



Strasbourg, 27 June 2012

CDL-JU(2012)015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with the
CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

**11th meeting of the Joint Council
on Constitutional Justice**

Brno, Czech Republic, 31 May – 1 June 2012

**MINI-CONFERENCE ON
“THE RULE OF LAW”**

REPORT

by
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Good afternoon,

I was asked to discuss the Israeli Supreme Court case law with respect to the rule of law. Before engaging that topic, I would like to open with a few introductory remarks regarding the Israeli legal system.

The Supreme Court of Israel is the highest judicial instance in the country. It sits both as the final court of appeal in criminal, civil and certain administrative cases, and as the High Court of Justice, which hears constitutional and administrative petitions as a first and last instance court. When wearing the latter "hat", the Court performs functions somewhat similar to those of a constitutional court including judicial review of the executive and the legislature. According to Israeli law and the principle of *stare decisis*, the lower courts in Israel must follow Supreme Court precedents.

Historically, our legal system was derived from many legal sources. It was initially based on common law principles introduced by the British during the Mandate (prior to the establishment of Israel). Many continental law features were then added by our "founding mothers and fathers", European immigrants whose legal education took place in Germany before the Second World War. Our legal system has also drawn upon the principles of Jewish law and its rich heritage. All these influences have been merged into one Israeli system.

Israel does not have a formal, ceremonial constitution. Instead, shortly after the state was established (in 1948), a decision was made by the Israeli Parliament that Basic Laws would be legislated and, at some point in the future, would be unified into a formal constitution. While Basic Laws were enacted over the years, they were not yet codified. In the 1990s, the Supreme Court declared that our Basic Laws have the main characteristics of a constitution, mainly their superiority over other legislation, enabling the Supreme Court to perform judicial review.

Lacking a formal constitution, the Israeli Supreme Court has taken a major role in promoting the values of justice, democracy and the rule of law. Basic rights, such as freedom of speech, freedom of occupation, freedom of association, equality and due process – were all developed by the Supreme Court, often without being enumerated in our Basic Laws. Some are still not enumerated in the Basic Laws today. Equality is a good example. It is not an enumerated right in the Basic Laws, but the Supreme Court has interpreted the right to human dignity to include some forms of equality. Indeed, the Court used the right to human dignity both as a way of constitutionally protecting fundamental rights that are not enumerated in our Basic Laws and as a vehicle for developing case law doctrines such as the inadmissibility of illegally obtained evidence.

Finally, to conclude my introductory remarks, our Supreme Court promotes wide access to the Court sitting as the High Court of Justice. There is little, if any, requirement of standing and no need to show, as in the U.S. Supreme Court, a "case or controversy". There is abstract review, and cases are rarely denied on injunctiability grounds.

In order to examine the notion of the rule of law, I would like to present two unique cases that exemplify one element of the rule of law. That element was also discussed in the March 2011 Venice Commission Report on the Rule of Law.

There is, of course, widespread disagreement on the meaning of the phrase "rule of law". A thin, formalist conception, promoted by the likes of Friedrich Hayek

and Joseph Raz, defines the rule of law as the condition wherein, to use Hayek's phrasing, government "is bound by rules fixed and announced beforehand". A thick conception suggests laws "must reflect certain substantive characteristics" for the rule of law to take hold. It is not my purpose today to engage too deeply in this debate. Instead, I would like to focus on two recent Supreme Court decisions that touch upon the importance of the rule of law and its boundaries.

The two cases involve similar facts. Both cases relate to outposts in the West Bank (known as Migron and the Ulpana Hill). In both cases, the petitioners were human rights organizations and Palestinians who claimed that they owned the land on which the outposts were built. At all stages of litigation before the Court, the State's representatives did not contest the allegation that the land was privately-owned. The State informed the Court that they considered these outposts illegal, and thus, subject to evacuation. In both cases, demolition and demarcation orders were issued by the state against the settlers.

In the case of Migron, which is the largest outpost in Judea and Samaria, the state continuously tried to avoid forceful evacuation and tried instead to reach an agreement with the settlers where they would voluntarily evacuate. The state thus repeatedly asked the Court to extend the time to uphold the demolition orders. On August 2nd, 2011, the Court issued a ruling rejecting further delays. The Court noted that the outpost was established in 2001, its establishment was not approved by any government resolution and the state conceded that the outpost was established unlawfully, on private Palestinian land and without the required permits. The Court stated that: "the matter that was placed before us ... is one of the gravest and most unusual cases that has come before this Court concerning the erection of an illegal outpost." It ruled that despite the efforts to reach an agreement with the settlers, the settlement had grown significantly over the years, and a peaceful evacuation or relocation of the settlers was not foreseeable in the near future. The Court issued a final order requiring the State to evacuate the Outpost of Migron, giving the state 8 months to carry out the final order, ending on March 31, 2012.

The second case involves another outpost, "the Ulpana Hill". Here too, as mentioned earlier, the state did not contest the factual allegation that the land was privately owned, and announced that according to the enforcement priorities it had set for itself, outposts that were built on privately-owned land are top priority for law enforcement and must be vacated and demolished. In May 2011, the state informed the Court that following a series of deliberations with the participation of the Prime Minister and the Attorney General, a decision was made to evacuate illegal outposts built on privately-owned land. The state announced that it would evacuate the Ulpana Hill within one year. Based on the state's declaration, the Court delivered its ruling. Part of its holding stated that "we hereby note the state's declaration" that state policy required the evacuation of the apartment buildings within one year, ending in May 2012.

