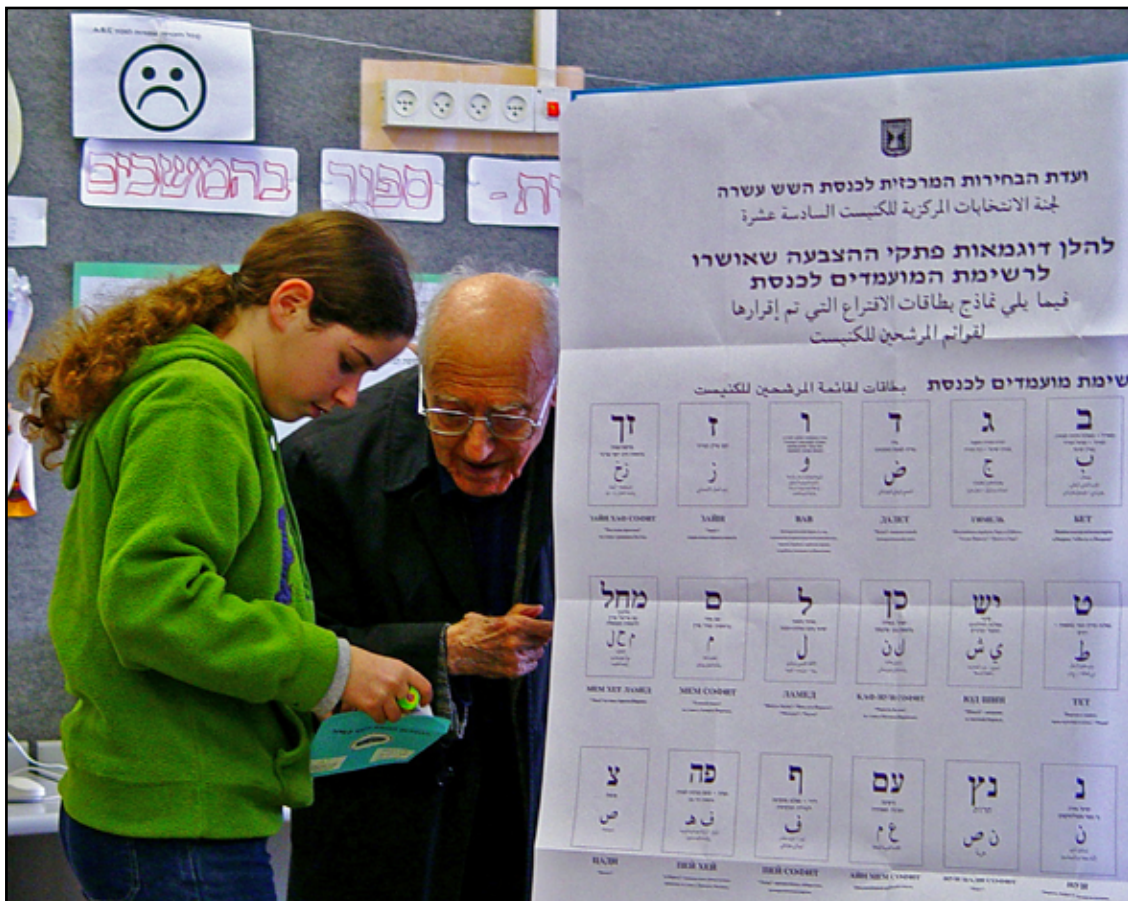


# The Israeli Prevention of Terrorism Ordinance and its Impact on the Quality of Democracy

By Eunice G. Buhler

*The key challenge to democratic governments when faced with terrorism is defending the security of their citizens while upholding their rights and freedoms. Israel encountered this challenge almost immediately after its establishment in 1945. In response to early acts of terrorism, the Israeli government enacted the Prevention of Terrorism Ordinance (PTO) in 1948. The Ordinance, while controversial, strengthens the quality of democracy in Israel by providing protection for Israeli citizens.*



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An elderly man is helped at the poll by his granddaughter in a school in Jerusalem.

