges may rely on hearsay evidence which they are not obliged to disclose to the detainee or his lawyer or which they may accept without the detainee or his representative being present. Furthermore, hearings shall be held *in camera*.⁶⁰ Quite a number of appeals or petitions brought before the HCJ concerning administrative detentions failed to be successful in recent times.⁶¹ Nevertheless, there are many other court decisions ordering the release of detainees due to insufficiency of the presented evidence, especially after a long period of detention without gathering of new evidence during this time.⁶²

In *Marab v. the IDF Commander*⁶³ the petitioners issued a complaint challenging an Order especially enacted in the West Bank during the second Intifada. By virtue of the regulations, the authority to order that a detainee be held in detention for a period of up to 18 days was accorded to IDF (Israel Defense Forces) officers. During these first 18 days, the decision of a court did not have to be sought by the IDF and detainees did not have access to judicial review of the issued order, nor the right to see a lawyer. After expiration of this period, the detained person should be brought before a judge. Subsequent orders issued after the expiration of the first one underwent changes with regard to the periods during which judicial review and con-

⁵⁹ Emergency Powers (Detention) Law, 1979; The Internment of Unlawful Combatants Law, 2002; Order Regarding Administrative Detention (Temporary Provision) (Judea and Samaria) (No. 1591), 2007.

⁶⁰ Order Regarding Administrative Detention (Temporary Provision) (Judea and Samaria) (No. 1591), 2007, sections 7 (c), 8 (a).

⁶¹ See for example HCJ 9071/09, *Ahmed Sami Ahmed Varde v. IDF commander in the West Bank* which dealt with the legality of administrative detention during pending criminal trials; Israel Supreme Court, A.D.A. 6434/09, *Anon v. State of Israel*: in this case, an incarceration according to the Internment of Unlawful Combatants Law was preceded by a criminal sentence and mainly based on the evidence already presented during the criminal trial.

⁶² See this example from the Israel Democracy Institute Terrorism and Democracy Newsletter: http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/17th%20newsletter/5/5.aspx.

⁶³ HCJ 3239/02.

tact with a lawyer was excluded – they were shortened. Precisely, this case does not deal with the legality of administrative detention, but detention for investigative purposes. Nevertheless, both instruments are used for preemptive ends related to the security of the area.

In the judgment, former Chief Justice *Aharon Barak* underscored the public authority's duty to strike a proper balance between individual liberty and public necessity by adhering to the principles of reasonableness and proportionality.⁶⁴

Despite the continuous shortening of periods in the subsequent orders, the Court ruled that they exceeded the appropriate limits established by finding a proper balance between security needs and the detainee's right to liberty even when the investigating authority is in need for more time to complete the investigation. By requiring a prompt approach of the competent judicial body, it can be assured that proper considerations are made by the judiciary and not by the investigating authority that issued the detention order.⁶⁵

With regard to the provisions of the Order preventing meetings with a lawyer, the Court upheld them, even though the period of prevention could well amount up to 32 days. Stating that the right to meet with a lawyer is not guaranteed in an absolute manner, the court dismissed the petitioners' claims by bringing forward the public interest in the security of the combat forces. Additionally, the Court made reference to the unaffected right of every person or organization interested in the detainee's faith to petition the HCJ.⁶⁶

d) Conclusion

Detainees appealing or petitioning to the Israeli Supreme Court challenging administrative detention orders often face a major problem of effectiveness of their defense when the court relies on evidence gathered by secret service authorities that usually will not be disclosed to him or his legal representative. This restriction on the right of access to justice can only be "healed" by a consequent implementation of the Court's own stance on a closer scrutiny of the evidence before it by acting as the "*mouth of the prisoner*"⁶⁷, the longer a detainment or incarceration has lasted. All the more as the test whether the detainee would harm State or public security in case of revocation of the detention order is primarily based on the aforementioned evidence. The other main fundamental rights issues raised in the detention cases before the Supreme Court relate to the right to contact a lawyer and the right to be brought promptly before a judge

⁶⁴ Ibid. para 20.

⁶⁵ Ibid. para. 33-34.

⁶⁶ Ibid. para. 45-46.

⁶⁷ Justice A. *Procaccia*, H CJ 11006/04, *Kadri v. Commander of IDF forces in Judea and Samaria*, para. 6.

for a hearing after a detainment order was issued. Being well aware of the fact that these rights lie at the heart of due process, the Court scrupulously and thoroughly weighed the conflicting rights and interests. However, it mostly confirmed the provisions regulating the period of time without hearing or access to legal representation by interpreting them according to international law and Israeli constitutional law.⁶⁸

