UDC: 343.123.3(569.4) DOI: https://doi.org/10.56461/iup_rlrc.2022.3.ch2

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JUDICIAL STAY OF CRIMINAL PROCEEDINGS: AN ISRAELI DEVELOPMENT TO A BRITISH DOCTRINE

The right to a fair trial in criminal proceedings is one of the most basic constitutional rights. The way to achieve it is to ensure a "favourable neighbourhood" for this right i.e., constitutional law that recognises human rights, the tradition of judicial review, and a judicial system capable of scrutinising decisions of the Government. The last condition is specifically related to the capacity of a judicial system to review the prosecution's discretionary decisions and to stay or dismiss the proceedings when necessary. In the United Kingdom, the doctrine is known as the "judicial stay of criminal proceedings and is justified by the concept of "abuse of process". Israel "imported" the doctrine and has developed it in its own way. The prosecution's power is among the most far-reaching powers of administrative authorities. The need to restrain it asked for a mechanism, set in legislation or in case law, which would balance the goal of efficient enforcement of law and order with the preservation of fundamental values, including fairness, equality, and due process, to prevent distortion of justice. It became necessary to allow a defendant to raise arguments justifying the request to stay the trial, such as: delay in the criminal justice process; breach of promise not to prosecute; loss or destruction of evidence; investigative impropriety; prosecution's manipulative practices or misuse of process or power; selective and discriminatory enforcement; entrapment; prejudicial pre-trial publicity, etc. How do legal systems with limited and partial constitutional "tools" handle this essential principle of protecting fairness?

Keywords: criminal proceedings, constitutional law, judicial review, fairness, dismissal.

1. INTRODUCTION

The basic right to a fair trial in criminal proceedings is one of the most basic constitutional rights and an essential aspect of human dignity. The way to achieve it in a particular legal system is to ensure a so-called "favourable neighbourhood" *i.e.,* constitutional law that

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recognises human rights, the tradition of judicial review, and an independent judicial system that is willing to scrutinise acts and decisions of the Parliament and the Government. The last condition is specifically related to the capacity of a judicial system to review the prosecution's discretionary decisions and to stay or dismiss the proceedings when necessary and, specifically in our case, to review the discretion of the prosecution, and in some cases, to stay or dismiss the trial. In the United Kingdom, the doctrine of "judicial stay of criminal proceedings" (furthermore "JSOCP") is based on the concept of "abuse of process". Israel "imported" the doctrine and has developed it in its own way. Conceptually, the doctrine answers to one of the most significant challenges of legal systems: how to broaden the role of judges as protectors of human rights in a democracy.[1] The doctrine can be used to examine and explain the key elements of the British and Israeli legal systems. To this aim, we will take a closer look at the topic of prosecutorial discretion and judicial review. In criminal cases, the courts have absolute power to decide on someone's guilt or innocence. At the same time, in the UK and Israel alike, the legislator has in the past refrained from granting the court, by way of an explicit legal rule, the power to rule that an indictment filed by the prosecution is to be set aside. This applies even when the charge is obviously tainted with extreme unreasonableness or when conducting the trial is clearly in contrast to the public interest or is unfair. The range of persons authorised to prosecute is usually vast; it may include the Attorney General's office staff, police and municipal prosecutors, private authorised prosecutors, etc. Indictments are issued by district prosecutors, police prosecutors, and others without any prior judicial approval or pre-trial screening. In fact, the prosecutor controls the entire proceedings: filing the indictment, refraining from filing it, staying the proceedings, reaching a plea bargain, filing an appeal, and so forth. The UK and Israel follow the expediency principle. Prosecutor first analyses whether there is enough evidence for a realistic prospect of success in a case and then decides whether the prosecution is in the public interest. The powers of the prosecution are among the most far-reaching powers the state authorities can have. In light of the broad powers of the prosecution, it was essential to arrive at an arrangement, whether in legislation or in case law, which would balance the goal of enforcing the law and ensuring that criminals were punished, against the goal of preservation of fundamental values, including the presumption of innocence, the protection of human dignity, fairness, equality, and due process, in such a way as to prevent distortion of justice. Prosecutors must prosecute, not persecute. They must be consistent, fair, and objective. However, it can happen that they approach particular individuals harshly or gently for political reasons; it is also possible that race, religion, or nationality influences prosecutorial decision-making.

Therefore, the exercise of prosecutorial discretion calls for accountability. It became necessary, in the UK and in Israel, to allow a defendant to raise before the court arguments which could justify the request to stay and actually dismiss the trial, such as: delay in the criminal justice process; breach of promise not to prosecute; loss or destruction of relevant evidence; investigative impropriety; prosecution's manipulative practices or misuse of process or power; selective and discriminatory enforcement; entrapment; prejudicial pre-trial publicity (the so-called "trial by the media" and "moral panic"); unique personal

[1] Barak, A. 2006. *The Judge in a Democracy*. Princeton: Princeton University Press.

circumstances, etc. Under British case law, the court has the inherent authority to set aside an indictment which constitutes "abuse" of the defendant's rights given the circumstances of the case.[2] The approach adopted by the English case law, which originated in the demand to protect the defendant from the abusive practices of the prosecutorial authorities,[3] subsequently imposed a broader test, according to which the defendant needed merely to indicate "gravely improper" conduct of the prosecutor.[4]

In 2007, the Knesset *i.e.,* the Israeli Parliament, adopted an amendment to the Criminal Procedure Law (Amendment No. 51). This new law added another objection to the objections that the defendant was so far entitled to raise: "[…] The filing of the indictment or the conducting of the criminal proceeding is in material contradiction to the principles of justice and legal fairness." At first glance, it seems that the Parliament has thereby recognised a preliminary argument which exploits concepts of "justice" and "legal fairness" and granted the discretion to the court to decide whether it is proper to conduct the trial against the defendant regardless of the question of guilt or innocence, and even without examining all the relevant facts of the case. This new law emphasised a unique evolution of the doctrine of JSOCP, a rare legislative action based on British tradition.