According to some political scientist, “A high-quality democracy represents a balancing of virtues that lie in tension.”<sup>1</sup> An act of terrorism can threaten those virtues and throw off the balance. To maintain a high level of democracy, governments are forced to take action in response to terrorism in order to prevent future terrorist activity. The challenge democratic governments face when confronted with the issue of terrorism, is how best to defend their people against acts of terror while upholding the rights and freedoms granted to their citizens. The State of Israel, a democracy since its inception in 1945, encountered that challenge early on in its existence. In response to an act of terror, Israel took action to establish the balance required for a high-quality democracy by enacting the Prevention of Terrorism Ordinance (PTO) in 1948, which was amended in 1980 and again in 1986 and 1993. The PTO strengthens the quality of democracy in Israel by increasing the protection of freedom for Israeli citizens. First, this paper shall offer background discussion on the creation of the PTO and on various characteristics by which to measure quality of democracy. Second, it will address the unique challenges that terrorism poses to Israel and how the PTO has been used to protect citizen freedom. Finally, this paper shall examine how the PTO fits into a global context of other anti-terrorism legislation.

## ISRAEL’S HISTORY WITH TERRORISM

Since its founding, the State of Israel has been threatened by terrorism.<sup>2</sup> Acts of terror, most frequently committed by Palestinian extremist groups against Israeli citizens, have caused Israel to constantly be on the defense. Consequently, Israeli citizens have found themselves having to live their lives, go to school, commute to work, and raise families in the shadow of terror.<sup>3</sup> Recognizing that threat to its national security, the government of Israel made a “commitment to combat terrorism in all its aspects.”<sup>4</sup> That commitment was first reflected in the passing of the Defense Regulations (State of Emergency) in 1945, which enabled the State to act in extraordinary ways to defend itself and its citizens in times of emergency.<sup>5</sup>

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Those Regulations apply during a broad national state of emergency, which has existed continuously since 1945. In addition to the Defense Regulations, the PTO addresses Israel’s specific challenges arising from terrorism. By enacting the PTO, Israel recognized that terrorism is a danger that extends beyond the general state of emergency and must be directly addressed.

The PTO was enacted in response to an international terrorism crisis. The crisis arose when the United Nations sent the Swedish diplomat Count Folke Bernadotte to Israel to act as a mediator in the Israel-Palestine conflict. Upon his arrival, a militant Israeli group believed Bernadotte to be pro-Arab, so they shot and killed him.<sup>6</sup> This act of terror compromised the legitimacy of the newly formed Israeli government in the eyes of the international community. In an effort to recover from that embarrassment, the Israeli legislature passed the PTO on September 23, 1948, just six days after Bernadotte’s assassination. The original PTO of 1948 (before amendments were made) consisted of twenty-five sections that recognized the danger of a terrorist organization and outlined how the organization and its members should be treated under the law. The first section of the PTO defined a terrorist organization as a “body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence.”<sup>7</sup> The subsequent three sections of the PTO created categories for the varying extent to which a person is involved in activity with a terrorist organization. In addition to those definitions, the PTO outlined actions that the government could take against a terrorist organization and its supporters. The later half of the PTO addressed judicial proceedings and punishment of those accused of terrorism. The PTO of 1948 required the accused to be tried in a military court, while the 1980 amendment to the PTO repealed the provisions pertaining to military courts thereby allowing accused terrorists to be tried as civilians. Generally speaking, the amendments to the PTO liberalized its provisions and reflected Israel’s intent to uphold democratic principles of freedom.

## WHAT MAKES A HIGH-QUALITY DEMOCRACY?

When assessing anti-terrorism legislation of a democratic country, one must consider how the laws affect the quality of democracy. Several factors contribute to the measurement of the quality of

democracy. At the most basic level, at times referred to as a “thin” definition of democracy, “people have the right to choose their leaders in regular, free, and fair elections,” which Israel has had from the start.<sup>8</sup> To have a functioning liberal democracy, however, a government must meet additional criteria. A more comprehensive, or “thick,” system of democracy ensures additional dimensions of governance, which includes, but is not limited to, “individual freedom of belief, opinion, discussion, speech, publication, broadcast, assembly, demonstration, (and) petition” and “equality of all citizens under a rule of law.”<sup>9</sup> The mere increase in the quantity of these dimensions of governance does not necessarily improve the quality of democracy. Moreover, a high-quality democracy achieves a balance and does not necessarily “rate infinitely high on every measure of democratic quality.”<sup>10</sup> Accordingly, Israel’s PTO places restrictions on certain freedoms of people involved in terrorist activity so that citizens can enjoy greater freedoms. In so doing, Israel strikes a more perfect democratic balance, which improves the quality of its democracy.

