Part 8

Constitutional Rights and ‘State of Emergency’
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The National Security Constitution and the Israeli Condition

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I. INTRODUCTION

ISRAEL OFFERS A unique case study for the assessment of the constitutional regulation of national security. The special value attached to the Israeli example derives from several factors: first, Israel has experienced continuous existential threats ever since its establishment. Therefore, in Israel, the constitutional regulation of national security is not only a matter for the law books. It is the result of a constant challenge to both the existence of the country and the rule of law.¹ Second, national security threats have served as one of the reasons working against the aspiration to finalise Israeli constitution-making. Third, Israel presents a working laboratory to one of the constitutional models for dealing with national threats – a model based on the power to declare an emergency regime. Against the background of the controversy around this model, Israeli law serves as an example of both its advantages and weaknesses. Fourth, the Israeli Supreme Court also practices judicial review in matters related to the military and national security, and thus makes the regulation of security matters in Israel a living legal reality.

The following analysis is aimed at reviewing and evaluating the Israeli case study, taking into consideration its unique traits as well as its potential contribution to understanding the relative advantages and disadvantages of models for regulating emergency conditions in other systems. Following this Introduction (which serves also as part I), part II describes the basic features of the regulation of security matters in Israeli law and part III elaborates on the issues regulated on the constitutional level by provisions of the Basic Laws. Part IV takes the analysis another step forward by describing the de facto application of the constitutional regime in this area. Part V offers another perspective on the Israeli case study by looking into other models of regulating the issue of emergency conditions in other legal systems. Two other important aspects discussed at this stage are the impact of judicial review on the de facto regulation of security issues (part VI) and more specifically the impact of norms of international law as applied by the courts

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Towards the end, part VIII offers a relatively new perspective on the Israeli case study, by looking into the impact of new laws which set special security-oriented norms and limit their durability to a limited period of time (using ‘sunset’ provisions). This development is also evaluated in the conclusion vis-à-vis the more traditional building blocks which constitute the regulation of emergency conditions in Israel (part IX).

II. FOUNDATIONS

Israel did not fully accept a formal constitution as promised by its Declaration of Independence in part because its establishment was accompanied by constant existential threats. Within these circumstances, the idea of a constitution was risky in more than one way. On the one hand, having a constitution necessarily meant the limitation of government powers during a time in which it was vital to give the government maximum strength in order to secure the prospects of the state to protect itself against its enemies. On the other hand, a constitution that would have merely reflected the necessities of the time could not set a vision for the country. This could have been an unbalanced and potentially dangerous constitution. Eventually, the compromise of refraining from enacting a formal constitution (and instead legislating Basic Laws that would eventually be consolidated into such a document) proved to be the pragmatic solution in several contexts including, namely, national security.

Lacking a formal constitution, the normative framework of national security law in Israel has found its grounding in legislation, judicial precedents, and later, also in Basic Laws.

(1) Legislation – statutory law in this area has traditionally included both legislation originating from the days of the British Mandate in Palestine and original Israeli legislation. The Law and Administration Ordinance provided the first constitutional principles in this area, although formally speaking it only had the force of ordinary legislation. This Ordinance was enacted in the first days of the state and was aimed at reflecting the main principles regarding the roles and powers of the various branches of government. The most important provision of the Ordinance in this context was section 9, which acknowledged Parliament’s power to declare an ‘emergency situation’. It further stated that when the government declares an ‘emergency situation’ it has the power to promulgate ‘emergency regulations’ that carry the power to abolish or amend any existing law.

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2 Declaration of the Establishment of the State of Israel, 1 LSI 7 (1948).
3 This compromise is known as the ‘Harari Decision’: ‘The first Knesset charges the Constitution, Law and Justice Committee with the task of preparing a constitution for the country. The constitution will be built chapter by chapter, so that each one will in itself be a basic law. The chapters will be submitted to the Knesset as the Committee concludes its task and, together, all these chapters will become the constitution of the country’, DK 5 (1950) 1743 (in Hebrew).
4 Another area of controversy which posed difficulties was the regulation of law and religion. For more background on the early stages of the Israeli constitutional process, see D Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective’ (1995) 26 Columbia Human Rights Law Review 309.
5 The main statutory framework from this time is the Defence (Emergency) Regulations, 1945, Palestine Gazette 1442, 1055 (Isr).
6 The Law and Administration Ordinance, 5708-1948.
for a period not exceeding three months. Indeed, section 9 succinctly included the basic features of the constitutional regulation of national security in Israel: the power of the Parliament to wave its sovereignty and sole power to legislate by declaring a state of emergency; and the power of the government to overstep the boundaries set between the executive branch and the legislative branch for a limited period of time. It reflected a willingness to grant the executive branch additional power, subject to Parliament’s final word – its power to revoke the declaration of the emergency situation. In addition to the power to promulgate emergency regulations, Israel enacted several laws that included provisions stating that they would be in force only when a declaration of a state of emergency is in force.7

