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Judicial Stay of Criminal Proceedings: Protecting the Basic Right to Fairness Without a Comprehensive Constitution - an Israeli Development to a British Idea

PhD. Thesis

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INTRODUCTION

Fairness. The basic right to a fair trial in criminal proceedings is one of the most basic constitutional rights, part and parcel of human dignity. The way to achieve it in a particular legal system is to ensure a favourable neighbourhood: Constitutional law that recognises human rights; a tradition of judicial review; an independent judicial system that is willing to scrutinise acts and decisions of Parliament and Government; and specifically in our case – to review the discretion of the prosecution, and in some cases to stay, to dismiss, the trial.
This doctrine is known in the United Kingdom by the expression of "abuse of process" that justifies "Judicial Stay of Criminal Proceedings".[1] Israel "imported" the doctrine and has developed it uniquely.

Conceptually, the doctrine corresponds with one of the most significant challenges of legal systems: the broader concept of the role of judges in a democracy as protectors of human rights.[2] This example can examine and explain key elements in the British and Israeli legal systems.

In this light, we shall have a closer look at the topic of prosecutorial discretion and judicial review. In hearing criminal cases, the courts have absolute power to determine guilt or innocence. At the same time, in the United Kingdom and Israel alike, the legislator has refrained, in the past, from granting the court, by way of an explicit provision, 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 the conducting of the trial is clearly in contrast to the public interest or is unfair. The legislator has done so and gave such power to the court only in minor offences (*de minimis*).

In many countries, subordinate to the Attorney General, who heads the prosecution, are many prosecutors who are competent to decide on the filing of an indictment and conduct a criminal proceeding against a defendant. The range of persons authorised to prosecute usually is vast; it may include the Attorney General's office staff, police and municipal prosecutors, private

[1] "Judicial", and not "Prosecutorial". For convenience, in this paper, the abbreviation JSOCP will be used to refer to the doctrine of judicial stay of criminal proceedings.
[2] Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006).

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 proceeding – filing the indictment, refraining from filing it, staying the proceedings, reaching a plea bargain in the course of the trial, filing an appeal, and so forth. In Israel, we follow Britain, by law, the expediency principle. Prosecutors ask first whether there is enough evidence to provide a realistic prospect of success in a case and then decide whether the prosecution is in the public interest.

This power, which the prosecution holds, is one of the most significant powers of any administrative authority. There is, however, a difference between the judiciary stepping into prosecutors' shoes to discharge the duties that prosecutors should perform and the judiciary providing necessary supervision to prevent arbitrary and unjustifiable prosecutorial decision making. 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 purpose of enforcing the law and ensuring that criminals were punished, against the 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. They may deal with particular individuals harshly or gently for political reasons; it is also possible that race, religion, or nationality may play a role in prosecutorial decision-making. Therefore, the exercise of prosecutorial discretion calls for accountability.

It became necessary, in the United Kingdom and in Israel, to allow a defendant to raise before the court arguments to justify the request to stay (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 manipulation or misuse of process or power; selective discriminatory enforcement; entrapment; prejudicial pre-trial publicity ("trial by the media"; "moral panic"); unique personal circumstances, etc.

Under British case law, the court has the inherent authority to set aside an indictment that constitutes "abuse" of the defendant under the circumstances of the case.[3] The approach adopted by English case law, which originated in the demand for "abuse" of the defendant by

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

the prosecutorial authorities[4], subsequently imposed a broader test, according to which the defendant needed merely to indicate "gravely improper" conduct.[5]

In 2007, the Knesset (the Israeli Parliament) 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 Parliament has thereby recognised a preliminary argument which exploits concepts of "justice" and "legal fairness" and the granting of pro-discretion to the Court, which may decide whether it is fitting and proper to conduct the trial against the defendant, even regardless the question of guilt or innocence, and even without examination of all the relevant facts.