Measuring the degree of freedom exercised by citizens is a second way of assessing quality of democracy. An entity that publishes measurements of the quality of democracy is Freedom House, an independent watchdog organization that supports the expansion of freedom around the world. Freedom House has developed a numeric system of measuring the state of freedom around the world that spans numerically from 1 to 7; in which 1 indicates most free and 7 signifies not free. Generally, democratic nations receive the lowest (most free) scores. The United States, for instance, earns the following scores: Political Rights-1; Civil Liberties-1; Status-Free.<sup>11</sup> On the other hand, China earns: Political Rights-7; Civil Liberties-6; Status-Not Free.<sup>12</sup> Presently, Israel scores: Political Rights-1; Civil Liberties-2; Status-Free.<sup>13</sup> When compared to China, Israel clearly offers greater freedom to its citizens. Like the US, Israel has a high freedom score for political rights, however it has a slightly lower or “less free” score for civil liberties which is likely unavoidable due to the elevated terrorist threats in Israel. In an effort to strike a balance, Israel must accept some sacrifices in civil liberties to protect citizens from the dangers of terrorism. Israel’s anti-terrorism policies take into consideration the complex nature of terrorism.

## THE UNIQUE CHALLENGE OF TERRORISM

Creating anti-terrorism policy is a particularly complex challenge for two main reasons. First, the lines that categorize terrorism are blurred between war and crime. Terrorism cannot be treated as war or as crime, but intertwines elements of both.<sup>14</sup> The interwoven nature of terrorism complicates legal matters involving the treatment of terrorists. The PTO is Israel’s attempt to set a clear set of definitions and procedures to address the continually morphing and elusive crime of terrorism. Unlike traditional war, terrorism poses an elevated threat. For example, during formal international war, nations operate by a set of codes, but terrorism breaks all those rules. In the context of a formal war, terrorism becomes a way of avoiding engagement with the army of the enemy.<sup>15</sup> Unlike war in which soldiers are separated from civilians, terrorists easily blend into the common public. When comparing war to terrorism, legal scholar Bruce Ackerman eloquently illustrates the difference: “Only a very small percentage of the human race is composed of recognized members of the German military, but anybody can be suspected of complexity with al Qaeda.”<sup>16</sup> Accordingly, as the changing characteristics of terrorism alter the balance between safety and freedom, the provisions of anti-terrorism laws may have to be modified to strike the appropriate balance. For instance, Section 4 of the PTO was expanded in 1980 to include “any act manifesting identification or sympathy with a terrorist organization” as punishable action.<sup>17</sup> That modification expanded the protection of Israeli citizens while simultaneously affecting a balance with freedoms.

Second, terrorist activity assaults more than civilian safety as it also jeopardizes state security, which consequently threatens the integrity of the state at hand. Safety and security are two distinctly different concepts. While safety involves one’s bodily survival and integrity, security accounts for the mental state of the person in danger.<sup>18</sup> This mental state of security is tied to the citizens’ regard for the law. For example, John Locke writes of a social contract under which citizens obey the government’s laws as long as the government protects the interests and safety of the citizens. If civilians feel a lack of security, they are led to believe that the government is not keeping its part of the contract. In response, citizens may feel compelled to break their end of the contract, which could throw the state into disarray. An attack on citizen psyche

presents a greater threat than does physical damage to citizens because while an act of physical harm has isolated repercussions, an attack on the human psyche threatens the collapse of the state. The terrorist tactic of delivering a “message of fear” gives terrorists a unique power to damage the stability of the state.<sup>19</sup> Just as acts of terror influence the mental state of citizens, so too do the actions taken by a government to combat terrorism. Consequently, it is imperative that a state that is faced with a strong terrorist threat respond to that peril with even more vigor, thus providing mental assurance to its citizens. Accordingly, the PTO’s hard stance on terrorism helps the Israeli government win over the assurance and confidence of its citizens.