(2) Judicial precedents – the Israeli Supreme Court, sitting as the High Court of Justice, has also opened its gates to petitions in matters of national security from its very first days. It is possible to indicate petitions in matters such as judicial review of administrative detentions even from the time of the War of Independence.8 However, until the 1990s, the scope of judicial review was limited to the invalidation of executive decisions.9 Legislation was immune from the power of judicial review, following the British tradition of sovereignty (which has been gradually deserted later on in both Israel and Britain).10 Thus, executive decisions in the area of national security were subjected, first and foremost, to the ultra vires principle, meaning that the government, including the military, cannot act without statutory authorization.11

(3) Basic Laws – among the Basic Laws, the most important one for the foundations of national security law is Basic Law: The Government,12 which defines the powers of the executive branch. This Basic Law currently includes the updated regulation of the issue of an emergency situation (replacing the Law and Administration Ordinance in this regard, as detailed below). Another important aspect of the constitutional regulation of national security is found in Basic Law: The Military, which clarifies the subject of the military to the government. Section 2(a) of this Basic Law states in this regard:

The Army is subject to the authority of the Government.

Other provisions of the Basic Law detail the chain of command and control of the military by the government. Section 3(b) of the Basic Law states that

[t]he Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defence.

7 See, eg Emergency Land Requisition (Regulation) Law, 5710-1949; Commodities and Services (Control) Law, 5718-1958. A notable example of a newer law that applies only in times of emergency is that of the Emergency Powers Law (Detention), 5739-1979, authorizing the use of administrative detentions. These laws were designed to serve as ‘dormant’ legislation. In practice, however, they have not been dormant in any practical sense – they are in force de facto since their legislation (due to the continuous nature of the declaration of emergency situation, as described later).
8 HCJ 7/48 Al-Karabutli v Minister of Defence 2(1) PD 5 [1949] (in Hebrew).
9 See Barak-Erez, ‘From an Unwritten to a Written Constitution’ (n 4).
10 In Britain, laws are currently subject to judicial review based on the Human Rights Act, 1998. In Israel, the change has developed gradually during the 1990s, as explained below in part VI.
11 In this sense, Israeli law presents an example of the ‘legislative’ model of terrorism law. For this terminology, see D Barak-Erez, ‘Terrorism Law between the Executive and Legislative Models’ (2009) 57 American Journal of Comparative Law 877.
12 On the various versions of this Basic Law, see nn 13–16 and the accompanying text.
III. THE EMERGENCY CONSTITUTION AND THE BASIC LAWS

As indicated, the constitutional basis for Israeli national security law was incorporated into Basic Law: The Government. The first version of this Basic Law, enacted in 1968, did not address the issue, but it was eventually regulated by Basic Law: The Government from 1992 and Basic Law: The Government from 2001, the current valid version of this Basic Law.

Section 1 of Basic Law: The Government states:

The Government is the executive authority of the State.

Thus, it does not authorise the government to act beyond its statutory powers. Indeed, the government has residual power to act in areas not regulated by existing legislation, but this power has been interpreted as inapplicable to actions which infringe human rights or to new initiatives aimed at the regulation of new areas of law (where power lies only with the legislature). Therefore, the government may take steps considered necessary for safeguarding national security, when these are not legislated, only within its power to promulgate emergency regulations (formerly based on section 9 of the Law and Administration Ordinance, and currently on Basic Law: The Government).

Sections 38 and 39 of Basic Law: The Government adhere to the principles of the regulation of emergency situations as they had been originally drafted in 1948. According to section 38, the power to declare an emergency situation is given to the Knesset, the Israeli Parliament. Section 38(a) states:

Should the Knesset ascertain that the State is in a state of emergency, it may, of its own initiative or, pursuant to a Government proposal, declare that a state of emergency exists.

When such a declaration is in force, the government is empowered to promulgate emergency regulations that may change current laws, for a period not exceeding three months. Section 39(a) states that

[d]uring a state of emergency the Government may make emergency regulations for the defence of the State, public security and the maintenance of supplies and essential services,
and section 39(c) states that

emergency regulations may alter any law temporarily suspend its effect or introduce conditions, and may also impose or increase taxes or other compulsory payments unless there be another provision by law.

Section 39(f) adds the factor of the time limitation on emergency regulations, stating that

the force of emergency regulations shall expire three months after the day of their enactment unless their force is extended by law, or they are revoked by the Knesset by law, or pursuant to a decision of a majority of the members of Knesset.

The current version of Basic Law: The Government includes several additional limitations on the powers of government during a state of emergency. First, the declaration of a state of emergency may not exceed one year, although it may be renewed. Section 38(b) states in this regard:

The declaration will remain in force for the period prescribed therein, but may not exceed one year; the Knesset may make a renewed declaration of a state of emergency as stated.

The practical implication of this limitation is that the Knesset is obligated to revisit its decision in this matter at least once a year. Second, the Basic Law subjects the power to promulgate emergency regulations to several substantive limitations regarding their contents. Section 39(d) states that

emergency regulations may not prevent recourse to legal action, or prescribe retroactive punishment or allow infringement upon human dignity.