The British literature on the doctrine is quite limited. There are only a few monographs on the topic.[5] The earlier studies are limited mainly to the British context[6] and they usually map the case law in Britain not chronologically but according to the different types of abuse.[7] Little discussion can be found about the justifications and the legal theoretical foundations of the doctrine.[8]

In this paper, the author analyses the doctrine through a new approach to hybridisation. The paper summarises the findings of an investigation into the relationship between the elements of constitutional law, judicial independence and legal doctrine relevant to the doctrine. The author presents a hybrid overview of the necessary elements that are found behind it.[9] It is interesting to examine how legal systems with limited constitutional "tools" at their disposal apply the doctrine in order to ensure the realisation of the principle of fairness. Both the UK and Israel are characterised by a lack of a comprehensive constitution. There are some "trends" or "winds" of "constitutionalism," nevertheless, neither of the two countries has a complete constitution. How this affects the court's ability to implement its

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[2] *A-G of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 935.

[3] *Connelly v D.P.P.* [1964] 2 All E.R. 401.

[4] *R v Looseley* [2001] 4 All E.R. 897. See also: *R. v Grant* [2005] EWCA Crim. 1089. *R. v* Beardall [2006] EWCA Crim. 577. *R. v Harmes* [2006] EWCA Crim. 928. *Jones v Whalley* [2006] UKHL 41.

[5] See mainly: L.-T. Choo, A. 2008. *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford Monographs on Criminal Law and Justice.

[6] Wells, C. 2017. *Abuse of Process.* 3rd ed. Oxford: Oxford University Press.

[7] Young, D, Summers, M. & David Corker. 2015. *Abuse of Process in Criminal Proceedings.* 4th ed. Bloomsbury: Bloomsbury Professional.

[8] The only comprehensive textbook in Hebrew is: Nakdimon, Y. 2021. *Judicial Stays of Criminal Proceedings.* 3rd ed. Nevo.

[9] Initial, different, and partial observations were made by the author in his previous short article: Zamir, A. 2014. Truth v. Justice: Judicial Stay of Criminal Proceedings Due to Principles of Justice and Fairness – an Israeli Development to a British Rule. *The Journal of Criminal Law*, 78(6), p. 511.

powers of judicial review and discretion when it comes to prosecutorial decisions? On the one hand, the paper will examine whether the primary justification for using the doctrine in the United Kingdom is of a procedural nature *i.e.*, one of "due process" used in order to avoid "abuse of process". On the other hand, the article will examine whether its primary justification in Israel is to be found in the constitutional principle of human dignity. The research highlights that the Israeli Basic Law on Human Dignity and Liberty from 1992 also emphasises the principles of justice and fairness. Even without a comprehensive formal constitution, and although the Basic Law speaks only about "liberty" and "dignity", we should wonder whether it is up to the courts to determine what is meant by these principles on a case-by-case basis. Do they also include the principles of due process and the right to a fair trial? Could the mechanism of judicial review and the principles of reasonableness, proportionality and equality be used as criteria for examining the public interest in the indictment, just as they serve for the examination of any administrative act, whether individual or general? Is it possible to "constitutionalise" or "codify" the doctrine? If there are different justifications, do they influence the courts' tendency or reluctance to apply the doctrine? As it seems, the types of justification or their sources have a lesser impact on the readiness of the court to apply the doctrine. Among the more relevant factors is the level of independence of the judiciary, the degree of its readiness to undertake judicial review of the acts of governmental bodies, and the way courts balance contradicting interests. Paradoxically, the broad discretion granted by the legislator to the courts on this matter has not led to greater recourse to the judicial stay of criminal proceedings. Can we determine or foresee the level of courts' readiness to use their authority in this regard? The answer is probably negative.

2. RELEVANT ASPECTS OF THE BRITISH CONSTITUTIONAL LAW

The UK has an unwritten constitution. In other words, no single document, or series of documents, is known as the Constitution. The lack of a codified constitution also means that there is no set of rules that is antecedent to the state and government institutions and could therefore be said to represent a foundation of the state. The most specific feature of the UK constitution is that it lacks a formal codification. UK, nevertheless, displays the broad characteristics of what has been termed liberal democracy and achieves this without having guarantees set out in a constitutional framework.[10]

Indeed, the concept of parliamentary supremacy is deeply rooted in Britain's cultural and legal tradition.[11] Britain is well known for exporting parliamentary democracy to different countries and legal systems worldwide, making it their rule of law.[12] The courts' incompetence to declare primary legislation void became part and parcel of the British

[10] Leyland, P. 2016. *The Constitution of the United Kingdom - A Contextual Analysis.* 3rd ed. Bloomsbury: Bloomsbury Publishing, pp. 55,60.

[11] Baker, A. V. 2001. So Extraordinary, So Unprecedented an Authority: A Conceptual Reconsideration of the Singular Doctrine of Judicial Review. *Duquesne Law Review*, 39(4), p. 729. Dicey, A. V. 2013. *The Law of the Constitution.* Oxford: Oxford University Press, pp. 27-50.

[12] For the history of Parliament see: Bradley, A. W. & Pinelli, C. 2013. Parliamentarism. In: Michael Rosenfeld, M. & Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, pp. 650-652.

legal system and Britain's social culture. Britain has traditionally painted the courts as disabled lawmakers and stressed their function as law-declarers. [13]

The British Human Rights Act 1998 (further "HRA") took effect on October 2, 2000.[14] The HRA assimilates the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (further "ECHR" or "Convention")[15] in British law. Some jurists and scholars consider the ECHR a pivotal factor in Europe's reaction to World War II, which created a new awareness of civil liberties and fundamental human rights.[16] One of the most crucial lessons the European countries learned from the Nazi Germany regime was to use constitutions and constitutional guarantees, which made a judicial review a tool for restraining the power of European governments and for preventing another "Weimar-style" democratic backsliding. The HRA challenges the old British concept of Parliament as an impeccable institution that can do no wrong. Scholars have noted that the HRA undoubtedly may become one of the most fundamental constitutional documents since the Bill of Rights, which will cardinally affect the practice of traditional constitutional principles and the British legal culture.[17]