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

Indeed, Israel has one of the most interesting legal systems, as a *sui generis* mixed jurisdiction and a legal system with a unique Constitutional law. From a narrower point of view, when talking about a distinct group of hybrid systems, scholars often refer to jurisdictions in which the Romano-Germanic tradition of Civil law and the Anglo-American practice of Common law play a vital role. The "third legal family"[6] includes Quebec, Louisiana, South Africa, Scotland, Israel, the Philippines, Puerto Rico, Cyprus, and Malta.

Israel is an atypical mixed legal system.[7] First, it is the only mixed jurisdiction, not a former Civil law country that England or the United States later took over. Instead, it is a Common law system that step-by-step embraced Civil law. Starting in the mid-nineteenth century, the

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

[5] See *R v Looseley* [2001] 4 All E.R. 897; the English case law subsequent to that ruling followed it, and mentioned by consent the more flexible test for the application of principles of fairness and justice. See e.g. *R. v Grant* [2005] EWCA Crim 1089; *R. v Beardall* [2006] EWCA Crim 577; *R. v Harmes* [2006] EWCA Crim 928. The House of Lords also ruled that the withdrawal, by the prosecution, from a decision or a promise not to prosecute was likely to be deemed to constitute an unfair proceeding, which would justify a stay of the proceedings or cancellation of the indictment by the Court. See *Jones v Whalley* [2006] UKHL 41.

[6] Vernon Valentine Palmer, Introduction to the Mixed Jurisdictions, in *Mixed Jurisdictions Worldwide: The Third Legal Family* (Vernon Valentine Palmer ed., 2nd ed., 2012) p. 3.

[7] Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, Loyola Law Review, Vol. 69, 2016, p. 660.

law in Palestine had a significant influence on French law. Still, during the thirty years of the British Mandate over Palestine (1917–1948), local law underwent a massive process of Anglicisation. Therefore, Israel was established to a great extent as a Common law jurisdiction. Only during the 1960s and 1970s did Israel becomes a hybrid legal system. A few legal fields, private law and, later on, criminal law, gained more and more of the Civil law tradition. In part, this phenomenon followed the massive Jewish immigration from Europe and the Muslim world. Second, Israel's mixed legal system is unique as there is no single influence upon its laws. Israeli private law is based on various sources. It is a diverse legal system that "borrows" from several foreign systems: Italian, German, and French, as well as American and English. Of course, Israel's legislators and judges use foreign law only as a source of comparison and inspiration.

Israel also has an atypical constitutional law system.[8] 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".[9] Yet, the Declaration is not a constitution; it even says that a constitution shall be adopted "not later than 1st October 1948". It never happened. The "Knesset" decided not to draft a constitution but to prepare Basic Laws - each to be a chapter in 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's 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 a constitution. As of today, the basic laws do not deal with all constitutional issues, and there is no deadline set to complete the process of merging them into one comprehensive constitution. Only a few Basic Laws have a "limitation clause," *e.g.*, Basic Law Human Dignity and Liberty, enabling the Courts to exercise judicial review upon legislation. However, the right to a fair trial is not explicitly mentioned.

The criminal procedure in Israel is an adversarial one based on the Anglo-American legal tradition. In Israel, a judge, or a panel of three judges in grave matters, of a first instance, sits

[8] Suzie Navot, *Constitutional Law in Israel* (2nd ed., Wolters Kluwer, 2016), pp. 23-24.
[9] An English version of the Declaration is available at:
https://main.knesset.gov.il/en/about/pages/declaration.aspx

as a tribunal of fact, without a jury or lay assessors (there are lay assessors only in Labour Courts), and must always provide reasons, which are also appealable. The parties are those who are responsible for bringing the evidence in any way they see fit (Pre-trial discovery of the evidence to the Court exists only in civil cases). When the trial begins, the tribunal sees only the indictment in front of it, not the evidence.

