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The Decline of Habeas Corpus in Israel

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THE DECLINE OF HABEAS CORPUS IN ISRAEL

Israel Zvi Gilat* & Joshua Segev**

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I. INTRODUCTION

The Israeli Supreme Court, sitting as a High Court of Justice (hereinafter "HCJ"), may issue habeas corpus "orders for the release of persons unlawfully detained or imprisoned."¹ The literal meaning of the writ in Latin is "you have the body,"² and its purpose is to preserve individual liberty by reviewing the legality of a person's arrest or detention. The importance of habeas corpus in common law cannot be overstated.³ A habeas corpus petition is considered an

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1. § 15(d)(1), Judicature, 5744–1984, LSI 38 101 (1983–84), as amended (Isr.).
2. Habeas Corpus, BLACK'S LAW DICTIONARY (11th ed. 2019).
3. See JUDITH FARBEY & ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS 1–20 (1989) (discussing the practical importance of habeas corpus); see also DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH

essential component of the defense of individual liberty, and by extension of all basic rights and liberties, in the Anglo-American legal tradition.

It is interesting to note that the right to habeas corpus serves today as a cornerstone of the constitutional law of many countries around the world, even those without strong links to Anglo-American common law.⁴ In the past two decades, this has been not only a tradition, but rather a living reality of American constitutional law, to a large degree due to the legal proceedings, which accompanied the imprisonment of many illegal fighters following the terror attacks of September 11, 2001.⁵ But the lively debate in the United States about the function and limits of habeas corpus continues. This discussion encompasses suits concerning post-conviction, immigration, and extradition,⁶ as well as cases that seek to reach new constitutional frontiers, *i.e.*, whether to provide relief in conditions of confinements due to the Covid-19 pandemic,⁷ or should the right to habeas corpus be accorded to animals.⁸

(2000).

4. However, the effectiveness of the writ varies between countries. On the globalization of habeas corpus, see Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT'L L. REV. 551 (2009). On the effort to establish habeas corpus in international law, see Luis Kutner, *World Habeas Corpus: A Legal Absolute for Survival*, 39 U. DET. L. J. 279 (1962); Leonard B. Sutton, *Habeas Corpus: Its Past, Present and Possible World-Wide Future*, 44 DENV. U. L. REV. 548 (1967); Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303 (2006).

5. The U.S. Supreme Court's deliberations on this subject reached their peak in 2008. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (establishing that the right to habeas corpus must be given to detainees in the U.S. Navy's detention center in Guantanamo Bay, Cuba); see also Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753 (2013); Stephen I. Vladek, Book Note, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011); Joshua Alexander Gletzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719 (2012); Joshua M. Lott, *The End of Innocence? Federal Habeas Corpus Law After In Re Davis*, 27 GA. ST. U. L. REV. 443 (2011); Brian R. Farrel, *Habeas Corpus in Times of Emergency: A Historical and Comparative View*, 1 PACE INT'L L. REV. ONLINE COMPANION 74 (2010); Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

6. See Vladek, *supra* note 5, at 941. See generally Bernardo Villarreal Aguirre, *Immigration and the Suspension of the Writ of Habeas Corpus*, 44 MARSHALL L. REV. 117 (2020) (discussing the correlation and effect of habeas corpus on immigration).

7. See generally Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and Covid-19*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 131 (2020) (arguing that courts should grant motions for habeas corpus by individuals that are highly susceptible to serious health effects arising from Covid-19).

8. See Steven M. Wise, *Introduction to Animal Law Book*, 67 SYRACUSE L. REV. 7,

By contrast to these developments in the American legal scene, in the last few decades a sharp decline in the conspicuousness of habeas corpus writs can be noted in Israeli law.⁹ The great constitutional cases of the last few decades—even those dealing with classic habeas corpus matters, such as liberty from unlawful imprisonment in security and criminal matters—are no longer adjudicated as habeas corpus cases. Our claim is that a review of the present state of these writs in Israeli law will reveal a stagnation or even a deterioration. Moreover, this condition is particularly evident in light of their important role in the formative era of Israeli constitutional law.¹⁰

This Article examines the decline of habeas corpus in Israeli law and identifies the factors for this decline. We identify three factors for the decline of habeas corpus: (1) the development of statutory alternatives in matters previously controlled by habeas corpus, making it superfluous; (2) habeas corpus rulings in prominent fields, such as child kidnappings and security detentions, lacked a procedural or substantive characterization and in the absence of a procedural or substantive characterization, it was condemned to stagnation even where there was no legislative development, and certainly where there was; and (3) starting from Israel's Constitutional Revolution in 1995, which was characterized by the adoption of judicial review of primary legislation, we note a preference of the Justices of the HCJ to adjudicate cases of human liberty by directly review primary legislation in accordance with the tests of section 8 of the Limitation Clause of Basic Law: Human Dignity and Liberty.¹¹

These three factors reflect a tendency towards grandiose constitutional engineering over case-by-case constitutional

20–30 (2017); Richard L. Cupp Jr., *Litigating Nonhuman Animal Personhood*, 50 TEX. TECH. L. REV. 573, 579–89 (2018); Charles Edward Andrew Lincoln IV, *Aristotle and Animal Law: The Case for Habeas Corpus*, 55 U.S.F. L. REV. 1, 11–15 (2020). Recently, *In Re Nonhuman Rights Project v. Breheny*, the New York Court of Appeals ruled by a vote of 5 to 2 that the petitioner Nonhuman Rights Project may not seek habeas corpus relief on behalf of Happy, an elephant at the Bronx Zoo, in order to transfer Happy to an elephant sanctuary. See <https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf>.

9. See *infra* Part II.

10. See *infra* Part I.

11. See § 8 Human Dignity and Liberty, 5752–1992 SH 150 (1992), as amended (Isr.) (“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”).

engineering of the space of human liberty. This preference is evident both in the activity of the legislature and in the rulings of the HCJ. In other words, while habeas corpus had previously been used in a pattern like that of Adam Smith's 'invisible hand'¹²—on a case-by-case basis—in the age following Israel's Constitutional Revolution, the Israeli legislature, called the *Knesset*, and the HCJ prefer (each for its own reasons) to regulate in a direct and comprehensive fashion, the basic structure of the society in relation to human liberty.

The Article proceeds as follows: in Part I we describe the origin and adoption of habeas corpus in Israeli law. In Part II we discuss the decline of habeas corpus in Israeli law. In Part III we identify leading factors to the decline of habeas corpus, representing a systemic and normative preference to minimize habeas corpus. First, we look at the development of statutory alternatives. Second, we examine two types of habeas corpus decisions in two prominent subjects previously controlled by the writs—child kidnapping and security matters—and show that it lacks a procedural and substantive characterization. Third, we consider the effect of Israel's Constitutional Revolution on habeas corpus litigation and adjudication.

II. THE ORIGIN OF HABEAS CORPUS AND ITS ADOPTION IN ISRAEL

Habeas corpus emerged in English common law in the Middle Ages,¹³ in the context of the political power struggle between the courts and other authorities, and of the conglomeration of authority by the English courts. Habeas corpus developed as a Crown prerogative,¹⁴ whose original purpose was to mandate the

12. ADAM SMITH, *WEALTH OF NATIONS*, Ch. 2 (Bruce Mazlish ed., 1961).

13. For a comprehensive and in-depth historical account of the development of habeas corpus in English law from antiquity to modern times, see PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010). See also WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 3–94 (1980); CHESTER JAMES ANTIEAU, *THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS*, 1–6 (1st Vol. 1987).

14. For a general explanation of prerogative writs in English law and their development, see generally S.A. De Smith, *The Prerogative Writs*, 11 *CAMBRIDGE L. J.* 40 (1951) (giving a general account of the nature and development of the prerogative writs); Edward Jenks, *The Prerogative Writs in English Law*, 32 *YALE L. J.* 523 (1923) (discussing the use of habeas corpus in English common law). The prerogative writs are: (1) *Habeas corpus ad subjiciendum*, which requires a person imprisoned or in private detention on a criminal charge to be brought before the court; (2) *Certiorari*, which instructs charges, writs or convictions by lower tribunals to be dropped; (3) A prohibitive writ, warning lower tribunals and courts not to exceed their authority; (4) *Mandamus*, which puts in force a public obligation. Having examined the

appearance of various persons—litigants, witnesses and jury—before the king’s courts.¹⁵ In the subsequent centuries of the writ’s development, it was used at first by the king’s courts in order to review the legality of arrests made by other local courts.¹⁶ At the end of the sixteenth and beginning of the seventeenth century, against a background of an intensifying political struggle between the king and Parliament, courts began to use habeas corpus to free prisoners held by the king and his representatives with no legal grounds.¹⁷ During this period, habeas corpus also began to be used to regulate “private” detentions: women imprisoned by their husbands, children who were kidnapped or in the midst of a custody battle, and slaves.¹⁸ The English Parliament’s attempts to strengthen the writ of habeas corpus by entrenching its accessibility through positive legislation, and to limit the power of the Crown to imprison subjects, mostly ended in failure. However, they did manage to establish habeas corpus in the legal consciousness as a first-rate guarantee of human liberty.¹⁹ During this very same period, and drawing on the English tradition, the founding fathers of the United States saw fit to ground the

development of the writs, De Smith concludes that progressive writs only began to be identified with the Crown’s rights and the king’s authorities starting in the seventeenth century. However, a thorough examination of the development of the writs shows that each writ developed gradually and serially, from case to case, slowly acquiring its unique characteristics, and hence it is actually impossible to find the common characteristics of all prerogative writs. DeSmith’s conclusion is therefore that despite the fact that the term “prerogative writs” is familiar to any Anglo-American legal scholar, it is not possible to give a satisfying answer to the question “what are prerogative writs?”, besides for establishing that they are identified with the king’s authority.

15. See DUKER, *supra* note 13, at 12–18.

16. See *id.* at 33–44; HALLIDAY, *supra* note 13, at 27.

17. See HALLIDAY, *supra* note 13, at 165–74.

18. See *id.* at 124–32, 174–76; Vladek, *supra* note 5, at 950.

19. William Blackstone, for instance, held that the writ of habeas corpus serves as a bulwark of the British Constitution and the greatest guarantee of human liberty. Similarly, he said that the law of habeas corpus legislated in the British Parliament in order to protect the authority of courts to issue such writs constitutes a second Magna Carta. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129, 135 (3rd Vol.1772); see also DUKER, *supra* note 13, at 7. On the constitutional importance of the writ of habeas corpus see The Federalist No. 84 (Alexander Hamilton) (“The establishment of the writ of habeas corpus, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, to which we have no corresponding provision in our Constitution, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.”).

availability of the writ in the American Constitution.²⁰

Inspired by this venerable tradition, the Israeli Supreme Court sought to establish the use of habeas corpus writs in Israeli law by virtue of its subject matter jurisdiction and the legal tradition of common law. Section 15(d)(1) of Basic Law: Judiciary (1984) specifies that Israel's highest court, the HCJ, has jurisdiction to "issue warrants to release individuals unlawfully detained or imprisoned."²¹ This authority to issue writs of habeas corpus by the Supreme Court was established originally in section 7(a) of the Courts Ordinance, 1940 by the British Mandate colonial legislature, stating: "[t]he High Court of Justice shall have exclusive jurisdiction in the following matters: . . . applications (in the nature of habeas corpus proceedings) for orders of release of persons unlawfully detained in custody."²²

Following its foundation after the establishment of the State of Israel, the Israeli HCJ established its jurisdiction to issue habeas corpus, relying on its original legislative authority and accepted common law practices.²³ The great constitutional decisions of the HCJ in the period of the founding of the State of Israel concerned habeas corpus issues, continuing the English tradition. Hence, in the midst of the War of Independence, in the *El-Karbutli v. Minister of Defense*, a

20. See U.S. CONST. art. I, § 9, cl. 2. On the adoption of habeas corpus in the U.S. Constitution and its development in accompanying legislation, see generally Dallin H. Oaks, *Legal History in the Supreme Court*, 64 MICH. L. REV. 451 (1966) (discussing the historical use of habeas corpus in federal courts); Francis Pascal, *Habeas Corpus and the Constitution*, 1970 DUKE L.J. 605 (1970); Lewis Mayers, *The Habeas Corpus of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965) (discussing application and interpretation of habeas corpus over time); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L.L. REV. 579 (1982) (discussing historical application of habeas corpus); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375 (1998).

21. § 15(d)(1), Judiciary, 5744-1984, LSI 38 101 (1983-84), as amended (Isr.).

22. Courts Ordinance, 1940, § 7, PALESTINE GAZETTE, Supp. 1, 1940, at 144. After the founding of the state of Israel, the writ was formalized in Hebrew as § 7(b)(1) Courts Law, 5717-1957 LSI. 11 158, which is known today as § 15(d)(1) of Basic Law: Judiciary. See also HAIM COHEN, *The First Fifty Years of the State of Israel*, 24 J. Sup. Ct. His. 3, 10 (1999) (discussing the role of habeas corpus in the Supreme court of Israel).

23. See COHEN, *supra* note 22; Joseph Laufer, *Israel's Supreme Court: The First Decade*, 17 LEGAL EDUC. 43, 44 (1964). For a general and historical review of the foundation of the Supreme Court and its powers, see Yair Sagy, *The Missing Link: Legal Historical Institutionalism and the Israeli High Court of Justice*, 31 ARIZ. J. INT'L & COMP. L. 703, 716-20 (2014).

prisoner suspected of collaborating with enemy forces, was released because of the absence of an administrative appeal committee that would review his objections to his arrest.²⁴ Similarly, in the *El-Koury v. IDF Chief of Staff*, a man suspected of maliciously preventing members of the Negba kibbutz from receiving assistance, was released from administrative detention, due to an apparent technical flaw in the arrest warrant, which did not specify the place of his arrest.²⁵ In these petitions, the question under consideration was whether the respondent was able to legally justify the detention of the plaintiff.