Of course, I did not choose to discuss these cases because of the rulings I just described, but because of the events that took place following the Court's rulings. The time limit for implementing the judicial decisions in these cases lapsed, but the state has yet to evacuate the Outposts. In the beginning of March, the state petitioned the Court, asking to delay the scheduled evacuation of Migron until 2015 due to an agreement that was signed between the settlers and an Israeli Government Minister, according to which the settlers will rebuild their homes in a different location. In the Ulpana Hill case, a few days before the May 2011 deadline, the state petitioned the Court, asking to "reopen" the case and delay the evacuation so the legal status of the land on which the homes were built could be reexamined.

The state argued that settlers had commenced legal procedures in the District Court alleging that the land was purchased and the Supreme Court should therefore refrain from deciding the case until the District Court decides on the status of the land. The state also said that it wanted to reexamine its policy respecting the evacuation of these outposts.

In two short decisions, the Court denied both requests, referring, *inter alia*, to the importance of upholding the rule of law. In the Migron case, the Court noted that “All are subject to the law, and the moment of truth has arrived.” Justice Naor, writing for the Court, stated that “Solutions that could have been accepted in 2006, when the petition was filed, cannot be accepted now after all of the procedures have taken place and postponements have been exhausted.” The Court was nonetheless willing to delay evacuation for six months, ending August 1st, 2012, to allow the settlers to organize and prepare for relocation.

Similarly, the Court refused to “reopen” the Ulpana Hill case, particularly since it is not clear whether such a procedure exists. President Grunis, writing for the Court, discussed the importance of the principle of finality of procedures (*res judicata*). He wrote that the principle of finality of procedures “is in the public interest. It allows the legal process to be delimited, and prevents harassment of a litigant over the same issue.” This principle, the Court noted, also reflects the notion of separation of powers; it marks the end of the judiciary's handling of an issue – and the initiation of the other branches authority to implement the Court's decision. The Court added that judgments must be executed within the period prescribed by the Court, and ruled that the desires of political leadership to review implementation of their own policy on West Bank Outposts do not merit reopening of a final court order. The Court ruled that the state has not pointed to any legal precedent that supports its request to reopen the case, nor has it revealed any new facts to back up its request; as the state knew before the judgment was delivered that the settlers had commenced civil legal procedures to clarify the land ownership issue. The Court stated that it is particularly important to uphold court orders and follow the principle of the finality of procedures in procedures before the High Court of Justice, viz. procedures in which the State is the respondent. The Court noted that accepting the state's position would lead to a problematic result - each time the state wants to reexamine its policies, the Court could be asked to reopen closed cases. “Policy,” the Court noted, “is not static. Therefore, would each time the state changes its policy it would request to reopen the judgment?”

As in the Migron case, the Court rejected the State's motion in the Ulpana Hill case, but still granted additional time to execute the demolition orders. The Court delayed the evacuation for 60 days, ending July 1st, 2012.

These two cases are at the heart of a public debate in Israel. In fact, in the Migron case, the Court noted that it “made every effort to show restraint and patience, notwithstanding the gross violation of the law – both in light of the desire to promote peace within Israeli society, and to avoid any appearance that the dispute before us is a political dispute between the various competing factions of Israeli public opinion.” It is unclear what will happen next. A few proposals were made to override the Court's decision by legislation that would create some sort of a procedure to compensate the owners of the land, but none passed thus far. The issue of executive or legislative override is unclear in Israel since our Basic Laws neither allow nor ban overrides. What is clear is that this is an important point in history of the Israeli legal system, and its delicate process of defining the boundaries of its separation of powers.

It is important to note that the notion of the rule of law and the significance of implementing court orders is well-established in Israel. The cases I described are relatively rare. Court orders are generally implemented. Nonetheless, these two cases clearly raise two potential rule of law concerns, one trivial and one potentially damning. The thin formalist conception of the rule of law requires limits on executive and legislative action. The government must follow the rules. Failure to comply with a judicial order violates the established rules of law. Where judicial review is the norm, failure to comply with its results violates the rule of law. In the cases above, the government admitted that the outposts were subject to evacuation. Continued violation is therefore properly understood as a largely trivial violation of even the thin conception of the rule of law. There is the possibility that a further, more substantive circumvention, of the rule of law could still take place. One worries that the continued requests for more time and request to reopen litigation could be a means of circumventing the Court orders, setting us on a slippery slope, even if the possible failure to comply with final orders is not realized.

Time will tell what will happen next. The public debate these cases instigated indicates how important they are to establishing and maintaining the rule of law in Israel.

I would like to pose a question to end my presentation. To what extent can we argue that judicial review is essential for promoting the rule of law? Of course, we know that there are countries in which courts do not perform judicial review. The Netherlands is one such country, and we surely won't argue that it does not uphold the rule of law. My short answer is that it is probably dependant upon a country's culture, laws, legal system, and no less important, its political and constitutional tradition. In Israel, judicial review plays a major part in promoting the rule of law. Therefore, it is probably an essential part of the rule of law in Israel. Yet, the cases I presented reflect a continuing uneasy tension between the judiciary and the legislator in Israel. Controversies surrounding the constitutional authority and protection of judicial review raise questions about whether the rule of law as a normative ideal requires adoption of judicial review. This remains to be answered. In the interim, we must be on the lookout for erosion of even the thin conception of the rule of law in discrete contexts, like the ones I described today, where the authority of the Court is unquestioned.