Purpose and relevance of the research – filling a gap – research questions

The British literature regarding the doctrine is quite limited. There are only several leading books dealing with it.[10] Those previously published studies are limited mainly to local British materials;[11] they usually map the case law in Britain not chronologically but according to the different examples of abuse.[12]

It seems that no previous study has investigated the chronological evolution of the doctrine. In addition, little discussion can be found about the justifications and the legal theoretical foundations for it. Also, far too little attention has been paid, in English or any other foreign language besides Hebrew, to the development of the doctrine in Israel.[13] Recent developments in the field may lead to a renewed interest in the core justifications of the doctrine.

The originality and importance of this paper are a new methodology and a new idea of hybridisation. The research aims to explore the relationship between fundamental elements in constitutional law, judicial independence and legal theory, and the doctrine. The thesis shall present a hybrid overview of the necessary elements that stay behind it. It is interesting to examine how legal systems with limited and partial constitutional "tools" handle this essential principle of protecting fairness. Interestingly, both the United Kingdom and Israel lack a comprehensive constitution. There are some "trends" or "winds" of "constitutionalism," but both countries' "Constitution" is not complete. How does it affect the court's ability and willingness to implement its powers of judicial review and discretion upon prosecutorial

[10] See, mainly, Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings,* (2nd ed., Oxford Monographs on Criminal Law and Justice, Oxford, 2008).
[11] Colin Wells, *Abuse of Process,* (3rd ed., Oxford, 2017).
[12] David Young, Mark Summers, David Corker, *Abuse of Process in Criminal Proceedings,* (4th ed., Bloomsbury, 2015).
[13] The only comprehensive textbook in Hebrew is: Yisgav Nakdimon, *Judicial Stays of Criminal Proceedings,* (3rd ed., Nevo, 2021) [Hebrew].

decisions?

On the one hand, the dissertation will examine if, in the United Kingdom, the primary justification for using the doctrine is of a procedural nature, one of "due process", in order to avoid "abuse of process". On the other hand, the work will examine if the primary justification in Israel is a constitutional one of "material" nature, "human dignity".
The research highlights that the Israeli Basic Law Human Dignity and Liberty, 1992, also necessitate these justice and fairness principles. Even without a comprehensive formal constitution, and although this Basic Law generally speaks only about "liberty" and "dignity", we should wonder whether it is up to the courts to determine, on a case-by-case basis, what it means? Does it also mean due process and a fair trial? Do the tools of judicial review – including the causes of reasonableness and proportionality and the principle of equality – serve 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 indeed the justifications vary, does it influence the tendency (or the reluctance) of the courts to use the doctrine? It seems that the justification or the source has less impact; more relevant influential factors are the independence of the judiciary, the general tendency to implement judicial review on governmental bodies, and the way that courts, in a given system, make the balance between contradicting interests. Paradoxically, this broad discretion, taken by the courts or given by the legislator to the courts, has not been utilised. Can we determine or foresee the courts' "enthusiasm" to use their authority? My interest in this topic developed while serving as a judge for seventeen years; my personal experience prompted this research.

Methodology and structure

This qualitative research focuses on collecting and analysing textual data: Books, articles, and judgments. It is mainly descriptive. The research will hold a conceptual analysis of the doctrine of judicial stay of criminal proceedings. Special attention will be paid to explaining the development of Israeli Constitutional law and fundamental relevant aspects of British Constitutional law.

This is not a quantitative study, and it is unable to encompass the entire scope of cases across all the judicial tribunals in the United Kingdom and Israel. Therefore, not only due to practical

constraints, but it also does not provide a comprehensive or statistical review of the use of the doctrine in lower courts. The focus will lay on the higher instances' rulings, and it is hoped that this research will provide a deeper understanding of the doctrine, especially in the light of other legal institutions.

The dissertation is composed of seven themed chapters.
The first chapter describes the relevant aspects of the British Constitutional law, focusing on the British Human Rights Act, the linkage between constitutionalism and trust in the United Kingdom, the model for protecting human rights, and the judicial review under the Human Rights Act.