Another pivotal element that plays a vital role in democracies is the element of trust. Trust is one of the most crucial foundations of political legitimacy.[18] In the UK, unlike in the United States, most people do not have a mindset of distrust for the Government and do not display an inherent suspicion of the political authorities like Parliament and Government. Therefore, a more restrained judicial review of administrative actions has evolved there. British judges are generally reluctant to limit the exercise of ministerial administrative power.[19] This model, which is anchored in British tradition and would not necessarily function well in other legal systems, does not necessarily focus on the judiciary as a guardian of human rights. One may argue that this trend might even strengthen due to the 2016 vote to leave the European Union ("BREXIT"). The Human Rights Act – the main instrument for the protection of human rights in the United Kingdom – will expectedly not be directly affected. However, the formal disappearance of the EU fundamental rights law from the United Kingdom legal order will lead to a more general disenchantment with human rights law. This development is likely to lead to heightened uncertainty in this area, particularly if the Government decides to go ahead with plans to repeal the Human Rights Act.[20] It is open to debate whether this change will have any effect on the JSOCP doctrine or not.

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[13] Curtis, M. 1997. The Government of Great Britain. In: *Introduction to Comparative Government*. 4th. ed. London: Pearson, pp. 48-89.

[14] The British Human Rights Act. 1998. Available at: https://www.legislation.gov.United Kingdom/United Kingdompga/1998/42 (2. 10. 2022).

[15] European Convention for the Protection of Human Rights and Fundamental Freedoms. 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (2. 10. 2022).

[16] Young, J. 1999. The Politics of the Human Rights Act. *Journal of Law & Society*, 1999(26), p. 27.

[17] Hunt, M. 1999. The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession. *Journal of Law & Society*, 26(1), p. 86.

[18] Misztal, B. A. 1996. *Trust in Modern Societies.* Cambrige: Polity Press, p. 245.

[19] Curtis, M. 1997. The Government of Great Britain. In: *Introduction to Comparative Government*, 4th. ed. London: Pearson, p. 89.

[20] Lock, T. 2017. Human Rights Law in the UK After Brexit, *Public Law,* 2017 (supp. 1), p. 117.

3. THE DEVELOPMENT OF THE DOCTRINE IN THE UK

In British criminal law, known as the "abuse of process" principle,[21] the JSOCP doctrine is well-established in the British legal system. We may argue that the doctrine combines two main aspects presented above: taking human rights into account and exercising judicial review. It was created in 1964 in the House of Lords' judgment in the case of *Connelly*.[22] The case concerned a defendant who took part in an armed robbery during which a man was killed. Though found guilty of murder, the conviction was later overturned in an appellate court on the grounds that the judge misdirected the jury in the first instance. Later, the defendant was retried on the same sequence of events for committing robbery. The defendant's claim that he was already tried for these events was overruled since the murder he was prosecuted for in the first trial was materially different from the robbery felony he was accused of in the latter.

Notwithstanding this, the House of Lords raised the question of whether the second indictment against the defendant – issued for the same sequence of events he was already tried for – constitutes an "abuse of process" that justifies the second trial's dismissal. The House of Lords determined that the second trial does not constitute an abuse of process since the United Kingdom criminal proceedings at the time prevented combining murder and robbery crimes in a single indictment. Nevertheless, in this judgment, the House of Lords established the foundations of the "abuse of process" criminal law doctrine, also called the "judicial stay of criminal proceedings" doctrine. The Court mentioned that British criminal law has always acknowledged the court's jurisdiction to prevent injustice toward the defendant. That was evident over the years from the judicial discretion exercised by courts in the UK, securing justice for the defendant. Lord Devlin indicated that if no restrictions are put on the prosecution's power to break one criminal case into several indictments, the defendant may suffer injustice and abuse of process. It is appropriate and desirable that the court would deliberate a single factual case just once in order to maintain public trust.

The Court's ruling in the following years expanded the doctrine's application to many other situations since the rationale that a court may dismiss proceedings in cases of abuse of process seemed appropriate in other cases, as seen in a variety of examples. For instance, the doctrine was mentioned in cases of impairments in the acts of the investigative authorities which may have damaged a defendant's ability to defend himself; it was implemented in indictments which were filed merely to prevent the application of the statute of limitation; it was pointed out regarding filing an indictment a very long time after the offences were allegedly committed, which could have impaired the defendant's right to defend himself; it was invoked in situations where the authority was involved in the crime the defendant was accused of or entrapped the defendant into committing a crime; it was applied when

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[21] L.-T. Choo, A. 2008. *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford Monographs on Criminal Law and Justice. Young, D, Summers, M. & David Corker. 2015. *Abuse of Process in Criminal Proceedings*. 4th ed. Bloomsbury: Bloomsbury Professional. Wells, C. 2017. *Abuse of Process*. 3rd ed. Oxford: Oxford University Press.

[22] *Connelly v D.P.P.* [1964] 2 All E.R. 401.

the authority tried to withdraw from an agreement not to prosecute the defendant for a criminal act. The doctrine was applied as well in various other situations where prosecuting the defendant was unjust, or concerns were raised regarding potential abuses of his right to a fair trial.

The 1993 judgment in the case of *Bennett*, ruled by the House of Lords, is another milestone in the evolution of the abuse of process doctrine.[23] The House of Lords determined that the judiciary is accountable for the rule of law, including *inter alia*, ensuring that the state authorities abide by the law. Applying judicial criticism to the authorities' conduct and preventing violation of individuals' fundamental rights is the duty of the judiciary and the way to ensure the accountability of state authorities. Thus, the Court has the authority to impede the law enforcement authorities from wrongdoing before submitting the indictment and from abusing their power. Consequently, declaring the submission of the indictment against the defendant as an abuse of process and hindering the trial from being held represents a realisation of the court's responsibility.

In the 2001 *Looseley* case,[24] the House of Lords determined that entrapment circumstances in which the authorities seduce a defendant to commit a felony are an abuse of process and may thus justify the remedy of ordering a stay of proceedings for the defendant.