Accordingly, habeas corpus jurisprudence during the HCJ's formative years was the most noticeable of all other subject matter adjudication in both its quality and importance. The HCJ's justices often praised and extolled the importance of these petitions, referring to the English tradition which associates habeas corpus with the idea of personal liberty.

For example, in the *El-Koury* case, which was perceived by many legal scholars as the keystone of public law and the defense of human rights,²⁶ Justice Agranat embraced the presumption of innocence, a foundational convention of English common law.²⁷ This significant principle, Agranat explained, applies in Israel too, by virtue of item 46 of the King's Order in Council, since it does not contradict the conditions of the land and its inhabitants, and also matches the spirit

24. See HCJ 7/48 El-Karbutli v. Minister of Defense, 2 P.D. 5 (1949) (Isr.); see also Richard Gladstein, *Administrative Detention in Israel and the Occupied Territories*, 1 ANTIOCH L.J. 87, 99 (1981); Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585, 642 FN 259 (2003).

25. See HCJ 95/49 El-Koury v. IDF Chief of Staff, 4 P.D. 34 (1950) (Isr.).

26. See *id.* (instructing to release petitioner, despite evidence that he had murdered and inflicted violence on Jews, due to the fact that the warrant for his arrest did not specify the place of arrest, in violation of the requirements of ordinance 111(1) of The Defense Regulations (Emergency), 1945, supplement 2, 858). On the importance of the *El-Koury* case and its formalistic nature see MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 75, 82 (2011). According to Mautner, in the formative years of the State of Israel human rights were protected by means of legal formalism, and the *El-Koury* case is representative of the use made by Supreme Court judges of formalism for the advancement of a liberal world view.

27. This axiom is known as the principle of individual liberty, and is an important component in the ideal of the rule of law and part of the unwritten constitution of the State of Israel. According to the principle of individual liberty, the individual is free to do as he or she pleases so long as the legislature has not limited or narrowed this liberty. It follows that freedom to act is the obvious default rule, while limitations on freedom of action are the exception which require positive proof. See Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMPLE L. Q. 405, 418 (1983).

of the Declaration of the Establishment of the State of Israel (hereinafter: the Declaration of Independence),²⁸ which asserted that the State of Israel will be founded on principles of liberty and justice.²⁹ However, Agranat continued, “declarations regarding individual liberty are one thing, and the implementation of this right is another.”³⁰ Drawing on the scholar Albert Venn Dicey, Justice Agranat ruled that a pledge of allegiance to the principle of liberty is insufficient, but also requires actual implementation. This is the role of the writ of habeas corpus:

In England, as is well known, the problem was resolved a long time ago by the creation of the famous remedy known as habeas corpus *ad subjiciendum*, which was granted to any person who complained of an unlawful arrest. This remedy served the one and only purpose of allowing the court to review the legality of the current arrest of the complainant. If it found he was unlawfully arrested, he was to be released immediately.³¹

Another case in the formative years of the Israeli Supreme Court which emphasizes the importance of habeas corpus for individual liberty, while relying on the English tradition, is *Rimon v. Rimon*, decided in 1950,³² which was one of the first cases to deal with child kidnapping. In this case, a mother of a minor appealed for the child’s ‘release’ from custody in the hands of relatives of the woman’s husband, who had committed suicide.³³ She requested a habeas corpus writ to be issued by the HCJ.³⁴ The husband’s family tried to defend themselves by relying in part on the argument of an alternative remedy, since the claimant could have sued for custody in the local District Court, which was authorized at the time to adjudicate custody disputes.³⁵

28. See Declaration of the Establishment of the State of Israel, 5708–1948 LSI 1 3–5 (1948), as amended.

29. HCJ 95/49 El-Koury v. IDF Chief of Staff, 4 P.D. 34 (1950) (Isr.).

30. *Id.*

31. *Id.* at 38.

32. See HCJ 113/50 Rimon v. Rimon, 4 P.D. 781 (1950) (Isr.); see also Chaim I. Goldwater, *Enforcing Foreign Custody Orders*, 10 ISR. L. REV. 135, at n. 2 (1975).

33. See *id.*

34. See *id.*

35. See HCJ 113/50 Rimon v. Rimon, 4 P.D. 784 (1950) (Isr.).

To this argument, Justice Shneor Zalman Cheshin responded that one should not ignore the point of writs of habeas corpus, “meant to serve as an efficient means for instant deliverance from unlawful or unjust detention.”³⁶ Moreover, Justice Cheshin emphasized that even if a citizen does have the option of an alternative remedy, “if that remedy cannot be attained immediately, but only after long deliberations, justice requires that the petitioner will not be rejected or denied the remedy of a writ of habeas corpus.”³⁷ Another claim made by the respondents in *Rimon* was that habeas corpus was designed to regulate the relations between an individual and the government authorities, lest an individual’s personal rights be curtailed by the state, and not to order relationships between private individuals.³⁸ To this Justice Cheshin responded:

Actually, the right to petition a court for a writ of habeas corpus, to release a minor from custody and return him to those responsible for his care—this right is set out in the principles of common law, which originate in antiquity ‘Whenever a minor is unlawfully detained, he has the right to be released from this illegal detention . . . as if he were an adult; this right is reserved to him by the writ of habeas corpus.’³⁹

These examples show clearly how the Israeli Supreme Court sitting as a HCJ positioned itself as the ultimate champion of individual liberty, relying on the grand English tradition of habeas corpus, whether in the realm of the relationship between individuals and the state, or the relationship between individuals themselves. In fact, we can learn from here not only about the nature of the judicial function, but also about the nature of Israel as a state that pursues liberty in the tradition of habeas corpus. An instructive example of this can be found in an article from the late 1970s written by Justice Berenson in the legal journal *Hapraklit*:

In Israel, the authority of the Supreme Court is established in positive law, which proclaims that the

36. *Id.*

37. *Id.*

38. *See id.* at 786.

39. *Id.*

court shall have jurisdiction to hear and determine matters necessary to be decided for the administration of justice. Specifically, it will intervene in cases of unlawful arrest or detention. . . The most famous and important of these is the procedure of habeas corpus, designed to defend civilians from unlawful imprisonment, detention or arrest by public authorities or even private citizens. This simple and ancient procedure, instituted in England by its judges. . . is what made that country and every one that followed its example, including Israel, into a freedom-loving country, which protects any individual in its jurisdiction – citizen, resident, visitor, passerby etc. – from an arbitrary denial of his liberty.⁴⁰

This short, select resume of decisions and legal writings demonstrates the honorable place habeas corpus assumed in the Israeli constitutional framework. Its centrality and reflective status have also had simple doctrinal implications. First, the petition of habeas corpus did not require the showing of standing, and an unlawfully imprisoned person will be released at anyone's request.⁴¹ Second, habeas corpus was valued so highly that any request for habeas corpus took precedence over discussion of any other matter.⁴² Third, even if the petitioner had access to alternative remedies in other courts, the HCJ would have provided his habeas corpus request, if this was deemed the fastest and most efficient means for securing an individual's release.⁴³

III. THE DECLINE OF HABEAS CORPUS

We identify a decline in the prominence of habeas corpus in

40. Tzvi Berenson, *On the High Court of Justice, the Extent of its Authority and the Right of Standing*, 31 HAPRAKLIT 194, 194–95 (1977).

41. See *id.* at 195 (“If there is no legal basis for a person’s detention or arrest, they will be released immediately by the court, according to the request of each petitioner.”).

42. *Id.* (“The judges thought these matters were of such great importance that a request for habeas corpus was granted precedence over all other litigations.”).

43. HCJ 113/50 Rimon v. Rimon, 4 P.D. 784 (1950) (Isr.).

Israeli law over the last few decades.⁴⁴ In criminal procedures,⁴⁵ in petitions by prisoners about the very fact of their imprisonment⁴⁶ or its conditions,⁴⁷ in petitions by patients in mental health institutions⁴⁸ and in custody disputes, the use of habeas corpus has virtually disappeared.⁴⁹ While it is true that petitions and requests for habeas corpus in administrative contexts, and especially security-related contexts, have become very frequent,⁵⁰ even in these security-related contexts most habeas corpus petitions are erased,⁵¹ rejected outright or in part,⁵² so that only rarely does the HCJ agree to turn the injunctive relief to a permanent one. In most security-related cases, writs of habeas corpus have come to be used by petitioners to locate detainees held by the security forces.⁵³ It should also be noted that

44. The decline in the importance of habeas corpus can be seen even in academic scholarship. As far as we are aware, no article or book about habeas corpus in Israel has been published over the last thirty years, and no department or college of law teaches a course on the topic.

45. See HCJ 4299/18 Blomberg v. The General Attorney, Nevo Legal Database (2018) (Isr.) (a petition for habeas corpus “is not intended to replace the regular criminal proceedings when there is no claim that the arrest was fundamentally illegal”); see also HCJ 416/06 Misgav v. Chief of Staff of the Israeli Police, Nevo Legal Database (2006) (Isr.). In both cases, the petitioner was denied habeas corpus regarding their petitions.

46. See HCJ 4159/10 Atsmon v. Prison Authorities, Nevo Legal Database (2010) (Isr.) (the habeas corpus petition of a prisoner, whose final judgment was being delayed, was rejected on the grounds that “the petitioner’s arguments belong in the criminal procedure track rather than as a petition to the Supreme Court.”).

47. See Criminal Matters Request 7053/01 Anonymous v. State of Israel, 56(1) P.D. 504 (2001) (Isr.).

48. Patients forcefully committed to psychiatric wards applying for habeas corpus must first exhaust the procedures set out by the Care of the Mentally Disturbed Law of 1991. See, e.g., HCJ 5487/98 Navarro v. District Psychiatrist, Nevo Legal Database (2000) (Isr.).

49. See, e.g., HCJ 5479/06 Mazurin v. State of Israel, Nevo Legal Database (2006) (Isr.).

50. See HCJ 8208/16 Zain v. IDF Commander in West Bank, Nevo Legal Database (2016) (Isr.); HCJ 2586/16 Ashrif v. State of Israel, Nevo Legal Database (2016) (Isr.); HCJ 4169/10 Cohen v. Minister of Defense, Nevo Legal Database (2010) (Isr.). The preceding cases are used to illustrate how frequently habeas corpus cases are brought before the court.

51. See HCJ 8354/20 Anonymous v. IDF Commander in West Bank, Nevo Legal Database (2020) (Isr.).

52. See HCJ 3208/09 Bakhry v. Ofer Camp Court of Appeals, Nevo Legal Database (2009) (Isr.).

53. See, e.g., HCJ 7206/20 Anonymous v. IDF Commander in West Bank, Nevo Legal Database (2020) (Isr.) (the writ of habeas corpus was filed to trace the whereabouts of the petitioner who had been detained by Israeli security forces); HCJ 8189/19 Musalem v. IDF Commander in West Bank, Nevo Legal Database (2019) (Isr.) (writ was filed in order to compel respondents to inform what happened to the

habeas corpus decisions in recent decades no longer include encomiums to the importance of habeas corpus for individual liberty in the English traditions or Israeli law.

At the same time, there is a weakening of the doctrine of habeas corpus, so that often the Supreme Court rejects a petition for habeas corpus by referring to an alternative remedy, exhaustion of proceedings, or the petitioner's lack of standing.⁵⁴ As noted, in earlier times it was well accepted that even if an alternative remedy existed, the HCJ will provide habeas corpus warrants, since they are the best guarantee for human liberty. For the same reason, the HCJ also agreed to issue a habeas corpus writ at the request of any petitioner, without insisting that he satisfy the requirements of standing.⁵⁵

The following cases may serve as examples of the decline of habeas corpus. In the *Gutman v. State of Israel*, decided in 2008,⁵⁶ the petitioner requested a writ of habeas corpus in order to release from arrest seven minors who refused to divulge their names, and had been arrested for allegedly entering a forbidden security area, criminal trespassing and disturbing a police officer from doing his job. The Court rejected the request for habeas corpus, citing the availability of an alternative remedy⁵⁷ and the petitioner's lack of legal standing.⁵⁸

Another case that attests to the decline of habeas corpus is the *Merichik v. Judge Nitsa Maimon-Shaashua*, also decided in 2008.⁵⁹ In this case, the petitioner petitioned against the decision of the

petitioner who had been arrested by Israeli security forces); HCJ 10058/07 Anati v. IDF Commander in West Bank, Nevo Legal Database (2008) (Isr.) (writ filed by petitioner in order to request respondent to answer what happened to petitioner after he was arrested by Israeli security forces).

54. See HCJ 7131/20 Turgeman v. State of Israel, Nevo Legal Database (2020) (Isr.) (petitioner's writ of habeas corpus petition was rejected because of "existence of an alternative remedy."); HCJ 5479/06 Mazurin v. State of Israel, Nevo Legal Database (2006) (Isr.) (petitioner's writ was rejected because they had no status regarding the minor they wished to protect).

55. See Berenson, *supra* note 40 ("The jurisdiction of the HCJ extends to any governmental or public matter that is not under the jurisdiction of another court of tribunal. In this country a very broad interpretation was adopted to both types of matters that the court may hear, the remedies it may grant to citizens affected by the authorities' actions or inactions and placing the public bodies under review.").