Section 39(e) adds another limitation by stating that

emergency regulations shall not be enacted, nor shall arrangements, measures and powers be implemented in their wake, except to the extent warranted by the state of emergency. Since 1992, Basic Law: The Government provides for another important matter, not previously regulated – the declaration of war (and not only of emergency). In the current version of the Basic Law, it is governed by section 40. Section 40(a) states in this regard that, in principle,

the state may only begin a war pursuant to a Government decision.

At the same time, section 40(b) clarifies that

nothing in the provisions of this section will prevent the adoption of military actions necessary for the defence of the state and public security.

In addition, section 40(c) states that the Knesset (more specifically, its Foreign Affairs and Security Committee) must be notified of decisions to begin war or of military

22 These additional limitations had been introduced for the first time in Basic Law: The Government, 5752-1992 (n 14).
actions. With regard to war, the Prime Minister should also give a notice to the Knesset plenum.

The constitutional significance and force of these provisions of Basic Law: The Government is connected to the fact that they are not subject to change through emergency regulations. According to section 41 of the Basic Law,

\[\text{(n)}\text{otwithstanding the provisions of any law, emergency regulations cannot change this Basic Law, temporarily suspend it, or make it subject to conditions.}\]

It is difficult to circumvent this limitation because according to section 44(a) the Basic Law itself may be repealed only by a special majority.\(^{24}\) Thus, in contrast to regular legislation that may be changed by a simple majority vote in the Knesset, the required majority in this context is at least 61 Knesset Members (out of the 120 in the full plenary). This provision secures for Basic Law: The Government certain durability. At the same time, in terms of political reality, the majority needed does not constitute a high barrier to cross, since every stable coalition government needs at least this majority in the Knesset in order to be able to govern effectively.\(^{25}\)

Another important limitation on the use of emergency regulations derives from Basic Law: Human Dignity and Liberty, which includes the main constitutional provisions on the protection of human rights in Israel. According to section 12 of this Basic Law, it cannot be suspended or amended by emergency regulations. In addition, emergency regulations may limit the application of the rights guaranteed by the Basic Law, only subject to the condition that

the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required.

Whether such emergency regulations meet this standard is a question subject to judicial review.

IV. THE EMERGENCY CONSTITUTION IN PRACTICE

The Israeli regime of emergency powers is formally based on the assumption that emergency law is the exception to the norm and that the government is subject to close parliamentary scrutiny in this area (since the Knesset controls the power to declare and prolong an emergency situation). Practice, however, presents a different de facto balance between the executive and the legislature.

In fact, the emergency situation originally declared in Israel in May 1948, pursuant to its establishment, has never been abolished for several reasons. First and foremost, threats on Israel’s security never subsided after its independence, culminating in both wars and terrorist attacks. Hence, one might understand why the Knesset found it diffi-

\(^{24}\) S 44(a) of Basic Law: The Government (n 15) states: “This Basic Law can only be changed by a majority of the Knesset members; the majority under this sub-section will be required for decisions of the Knesset plenum in the first, second and third readings; for purposes of this sub-section, “change” is either explicit or by implication”.

\(^{25}\) The requirement of special majority to amend Basic Law: The Government is thus very different from the strong preservation of the status quo originating from the harsh procedure of constitutional amendment in the US. See US Constitution, Art V.
cульт to take the initiative and stop renewing this declaration. Second, from a political perspective, the coalition-based system of government in Israel does not allow for a very independent parliamentary supervision of the executive. Knesset Members who belong to the parties that comprise the government tend to support it, especially in core matters such as national security. This way, Israeli emergency law demonstrates once again the danger of analyzing legal regimes only by reference to the ‘law in the books’. In these books, the emergency regime is the exception. In the realm of ‘law in action’, it is the standard.26

In 1999, the Association of Civil Rights in Israel (ACRI) petitioned the High Court of Justice arguing that the declaration of an emergency situation had become unreasonable with the passage of time. The prospect of abolishing the declaration necessitated a serious process of reviewing current legislation in order to assess whether some of the laws which include provisions conditioning their applicability in the existence of a declaration of emergency situation should be amended (by applying them during periods with no declaration of an emergency situation in force). Accordingly, the Ministry of Justice initiated such a process and the court allowed it to do so, holding the petition open until this process is finalised and the court is updated regarding its results.27 Eventually, however, with no obvious sign that the threats on Israel had declined, the court decided to dismiss the petition, expressing its wish that the Ministry of Justice continue to promote the effort it had initiated in reviewing statutory schemes which currently apply only during emergency situations.28

V. THE EMERGENCY CONSTITUTION FROM A COMPARATIVE PERSPECTIVE

The regulation of national security in Israeli constitutional law should be assessed also by reference to the theoretical and comparative study of exceptions made for emergencies.