Additionally, the State of Israel faces a unique challenge in effectuating anti-terrorism policy, because the state does not operate under a constitution. In many other democratic societies the constitution serves the purpose of primary protector of civil rights. Without a constitution, the Israeli government must take careful measures to preserve citizens’ rights when enacting anti-terrorist legislation. Although the Basic Laws thoroughly establish the government and serve the function of a constitution, the absence of a constitution from the Israeli legal framework simply adds one additional dimension to the challenge that Israel faces when dealing with terrorism. However, legislation such as the PTO coupled with the Israeli judicial system, provides the framework for preserving civil rights in Israel.

## PROTECTING CITIZEN FREEDOM

The PTO improves the quality of democracy in Israel by giving citizens the security to exercise their freedom and rights. In its first three years of existence, Israel did not have a special law outlining how terrorist organizations should be treated. By addressing terrorism head on, the PTO provides Israeli citizens with a sense of security in knowing that their government will be tough against a terrorist threat. Security and freedom are connected in that “security is the necessary condition for the enjoyment of rights.”<sup>20</sup> In this way, the PTO offers a “freedom from fear” which is necessary for the enjoyment of other legal freedoms.<sup>21</sup> The balance struck by the PTO is not arbitrary. It restricts freedoms of terrorists to preserve the more valuable freedoms of civilians. For instance, when terrorists endanger civilian security by inflicting fears beyond endangerment of bodily integrity, such as

damage to property, it is fitting that the government enforce a law to confiscate property of a terrorist organization. Accordingly, the PTO allows the government to confiscate “any property of a terrorist organization” and “any property being in a place serving a terrorist organization.”<sup>22</sup> Essentially, by accounting for the type of harm that terrorists traditionally inflict and dictating punishments that mirror the crime, the PTO strikes the proverbial balance that makes a high-quality democracy.



Israeli youth exercise their right to assembly outside a McDonalds.

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Critics of the PTO may claim that its provisions violate citizen freedoms and rights in ways that violate the spirit of democracy. For instance, critics argue that confiscation of property from a terrorist organization (PTO, Section 5) or the criminalization of the support of a terrorist organization (PTO, Section 3), violates rights to property and freedom of association. Such an argument may assert that the PTO violates democratic freedoms instead of fostering them. After all, “essential civil rights” that are basic to democratic regimes include “freedom of assembly, association, and organization,” to name a few.<sup>23</sup> Yet this criticism does not take into account that the PTO does not unconditionally violate freedoms of assembly or association, but only takes these freedoms away from people who harm or threaten to harm society. Democratic countries grant rights and freedoms to citizens as long as citizens do not violate the rights and freedoms of other citizens. By inflicting harm on civilians, members of terrorist organizations violate the rights and freedoms of society, and deserve to have their rights and freedoms surrendered. The PTO is justified in taking away rights and freedoms of an individual who has damaged the rights and

freedoms of innocent members of society. In striking the balance of a high-quality democracy, Israel chooses to put greater importance on the freedoms of those acting in conformance with society, than on the rights of terrorists. Thus the right of citizens to live without fear of terrorism is more deserving of preservation than the desire of terrorists to assemble or own property, among other freedoms.

The Supreme Court case of MK Azmi Bishara is an example of how the PTO has been used to protect freedom. This case is a particularly poignant example of the balance achieved by the PTO because both the Israeli government and Bishara asserted that their freedoms were violated by the opposite party. The case emerged in 2001 when Member of the Israeli Knesset, Azmi Bishara, was indicted for two counts of supporting a terrorist organization, in violation of sections 4(a), 4(b), and 4(c) of the PTO, and for assisting in unlawful departure of Palestinian citizens, in violation of Regulation 18 (d) and Regulation 5 of the Emergency Regulations.<sup>24</sup> Bishara's indictment under the PTO arose because while in office he made political speeches at public gatherings in June 2000 and June 2001 that praised the violent terrorist group Hezbollah and challenged the right of Israel to exist as a state.<sup>25</sup> The Knesset chose to lift the parliamentary immunity that was given to him by virtue of his position as a member of the Knesset and charged him with criminal offenses emanating from his speeches. Bishara's supporters argued that his indictment was a politically motivated violation of the freedom of speech.<sup>26</sup> Bishara's supporters further asserted that the government should not censor the content of his speech, and that Israel's criminalization of Bishara by means of the PTO violated his freedom. However, those arguments are flawed for two reasons. First, Bishara's speeches urged Hezbollah's "tactics be adopted by the Palestinians" and posed a real threat of danger to the security of innocent civilians as Hezbollah was responsible for several Israeli deaths.<sup>27</sup> By offering support for a group that has conducted major acts of terror in Israel, the State of Israel was justified in taking especially strict precautions against Bishara. Second, the strict interpretation of the PTO to remove Bishara's immunity due to his political speech was an unprecedented interpretation of the PTO.<sup>28</sup> After further judicial review, the Israeli Supreme Court restored the candidacy of Bishara in the legislature.<sup>29</sup> In the end, Bishara's rights were not violated. The case is a good example of how the Israeli anti-terrorism legislation is balanced by the Israeli courts to assure