56. HCJ 428/08 Gutman v. State of Israel, Nevo Legal Database (2008) (Isr.).

57. *Id.* at ¶ 4 (Procaccia, J., opinion). The HCJ explained that the minors' case is being handled in criminal procedures in accordance with criminal law. Hence, there is a clear alternative remedy in their case, and no need for the HCJ.

58. *Id.*

59. HCJ 5045/08 Merichik v. Judge Nitsa Maimon-Shaashua, Nevo Legal Database (2008) (Isr.).

Magistrate Court of Kefar-Saba to keep her in custody in order to secure her attendance of hearings in a criminal process held in that same court.⁶⁰ The District Court determined that despite the existence of a reason to hold her under arrest, the requirement of section § 21b in the 1996 Criminal Justice Remedy Law (Enforcement Authority – Arrests) had not been met, according to which no arrest warrant may be served prior to presenting evidence for guilt. The Magistrate Court was accordingly requested to examine the evidence against the appellant.⁶¹ However, the hearing at the Magistrate Court was to be held over ten days later, and it was promised that a decision would be reached fifteen days after the decision by the District Court. In fact, during all this time Merichik was held in a legally dubious detention, and despite the District Court's ruling, no hearing was held about her case.

Merichik petitioned the HCJ against its continued arrest. Justice Edmond Levy expressed his indignation at this kind of treatment of the petitioner, and remarked that the detention without a hearing stemmed from “[f]or various reasons, which I find difficult to reconcile with the fundamental right to liberty from detention. . . .”⁶² However, the HCJ decided to reject the petition, not because Merichik's lawyer rushed to submit it before the expected decision of the Magistrate Court, but because the HCJ is not the correct court for reviewing the claim. If the petitioner wishes to appeal the decision to detain her, she must do so in the way prescribed by law, which a petition to the HCJ cannot replace.⁶³

In this decision, we see a separation of the idea of liberty from the procedure of habeas corpus. If habeas corpus is the best guarantee of human liberty, how can we reconcile the risk of damaging the basic right to liberty with the claim that the HCJ is not the appropriate forum, and that decisions about detentions should be reached according to the way established by law? As mentioned, the

60. *Id.* The appellant was accused of trespassing, attacking a police officer and refusal to show signs of identification, while she was biting and beating police officers removing her from the Shvut Ami settlement in Samaria. After her arrest, she refused to have her picture taken or given fingerprints. Since that incident, she had been under continuous arrest, as she refused to comply with the conditions of detention. The arrest was prolonged from time to time by fixed terms, until the Magistrate Court decided that if its conditions are not satisfied, she would remain under arrest until the end of legal procedures.

61. *See id.*

62. *Id.* at ¶ 5 (Levy, J., opinion).

63. *See id.* at ¶ 6.

availability of an alternative remedy of the claim that the appellant lacks legal standing did not prevent courts from issuing the writ. In other words, habeas corpus was not perceived previously as a final remedy, which may only be employed as a last resort.

Another example may be found in the case of *Anonymous v. the Israeli Police*.⁶⁴ The petitioner had been arrested and interrogated in the Judea and Samaria police district, under suspicion for several crimes, including contact with an enemy agent, intent to form a conspiracy, and intent to cause a person's death.⁶⁵ A request for the extension of the petitioner's detention, presented to the Jerusalem Magistrate Court, was rejected, since the Court felt it was not authorized to make this decision in the absence of conditions permitting the application of Israeli Criminal law.⁶⁶ The State's appeal to the District Court was also rejected under the same reasoning, that the Court lacked the authority to rule on the prolongation of the appellant's detention.⁶⁷ However, the District Court judge delayed the release of the appellant to allow the State to inform the appellant's attorney whether it planned to make another appeal to the Supreme Court.⁶⁸ Instead, the State made a request to the Military Court of Judea and Samaria to extend the appellant's arrest by seven days.⁶⁹ The Military Court determined that it is authorized to rule on the matter, and instructed the police to extend the appellant's arrest by four days.⁷⁰ At this point, the appellant turned to the District Court, asking to be released because of contempt of court. The District Court refused, arguing that if a claim of unlawful arrest is to be made, it should be presented to the Military Court.⁷¹ The appellant finally petitioned for the HCJ for a habeas corpus remedy. The HCJ ordered the deletion of the petition due to the availability of an alternative remedy, since the appellant could have appealed his case to the Military Court of Appeals. Given this option, the Justices wrote, there was no need to petition to the HCJ and to describe this as an emergency petition. The judges even expressed their doubts whether this petition should have been defined as a habeas corpus one,

64. See generally HCJ 594/16 *Anonymous v. Israeli Police Judea & Samaria Division & The Judean Military Court*, Nevo Legal Database ¶ 2 (2016) (Isr.).

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.* at ¶ 6.

“because it is largely directed against the substance of the decision of the Military Court.”⁷² The judges noted that they were not “taking any position about the merits of the allegations raised in the matter of the petitioner’s arrest.”⁷³

Such doubts regarding the definition of the petition as a habeas corpus are further evidence for the erosion of its status. It seems that in their opinion, the Justices were relying on a distinction between claims of procedural defects or lack of authority, which arise in the decision to detain, and claims of substantial defects in the Military Court’s decision to extend the arrest. Habeas corpus is concerned with fundamental defects in procedure and authority.⁷⁴ Defects concerning the substance of a decision should be appealed through the usual channels in the Military Court of Appeals.

This sharp distinction made by the judges, in the absence of a discussion about the substance of the claims, or at least about the kind of claims that would merit the right of habeas corpus, is problematic. Not only because it reflects a very dichotomous distinction between claims about jurisdiction and claims about substance, but also from a historical perspective of habeas corpus. Indeed, in Anglo-American law, habeas corpus procedures are not regularly intended to determine the guilt or innocence of the detainee, but rather whether the arrest meets general guidelines and rules.⁷⁵ However, many scholars have recognized the fact that many of the procedural matters determined by a court in issuing a writ of habeas corpus are tied to substantial questions of liberty and justice.⁷⁶

The case of *Anonymous v. Israeli Police* demonstrates that habeas corpus is perceived by the Justices of the HCJ as a remedy of last resort, given only in special cases of lack of authority.⁷⁷ Do the circumstances of the arrest of the detainee in the case of *Anonymous v. Israeli Police*—attempts to detain the appellant through the civil law

72. *Id.*

73. *Id.*

74. See HCJ 4299/18 Blomberg v. The General Attorney, Nevo Legal Database ¶ 13 (2018) (Isr.) (Barak-Erez, J., opinion) (explaining that habeas corpus concerns “fundamentally illegal” arrests or detentions in regard to extradition).

75. See *Fay v. Noia*, 372 U.S. 391, 402 (1963); Roger Berkowitz, *Error-Centricity, Habeas Corpus and the Rule of Law as the Law of Rulings*, 64 LA. L. REV. 477, 480 (2004).

76. See STEVEN M. STATSINGER, *HABEAS CORPUS: PRACTICE, COMMENTARIES AND STATUTES*, 1, 9–10 (2d ed. 2007).

77. See HCJ 594/16 *Anonymous v. Israeli Police Judea & Samaria Division & The Judean Military Court*, Nevo Legal Database (2016) (Isr.).

system and his subsequent unilateral transfer to the military tribunal—not merit a discussion of the substance of his claims, or at least about their nature? Concisely put, our argument is that the HCJ reserves habeas corpus only for cases of lack of authority, and that it interprets lack of authority in a very specific, narrow sense.⁷⁸ A further implication is that habeas corpus becomes a residual and irrelevant remedy for most cases of detention, which are not clear-cut cases of lack of authority. This is the present state of habeas corpus.

However, remnants of the centrality of habeas corpus in Israeli constitutional law may still be found today. In *Anonymous v. State of Israel*,⁷⁹ the Supreme Court, sitting as a Court of Criminal Appeals, struck down section 5(2) of the Criminal Procedure (Arrest of a Security Offense Suspect) (Temporary Provision), 2006.⁸⁰ This law allowed for a hearing regarding the extension of a security suspect's arrest without their presence. One could argue that the Supreme Court overruled this law because of its impingement on habeas corpus,⁸¹ and that in this it resembles *Boumediene v. Bush*,⁸² where the United States Supreme Court struck down a congressional law limiting the right to petition the courts detention of persons in the U.S. Navy's Guantanamo Bay in Cuba. This judgment was described by scholars⁸³ as significant and groundbreaking on a few levels,

78. See *id.* at ¶ 9–10. Thus, for example, one may have adopted a less stringent cause of intervention, including defects pertaining to the root of the procedure as a test for applying habeas corpus.

79. Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500, (2010) (Isr.).

80. *Id.* ¶ 2. Section 5 of the Statute reads:

5. *Hearing held in the absence of an arrestee suspected of committing a security offense*

...

(2) The court may order that a hearing concerning an application for a rehearing pursuant to s. 52 of the Arrests Law or of an appeal pursuant to s. 53 of the said statute be held in the arrestee's absence — if an application for such has been filed with the approval of the supervisor, and if the court has been persuaded that the suspension of the arrestee's interrogation is likely to cause material harm to the investigation.

81. See Suzi Navot, *Habeas Corpus: In Light of Criminal Matter Case 8823/07*, 34 BIDLATAIM PETUCHOT 48 (2010).

82. See generally 553 U.S. at 723.

83. See generally Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 1 (2008); Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of Boumediene*, 57 WAYNE L. REV. 99, 109 (2011); Baher Azmy, *Executive Detention, Boumediene and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 449 (2010); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S.

especially since, for the first time in history, the United States Supreme Court had overruled a federal law seeking to limit the authority of federal courts to accept petitions of habeas corpus. It was decided for the first time—contrary to accepted and established opinions—that the suspension clause in the American Constitution bestows an affirmative right to petition a court for habeas corpus.⁸⁴

In our view, the comparison between *Anonymous v. State of Israel* and the *Boumediene* case is inapt, to say the least. In *Anonymous v. State of Israel*, the Supreme Court justices accepted the appellant's position that a person may not be judged in absentia, since the accused's right to be present at his or her trial "is a core element of the right to due process, and it is therefore a protected constitutional right pursuant to" the Basic Law [Basic Law: Human Liberty and Dignity].⁸⁵ Justice Eliezer Rivlin explained that the "legal proceeding does not deal with elements that are absent – it deals with elements that are present."⁸⁶ In order to emphasize the importance of the presence of a detainee at the hearing held in his or her case, Justice Rivlin made reference to the habeas corpus tradition:

The importance and longevity of the principle regarding the arrestee's physical presence in court is indicated by the doctrine whose name indicates its logic — habeas corpus ("bring the body"). This common law doctrine allows the court to be petitioned to issue an order by which the authorities are directed to bring before the court a person who has been imprisoned by those authorities, so that he can be released if it discovered that the arrest was illegal. This power, which in Israel is conferred on the

CAL. L. REV. 259, 260–261 (2009); Steven I. Vladeck, *Boumediene's Quiet Theory: Access to Court and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009).

84. It should be pointed out that the court's decision was at first qualified as applying to the Suspension Clause of the U.S. Constitution, and the *Boumediene* case, was not seen as ruling about the applicability of other constitutional defenses such as the right to due process, freedom from arbitrary search and arrest, and more. However, since the right of habeas corpus is a right to reviewing the constitutionality of arrests, this review may in the end involve substantive constitutional instructions found in other parts of the U.S. Constitution. For example, the Fifth Amendment's right to due process is most relevant in this context, and there is a rich scholarly literature examining its application in the cases of prisoners in Guantanamo.

85. See Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500, ¶ 17 (2010) (Isr.) (Rivlin, E., J., opinion).

86. *Id.*

High Court of Justice, reflects the fundamental perception that the court that is deciding the matter of a person's liberty will generally be required to see the person and hear his arguments regarding the legality of his detention.⁸⁷

However, even these words raise doubts about the place of habeas corpus in contemporary Israeli constitutional jurisprudence and may even be exemplary of its present stagnation. If the extension of a detention in the suspect's absence is so wrong, why didn't the Supreme Court make use of writs of habeas corpus to minimize the number of hearings in absentia, according to this law?

Furthermore, *Anonymous v. State of Israel*⁸⁸ is far from being an "Israeli *Boumediene*." The importance of *Boumediene* lies in the U.S. Supreme Court's recognition of the very existence of a constitutional right to habeas corpus, against the background of congressional legislation which tried to deny imprisoned detainees in Guantanamo the right to request habeas corpus remedies from federal courts. Congress had not only diminished the right to habeas corpus, it had even unambiguously overturned previous Supreme Court decisions so that the diminished right to habeas corpus that was implemented through statute would apply to pending cases.⁸⁹ The entire tumult concerned habeas corpus, with many dozens of appeals for habeas corpus being presented, time after time, by many different appellants to different courts.⁹⁰

In Israel, the authority to issue a writ of habeas corpus was restricted to the HCJ by 15(d)(1) of Basic Law: Judicature. The petition to strike down section 5(2) of the criminal law of 1997 was not made in the form of a habeas corpus petition to the HCJ, nor as a reaction for habeas corpus petitions made in regard to processes taking place in lower courts. It was never argued by any of the appellants, the State, or another party, that section 5(2) limits or diminishes the authority of the Israeli Supreme Court to issue writs of habeas corpus. Had there been a contradiction between section

87. Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500, ¶ 20 (2010) (Isr.) (Rivlin, E., J., opinion).

88. Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500 (2010) (Isr.).

89. See Meltzer, *supra* note 83, at 7.

90. See Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SEC. L. & POL'Y 1 (2009).

15(d)(1) of Basic Law: Judiciary and section 5(2) of the said law, the Supreme Court would have overruled section 5(2) by virtue of the principles established in the case of *Herut, the National Jewish Movement v. Chairman of the Central Electoral Committee for the Sixteenth Knesset*,⁹¹ according to which an ordinary law may not negate or diminish the authority of the Supreme Court established by Basic Law: Judiciary.

