"Intent to regularise": The Israeli Supreme Court and the Normalisation of Emergency

by John Reynolds[1]

"Israel is a normal country that is not normal"
Supreme Court of Israel[2]

One of the first cases brought before Israel's Supreme Court in 1948 involved a challenge to the validity of the 1945 British Mandate Defence (Emergency) Regulations in the legal order of the nascent Israeli state. The minority opinion in the case was expressed by Justice Shalom Kassan, who argued that the regulations (which grant broad emergency powers to the executive and military authorities) were undemocratic and inapplicable: "I cannot act and pass judgment in accordance with the defense regulations which are still on the statute book. Believing as I do that these laws are essentially invalid, I should not be asked to act against my conscience merely because the present government has not yet officially repealed them, though its members declared them illegal as soon as they were passed. … If the courts of the British Mandate did not cross these laws off the statute book, this court is honorbound to do so and to utterly eradicate them."[3] The positivist majority decision of the Court, however, although expressing similar misgivings about the nature of the emergency regulations, held that the judiciary "must accept the regulations as they are, that is as valid, legal regulations". The outcome notwithstanding, a clear assumption that the government would annul the regulations in due course pervaded the judgment.

Proposals for the revocation of the regulations (or their replacement by permanent legislation) were made in the Knesset in 1949, and on a number of occasions in the 1950s. Criticism voiced by Jewish-Israeli judges, legislators and religious figures routinely characterised the regulations as colonialist and fascist. The context of this opposition was a small number of high-profile cases of administrative detention of members of Jewish paramilitary groups. Notably, however, the regulations had also emerged by 1950 as the legal basis for the system of military government applied over predominantly Palestinian Arab regions within Israel. As the threat of Jewish attacks against the state dissipated, the racialisation of the emergency regulations intensified through their essentially exclusive use against Arabs: Palestinian citizens of Israel, who lived under military rule until 1966, and the Palestinian population of the occupied territories from 1967 onwards. Thus, the British regulations have been retained in the Israeli legal system interminably, and are deeply entangled with the ideology of the ethno-religious state. To this day, they continue to underpin security policy in a heavily racialised manner vis-à-vis the Palestinians.

The Mandatory regulations constitute just one element of Israel's broader, multifarious emergency legal regime. In a region noted for prolonged use of emergency law as a governmental structure of authoritarian rule (Algeria 1992-2011, Egypt 1981-2012, Syria 1963-2011), Israel stands out as *the* exemplar of "permanent emergency". In addition to the retention of the British mandatory emergency regulations, a formal state of emergency (upon which some

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[2] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, judgment, 8 May 2012, para. 19. Extracts quoted from the judgment in this article are based on an unofficial professional translation; on file with the author.

[3] HCJ 1/48; 2/48, *Dr. Herzl Cook v. Defense Minister of the Provisional Government of the State of Israel, et al.*; *Ziborah Wienerski v. The Minister of Defense, et al., HaMishpat*, vol. 3, 1948; quoted in Sabri Jiryis, *The Arabs in Israel* (New York: Monthly Review Press, 1976) 13-14.

but not all elements of Israel's emergency jurisprudence are dependent) was proclaimed within days of the birth of the state and has persisted without interruption since 19 May 1948; sixty-five years and counting. More than six decades on from the judicial acquiescence to the enforcement of the British emergency regulations, this long-standing state of emergency was itself the subject of a recent decision handed down by the Supreme Court. Before discussing that case, a brief overview of the structure of what I refer to as Israel's "emergency legalities" may be useful.

Israel's Emergency Legalities

The Israeli legal system includes several mechanisms of emergency law that overlap but exist independently of each other. The resulting jurisprudential situation is complex to the point of being "incoherent" and "convoluted"; contrary to conceptions of this situation as the inadvertent accumulation of necessary, threat-specific responses enacted at particular points in time, however, it can more revealingly be understood as a concerted tool of governance whose structural ambiguity offers a convenient flexibility.[4]

Emergency powers in Israel assume three principal legal forms. The first, the Mandatory emergency defense regulations, as noted, remain on the law books of the land long after the departure of their original British authors. While framed in the lineage of colonial emergency doctrine, their subsequent application by Israel was not tied to the declaration of a state of emergency. Israel has itself constructed two further bases in law for extraordinary measures. Administrative emergency regulations are secondary orders enacted by executive office holders that are dependent on a declared state of emergency. Statutory emergency legislation entails primary laws passed by the Knesset that can be made contingent on the existence of a declared emergency, or, alternatively, can be worded to apply independently.[5] The focus of the present article is the underpinning state of emergency, as challenged before the Supreme Court.