It seems that the JSOCP is a procedural remedy by which the court can halt the prosecution and prevent it from initiating proceedings on the grounds that the prosecution would amount to an abuse of process. The court's authority to stay criminal proceedings on such grounds is known as the "abuse of process doctrine" or the "abuse of process discretion".[25] It derives from the general responsibility of the court to regulate proceedings.[26] Choo observes that in determining whether to stay the proceedings on the above basis, the court is effectively reviewing the exercise of prosecutorial discretion by the executive. As we saw, in the landmark case of *Bennett*, Lord Lowry identified two categories of cases in which a court has the discretion to stay the proceedings on the basis that pursuing those proceedings will constitute an abuse of its own process "either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case".[27]

Although English courts have occasionally spoken of a stay as a remedy, and despite its vagueness, the usual justification for a stay is to protect the judicial process and the rule of law.[28] Accordingly, the courts have spoken of maintaining the "integrity of the judicial process", "fairness", "upholding the rule of law", keeping the "public confidence in the criminal justice system", etc. It must be emphasised that the above expressions, especially the "fairness to try" terminology, have been subject to criticism. Choo wrote in this regard:

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[23] *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All E.R. 138.

[24] *R v Looseley* [2001] 1 W.L.R. 2060.

[25] L.-T. Choo, A. 2008. *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford Monographs on Criminal Law and Justic, p. 1.

[26] In *R v Beckford* [1996] 1 Cr App R 94, the Court of Appeal even referred to this duty as "constitutional".

[27] *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All E.R. 138.

[28] Wells, C. 2017. *Abuse of Process*. 3rd ed. Oxford: Oxford University Press, pp. 8-9.

> "It is confusing, to say the least, to use the term "unfair trial" to connote a trial that has the potential to result in a factually incorrect guilty verdict and to say that it would be unfair to try a defendant in circumstances where, even if a "fair trial" can be held, it will nevertheless be inappropriate to try the defendant because of considerations of moral integrity. To make matters even more confusing, the courts sometimes display lack of care in their use of these terms".[29]

At the outset, it is fair to say that all those rhetorical exercises are of no use for the attempts to define the test for the application of the JSOCP. In effect, they even raise doubt on whether there is any relevant test. A workable test defined with precision, and stripped of vague value judgments, is probably an unrealistic goal. However, we must not be discouraged by the use of all those vague expressions, such as "fairness", "rule of law", and "public confidence"; they do reflect sentiments that most people understand. Moreover, there is a notable lack of constitutional terminology in the discussions on this matter, which barely involve justifications that recall human rights, such as human dignity.

4. THE RELEVANT FEATURES OF THE ISRAELI LEGAL SYSTEM AND ITS CONSTITUTIONAL LAW

When the British left Israel in 1948, they left behind a mixed system of governmental law - one part of it based on English law and the other part remaining Ottoman. The mandatory legacy shaped many aspects of Israeli law. It is found first and foremost in the general characteristics of the legal system. The Israeli legal system inherited from the mandatory law several important features: the respectful attitude to precedent; the notion that judges have an active and essential role in creating norms; the centrality of lawyers in the conduct of legal proceedings; the unified structure of the court system; and many other general characteristics. Even when a branch or several branches of Israeli law underwent partial processes of continentalisation (for example, civil law that has been in a continuous process of codification in recent decades based on models taken from continental Europe), the Israeli legislature maintained a mandatory conception, mainly regarding the role of judges.[30] Therefore, the absorption of the doctrine of JSOCP in Israeli law does not raise any wonder or difficulty.

The Declaration of Independence, back in 1948, stated that the state of Israel "will be based on freedom, justice, and peace […] will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or gender […] will guarantee freedom of religion, conscience, language, education and culture and will safeguard the holy places of all religions".[31] Yet, the Declaration is not a constitution. The

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[29] *Ibid,* p. 187.

[30] Shachar, Y. 1995. History and Sources of Israeli Law. In: Shapira, A. & DeWitt-Adar, K. (eds.), *Introduction to the Law of Israel*. The Hague, p. 1.

[31] The Israeli Declaration of Independence. 1948. An English version of the Declaration is available at: https://main.knesset.gov.il/en/about/pages/declaration.aspx (2. 10. 2022).

Knesset decided not to draft a constitution but to prepare basic laws - each to be a chapter of the future constitution. As of today, there are 13 basic laws in Israel. These basic laws deal with the formation and role of the principal state institutions and their relations. A few of them also protect certain civil rights. While these laws were initially meant to be draft chapters of a future Israeli constitution, they are already used daily by the courts as a kind of constitution. Yet, the basic laws do not deal with all constitutional issues, and there is no deadline to complete the process of merging them into one comprehensive constitution. Only a few basic laws have a "limitation clause", such as the Basic Law on Human Dignity and Liberty, enabling the courts to exercise judicial review of legislation. However, the right to a fair trial is not explicitly mentioned.

The system that develops in a country with an unwritten constitution and an unwritten bill of rights depends on the content of the laws prevailing in the country and on the interpretation of the laws by the judiciary. In the Israeli legal system, which has neither a written constitution nor an entrenched bill of rights, human rights guarantees are incorporated into the constitutional arena by a presumption developed by the Supreme Court.[32] This presumption ensures that civil rights will be upheld. In practice, based on decades-long experience, this strong presumption enables the courts to modify the ordinary meaning of statutory provisions so that they will be consistent with the concept of civil rights. According to the prevailing interpretation, the legislature has no intention to curtail civil liberties.