It was not claimed that there was a contradiction between section 15(d)(1) of Basic Law: Judiciary and section 5(2) because there simply is no contradiction. The juridical authority of the Israeli Supreme Court to issue habeas corpus was not damaged by section 5(2), especially in light of the fact that the court relies on a restrictive interpretation of its authority to issue writs of habeas corpus, reserving it for cases of breaches of authority, such as we have seen in the case of *Anonymous v. Israeli Police*. A judge who orders the continued detention of a detainee in the latter's absence is acting according to his or her authority by virtue of section 5(2), and an appeal to the Supreme Court for a writ of habeas corpus would be rejected based on the argument that there is no breach of authority in the decision to continue the detention, and that substantial appeals about the judge's decision should be made through the regular procedures of such appeals. True, the detainee's right to due process was damaged by the very possibility of ordering a prolongation of his or her arrest in absentia, but not his or her right to habeas corpus (as this is interpreted by the HCJ). The issue of habeas corpus was mentioned casually by Justice Rivlin, but it is not crucial for the legal decision in case *Anonymous v. State of Israel*.⁹² This affair, as well as the others, attests to the poor condition in which habeas corpus is found today. The questions that will occupy us in the remainder of this Article are: what happened to habeas corpus? What factors led to its decline?

IV. THE FACTORS FOR THE DECLINE OF HABEAS CORPUS IN ISRAELI JURISPRUDENCE

So whatever happened to habeas corpus? We wish to highlight

91. HCJ 212/03 *Herut, the National Jewish Movement v. Chairman of the Central Electoral Committee for the Sixteenth Knesset*, 57(1) P.D. 750, ¶ 4 (2003) (Irs.) (Barak, A., Chief Justice, opinion).

92. Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500 (2010) (Irs.).

the factors which share one distinct common denominator, which is that they focus our attention on the role of the Supreme Court in Israeli society and its systemic position *vis-à-vis* other courts and government authorities. We identify three factors—sometimes overlapping, sometimes complementary—which have brought the decline of habeas corpus: In Part A, we argue that legislative developments in domains previously controlled by habeas corpus, such as prisoner appeals and conflicts over child custody, have made habeas corpus superfluous.⁹³ These legislative developments brought about both the development of substantive law, and the establishment of alternative courts that were both lower and more available. In light of these legislative developments, Supreme Court judges preferred to position themselves as a court of appeals about those lower courts, and decrease the use of habeas corpus.

We argue in Part B that a review of habeas corpus rulings on specific subjects such as custody conflicts and security matters would show that they lack any procedural or substantive character.⁹⁴ The guiding principle behind these rulings is the primacy of the rule of law, in the sense of the subordination of citizens and government authorities to the Supreme Court, but apart from this principle, there is some difficulty in identifying any substantive or procedural rationale characterizing habeas corpus. Accordingly, habeas corpus rulings are characterized as promoting specific (procedural or substantive) justice on a case-to-case basis. In the absence of any procedural or substantive character, it is doomed to stagnation especially in places where legislative developments took place.

Lastly, we argue in Part C that since the Constitutional Revolution, we can identify a preference by Supreme Court justices to discuss human liberty questions by means of a direct attack on primary legislation and in accordance with the Limitation Clause tests of Basic Law: Human Dignity and Liberty.⁹⁵

The common denominator of these factors is a preference or tendency for grandiose constitutional engineering⁹⁶—whether by the

93. See *infra* Part A.

94. See *infra* Part B.

95. See *infra* Part C.

96. See Michael Birnhack, *Privacy in Crisis: Constitutional Engineering and Privacy Engineering*, LAW AND GOVERNMENT IN ISRAEL (forthcoming 2021). Currently, the article is available in Hebrew only. However, an English abstract is available at <https://ssrn.com/abstract=3650193>. We borrowed the term “constitutional engineering” from Birnhack. In his article, Birnhack deals with two types of engineering: constitutional engineering and privacy engineering.

legislator or by the Supreme Court—over small-scale constitutional engineering of the space of human liberty. In other words, habeas corpus writs evolved case to case, while, by contrast, both the Israeli Legislature (the “Knesset”) and the Israeli Supreme Court prefer to advance and organize the space of human liberty in a wider, more comprehensive and deeper fashion.

A. The Development of Statutory Alternatives for Habeas Corpus

One factor of the decline of habeas corpus can be traced to the development of statutory alternatives. For example, child kidnapping cases were controlled by habeas corpus decisions for over four decades. In 1991, the State of Israel ratified the Hague Convention on the Civil Aspects of International Child Abduction⁹⁷ through the passage of the Hague Convention Law (Return of Abducted Child).⁹⁸ The Hague Convention Law and its accompanying convention brought a significant change to the centrality of habeas corpus in cases of child kidnappings.⁹⁹

The Hague Convention Law requires the immediate return of children kidnapped from their normal place of residence, and places direct responsibility on the country where the child has been taken to assist in locating and transferring the child to his or her normal place of residence.¹⁰⁰ This law permits a parent, whose child has been kidnapped and brought to Israel from another country, to request that the authorities of that country help locate and return the child. This law has led to a great decline in habeas corpus petitions in child kidnapping matters because the parent of the kidnapped child now

97. See generally Convention on the Civil Aspects of Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention]. For a basic overview of the objectives and mechanism of the Hague Convention, see Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 398–400 (2002).

98. See The Hague Convention (Return of Abducted Children) Law, 571–1991, 1991 S.H. 148 [hereinafter Hague Convention Law]. The Hague Convention Law incorporates into Israeli Law the majority of the provisions of the Hague Convention and accords them the force of law. The supplement to the Hague Convention Law includes all the substantive provisions of the Hague Convention with identical wording.

99. See Ariel Rosen-Zvi, *Israel: Protection of Family Members and Strengthening the Partnership between Spouses*, 31 U. LOUISVILLE J. FAM. L. 367, 374–80 (1992) (explaining the changes in Israeli legal practice concerning kidnapped children after the Hague Convention Law).

100. See The Hague Convention art. 1.

has more simple, accessible, and efficient means to demand for the return of the child to their original country.¹⁰¹ The precedence that the Hague Convention Law procedures have taken over habeas corpus procedures also stems from the fact that we are not dealing with a conflict between individual citizens, but a conflict between the state from which the child has been kidnapped and the state to which they has been taken, a fact that provides massive financial and legal assistance to the side initiating the Hague Convention procedures.¹⁰² Moreover, acceptance of the Hague Convention is made obligatory by the norms of international public law and the preservation of positive foreign relations with the signatory countries of the Convention.

In fact, the Hague Convention does not deal directly with the possibility of making habeas corpus petitions to the Supreme Court, and *prima facie*, according to the Convention, the parent of a kidnapped child still has the option of doing this.¹⁰³ Nevertheless, the HCJ held that in certain circumstances, a parent who has used Hague Convention procedures is precluded from petitioning for habeas corpus.¹⁰⁴ The Court emphasized that the Hague Convention Law did not strip the HCJ of the authority to issue writs of habeas corpus in Hague Convention cases, but rather that the Court's discretion whether to exercise its power would take into consideration the fact that the Convention was used instead.¹⁰⁵

It is important to note that the Hague Convention's statutory alternative to habeas corpus is available only in cases of a kidnapping between signatory states. In cases where a child is kidnapped from a non-signatory state, there is no apparent change from the normative conditions prevalent before the signing of the treaty, and the parent may still petition the Supreme Court for a writ of habeas corpus.¹⁰⁶

101. See Rosen-Zvi, *supra* note 99, at 376–77.

102. See Schuz, *supra* note 97, at 465–466.

103. Article 29 of the Hague Convention declares: “This Convention Shall not preclude any man, institution or body who claim that there has been a breach of custody or access rights... from applying directly to the juridical or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.”

104. HCJ 4365/97 Tur-Sinai v. Foreign Minister, 53(3) P.D. 673, 679 (1999) (Isr).

105. See *id.*

106. See Rhona Schuz, *The Relevance of Religious and Cultural Considerations in International Child Abductions Disputes*, 12 J.L. & FAM. STUD. 453, 457 n.18 (2010). According to Schuz, in habeas corpus non-Convention cases, the HCJ will order the return of the child, unless the abductor can show that it would cause significant irreversible harm to the child. Schuz also notes the Court held that this test is wider

However, the Knesset enacted the Family Court Law in 1995,¹⁰⁷ which bestows exclusive authority over kidnapping cases involving minors to the family court, including, not limited to, those covered by the Hague Convention Law.¹⁰⁸ Thus, today there is an alternative statutory forum, the Family Court, which replaces habeas corpus petitions to the HCJ.¹⁰⁹ Indeed, since 1995 the vast majority of Supreme Court hearings regarding child kidnappings are appeals of rulings from the Family Court and not habeas corpus petitions.¹¹⁰

Another example of legislative developments that have led to the decline of habeas corpus may be found in the domain of administrative detention. The Emergency Powers (Detention) Law, 1979 (hereinafter “Detention Law”)¹¹¹ replaced the relevant regulations of administrative detention detailed in the Defense (Emergency) Regulations, 1945. The new law gave the Minister of Defense the authority to order the arrest without trial on the grounds of state and public security. However, the law requires bringing the detainee in front of the president of the District Court in the

than the exception of “grave risk” of harm, established by Article 13(b) of the Hague Convention. *See id.* The list of Israeli Supreme Court cases cited by Schuz. *See also* Rosen-Zvi, *supra* note 99, at 378. Thus, the differences between the Hague Convention Law and the habeas corpus law are not solely procedural.

107. Family Court Law, 5755-1995 S.H. 393 (Isr.) [hereinafter Family Court Law].

108. *See id.* ¶ 5 (listing several topics that would henceforth be under the exclusive jurisdiction of the family court, including claim in the matter of the return of an abducted minor).

109. It remains an open question what is the substantive law, where the family court will rule in non-Convention cases, but involve foreign jurisdiction or cases of minors, whose personal or international connection to Israel is uncertain. While the legislature authorized the family court to rule on child kidnappings, the legislature did not discuss the question of the substantive laws, where the family court will decide the non-Convention case. Hence, the substantive law regarding non-Convention child abductions remained the same and in accordance with the rules established in the habeas corpus jurisprudence. On the different approaches to the substantive law regarding child abductions not controlled by the Hague Convention Law, see Leslie Kim Treiger, *A Digest of Selected Judgments of the Supreme Court of Israel*, 27 ISR. L. REV. 495, 502-04 (1993), reviewing HCJ 243/88 Konsloos v. Turgeman 45(2) 626 (1991) (Isr.).

110. *See* LFA 741/11 *Doe v. Doe*, Nevo Legal Database (2011) (Isr.) (for a list of Israeli Supreme Court cases cited there).

111. *See* The Emergency Powers (Detention) Law, 5729-1979 (Isr.). The new statute was meant to replace the mandatory regulations with an Israeli law that would meet modern “security needs and at the same time, as far as possible, protect the principles of the rule of law.” *See* Itzhak Zamir, *Administrative Detention*, 18 ISR. L. REV. 150, 150 (1983).

jurisdiction where the arrest was made.¹¹² The president of the District Court is authorized to release the detainee if they are convinced that the arrest was made without reasonable considerations or reasonable grounds of state or public security.¹¹³ The detainee may then appeal this decision to the Supreme Court.¹¹⁴ This law, and the procedures it sets in motion, has endured heavy criticism, because in its present form the law does not permit a detainee to know the grounds which led to his detention and to properly defend himself.¹¹⁵ For this reason, some scholars have called for its replacement.¹¹⁶ Similar criticism has been made about the similar, but not identical procedures prevalent in the West Bank, in accordance with the Defense (Emergency) Regulations, 1945 and the Security Affairs Law (Judea and Samaria) (No. 1651) of 2009.¹¹⁷

It is interesting to note that, in contrast to the Hague Convention, appeals and requests for habeas corpus in security matters are extremely common, probably due to the insufficiency of the Detention Law from the point of view of the detainee.¹¹⁸ However, in security matters, the majority of appeals for writs of habeas corpus are deleted,¹¹⁹ rejected outright or rejected *de facto as well*.¹²⁰ The Supreme Court makes clear that habeas corpus should not be invoked while the petitioner is held in proper administrative detention. In

112. The Emergency Powers (Detention) Law, 5729-1979 § 4a (Isr.).

113. *See id.* § 4c.

114. *See id.* § 7a.

115. *See* ELAD GIL ET AL., EXTREME MEASURES FOR COMBATTING TERROR: ADMINISTRATIVE DETENTION, HOUSE DEMOLITION, DEPORTATION AND RESIDENCE READJUSTMENT, iv-vii (2010).

116. *See id.*

117. Another legislative development regarding detentions is the enactment by the Knesset of the Detention of Unlawful Combatants Law of 2002, where the IDF Chief of Staff is authorized to order the detention of unlawful enemy combatants, and is subject to judicial review by the District Court. Since the enactment of the Detention of Unlawful Combatants Law, detentions of unlawful combatants are heard on appeals to the Supreme Court and not as a petition for habeas corpus. *See* Joshua Segev, *Detaining Unlawful Enemy Combatants in Israel: A Matter of Misinterpretation?*, in CONSTITUTIONALISM UNDER EXTREME CONDITIONS 121 (Richard Albert & Yaniv Roznai eds., 2020).

118. *See* HCJ 9441/07 Agbar v. IDF Commander in Judea and Samaria, Nevo Legal Database (2007) (Isr.).

