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Supreme Court of Israel

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Table of contents

A. Description	2
I. Introduction.....	2
II. Basic Texts.....	2
III. Composition and Organisation	2
1. Composition.....	2
2. Procedure	3
3. Organisation.....	3
IV. Powers.....	3
V. Nature and effects of Decisions	4
B. Basic Law: The Judiciary	5
C. Case-law (from the CODICES database)	10

A. Description

I. Introduction

The Israeli Supreme Court convened for the first time on 15 September 1948. Since that time, the Supreme Court has been at the apex of the court system in the State, the highest judicial instance. It sits in Jerusalem and has jurisdiction over the entire State.

Israel's three-tiered court system – Magistrates' Courts, District Courts and the Supreme Court – was established during the British Mandate period (1917-48). With independence in 1948, Israel passed the "Law and Administration Ordinance, 5708-1948" Section 17, stipulating that laws prevailing in the country prior to statehood would remain in force insofar as they did not contradict the principles embodied in the Declaration of Independence or would not conflict with laws to be enacted by the Knesset (Parliament). Thus, the legal system includes remnants of Ottoman law (in force until 1917), British Mandate laws (which incorporate a large body of English common law), elements of Jewish religious law and some aspects of other systems. However, the prevailing characteristic of the legal system is the large corpus of independent statutory and case law which has been evolving since 1948.

II. Basic Texts

The "Courts Law, 5717-1957," left the existing British court structure in place (with minor modifications), delineated the courts' powers and made specific provisions for them. In 1984, "Basic Law: The Judiciary and the Courts Law (Consolidated Version), 5744-1984", was enacted to replace the earlier version. It provides that judicial authority in Israel is vested in courts and tribunals. The courts have general judicial authority in criminal, civil and administrative matters, while the tribunals have specific authority in certain specific matters.

III. Composition and Organisation

1. Composition

The number of Supreme Court justices is determined by a resolution of the Knesset. At the present time there are 15 Supreme Court Justices. 14 are permanent members and one is a

temporary appointed justice to the Supreme Court for a period of 6 months to one year. The President of the Supreme Court is the head of the Court and serves as the head of the judicial system as a whole. The President is assisted by the Deputy President.

“Basic Law: The Judiciary” as well as “Courts Law (Consolidated Version), 5744-1984”, stipulate the method for making judicial appointments; qualifications for the appointment of judges; mode of appointing judges (by the President of the State, upon the proposal of an Appointments Committee); provisions for the independence of judges and the operation of the Judges’ Disciplinary Tribunal.

A judge’s term begins with the declaration of allegiance and ends with the mandatory retirement age of 70, resignation or death, and at the election or appointment to a position which forbids one from being a Knesset member. A judge may also be removed from office by resolution of the Judges’ Nominations Committee or by a decision of the Judges’ Disciplinary Tribunal.

2. *Procedure*

The Court is in session year round except for a recess from the 15th of July until the 1st of September. During this recess period, the Court will reconvene for urgent cases, criminal appeals and sentencing.

The Court normally consists of a panel of three Justices. A single Supreme Court Justice may rule on interim orders, temporary orders or petitions for an order nisi, and on appeals on interim rulings of District Courts, or on judgments given by a single District Court judge on appeal. The Supreme Court sits as a panel of five Justices or more in a “further hearing” on a matter in which the Court previously sat as a panel of three Justices. In matters that involve fundamental legal questions and constitutional issues of particular importance, the Court may sit as an expanded, odd-numbered panel of more than three Justices.

In a case in which the President of the Supreme Court sits, the President is the presiding judge; in a case in which the Deputy President sits and the President does not sit, the Deputy President is the presiding judge; in any other case, the judge with the greatest seniority is the presiding judge. Seniority is calculated from the date of the Justice’s appointment to the Supreme Court.

3. *Organisation*

Justices have staffs consisting of one secretary, two legal advisors (lawyers), and two clerks. The current President of the Supreme Court has four administrative assistants, two clerks, two legal advisors and two comparative law clerks.

The salary of judges and their pensions are determined by law or by resolution of the Knesset or one of its committees. However, the law does not permit a resolution specifically intended to lower the salary of judges. Similarly, the budget of the Judiciary is set by the Knesset.

