

The Judicial Rhetoric of Morality

Israel's High Court of Justice on the Legality of Torture

Anat Biletzki

Discussant: Alan J. Weisbard

JANUARY 2001, PAPER NUMBER 9

The Occasional Papers of the School of Social Science are versions of talks given at the School's weekly Thursday Seminar. At these seminars, Members present work-in-progress and then take questions. There is often lively conversation and debate, some of which will be included with the papers. We have chosen papers we thought would be of interest to a broad audience. Our aim is to capture some part of the cross-disciplinary conversations that are the mark of the School's programs. While members are drawn from specific disciplines of the social sciences— anthropology, economics, sociology and political science— as well as history, philosophy, literature and law, the School encourages new approaches that arise from exposure to different forms of interpretation. The papers in this series differ widely in their topics, methods, and disciplines. Yet they concur in a broadly humanistic attempt to understand how— and under what conditions— the concepts that order experience in different cultures and societies are produced, and how they change.

Anat Biletzki is Senior Lecturer in Philosophy at Tel Aviv University. She was a Member of the School in 1999-2000. Alan J. Weisbard is Associate Professor of Law, Medical Ethics, and of Jewish and Religious Studies at the University of Wisconsin, Madison. During 1999-2000, he was a Laurance S. Rockefeller Visiting Fellow and Fellow in Ethics and Public Affairs at Princeton's University Center for Human Values and the Woodrow Wilson School— and a regular participant at the Thursday Seminar.

The theme for the 1999-2000 year was the "universalism of human rights." Member projects addressed questions such as: "What is the history of the idea that human rights are universal rights? What has been the political impact of recent human rights campaigns? What sorts of cultural (legal, religious, inter-national) conflicts have emerged in the name of, or in opposition to, calls for the enforcement of human rights? Members were urged to examine these questions in concretely located examples or problems. Over the course of the year, in the comparative process of discussing their local cases with one another, the question came to be how a "universal" right can be determined or understood when weighed within specific historical or cultural situations— and why the staking of such transcendental claims may be necessary. Anat's paper is not only a fine example of such a discussion but, as her prologue points out, it stands as a testimonial to how quickly the scope and evaluation of these rights can seem altered by changing circumstances.

It seemed the best of times. Only thus can one make sense of some of the thoughts propounded, some of the statements made, and some of the comments appended to the following article. Written and presented in October 1999, and then revised and commented upon in June 2000, it manifested an optimism born of political and historical circumstances; perused now, in December 2000, it may read as a poignant attempt to harness such circumstances to academic analysis. A drastic conclusion to be drawn is that those academic projects which revolve around current events in an effort to encompass these events within general, theoretical, or universal conceptions are fated to be, at worst, ridiculed as misrepresentation or, at best, commended for serendipitous reportage. More moderate would be the admission that our ill-fated commentary and analysis of historical and political phenomena is itself a lesson to be learnt, indeed a self-referential lesson, in social and political science. The philosophical lesson of this exercise would take a Wittgensteinian turn: one should perhaps resist the temptation to any generalization or theorization and rest content with description of particulars. This article should then be read only as a description of certain heroes in a certain place at a certain time.

But what of human rights? More to the point, what of the universalism of human rights? This article purported to advance the claim that the universalism of human rights allows for no particularization, no contextualization which would, or could, excuse their infringement. It therefore addressed the courts and, in particular, their use of legal language, as the focal point of such universalism, as the place where one might expect to anchor the demand— not always or invariably met— for absolute recognition of human rights, no matter what the particulars of the historical or political situation. Indeed, the rejoinder to the article mobilized these particulars to explain in more favorable light the court's workings. One could say that the contrast here lies between a view of the court as needing to be above history and politics (at least as a regulative ideal) and an acceptance of the court as bound by its situation within history and politics. Given the despondency, even the despair, of the present turn of historical and political events it would seem almost mandatory, morally mandatory, to insist on the former. For, not being able to trust politics, and not yet capable of historical perspective, we must still look to the courts— and to ourselves— to safeguard whatever is left of (universal) human rights in these times of treachery.

Anat Biletzki, December 2000

The Judicial Rhetoric of Morality: Israel's High Court of Justice on the Legality of Torture

On September 6, 1999, Israel's Supreme Court, in a monumental (to all, no matter what side you're on) and surprising (to some) decision, banned the use of torture as a method of interrogation allowed the General Security Services (GSS) in protecting the State of Israel from security risks. A look at this very recent decision, in its legal, political, sociological, or historical aspects is, most emphatically, a look at human rights; and since I have been, for several years now, an active participant in the debate concerning the court's stance in particular, and Israel's stance on human rights in general, I've thought to elaborate on this historical move and thereby to expose Israel's troubled position in the matter of human rights. When Israel's Supreme Court outlawed torture seven weeks ago, it did so sitting as a High Court of Justice. Special significance accrues to the specific function of the High Court of Justice in Israel's unique legal system. A "regular," three-branched system of government—including the legislative, the executive, and the judicial authorities—exists in Israel, as it does in other democratic, pseudo-democratic, formally democratic, and so-called democratic regimes. The Supreme Court of Israel functions as a routine high court of appeals in this three-pronged system. Additionally, and quite uniquely however, the Supreme Court sustains another function: that of being a High Court of Justice—that is to say, it is every and any person's haven of complaint against every and any (supposed or real) iniquity perpetrated by state authorities, organizations, or bodies of control and administration. As such, it becomes the natural locale for human rights issues.

On September 7th, the headline in one of Israel's leading newspapers, *Ha'Aretz*, read: "At 10 a.m. Torture Stopped." Amir Oren, a top military correspondent, and one of Israel's most articulate columnists, reported concisely and laconically:

. . . the General Security Services (GSS) views itself more as an arm of the empire than as an arm of the administration. So it was to be expected that the GSS reacted to the High Court decision with immediate obedience, and with no machinations. Up until yesterday morning the GSS had operated under power granted it by permits from a special governmental commission. A little after 10 a.m. the fax machines in the interrogation installations spouted the words of the High Court decision, with special emphasis on article 38 which denies the legality of said permits. At that same moment the director of interrogations instructed the GSS to desist from any torture included under that sterile term "permit."

In the week following the decision, tens, if not hundreds, of articles, columns, op-eds, comments, letters to the editors, talk-shows (on radio and tv) and just plain conversation, in Israel and around the world, revolved around what was taken to be an important historical, legal, and political move by a Supreme Court in a country that views itself, even if it is not always viewed so by others, as a part of the enlightened "Western World." Headlines screamed out that "Israel now joins the world's enlightened nations" and a consensus seemed to emerge, that what was at stake was "nothing less than Israel's moral

integrity and foundation as a democratic state, subject to the rule of law.”¹

I say “seemed to emerge” since perusal of several current articles in the Israeli and foreign press evinces that seeming consensus in most, but by no means all, of the written and voiced statements both in Israel and abroad. A telling contrary example is to be found in *Commentary* magazine of last month (October 1999), where Hillel Neuer, a recognized right-leaning legal scholar, published an article called “Israel’s Imperial Judiciary.” His article focused on a different issue altogether and took scant notice of the September decision, describing it only, and only in brackets, as one of the court’s “controversial rulings...[a] banning of certain interrogative methods used by Israel’s security forces.”² His position as an outsider to the the exuberant consensus of which I speak is doubly obvious: he views the Israeli High Court of Justice as being *too* liberal, *too* secular, *too* oblivious to the needs and demands of the religious populace; he accordingly places the “monumental” decision on the sidelines. Neuer’s article is replete with misleading remarks, misunderstandings, misnomers, misgivings, and just plain mistakes. When beginning to write this talk, my first inclination was to present his report, which takes Israel’s Supreme Court to task from the right, and to argue with it point by point, thereby “defending” the court from the left, so to speak. But in this process, I discovered that the story I want to tell about the Israeli Supreme Court is not a streamlined tale of right vs. left, or right vs. wrong, or tolerance vs. discrimination, or enlightenment vs. darkness. It is instead the story of a *schizophrenic* court—a court that is consistently inconsistent with rulings that are consistently split, a trait with problematic legal, political and historical roots.

Misrepresentations exhibited by the likes of Neuer have to do with the ignorance—both factual and conceptual—of many outsiders (even, or especially, if they be Jews) in evaluating the goings-on in Israel.³ Now there is, as there always is in our postmodern milieu, a general problem of the indeterminacy of translation at work here in both philosophical and cultural frameworks. I am not intimidated by the philosophical hurdle for, in contrast with (mostly anthropological) talk about other cultures, I continue to view Israel as a “western” culture and insist on analyzing local and current issues of that culture within the (unjustifiably maligned) discourse of human rights. This insistence, however, does not absolve us of “knowing the facts,” or, at the least, “knowing the background.” I am here merely pointing to the inadmissible strategy of talking about a country, a nation, a social, or a legal system, without getting your facts and concepts right. So I will begin by attempting to present certain political and legal concepts and facts that are unique in the Israeli setting, and that are absolutely necessary for my later discussion of the court’s decision on torture.