The Israeli Supreme Court's endeavour to secure civil rights is exemplified by the landmark decision of *Kol Ha'am* from 1953.[33] *Kol Ha'am* dealt with the power of the Minister of Interior to prevent any newspaper from publishing material that is, in its opinion, "likely to endanger the public peace". The Supreme Court flexibly interpreted the statute, basing its ruling on the presumption of civil rights under which every law should be interpreted. The impact of this decision on Israeli constitutional law was to achieve a judge-made constitutional doctrine, much like the formal constitutional doctrine of the United States.[34]

In March 1992, an event took place in the Israeli constitutional arena which had a significant impact on the Israeli interpretation of the JSOCP doctrine. The Knesset enacted two new basic laws: the *Basic Law on Freedom of Occupation*[35] and the *Basic Law on Human Dignity and Liberty.*[36] These laws, which formed a constitutional revolution and a constitution in miniature, created a new era in Israeli constitutional law. They recognised several fundamental rights - freedom of occupation, the right to property, the

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[32] Grimm, D. 2003. Types of Constitutions. In: Rosenfeld, M. & Sajó, A, (eds.), *The Oxford Handbook of Comparative Constitutional Law*, p. 106.

[33] H.C.J. 73/53 *Kol Ha'am v Minister of the Interior*, 7 P.D. 871 (1953) [Hebrew]. An English version is available at: https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior (2. 10. 2022)

[34] Halmai, G. 2013. The Use of Foreign Law in Constitutional Interpretation. In: Rosenfeld, M. & Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, p. 1340.

[35] The Basic Law on Freedom on Occupation. 1994. An updated English version is available at (the 1994 version replaced the 1992 version): https://knesset.gov.il/review/data/eng/law/kns13_basiclaw_occupation_eng.pdf (2. 10. 2022).

[36] The Basic Law on Human Dignity and Liberty. An updated English version is available at: https://www.mfa.gov.il/mfa/mfa-archive/1992/pages/basic%20law-%20human%20dignity%20and%20liberty-.aspx (2. 10. 2022).

right to freedom, privacy, and human dignity - and provided that these rights could not be infringed save by legislation that meets certain specific criteria.

The new basic laws opened the door to judicial review of statutes to an extent previously unknown in Israel. Thus, the "limitation clause" made it possible for a court to annul a law endorsed by the Knesset if, in its view, it conflicted with the fundamental rights safeguarded by the basic laws and did not "accord with the values of the state of Israel" - an imprecise term of uncertain boundaries. [37] The fact that legislation has not confined the power to annul laws to a particular constitutional court (such as in France, Germany, and Italy) has opened the gates to a phenomenon with which Israel is still unfamiliar. In addition to their power to annul specific laws, the basic laws have far-reaching implications for the interpretation of existing legislation and the delimitation of the authority of governmental agencies. Recognition of human rights in the Basic Law on Human Dignity and Liberty is general and all-embracing and may even evolve into a substitute for a constitution that expressly addresses fundamental rights, such as equality or freedom of expression. Human dignity can encompass equality before the law, freedom of expression and assembly, the right to due process, and more. In any event, in enacting the new basic laws, the state of Israel has joined the family of nations that believe that limitations must be set on the right of a majority to derogate from fundamental human rights.

5. HOW ISRAEL IMPORTED AND IMPLEMENTED THE DOCTRINE?

The Israeli constitutional model determined that JSOCP is a constitutional remedy provided to a defendant by a criminal court in case of violations of the human rights defined in the Basic Law on Human Dignity and Liberty. In accordance with this basic law, the defendant has a constitutional right to a fair trial. This constitutional model enables the court to stop judicial proceedings in a case where to prosecute a defendant and conduct legal proceedings would unjustly impair his right to dignity, liberty, and due process. This right might be realised in Israeli law if the limitation clause of the Basic Law on Human Dignity and Liberty was applied. The limitation clause states that fundamental rights should not be harmed unless for right reasons that adhere to Israel's values and have a reasonable scope. The constitutional model is applied to determine the scope of the defendant's constitutional right, the extent to which this right should be protected under the circumstances, and the applicability of the JSOCP doctrine in the case.

The court should therefore execute a two-phased balancing test. In the first phase, the court will internally examine the balance between the defendant's rights and other basic rights. At the end of this phase, the court will determine whether the defendant's human rights were breached. If such a right were indeed breached, the Court would conduct a second external phase of balancing between the breach of human rights and the opposing values and principles that constitute the public interest in the case. At the end of the second phase, the scope of protection that should be granted to the defendant will be determined. In a case in which the seriousness of the violation of a defendant's human rights justifies

[37] Barak-Erez, D. 1995. From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective, *Columbia Human Rights Law Review*, 26(2), p. 309.

stay of proceedings, the defendant will be entitled to JSOCP. The prosecution proceedings will be halted as unconstitutional, either by an order stating the defendant should not be indicted (in case the hearing is conducted at the Supreme Court prior to the indictment) or by applying the authority of the criminal court to cancel the indictment (in case of a decision that was made after the indictment was submitted).

The Supreme Court deliberated a claim for JSOCP for the first time in a comprehensive judgment from 1996. In the case *Yefet*,[38] the Court deliberated on the bankers' conviction in the "bank stock adjustment" case. It rejected the defence's claim that the criminal proceedings should not have been initiated in the first place for various reasons, including the authorities' own involvement in the shares' adjustment. The defence argued that the indictment should be dismissed by applying the JSOCP based on the authorities' misconduct. The majority opinion held that JSOCP is not applicable under the circumstances of the case. While presenting the court's decision, Justice Levin said that, in principle, a claim for JSOCP should be used only in cases when the authority "used its power in an exceptionally unfair and unjust way". The court adopted the test of "an outrageous conduct by the authority that involves persecution, oppression, and abuse of the defendant […] when it comes to cases the mind cannot tolerate, where conscience is shaken, universal sense of justice is gravely compromised, and the court is flabbergasted by".

In the years to come, the *Yefet* test was a leading test which practically turned the claim for JSOCP into a "dead letter" in the Supreme Court's rulings. An additional Supreme Court rulings indicated that the Court is willing to acknowledge the claim for JSOCP as case law, but one that should not be ruled. This was especially obvious in the case of *Kogen,* which was ruled in 1997.[39] The case involved soldiers who took part in a military mutiny and were prosecuted despite an explicit promise of the state not to do so. The Court refused to intervene in the state prosecution authority's decision, emphasising the gravity of the matter and the public interest. Despite the reasons provided by the Court, the violation of principles of judicial justice and fairness to the detriment of defendants was undeniable and might have caused distrust in the authorities' promises in future similar cases. It is worth noting here the Privy Council ruling in Phillip's case.[40] In a 1995 ruling, the Privy Council accepted the claim of the coup leaders who seized the local Parliament that they should be granted leave because of the injustice caused by violating the pardon they received during negotiations.