It will then go on, in the second chapter, to describe, chronologically, the development of the doctrine of JSOCP in the United Kingdom. The chapter has been organised into sub-issues: the Late 60's and the 70's of the twentieth century, the 1980's, the 90's (as the decade of the doctrine's expansion, the doctrine during the 2000s (far from conclusiveness), and the main justifications for implementing the doctrine (asking whether there is a rule of thumb?).

In order to establish proper grounds for understanding the legal tradition in which the doctrine exists, the third chapter is concerned with relevant essential elements of the Israeli legal system. Therefore, the chapter will give a brief history of Israeli law, present Israel as a unique mixed legal system, describe the court system and structure, and then will dive into two critical dimensions: judicial independence and the principle of judicial activism.

The fourth chapter will follow up with a description of the fundamental elements of the Israeli Constitutional law, including the Israeli structure of Government, the role of the Attorney General, the absence of a written constitution, the role of the Judiciary in defending civil rights, and the Israeli constitutional "revolution".

Chapter five will then examine, within this background, the move in which Israel "imported" the doctrine, firstly only by case law, with a solid linkage to terms like human dignity and the constitutional right to fair and due process. The chapter will then present the JSOCP as a constitutional remedy and describe the pre-legislative judgments of the Israeli Supreme Court in detail.

The sixth chapter holds a broad discussion of the unique "legalisation" of the doctrine through a new law enacted by the Israeli Parliament in 2007. The chapter begins by mentioning the academic criticism regarding the doctrine, the committee discussions and the legislative-parliamentary history; it continues to describe the JSOCP Bill, the discussions at the Constitution, Law and Justice Committee and the Knesset Assembly; it suggests guidelines for interpreting the JSOCP Law and criticises the outcome of "from misconceiving to ignoring" by the Supreme Court.

In the seventh chapter, I am briefly summarising the theory of legal realism to find an explanation for what seems to be a casuistic case-by-case approach to the doctrine.

CONCLUSION: Common Law Wins, or: Legal Realism Prevails

We went on a long journey, both in time and in place. When it ended, it seems that the doctrine of "abuse of process" or "judicial stay of criminal proceedings" remained somewhat vague. The findings of this study suggest that the trial to "codify" or "constitutionalise" the doctrine – failed, both in the United Kingdom and Israel.

One might think that we could have expected such a result in the "homeland" of Common law (the United Kingdom) and less in a mixed legal system that pretended to move towards codification and constitutionalisation (Israel). It is somewhat surprising that the judgments ruled on the matter in both systems share a commonality: most of them lack a theoretical and principal discussion that may become solid and deep 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 present study raises 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 ruling. However, in our case, the Supreme Court seems to have remained in the "period of ignoring", almost totally avoiding interpreting and analysing the content and meaning of the new law and its legislative history.

The peculiarity is even more enhanced since the new law grants the court a vast and powerful jurisdiction in criminal cases, 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 it even if the law grants it. How can that be, in view of the Israeli court's bold attitude in the past, 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 wished to change precisely this old concept and 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 normative 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".[14] However, this answer does not justify the fact that

[14] Such hysteria or panic is hardly justified since the data published annually in the last decade by the police and the Central Bureau of Statistics in Israel show that crime levels dropped in most offences despite population growth. For possible sociological explanations to the panic, see: Stanly Cohen, *Folk Devils and Moral Panics* (3rd ed., Routledge, 2002); Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd ed., Wiley-Blackwell, 2009). Moral panic is created following the definition of certain events as threatening the values of the society or the common interests of its members. The target audience is usually given partial, inaccurate, and even false information sensational and trending. Therefore, this phenomenon is developing among the public around a specific

the new law and the legislator's intention are practically ignored.

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. This, I believe, 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 will 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 authorities conduct, 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's trust in a prosecution whose considerations are subject to the court's scrutiny. Phrased differently, if the court itself decides that filing an indictment and conducting a criminal proceeding adhere to principles of justice and fairness, the whole procedure will be perceived as more legitimate. If the trial does not occur eventually and the court does not inquire into the case, we shall not say that the truth has lost. Instead, that 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).