Pursuant to section 9 of the 1948 Law and Administration Ordinance (the first piece of legislation enacted by Israel's Provisional State Council), the country was ushered into a formal and temporally-indeterminate state of emergency from the outset. After more than forty years of emergency as the status quo, the governing legal framework was given a slight procedural makeover, with the authority to declare an emergency reconstituted in the 1992 Basic Law: The Government,[6] and subjected to a condition that the declaration "may not exceed one year". Thus, a twelve-month lifespan was ostensibly imposed on the state of emergency. With the Basic Law proceeding to allow for unlimited renewals by parliament, however, the temporality of the emergency in effect remained indefinite. The Knesset has duly renewed the state of emergency every year thereafter, without exception.

As intimated above, a number of mechanisms are triggered by a declared state of emergency. For one, the government is authorised to enact discrete administrative emergency regulations to circumvent 'normal' constitutional guarantees. As early as the summer of 1948, for instance, an emergency "Requisition of Property" decree was promulgated to allow the provisional government to seize property for so-called "security" purposes. By the end of 1948, further emergency orders had been introduced to underwrite large-scale land transfers on state security

[4] Yoav Mehozay, "The Fluid Jurisprudence of Israel's Emergency Powers: Legal Patchwork as a Governing Norm" (2012) 46(1) *Law & Society Review* 137, 137-138.
[5] Ibid. 140-141.
[6] Originally Article 49; now Article 38.

grounds.[7] The use of the emergency paradigm as a surface upon which colonial land policies would be legally inscribed is thus evident from the get-go, and the ensuing decades have seen no shortage of emergency orders imposed in a diversity of spheres.

In addition to such executive decrees (secondary orders), formal statutory legislation (primary laws) can also be framed in such a way that applicability is contingent upon the existence of a state of emergency. The 1979 Emergency Powers (Detention) Law 1979, for example, which allows for administrative detention of residents of Israel, residents of territory occupied by Israel, and residents of other states, was framed so that it "shall only apply in a period in which a state of emergency exists in the State by virtue of a declaration under section 9 of the Law and Administration Ordinance." To complicate matters, renewed secondary emergency orders can also be converted into primary emergency laws by accumulation.

As regards international law, formal declaration of a public emergency allows the state to trigger the regime of emergency derogations contained in international human rights treaties, and to suspend certain legal obligations in responding to a "threat to the life of the nation". Upon ratifying the International Covenant on Civil and Political Rights in 1991, Israel submitted a formal notification stating that (since 1948) its situation constituted a public emergency within the meaning of the Covenant's derogation provision in Article 4. On this basis, Israel declared that it was derogating from Article 9 (right to liberty).[8] While repeatedly questioning Israel's reliance on the state of emergency and denouncing excessive measures enacted thereunder, the UN Human Rights Committee acknowledges that the law entitles states to derogate.[9] Thus, international law is itself implicated in the perpetuation of Israel's emergency legalities.

It must be noted that, although commonly assumed to be confined to national security matters, Israel's emergency legal regime infiltrates areas that have no apparent connection to any perceived threats to the existence or security of the state. In addition to an array of emergency powers aimed at appropriating Palestinian land and furthering Israel's settler-colonial project, emergency measures have been deployed in the spheres of economic regulation, labour law, trade and monetary issues.[10]

Leaving the imperial and hegemonic features of the doctrine of emergency itself aside, two substantive legal questions arise from Israel's declared emergency: firstly, whether Israel's situation has, unremittingly since 1948, surpassed the threshold of an impending threat to the life of the nation; and secondly, given that this has been answered in the affirmative by the state, whether the measures enacted in the state-of-emergency paradigm are necessary and proportionate. It was concerns over both of these questions that prompted legal activists to seek judicial review of the declared emergency in Israel.

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[7] Amichai Cohen & Stuart Cohen, *Israel's National Security Law: Political Dynamics and Historical Development* (London: Routledge, 2011) 56.