The idea that emergency circumstances merit the suspension of the ordinary constitutional regime is not new. Rather, it is derived from the institution of dictatorship in the Roman Empire. In Rome, a dictator was appointed as a temporary leader with special powers for a limited period of time, in order to confront threats to the empire. As Clinton Rossiter writes:

> The splendid political genius of the Roman people grasped and solved the difficult problem of emergency powers in a manner quite unparalleled in all history, indeed so uniquely and boldly that a study of modern crisis government could find no more propitious a starting point than a brief survey of the celebrated Roman dictatorship.29

At the same time, history teaches us that the power to declare an emergency situation may be abused. The most notable example of such gross misuse has been the rise of the Nazi regime, which took advantage of and circumvented the Weimar Constitution, by

26 For this distinction, see R Pound, ‘Law in Books and Law in Action’ (1910) 44 American Law Review 12.
27 See HCJ 3091/99 Association for Civil Rights in Israel v Knesset (1 August 2006) (in Hebrew) (hereinafter: Declaration of Emergency case). The Supreme Court decided to postpone the hearing of this petition without dismissing it.
suspending several of its protections in the name of national security.\textsuperscript{30} Concerns are inspired not only by historical experience; they are based also on the theoretical understanding that exceptions to the norm tend to gradually eliminate it.\textsuperscript{31}

In principle, the challenge posed by extraordinary threats to national security (or other types of crisis) to the constitutional order raises several questions.\textsuperscript{32} The first question is whether to insist on maintaining the regular legal order (thus giving preference to human rights and democracy under all circumstances) or to allow for accommodations that curtail the regular level of human rights protections or democratic processes. Israeli law, like many other systems, has chosen the latter option, as explained below.\textsuperscript{33} The second question concerns the choice between different versions of accommodations – introducing express constitutional provisions which allow for the partial suspension of some constitutional arrangements; adopting lenient constitutional interpretations that allow for broadening executive power without express regulation of emergency regimes;\textsuperscript{34} or assuming that government will choose to break the rules when this becomes absolutely necessary.\textsuperscript{35} Here, the Israeli system opted for the first alternative.

In general, the argument for the express regulation of emergencies in the constitution derives from the recognition that it avoids the following contradicting evils – the inability to effectively protect the state from its enemies (if only the regular constitutional regime applies) and the destruction of the rule of law as a guiding principle (if emergency extra-legal measures are taken). This preference also finds grounding in the approach of international law. Several human rights conventions allow for ‘derogation’ from the regular level of protection of human rights in states of emergency.\textsuperscript{36} The main shortcoming of this model concerns the possibility of overusing it. This concern is doomed to be in the background; the answer to it should lie in the domain of political culture (that has to push against this possibility to the maximum extent possible).

\textsuperscript{30} Article 48 of the Weimar Constitution (the Constitution of the German Reich, 1919 (Die Verfassung des Deutschen Reichs)) stated: ‘In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 154, partially or entirely’. English translation available at: www.zum.de/psm/weimar/weimar_vve.php.

\textsuperscript{31} The concern regarding the effect of the exception on the norm has been inspired by the writings of Carl Schmitt. See C Schmitt, Political Theology (Chicago, University of Chicago Press, 1985).

\textsuperscript{32} The description of these choices in the following paragraph is similar to the one offered by EA Posner and A Vermeule, ‘Accommodating Emergencies’ (2003) 56 Stanford Law Review 605, 606–07.

\textsuperscript{33} In theory, each of these alternatives has different merits and vices. Express provisions regulating emergency situations create stability since they clarify the ‘rules of the game’. At the same time, they are susceptible to overuse, due to the simplicity and prima facie legitimacy associated with the act of suspension of the regular constitutional order.

\textsuperscript{34} This alternative, based on the interpretation of vague constitutional provisions, necessitates the government to act under a cloud of constitutional uncertainty. It may thus deter the government from overusing special powers, and at the same time may make it hard to act effectively, even when executive action is needed.

\textsuperscript{35} The last alternative mentioned is, in fact, an extra-legal one. It wishes to narrow the recourse to emergency measures to the minimum degree possible. However, it may in fact eventually lead to scepticism regarding the rule of law altogether. This proposal has been promoted by O Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’ (2003) 112 Yale Law Journal 1011.

\textsuperscript{36} See, eg Art 4 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 states the following: ‘(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin’. See E Hafner-Burton, LR Helfer and CJ Farris, ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65 International Organization 673.
As a matter of practice, several modern constitutions include provisions regulating the possibility to declare emergency regimes during which ordinary constitutional protections do not apply to the same extent. It is worthwhile to compare these examples to the regulation of emergencies in Israel. The brief analysis below focuses on three important case studies – those of South Africa, Germany, and Spain – which had suffered during the twentieth century from dictatorial regimes and abuses of emergency powers.

Section 37 of the South African Constitution of 1996, which serves as an example for a modern and sophisticated constitutional document, recognises the possibility of declaring a state of emergency by an Act of Parliament when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency,

and when ‘the declaration is necessary to restore peace and order’. In such circumstances legislation may derogate from the ordinary level of protection of constitutional rights. However, the constitution puts additional limitations on such legislation, which may do so only when ‘the derogation is strictly required by the emergency’ and consistent with the obligations of the state under international law. In addition, the South African Constitution recognises a table of non-derogable rights. It awards absolute protection to human dignity and life, and authorises only limited derogations from other rights.

The German Basic Law and the Spanish Constitution shed light on the possibility of distinguishing between several types of emergencies (a distinction unknown to Israeli law).