IV. Powers

The Supreme Court is an appellate court as well as the High Court of Justice. As an appellate court, the Supreme Court considers both criminal and civil cases and other decisions of the District Courts. It also considers appeals on judicial and quasi-judicial decisions of various kinds such as matters relating to the legality of Knesset elections, disciplinary rulings of the Bar Association, prisoners’ petitions and administrative detention.

As the High Court of Justice, the Supreme Court rules as a court of first and last instance, primarily in matters regarding the legality of decisions of State authorities: government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters which the High Court of Justice deems necessary to grant relief in the interest of justice and which are not within the jurisdiction of another court or tribunal.

In 1992 the Knesset enacted “Basic Law: Freedom of Occupation” (which deals with the right to follow the vocation of one’s choosing) and “Basic Law: Human Dignity and Liberty” (which addresses protections against violation of a person’s life, body or dignity). These Basic Laws, as well as the other nine Basic Laws (on the Judiciary, The Parliament, The Government, The Army, State Comptroller etc) have constitutional status and therefore give the Court the power to overturn Knesset legislation which conflict with their principles. Thus, in recent years, the Israeli Supreme Court began to use these Basic Laws to conduct judicial review of Knesset legislation.

V. Nature and effects of Decisions

The Supreme Court of Israel is the highest judicial authority in Israel; its precedents are binding on all lower courts as well as on all persons and State institutions. It is not binding on the Supreme Court itself.

Supreme Court opinions are published in Hebrew by in a series called Piskei Din. Official printed versions are available soon after a final judgment is rendered. Decisions are also available on the Internet immediately after pronouncement. A number of past judgments which have been translated into English have been published in a series entitled “Selected Judgments of the Supreme Court of Israel”, and in the new series entitled “Israel Law Reports”.

B. Basic Law: The Judiciary¹

Chapter One: Basic Provisions

1. Judicial power

(a) Judicial power is vested in the following courts**:

- (1) the Supreme Court;
- (2) a District Court;
- (3) a Magistrate's Court;
- (4) another court designated by Law as a court.

In this Law, "judge" means a judge of a court as aforesaid.

(b) Judicial power is vested also in the following:

- (1) a religious court (*beit din*);
 - (2) any other court (*beit din*);
 - (3) another authority all as prescribed by Law.
- (c) No court or court (*beit din*) shall be established for a particular case.

2. Independence

A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law.

3. Publicity of proceedings

A court shall sit in public unless otherwise provided by Law or unless the court otherwise directs under Law.

Chapter Two: Judges

4. Appointment of judges

(a) A judge shall be appointed by the President of the State upon election by a Judges' Election Committee.

(b) The Committee shall consist of nine members, namely, the President of the Supreme Court, two other judges of the Supreme Court elected by the body of judges thereof, the Minister of Justice and another Minister designated by the Government, two members of the Knesset elected by the Knesset and two representatives of the Chamber of Advocates elected by the National Council of the Chamber. The Minister of Justice shall be the chairman of the Committee.

(c) The Committee may act even if the number of its members has decreased, so long as it is not less than seven.

5. Nationality

Only an Israeli national shall be appointed judge.

¹ Passed by the Knesset on the 25th Adar Alef, 5744 (28th February, 1984) and published in Sefer Ha-Chukkim No. II 10 of the 4th Adar Bet, 5744 (8th March, 1984), p. 78; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 1348 of 5748, p. 237.

6. Declaration of allegiance

A person appointed judge shall make a declaration of allegiance before the President of the State. The declaration shall be as follows:

“I pledge myself to be in allegiance to the State of Israel and to its laws, to dispense justice fairly, not to pervert the law and to show no favour.”.

7. Period of tenure

The tenure of a judge shall begin upon his declaration of allegiance and shall end only –

- (1) upon his retirement on pension; or
- (2) upon his resignation; or
- (3) upon his being elected or appointed to one of the positions the holders of which are debarred from being candidates for the Knesset; or
- (4) upon a decision of the Judges' Election Committee prepared by the chairman of the Committee, or the Ombudsperson; or
- (5) upon a decision of the Court of Discipline.