119. *See* HCJ 5479/06 Mazurin v. State of Israel, Nevo Legal Database (2006) (Isr.).

120. *See, e.g.*, HCJ 8208/16 Zain v. IDF Commander in West Bank, Nevo Legal Database (2016) (Isr.); HCJ 2586/16 Ashrif v. State of Israel, Nevo Legal Database (2016) (Isr.); HCJ 4169/10 Cohen v. Minister of Defense, Nevo Legal Database (2010) (Isr.).

most security cases, habeas corpus writs have come to be used by security forces for the purpose of locating prisoners,¹²¹ in which case, once the prisoner is found, the legality of his or her detention will be considered according to the usual procedures determined by the Detention Law by the president of the District Court with an option of appeal to the Supreme Court (or according to the Security Instructions law before Military Courts with a possibility of appeal to the Supreme Court for their decision).

Another domain in which a statutory alternative to habeas corpus has developed is prisoner appeals, since the 1980 passing of the Article Eight "A" of the Prison Ordinance.¹²² In accordance with this new ordinance, the legislature put into effect an appeal-track to District Courts for prisoners, with the main purpose of creating an efficient deliberative framework for dealing with such appeals. As mentioned above, before the establishment of this procedure, any prisoner or detainee was entitled to petition the Supreme Court about the violation of his or her rights by the prison or detention facility authorities.¹²³ It was also taken into consideration that the new arrangement will be more efficient also for the prisoner's access to the court within his prison facility. While the authority of the Supreme Court is preserved in the case of prisoners petitioning for habeas corpus in matters related to the legality of their imprisonment,¹²⁴ a review of court decisions shows that the Supreme Court tends to refer prisoners to the remedies provided by the regular criminal procedures even where they claim against the legality of their imprisonment.¹²⁵

In summary, since the end of the 1970s, legislative developments have taken place in domains previously controlled by habeas corpus. These legislative developments led to the evolution of substantive law, as well as to the establishment of alternative judicial authorities that were lower and more accessible parallel to the writ of habeas corpus. Our conclusion is consistent with studies from England and the United States, where developments in legislative or statutory

121. See HCJ 8354/20 Anonymous v. IDF Commander in West Bank Nevo Legal Database (2020) (Isr.).

122. See Prison Ordinance (Amendment No. 5) Law, 5740-1980, 34 LSI. 150 (1980).

123. See Berenson, *supra* note 40, at 197-98; Criminal Matters Request 7053/01 Anonymous v. State of Israel, 56(1) P.D. 504 (2001) (Isr.).

124. See *id.*

125. See *id.*

alternatives have led to a reduction in the use of habeas corpus.¹²⁶

As we have shown, these alternatives did not mandate the complete abandonment of habeas corpus. In fact it was the Supreme Court, in its actual practice, that made the use of habeas corpus superfluous and instructed petitioners to make use of the statutory alternatives, despite legislative gaps.¹²⁷ Besides, this intensified legislation in domains previously controlled by habeas corpus relied on the assumption that the legislature, rather than the courts, had the authority to determine the circumstances and conditions for denying persons their liberty. The motives for this alternative legislation may be diverse, but the additional assumption implied in this alternative legislation is that the role of the Supreme Court is to serve as an appeals court for lower courts operating according to the new legislative developments, rather than a first and last court of human liberty.

B. Casuistic Rulings, Devoid of Procedural or Substantive Characteristics

A review of habeas corpus decisions on specific topics, such as custody disputes between partners or security matters, demonstrates that even though at its heart lies the primacy of the rule of law, in the sense of the subordination of citizens and government bodies to the Supreme Court, nevertheless it lacks any procedural or substantive character. Accordingly, habeas corpus rulings are characterized by the promotion of specific justice (procedural or substantive) on a case-by-case basis. Lacking any procedural or substantive character, it is doomed to legal stagnation (especially where there has also been legislative developments).¹²⁸ In other words, a review of habeas

126. See HALLIDAY, *supra* note 13, at 253; Vladek, *supra* note 5, at 953.

127. The HCJ not only encouraged but mandated the use of alternative lower legal forums. See HCJ 6681/20 Anonymous v. Welfare Officer for the Youth Law North Jerusalem Area Ramat Eshkol, Nevo Legal Database (2020) (Isr.) ("In short, it is unsuitable to 'bypass' the appropriate appellate court by way of a petition impersonating to be a habeas corpus petition.").

128. Constitutional developments did not deny or reduce the Supreme Court's authority to directly issue writs of habeas corpus, even though this is what ended up happening. However, in terms of the letter of the law of the Supreme Court, the authority to issue writs of habeas corpus belongs to the Supreme Court, even when statutory appeal procedures are available. Therefore, in our opinion, the absence of a procedural or substantive character is an independent factor for the decline of habeas corpus. If habeas corpus had a procedural or substantive character, it would

corpus rulings on specific topics, such as custody disputes between partners and security matters, shows that the use of the writ has lacked a general guiding principle from the start. In the absence of such guidelines, the rulings are mostly casuistic, and occasionally even self-contradictory, when the court uses the writ of habeas corpus to promote substantive or procedural justice on a case-by-case basis. It is true that casuistry, contradictions, and a lack of coherence in a legal doctrine do not constitute a sufficient reason for its abandonment. However, we argue that lack of coherence and the lack of substantive or procedural character (especially when compared to parallel legislative arrangements) paved the road to the abandonment of habeas corpus.

1. Habeas Corpus Rulings in Child Kidnapping Cases

The very first ruling after the foundation of the State of Israel, which laid the foundations of habeas corpus for child custody, and established the Supreme Court's role as champion of the rule of law and as the impartial defender of the weak is the *Amado v. Immigrant Camp Superintendent*.¹²⁹ The appellant, a mother of two and resident of France, requested a writ of habeas corpus against the father who had left France with his children in violation of a decision by a French civil court, and was holding them in an immigrant camp in Pardes Chana, Israel.¹³⁰ The mother's request was based on another decision issued by the Paris civil court, after the father did not return with the children, and according to which the father had forfeited the right to see the children or keep them. In his response to the Supreme Court, the father claimed that his wife neglected household maintenance and the supervision of the children, since she is subject to "psychic illnesses" incurred by the influence of a mystic cult leader with whom she had associated with over the past few years.¹³¹ He further asserted that he is afraid his children will be deprived of a Hebrew and

be put to use by judges and litigants according to its unique advantages and principles. Hence the decline of habeas corpus is also related to this lack of character.

129. See HCJ 125/49 *Amado v. Immigrant Camp Superintendent*, 4 P.D. 4 (1950) (Isr.) (laying down the foundation of Israeli jurisdiction over the custody of children); see also Norman Bentwich, *Jurisdiction over the Custody of Infants*, 1 ISR. L. REV. 147, 150 (1966).

130. See HCJ 125/49 *Amado v. Immigrant Camp Superintendent*, 4 P.D. 4 (1950) (Isr.).

131. See *id.* at 8.

Jewish education if they remained with their mother.¹³²

The Supreme Court unanimously approved the mother's request, making the writ of habeas corpus absolute, and instructed the children to be returned to their mother's custody. Chief Justice Smoira emphasized the obligation to abide by the universally binding (*in rem*) foreign court: "the right was established, by an authoritative court, in favor of one of the parents, and the other parent is acting in opposition to it, removing the child from his lawful custody, or continuing to hold it unlawfully—the solution for this is a habeas corpus remedy."¹³³

Chief Justice Smoira rejected the father's claim that the children's welfare is better served by allowing them to get a national-Jewish education in Israel, which they could not receive in France.¹³⁴ The Supreme Court's perspective on this claim by the father, thought Chief Justice Smoira, should be as impartial as that of the court of a third, uninvolved country.¹³⁵ From this perspective, Smoira raised another fear of insincerity on the part of the father in his alleged wishes to give his children a national-Jewish education,¹³⁶ and said:

As for public policy, this court and every judge in Israel would obviously be pleased if every Jewish child that immigrates into the country were to receive his education in Israel. But this is not the way to encourage the immigration of Jews to the Land of Israel. Heaven forbid that we should turn our country into a refuge for people who, during the course of quarrels in their married lives, smuggle their children away in contravention of the law and of justice. That way brings no blessing either to the country or to the children.¹³⁷

Chief Justice Smoira's opinion was seconded by Justice Dunkelblum, Justice Agarnat, Justice Assaf, and Justice Cheshin.¹³⁸ Justice Assaf and Justice Cheshin expressed serious hesitations and

132. *See id.*

133. *Id.* at 14.

134. *See id.*

135. *See id.*

136. *Id.* at 27.

137. *Id.*

138. *Id.* at 28–37.

misgivings,¹³⁹ while Justice Cheshin disagreed vehemently with Smoira about the role national considerations should have in a habeas corpus discussion of the child's welfare:

The ingathering of the exiles is not just an empty phrase, and each one of us here today, and each one who is not with us today, is fully and clearly cognisant of the fact, that every Jew who immigrates to Israel aids not only the restoration of the nation and the building of the land, but also ensures his own security and future and the security and future of his children and family. A child from Israel who becomes rooted in the land of his forefathers has been freed from the dangers of assimilation and annihilation.¹⁴⁰

However, Justice Cheshin concurred with returning the children to the mother's custody for their own benefit, reasoning in part that despite the father's good intentions regarding his children's education, the children were at present in an immigrant camp, far from the supervision of their mother and other family, dependent on the good will of others and living off welfare.¹⁴¹

A significant landmark in habeas corpus jurisprudence regarding kidnapped children, which *de facto* established the rule of law in the sense of the subordination of citizens and government authorities to the Supreme Court, was *Schumacher v. Shtarks*,¹⁴² which was also responsible for polarization and enmity between secular and religious

139. See *id.* at 28, 36; see also Pinhas Shifman, *The Welfare of the Child in Israeli Law – The Sole Consideration in the Laws of Minors?*, 3 INT'L J. L. & FAM. 185, 192, n.28 (1989) (critiquing the national misgivings with which the Amadou case Justices struggled).

140. HCJ 125/49 Amado v. Immigrant Camp Superintendent, 4 P.D. 30 (1950) (Isr.). Justice Cheshin had a completely different impression of the father and his actions than the other judges: "The father has opened a new chapter in his life. He has decided to settle among his own people, and to bring his children up in the spirit of Israel. I was not particularly impressed with the argument of counsel for the mother, that the father immigrated to Israel because he had kidnapped his children from their mother's home, and because he could find no other place to which to take them. The opposite is true: he took his children with him because he had made up his mind to abandon the life of exile and to live a Jewish life in his own land." *Id.* at 31.

141. *Id.* at 34–35.

142. See HCJ 10/60 Schumacher v. Shtarks, 14 P.D. 299 (1960) (Isr.).

Israelis.¹⁴³ Ida and Alter Schumacher had immigrated with their son, the six-year-old Yossele, and daughter to Israel from the Soviet Union.¹⁴⁴ Due to financial difficulties, among which was the family's lack of a permanent domicile, they entrusted their son to the mother's ultra-Orthodox parents.¹⁴⁵ After they secured a permanent domicile, they asked for the child to be returned to them, but the grandparents refused.¹⁴⁶ Yossele's parents petitioned the HCJ, and voiced their suspicion that the mother's parents are planning to leave Israel.¹⁴⁷ Chief Justice Olshan, and Justices Zussman and Witkon made the writ absolute and ruled that Yossele was to be returned.¹⁴⁸ They noted that the parents have the right of custody over the child, and the question of the child's welfare is not "so complicated or doubtful such as to require further investigation,"¹⁴⁹ and so they were entitled to habeas corpus from the HCJ and do not need to sue for custody in the court authorized for dealing with custody disputes (the District Court, at the time).¹⁵⁰ After the mother's parents persisted in their refusal to return the child, and eventually even smuggled him abroad, the Justices instructed for Yossele's grandfather to be arrested,¹⁵¹ and for an investigation into the affair by the Israeli police and the national intelligence agencies.¹⁵²

After these decisions, Yossele was located by the Mossad in an ultra-Orthodox family in New York, and returned to his parents in a

143. See Lucy Endle Bassli, *The Future of Combining Synagogue and State in Israel: What Have We Learned in the First 50 Years?*, 22 HOUS. J. INT'L L. 477, 496-97 (2000); see also Geraint Rees, *Extradition: The Extraditions Acts, 1870 - 1873*, 2 CAMBRIAN L. REV. 47, 53-54 (1971); Motti Inbari, *The Yossele Schumacher Affair: A Case Study of Israel's Response to Ultra-Orthodox Ideological Crime*, 61 J. CHURCH & STATE 20 (2019).

144. See Bassli, *supra* note 143, at 496.

145. See *id.*

146. See *id.*

147. See HCJ 10/60 Schumacher v. Shtarks, 14, 299 (1960) (Isr.). The respondents replied that it was Yossele's parents who were planning to emigrate, and this is why they are requesting to have the child returned to their custody.

148. See *id.*

149. In such a case, the burden of proof that the child's welfare requires the rejection of the petition of habeas corpus lies on the respondents, noted Chief Justice Olshan. However, he immediately qualified his statement, writing that it is possible that a court will not be convinced about the welfare of the child, even though the petitioners do not provide sufficient proof. *Id.*

150. See *id.* at 300.

151. See Motion 309/61 Shtarks v. Schumacher, 15 P.D. 1562 (1961) (Isr.).

152. See Motion 52/60 Schumacher v. Shtarks, 14 P.D. 780 (1960) (Isr.).

complex operation.¹⁵³ The *Schumacher* affair is a significant landmark in habeas corpus jurisdiction, not because of any doctrinal developments in it, but mostly because it established the primacy of the rule of law in the sense of the subordination to the HCJ of citizens and government authorities.¹⁵⁴

These two cases demonstrate well how the HCJ solidified the rule of law and its own authority by means of writs of habeas corpus. However, as its rulings became more frequent, it became harder to harmonize different decisions, and their implications for the HCJ's jurisdiction *vis-à-vis* the District Courts, which was the authorized court in child custody cases, and foreign courts. The habeas corpus doctrine in child abductions, as established by the precedents reviewed here, is composed by a competing set of reasons, rules, and principles that leaves plenty of discretion in the hands of the Court.