The German Basic Law distinguishes between ‘internal emergency’ (regulated by Articles 91 and 87a(4)), ‘state of tension’ (regulated by Articles 12a(5)–(6) and 80a) and ‘state of defence’ (regulated by Articles 115a–115l). The most severe situation is that of ‘state of defence’, limited to circumstances in which ‘federal territory is under attack by armed force or imminently threatened with such an attack’. A determination that such a situation exists ‘shall be made by the Bundestag with the consent of the Bundesrat’ based ‘on application of the Federal Government’ and it requires ‘a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag’. During such time legislative powers may be exercised with modifications, including the passing of federal legislation in areas which are normally regulated by the Länder (Art 115c) and the use of a special enhanced legislative process (Art 115d), sometimes even only by the Joint Committee, rather than by the Bundesrat and Bundestag (Art 115e). These extraordinary laws ‘shall suspend the operation of incompatible law so long as they are in effect’. However, the last word is given to the democratic process. According to Article 115l, the Bundestag may, with the consent of the Bundesrat, at any point repeal laws enacted by the Joint Committee (Art 115l(1)) and may also at any time terminate the declaration of the state of emergency (Art 115l(2)).

39 Grundgesetz (GG).
40 Constitución Española, BOE n 311, 29 December 1978.
The Spanish Constitution also distinguishes between three types of emergencies: alarm, emergency, and siege (Article 116(1)). Siege, the highest level of emergency situation, can only be declared by the absolute majority of the House of Representatives at the exclusive proposal by the Government.

The House of Representatives shall determine the territorial scope, duration, and conditions of the declaration. Article 116(5) states that

[t]he House of Representatives may not be dissolved while any of the states contained in the present article are in effect,

and Article 116(6) clarifies that

[t]he declaration of the states of alarm, emergency, and siege shall not modify the principle of the responsibility of the Government or its agents as recognised in the Constitution and in the laws.

In addition, Article 55 accepts the possibility of suspending basic rights when a state of emergency or siege is declared.

The US Constitution, which dates from the eighteenth century, includes a much less sophisticated regulation of emergency. In fact, formally speaking, it does not recognise special rules for times of emergency, and only authorises the possibility of suspending the Writ of Habeas Corpus. According to Article I, section 9, clause 2:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.\(^\text{41}\)

This provision falls short of constituting a full scheme of emergency powers, but it forms a pragmatic alternative to the need to do so, by barring the access to court of people whose liberty is being infringed by the executive.\(^\text{42}\)

\(^{41}\) US Constitution, Art I, §9, cl 2. In practice, the use of suspension power in the US has been a source of public debate. The most well-known (and controversial) example of such suspension comes from the decision of President Lincoln during the Civil War. Richard Posner wrote in this regard: ‘One response to Lincoln’s actions might be to say that if he was acting justifiably, we should amend the Constitution to authorize presidents to suspend habeas corpus in emergencies . . . The alternative, which has been chosen by default, is to say that we are not going to give the president that legal authority but we are going to expect him to suspend habeas corpus if doing so is necessary (as Lincoln believed) to save the nation’. RA Posner, \textit{Not a Suicide Pact – The Constitution in a Time of National Emergency} (Oxford, Oxford University Press, 2006) 153–54. This analysis adheres to the model of using extra-legal measures. See n 35 above.

\(^{42}\) For an interpretation of the Suspension Clause as a source of emergency power in the substantive sense of the word, see AL Tyler, ‘Suspension as an Emergency Power’ (2009) 118 \textit{Yale Law Journal} 600. Against this background and following the events of 9/11, Bruce Ackerman has suggested going beyond the traditional regulation of the matter and introducing in the US as well the possibility of declaring an emergency regime, during which the President (as the head of the executive branch) will be authorized to take measures necessary for the defence of the country and its people. See B Ackerman, ‘The Emergency Constitution’ (2004) 113 \textit{Yale Law Journal} 1029; B Ackerman, \textit{Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism} (New Haven, Yale University Press, 2006). This proposal builds upon the regulation of emergencies in other constitutions (and accommodates this idea to the US context by the proposal to enact a framework statute in this regard). In the US, however, this proposal was generally speaking received with concern. Critiques offered various reasons – ranging from concerns regarding the ability to protect rights, see, eg LH Tribe and PO Gudridge, ‘The Anti-Emergency Constitution’ (2004) 113 \textit{Yale Law Journal} 1801, to analytical arguments against the effectiveness of regulating the matter only by a statute, see, eg A Vermeule, ‘Self-Defeating Proposals: Ackerman on Emergency Powers’ (2006) 75 \textit{Fordham Law Review} 631.
Evaluating the Israeli condition against the above comparative background leads to several poignant points. First, the express regulation of emergency regimes is currently considered the lesser evil by various modern constitutional documents. Second, the primary problem with the Israeli regulation of emergency situations does not derive from the law in the books, but rather from the continuity of the declaration of emergency in practice. At the same time, putting formal limitations on the duration of emergencies is not a sensible solution, given the palpable threats the country faces. However, the possibility of amending the relevant provisions in a manner that will allow for distinctions between various degrees or levels of emergencies (as in Germany and Spain) should be considered.\footnote{Distinctions between different emergencies are also found in Canada, where the matter is regulated not by the Canadian Charter of Rights and Freedoms, but rather by a statute – the Emergencies Act 1985 (Can). See R Martin, ‘Notes on Emergency Powers in Canada’ (2005) 54 University of New Brunswick Law Journal 161; KL Scheppele, ‘North American Emergencies: The Use of Emergency Powers in Canada and the United States’ (2006) 4 International Journal of Constitutional Law 213, 230–31.}