[8] "Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1991" UN Doc. ST/LEG/SER.E/10 (1992) 149.

[9] Some international lawyers, such as John Quigley, question the procedural and substantive validity of Israel's derogation. John Quigley, "Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?" (1994) 15 *Michigan Journal of International Law* 491.

[10] Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) 232-33, citing Menachem Hofnung, *Democracy, Law and National Security in Israel* (Brookfield, VT: Dartmouth, 1996) 55-60, and Mordechai Mironi, "Back-to-Work Emergency Orders: Government Intervention in Labor Disputes in Essential Services" (1986) 15 *Mishpatim* 350, 380-86.

Emergency on Trial

In 1999, the Association for Civil Rights in Israel (ACRI) submitted a petition to the Supreme Court against the legislature, challenging the constitutionality of the continued state of emergency and seeking its annulment. The petition argued that the Knesset's persistent renewal and extension of a state of emergency had transgressed Israeli constitutional law and international legal norms, on the basis that Israel's security circumstances are not of such extraordinary status as to justify an extraordinary regime that subverts liberal understandings of the rule of law and separation of powers. It was put forward that, in contrast to the intentions (if construed in a favourable light) of the doctrine of emergency to enable the implementation of urgent and necessary measures for a limited duration, Israel's state of emergency was permanent in time and unlimited in scope, and thus unlawful. ACRI further submitted that the declared emergency enabled the imposition of legislation and regulations that violate land rights, that unduly hamper free expression, association and assembly, and that contravene Israel's own Basic Laws.

As hearings proceeded in the years following the outbreak of the second Palestinian intifada in 2000, the Supreme Court, under former Chief Justice Aharon Barak, suggested that the petition should be withdrawn given the exacerbated security situation. ACRI submitted an amended petition in 2003, which argued that even in a context of heightened threats to security the use of emergency powers should be minimal in time and scope, and that Israel's state of emergency declaration was still unfounded. The state's response (with the government of Israel now added to the Knesset as a respondent) claimed that repeal of the emergency would create a legal vacuum and deprive the authorities of the necessary means of suppressing threats to security. The government did affirm its intention to move away from the (declared) state-of-emergency paradigm, and told the Court that it would continue to take steps to amend or replace legislation that is contingent on the existence of a formal emergency.

The Ministry of Justice notified the Court of the revocation and replacement of certain pieces of emergency legislation on an ongoing basis. The authorities presented the seemingly contradictory position that although a state of emergency continued to exist in fact, the state of emergency in law should be gradually phased out. What can be inferred from this position is both a tacit acknowledgment that the factual situation does not justify the application of exceptional emergency legalities, but also the conflicting assumption that those exceptional legalities should be subsumed into the 'normal' legal order over time.

The Supreme Court essentially agreed. While acknowledging in regard to the legal framework that "the present situation must not remain unchanged", the Court has consistently framed the issue as a "complex and sensitive" one in which the authorities must be left with a generous margin of flexibility.[11] In an interim decision delivered in August 2006, the Court rejected ACRI's claim that Israel's situation was not, in fact, one of an ongoing state of emergency: "the war with terror is raging at full force, and it is impossible to disregard this."[12] At the same time, the Court noted that "the state of emergency has been exploited for statutory matters regarding which balanced legislation could have been enacted long ago".[13] The Court gave the respondents time to institute changes to civil legislation that was tied to the state of emergency, and by 2011 was satisfied that:

[11] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, judgment, 8 May 2012, paras. 7, 9, 11.
[12] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, interim decision, 1 August 2006.
[13] Ibid.

> Progress has been made in the legislative processes. Part of the legislation that was contingent on the state of emergency was altered and amended, another part is in various stages of the legislative process, and there is an intent to regularise the remainder.[14]

Accordingly, in May 2012, after twelve hearings over the course of twelve years, the Court issued a twelve-page judgment (half of which comprises background information and summaries of the arguments) concluding that the petition had "run its course" and should be dismissed.[15] Israel, according to the Court, continued to face a state of emergency: "the winds of war have never ceased to blow, and unfortunately the situation remains relatively unchanged."[16] Justice Rubinstein's opinion, on behalf of the Court, evokes Israel's siege mentality with verbose descriptions of "the unending threats of our enemies from near and far." He quotes an extract from a ruling of the Court in the early 1980s—roughly the half-way point of Israel's state of emergency to date—from which it becomes clear that little has changed in the Court's approach over the last thirty years:

> As known, the state of emergency has lasted for over 30 years, and who knows how much longer it will continue. The fact that the state of emergency persists does, on the one hand, mandate the reduction of the emergency means the state employs to defend its existence so that, as much as possible, these means will not violate civil rights, but on the other hand, the continuing state of emergency, owing to well-known reasons and circumstances, points to the fact that it is difficult to compare the situation the State of Israel has been in since its foundation to that of any other state.[17]

Rubinstein maintains this narrative of Israeli exceptionalism in his depiction of a normal country (in that it is an "active democracy in which fundamental rights … are safeguarded") that is not normal (in that it is subject to threats of a gravity faced by no other 'normal' democratic country).[18] The gauntlet thrown down by this supposedly unique situation thus challenges Israel to construct a juridical order that can respond to the exceptional threat without compromising the state's 'normality'. Rubenstein commends the state for its work to date in phasing out and replacing some emergency legislation, and highlights the need to continue extricating relevant security and anti-terrorism measures from a declared state of emergency; that is, to embed them instead within the 'normal' legal system. Before and until this process is complete, in Rubenstein's reckoning, it is not the place of the judiciary to obstruct executive or legislative renewals of the state of emergency, nor to restrict the use of necessary powers that remain dependent on the declared state of emergency. Here, the Supreme Court's accustomed deference to the security agencies is apparent: "this court is not a substitute for the discretion of the authorised agencies".[19]

Hyperlegality

In his reading of the proliferation of British anti-terrorism legislation enacted since the late 1990s, Nasser Hussain describes a structural shift in the law away from traditional conceptions

[14] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, interim decision, 7 December 2011.
[15] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, judgment, 8 May 2012, para. 11.
[16] Ibid.
[17] HCJ 1/80, *Kahana v. The Minister of Defence*, PD 35(2), 253, 257.
[18] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, judgment, 8 May 2012, para. 19.
[19] Ibid. para. 17.

of emergency powers as reactive and temporary, towards an understanding of security law as part of a larger, permanent "methodology of governance".[20] Hussain emphasises certain mechanisms—the increasing use of (racialised) classifications of persons in the law, the emergence of intensely bureaucratic and administrative facets of emergency law, the use of special tribunals and commissions—that contribute to what he posits as "hyperlegality" at work.

A similar methodology can be detected in the process endorsed by Israel's Supreme Court, which seeks to construct a framework of permanent extraordinary measures and to preserve the system of control over the Palestinians, as opposed to properly disentangling the web of emergency powers spun over the last six decades. The normalcy/emergency binary cedes part of the space of exception to a complementary paradigm in which the state of emergency is normalised in ordinary legislation (the forthcoming comprehensive anti-terrorism law cited by Justice Rubinstein, for example) and bolstered by 'super-emergency' measures during large-scale assaults on the occupied territories.[21] The non-contingent emergency laws will, of course, remain in place even if the state does fulfil its promise to phase out the official state of emergency, and the fluidity of Israel's disparate emergency legal mechanisms will continue to offer a vehicle for the execution of sovereign will.

Emergency doctrine typically occupied a central space in the legal system of the colony, operating as a bridge between what James Fitzjames Stephen in India presented as the twin imperial pillars of conquest and justice. Its exceptionality and malleability facilitated the forcible imposition of sovereign control, while its legality provided the necessary veneer of legitimacy. It was, and is, the pure expression of law as a conduit for hegemonic practice. The separate opinion of (retired) Chief Justice Beinisch in the emergency law case is candid in this regard: "The state of emergency declared by law is, to a large extent, the result of a political outlook".[22]

[20] Nasser Hussain, "Hyperlegality" (2007) 10 *New Criminal Law Review* 514, 515.
[21] Yuval Shany & Ido Rosenzweig, "High Court of Justice Rejects Petition to End Israel's State of Emergency" 41 *Terrorism & Democracy* (May 2012), citing the 2008 Incarceration of Unlawful Combatants Law (Temporary Order and Amendment) enacted in anticipation of Operation Cast Lead.
[22] HCJ 3091/99, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, judgment, 8 May 2012, separate opinion of Chief Justice (Retired) D. Beinisch.