In all habeas corpus rulings related to child kidnappings, an inner tension can be sensed between this special procedure and the ordinary procedure conducted in courts authorized to resolve disputes between parents about custody of children.¹⁵⁵ An authorized court determines the identity of the parent entitled to full custody, and the other parent's visitation rights, on the basis of a review of the "child's welfare," in which the court establishes how the child will gain the maximum benefit from his or her separated parents. The HCJ is not this "authorized court," and takes the child's benefit into account not in direct deliberations, but rather only as a consideration against issuing the writ.¹⁵⁶ Hence, in most cases it is decided that the child will be returned to the place where he lived before the kidnapping, on the assumption that the "center of his or her life" is to be found there, and the courts there will deal with the matter directly.

153. See Inbari, *supra* note 143, at 29; Bassli, *supra* note 143, at 496–97.

154. See Inbari, *supra* note 143, at 21 (arguing that Ben-Gurion used the *Schumacher* affair to show that no group enjoys privileges that place it above the law).

155. See HCJ 125/49 Amado v. Immigrant Camp Superintendent, 4 P.D. 14 (1950) (Isr.) ("So long as the right over the child's care has not been determined by an authorized court, and the right itself is contested in a *bona fide* dispute, the prosecutor is still in need of the court's establishing of this right, and this kind of litigation falls under the personal status clause and is appointed, according to items 47, 51-54 and 64 of the King's Order in Council of 1922 to the authority of the District Court both for Israeli natives and foreigners, or—in particular circumstances—the authority of the religious courts. If the right has been established by the authorized court in favor of one parent, and the other acts against this and removes the child from its legal custody or continues to hold it unlawfully—in this case remedy will be provided by petitioning for habeas corpus.").

156. See HCJ 113/50 Rimon v. Rimon, 4 P.D. 781 (1950) (Isr.).

2. Habeas Corpus Rulings in Security Matters

The first judicial decision after the founding of the State of Israel, which established the framework of habeas corpus security rulings, and established the HCJ as the champion of the rule of law, defender of liberty and minorities, is the *El-Karbutli* case.¹⁵⁷ The petitioner, Ahmad Shuki El-Karbutli, requested a habeas corpus for the release of his friend, Hajj Ahmad Abu Laben.¹⁵⁸ The reason for the arrest of the detainee was never known to his lawyer, and the authorities kept putting off his meeting with the detainee, so that the request for habeas corpus ended up being made by the detainee's friend.¹⁵⁹ From the response by the state prosecutor, Chaim Cohen, it became clear that the detainee has been arrested by means of an administrative detention, signed by the Chief of Staff in accordance with ordinance 111 of the Defense Regulations (Emergency).

The petitioner argued that the arrest warrant made in accordance with ordinance 111 is illegal for three reasons. First, ordinance 111 is invalid, since it "violated the conditions of items 2 and 9 of the Mandate-era law," according to which the Mandate authorities are responsible for creating guarantees for the civil rights of citizens and establishing a legal system guaranteeing these rights.¹⁶⁰ Second, ordinance 111 contradicts the principles of "freedom, justice and peace in light of the vision of the prophets of Israel," on which the State of Israel was founded, as recorded in the Declaration of Independence.¹⁶¹ "Third, on the date of the issuance of the warrant of arrest, the review committee which sub-ordinance 111(4) was designed to establish was not yet in existence, so the entire ordinance 111 should not be activated."¹⁶²

The HCJ accepted the petition unanimously and instructed for the release of the detainee. This move was surprising, as the HCJ was quite young, and its institutional independence was still in doubt; nevertheless it was ready to grapple with the military authorities in the midst of a war of independence, and despite the fact that the detainee was an Arab resident in recently conquered territory.¹⁶³

157. See HCJ 7/48 *El-Karbutli v. Minister of Defense*, 2 P.D. 5 (1949) (Isr.).

158. See *id.* at 8.

159. See *id.*

160. *Id.*

161. *Id.*; HJC 10/48 *Zeev v. Gubernik*, 1 P.D. 85 (1948) (Isr.).

162. HCJ 7/48 *El-Karbutli v. Minister of Defense*, 2 P.D. 9 (1949) (Isr.).

163. See *id.*

However, a review of the rationale of the court in the *El-Karbutli* case reveals that the decision was based on extremely narrow constitutional grounds, while refusing to arrogate the authority to cancel primary legislation on the grounds of impingement upon rights.

Regarding the first reason, the HCJ accepted the argument of the petitioner that the Mandate law was binding on the Mandate authorities, and that all actions or laws undertaken must not contradict it.¹⁶⁴ However, it was determined that the items under consideration do not specify the nature of the rights which the Mandate is expected to guarantee, and do not specify to what extent one may legislate laws that curtail individual rights for the sake of the public good.¹⁶⁵ The HCJ further argued that the legislation of Administration Ordinance 111(1) itself was carried out in order to guarantee the welfare of the public, even if it was abused in the past.¹⁶⁶ Consequently, they rejected the petitioner's first reason.¹⁶⁷

As to his second reason, the justices repeated their position from the *Zeev v. Gubernik* case,¹⁶⁸ that even though the Declaration of Independence expresses the vision of the people, it is not a Constitution by which one may nullify and strike down legislation.¹⁶⁹

164. In this fashion the court accepted the Mandate-era Jewish leadership's claim, that the Defense (Emergency) Regulations, 1945, contradicted the Mandate writ, and thus are null and void. *See id.* at 26.

165. *See* HCJ 7/48 *El-Karbutli v. Minister of Defense*, 2 P.D. 12 (1949) (Isr.). The HCJ voiced a remark which has since been forgotten, and which holds that "courts do not create rights – that power belongs to the legislature. Courts merely ensure that existing rights are kept and honored." *Id.* This approach stands in stark opposition to a long line of Supreme Court precedents. *See* HCJ 1/49 *Bejerano v. Minister of Police*, 2 P.D. 80 (1949) (Isr.); HCJ 144/50 *Sheib v. Minister of Defense*, 5 P.D. 399 (1951) (Isr.); HCJ 73/53 *Kol Ha'am Co., Ltd. v. Minister of the Interior*, 7 P.D. 87 (1953) (Isr.); HCJ 176/54 *Yehoshua v. Appeals Tribunal Under the Invalids (Pensions and Rehabilitation) Law*, 9 P.D. 617 (1955) (Isr.); EA 1/65 *Yeredor v. Superintendent of Central Electoral Committee for the Sixth Knesset*, 19(3) P.D. 365 (1965) (Isr.).

166. *See* HCJ 7/48 *El-Karbutli v. Minister of Defense*, 2 P.D. 12 (1949) (Isr.).

167. *See id.*

168. *See* HJC 10/48 *Zeev v. Gubernik*, 1 P.D. 85 (1948) (Isr.).

169. *See* HCJ 7/48 *El-Karbutli v. Minister of Defense*, 2 P.D. 6 (1949) (Isr.). Some scholars argued that the *Zeev* decision, adopted almost literally and completely in *El-Karbutli*, squandered a historic opportunity to recognize the Declaration of Independence as the Constitution of the State of Israel. *See* Joshua Segev, *Justifying Judicial Review: The Changing Methodology of the Israeli Supreme Court*, in ISRAEL'S CONSTITUTIONAL LAW IN THE MAKING 105, 107 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013). Professor Pnina Lahav took this argument a step further when she claimed that by not recognizing the Declaration of Independence as Israel's Constitution, the HCJ adopted a majoritarian perception of democracy. *See* PNINA

The petitioner in *El-Karbutli* contested this position on the grounds that it is based on the assumption that the Declaration of Independence is a strictly political document.¹⁷⁰ The HCJ responded forcefully that the Declaration of Independence is not the Constitution, because the latter would have to be enacted by the Constituent Assembly.¹⁷¹

The petitioner's third reason was the one accepted by the HCJ. The HCJ reflected on whether the instruction in Ordinance 111(4) concerning the establishment of a review committee is self-standing, or whether it should be seen as a precondition for putting into effect the arrest authorities given to the military commander—an authority which should not be activated before a legal body has not been appointed to deliberate on objections to detention. According to the HCJ, the relative insignificance of the right to appeal to the counseling committee is itself a reason to suspect that the legislature's intention was that this right should be guarded zealously, so that at least one guarantee of his liberty will be reserved to the detainee—the critical supervision of a review committee.¹⁷² It is noteworthy that during deliberations on the *El-Karbutli* affair a counseling committee had already been established, and so the military commander did have the right to use ordinance 111. However, the HCJ rejected the State's argument that this is a formal, technical or trifling issue. The HCJ explained the authorities are no less subordinate to the law of the land as any private citizen and must use their force according to the limits placed by the legislature.¹⁷³

Hence, the HCJ confirmed the writ of habeas corpus and called for the release of the prisoner “unless there be some legal reason to detain him,”¹⁷⁴ and also ruled for compensation in his favor. To this end, the HCJ defended the prisoner and ordered his release. However,

LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 92 (1997).

170. HCJ 7/48 *El-Karbutli v. Minister of Defense*, 2 P.D. 13 (1949) (Isr.).

171. *See id.*

172. *See id.* at 14 (“There are strong reasons to suspect, therefore, that when the legislator placed such a dangerous weapon as ordinance 111 in the hands of the authorities, his intention was that the founding of a committee by the authorities will be a precondition for their putting the ordinance into effect.”).

173. *See id.*

174. In other words, the Supreme Court justices presented the military authorities with the loophole of re-arresting the detainee by issuing a new warrant of administrative detention, which will now be legal, since meanwhile the counseling committee had been established.

the critics are right in pointing out that the HCJ did not establish in *El-Karbutli* a broad constitutional defensive bulwark, which acknowledges individual and civil rights; it also did not strike down the Defense (Emergency) Regulations, 1945.¹⁷⁵ Moreover, the request that, prior to impairing the individual's liberty, a review committee will be formed, to which the individual could bring complaints, was also revealed to have only minor implications, since, as stated above, a review committee had already been established at the timewhen the HCJ deliberated *El-Karbutli*.¹⁷⁶ Hence, the value of this decision is in establishing the axiom of universal subordination to the law and to critical judgment; even administrative detention is not exempt. But this is the importance of the precedent.

Another foundational security habeas corpus decision, mentioned above, was *El-Koury*.¹⁷⁷ According to the security authorities, *El-Koury* presented a threat to the public, but they lacked the evidence to bring a criminal process against him for activities against the Jewish populace before the founding of the State of Israel and during the War of Independence. El-Koury petitioned the HCJ against his arrest, making three arguments: first, the warrant did not specify the name of the detainee; second, the warrant did not specify where the detainee was to be held; third, the Chief-of-Staff did not exercise his independent judgment, but had just rubber-stamped the recommendation of the arrest committee.

Justice Agarnat, joined by justice Olshan and Justice Silberg, instructed to release the petitioner, citing the seemingly technical defect that the warrant for the arrest of El-Koury did not specify a place of arrest, despite the requirement of ordinance 111(1) of the Defense (Emergency) Regulations, 1945. According to Justice Agarnat, the omission of the place of arrest is a substantial defect, given the concern for human liberty ensconced in the maxim of English common law that "every man is presumed innocent."¹⁷⁸ This grand rule matches the spirit of the Declaration of Independence and its affirmation that Israel will be founded on the principles of liberty,

175. This was indeed the criticism voiced about the Supreme Court's rulings in cases where the legal validity of the Defense (Emergency) Regulations, 1945, were under review.

176. Future attempts to use the precedent-setting statement in the *El-Karbutli* failed. For example, see HCJ 5973/92 Association for Civil Rights in Israel v. Minister of Defense, 47(1) P.D. 267 (1993) (Isr.).

177. See HCJ 95/49 El-Koury v. IDF Chief of Staff, 4 P.D. 34 (1950) (Isr.).

178. See *id.* at 37.

justice and peace.¹⁷⁹ With these words, Justice Agarnat deviated slightly from the approach which rejected the constitutional relevance of the Declaration of Independence as a source of rights and liberties, and softened the legal tradition established in the *Zeev* and *El-Karbutli* cases, according to which the Declaration of Independence cannot serve as a Constitution, which can be used to invalidate laws and orders.

Therefore, Professor Lahav is correct to claim that “the *El-Koury* judgment did not constitute a true breakthrough in the Israeli perception of civil liberty.”¹⁸⁰ This is because it largely relied on the British judicial model, which resolves such issues by means of the tools of administrative law – itself fundamentally a branch of common law, moving from case to case—rather than on the instruments of the American constitutional model. The HCJ’s assertion that an arrest warrant issued by virtue of ordinance 111, and which did not specify the place of arrest, as required by the ordinance, constitutes a severe defect which annuls the warrant – this claim too turned out to be a precedent of only limited significance.¹⁸¹ Hence, the value of this judicial decision lies in its establishing individual liberty as axiomatic, yet the questions about how and in what circumstances it may be limited remain unanswered.

These two decisions demonstrate well how the HCJ established the rule of law and its authority in security matters by means of habeas corpus. However, we can see clearly that the Court refused to set down substantial or procedural content regarding the causes and circumstances for issuing a writ of habeas corpus.