8. Retired judge

A judge who has retired on pension may be appointed to the position of a judge for such time, in such manner and on such conditions as may be prescribed by Law.

9. Restriction on re-posting

- (a) A judge shall not be permanently transferred from the locality where he is serving to a court in another locality save with the consent of the President of the Supreme Court or pursuant to a decision of the Court of Discipline.
- (b) A judge shall not without his consent be appointed to an acting position at a lower court.

10. Salary and benefits

- (a) The salaries of judges and other payments to be made to them during or after their period of tenure or to their survivors after their death shall be prescribed by Law or by a decision of the Knesset or of a Knesset committee empowered by the Knesset in that behalf.
- (b) No decision shall be passed reducing the salaries of judges only.

11. Judge not to engage in additional occupation, etc.

A judge shall not engage in an additional occupation, and shall not carry out any public function save with the consent of the President of the Supreme Court and the Minister of Justice.

12. Criminal proceedings

- (a) No criminal investigation shall be opened against a judge save with the consent of the Attorney-General, and no information shall be filed against a judge save by the Attorney-General.
- (b) A criminal charge against a judge shall not be tried save before a District Court consisting of three judges unless the judge has consented that the charge be tried in the ordinary manner.
- (c) The provisions of this section shall not apply to categories of offences designated by Law.

13. Disciplinary proceedings

- (a) A judge shall be subject to the jurisdiction of a Court of Discipline.
- (b) A Court of Discipline shall consist of judges and judges retired on pension appointed by the President of the Supreme Court.
- (c) Provisions as to the grounds for instituting disciplinary proceedings, the modes of filing complaints, the composition of the bench, the powers of the Court of Discipline and the disciplinary measures it shall be authorised to impose shall be prescribed by Law. The rules of procedure shall be in accordance with Law.

14. Suspension

Where a complaint or information is filed against a judge, or criminal investigation was opened against him, or criminal charges were brought against him, the President of the Supreme Court may suspend him from office for such period as he may prescribe.

Chapter Three: The Courts

15. Supreme Court

- (a) The seat of the Supreme Court is Jerusalem.
- (b) The Supreme Court shall hear appeals against judgments and other decisions of the District Courts.
- (c) The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court (*beit mishpat* or *beit din*).
- (d) Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent –
 - (1) to make orders for the release of persons unlawfully detained or imprisoned.
 - (2) to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting;
 - (3) to order courts (*batei mishpat* and *batei din*) and bodies and persons having judicial or quasi-judicial powers under law, other than courts dealt with by this Law and other than religious courts (*batei din*), to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given;
 - (4) to order religious courts (*batei din*) to hear a particular matter within their jurisdiction or to refrain from hearing or continue hearing a particular matter not within their jurisdiction, provided that the court shall not entertain an application under this paragraph if the applicant did not raise the question of jurisdiction at the earliest opportunity; and if he had no measurable opportunity to raise the question of jurisdiction until a decision had been given by a religious court (*beit din*), the court may quash a proceeding taken or a decision given by the religious court (*beit din*) without authority.
- (e) Other powers of the Supreme Court shall be prescribed by Law.

16. Other courts

The establishment, powers, places of sitting and areas of jurisdiction of the District Courts, the Magistrates' Courts and other courts shall be in accordance with Law.

17. Appeal

A judgment of a court of first instance, other than a judgment of the Supreme Court, shall be appealable as of right.

18. Further hearing

In a matter adjudged by the Supreme Court by a bench of three, a further hearing may be held by a bench of five on such grounds and in such manner as shall be prescribed by Law.

19. Retrial

In a criminal matter adjudged finally, a retrial may be held on such grounds and in such manner as shall be prescribed by Law.

20. Established rule

- (a) A rule laid down by a court shall guide any lower court.
- (b) A rule laid down by the Supreme Court shall bind any court other than the Supreme Court.

21. Registrar

A court may have a registrar, who may or may not be a judge.

Chapter Four: Miscellaneous Provisions**22. Law not to be affected by emergency regulations**

This Law cannot be varied, suspended, or made subject to conditions by emergency regulations.