A change of direction can be found in the 2005 Supreme Court judgment in the case of *Borovitz*.[41] In that case, the district court convicted an insurance company, its CEO, and two additional officers for offences concerning restrictive agreements they have formed in various insurance fields in contravention to the Antitrust Law. The insurance company was fined, and the officers were subjected to prison sentences, probation, and fines. Claiming application of JSOCP, the appellants pleaded dismissal of the indictment

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[38] Yefet v the State of Israel, P.D. 50 (2) 221 [1996] Crim. App. 2910/94.

[39] H.C.J. 5319/97 Kogen v the Chief Military Prosecutor, H.C.J. 5319/97 [1997] P.D. 51 (5) 67. An English version is available at: https://versa.cardozo.yu.edu/opinions/kogen-v-chief-military-prosecutor. (2. 10. 2022).

[40] *A-G of Trinidad and Tobago v Phillip* [1995] 1 All E.R. 935.

[41] *The State of Israel v Borovitz*, P.D. 59 (6) 776 [2005] Crim. App. 4855/02.

and cancellation of the judgment against them based on their discrimination relative to others who formed restrictive agreements, yet were not prosecuted. They claimed to be victims of a ban imposed by their agreement partners, who, as a result, joined the restrictive agreements only to mislead them. Additionally, they claimed impairments in the procedure of authorising the private detectives who investigated the case and, in the way, the criminal investigation procedure was conducted. In merits, the claim for JSOCP was rejected based on the observation that the criminal procedure conducted in the case did not clearly harm the principles of justice and fairness in a way that justifies the stay of the proceedings or their acquittal.

In the *Borovitz* case, the Court expressed a central reservation concerning the narrow test, determined in *Yefet's* case, for a JSOCP to be applicable. The Court ruled, as stated by Justice Eliyahu Matza, that "it should not be dismissed that the harm in the sense of justice and fairness may be referred not solely to an outrageous act by the authorities but, for example, to their negligence or even to circumstances the authorities have no control over, yet clearly bring to the conclusion that the defendant in a case cannot be fairly tried, or that the criminal proceeding itself will materially harm the sense of justice and fairness". Thus, it seems that the claim for JSOCP should not be evaluated solely in relation to the authorities' conduct but instead viewed from a broad perspective, including the circumstances of the case as a whole.

Having said that, it should be noted that the reservation the Court expressed regarding the *Yefet* test is not absolute. The test developed in *Yefet's* case was viewed by the Court as suitable in cases of judicial estoppel and it was noted that in different cases, different levels of precaution might be taken, often a lower one. The Court also stressed that not every inadequate act of the authorities – be it the investigative, the judicial, or a different one – justifies a JSOCP. The Court will place great weight on the public interest in holding the trial. It will deliberate on other means for addressing the flawed acts of the authorities before taking the radical measure, such as JSOCP, which should be taken only in "highly extreme cases" and after the defendant shows a clear causal relationship between the authority's misconduct and the violation of his rights. Applying JSOCP is supposed to reflect, according to the judgment, a proper balance between all the principles, values, and interests the criminal proceedings involve. Thus, the Court would take into consideration a number of different aspects of the concrete case. On the one hand, there are the interests involved in prosecuting the defendants and executing legal proceedings, the imperative of revealing the truth, protecting public safety, protecting the rights of the victim, and, on the other hand, protecting the defendant's fundamental rights, revoking flawed actions of the public authorities and the need to deter them from repeating these errors in the future, observing the integrity of judicial proceedings and preserving public trust in the legal system. The Court clarified that the question of whether to apply JSOCP will be examined in three phases. In the first phase, the Court will identify the flows in the procedure, regardless of the question of whether the defendant is guilty. In the second phase, the Court shall examine whether, due to the flaws, conducting the criminal proceedings will "acutely damage a sense of justice and fairness". In this phase, the Court must balance different relevant interests and consider the actual circumstances of the case. It will consider the

severity of the felony the defendant is accused of, the strength of the evidence, the personal circumstances of the defendant and of the victim of the felony, the gravity of violations of the defendant's rights, the extent of liability of the authority, and whether it acted maliciously or in good faith. In the third phase, the Court will consider remedies and whether, rather than dismissing the indictment altogether, the flaws identified may be fixed in mild and proportional ways, such as dismissing specific accusations, dismissing a piece of evidence, or reducing the punishment.

The Supreme Court viewed the case-law set in the case of *Borovitz* as an expansion of the previous precedent set in *Yefet's* case. In the case of *Rosenstein*[42], the Court ruled that JSOCP may be claimed not only in the narrow sense of criminal proceedings but also in extradition proceedings, either as an "internal" claim in the extradition proceedings or an "external", a general one, in the Court. As stated by Justice Edmond Levy, using the test for JSOCP, which may have led to rejecting the extradition request, was applicable since "there were serious concerns of violating either the principles of justice and legal fairness or the right to a due process".[43]

The Basic Law on Human Dignity and Liberty reinforced the principles of justice in criminal law. The JSOCP law completes it and further fortifies the protection of individual rights to due process. The legislator developed and expanded a case law, enabling a better ecosystem to protect justice and fairness in criminal law. The case law evolved before the legislation. It started by acknowledging the applicability of the JSOCP claim only in exceptional circumstances where the public authority's conduct is "outrageous, involving prosecution, oppression, and abuse of the defendant". It continued in a more liberal approach, also applied in trial courts, saying it is sufficient that "conducting a fair trial to the defendant cannot be ensured, or that executing the criminal proceedings will genuinely harm the sense of justice and fairness" in order to acknowledge the claim. This evolution resembled the evolution of the doctrine in Britain, which started with setting a criterion of "abuse" by the prosecution authorities toward the defendant and later formed a broader criterion according to which an indication of "severe inappropriate misconduct" by the defendant is sufficient.