Such a reform will decrease the scope of exceptional executive powers in times of ‘ordinary’ emergencies. Indeed, as the analysis so far reveals, the constitutional text by itself may not suffice for safeguarding a balanced use of emergency powers. Even a constitutional regime which acknowledges distinctions between degrees of emergency is not a full guarantee against a political choice to use the most extreme measure. However, introducing these nuances into the constitutional system may diminish the prospects for the overuse of emergency powers.

VI. JUDICIAL REVIEW AND NATIONAL SECURITY

The regulation of national security in constitutional texts proves to be important only if it is enforced by the courts. As already noted, in Israel, executive decisions in the area of national security have been subject to judicial review since the early days of the Israeli Supreme Court.\footnote{See Al-Karabulli (n 8). For the growth of judicial review of decisions in the area of national security, see B Bracha, ‘Judicial Review of Security Powers in Israel: A New Policy of the Courts’ (1991) 28 Stanford Journal of International Law 39.}

This is also the case today, and even more so, as the Israeli Supreme Court has significantly narrowed preliminary barriers for judicial review, including the justiciability doctrine.\footnote{D Barak-Erez, ‘Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint’ (2009) 3 Indian Journal of Constitutional Law 118.}

The relatively significant role exercised by the judiciary in the Israeli context is often juxtaposed with the relatively weak parliamentary supervision of decisions in the area of national security (due to various factors, including the parliamentary coalition system which guarantees an almost automatic support for government decisions, as well as the background perception that Israel is under constant threat).\footnote{See Shinar (n 23); Friedberg and Hazan (n 23).}

It is important to note, however, that although the role of judicial review is important it is also limited. The decisions of the Supreme Court in this area do not challenge the basic structure of the regulation of the emergency regime (nor the declaration of the emergency situation itself),\footnote{See nn 27–28 above and accompanying text.} but rather criticize specific decisions in the area of national...
security within this framework. In other words, judicial review has proved more effective when it addresses specific decisions to use emergency regulations, and not the basis of the emergency regime as such.

The landmark precedents exercising judicial review over decisions in the area of national security have touched on decisions or actions that incongruously prioritised national security over basic rights (and thus were deemed ultra vires, unreasonable or disproportionate). These cases include the ruling to invalidate the military censor’s decision not to disclose the name of a retiring head of Mossad (the Israeli intelligence authority) and the ruling which prohibited the use of physical interrogation measures by the General Security Services.

Traditionally, the Israeli Supreme Court has intervened in the area of national security mostly by reviewing executive decisions, due to the constitutional convention prevalent in the formative years of the Israeli legal system – of legislative sovereignty. Thus, judicial review of legislation in the area of national security was beyond the reach of the court. However, the immunity of legislation from judicial review was removed with the enactment of the Basic Laws on human rights in 1992 – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. These Basic Laws were interpreted by the Court as also extending judicial review to legislative infringements of human rights. One notable example of litigation, which challenged the constitutionality of legislation in the area of national security, has been the controversy over the law which prohibits residents of the Occupied Territories from applying for residency in Israel (as well as from starting a process of naturalization) based on their family relations with Israeli citizens.

VII. NATIONAL SECURITY BETWEEN CONSTITUTIONAL LAW AND INTERNATIONAL LAW

An analysis focused on the constitutional aspects of national security obscures the fact that, in the Israeli context, many of the important constraints in this area derive not only from constitutional law but also from international law. This has been the case due to

48 In general, the court is willing to intervene when the government tries to wield its power to promulgate emergency regulations although it has other means of action, including the possibility of initiating new legislation. See HCJ 2994/90 Poraz v Government of Israel 44(3) PD 317 [1990] (in Hebrew); HCJ 6971/98 Paritzky v Government of Israel 53(1) PD 763 [1999] (in Hebrew).
51 See text to nn 9–10.
53 See HCJ 6821/93 United Mizrahi Bank v Migdal Cooperative Village 49(4)PD 221 [1995] (in Hebrew). However, judicial review of infringements of Basic Law: Human Dignity and Liberty does not extend to laws which preceded this Basic Law, according to the express exception stated in s 10: ‘This Basic Law shall not affect the validity of any law [din] in force prior to the commencement of the Basic Law’.
54 The Court was bitterly divided in this matter, and petitions against the law were rejected twice by close majority–minority decisions. The justices in the minority stated that despite the importance of the legislative goal, the measure taken – enacting a sweeping rule against so-called ‘family unification’ with Palestinian residents of the Territories and thus infringing constitutional rights of their Israeli relatives – did not pass the proportionality requirement. See HCJ 7052/03 Adalah v Minister of Interior 61(2) PD 202 [2006] (in Hebrew); HCJ 466/07 Galon v Attorney General (11 January 2012) (in Hebrew). See also D Barak-Erez, ‘Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights’ (2008) 6 International Journal of Constitutional Law 184.
several reasons: first, the power of international law has generally expanded worldwide, as well as in the Israeli context where the Supreme Court gradually takes more guidance from the norms of international law; second, and more concretely, many of the challenges in the area of national security in Israel have concerned the Occupied Territories – beyond Israel proper. Accordingly, the international law of occupation has proved extremely relevant. In fact, some of the Israeli Supreme Court’s most interesting and important decisions were mainly inspired by international law more than by Israeli domestic constitutional law. Examples include the decisions on the security barrier and the decision on targeted killings.