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behaviour perceived as immoral and threatening society's basic values. In many cases, there is no empirical basis for the same hysteria, and the public response to the same behaviour is excessive and disproportionate in many cases. Panic is fueled by the media, which has a key role in raising awareness of risks and creating waves of fear and anxiety. This put pressure on both the legislature and the courts. This pressure can lead to biases and mistakes and reactions to the extension of criminal responsibility, over-enforcement, and aggravation of punishment. It can be said that any legal system is not immune from the phenomenon, and in Israel and the United Kingdom, the consequences of a moral-public panic around certain offences can also be identified. There is, as mentioned, an inherent danger in a panic that will lead to the result of excessive criminality.

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 a fair proceeding should be reflected in the balance between opposing interests. This status will be derived from the fact that this right is acknowledged in the basic law: Human Dignity and Liberty, especially the human rights to dignity and personal liberty. The legislator's recognition of JSOCP is tantamount to the *de-facto* fulfilment of the basic law. The power of the right to JSOCP does not turn it into an absolute right, but it gives 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 the criminal proceeding. Fighting crime, protecting public safety, and maintaining offence victims' rights are added to this value. On the flip side, there are values of justice and fairness toward suspects and defendants, the disregard of which may infringe on fundamental rights and cause serious harm to the public's trust in criminal proceedings fairness.

As seen, the doctrine had been evolving in the United Kingdom and later on in Israel before any law was passed. Initially, willingness to acknowledge JSOCP claims was presented only in exceptional cases, when the authority's demeanour was scandalous behaviour involving discrimination, oppression, and abuse of the defendant. It continued in 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 proceeding would substantially harm the sense of justice and fairness. The ruling evolution adhered to the British ruling 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".[15]

The JSOCP doctrine requires, to some extent, that the court puts itself in the shoes of the prosecution in deciding to avoid an indictment or dismiss an existing one due to broad considerations of justice and fairness.

[15] The aforementioned British case of *Looseley*.

However, there is no reason for the court to refrain from doing so. The court was granted explicit permission to do so and had 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 law without doing justice harms the defendant's personal interest and opposes the general public interest.

Executing the JSOCP doctrine necessitates a change in the mindset and past rooted fixations. Sometimes, the value of revealing the truth, in its classic meaning, should withdraw in the face of justice and fairness values.

I hope that this study adds to our understanding of the doctrine.

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PUBLICATIONS AND ACTIVITIES

Recent Publications

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- ICC International Commercial Mediation Competition, Paris, France, February 2020 [observer]
- Hong Kong Arbitration Week, Hong Kong SAR, October 2019
- Tel Aviv Arbitration Day, Tel Aviv, Israel, February 2019 [panel member]
- ICC International Commercial Mediation Competition, Paris, France, February 2019 [judge]
- International Conference of Court Annexed Mediation, Budapest, Hungary, October 2018 [presenter]
- Annual Conference, IBA, Rome, Italy, October 2018
- International Criminal Court Moot Court Competition, The Hague, The Netherlands, May 2018 [bench member]
- International Arbitration Conference, CEU, Budapest, Hungary, May 2018 [panel member]
- Annual Conference, IBA, Sydney, Australia, October 2017

Visiting Scholar/guest lecturer

- Pécs University, Faculty of Law, Pécs, Hungary, Lecturer of the Seminar: Judicial discretion - how judges think? The British and the Israeli experience, Semester II, 2022.
- City University of Hong Kong, Hong Kong SAR, October 2019 [one lecture].
- Pécs University, Faculty of Law, Pécs, Hungary, March 2019 [three lectures].
- Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, Sep.-Oct. 2012