The rulings in Israel paved the way to legislate the JSOCP law, but the legislator developed and intensified the case law to enhance justice. In 2007, the Knesset adopted the amendment to the Criminal Procedure Law (Amendment No. 51). This new law added a preliminary argument to the arguments that the defendant is entitled to raise: "[…] The filing of the indictment or the conducting of the criminal proceeding is in material contradiction to the principles of justice and legal fairness." At first glance, it seems that the Parliament has, thereby, recognised a preliminary argument which exploits concepts of "justice" and "legal fairness" and the granting of discretion to the Court, which may decide whether it is proper to conduct the trial against the defendant regardless of the question of guilt or innocence, and even without examining all the relevant facts. This new law emphasised a

[42] Rosenstein v the State of Israel [2005] Crim. App. 4596/05. An English version is available at: https://versa.cardozo.yu.edu/opinions/rosenstein-v-state-israel (2. 10. 2022).

[43] Ibid, section 10 of the judgment. The claim for JSOCP was rejected on merit since the appellant did not prove that the decision to extradite was discriminatory.

unique evolution of the doctrine of JSOCP, a rare legislative action based on British tradition.

The road the legislator walked on is broad, in which a material "contradiction" to principles of justice and fairness may lead to an indictment dismissal, even if no actual "harm" was done to the defendant.

According to the JSOCP law, the Court is somewhat required to step into the prosecution's shoes and decide whether to refrain from an indictment or dismiss it due to principles of justice and legal fairness. The Court was explicitly permitted to do so by the law and is obliged to realise the legislation's purpose while balancing it with other interests of criminal law. It is a subtle balance that requires the understanding that convicting criminals could unjustly harm the rights of the defendant and, thus, contradict to the public interest. Executing the JSOCP law requires a new mindset that the Basic Law on Human Dignity and Liberty promotes, as the law which protects basic human rights even in serious crimes.

The first time the new law was referred to in the Supreme Court was in the 2007 ruling in the case of *Limor*[44], where a few defendants appealed for JSOCP based on claims of delay and selective enforcement. The Supreme Court eventually endorsed the district court's ruling and rejected the defendants' claims. Though laconically, the Court noted that the *Borovitz* criterion would continue to guide the Court after the law was passed. Shortly after, in its ruling in the *Teger*[45] case, the Supreme Court comprehensively analysed the JSOCP status before and after the endorsement of the law. Though the Court was not required to, it noted, in the words of Justice Berliner, that the concept of "material contradiction" adopted by the law is similar to the "actual harm" criterion established in the *Borovitz* judgment. The Court thus concluded that the ordinance was not revolutionary compared to the state of affairs existing before the *Borovitz* case. Since then, one can identify inconsistencies and lack of uniformity in the Supreme Court's rulings.

6. CONCLUSION: COMMON LAW WINS, OR LEGAL REALISM PREVAILS

The case-by-case approach can be explained by or seen as an expression of legal realism, a jurisprudential philosophy that contextualises law practice. Its supporters argued that a multitude of extra-legal factors—social, cultural, historical, and psychological—are at least as important in determining legal outcomes as the rules and principles by which the legal system operates, and that one must go beyond the technical (or logical) elements its procedures or rules are entailing. The law is not only about the rules which are incorporated in statutes and court decisions guided by procedural law. Law is just as much about the experience, about real flesh-and-blood human beings doing things together and making decisions. Pound's famous distinction between "law in books" and "law in action"[46] is a recognition of the difference between the law embodied in various codebooks and law practised by a broad range of officials, including police, judges, attorneys, prison staff, and others. Llewellyn admired Pound's approach, yet he criticised him for not being experimental enough. For all of his pronouncements regarding the contextualisation of law,

[44] *The State of Israel v Limor* [2007] Crim. App. 7014/06.

[45] *Teger v the State of Israel* [2007] Crim. App. 5672/05.

[46] Pound, R. 1911. The Scope and Purpose of Sociological Jurisprudence. *Harvard Law Review*, 24(8), p 591.

Pound did not show much interest in the actual behaviour of judges and of others whose job was to apply the law. In other words, Llewellyn advocated for an even more positivistic, behaviouristic form of legal realism. From his perspective, Pound never wholly escaped from the conventional, formal jurisprudence that emphasised legal order and wordiness. Instead, a fully formed legal realism insists on learning the behaviour of legal practitioners, including their practices, habits, and ways of action.[47] More specifically, Llewellyn describes an adjudicatory phenomenon he calls "the law of fitness and flavour." He observes that cases are decided with "a desire to move in accordance with the material as well as within it […] to reveal the latent rather than impose new form, much less to obtrude an outside will". Llewellyn is *not* talking about following precedents, as he is careful to explain that no specific case generates this sense of flavour and fitness. Instead, it is the case law system that generates "a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration." The instant outcome and rule must "fit the flavour of the whole"; it must "think with the feel of the body of our law" and "go with the grain rather than across or against it".[48]

This legal theory corresponds with our doctrine. To understand and study it we went on a journey through time and different places. The journey brought a sense that the doctrine of "abuse of process" or "judicial stay of criminal proceedings" has still remained somewhat vague. The findings of the study suggest that the effort to "codify" or "constitutionalise" the doctrine failed, both in the UK and Israel. One might think that we could have expected such a result in the "homeland" of common law (the UK), but to a lesser extent in a mixed legal system that pretended to be moving towards codification and constitutionalisation (Israel). It is somewhat surprising that the judgments on the matter in both systems share a commonality: most of them lack a theoretical and principal discussion that may become solid foundations for the doctrine. It will be complicated for the doctrine to evolve and develop without these foundations. The "job" was left for the judges, on a case-by-case basis, a typical approach of the common law, mainly based on legal realism. It can thus be suggested that the constitutional language is almost entirely absent in Britain as a basis or a justification for using the doctrine. In Israel, after "importing" the British doctrine as such, a serious effort has been made to give it a more legislative and even constitutional justification, using terminology taken from the constitutional theory of protecting human rights, especially human dignity, or from administrative law. The author here contemplates the possibility that those efforts failed. The years following the new JSOCP law's entry into force in Israel reveal a rather peculiar picture. When the legislator sets new norms, one may usually identify in the years that follow different periods and layers of reference and legal interpretation in the Supreme Court's rulings. However, in this case, the Supreme Court seems to have remained in the phase of ignoring the new law, almost totally avoiding to interprete and analyse the content and meaning of the new law and its legislative history. The specificity of this situation is even more pronounced since the new law grants the Court a vast and powerful jurisdiction in criminal cases,

[47] Llewellyn, K. N. 2017. *Jurisprudence – Realism in Theory and Practice.* Transaction ed. Routledge.