23. Provisions to be prescribed by Law

Provisions as to the following matters shall be prescribed by Law:

- (1) the manner of electing, and duration of the tenure of, the members of the Judges' Election Committee;
- (2) qualifications for the posts of judges of the various grades;
- (3) the manner of appointing the President of the Supreme Court, the Deputy President of the Supreme Court and the President and Vice-president of a District Court and a Magistrate's Court;
- (4) the conditions and procedures for terminating the tenure of a judge;
- (5) the manner of appointing a judge to an acting assignment at another court and of transferring a judge, temporarily or permanently, from the locality where he is serving to a court in another locality;
- (6) proceedings for the suspension of a judge from office, and review of the suspension;
- (7) the matters which the courts of the different grades are to hear by a single judge or by three or more judges;
- (8) the manner of designating the judge or judges who is or are to hear a particular matter.

24. Provisions to be prescribed under Law

Provisions as to the following matters shall be prescribed under Law:

- (1) rules as to the administration of the courts, the making thereof and responsibility for their implementing;
- (2) the rules of procedure of the Judges' Election Committee;
- (3) procedure for the resignation of a judge;
- (4) procedure for the appointment and the powers of the registrar of a court;
- (5) the number of judges who are to serve in the courts of the different grades and location.

YITZCHAK SHAMIR
Prime Minister
CHAIM HERZOG
President of the State

C. Case-law (from the CODICES database)

ISR-2003-3-009

a) Israel / b) High Court of Justice / c) Panel / d) 11-11-2003 / e) H.C. 316/03 / f) Bakri v. Israel Film Council / g) to be published in the Official Digest / h).

Keywords of the Systematic Thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, film, censorship / Expression, freedom, irrespective of veracity / Administrative decision, judicial review / Censorship, film / Expression, freedom, assertion / Fundamental right, exercise / Information, accuracy / Judicial review, test / Media, accurate information / Debate, public, contribution.

Headnotes:

Freedom of expression is one of the fundamental principles of democracy. The Supreme Court's judgments, long ago, recognized it as a "superior right", even acknowledging that it serves as a basis for other rights. The fact that expression may be offensive, rude, or grating cannot serve as a reason not to protect it. It has been established that regarding the freedom of expression, the truth of the expression is not relevant. To permit the restriction of the false expression would allow the authorities the power to distinguish between the true and the false. A governmental body has no monopoly over the truth. In general, revelation of the truth in a free and open society is a prerogative given to the public. This is exposed to a spectrum of opinions and expressions, even false expressions.

An open, democratic society, which upholds the freedom of expression, certain in the feeling that this advances society and does not threaten it, is willing to bear offence, even substantial offence to the feelings of the public, in the name of the freedom of expression.

Summary:

On 3 April 2002 the Israeli Defense Forces (IDF) entered the Jenin refugee camp, located in the northern part of the West Bank. The camp served as a central base for organizing terror attacks, from which many suicide bombers had been sent to commit such attacks all over Israel. After the civilian population was warned to evacuate, IDF forces engaged in intense house-to-house combat. Armed Palestinians hid among civilians. During the battle, 23 IDF soldiers were killed and about 60 were wounded. According to IDF data, the Palestinians suffered 52 dead, half of whom were civilians. Serious damage was caused to property. During the warfare and for

several days thereafter, journalists were forbidden from entering the camp. It was only possible to learn of what had occurred by seeing the battlefield itself, and from testimony of the people involved.

The petitioner, an Israeli-Arab, filmed the reactions of Palestinian residents to the events, and edited them into the film "Jenin, Jenin". From the outset, the petitioner declared that he did not attempt to present the Israeli position or present a balanced portrayal of the events. His goal was to present the Palestinian story. According to the film, the IDF carried out a massacre in Jenin and attempted to cover it up by hiding the bodies. IDF soldiers, so it claims, intentionally harmed children, women, the elderly and the handicapped.

