

The Influence of Basic Laws on Criminal Law and the Right to Remain Silent According to Israeli Supreme Court Rulings – A Brief Overview

Michael Pilyavsky

*South-West University “Neofit Rilski”, Blagoevgrad, BULGARIA
Department of Philosophy*

Received: 16 February 2024 ▪ Revised: 18 April 2024 ▪ Accepted: 26 April 2024

Abstract

The practice of “Privilege Against Self Incrimination” of secrecy against self-incrimination in all Western legal methods, including Israeli law, is seen as one of the human rights in general and part of the right to due process in particular. The constitutional revolution took place and with the enactment of the basic laws of human dignity and freedom, which established several human rights, among them is the right to remain silent, which is considered a right derived from the Basic Law of Human Dignity and Freedom.

Keywords: human rights, Israeli basic laws, the right to remain silent.

1. The privilege against self-incrimination

The practice of “Privilege Against Self Incrimination” of secrecy against self-incrimination in all Western legal methods, including Israeli law, is seen as one of the human rights in general and part of the right to due process in particular. This right, which is mentioned in the various laws, adopts the approach according to which it is forbidden to force a person to testify Against himself. Behind this approach stands the principle that every person is innocent unless proven otherwise – a principle derived from the presumption of innocence (Israel Penal Code, 1982).

Although it is possible to find a justification for the right to remain silent also in Jewish religious law, which is based on the Talmudic rule “No man calls himself evil”, the prevailing opinion among legal scholars is that the origin of the right to remain silent is in the Middle Ages of Europe, when in the ecclesiastical courts in England the legal system of “Ius commune” was applied. The secrecy in its beginning is expressed in the well-known Latin proverb “Nemo tenetur prodere seipsum,” which means “No person is to be compelled to accuse himself.”

Modern secrecy, as understood today, is a product of power struggles between the king’s courts and the ecclesiastical courts and the difference in the ways of proof in these courts.

Privilege against self-incrimination was adopted from English common law in America. The North at the same time as its recognition in England in the 11th century.

The USA was the country the first to have secrecy stipulated in its constitution in the fifth amendment to the constitution in 1792. Even before confidentiality was established in the US Constitution, some US states gave constitutional status to confidentiality in their state constitutions. For example, the right of firsts is attributed to George Mason, the drafter of the Virginia state constitution, who was the first to establish privacy as a constitutional right in “paragraph eight” of the “Declaration of Rights” of Virginia, which served as a solid basis for the establishment of the federal Bill of Rights (Galily, 2019; Gabbai, 2008).

The American legal system, known for its unique achievements in the field of the protection of civil rights, adopted confidentiality against self-incrimination due to the fear of the violation of civil rights, a fear that arose from the possibility of the absence of a bill of rights, the common law system will be replaced by the continental system, and so may to penetrate the inquisitorial torture method that was used in France, Spain, and Germany.

The right for secrecy was adopted after discussions and debates about the establishment of the Fifth Amendment to the Constitution. The USA mainly revolved around the conflict of powers between the federal regime and the states, mainly due to the Anti-Federalists’ fear of trampling on human rights and harming the rights of the citizens of the states. At the end of the process, secrecy was adopted through the Fourteenth Amendment to the US Constitution, which was established in 1868 (Gross, 1988).

The right to privacy, which developed philosophically in the 60s of the 20th century in the United States, included an important element that started in the foundation of the right for secrecy against self-incrimination.

The right to privacy, which was designed in American law, included, among other things, a person’s right to “control” the information about him. Others who sided with this approach emphasized the limitation of society to penetrate the privacy of the individuals who make it up.

Another justification that also comes from the development of human rights in the United States is the approach that considers confidentiality against self-incrimination as a defense of freedom of speech. Meaning, protection against a possible violation of freedom of speech, expression, or belief. The scholar Rothkopf points out that during the time of Senator McCarthy in the USA, there was a “witch hunt” for people who held pro-communist opinions are Pro-Communist (Rothkopf, 2001).