[48] Llewellyn, K. N. 1960. *The Common Law Tradition: Deciding Appeals.* Boston: Little, Brown & Co, pp. 190-191, 222-223.

enabling it to exercise judicial discretion regarding the prosecution's considerations. Moreover, it turns the Court into a more inquisitorial and meaningful player in the criminal proceeding, one that is able to decide whether the trial against the defendant is just and fair altogether. However, the Court does not wish to take this responsibility and power even when the law grants them to it. How can that be, in view of the bold attitude of the Israeli Court in the past, of a court that was not deterred from exercising strict judicial activism, including wide judicial criticism of government bodies, even though the law did not explicitly grant it this authority? When the legislator entrusts a powerful weapon to the Court's hands, why is the Court reluctant to use it? Would a possible answer be that the Court has not made the required conceptual leap? It maintained the old conservative concept that deems the prosecution as the sole authority to decide whether a person should be prosecuted according to criminal law, and only once it has decided to do so, the Court's role is to inquire and rule whether the defendant is innocent or guilty. This answer does not seem right, as the new law intended to change precisely this old concept and to set new legal standards concerning the defendant's human rights. A second answer may be that the Court prefers the "law and order" attitude, prioritising fighting crime and defending society and its individuals. This state of mind may be prevalent among many judges, *inter alia*, due to the public and media's "buzz" or panic on "crime surge" and "rising crime levels". However, this answer does not justify the fact that the new law and the legislator's intention are practically ignored by judges. A third answer may suggest that the Court prefers an inquiry to find the truth over vague "justice and fairness" considerations; after all, it is the Court's core role to hear witnesses, examine the evidence, and rule accordingly. The author believes this is a narrow perception of the Court's role and the interpretation of the term "truth". The Court also serves general social goals, and if it concludes in a certain case that the defendant was wronged or that it would be unfair to conduct the trial against him or her (for reasons of discrimination, delay, breaching a commitment, etc.), it has the jurisdiction to dismiss the charges. For the prosecution, and more so for the felony victim (if the felony concerns a specific victim), the result would seem unjust in this individual case, and it is hard to deny this subjective feeling. However, injustice toward the victim may be waivered in order to do justice to the defendant. Similarly, essential values of justice and fairness for the defendant may outweigh the injustice caused by the fact that the factual truth of the case would not be revealed since the realisation of these values conveys an essential social message regarding, *inter alia*, advisable norms of the conduct of authorities, or a humane behaviour that respects the value of human dignity. Even if we adopt the utilitarian approach, the power given to the Court to exercise discretion more decisively and clearly should be advocated. Such an attitude will increase the public trust in a prosecution, the considerations of which are subject to the Court's scrutiny. If the trial does not occur eventually and the Court does not inquire into the case, we shall not say that the truth has been lost. Instead, a different truth has prevailed, that of the defendant. This truth sheds light on a different narrative, showing the injustice and unfairness caused to the defendant and, more broadly, to common essential values. Nailing down the JSOCP claim in an explicit law provision is, in some way, a "justice revolution" since it integrates values of justice and fairness into criminal law, even if the legislator

chooses to do so by setting a test which is similar to one determined in previous judgments. The constitutional status of the right to fair proceedings should be reflected in the balance between opposing interests. That status can be derived from the fact that this right is acknowledged in the Basic Law on Human Dignity and Liberty, especially in the human rights to dignity and personal liberty. The legislator's recognition of JSOCP is tantamount to *de facto* fulfilment of the Basic Law. The power of the right to JSOCP does not turn it into an absolute right, but it makes it a heavy weapon to fight for primacy when required. Nobody denies that the value of revealing the truth is acknowledged as a pivotal purpose of criminal proceedings. Fighting crime, protecting public safety, and restoring victims' rights are added to this value. On the flip side, there are values of justice and fairness toward suspects and defendants, the disregarding of which may infringe on fundamental rights and cause serious harm to the public trust in the fairness of criminal proceedings. As seen, the doctrine had been evolving in the UK and later on in Israel before any law was passed. Initially, willingness to accept the JSOCP claims existed only in exceptional cases when the authority's demeanour presented scandalous behaviour involving discrimination, oppression, and abuse of the defendant. The evolution of the doctrine brought to a more liberal approach which settled for recognising the claim when it could not be ensured that the defendant would get a fair trial or when the criminal proceedings would substantially harm the sense of justice and fairness. The evolution adhered to the British approach, which started with the demand to prevent the defendant's abuse by the prosecution authorities and created a broader test that settles for the defendant's indication of "severely improper behaviour". The JSOCP doctrine requires, to some extent, that the Court puts itself in the shoes of the prosecution when deciding whether to avoid an indictment or dismiss an existing one due to broad considerations of justice and fairness. However, there is no reason for the Court to refrain from doing so. The Court was granted explicit permission to do so and has the duty to fulfil the purpose of the legislation while wisely balancing other interests of criminal law. This intricate balance should be based on the understanding that fulfilling the purpose of the law by harming the defendant's personal interest opposes the general public interest. Executing the JSOCP doctrine necessitates a change in the mindset and overcoming of the past fixations. Sometimes, the value of revealing the truth, in its classic meaning, should withdraw in the face of values of justice and fairness.

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