Conceptual lines: left, right, and human rights

Take a look at the latest article in the *New York Times* about Israel. (This week in fact—the week of October 23, 1999—there were three articles on Israeli culture, and all three are appropriate for my point.⁴) Chances are the reporter will mention, in passing or in essence, the line, in Israeli politics, between Right and Left. Versed as we all are in talking about “the left,” and cognizant as we all should be that such talk must shy away from banal and easy distinctions, I still, perhaps egocentrically, submit that the division between right and left in Israel, between the very meanings of the words “right” and “left,” and even between the references of these terms, are more convoluted than elsewhere. There are at least three continuums on which the terms “right” and “left” play a part:

- a) The social-economic axis (supposing we can unite those) is that upon which

Israelis speaking of right and left, speak a language similar, and basically parallel, to the common jargon of right and left in the Anglo-American and European world. If “right” be something in the region of capitalism, conservatism, and individualism, and “left” a move towards socialism, liberalism, and communitarianism, then talk of right and left in Israel is coherent on that axis inasmuch as that axis itself can be coherent. The internal tensions and problematics of drawing such a left-to-right line show up consistently in any political discussion that has to do with socio-economic terms and facts. Thus, for example, the question of the right-leaning liberal or the left-leaning individualist is a wonderful intellectual pastime with, nevertheless, concrete implications in the fields of welfare, education, economic development, health, and all other issues in what I shall call, for obvious reasons, “internal” politics.⁵

b) The Arab-Jewish conflict provides the most blatant and, therefore, the most recognizable and easily defined distinction between the Israeli left and the Israeli right: the right is that political world-view which sees the Jewish possession of, and sovereignty over, all, or most, of the historical/biblical land of Israel as a political end; the left, a position which recognizes Palestinian rights to parts (or even all) of that same land. I mention here the obvious extremes, making note, as always, of the fact that the continuum—which I will term the “external political” continuum—houses several gradations and complexities, as, for example, the right’s awareness of the fact that there might be pragmatic considerations weighing in favor of a Palestinian state (even if, in principle, that state is not recognized as a right of the Palestinian people), or, for another example, the left’s recognition of Israel’s security problems as constitutive of any long-ranging solution to the conflict. Additionally, the right and left have moved about in various directions over the past fifty years.⁶ Still, importantly, inherently, and essentially, the left is distinguished from the right in supplying a *yea vs. nay* answer to the question of Palestinian rights in general, and to the question of a Palestinian state in particular.

c) The secular-religious partition of Israeli society is the third axis upon which the question of Israeli identity turns. It is true that, traditionally, the left was identified with secular values, while religious communities and populations belonged with the right.⁷ Obviously this identification with left and right had more to do with the Arab-Jewish conflict just adumbrated, than with the socio-economic left-right which is so much more familiar to Western culture. And, to my mind, almost as obviously, this affinity—between the left and secularism and the right and religiosity—was “natural,” given the religious underpinnings of the claim to historical rights over the land that went with the political right. There are, however, two developments, even complications, which divorce the almost automatic coupling of religion with rightist politics that should be mentioned. One has to do with the rise of Jewish or Israeli nationalism (or even chauvinism) which is not religious, and which demands a different article in order to give it its due. The other is the phenomenon of religious doves, i.e., those religious Jews who do not view present day political rule over the land as having anything to do with the holiness of the biblical land of Israel, which refutes the easy assimilation of right to religion and left to secularism. Still, again, I would submit that it is not by chance or circumstance that the correlation between rightist positions fits in with a religious world-view.

The statistical evidence (of polls, elections results, and concrete activities) consistently linking the two is merely a manifestation of affinity in principle.

Beyond these three—the socio-economic (call it the internal), the Arab-Jewish (call it the political), and the religious-secular (call it the religious)—rifts, Israeli society is also wracked by other cultural, ethnic, and generational tensions that make consistent talk of left vs. right almost impossible. Yet even if we stick to these three, one cannot, in good faith, draw a line down the middle and group the socio-economic “leftist” with the pro-Palestinian “leftist,” and he or she, again, with the secular citizen, while leaving, on the other side of the line, the “rightist” with the Jewish nationalist, consistently religious (or pro-religion). There are several diagonals which can be argued for coherently as providing viable world-views, such diagonals making our talk of left vs. right in Israel a tricky project indeed. Think of the unequivocally secular capitalist who can, and often does, recognize the Palestinian’s right to national self-identity (left-right-left), or, for that matter, the religious kibbutznik who insists on Jewish sovereignty over the Holy Land (right-left-right). There are many other permutations.

Where do human rights fit in this panoply of labels? How do human rights organizations and human rights activists align with issues of left and right? What is the status of human rights in the legal system, how do the courts address issues having to do with human rights? Before expounding on the formal political and legal system of Israel let us notice that there are some natural, call them “intuitional” or “experiential,” associations between human rights and each of the left-right axes explored above. In fact, the first two, the internal (socio-economic) and the political (Arab-Jewish), have been used, by some in the Human Rights community, to differentiate between two “families” of human rights: civil-political rights and socio-economic rights.⁸ I will not address that intricacy here, but I do note that Israel can be, and is variably, seen as a country which is both progressive and creditable in the area of socio-economic rights, expressing, by law and statute, interests in education, accommodation, adequate standard of living, health-care, work, leisure, etc.⁹ It is in the arena of civil-political rights—including rights to life and bodily integrity, basic freedoms of conscience, religion, opinion, speech assembly, association; political rights of participation; freedom of movement and freedom from imprisonment, the right to non-discrimination, the right to trial and due process, and finally, the right not to be tortured or humiliated—that its record is far more worrisome. For, by and large, it is not unfeasible to generalize (even if such generalization be inductive) and claim that it is the Arab population of Israel—and of course its conquered territories—whose human rights are infringed. And it is then a short step to take from this generalization to the association of human rights activism and propagation with (what I’ve called) the political (as opposed to the socio-economic) left.

A cautionary note is in order here. It has forever been the battle-cry of human rights organizations, all over the world, that they are not political, in the very mundane, concrete, and locally contextual sense of the term “political.” In fact, it is precisely the universal aspirations of the very concept of “Human Rights”—purporting to defend the rights of all and any *human* beings, independent of political positions, opinions, affiliations, loyalties, or conflicts—that divorce human rights issues from any local or parochial politics.¹⁰ More so, it is that very separation between human rights and politics, often associated with neutrality, objectivity, and transparency, that imbues human rights organizations with credibility and authority. So it may be considered both conceptually and pragmatically illegitimate, on my part, to attempt to explicate the ties between human rights and the Israeli left (or right) as non-circumstantial. Be that as it may, I fail to see how talk of human rights in the Israeli

context can be disjoined from the Jewish-Arab conflict.

What of the third axis—that of the secular-religious dichotomy—as it pertains to human rights, and particularly to the discussion of rights such as freedom of, and to, religion under the auspices of the discussion on separation of state and religion? Although this is both a theoretically rich and crucially pertinent issue in present-day Israel, and despite its seeming fit with the general thrust of my work, it cannot be directly linked to the analysis of the decision against torture now before us. Suffice it to say, indirectly at this point, that my holistic view of politics may demand, at the end of the day, some resolutions concerning the normative stance of a high court, any high court, on questions of religion and human rights. In those instances where religious rights might come into conflict with other human rights, the high courts may be called upon to adjudicate the matter of torture no differently than any other matter.

The legal-political system—especially in the matter of a constitution

Israel has three branches of government: the legislative, representative body, called the Knesset with the exclusive authority to enact laws; the executive body (colloquially called the government); and the judiciary. The latter consists of courts, tribunals, and, most germane to us, the Supreme Court, which, as pointed out above, functions under two, distinctly different auspices, both in principle and in procedure: the High Court of Justice wherein redress against State authorities is enabled, and the Supreme Court which functions as the head of the court system in the State. In either role, it is the highest judicial instance. On the one hand it is the highest appellate court in the land for criminal and civil suits; on the other it is a “High Court of Justice,” a remnant of the British Mandate law, providing relief for citizens who challenge actions taken by “the state,” i.e., by the administration and all other state, municipal, and bureaucratic authorities. As the High Court of Justice—called the Bagatz—it is able to rescind, qualify, or rule on regulations and orders formulated by the executive government with all its branches and offspring, the local authorities and all bodies and persons performing public functions under the law. The vexing question is, of course, by what guidelines is it enabled to do so?

Lacking a constitution, Israel in some ways resembles the common-law system of Great Britain; judges base their judgments on precedents and legislated laws of the Knesset. This leaves open the question of basic rights and liberties. In its Declaration of Independence of 1948, the People’s Council of Israel established a Constitutive Assembly entrusted with the formulation of a charter, or constitution, which would provide the basis for the “rule of law” and a basic bill of rights. The process of drafting this constitution became mired in political dust and mud, so that, by 1950, the Constitutive Assembly declared itself the first parliament, or Knesset, and set about working as a legislative body. From that date until today the legislative game travels a two-tiered road, enacting “regular” laws, and formulating supposedly more fundamental “Basic Laws,” with the understanding that after all the basic laws are enacted they will, together, constitute, with an appropriate introduction and several general rulings, the constitution of the State of Israel. Among the basic laws enacted thus far one encounters the establishment of the courts, the status of Jerusalem (as capital and indivisible), the establishment of the military, and two laws having to do with human rights: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. Interestingly enough, several laws which would seem to be fundamental, i.e., “basic,” such as the Law of Return, or the Equal Rights of Woman Law, are not Basic Laws at all.

What was the High Court of Justice, the Bagatz, to go on as it operated to protect the

citizen from the whims of the state? Some (but not all) viewed principles expressed in the Declaration of Independence, such as “complete equality of social and political rights,” “freedom of religion, conscience,” and “freedom of speech” as its guidelines in navigating between individual rights and state demands. In addition, the court initially constrained the options of legal standing (only persons who had been directly injured by a government action could sue), and the options of “justiciability” (certain issues were not eligible for judicial intervention). Both these restrictions have been gradually lifted over the years as the court involved itself in rigorous debate over its own functions and responsibilities. Thus, for example, the demand for direct injury by the state has been lifted, the court now recognizing a non-injured party’s right to sue the state for wrongdoing (to another, or in principle). And the question of judicial review, which seems to “trespass upon the preserves of the political [legislative] and executive authorities,” has received great attention, with the court voicing its views in matters which, originally, it deemed unjusticiable. Both these developments are germane to the court’s historical and current treatment of the applications and petitions on torture.