2. The influence of basic laws on criminal law and the right to remain silent according to Israeli Supreme Court rulings

Indeed, following the Basic Laws enacted in 1992 in the Knesset, the constitutional reduction was carried out as (retired) Judge A. Barak defined the term, and often uses it about the Basic Laws (Barak, 1992). It could be said that the basic point of departure is that the constitutionalizing of criminal law took place following the enactment of the basic laws which state that every person is entitled to dignity and respect for his life and body, that is, all criminal law today is subject to the basic laws, i.e., laws of evidence, criminal procedure, etc. Still, their very essence of laws subject to the Basic Law may harm human dignity and freedom, but the Basic Law of Human Dignity subordinated procedural criminal law to a Basic Law. It is filled with a type of content from principles that we aspire to and give interpretations and include parameters in the law to expand. In other words, the victories of suspects and accused in crimes in light of the fundamental law of human dignity and freedom, and the rights of suspects and accused in crimes essentially express the principle of freedom and human dignity, being based on the assumption that recognizes the individual as a rational personality with personal autonomy anchored in the principles of liberal democracy, that is, the basic laws carry out the directive for the criminal law

And this is to ensure conditions for social existence while emphasizing the freedom of the candidate for prosecution and his judicial rights before him in a unilateral procedure that the state is using against him due to the violation of the criminal norm that society has established and prohibits the execution of the act that offends in some way.

From this it will be possible to say that when it comes to human rights in criminal proceedings, these are usually included in the Basic Law even beyond the operative rights listed in it, for example the basic right of a detainee and meeting with his lawyer is derived according to the opinion of Judge Alon in the Sufian case (Sufian v. Commander of the IDF forces, Ezat et al., 1991) of a person's right to personal freedom according to section 5 of the Basic Law on Human Dignity and Freedom and according to the Azazmi case (Court ruling Azazmi, 1992) in the same spirit, the rights of a prisoner to cultural human orders must be recognized and all this in order to uphold his dignity as a human being and not to harm his spirit, and this is according to the Basic Law of Human Dignity and Freedom, and as stated by the judge (retired) Prof. A. Barak, saying that the dignity of a person according to Section 2, Section 4, Section 5 of the Basic Law on Human Dignity constitutes a proper basis on which various human rights can be subsumed the conventions in the criminal procedure (Barak, 1994). So, from here it can be interpreted that even if different rights do not find an explicit expression in the special provisions of the law that deal, for example, with the search of the suspect's body or the arrest. So from the Basic Law of Human Dignity, it is possible to infer your right as a suspect or accused in a criminal proceeding in the spirit of the interpretation of a Basic Law, and the right of the litigants in a criminal case to a fair trial and prevention of miscarriage of justice therefore also the right to silence and confidentiality against self-incrimination as per the Basic Law of Human Dignity, that is, the Basic Law, therefore, has rights Also explicit are the rights implied by the general provisions regarding the respect of the suspect or the accused for freedom and dignity according to the Basic Law on Human Dignity and Freedom.

From this, it would be appropriate to say that according to the Basic Law on Human Dignity and Freedom, which affects the criminal justice process, the right to the autonomy of the dignity of the will of Omar stands in the way And in your view as a free person with freedom of choice and action because the purpose of the basic law of human dignity and freedom is to anchor the person against harm and deprivation of his right in a criminal proceeding that may harm his dignity and freedom.

Because indeed the constitutional revolution took place and with the enactment of the basic laws of human dignity and freedom, which established a number of human rights, Among them is the right to remain silent, which is considered a right derived from the Basic Law of Human Dignity and Freedom and according to the ruling of the supreme court, the Insurance Company Rule v. Minister of Finance (Insurance Liability Ltd v. Minister of Finance, 1994), which states that human rights have a kind of constitutional power over the law that exceeds all other basic laws of Today, the basic rights of the citizen in Israel are defined and established to a constitutional extent, it should be noted that most of these rights have already been recognized in the past by a minority of legislative measures and most of them by virtue of the ruling of the Supreme Court, but with the enactment of these basic laws they were raised to a normative level with constitutional status, hence the derived conclusion, because it will not be possible to violate the legal rights of the Knesset unless it meets the requirements of the limitation clause according to the Ganimat case (Ganimat v. the State of Israel, 1995) which states that human rights have the main influence on the criminal procedure, which has a strong connection to the personal freedom of the individual that is reflected In giving constitutional status to the rights in the criminal law that affects the criminal procedure. That is, from now on we can.