The impact of international law has consistently intensified due to the unprecedented willingness of the Israeli Supreme Court to engage with petitions concerning military actions that are taking place in real time, when they have an effect on human rights of civilians. The orders given by the Court may have been restrained, but in some cases even the willingness to hear a petition has a restraining effect on military actions.

VIII. EMERGENCY LEGISLATION WITHOUT EMERGENCY – TOWARD A NEW PARADIGM?

The backbone of national security law, as described so far, has been the power to declare an emergency situation. Therefore, the focus was on the scope of the power to declare an emergency situation and possible reforms in the way it is regulated. In contrast to this traditional analysis, it is suggested here to shed light on the constitutional significance of a relatively new legislative policy of enacting new laws which regulate top priority national security matters without conditioning their force in the existence of a formal declaration of an emergency situation.

More specifically, it is possible to point at two categories of new laws of this sort – ordinary laws and so-called temporary laws which include ‘sunset’ provisions.

A representative example of this new legislative trend is the Incarceration of Unlawful Combatants Law, 5762-2002, which unlike the law on administrative detentions is not limited to emergency situations. A major legislative bill – the Draft Bill Struggle Against Terrorism, 2011 – emphasises the willingness to broaden this option. The Bill, designed

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56 At the same time, there have been some doubts regarding the complete application of Israel’s Basic Laws on human rights in these areas: HCJ 1661/05 Hof Aza Regional Council v Israeli Knesset 59(2) PD 481 [2005] (in Hebrew).
59 See eg HCJ 2936/02 Physicians for Human Rights v Commander of the IDF forces in the West Bank 56(3) PD 3 [2002] (in Hebrew); HCJ 2117/02 Physicians for Human Rights v Commander of the IDF forces in the West Bank 56(3) PD 26 [2002] (in Hebrew).
60 For a broader analysis, see Barak-Erez, ‘Broadening the Scope of Judicial Review’ (n 45).
62 Draft Bill Struggle Against Terrorism, 2011, HH (Government) No 611, p 1408.
to form the basis for the new anti-terrorism law in Israel, aims at enacting a law in this area for all seasons, notwithstanding the existence of an emergency situation. In fact, the Bill even aims at amending several existing laws which currently condition their applicability in the existence of an emergency situation.

Interestingly, in its decision on the continuity of the declaration of emergency, the Supreme Court has pointed to the new Bill as one of the steps taken by the Ministry of Justice in order to get prepared for the non-renewal of the declaration of emergency situation. The decision refrains from addressing the possibility that this achievement may become a ‘Pyrrhic victory’ if the practical result is that the declaration of emergency will end but the so-called normal legislation will become emergency-oriented in its substance.

A similar development is the legislation of ‘temporary’ laws – laws with sunset provisions which limit their force to a period of a few years with no connection to the existence of an emergency situation. Representative examples in this regard include the law which limits ‘family unification’ with relatives of Israeli citizens who live in the Occupied Territories and the special law on investigations of suspects in national security offences, regarding the time period before they can meet with their attorneys and the procedures lengthening their arrests.

Indeed, legislating special laws in times that are perceived as ‘special’ due to national security threats (but with no formal constitutional declaration of an emergency situation) is not special to Israel.

Following the events of 9/11 this has been done by several Western democracies, such as the US, Canada and the UK. Partially at least, these laws were enacted for a limited period of time, in a way that contributed to their public legitimacy.

The US Patriot Act of 2001 originally included a sunset clause (section 224) which limited some of the law’s provisions to four years. Later on the issue of prolonging these provisions was the subject of heated debates, and eventually most of them were indeed prolonged. In a similar manner, the Canadian Anti-terrorism Act of 2001 limited the force of two controversial powers – regarding preventive arrests and investigative hearings – to five years. Eventually, these powers were not prolonged. In the UK, the Anti-terrorism, Crime and Security Act 2001, limited its provisions on unlimited detentions of non-nationals declared as ‘suspected international terrorists’ to a period not exceeding five years. After this controversial power was declared as incompatible with the European Convention on Human Rights, the UK enacted the Prevention of Terrorism Act of 2005, which introduced the power to promulgate ‘control orders’ to national and non-nationals alike. This power was limited to a duration of one year with the possibility of prolonging it (section 3), and in fact, it was indeed prolonged.