During the past decade the court has been both praised and degraded for being an “activist” court. The term “activist court” comes up in legal studies and in political theory as an issue to be reckoned with, and I cannot, in this context, address the theoretical conundrums (having to do with separation of powers, constitutionalism, etc.).¹¹ The court in Israel has become activist in a very concrete—and some say illegitimate—manner, viewing itself as having power of judicial review of *laws enacted by the Knesset*. In other words, the court deems itself authorized to decide, post-legislation, on the legitimacy of laws according to principles voiced in the Declaration of Independence and according to Basic Laws. Most importantly, since the enactment of the two Human Rights Laws in the nineties, the president of the court, Aharon Barak, has declared Israel a “constitutional democracy” (which it is not, but more on that later, perhaps), noting the passing of these laws as a “constitutional revolution.”

Security, torture and the courts

I now come, finally, to my first, very general hypothesis: Israel’s courts, in general, and the High Court, in particular, are schizophrenic in the following way. Explicitly activist on matters having to do with individual rights, private rights, or economic rights, the court seems to be, *prima facie*, the epitome of the liberal ideal: a court of human rights. Further investigation reveals, however, that this consistent rights-oriented activism always and only relates to internal political issues, i.e. issues not having anything to do with the Arab-Jewish conflict. More concretely, examining past decisions of the High Court, one finds that almost all “liberal” judgments have occurred when the court addresses problems *within* the Green Line (the old, pre-1967 border between Israel and the occupied territories), and *among* Jews (or between Jewish citizens and the state). On the other hand, questions having to do with the populace of the West Bank and Gaza, or with Arabs (Palestinians) within the Green Line, have almost invariably gone the other way. The rights of Arabs as a minority in Israel and the rights of conquered peoples are not there for the asking; looking at the court’s decisions, one wonders if they’re recognized as “rights” at all.

How is this schizophrenia of the courts to be explained? By two primary constructs which will serve, for the moment, to give us an inkling of more complex explanations to come: racism and the myth of security. About the first, racism, one could shrug noncommittally and point to racism as a universal, behavioral habit. (Some, in fact, do.¹²) Or one

could, more profoundly, pinpoint racism as the deep-grounded motivation behind the workings of Israeli (Jewish) society and culture, and posit the court as a reflection of society (rather than as its norm-setting guide). Racism, whether viewed nonchalantly or exposed from the depths, is a real explanation of the court's schizophrenia (and of countless other Israeli manifestations). Nevertheless, and without resisting such real explanations, I desist discussion of this construct for its sheer complexity. On the other hand, the construct of "security," far more than the phenomena of racism, is aired out in the open. And it is this blatant and, to my mind, suspiciously transparent openness that hints at the stakes, and explanation, of what I have been calling the High Court's schizophrenia: it is important and instructive to examine the legal and conceptual rationalizations, all of which are ostensibly to do with security, that have permitted an erudite court, which perceives itself in enlightened, non-racist terms, to behave in such a clearly discriminatory manner.

For the past fifty years, *security* has been the over-riding term, concept, framework, myth, tradition, and music of Israel's existence. Israel's self-perception as a beleaguered nation, surrounded on all sides by hostile enemies, has built a conceptual infrastructure, palpably observed in any and all Israeli practices, which puts security at the top of the scale of values (perhaps one under the state itself). Security is, forever, above any political consideration, any social debate, any cultural discussion. And as such, it provides the grounding for immorality, or gives the lie to supposed morality.

Torture is forbidden, explicitly and unequivocally, by international human rights laws, formulated and coded in several contexts:

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, of 1948, states, in article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The declaration has outstanding moral weight but it is not legally binding. Accordingly, the United Nations set about establishing a series of conventions which hold the signatory states accountable.

Thus, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, of 1966, article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The European Council's CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, of 1950, article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Finally, it is the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984) which defines torture in article 1. "For the purposes of this convention, the term 'torture' means any act by which extreme pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating him or a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

It should be noted that the prohibition of torture and brutality (I will use this term henceforth for “inhuman or degrading treatment or punishment”) is absolute in the following sense. Formulating the conventions, their writers were aware of the qualifications needed to made in time of war, emergency, or extreme instability, and included the procedures for such qualifications in the text of the conventions. Certain prohibitions, however, were not open to any “derogation,” and the covenants place torture in this group. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or other public emergency may be invoked as a justification of torture.” (CTC 2/2)

Amazingly enough, Israel has signed and ratified these contracts and conventions, along with others.¹³ How then can the systematic and routine use of torture be explained, given Israel’s outward and explicit condemnation, along with other “enlightened” nations of the world, of the use of torture? This question can only be answered via a historical detour.

Until 1987, Israel denied its use of torture. More to the point, Israel’s security forces denied their use of torture when called to account for events which seemed in blatant contradiction to codes of conduct, codes which did not permit investigative procedures going under the name of “torture.” For several reasons, having to do with political development and maturity (and facily cited in a more specific manner as the “Bus 300 affair” and the “Nafsu fiasco”),¹⁴ the Israeli polity seemed troubled enough, open-minded enough, and self-reflective enough in 1987 to demand an investigation of the routine practices of the secret services. And, one might say ironically, the official commission of inquiry set up to unearth these practices and to evaluate them, proceeded to legitimize torture.¹⁵ Not in so many words, of course. The Landau Commission (headed by a former Supreme Court Justice Moshe Landau)¹⁶ indeed chastised the services for overdoing things, for using extreme interrogative methods indiscriminately, and especially for lying about this when questioned. But it went on to confirm, in legal jargon, the use of “psychological pressure” and “a moderate measure of physical pressure,” when and where needed. And, in the undisclosed part of its recommendations, it elaborated the circumstances allowing, and the methods allowed in, the use of “moderate physical pressure.” Since this part of the commission’s report remained (and remains to this day) classified material, “moderate physical pressure” has become the Israeli euphemism for torture. Under that euphemistic label, though, one encounters the dry data of numbers and methods of prisoners and interrogations carried out after the Landau Commission’s recommendations. Some examples will give us the gist of the matter: The official number of Palestinians interrogated by the GSS between 1987 and 1994 was 23,000.¹⁷ Interviews conducted with 700 Palestinians between 1988 and 1992 disclosed that 94% of those interrogated were subject to torture or abuse.¹⁸ And, perhaps most poignant of all, prime-minister Itzhak Rabin, in an interview on Israeli radio, admitted, in 1995, that “we have resorted to ‘shaking’ 8,000 prisoners.”

What could be the reason, the legal and moral grounding, given for such permission to torture? We in Israel have become oh-so-familiar with two, closely related, catch-phrases: the “necessity” defense, and the “ticking time-bomb.” Although the first phrase, the “necessity” defense, functions as a legal construct while the second, the “ticking time-bomb” serves as a rhetorical device, both, together, provide deep justification—legal, moral, psychological, and pragmatic justification—for the use of torture, by any other name.

I will deal with the latter expression first, as it leads, naturally, to the former, and as it involves grave moral deliberations and a famous—or perhaps infamous—moral argument (or is it fallacy?).¹⁹ The argument is always presented in its extreme, narrative version: a choice is offered between torturing a terrorist known to have information about a ticking

time-bomb and letting the bomb go off, thus killing an indefinite number of innocent victims. Is the absolute moral prohibition (not to mention the legal prohibition) of torture still as absolute under such circumstances? Wouldn't, we are asked, this absolute evil become a merely relative evil, and an undoubtedly lesser evil, in comparison to the unfathomable disaster about to occur? True to hypothetical moral arguments the ethicist can now engage in the to-and-fro befitting such arguments. Starting with the "lesser evil" claim based on utilitarian profit-over-damage, it seems clear that offense to the dignity and physical integrity of one person is a lesser evil than that of several people. More banal, but quite convincing, is the (im)balance presented between the dignity and physical integrity of a terrorist, a murderer, desirous of the annihilation of hundreds of innocent bystanders and the dignity and physical integrity of those same innocent bystanders. Thus, abuse of this person's dignity and integrity is, although evil, a far lesser evil than the suffering of those hundreds. The arguments can then move on to the "sanctity of life" claim, which can swing both ways: either the sanctity of each and every life (and therefore the terrorist's life as well) or the sanctity of more lives being greater than that of one. If the utilitarian profit-over-damage mode remains in effect, the sanctity of several lives outweighs that of merely one life (or does it?). Finally, though, the "slippery slope" claim (or one of the many slippery slope claims that come up in this discussion), when abetted by a utilitarian argument, leads to torture of not only the terrorist, but perhaps his wife, or his daughter, if so many lives are to be saved . . . As long as we engage in balancing gains and losses, even moral gains and losses, we remain in the relativistic, and definitely not unequivocal situation, of debating the moral status, and the bottom line, of torture.

In contradistinction to such arguments (though, hopefully, not in ignorance of them), International Human Rights law and organizations, view torture as an absolute evil and do not accept the ticking time-bomb as a counter-argument to this absolutism. This moral stance also has, to be sure, philosophical roots in ethical theories, one of which is the recognition of a person as an end and never merely a means.²⁰ Pressure on and torture of a human being for the purpose of retrieving information makes that person a means to secure external purposes while his person, his desires, his pain, and his suffering are insignificant, or significant only insofar as they serve that same purpose. Israeli human rights organizations have engaged in the raging debate about the ticking time-bomb—which goes on continuously within Israeli society on the theoretical-legal level and sporadically on the concrete level every time current events point up the dilemma—by continuing to insist that, even in a country so tragically acquainted with ticking time-bombs, torture should remain taboo.