In anticipation of its commercial screening in Israel, the film was submitted, as required by the Film Ordinance of 1927, for approval to the Israeli Film Council. The film left a difficult impression upon the Council members. A majority of Council members decided that the film should not be approved for screening, as its content was a false propaganda, and would disrupt public order. A minority of dissenting Council members suggested that the screening be permitted, but that it either be accompanied by slides presented by an IDF spokesman, or that it be permitted exclusively for viewers 18 and older. The petitioner claimed that the Council's decision was unconstitutional. The state asserted before the court that the film is false, and must be censored, due to the danger that it poses to the public order and the offence it causes to feelings of the public. The Supreme Court allowed the families of the IDF soldiers who fell in battle, as well as a group of soldiers who participated in the fighting, to join as additional respondents to the petition.

The Court decided that the film "Jenin, Jenin" should be permitted to be screened, and that the decision of the Council should be reversed. Justice Dorner held that the Council's decision infringes the freedom of expression of its producer and of others, to whose opinions the film gives voice. Freedom of expression is not an absolute right. The court distinguished between the very principle of freedom of expression and the degree of protection, which may only be partial. Rude and offensive expressions as well as false expressions are protected.

Justice Dorner held that the Council has a clear purpose: exposing the truth, however, it was not granted the authority to expose the truth by silencing expression that members of the Council consider to be lies. The Council does not have the authority to restrict expression that is principally ideological or political, simply because the government, part of the public, or even a majority of it, disagrees with the views expressed. She also held that the Council's decision was not proportionate. As to the suitability of the means chosen, after being censored, "Jenin, Jenin" was transformed into a symbol. Clearly, this was not the Council's intention. As to the minimal violation test, prohibiting the screening of a film is not the only means available to the Council. The Council could have made use of a less blunt instrument. As for the relativity test, the damage caused by the Council's decision is greater than its benefit.

Justice Procaccia concurred. She focused on the severe offence to the feelings of many members of the Israeli public caused by the film. The allegedly documentary presentation of the operations of the IDF – portraying them as war crimes – provokes difficult emotional reactions in three circles of the public. First, the inner circle of soldiers who participated in the operation, who closely experienced the horrors of battle. Second, the circle of bereaved families who lost those dear to them in battle. Third, large parts of the public. The offence is intensified by the reality that the country continues to confront terrorist attacks.

The Council may prevent the presentation of films which may disturb the public order. “Disturbing the public order” is a broad concept, which also takes account of offence to the sensitivities of the public. The force of an offence is not only connected to its content, but also to its timing. Offence during times of peace and calm is not similar to offence during times of war. The Council must place, on the one hand, the principle of freedom of expression, which reflects a fundamental right with constitutional weight and, on the other hand, other values which the Council is responsible for preserving. The general principle is the freedom of expression. This freedom applies to messages regardless of their nature, content, quality, or truth.

In order to balance the two, the Council must first take into account the type of expression at issue. Second, the offence to the sensitivities of the public should be evaluated on two levels. Both the severity of the offence, and the probability of its occurrence must be taken into account. In light of the importance of the freedom of expression, it will be restricted only when we are faced with an offence whose intensity is beyond the level of tolerance which persons in a democratic society must accept. The restriction must be proportionate. It may not exceed that which is necessary to ensure public order.

Justice Procaccia held that under the circumstances, even though the wound is grave, it is not of the severity required to restrict the freedom of speech. The injury to the public is both broad as well as deep. It is not a superficial injury, transient, and blowing over like the wind. The feeling, the reaction, is genuine and harsh. The recent occurrence of the events may aggravate the intensity of offence. Between the battle in Jenin and the Council’s decision to prohibit the film, almost seven months passed. The interim period has strengthened the public endurance in the face of the offence caused by the film. It can now meet the film head-on. Prohibiting its screening does not accord with our standards for balancing the conflicting values here.

With Justice Grunis also joining both Justice Dorner’s and Justice Procaccia’s comments, this judgment was unanimous.

Cross-references:

- H.C. 73/53 “*Kol Ha’am*” *Company Limited v. Minister of the Interior* 7 Isr.S.C. 871; An English translation is to be found in *Selected Judgments of the Supreme Court of Israel* Vol. 1 (1948-1953) 90;

- H.C. 4804/94 *Station Film Co. v. The Film Review Board* 50(5) Isr.S.C. 661; An English translation is to be found in *Israel Law Reports* (1997) 23.

Languages:

Hebrew, English (translation by the Court).