III. Conclusion

All cases examined here have been adjudicated in times of emergency or at least great stress, where public and state security were tremendously threatened. Despite the enormous discrepancies between the circumstances in the two countries under study regarding the severity of the terrorist peril and its impact on the proper functioning of social and political life as well as Israel's unique situation given the occupation of the West Bank, it is still useful to compare Germany in the 1970s and Israel during the second Intifada. Taking into account that the young German state had never before faced a large-scale terrorist threat, political institutions and the public found themselves in a quasi state of exception.⁶⁹ Nevertheless, legal tools in the struggle against terrorism differ – they necessarily have to.⁷⁰ Different constitutional preconditions, different legal traditions as well as historical and cultural settings lead to the enactment and implementation of special security legislation in each country. Still, when analyzing the case law of the respective highest courts, similarities are obvious. Regardless of the concrete competences of the courts and their position in the respective legal systems, and regardless of the existence of a written constitution, the task for both eventually remains the same: balancing the need to effective remedies to ensure state and public security on the one hand, and the right to liberty and of access to justice on the other hand. Both courts contributed to an effective control of the executive branch by encouraging it to keep on adhering to the rule of law, thereby

⁶⁸ Compare Israel Supreme Court, Cr.A., 6659/06, *A. v. State of Israel* as for the Internment of Unlawful Combatants Law.

⁶⁹ In 1967, passing an emergency constitution (“*Notstandsverfassung*”), the German lawmakers eventually refrained from allowing *general* limitations of fundamental rights guaranteed in the Basic Law during emergency situations and contented themselves with possible restrictions of the right to privacy of correspondence, posts and telecommunications in art. 10, provided they “(...) serve to protect the free democratic basic order or the existence or security of the Federation or of a Land (...)”

⁷⁰ In Germany, for example, legal provisions enabling state authorities to use preventive detention as a means in the struggle against terrorism do not exist. It is highly doubtful if the enactment of a law allowing for such a measure would not contravene the German *Grundgesetz* or provisions of the ECHR, compare Susanne C. Walther, *Präventivhaft für terrorismusverdächtige „Gefährder“: eine Option für Deutschland?*, in ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 464 (2007).

underscoring that it is essential to fight terrorism within the law, and not outside of it.⁷¹ Moreover, the test of proportionality applied by the Israeli Supreme Court is similar to the one applied by the German Federal Constitutional Court.⁷² The concept of “open door” to the Supreme Court of Israel as a very wide interpretation of the right to standing to sue is remarkable since it gives human rights organizations the possibility to challenge in principle measures directed at terror suspects – a group of people that would usually not benefit from any public support in times of emergency.

In the examined cases, the judiciary had to adjudicate measures or legal provisions that were deemed absolutely necessary to prevent the commission of new offences related to terrorism in the future. A main (legal) problem that the courts had to face was to review these assertions and eventually replace them in parts by the courts’ own considerations. Even though this constitutes an integral part of the concept of judicial review, courts in times of emergency risk getting criticized especially by members of the executive or the legislative branch for questioning their approach to safeguard lives and physical integrity of the citizens. The expertise in security issues generally lies with the executive (and maybe the legislative), and not with the courts. Lacking access to secret service authorities disposing of the security related information and the qualification to evaluate and draw the right conclusions from this data, judges are neither well advised nor legally empowered to fully impose their considerations on those who are democratically accountable to the people, but they are entitled to judge on the reasonableness of their assertions. Additionally, as Justice *Barak* once remarked, notwithstanding that the courts may sometimes seem to sit in their ivory towers, they cannot detach themselves completely neither from the reality outside the court buildings, nor from all the pressure exerted by public opinion and the political branch.⁷³

Thus, the courts could not always withstand the alleged requirements of the state authorities for effective security policies. The *communication ban*-case before the German Federal Constitutional Court is a good example for that. In situations of at least a perceived imminent threat, national courts obviously struggle hard to accomplish the objective to uphold fundamental rights⁷⁴ Hence, both the Israeli Supreme Court and the Federal Constitutional Court tried to

⁷¹ For Israel see Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era*, in N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS 67 at 91-93 (2005-06).

⁷² In place of many compare Cr.A., 6659/06, *A. v. State of Israel*, para. 29-47.

⁷³ HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel*, para. 86.

⁷⁴ Compare George J. Alexander, *The Illusory Protection of Human Rights by National Courts during Periods of Emergency*, in HUMAN RIGHTS LAW JOURNAL 1 (1984). It is an interesting and highly disputed question whether

refrain from intervening in military or security related assertions of the executive branch and focused on using the proportionality analysis when considering the state's approach to meet a specific danger.⁷⁵ Criticism that aroused after interventions of the Israeli Supreme Court in ongoing military operations show that there is only a fine line between a well-respected judicial balancing and a denounced judicial intervention in issues and matters believed to be exclusively reserved for the executive and legislative branches of the state.⁷⁶