Beyond the very theoretical moral issues, dealing with the question torture leads us to the skewed practicalities of such interrogations. Fully cognizant of the real-life, day-to-day horrors encountered in the recent (and not so recent) past, human rights organizations and their lawyers have unearthed the abusive and opportunistic use made of the ticking time-bomb argument by the security services in order to obtain permission to torture in cases that are far removed from any kind of an immediate-danger scenario. The evidence amassed in the hundreds of suits and depositions points clearly to a cheapening of the ticking time-bomb rationale.²¹

During this past decade, the High Court has heard hundreds of appeals by Palestinian detainees complaining of physical and psychological methods of "pressure." The court has often issued orders *nisi* and interim injunctions against these measures. Still, when the State has appealed against such injunctions, the court has almost invariably accepted the ticking time-bomb argument, citing security as its overriding concern. In almost all cases in which

the court was petitioned to intervene and put a stop to inhuman treatment, and in which the state, i.e., the security forces, demanded continuance, the court shied away from taking a firm stand for human rights, claiming either unjusticiability or permitting the atrocities to continue as “necessary.”

Which brings us, finally and inevitably, to the “necessity” defense. Faced with a ticking time-bomb, the interrogator views his use of extravagant methods as “of necessity” in order to save human life. The Landau Commission had, indeed, cited the “necessity” defense as a legal—not a moral—justification for the psychological pressure and “moderate physical pressure” which it allowed, legitimized, and routinized. Claiming the immediate need to interrogate (usually because of a ticking time-bomb), the secret services demanded the authority to question suspects via effective methods before the fact, rather than having to appeal to “necessity” as an ad hoc, circumstantial defense. The intricacy here in the legal status of the “necessity” defense—which has implications for the decision on torture that we will encounter shortly—lies in the subtle, but essential, difference between a formulated justification grounding an action and a post-factum explication (which may sometimes be used to mitigate or even exonerate said action). The story of ticking time-bombs, coupled with legal affirmation (by commissions and courts) of necessity, worked together to anchor evil. Thus did Israeli law, and culture, integrate torture into its security-minded vocabulary. This fact was documented in March 1991 by B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories,²² in a report about the “Interrogation of Palestinians.” Another, follow-up report came out in March 1992. In the years since then B’Tselem has published six additional reports²³—as have Amnesty International, Human Rights Watch, and others—on torture in Israel.²⁴ These reports were distributed to ministers and Knesset members, to diplomats and decision makers, to committees in Israel and abroad. Other organizations, lawyers and legal/political scholars provided written arguments, magazine articles, newspaper columns. Letters were written, conferences organized, protests arranged, petitions and applications to the High Court of Justice rendered again and again and again. The bottom line of all the reports was single-minded, and unequivocal: torture goes on in Israel, it is a fact of life, here, and now, and at all times.

What makes a country—its leaders and its populace, its secret service and its soldiers, its judges and its lawyers (with so very few exceptions)—able to countenance the constant presence of evil proclaimed as absolute by enlightened nations, even proclaimed as evil by official state ideology? Before the 1987 Landau Commission report (and recommendations), one, or at least some, could claim ignorance. After 1987, and more so, after the outburst of the Intifadeh and the accompanying spread of information by human rights organizations, journalists, news organizations, and the media at large, the “we didn’t know” defense became moot. The question gnaws at Israelis of conscience. It is, perhaps, and as I’ve framed it, a moral question, but it harbors historical, sociological and cultural explications.

Let me start with a strange, delayed insight. When the B’Tselem reports came out, and were presented in press conferences in Israel and around the world, workers in B’Tselem were prepared for all kinds of responses: denial, disbelief, shock. But we were the ones who were shocked, for the one consistent response (even from people abroad) was that torture was a necessary evil. Why this consistency? What is its source? And aren’t the answers to these questions actually the answers to the question above? Mounds of paper have been covered in sociological, historical, political ink in pursuit of explanations; here I will offer a shorthand account.

As I mentioned above, Israeli society as a whole, not only Israeli secret service agents, perceives itself (and has in general bequeathed this perception to many abroad) as a small

nation embroiled in a struggle for survival, a struggle so terrible that it allows us to view the people of a whole nation, under our occupation for over thirty years, as walking, ticking time-bombs. This, accompanied by a history of Jewish persecution, gives rise to a discourse of power which enjoins the Israeli to be strong, and permits a one-directional relationship of power vis à vis the other, the Palestinian other. This discourse and its practical implications are tolerated in the name of survival even when taken to the extreme of torture. And this discourse has also had tremendous semantic consequences: the universal discourse of human rights has gone awry in Israel. After ratifying international conventions of human rights and being party to international law, Israel persists in sophisticated legalese, intriguing arguments meant to deprive the other nation, the Palestinian nation, of its human (civil and political) rights. The High Court, heart of Israeli democracy and liberalism, has often confirmed and perpetuated this *lingua esoterica*, more or less (lately less) explicitly. This is the same court that allowed the Minister of Defense (Rabin) to bind and gag four hundred and fifteen people and expel them to Lebanon in spite of the inadmissibility of such acts in International law; the same court that permits, again and again, demolition of the houses of suspects even when such suspects are already dead and such demolition is abhorred as collective punishment; and the same court that has consulted and deliberated for years on end about the question of torture — before delivering last month's exceptional judgment.²⁵

An historic judgment

Some striking points loom large while reading the judgment of the High Court of Justice. Most of these are, understandably, legal questions. But can this legal discussion be mined for moral thought? Can it be usurped as a political tract? What makes it different from decisions of the past? And what are its implications for the future? I will try to answer all these questions, but first, the judgment itself.²⁶

In the preamble, Chief Justice Aharon Barak, asks two precise and direct questions: “Is the GSS authorized to conduct these interrogations?” and “Is the sanctioning of these interrogation practices legal?”

Is GSS is authorized to conduct *these* interrogations? *Which* interrogations? This question is then immediately unpacked into two others: any interrogation and interrogations using the means being petitioned against. Speaking of “The Authority to Interrogate” in general (and providing a definition of general interrogation as “the asking of questions which seek to elicit a truthful answer”), the judgment goes into a long-winded discussion over the intricacies of who may interrogate and who may not, according to what law or statute, and finds in the affirmative: the GSS may interrogate, according to the Criminal Procedure Statute. But it is in the next section, “The Means Employed for Interrogation Purposes,” that one meets the far more important question about “these” interrogations: “What,” asks the judgment, “is the scope of these powers and do they encompass the use of physical means in the course of the interrogation in order to advance it? Can use be made of the physical means presently employed by GSS investigators (such as shaking, the ‘Shabach’ position,²⁷ and sleep deprivation) by virtue of the investigating powers given the GSS investigators?..Does the ‘law of interrogation’ sanction the use of physical means, the like used in GSS interrogations?”

In this second section of the first question (about the nature of *these* interrogations), the court begins to squirm, trying out the various moral and even political— rather than legal—arguments of which we have made mention above. First, it emphasizes the “clash of values or interests” (and thereby exhibits ignorance of the significant distinction between values

and interests) inherent in any procedure of interrogation in a *democratic* society. “On the one hand,” it explains, “lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated.” And it goes on to insist that “[t]his having been said, these interests and values are not absolute . . . Our concern, therefore, lies in the clash of values and the balancing of conflicting values.”

When I say “squirm,” I mean this quite literally; notice the twists and turns as the court continues: “This having been said,” again, “a number of general principles are nonetheless worth noting,” of which the most important is the *absolute* prohibition on torture demanded by International law and agreed to by Israeli law. “These prohibitions are ‘absolute’. There are no exceptions to them and there is no room for balancing.” Taking these principles seriously, and going from these general principles to the nitty-gritty of real methods, the court then enumerates various details of each of the specific methods brought up in the applications—methods used by the GSS to interrogate that included shaking, crouching, “Shabach,” powerfully loud music, and sleep deprivation—and concludes, concerning each of them separately, and, of course, in any combination, that they are prohibited during interrogation.

The legalese here is fascinating, but not exceptional. First the court confirms the GSS’s authority to interrogate as no different than the regular, police-like authority to interrogate. Then, under this presupposition of “regular” or “reasonable” interrogation, the court proclaims that the interrogation methods used up to now by the GSS are prohibited. “We,” writes the court, “have arrived at the conclusion that the GSS personnel who have received permission to conduct interrogations (as per the Criminal Procedure Statute [Testimony]) are authorized to do so. This authority—like that of the police investigator—does not include most of the physical means of interrogation which are the subject of the application before us.” There is nothing (legally) exceptional here because the real (moral) question has not yet been asked.

But now, finally, the crux of the matter comes up: “Can the authority to employ these interrogation methods be anchored in a legal source beyond the authority to conduct an interrogation?” asks the court. For, let us remember, the crux of the matter was the ticking time-bomb as an argument and the “necessity” defense as justification, both of which removed the GSS’s methods of interrogation from the scope of the regular authority to interrogate, which has been addressed up to this point in the decision. In this manner, then, the “necessity” defense accruing to imminent danger becomes the issue: can it constitute a norm-setting directive as to how to proceed when embarking upon an interrogation? The court seems to be clear and explicit on this: “A general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the ‘necessity’ defense. The ‘necessity’ defense does not constitute a source of authority, allowing GSS investigators to make use of physical means during the course of interrogations.” The legal explanation of this principle is just as clear and explicit: the “necessity” defense is an after-the-fact judgment, useful and relevant in cases where an investigator is accused of wrong-doing. It cannot function as a normative, before-the-fact guide to anything. “Thus,” we hear clear and loud, “the very nature of the defense does not allow it to serve as the source of a general administrative power.” And here we get to the final, negative answer to the second question asked by the court, “Is the sanctioning of these interrogation practices legal?” Given the kind of authority the GSS has for interrogation, and given the illegality of torture under this authority, the sanctioning of these interrogation practices is not legal. The court ends its tract with the words that enabled the headlines to

scream “Torture stopped”: “It is decided that the order *nisi* be made absolute, as we declare that the GSS does not have the authority to ‘shake’ a man, hold him in the ‘Shabach’ position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a ‘frog crouch’ position, and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the ‘necessity’ defense, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind.”