SUMMARY IN HUNGARIAN / MAGYAR NYELVŰ ÖSSZEFOGLALÓ

A tisztességes eljáráshoz való jog a bírósági eljárásokban a legalapvetőbb alkotmányos jogok közé tartozik, az emberi jogokkal összefüggő, nemzetközi bírósági gyakorlatban széles körben elfogadott, hogy szoros kapcsolatban áll az emberi méltósághoz való joggal. Ahhoz azonban, hogy egy meghatározott jogrendszerben megfelelően érvényesüljön megfelelő jogi környezetet is biztosítani kell, önmagában az alapjogi bíráskodás nem feltétlenül elegendő hozzá. Vagyis olyan alkotmányt, amely nem pusztán elismeri az emberi jogokat és a bírói jogvédelem lehetőségét, hanem egy független bírói szervezetet is, amely képes alaposan és befolyástól mentesen felülvizsgálni a parlament és a kormány aktusait, valamint a témám alapjául szolgáló esetben, az ügyészségi mérlegelést is melynek eredményeként felfüggeszthető vagy berekeszthető a tárgyalás. Ez utóbbi helyzetet az Egyesült Királyságban az „eljárással való visszaélés" doktrínájaként ismerik, melyre hivatkozással indokolható lehet akár a bírósági eljárás felfüggesztése is büntetőügyekben.

Izrael adaptálta ezt az eljárásjogi jogintézményt, ugyanakkor sajátos módon továbbfejlesztette. Alapjaiban a doktrína összhangban van a demokratikus jogrendszerek legfontosabb feladatával, vagyis a bíróknak az egyéni jogok védelmezőiként betöltött szerepével. A példa elemzése egyúttal segíthet rámutatni a brit és az izraeli jogrendszer legfontosabb elemeire is. A hatalom, amellyel az ügyészség rendelkezik, egyike a legjelentősebbeknek a hatósági szervek közül. Mégis, különbség van aközött, amikor a bíróság átveszi az ügyészség szerepét és aközött, amikor csak a szükséges felügyeletet gyakorolja felette, ezzel megelőzve az önkényes és jogtalan döntéseket. Ezért elengedhetetlenné vált, hogy megállapodás szülessen arról, hogy melyik megoldás képes egyensúlyt teremteni a jog kikényszerítésének biztosítása, illetve a bűnelkövetők megbüntetése és az olyan alapvető értékek megtartása között, mint az ártatlanság vélelme, az emberi méltóság védelme, a méltányosság, a tisztességes eljárás és az egyenlőség: ezeket úgy alkalmazva, hogy megakadályozzák az igazságosság torzulását. Következetesnek, méltányosnak és objektívnek kell lenniük. Lehetséges, hogy az ügyészség keményebben, vagy éppen elnézőbben lép fel bizonyos személyekkel szemben politikai okok miatt, ahogy az is előfordulhat, hogy az illető rassza, vallása vagy nemzetisége befolyásolja az ügyészi döntéseket. Éppen ezért az ügyészi mérlegelési jogkörök elszámoltathatóságát biztosítani kell. Az Egyesült Királyságban és Izraelben is szükségessé vált, hogy engedélyezzék, hogy az alperes felhozhassa az érveit a tárgyalás felfüggesztése (de valójában megszüntetése) mellett, hivatkozva például az eljárásbeli késedelmekre, nemperlési ígéret megszegésére, a releváns bizonyíték elvesztésére vagy megrongálódására, nyomozati

helytelenségekre, manipulált ügyészségre, eljárással vagy hatalommal való visszaélésre, szelektíven diszkriminatív végrehajtásra, tárgyalás előtti hátrányos publicitásra, stb…

A kutatás célja felfedni a kapcsolatot az alkotmányjog alapvető elemei, a bírói függetlenség, a jogelmélet és eme doktrína között. A dolgozat egy hibrid áttekintést ad a háttérben meghúzódó lényeges elemekről. Érdekes megvizsgálni, hogy azon jogrendszerek, melyek limitált és részleges alkotmányos „eszközökkel" rendelkeznek, hogyan kezelik a tisztesség védelmének esszenciális elvét.