Nevertheless, in most cases both courts did not succumb to the temptation to fully confirm the rule of the majority expressed by the actions of the state seeking to guarantee the security of its population to the widest extent possible. Deeming it sufficient that solely the legislative branch should exert control over government actions in times of emergency may work for a political system like the United States,⁷⁷ but not for countries like Israel or Germany where the majority in parliament and the government usually form a political unit. Both courts also rejected a "political question doctrine" when it comes to individual claims.⁷⁸ Consequently, those pursuing vindication of the rights of access to justice in the war against terror heavily rely on the courts' approach to the scope of judicial review as an integral part of the process of detention, essential for the protection of personal liberty.⁷⁹ In fact, by avoiding judicial balancing due to political sensitivity or the need to increased secrecy, a suspect would be *de facto* stripped off his rights to effectively challenge state measures curtailing his right to liberty. The same applies to restrictions on basic due process rights. Changing the rules of evidence by – for example – admitting hearsay evidence or the introduction of special procedures cutting the defendant off from his lawyer or from information classified as confidential constitutes not only a weakening of fundamental rights. It gets to the very core of these rights if basic principles of access to justice are not adhered to. An inviolable (minimum) standard of absolute rights in this respect can be derived from the right to human dignity.

regional human rights systems and their respective courts like the ECtHR are institutionally better equipped for a more independent hence effective judicial review of the member states' assertions on the existence of a state of emergency or on the necessity of the enactment of new security provisions.

⁷⁵ See BARAK *supra* note 55 at 289.

⁷⁶ Compare Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British and Israeli Approaches to the War on Terror*, in CARDOZO LAW REVIEW 2079 at 2098-2101 (2006).

⁷⁷ See ACKERMAN, *supra* note 10.

⁷⁸ For Israel see DAVID KRETZMER, THE OCCUPATION OF JUSTICE, at 22-24 (2002). One exception was made in a *targeted killing* case before the HCJ: Suzie Navot, *The Supreme Court of Israel and the War against Terror*, in EUROPEAN PUBLIC LAW, 323 at 325-326 (2003).

⁷⁹ HCJ 3239/02, *Marab v. the IDF Commander*, para. 32.

Indeed, the main legal argument human rights organizations are putting forward against the instrument of administrative detention is the violation of the detainee's dignity. It is argued that since the detainment is being based on a (albeit refutable) presumption of what a person might do or might not do in the near or far future, these persons are being treated as objects rather than as human beings with a free will.⁸⁰ With regards to the detention cases, the Israeli Supreme Court on several occasions invoked as purpose behind judicial intervention a “*safeguard against arbitrariness*”.⁸¹ This purpose not solely lies at the heart of legal remedies against administrative detention, but rather of all rights related to access to justice. Being under control of state authorities or targeted by state actions beforehand, always means a loss of autonomy of will for the individual. Finding yourself in situations without (legal) assistance, without an effective legal remedy, without possibility to make your voice heard, the principle of human dignity is at stake.⁸² This needs to be considered against the observation that human dignity plays a key role in Israel's constitutional law. The same can be said for Germany's Basic Law which guarantees it as an inviolable, hence absolute right. In several occasions, the Israeli Supreme Court underscored that human dignity is at the base of social order. Thus, it also applies to detainees not knowing in advance the period of internment, not being able to effectively challenge the evidence not disclosed to them, not allowed to a hearing or a meeting with a lawyer for a limited period of time.⁸³

Bearing in mind that designing the right to human dignity as an absolute right creates new problems of definition, and given the fact that fundamental rights systems across the world differ significantly,⁸⁴ human dignity might not be a universal remedy to prevent all sorts of excessive violations of the right of access to justice. Despite its vagueness, and despite divergent concepts of human dignity throughout the world it can serve not only as a moral and ethical, but also as a legal concept and guideline for judicial balancing and base for a minimum standard of access to justice rights in times of stress and emergency.⁸⁵ It only needs to be con-

⁸⁰ Administrative Detention in Israel and the Occupied Territories, Lecture presented by Attorney *Lila Margalit* (ACRI), Yale Law School, April 2008, p. 2, <http://www.acri.org.il/pdf/admindetention.pdf>.

⁸¹ Chief Justice *D. Beinisch*, Cr.A., 6659/06, *A. v. State of Israel*, para. 41; see also Art. 9.1 of the International Covenant on Civil and Political Rights (1966) which provides: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”

⁸² See *Vogel* supra note 24 at 1219.

⁸³ Israel Supreme Court, Cr.F.H. 7048/97, *Plonim v. Minister of Defense*, para. 17, overruling its decision in the first *bargaining chips* case (A.D.A. 10/94, *Plonim v. Minister of Defense*).

⁸⁴ Compare for example Man Yee Karen Lee, *Universal Human Dignity: Some Reflections in the Asian Context*, in *ASIAN JOURNAL OF COMPARATIVE LAW* (2008).

⁸⁵ See for example the Advisory Opinion of the Inter-American Court of Human Rights on Habeas Corpus in Emergency Situations, *OC-8/87* of January 30, 1987, para. 35-44.

sequently and regularly addressed within the legal reasoning of the respective court, when weighing liberty and security interests.