Had this been the end of the story, the substantial, rather than textual, end of the decision, our story could have had an unambiguously happy ending. But the High Court added, in section 37 of the decision, that “if the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose,” thereby opening the door to a host of deliberations, questions, and attacks. Insisting on the separation of governmental authorities and pointing to the legislative body alone as being able to legislate, the court “passed the ball,” so to speak, to the Knesset who could pass legislation allowing the GSS authority to use extreme means in “special circumstances.” Indeed, it would be part of the Knesset’s responsibility to address social, ethical, legal and political questions as part of this legislative procedure. But it would be the Knesset’s responsibility, not the court’s, for the court cannot, at the end of the day, rule on the legality of torture independently of the Knesset’s enactment of laws. It seemed, to some, that, quite perversely, the court ended its own deliberations on torture by somehow winking to the Knesset to decide on this issue. “These questions and the corresponding answers must be determined by the Legislative branch. This is required by the principle of the Separation of Powers and the Rule of Law, under our very understanding of democracy.” True, the Separation of Powers and the Rule of Law are viewed as the essentials of democracy. Along with general and free elections, majority rule, and the safeguarding of the rights of minorities, these principles serve to pinpoint and identify countries and states that are awarded the complimentary label of a democracy. True, also, that accredited democracies are regularly chastised, by human rights organizations, by political analysts, and by intuition alone, for infringement of these principles. Most true, however, is the troubling status of Israel as a “democracy” (with or without scare-quotes) and its attendant problems of human rights, given the stark factuality of lack of separation between religion and state and the ongoing occupation of over two million people.

The wobbly termination of so significant a document prompted certain human rights organizations even to decry the decision, claiming that the High Court constrained itself, in its judgment, to technical legal considerations so as to escape from the unequivocal condemnation of torture under any circumstances. And it is the more explicit, and troubling, phrasing of the end of the document, saying “We do not take any stand on this matter [the matter of sanctioning physical means due to Israel’s special security situation] at this time,” that supports the claim that the High Court did *not* proclaim the illegality of torture. Indeed, the High Court spoke very little about “torture” during the entire tractate, and even less about the concept of “human rights.”

So what is there to be happy about? I will address this question indirectly, by asking a different one: Why now? Why did the Israeli High Court of Justice decide, finally now, just now, to outlaw the methods being used by the GSS (by whatever convoluted argument they could find), when the same relevant moral and legal considerations have been there all along and the factual information has been available for at least the last decade? Undoubtedly, answers may be given by focusing on the historical-political changes which Israel and the

Palestinians have been undergoing during this same decade; changes which can be summed up under the title “peace process,” but which are amenable to deep psychological and sociological analysis. In lieu of such analysis of Israel and Palestine, I propose to concentrate on the legal rotunda—with all its complexities, deliberations, problematics, back-slapping and chest-beating—as a reflection of this social and cultural region rather than as its normative instigator.

I have called the Court a schizophrenic court, intending thereby to graphically outline the court’s decisions as differentiating between Jewish and Arab applicants, or, more fundamentally, between social-economic issues and political (i.e., Jewish-Arab conflict) ones: a liberal, rights-conscious court on the Jewish socio-economic side of things, a strict, security-minded one on the political conflict stage. But a look at the decisions rendered by the Court over the last decade, and more so at the justifications given for them, indeed, a look at some of the intricate rationalizations voiced in the decision on torture here before us, shows up a more complex situation. Perhaps speaking of a “neurotic” court, rather than a simply schizophrenic one, would point, metaphorically no doubt, at the underlying complexities, not to mention complexes of the court and its context. For certain facts—having to do with the GSS’s power and method of interrogation—have not changed. Certain myths and presuppositions—having to do with Israel’s locus of “few against many” and of “security and survival above all”—are slow to change. And it is the legal system’s self-image, that includes the contentious claim of a constitutional revolution now in the making, that has forced Israeli society in general and the court in particular to review these long-entrenched myths and presuppositions yet again.

Thus see the court trying to explain its lack of decision-making on these same issues in the recent past, saying: “Until now, therefore, the Court did not actually decide the issue of whether the GSS is permitted to employ physical means for interrogation purposes in circumstances outlined by the defense of ‘necessity.’ Essentially, we did not do so due to the fact that it was not possible for the Court to hear the sort of arguments that would provide a complete normative picture, in all its complexity. At this time, by contrast, a number of applications before us have properly laid out (both orally and in writing) complete arguments from sides’ respective attorneys. For this we thank them.” One wants to retort with an expletive! There have been hundreds of applications and petitions, submitted in principle by organizations and in particular by victims.

Or we watch as the court attempts to excuse the Landau Commission from culpability: “All that the Commission of Inquiry determined is that if an investigator finds himself in a situation of ‘necessity,’ constraining him to choose the ‘lesser evil’—harming the suspect for the purpose of saving human lives—the ‘necessity’ defense shall be available to him.” That is simply not true! To this very day, the Commission’s classified part, the part that details the methods that are allowed the secret service, has not been made public. Some would say for the secrecy of the methods; I would say for the shame.

Aharon Barak, the Chief Justice, has been one of the most controversial figures in Israeli law and politics during the last decade. Viewing himself as a great defender of human rights, and congratulating himself for the “constitutional revolution” Israel is supposedly experiencing, he has said, elsewhere, concerning the Basic Law: Human Dignity and Liberty: “From ‘human dignity and liberty’ one can infer various rights related to investigation . . . methods of interrogation in which a person becomes a means for acquiring information are to be prohibited, as is interrogation denying him his identity as a human being, and as is punishment infringing on the individual’s humanity.” More to the point, but somewhat less explicitly, in fact almost hidden between the lines of the decision before us, one can discern

a hint as to the place of human rights, basic laws, and specifically Basic Law: Human Dignity and Liberty. For in the closing section where the Israeli legislature is encouraged, if it so wants, to enact laws enabling or prohibiting the GSS to use special physical means, it is also forewarned: “If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, *provided, of course, that a law infringing upon a suspect’s liberty ‘befitting the values of the State of Israel,’ is enacted for a proper purpose, and to an extent no greater than is required.* (Article 8 to the Basic Law: Human Dignity and Liberty).” (my emphasis) These last few words are crucial. Given Barak’s proclivity to “constitutionalizing” the state’s basic laws, given his recognition of international human rights laws, and finally, given the court’s recent appropriation of “judicial review” over even the Knesset’s laws, a certain optimism tends to set in, thinking that any such law will be struck down as “unconstitutional.”

Epilogue

Some final, personal impressions—and the questions, fears, and hopes they raise. When, on September 5th, “the evening before,” activists, journalists, some human rights lawyers and some others tried to prepare for the next day’s decision, it was clear to most, if not all, that the High Court would rule against the applicants and for the State and the GSS, given its past rulings and a pervasive feeling that “nothing’s changed, nothing’s new.” The decision came, in that sense, as a surprise. In later discussions with legal scholars and other human rights lawyers we were told that, on the contrary, the legal profession was in no doubt that the High Court would see its way, this time around (and what was different this time around?) to the “right” decision. To put it bluntly, it seems possible that the political/activist perspective blinded some to the “progress” being made, and therefore expected, in the legal arena. Then, on September 6th, when the words of the High-Court’s decision came blaring through on live radio, people on the Israeli “left,” those in academia, and those in human rights organizations, breathed a sigh of relief and consensually proceeded to celebrate what it thought was a great change. It took two days of listening to talk-show interviews, reading letters to the editors, and conversations with men and women on the street to wake up to the reality of perpetuating myths. The consensus was not with the decision but rather lay in the variously expressed complaint and cry of fear: “Israel’s High Court has detracted from the country’s ability to protect itself.” Voiced by generals, former GSS directors, political leaders, and even some left-leaning journalists, this automatic and natural response was brought to an interesting head by newly elected Prime Minister Ehud Barak (no relation to chief justice Aharon Barak) who immediately called on the Knesset to, in fact, enact a law instructing the GSS in the wondrous ways of secret investigations and thereby safeguarding that old icon, security. No wonder then that one of the headlines a few days later read “Barak vs. Barak?”

In the half year subsequent to the High Court’s decision Israel’s public witnessed the musings of journalists, debates in academia and public conferences, statements from military and GSS officials (not to mention politicians), and general brouhaha concerning the question of torture. The official expression of this bewilderment can best be seen in the parliamentary and governmental steps that were immediately taken in (sometimes

automatic) reactions and (other times thoughtful) response to the decision. Thus one finds an immediate, knee-jerk introduction, in October 1999, of a bill—draft Criminal Procedure (Powers and Special Interrogation Methods for Security Offences) Law— which would allow the GSS to use “special interrogation methods” where there was reasonable suspicion that the detainee had information which, if immediately revealed, could prevent danger to human life or state security. Interestingly enough, but well explained in the terms we’ve expounded above, the signatories to the bill (which would have a lot of procedural steps to go through before passed, if ever), over forty of the one hundred and twenty Knesset members, were members of a wide spectrum of political parties, left and right. But, at almost the same time, a different group of legislators submitted another bill to the Knesset— the draft Penal Code (Amendment: Prohibition of Torture) Law— which would make torture (as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Israel ratified in 1991) a criminal offense.