protection of civil rights. The careful scrutiny that the Israeli legislators direct to terrorist activity is justified, as is evident by the fact that the actions of Bishara were carefully assessed and eventually found not to be terrorism.

## THE PTO IN A GLOBAL CONTEXT

The approach that Israel's PTO takes toward terrorism is not isolated in the global community. The United Nations enacted a resolution that is similar to the PTO at an international level. After the attacks on the United States on September 11th 2001, terrorism gained increased global attention, although Israel had been coping with the realities of terrorism for decades. The 2001 attacks sparked the creation of UN Resolution 1373 which can be compared to the PTO in several ways. UN Resolution 1373 stemmed from an international terrorism crisis, the September 11th attacks, just as the PTO was instigated because of an international terrorism crisis, the killing of Count Bernadotte. Both of those acts of terror placed the governments where the terrorism was committed in a compromising position in the eyes of the rest of the world, thus requiring swift and decisive governmental action. Although the PTO is a domestic law and Resolution 1373 is a suggested course of action enacted by an international body, both documents were created for the purpose of cracking down on terrorism and stem from similar roots. Just as Israel is "commitment to combat terrorism in all its aspects," so too is the UN "reaffirming the need to combat by all means...threats to international peace and security caused by terrorist acts."<sup>30,31</sup> Second, the Resolution shares similarities in structure and wording with the PTO. Sections 1 and 2 of the Resolution 1373, like Sections 1 through 4 of the PTO define who shall be criminalized for terrorist activity. Section 3 of the Resolution then outlines the appropriate action taken against terrorists, in a manner similar to Sections 5 through 6 of the PTO. For instance, Section 1 (a) of the Resolution calls for states to, "Prevent and suppress the financing of terrorist acts," just as PTO Section 4 (d) criminalizes a person who "gives money or moneys worth for the benefit of a terrorist organization."<sup>32</sup>

The creation of Resolution 1373 was a global community response to the challenge of terrorism. Because the UN approach was similar to the approach Israel had instated for decades, Resolution 1373 offered international credibility to Israel's approach. Resolution 1373 called on all member nations to submit reports on

steps they have taken in counterterrorism. In its report Israel was able to point to the PTO, while many other countries felt rushed to enact new legislation. Israel was ahead of other UN member states in that it already had anti-terrorism legislation.<sup>33</sup> Israel's legislation stemmed out of a crisis in its own country while other UN member states were obligated to pass legislation in response to a crisis that happened in the US, a foreign country. Thus, the PTO exhibits greater accountability to the people of Israel than to the UN, and is a better piece of legislation for Israelis.



US State Department  
Special Envoy for Middle East Peace George Mitchell  
meets with Israeli Prime Minister Binyamin Netanyahu

## CONCLUSION

Anti-terrorist legislation tests the balance of the rights and freedoms of citizens against the restrictive measures necessary for protection. A high-quality democracy seeks to protect citizen rights while also ensuring security. In approaching that struggle, Israel enacted the PTO legislation that strikes a balance between liberal civil liberties and protection against the constant threat of terrorist attacks. The PTO adds to the quality of Israel's democracy by providing confidence and reducing fear in society. The checks and balances system between the PTO and the Israeli judiciary provide further protection of the rights. Israel's approach to anti-terrorism through the enactment of laws such as the PTO is a model for the rest of the world as attested by the creation of UN Resolution 1373. §

## ENDNOTES

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