Formally speaking, ordinary legislation which includes sunset provisions is not part of the constitutional regulation of emergency situations. However, pragmatically, to a
large degree, this form of legislation makes the declaration of an emergency situation redundant. First, such laws provide the government with broad powers that are ready for use at times of threat to national security. Second, when these laws are challenged in court and accused of infringing the proper balance between the protection of national security and the protection of human rights, the court is expected to take into consideration the fact that these are ‘only’ temporary laws and therefore to limit the scope of judicial review. When the court does so, the result is that these laws in fact influence the constitutional framework of emergency. In the first decision, which reviewed the constitutionality of on ‘family unification’, the temporary nature of the law played an important role. Cheshin J referred to earlier precedents on temporary laws and stated that

the less we declare temporary laws void, the better . . . Security reasons are reasons that change from time to time, and determining that a law is a temporary law means a reduction in the harm caused by it merely to the areas where security reasons so demand.

Of course, the temporary nature of the law constitutes only one factor to be considered by the court, and it is still possible that the court will decide to invalidate even a law of a temporary nature.

The shift toward the legislation of laws with sunset provisions in the area of national security poses an additional question: to what extent are these laws of a really temporary nature? Indeed, it seems reasonable to enact special powers in the area of anti-terrorism for limited periods. This way, it is possible to answer temporal challenges without changing the underlying principles of the legal system. This understanding has shaped the tolerant view of the Israeli Supreme Court toward temporary laws of this kind. However, this tolerance has to be reassessed against the background of prolonging laws with sunset provisions time after time. This practice may create a new balance between security needs and human rights under the disguise of temporary legislation, forming a reality of ‘temporary permanence’ or ‘permanent temporariness’. In many ways, this new practice resembles the basic problem with the constant prolonging of the declaration of emergency situation under Basic Law: The Government. It should therefore come as no surprise that the Israeli Supreme Court is gradually developing a growing (although limited) willingness to review also laws defined as ‘temporary’ when they are prolonged more than once.

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68 This judicial restraint in reviewing temporary laws has developed as a general policy and is not limited to the national security context. See, eg HCJ 726/94 Klad Insurance Co Ltd v Minister of Finance 48(5) PD 441, 486 [1994] (in Hebrew); HCJ 24/01 Ressler v Knesset 56(2) PD 699 [2002] (in Hebrew).
69 Adalah v Minister of Interior (n 54) p 450 (para 118).
70 Indeed in the Adalah v Minister of Interior decision itself, the minority justices thought that the invalidation of the law is merited despite its temporary nature. In another case – CHR 8823/07 Anonymous v State of Israel (11 February 2010) (in Hebrew) – the Court invalidated a statutory provision which recognized the possibility of prolonging the arrest of a suspect in terrorist related activities without his or her presence in court.
71 See Ressler v Knesset (n 68) (a petition against the exemption of students of religious institutions from military service was accepted after the temporary law in this matter was prolonged); Galon (n 54) (the second petition against the law which prohibited family unification with Palestinians from the Occupied Territories was dismissed but some of the justices expressed a growing dissatisfaction with the practice of the prolonging a law which was originally legislated as a temporary measure. Special notice should be taken of the opinion of Levi J, who was part of the majority in the earlier decision in this matter, and ultimately joined the minority justices).
IX. CONCLUSION

The analysis offered so far shows that although the Israeli case study is special it still resembles problems and issues that are debated also in other systems. Recognizing special powers that may be invoked in times of emergency is a practice accepted by several systems and in this sense the Israeli regime as enacted by Basic Law: The Government is a reasonable compromise, especially when one takes notice of the special security threats Israel has to cope with. The unique nature of the Israeli condition derives not from the ‘law in the books’, but rather from the constant prolonging of the declaration of the emergency situation. At the same time, putting a formal limitation on the length of an emergency situation is not a practical solution, taking into consideration the threats facing Israel. The comparative study sheds light on a possibility that has not yet been pursued by Israel – of differentiating between various levels of security conditions. Beyond the formal contours of the constitutional norms, this chapter has noted the growing tendency to enact temporary laws with ‘sunset’ provisions which derive their professed justification from increased security threats presented as temporary. When these laws are prolonged, they seem to informally change the constitutional balance between security threats and human rights. In addition, the analysis offered clarifies the position that although the constitutional regulation of Israel’s national security law is formally grounded in Basic Law: The Government, in fact it is much broader and includes also the de facto permanent nature of the declaration of an emergency situation, the influence of international law and the access to judicial review of decisions in this area.

72 As noted above, this differentiation is recognized by the German Basic Law and by the Spanish Constitution. Similarly, such differentiation is also recognized in Canada by the Emergencies Act, 1985. See Martin (n 43); Scheppele (n 43). It is worth noting that Israeli law accepted this differentiation for limited purposes – in the context of the Civil Defence Law, 5711-1951 (as amended), which regulates the powers to defend residents of civilian areas during a period of battles.