While neither bill has been passed as law, and while it might seem that the pendulum can swing either way, as a schizophrenic pendulum is wont to do, let me conclude in an optimistic vein born of the latest swing. For, in February 2000, two reports concerning torture made headlines. First, a Knesset subcommittee finally allowed publication of the summary of a 1995 State Comptroller’s report on GSS investigations, confirming the allegations, by human rights groups, of GSS abuse (of prisoners, of the law, of accountability). In a security-minded press situation, this airing of bad news is good news. Secondly, and undoubtedly related, the head of the GSS, in a meeting with Prime Minister Barak, decided to abandon his demand for the legislation of “special” interrogation methods. Official explanation of this uncharacteristic move quoted pragmatic considerations, but added an extraneous reason, pointing out that the decision had been made “in part to avoid the condemnation of the international community.” If such external condemnation be seen as a factor constraining immoral acts which infringe on human rights, the High Court decision on torture, tentative and equivocal as we’ve made it out to be, may nevertheless be the harbinger of the internal condemnation needed, at the end of the day (or even at its start), to anchor human rights in Israel.

ENDNOTES

- 1 B'Tselem press release, Sept. 6, 1999.
- 2 *Commentary* 108/3, October 1999.
- 3 This is not to say that I would not take to task, and be taken to task by, similar misrepresentations within the Israeli discourse. I will, indeed, in the sequel address precisely the internal conundrum over the Court's decision.
- 4 *New York Times*, October 24, 1999: "Free to Be Personal, Not Political" by Deborah Sontag; "Striving to Become Israel's Louvre" by Deborah Solomon; "Trance Casts a Spell Over the Youth of a Worried Israel" by Bruce Feiler.
- 5 Sadly enough I cannot go into the fascinating issues that plague the American right and left, especially considering three problematic, and not unrelated, questions: a) How does "individualism" get a place of honor in the right, when liberal thought cherishes it as no less a value than conservative thought? b) In what ways is liberalism a "leftist" worldview, especially considering its distancing from socialism? c) How is communitarianism differentiated from other explicitly communist stands in the left?
- 6 For instance, one can point to the issue of a "Palestinian state" which was perceived as a legitimate entity only in the eyes of the far (radical) left, being a taboo term for almost all Zionist Israelis. A Palestinian state (no matter what its contours) is now a viable term (and hopefully a potentially realistic entity) over the whole Israeli political spectrum. Another illustrative example is the question of settlements in the conquered territories: where once these settlements were seen by anyone to the left of center as blatantly illegitimate, they are now pragmatically acquiesced to by large parts of the (so-called) left.
- 7 The outstanding exception to this generalization is the original, ultra-orthodox community (Neturei Karta) which views the right over the land as a promised, but fundamentally and religiously promised, right to be won only by messianic means. In other words, a Jewish fundamentalist of the old school would view the State of Israel as a worldly intervention, by human forces, in a Godly process that will bestow the Holy Land on the Children of Israel in its own, messianic time. It is this conviction that grounds the anti-Zionist stance of early Jewish fundamentalists. And it is fascinating to recount the change effected in large parts of this community, and in newly-born-again fundamentalists, that has moved them, over the last few decades, back into the Zionist (albeit ultra-nationalist Zionist) embrace.
- 8 In general civil and political rights usually include rights to life and bodily integrity, the right not to be tortured or humiliated, the basic freedoms of conscience, religion, opinion, speech, assembly, association, political rights of participation, freedom of movement and freedom from imprisonment, the right to non-discrimination and the right to trial and due process.

Social and economic rights are listed as rights to education, health-care, accommodation, an adequate standard of living, freedom from poverty, right to work and leisure, etc. (And there is the ongoing question on placement of the right to property.) The Universal Declaration of Human Rights accepted both groups of rights as basic and equal, but there have been debates on this issue, too various to list here, but see, e.g. Cranston (1978), Waldron (1984), Nozick (1974).

- 9 I make note here, however, of two impediments to the markers of progressiveness and creditability: 1) As of the latest (1998) census report, Israel sported the largest gap between “rich” and “poor” in Western countries (measured by relative income of highest percentiles and lowest percentiles). This factual, economic measure does not change the legal standing of the state vis à vis socio-economic human rights, but it does make one waver concerning the concrete implementation of statutes. 2) That socio-economic measures point to the consistently low “status” of Arabs can be used to ground the argument that socio-economic rights are not equitably distributed (and thereby are tightly connected to civil-political rights). This issue is too complex to address here as it must be taken up with wide-ranging arguments in political theory. And, in any case, my note of both impediments may be easily critiqued as ideologically situated.
- 10 This is the reasoning behind Amnesty International’s prohibition of members’ involvement in human rights issues in their own country.
- 11 But see, e.g., Bickel (1986), and Holmes dissent in *Lochner v. New York* (1998) for just two of the lucid expositions of the general issue of judicial review, and Gavison (1985, 1999), Jacobson (1993) and Shetreet (1994) for the particularities of the Israeli case.
- 12 The American court experience of blacks, and, in its wake, the data on jails and incarceration, provides a back-drop against which comment on Israeli courts and jails— as being racist in their anti-Arab judgments and applications— can lean with nary a blush.
- 13 Special note can be made to Israel’s signing and ratification of the Fourth Geneva Convention (Geneva Convention relative to the Protection of Civilian Persons in Time of War), about which B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, has said: “The refusal of the Israeli government to recognize this Convention’s applicability to the Occupied Territories is a dangerous evasion from its obligation as a member of the international community.” But that is another story.
- 14 On April 12, 1984, terrorists hijacked a bus on line no. 300. They were apprehended and then killed. In the ensuing investigation (by journalists, police, security forces, etc.) the commander of the GSS was accused of having given an order to kill the captured terrorists, of having lied about the order to the prime-minister (Shamir), and of having triggered a large-scale cover-up. He was then forced to resign (in September, 1986) after three high-ranking GSS officials threatened to expose the cover-up. The Bus 300 affair exposed the GSS to general doubt, which resulted in The Nafsu fiasco. Ezzat Nafsu, who served as a liaison officer in the Lebanon border area in the 1970, was suspected (rightly) of unauthorized contacts and (wrongly) of intent to commit espionage. He was tried in military court in 1980, after having been interrogated by the GSS, and sentenced to 10 years. In the wake of the Bus 300 affair his interrogator(s) were found to have perjured themselves. His

sentence was reduced to time served and he was released in 1986.

- 15 See *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases (An Annotated Sourcebook)*, B'Tselem, 1997.
- 16 Officially: Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activities, Jerusalem, 1987.
- 17 Report of the State Attorney, Michael Ben-Yair, *Ha'aretz*, January 13, 1995.
- 18 *Torture for Security: The Systematic Torture and Ill-Treatment of Palestinians by Israel*, Al-Haq, 1995.
- 19 I do not, here, investigate the relations between ethics and law, or raise the question of the moral grounding of legal acts. However, I do presuppose a connection between law and morality having to do both with formal argument (in the philosophy of law and in ethics) and the with the concrete turn of lawmakers (whether they be legislators or judges) and ordinary people to such linkage.
- 20 "Accordingly, the practical imperative will be as follows: So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only." Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*.
- 21 For example, in depositions extracted from GSS officials, the modus operandi of interrogation has been exposed as being time-dependent. In other words, the need for extreme interrogation seems often to diminish over the weekend, when operatives are off-duty. Surprisingly, ticking time-bombs tick only during weekdays . . .
- 22 "B'Tselem" means "in the image of," and is a part of the biblical expression "*b'tselem elohim*"—"in the image of God" taken from Genesis 1:27: "So God created man in his own image, in the image of God created he him; male and female created he them." The expression has evolved, in the Hebrew language, to encompass the image of the human being as a moral being of dignity; thus, losing one's "*tselem*" is tantamount to losing human dignity.
- 23 "The Death of Mustafa Barakat," September 1992; "The Case of 'Abd a-Nasser 'Ubeid," November 1993; "Torture during Interrogations," November 1994; "Salem and Hanan 'Ali," June 1995; "Legitimizing Torture," January 1997; "Routine Torture," May 1998.
- 24 Al-Haq, *Torture for Security*, 1995. Amnesty International, *Torture in the Eighties*.
- 25 Such a formal and explicit judgment is missing in any other country. The cynic would have it that this is not because there are no countries where prisoners are tortured, but rather because not one country would think of conducting a learned discussion on the question of the legality of torture. Amnesty International views things more straightforwardly: "Israel is the only country in the world known to have effectively legalized torture by officially allowing such methods," Amnesty International said in 1996. "We are hoping for a clear ruling by the High Court that the use of such interrogation techniques is unacceptable."

- 26 *Judgment Concerning the Interrogation Methods Implied by the GSS*, The Supreme Court of Israel, sitting as the High Court of Justice, September 6, 1999.
- 27 “Shabah” position is employed on a suspect who “has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room.” This is from a gruesome earlier section of the judgment, “The Physical Means.”

DISCUSSION

Alan J. Weisbard comments:

Anat Biletzki has provided a stimulating and illuminating discussion of what may well turn out to be not only the moment at which “torture stopped” in Israel, but a truly historic turning point in the evolution of Israel’s legal and constitutional tradition. While generally quite sympathetic to much of Anat’s analysis, my own perspective as an American legal scholar, familiar in general terms with Israel’s legal institutions and the particular judicial decision under review here—but hardly an expert on Israeli law—suggests an alternative reading and interpretation of the Court’s decision. I find more to admire in that decision, and find myself more hopeful for the future of Israeli law and society.