Another important decision which demonstrates the procedural

179. *See id.*

180. LAHAV, *supra* note 169, at 139.

181. *See, e.g.,* ADA 2/86 Anonymous v. Def. Minister, 41(2) P.D. 508 (1986) (Isr.) (a mistake was made in printing the date of the administrative detention warrant, which led to extending the detention by eighteen months instead of six months. The appellant claimed that the defect which was discovered is essential, and nullifies the warrant, since it applies to an essential component of the warrant. In this argument, the appellant made use of the ruling in the *El-Koury* case); *see also* HCJ 95/49 *El-Koury v. IDF Chief of Staff*, 4 P.D. 34 (1950) (Isr.). The HCJ rejected this argument, citing Justice Agarnat’s reasoning in the *El-Koury* case that “a merely technical imprecision will not suffice for nullifying a warrant.” In fact, the Supreme Court did make clear that issuing a warrant for a longer term than that specified by the Emergency Authorities Law (Arrests) of 1979 will count as an essential, not technical defect, if the warrant was produced deliberately for a longer period of time than that allowed by law. However, in this case the Supreme Court decided that the mistake is merely a “slip of the pen,” and consequently rejected the appeal.

and substantive emptiness of habeas corpus ruling is *Heruti v. Minister of Police* (1953).¹⁸² Yaakov Heruti's wife applied for habeas corpus for the release of her husband, arrested without a warrant by the police for allegedly violating the Ordinance of Official Secrets.¹⁸³ The question of the legality of the arrest depended on an interpretation of § 20 of the Ordinance, which stated that a violator of the order of official secrets may be arrested without a warrant. The question under dispute was whether this section permitted holding a detainee under arrest indefinitely, or whether the legislator's intent was only to authorize the police to catch and arrest the suspect without a warrant, but then to deal with him or her according to accepted procedures and bring the detainee before a Magistrate Court judge within 48 hours of the arrest. In fact, it turned out at the Supreme Court hearing that the respondent's position was that the detainee could be held indefinitely, but that meanwhile, the military prosecutor had issued an arrest warrant according to § 13 of the Terror Prevention Ordinance of 1948.

Justice Cheshin explained that "it has been decided many times that in habeas corpus cases the Court considers the state of affairs that holds on the day of the hearing of the response to the conditional writ."¹⁸⁴ Hence, if Heruti's arrest is legal according to the Terror Prevention Ordinance, there is no longer any need to deliberate on the interpretation of § 20 of the Official Secret Ordinance.

The counsel for the petitioner argued that this warrant is also illegal: according to § 8 of the Terror Prevention Ordinance, if the government declares in an official newspaper that a given group of people are a terrorist organization, that declaration will serve as proof in any legal hearing that this is the case. Indeed, the government had published such a notice, citing the aforementioned § 8, and alleging that a certain group of people, whose name the announcement mentions (sixteen people including Yaakov Heruti), are a terrorist organization. The petitioner's lawyer argued that when a person is accused of membership in a terrorist organization, the government must prove his or her affiliation with that organization. In the present case, however, the government had not officially declared the organization a terrorist organization, but only listed the people's names and called them a terrorist group.¹⁸⁵ By doing this, argued the

182. See HCJ 116/53 *Heruti v. Minister of Police*, 7 P.D. 615 (1953) (Isr.).

183. *Id.* at 616.

184. *Id.* (internal quotations omitted).

185. See *id.* at 617.

lawyer, the government had in effect convicted the detainee before he was brought to trial, an action that should nullify the arrest warrant. The HCJ rejected this reasoning:

At this stage of the proceedings, the court has only two questions: First, whether the military prosecutor had the authority to issue an arrest warrant. Second, if he followed the written procedure prescribed by law. The detainee is suspected of committing an offense under the Prevention of Terrorism Ordinance, since his arrest warrant was issued by a military prosecutor. However, there is no real proof that the military prosecutor acted without authority or deviated from the common practice. . . . At this stage of the legal process, the detainee is not yet on trial and the magistrate judge is not reviewing and assessing the evidence against the detainee. For the most part the evidence infrastructure is incomplete and one of the main purposes of the arrest is to give the police the time to collect this material without interruption. For the purpose of issuing an arrest warrant, it is sufficient, for example, if the police attorney declares under oath that there is a well-founded suspicion that the detainee has committed a certain offense. . . . Hence the case before us: the military prosecutor issued an arrest warrant against the detainee. The reason was undoubtedly the that the detainee was suspected of having committed one of the offenses stated in the Prevention of Terrorism Ordinance. However, this Ordinance specifies several offenses in addition to the offense of belonging to a terrorist organization. Thus, in order to issue the arrest warrant, the military prosecutor did not need the government's announcement at all.¹⁸⁶

The final case from the Supreme Court's formative period which we wish to discuss is the *Bouganim v. Chief of Staff*.¹⁸⁷ The petitioner, a mandatory service soldier in the IDF, was brought before a Military District Court and accused of several offenses, including reckless

186. *Id.* at 619.

187. HCJ 86/58 *Bouganim v. Chief of Staff*, 12 P.D. 1653 (1958) (Isr.).

behavior and threats against his commander. The military tribunal convicted the petitioner on all counts and gave him a prison sentence. The soldier then appealed to the Military Court of Appeals, which overruled one of the counts on which he had been convicted, but convicted him on another. The petitioner next turned to the Supreme Court, petitioning for a writ of habeas corpus on the grounds that he was being held unlawfully. The centerpiece of his complaint was that the Court of Appeals had overstepped its authority or that its decision was mistaken.

Justice Zussman rejected the petition. First, noted the judge, had the appellant been held by virtue of an unauthorized judicial decision, the HCJ would have instructed for his release without any further investigation or requirements.¹⁸⁸ However, explained Justice Zussman, no basis could be found for the claim of lack of authority, since it is precisely within the authority of the Military Court of Appeals to consider appeals from other military tribunals. A different question is whether the HCJ will instruct for the release of the petitioner through the principle of habeas corpus, if the military court made a mistake or misused its power in making its judicial decision. The answer to this question, according to Justice Zussman, is that even a judge who errs is acting within the bounds of his or her authority, for if else “only correct judicial decisions will be considered to fall within the bounds of authority, and there will be no end of deliberations, as the question may always arise whether a mistake has occurred in the decision, and it should be nullified for lack of authority.”¹⁸⁹ In such a case the HCJ will refrain from providing the petitioner with a habeas corpus remedy which would require his immediate release, but the petitioner may still appeal to the Supreme Court for a “writ of review,” asking the Supreme Court to review the correctness of the decision, and overrule it if made in error.

The reason for this conclusion stems from the distinction of habeas corpus in contrast to the alternative appeal procedure of the writ of review. First, Justice Zussman notes that in habeas corpus it is the prison director holding the detainee, who is required to justify the conclusion of the Military Court of Appeals:

This is an impossible injunction for the prison director: while it is true that he is responsible for not

188. See *id.* at 1658; see also Aryeh Rosenbloom, *Habeas Corpus - and the Writ of Review*, 15 HAPRAKLIT 104, 105 (1959).

189. HCJ 86/58 Bouganim v. Chief of Staff, 12 P.D. 1658 (1958) (Isr.).

detaining any man on the basis of a nullified judicial decision, he should not be burdened with the additional burden of defending the mistakes of a court, if such mistakes have been made.¹⁹⁰

Second, Justice Zussman raises broad systemic legal considerations:

While review processes are concerned with deliberation on the validity of the judicial decision, and the Supreme Court will decide the case in one way or another, in habeas corpus the Court is merely concerned with releasing a man from detention. Its reflection on the validity of the decision which led to his arrest will only be an incidental concern, which is not universally binding, and which applies only to the two parties concerned in the matter . . . To conclude: a decision which is overruled by the procedure habeas corpus has been overruled incidentally, and this cancellation is not an act of Court but rather applies only between the two deliberating parties. Between other parties, if the question should arise again whether the decision is right or wrong, the Court will be entitled to decide that it was legitimate, and the validity of the act is given only partially. This is an undesirable result, and we should prevent it by pointing out to the citizen the proper means by which he or she can overcome the judicial decision.¹⁹¹

We would like to pause and reflect on this systemic argument. Justice Zussman follows ancient common law maxim that habeas corpus does not create *res judicata*, which entails that one may always ask for it and seek a new court and judge who might accept one's petition.¹⁹² The basis for this practice was the significance attributed by English courts to human liberty, which they refused to weaken out of systemic procedural considerations. However, Justice Zussman notes a deficiency in this habeas corpus practice: habeas corpus does not realize the goal of the finality of judicial deliberations, and can

190. *Id.* at 1660–61.

191. *Id.* at 1661.

192. *See* Berenson, *supra* note 40, at 195.

even lead to contradictory results, when in one process it is assessed that a detention is illegal, and so the detainee should be released, while in another the same parties or others will determine that the detention is legal. In this way, Justice Zussman prioritizes considerations of directing behavior and the institutional considerations of judicial administration, and effectively establishes habeas corpus' inferiority to ordinary appeal procedures.

It is no coincidence that the usual praises for the importance of habeas corpus for the preservation of human liberty in a country which has no written constitution are absent from this judicial decision.¹⁹³ It is also no coincidence that the *Bouganim* case is cited frequently in contemporary jurisdiction, such as in the case of *Anonymous v. The Israeli Police*,¹⁹⁴ in which the status of the writ has been downgraded.

C. Israel's Constitutional Revolution and Habeas Corpus

A third factor leading to the decline of habeas corpus is Israel's "Constitutional Revolution". In 1992 the Knesset enacted two Basic Laws—Basic Law: Freedom of Occupation¹⁹⁵ and Basic Law: Human Dignity and Liberty.¹⁹⁶ They enshrined several human rights in Basic Laws, among them and relevant to our discussion are dignity¹⁹⁷ and

193. In an article from the late 1950s, legal scholar Aryeh Rosenbloom investigated the negative effect of the *Bouganim* case legal practice on civil liberties in a state without a constitution: "[a]nd here we must ask ourselves whether we can truly consider justified the narrow domain the Supreme Court has allowed for procedures of habeas corpus, which constitute one of the foundational guarantees of civil liberty. In a state without a written constitution, one that is particularly liable for constricting civil liberty due to its security situation and other concerns, any unnecessary restriction of habeas corpus (as well as of other prerogative procedures) could end up limiting civilians in their effort to realize one of the foundational liberties... Who could predict in advance all those unforeseeable circumstances that could arise in habeas corpus hearings, and where the Court will fail to redeem appellants deserving of a remedy?" See Rosenbloom, *supra* note 188, at 106.

194. See HCJ 594/16 *Anonymous v. The Israeli Police & Samaria Division & The Judean Military Court*, Nevo Legal Database ¶ 10 (2016) (Isr.).

195. See Basic Law: Freedom of Occupation, SH 114 (1992) (Isr.), as replaced by Basic Law: Freedom of Occupation, SH 90 (1994) (Isr.).

196. See Basic Law: Human Dignity and Liberty, SH 150 (1992) (Isr.).

197. See *id.* at §§ 2, 4. "PRESERVATION OF LIFE, BODY, AND DIGNITY: There shall be no violation of the life, body or dignity of any person as such." PROTECTION OF LIFE, BODY AND DIGNITY: All Persons are entitled to protection of their life, body and dignity."

liberty.¹⁹⁸ Since the enactment of the two Basic Laws, many Israeli legal scholars argued that Israel had undergone a Constitutional Revolution, which resulted in a formal constitution.¹⁹⁹ In *United Mizrahi Bank Ltd.*,²⁰⁰ Chief Justice Aharon Barak, joined by a majority of the Supreme Court, held that since 1992 Israel achieved, full-fledged constitutional review and that Basic Law: Human Dignity and Liberty enjoys normative superiority; hence new legislation that infringes upon rights protected by the two Basic Laws must satisfy the requirements of the Limitation Clause.²⁰¹

Since the *Mizrahi* decision, Supreme Court justices have evinced a noticeable normative preference to discuss questions of human liberty through the framework of judicial review of primary legislation and the tests of the Limitation Clause. The great constitutional decisions of the last few decades – even those dealing with classical topics previously controlled by habeas corpus, such as freedom from arrest and imprisonment on security and criminal grounds – are no longer considered subjects fit for habeas corpus. Thus, for example, in *Tsemach v. Minister of Defence* [1999],²⁰² a mandatory service soldier who was arrested by a military policeman and held for five days without being brought before a judge petitioned the HCJ.²⁰³ In his petition, he argued that the provisions included in the Military Jurisdiction Act - 1995, according to which he was arrested, contradict Basic Law: Human Dignity and Liberty and should be struck down by the Court.²⁰⁴ A short time after petitioning, the soldier was brought before a military tribunal, which extended his detention. After being put on trial, sentenced to two months and a half,

198. See *id.* at § 5. “Personal Liberty: There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.”

199. Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 83, 83(1993); Aharon Barak, *A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 36 n.70 (2002). For a critical assessment of the use of the term Constitutional Revolution with the enactment of the two Basic Laws and the resulting conclusion that Israel has a formal constitution: See Gary Jeffrey Jacobsohn, *After the Revolution*, 34 ISR. L. REV. 139, 139 (2000); Joshua Segev, *Who Needs a Constitution? In Defense of Non-Decision Constitution-Making Tactic in Israel*, 70 ALBANY L. REV. 409, 456–457 (2007).