To see that in light of the enactment of the Basic Law on Human Dignity and Freedom, the balance between the general attitude towards the individual in everything related to the rule of law and the methods of investigation that are directly subject to the laws of rights listed in the

Basic Law on Human Dignity and Freedom and according to the Honorable President (retired) A. Barak, who states that at the base of a concept Human dignity is based on the recognition that man is a free being who develops his body and spirit according to his will and this within the social framework with which he is connected and on which he depends, that is, man is his dignity and man's dignity is man and man's dignity is entitled to protection and all according to the provisions of section 4,7, 2 of the Basic Law on Human Dignity and Freedom (Basic Law: Human Dignity and Freedom) therefore the conclusion that can be drawn from it is that the right to remain silent in a criminal trial is enshrined in the Basic Law when it is an expression of man's being a creature with free will of choice and action and as established in the Odeh case (State of Israel v. Arad, 1997) that the right to remain silent can be derived from the presumption that every person has the right as long as he has not been convicted by law, that is, this presumption is learned from both the personal freedom of the person and his right to dignity, which includes confidentiality against self-incrimination and the suspect's absolute right to remain silent, and these rights are derived From the basic right to freedom anchored in the Basic Law.

Therefore, according to the Rahmilevich case (Rakhmilevich v. the State of Israel, 1998) if the Basic Law on Human Dignity and Freedom was enacted, the status and weight of these rights rose to the normative level of constitutional rights that affect criminal law. Therefore, it would be possible to say that it is now possible to strengthen the constitutional rationale of the right to remain silent by a fundamental law that affected the entire criminal law. Therefore, the constitutional purpose of the right to remain silent is intended to take the sting out of the governmental intrusion of the investigative authorities into the privacy of the person, hence a violation of the right The constitutional silence derived from a basic law that affected the criminal law can only be done by meeting the requirements of the limitation clause according to Section 8 of the Basic Law on Human Dignity and Freedom.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The author declares no competing interests.

References

- Barak, A. (1992). Protected fundamental rights. *Israeli Law Journal Law and Government*, vol. 9.
- Barak, A. (1994). Interpretation of the Law, *Constitutional Interpretation Journal*, Volume 3 (1994 Ami 432-43318).
- Gabbai, C. (2008). How did the income tax ordinance kill the right to remain silent? *Israeli Journal "Misim"*, Tel Aviv: Israel.
- Galily, D. (2019). The expansion of the mind – An implementation of human intellectual progress to understand human history. In T. V. Petkova & V. S. Chukov (Eds.), *3rd International e-Conference on Studies in Humanities and Social Sciences: Conference Proceedings* (pp. 225-240). Belgrade: Center for Open Access in Science. <https://doi.org/10.32591/coas.e-conf.03.22225g>
- Gross, E. (1988). Is secrecy against self-incrimination a landmark in the enlightened man's struggle for progress? *Israeli Law Journal Legal Studies*, Jerusalem: Israel.
- Israeli Supreme Court ruling 3412/91 Sufian v. Commander of the IDF Forces in the Gaza Strip.

Israeli Court ruling 3734/92 Azazmi Fayed.

Israeli Penal Code, 1982.

Rothkopf, G. (2001). The need to redefine the areas of confidentiality against self-incrimination and the right to remain silent. *Israeli Law Journal "HaMishpat"*, Tel Aviv: Israel.

Ruling 2316/95, BSH 537/95 – Imad Ganimat v. The State of Israel, Supreme Court (4), 589, pp. 657-658.

Ruling 97:511 State of Israel v. Adnan Arada [Fedaur (page 4-5)].

Ruling (TA) 10345/98 Rahmilevich v. State of Israel PsAm Tashnait (2) 12, 23.

The Israeli Basic Law: Human Dignity and Freedom.

Supreme Court 94/726 Clal Insurance Co. Ltd. v. Minister of Finance (1) 463, 441.