Anat begins her analysis of the Israeli High Court’s decision by noting that, “The questions [the Court] asks are, understandably, legal questions.” She then goes on to pose a series of her own challenging queries. Most salient for my present purposes are the first two: “But can this legal discussion be mined for moral thought? Can it be usurped as a political tract?”

The Israeli High Court’s decision in this case, like many other important judicial decisions, does have a powerful moral significance that may, in Anat’s terms, be “mined for moral thought.” I would add one important caveat: the business of mining has its own conventions, which are ignored at one’s peril. In seeking out the moral intuitions animating the High Court’s judgment and supporting opinion, the reader must, as the U. S. Supreme Court pronounced in a parallel context, “never forget that it is a [judicial opinion] we are expounding.” (*McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 [1819]) This caveat is stronger still as we approach the second inquiry. To “usurp” the Court’s opinion “as a political tract” would be, I fear, to mistake the conventions of the genre, and to risk drawing conclusions insufficiently sensitive to the Court’s evolving sense of its proper institutional role within Israeli statecraft. The resulting political conclusions and predictions for future action could be seriously misleading.

The task of a national supreme court in confronting matters of high policy, political controversy, and great moral significance is typically a delicate one, even in fully mature democratic societies with a well-established constitutional order. The delicacy is heightened in times of national crisis. Sophisticated jurists operating in these circumstances are generally not political innocents, and the accounts of the respective roles of branches of government provided in civics textbooks rarely capture the actual complexity of institutional function. American legal scholars (including some past and presently serving judges) have suggested the need for a more nuanced understanding of the judicial craft, attentive to the subtle interactions between courts and other governmental institutions in guiding a society. Drawing somewhat omnivorously on a large body of work by many scholars, ignoring heated internal debates, and claiming only modest originality here, let me set forth some of the insights potentially relevant to our effort to apply the lenses of philosophy and political theory to this legal text.

Courts are, necessarily, mindful of their important but limited role in a democratic society. Lacking the power of the sword, and reliant on the politically accountable branches of government (and accompanying public understanding and support) to carry out their orders, they must first cultivate, and then husband, their institutional legitimacy and credibility. They cannot

manifest their “politics” in blatant form and maintain that credibility for long.

Judicial expenditure of political capital comes in related, but somewhat distinct, currencies: in the cases the courts take on (to the extent that is discretionary within a given judicial system) and address on their merits; in the results they reach; and in the language they utilize to explain and justify those results. Courts can, through their language as well as their ultimate holdings, play a critical role in the inspiration and moral education of their societies; one may doubt whether the American civil rights revolution would have occurred but for the stirring judicial leadership exerted by the Warren Court. Nonetheless, judges are fully aware that they can sometimes more readily achieve far-reaching results, and make them stick, by employing less elevated and morally self-conscious language than the substantive issues might seem to invite. Thus, with some notable exceptions, judges do not typically craft their judicial opinions as political theorists or moral philosophers construct their arguments and scholarly articles (or, for that matter, as journalists compose their headlines and lead paragraphs). The nostrum, “watch what we do, not what we say,” does not exhaust the stock of judicial wisdom, but it does capture an important aspect of effective judicial strategy. The rate of exchange between these judicial currencies is subject to fluctuations, depending on circumstances of the case and the surrounding context—political, historical, temporal. The point especially critical to my argument here is that courts will sometimes conclude, wisely, that important results will be better accepted when propitiously timed and framed in bland, lawyer-like language. To exaggerate the case only slightly, the more technical, opaque, and even roundabout their opinions, the better. Justice need not (always) proceed with shofar blasts; sometimes a still small voice is best for the job.

These pragmatic considerations provide the foundation for a generally more sympathetic, respectful and optimistic interpretation of the High Court decision on the use of torture than that offered in Anat’s paper. My alternative, and necessarily speculative, narrative seeks to imagine how the High Court—not alone among political actors in Israel—might have understood and responded to a series of seemingly insoluble dilemmas during Israel’s first half century of statehood. How could Israel’s aspirations to survive and thrive, simultaneously as a Jewish and democratic state, as reflected in the idealistic language of Israel’s 1948 Declaration of Independence, be reconciled with the hard realities of its perilous existence in a very tough neighborhood? What role should the High Court be expected to play in promoting such a reconciliation, or in otherwise working through the hard choices to be made in the absence of any acceptable reconciliation? Taking into account Israel’s system of formal legislative supremacy, the absence of a comprehensive written constitution or an established tradition of constitutional judicial review, and the strong (and, for an extended period, growing) governmental and public support for a “tough” security policy perceived as adequate to the challenges of external threats and internal acts of terror, how ought one to understand and to evaluate the Court’s performance over time and the significance of its recent decision outlawing torture as a method of interrogation?

Lawyers prefer analogies to absolutes. What other experiences, one might inquire, are sufficiently comparable to provide a meaningful ground for understanding and evaluation? One possible comparison is to the actions of courts in other countries during times of national crisis. Such courts, not excluding those in generally democratic societies, have rarely maintained an exemplary record on human rights matters in such trying circumstances, and respected analysts have challenged the very possibility of effective judicial supervision of governmental or military actions in times of war or comparable crisis.

To focus on the history I know best, and that is often invoked as an international model, the United States Supreme Court has often fallen short of what, particularly looking back in retrospect, some might have wished its role to be. During the American Civil War, President Lincoln

suspended the writ of habeas corpus, with the substantial acquiescence of the Supreme Court, which only chose to intervene after the war's conclusion. (*Ex parte Milligan*, 4 Wall. [71 U.S.] 2 [1897]) During the Red Scare following World War I, and again during the height of the McCarthy era, the Supreme Court hardly distinguished itself in its protection of free speech and associational rights. Perhaps most instructive for the Israeli situation is a now oft-condemned decision issued during World War II. In *Korematsu v. United States*, (323 U.S.) 214 (1944), the American Supreme Court, speaking through the great civil libertarian Justice Hugo Black, with the acquiescence of Felix Frankfurter and William O. Douglas, upheld racist actions by military authorities, acting pursuant to Congressional authorization. These governmental actions, excluding Japanese-Americans, including many U.S. citizens, from their homes in the American West and placing them in detention camps—a policy publicly advocated by then California Governor, subsequently Chief Justice, Earl Warren—were clearly a violation of elementary due process standards. I come not to praise these decisions (would that I could bury them) but to suggest that they do provide chilling reminders of the difficulties facing judges demonstrably capable of providing inspired leadership in other, less vexed contexts.

Despite our idealistic yearnings, judges have not proved particularly well suited to substitute themselves for security officers; historically speaking, they seem at least as likely to outdo the officials in their fervor for security, as to rein them in. There may be times, for better and for worse, that the best to which a court can aspire is to avoid conferring added legitimacy on detestable, but arguably necessary actions. It is not clear that any system of law can fully reconcile irresistible force with immovable objects, whether in the world of physics or that of political morality. When the possibility for effective intervention is ripe, courts must act with shrewdness and circumspection carefully tailored to the specific needs of the situation. (This is discussed in Robert A. Burt, "Judicial Supremacy, Judicial Impotence and the Rule of Law in Times of Crisis," unpublished manuscript, June 2000.)

A second, perhaps more immediately relevant ground of comparison is to the actions of Israel's political branches, its Cabinet and Knesset. An instructive example is the decision of successive Israeli governments, of varying party leadership, to continue in effect (within Israel's pre-1967 borders), for more than half a century, the despised British Mandatory Emergency Regulations of 1946—regulations rigorously applied, sometimes with deadly consequences, against Zionist forces during the pre-Statehood years. Israel has been unwilling to take formal responsibility for enacting its own "emergency regulations"; after all, how could such provisions, however much perceived as necessary, possibly be reconciled with Israel's Declaration of Independence or heroically idealized readings of Jewish history and tradition? And what would the formal enactment of comparable provisions say about the newly reborn "Jewish State"? On the other hand, the Israeli governing authorities have for many decades proved unwilling to give up the near-plenary authority provided by the Mandatory regulations. Just so, the High Court may have struggled to find its way in the torture case, and in prior challenges to military and security authorities. Is it realistic to expect the Court to uphold challenges to governmental authority to engage in abhorrent interrogation practices, striking down the use of measures thought necessary by much of the political and military leadership, and perhaps also by some on the Court, and strongly supported by the public? If unprepared to strike these measures down, is it clear that the Court should engage the issue and confer its imprimatur on the use of torture, or might it better seek a way to duck the issue, or resolve the case, if it cannot be avoided, on some other basis? Perhaps the Court considered these interrogation techniques an evil, but a necessary evil; perhaps not. In any case, the Court may have been, by and large, unprepared to test its authority against the political and public support of the security apparatus at a time of perceived terrorist threat. This may amount to a failure of nerve, of courage, or of wisdom. It

may instead constitute a well-founded, if not particularly inspiring, prudential judgment, an exercise of practical wisdom. A confident assessment would require careful examination of the Court's jurisprudence over a period of decades, considering limitations on the Court's freedom of action and potentially subtle manifestations undermining the legitimacy of actions by the military and security apparatus—a task necessarily beyond the scope of this Commentary.