200. CA 6821/93 *United Mizrahi Bank Ltd. v. Cooperative Village Migdal*, 49(4) P.D. 221 at ¶ 77 (1995 (Isr.)).

201. See *id.*

202. HCJ 6055/95 *Tzemach v. Minister of Defense*, 53(5) P.D. 241 (1999) (Isr.).

203. See *id.* at 248.

204. See *id.* at 249.

and serving his sentence, the soldier was released. Thus, the soldier reduced his petition and requested the court declare sec. 234 and 237a of the Military Jurisdiction Act null and void. The soldier's petition was united with another petition made by five officers serving as military legal defenders, who requested that the HCJ nullify these sections and prohibit arresting soldiers unless this is called for by the needs of the investigation, a concern over tampering with the legal process, or a risk of escape from justice.²⁰⁵

Justice Zamir, writing for the majority, noted that the two petitions are abstract and theoretical in nature, since they are not based on any set of facts and do not request a remedy for a particular case, but rather raise a general question.²⁰⁶ The original petition had been concrete, arguing that the petitioner is being detained by an invalid legal order, and so it petitioned for his release; but since the prolongation of the arrest by the military tribunal, that petition also become theoretical. Justice Zamir pointed out that as a rule, the Supreme Court refuses to deal with purely theoretical questions. Exceptions are to be made only when the petition raises an important question, the illegal conduct is capable of repetition, yet evading review since dispute or injury is short term. According to Justice Zamir, the *Tzemach* case may be considered such an exception:

It raises an important question, which implicates principles basic to the rule of law. It is a question of the authority to infringe on personal liberty by arresting and detaining someone without judicial oversight. The question arises every day, year after year, for many soldiers – according to the respondents, close to 10,000 soldiers each year. The question, however, is short-lived: it arises when a soldier is arrested by a military police officer; it is concrete for just a few days, until the soldier is released or brought before a military tribunal to extend his arrest, and then the question dies. . . . The end result would be to render the decision to detain soldiers immune from judicial review. That would be a harsh result, inconsistent with the rule of law.²⁰⁷

205. *See id.*

206. *See id.* at 250.

207. *Id.*

The absence of a writ of habeas corpus in Justice Zamir's words is glaring. If thousands of soldiers are arrested every year, and the decision to arrest them is impervious to judicial review, this is indeed an extreme consequence which cannot be squared with the rule of law. However, if this assessment is correct, the failure is first and foremost that of the institution of habeas corpus, the Supreme Court's main method of prevention of arbitrary detention. Minority Justice Kedmi was of the opinion that there is no justification for holding a discussion of such theoretical questions, stating that the pushing off the discussion of the question of warrantless arrest in the military to actual cases will not create an "immunity from judicial review."²⁰⁸ Justice Kedmi did not mention habeas corpus explicitly, but that is precisely the central tool of supervision of unlawful arrests in actual cases. Unease about the absence of habeas corpus from the words of Justice Zamir becomes even more pressing when we consider the fact that some of the petitioners serve as military defense lawyers: are they really unaware that arbitrary arrests can be legally avoided by making an emergency petition for habeas corpus? Certainly, this is common knowledge. However, it seems that the petitioners, like the majority justices, prefer to establish the rule of law by means of a general ruling that would directly target the legislation inimical to individual liberty. They prefer this to having to determine in each particular case, in an incidental manner that only obligates the two parties in this particular case.

Another case which demonstrates the decline of habeas corpus in the wake of the Constitutional Revolution is *Human Rights Section v. Minister of Treasury* [2009],²⁰⁹ in which the Supreme Court deliberated on the constitutionality of the policy of privatizing prisons. A majority of the Supreme Court (against the dissenting opinion of Justice Edmund Levy) accepted the petition and canceled the law amending the Prison Act, due to the disproportional damage caused to the constitutional rights to individual liberty and human dignity of prisoners, who will serve their sentence in a prison that would be managed and operated by a private corporation. This decision, similarly to that in *Tzemach*, relies on the importance of individual liberty, the fact that individual liberty is a condition for other liberties, and on the dire consequences of curtailing it.²¹⁰ A

208. *Id.* at 250.

209. *See* HCJ 2605/05 Human Rights Section v. Minister of Treasury, 63(2) P.D. 545 (2009) [Isr.].

210. *See id.* at 598–99.

complete account of the richness of arguments adduced by the majority justices for their conclusions about the illegality of the amendment to the Prison Act is beyond the scope of this article. At present, it will suffice to say that the majority judges determined that the transfer of the authority to manage and operate prisons from the state to a private for-profit corporation would contradict the right to liberty in a way that fails the Limitation Clause tests.

The Justice Edmund Levy concurred with the majority justices about the need to guarantee prisoners' basic rights, and that the privatization of incarceration services and their entrusting to a private corporation deepens the damage done to the prisoner's right to liberty and dignity. However, Levy dissented in the conclusions, as well as about the result of overruling the law.²¹¹ In his view, at the present stage the review is premature. Justice Levy considered that judicial review about the future is only legitimate when there is a significant risk of damage to protected rights, and a potential for such damage alone is insufficient, since the law's intent is to improve incarceration conditions in prison, and the financial profit is a means towards this end. In his view, the Limitation Clause is not a perfectly sound foothold when we are dealing with merely theoretical assumptions. Hence, his view was that this complex issue, including the question of its influence on basic human rights and on other protected values, should be tested out in reality before being brought before judicial review.²¹²

Levy's position in *Human Rights Section*, bearing a striking resemblance to Justice Kedmi's position in the *Tzemach*, shows how judicial review takes place in the age of the constitutional revolution, in fields previously controlled by habeas corpus: the Supreme Court protects human liberties from a theoretical, broad and principled perspective, divorced from concrete circumstantial considerations or the concerns of specific petitioner. In our opinion, the rejection of Justice Levy's minority opinion by the majority justices demonstrates their systemic and methodological preference to avoid deliberating on topics of human liberty from the perspective of the actual case and the specific person, which are hallmarks of habeas corpus. This systemic preference in the case of the *Human Rights Section* is particularly conspicuous if one considers the fact that even though the phenomenon of privatization is a new one, habeas corpus could still

211. See *id.* at 708.

212. See *id.*

have been utilized in these contemporary circumstances. As mentioned above, starting from the seventeenth century, use has been made of habeas corpus to supervise 'private' forms of detention, i.e. detention by private bodies for profit (e.g., the emancipation of slaves).²¹³

To avoid misunderstanding, it is important to note that the Supreme Court has made use of habeas corpus to impose and extend its authority over other institutions of government, as the decisions in the *El-Karbutli*, *El-Koury* and *Schumacher* cases demonstrate clearly. Nevertheless, in its formative years the Supreme Court established its authority very gradually, moving sequentially from case to case. By contrast, in the constitutional era, the Supreme Court prefers to assert its authority through wide-ranging, constitutional decisions that concern the constitutionality and interpretation of Knesset's legislation.²¹⁴

Having reviewed the judicial landmarks over recent years in guaranteeing human liberty, we can note also a discrepancy between the two institutions – habeas corpus and the judicial review of primary legislation, as it is applied by the HCJ today. This discrepancy comes to a head-on collision in the case of *Anonymous v. The State of Israel*²¹⁵ in at least three aspects. First, in *Anonymous v. State of Israel*, the Supreme Court discusses the "constitutional question" of extending a security suspect's detention in his absence, although the question is theoretical and bears no practical relevance for the petitioner's private matter.²¹⁶ Second, the Supreme Court in practice chooses the mode of action of overruling the law (which permitted holding hearings about security detainee's cases in absentia) instead of acting in a sporadic, individual way by granting habeas corpus writs instructing detainees to be brought before the court on a circumstantial and fragmentary basis, while reviewing the justification in preventing the participation of the detainee in the hearings, on a case-by-case basis. Third, the Supreme Court's decision in *Anonymous v. State of Israel* is a principled precedent, binding on any future person or institution who would seek to prevent the

213. See *supra* Part II.

214. Joshua Segev, *The Changing Role of the Israeli Supreme Court and the Question of Legitimacy*, 20 TEMP. INT'L & COMP. L.J. 1, 39–46 (2006).

215. See Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500 (2010) (Isr.) ¶ 1, 8–11 (2010) (Isr.) (Rivlin, E., J., opinion).

216. Criminal Matter Request 8823/07 *Anonymous v. State of Israel*, 63(3) P.D. 500 ¶ 8–11 (2010) (Isr.) (Rivlin, E., J., opinion).

presence of a security detainee in a discussion of his case. If it were a habeas corpus petition, the decision would have been incidental and valid only between the disputing sides; it would have sufficed to obligate the authorities to bring the detainee to court, but nothing more.

Furthermore, in recent years, when some petitioners and human rights organizations have tried to use habeas corpus petitions in a more principled way they were rejected unequivocally. In the 2020 case *Anonymous v. IDF Commander in West Bank*,²¹⁷ a request for habeas corpus was submitted to the HCJ in order to reveal the fate of a minor, detained a day earlier by the Israeli Security forces. By order of the Court, the respondent informed the Court the minor was detained in an operation against stones and Molotov cocktails throwers, and was released a day after his arrest subject to the deposit of bail by his father.²¹⁸ Notwithstanding the aforesaid, the petitioners requested not to erase their petition, on the grounds that the petition also includes a request for general relief addressed to respondents, to hold up-to-date information in real time on the arrest of suspects in security matters.²¹⁹ The Court outright rejected their request noting that, since the petitioners were provided with details of the circumstances of the detention, and when the detainee was released into the hands of his family members, the petition was therefore exhausted, and must be erased.²²⁰ The Court reasoned that in respect to the general relief sought, the petitioners did not satisfy the requirement of exhaustion of proceedings, and that entangling the general relief with the writ for habeas corpus, which is inherently an emergency remedy, is inappropriate.²²¹

Moreover, one can even detect a retreat from the perception, specified in *Rimon*, *Schumacher*, and the common law tradition, that

217. See HCJ 8354/20 *Anonymous v. IDF Commander in West Bank*, Nevo Legal Database (2020) (Isr.).

218. See *id.* at ¶ 2.

219. See *id.*

220. See *id.* at ¶ 4.

221. See *id.*; see also HCJ 7206/20 *Anonymous v. IDF Commander in West Bank*, Nevo Legal Database ¶ 6 (2020) (Isr.) (“After considering the matter, we found that the petition in its current form [as a habeas corpus] had exhausted itself and should be deleted. Once the details were provided to the petitioners regarding the circumstances of the petitioner’s arrest and his whereabouts, the essence of the petition became irrelevant. As for the other remedies requested, we found that in circumstances where the details of the case were clarified, these general remedies need not be litigated in this procedure.”).

habeas corpus applies between private individuals as well as between the individual and the state. In *Anonymous v. Israeli Police*²²² two parents petitioned the HCJ to locate their fourteen-year-old son, after living for several months with his grandparents and his uncle, and in circumstances somewhat similar to *Schumacher*.²²³ The parents petitioned the HCJ to order their son's return and the Israeli Police "to conduct a serious and comprehensive investigation" in order to find out the place in which the minor is being held by their relatives.²²⁴ The HCJ requested the police to update on the matter, but noted that it had been *ex gratia* since petitions of habeas corpus deal with allegation of unlawful detention or imprisonment of persons by the authorities and that the Israeli police do not need a judicial order in order to perform its function by law.²²⁵ After the police informed the Court that the minor had been located and had been admitted to the hospital by emergency order, after a psychiatrist's examination, the Court order the petition to be erased and remarked that there was no place to petition the HCJ, before exhausting all proceedings, and especially not to use a habeas corpus petition, whose functional authority is very different from the matter brought before the Court by the parents.²²⁶

Hence, in *Anonymous v. IDF Commander in West Bank* and *Anonymous v. Israeli Police*, the original view, according to which the principal role of HCJ is to defend, regulate, reform and enforce human liberty in the public and private spheres by the writ of habeas corpus has been abandoned. The modern view espouses habeas corpus as an emergency remedy not suited to the principled constitutional era and should be employed as a last resort against governmental authorities.

V. CONCLUSION

In this Article we have argued that in the last three decades one may mark a decline in the conspicuousness of the writ of habeas corpus in Israeli jurisprudence. We identified three factors for this decline: first, the development of substantive and procedural statutory alternatives, which made habeas corpus superfluous. Second, a review of habeas corpus in specific matters, such as custody

222. See HCJ 1571/21 *Anonymous v. Israeli Police*, Nevo Legal Database ¶ 1 (2021) (Isr.).

223. See *id.*

224. *Id.*

225. See *id.* at ¶ 4.

226. See *id.* at ¶ 5.

disputes between partners and security matters reveals that the use of the writ was lacking any procedural or substantive character from the very beginning. Third, the adoption of a judicial review of primary legislation led to the handling of constitutional disputes through a direct attack on primary legislation, and in accordance with test of the Limitation Clause of Basic Law: Human Dignity and Liberty.

The common denominator of these three factors for the decline of habeas corpus in Israel is the preference for grandiose constitutional engineering of the space of human liberty over small-scale constitutional engineering. In other words, both the legislature and the Supreme Court today prefer to protect human liberty from detention and imprisonment by means broad rules and deep principles, as we can see in both contemporary codifying legislation and principle-based constitutional review decisions. The legislature's motives for grandiose constitutional arrangements and those of the Supreme Court are not precisely congruent. The assumption behind the development of the statutory alternatives is that the legislator, rather than the courts, has the authority to determine the circumstances and conditions for denying a person his or her liberty. By contrast, the assumption behind the Israeli jurisprudence of judicial review is that the Supreme Court is entrusted with the defense of human liberty, and will examine the constitutionality of its denial in accordance with the tests of the Limitation Clause. What these two factors have in common is the desire to structure the space of human liberty through grandiose constitutional engineering.