For Aharon Barak and the Israeli Supreme Court, the propitious moment for change may well have arrived with the torture case. The establishment of peace treaties with Egypt and Jordan, the negotiation of the Oslo Accords and the subsequent election of a government mandated to realize them, the advent of the Palestinian Authority, and even the glimmer of a potential negotiated peace with Syria appreciably transformed the security environment and, to at least some extent, the attitudes of a significant part of the Israeli public. The mass emigration to Israel from the lands of the former Soviet Union (and Ethiopia) shored up the "Jewish demographics" of the State, relaxing another persistent tension in Israeli society. Israel's transformation into a relatively stable, high-tech economy operating at European levels of affluence and productivity eased concern about the country's economic viability and dependence on economic support from world Jewry and the U.S. government. Given the convergence of these developments, perhaps the Court came to see that the extended term of Israel's "Emergency" had finally ended, and that the time had come for Israel to "normalize" its law, institutions, and practices. At long last, tolerance of and tacit acquiescence in what had been perceived as "necessary evils" were no longer perceived, by the Court or by leading segments of Israeli society more generally, as necessary to the survival and security of the State. From the Court's perspective, Israeli society was finally ready to grow into a greater maturity, to put an end to the period of "suspended animation" that had blocked its progress in realizing its oft-proclaimed democratic commitments.

But how was this to come about? Israel's institutions had settled into well-established patterns, and the always precarious governing coalition was not yet fully ready to proclaim the new dispensation—or to give up, too readily, the relatively unaccountable power accumulated by its predecessors and inherited by it. The government, and the public, would need to be prodded along, to enter into a major transition in self-understanding, practice, and accountability. In the absence of explicit leadership by the politically accountable branches (or perhaps, more subtly, to provide cover for difficult steps generally recognized as necessary, but too politically painful for those branches to initiate independently), the task came before Israel's High Court, in this case.

How ought a Court to act in such circumstances? To be sure, for purists of judicial restraint in actuality as well as in theory, these developments in the "real world" might be irrelevant to judicial consideration. Without seeking to rehearse all the familiar arguments, it does appear that the Israeli High Court, acting under the leadership of Court President Aharon Barak, was prepared to embark on a form of active "judicial statecraft." (One might note here that Justice Barak has maintained a long-term relationship with Yale Law School, where such ideas about the nature of law and the role of courts permeate the intellectual atmosphere.) Recognizing a form of political gridlock essentially precluding non-suicidal political initiatives, the Israeli Court chose to act. (In the American legal and constitutional context, one is reminded of the famous footnote 4 in *Carolene Products* [304 U.S.] 144 [1938], the wellspring of the jurisprudential theory that courts are called upon to undertake "more searching judicial inquiry" to recognize and enforce the constitutional rights of "discrete and insular minorities," and to redress structural blockages which restrict "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" in more normal circumstances.) The High Court did so in a carefully calculated fashion, unsettling the frozen status quo, shifting the implicit burdens of action and inaction, and forcing the political branches to place these contentious matters on the

agenda and to respond. If, perhaps especially if, they chose to respond to the Court's challenge by not responding—that is, by acquiescing in a new reality—so much the better; they would share the responsibility for the new course, even if initially reluctant to take the initiative themselves.

How is this judicial legerdemain best accomplished? While some, particularly those trained outside the law, might argue for maximal candor and transparency, and might well stress the opportunity (and even the obligation) for the Court to engage in explicit moral teaching for the benefit of Israeli society, we have already seen that has typically not been the path chosen by judges and courts in many historically significant cases. Speaking descriptively, when a court undertakes to do something “big” (and politically daring), it is more likely to explain its action in terms that, at least on their face, appear narrow and technical, compelled rather than chosen, and as “failing to rise to” the occasion. From the standpoint of judicial statesmanship, a successful “performance” is one that leaves the audience to conclude something like, “There is nothing (legally) exceptional here—because the real (moral) question has not yet been asked.” Not asked, perhaps, but substantially answered, albeit by indirection.

Finally, to what some observers find most worrisome about the High Court's decision: the seeming invitation to the government and the Knesset to respond to the Court's decision by conferring explicit legislative authority on the security forces to engage in the challenged interrogation practices. My own judgment is that there is probably less here than meets the eye, something more a matter of appearance than of substance, more a performance than a reality. Once again, the Court appears, at least to this observer, to be husbanding its legitimacy by appearing to defer to the politically responsible branches. This may constitute an elaborate charade, the judicial equivalent of a high stakes game of chicken, a game in which the Court reserves the last act to itself. The Court's opinion has seen the light of day; the interrogation practices have been exposed to full public view. The picture is not a pretty one. The Court may well imagine that the Knesset will be reluctant to take upon itself the moral and political responsibility for providing prospective legislative authorization for practices which so dramatically violate Israel's treaty commitments and the sensibilities of those democratic societies and citizens to whom Israel looks for respect and support.

Further, even should the Knesset so act, it might well be for naught (although a severe moral, political, and public relations price would be paid nonetheless). Despite the High Court's elaborate minuet of judicial deference to the Knesset, at a deeper and far more telling level, the Court appends an unmistakable signal. Immediately following its feint to the effect that, “this is an issue that must be decided by the legislative branch which represents the people,” the Court continues, “We do not take any stand on this matter at this time.” Such legislation will not, the Court is reminding us, provide the final word; the matter will inevitably return to the Court for its ultimate review. As Anat's analysis properly concludes, it is here that “a certain optimism tends to set in, thinking that any such law will be struck down as ‘unconstitutional.’” That may be a bigger step than Anat suggests, given Israel's formal commitment to legislative supremacy. Nonetheless, were the matter to return to the Court following Knesset action in the teeth of the Court's present opinion, that might provide a propitious occasion for the Court to assert, this time quite boldly, the advent of constitutional judicial review (and judicial supremacy in the interpretation and application of Israel's quasi-constitutional norms).

My principal disagreement with Anat's analysis, if it is a disagreement, rests on my belief that Anat's conclusion, seen through a lawyer's eyes, is fully of a piece with the rest of the Court's opinion, and with the opinion's context in recent Israeli history. I am hopeful that the Israeli High Court has in fact reached a historic moment with this opinion, in which the conditions of “Emergency” have finally passed, and the Court is now prepared to play a more active part in

nudging Israeli society toward the progressive fulfillment of its democratic aspirations. For present purposes, it is not necessary to comment on the vexed questions of whether the Court could or should have embarked on this path more fully at an earlier point, or justified its new direction in more forthright or stirring moral language. Confident judgment on these points requires far more contextual knowledge than I possess. I am grateful that the progress to date of peace negotiations, and Israel's increasing maturity as a society, have brought us to this point. Whether future developments will permit the full flowering of these hopeful possibilities remains to be seen.

* * *

I am indebted to Anat Biletzki, Menachem Lorberbaum, Stanley Katz, and particularly Robert Burt and Leonard Kaplan for their helpful comments on topics addressed here, and to Debra Keates for her patient and skillful editorial contributions.

REFERENCES

- Bickel, A. *The Least Dangerous Branch*. New Haven: Yale University Press, 1986.
- Burgers, J. and Hans Danelius. *The United Nations Convention against Torture : a handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*. Dordrecht and Boston: Nijhoff, 1988.
- Cranston, Maurice. *What Are Human Rights?* New York: Basic Books, 1978.
- Dershowitz, Alan. "Is It Necessary to Apply 'Physical Pressure' to Terrorists—and to Lie About It?" *Israel Law Review* 23 (1989): 192-200.
- Gavison, Ruth. "The Controversy Over Israel's Bill of Rights." *Israel Yearbook of Human Rights* 15 (1985).
- "A Constitutional Revolution?" *Towards a New European Ius Commune*. Ed. A. Gambaro and A.M.Rabello. Jerusalem: Sacher Institute, 1999.
- Jacobsohn, Gary. *Apple of Gold: Constitutionalism in Israel and the US*. Princeton: Princeton University Press, 1993.
- Kens, Paul. *Lochner v. New York: economic regulation on trial*. Lawrence: University Press of Kansas, 1998.
- Kremnitzer, M. "The Landau Commission Report—Was the security service subordinated to the law or the law to the "needs" of security?" *Israel Law Review* 23 (1989): 216-79.
- Meron, Theodor. *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press, 1991.
- Neuer, Hillel. "Israel's Imperial Judiciary." *Commentary* 108:3 (October 1999).
- Nozick, Robert. *State, Anarchy and Utopia*. New York : Basic Books, 1974.
- Shetreet, S. *Justice in Israel: A study of the Israeli Judiciary*. Dordrecht and Boston: Nijhoff, 1994.
- Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, Special edition of the *Israel Law Review* 23 (1989).
- Waldron, H. (editor). *Theories of Rights*. Oxford: Oxford University Press, 1984.

Human Rights Reports

- Torture in the Eighties*. Amnesty International, 1990.
- The Interrogation of Palestinians During the Intifada: Ill-Treatment, "Moderate Physical Pressure" or Torture.* B'Tselem, 1991.
- The Interrogation of Palestinians During the Intifada: Follow-up*. B'Tselem, 1992.
- The "New Procedure" in GSS Interrogation: The Case of 'Abd A-Nasser 'Ubeid*. B'Tselem, 1993.
- Torture and Ill-Treatment: Israel's Interrogation of Palestinians from the Occupied Territories*. Human Rights Watch, 1994.
- Torture During Interrogations: Testimony of Palestinian Detainees, Testimony of Interrogators*. B'Tselem, 1994.
- Torture for Security: The Systematic Torture and Ill-Treatment of Palestinians by Israel*. Al-Haq, 1995.

Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases (An Annotated Sourcebook). B'Tselem, 1997.

Routine Torture: Interrogation Methods of the General Security Service. B'Tselem, February 1998.

Conventions and Treaties

UNIVERSAL DECLARATION OF HUMAN RIGHTS, United Nations, 1948.

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, European Council, 1950.

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, United Nations, 1950.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, United Nations, 1966.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, United Nations, 1984.