ISR-2003-2-008

a) Israel / **b)** Supreme Court / **c)** / **d)** 15-05-2003 / **e)** E.Au. 11280/02; E.Au. 50/03; E.Ap. 55/03; E.Ap. 83/03; E.Ap. 131/03 / **f)** The Central Election Committee v. Parliament Member Tibi / **g)** 57(4) Isr.S.C. 1 (Official Digest) / **h).**

Keywords of the Systematic Thesaurus:

3.3.3 **General Principles** – Democracy – Pluralist democracy.

- 3.17 **General Principles** – Weighing of interests.
- 3.24 **General Principles** – Loyalty to the State.
- 4.5.10.4 **Institutions** – Legislative bodies – Political parties – Prohibition.
- 4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
- 4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
- 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
- 5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
- 5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Democracy, defensive / Party, disqualification, burden of proof / State, Jewish / Democratic state, core elements.

Headnotes:

A thriving democracy must not participate in its own destruction. Thus the “democratic paradox” arises from conflicting desires to foster an open marketplace of ideas (in which minority voices are protected against majority political forces), and to enable democracy to protect itself from those who seek to destroy it. In an attempt to resolve this paradox, the State of Israel has enacted numerous laws relating to the registration of political parties, the conduct of general elections, and the criminalisation of certain activities that threaten democracy.

There are many democratic states, but there is only one Jewish State. The Jewish character of Israel is its central feature – it is axiomatic. Israel’s Basic Law therefore bars the participation of a candidate or list of candidates who advocate nullification of the core elements of the State’s Jewish character as a central part of their aspirations and actions. The same prohibition applies to those seeking to abolish the basic democratic features of the State. Democracy is based on dialogue, not on force. Those who wish to change the structure of society may participate in the democratic dialogue, as long as they use legal means to achieve their aims, and as long as their activities comply with the core democratic characteristics of the state.

Summary:

Section 7A of the Basic Law on the Knesset empowers the Central Election Committee, (“the Committee”) to prohibit a list of candidates or a particular candidate from participating in the elections to the Parliament if they (in their aims or actions, either explicitly or implicitly):

1. deny the existence of the State of Israel as a Jewish and democratic state;
2. incite racism;
3. support the armed struggle, by an enemy state or of a terrorist organisation, against the State of Israel.

The Committee’s decision to disqualify a particular candidate must be reviewed by the Supreme Court, and there is a right to appeal a decision disqualifying a list of candidates.

On the basis of Section 7A of the Basic Law on the Knesset, the Committee considered the disqualification of several candidates for the January 2003 general elections. The first candidate, Azmi Bishara, is an Israeli Arab member of Knesset. The Committee cited two reasons for its decision to prevent Bishara from participating in the elections:

1. Bishara denied the Jewish character of the State, through his campaign to transform Israel into a “state of all of its citizens” as opposed to a Jewish state; and
2. Bishara supported the armed struggle of both Palestinian and Lebanese (Hezbollah) terrorist organisations against Israel. In addition, the Committee also decided to disqualify the list of candidates proposed by Bishara’s political party, the National Democratic Assembly (N.D.A.: Brit Leumit Democratit (B.L.D. in Hebrew)).

The second candidate, Ahmed Tibi, is also an Israeli Arab Member of Knesset. Tibi was disqualified from participating in the elections due to his support of Palestinian terrorist groups’ armed struggle against Israel. The Committee also considered the disqualification of Baruch Merzel, an Israeli Jewish candidate in a far right-wing party, Herut. Merzel is the former leader of the outlawed Kach movement, a racist anti-Palestinian and anti-Arab group. Numerous complaints of incitement to racial hatred were made against Merzel, but Merzel argued that he had changed his views, and the Committee approved his participation. All of those decisions were reviewed by the Supreme Court.

The Supreme Court, sitting as an extended bench of eleven Justices, held that Section 7A of the Basic Law on the Knesset assumes that a democracy can defend itself from undemocratic forces using democratic means to undermine democracy. That dilemma represents a kind of democratic paradox; Israeli constitutional law balances the democratic freedoms of expression and pluralism with the preservation of Israel as a Jewish and democratic state. Thus, that dilemma reflects Israel’s character as a defensive democracy.

Disqualifying a candidate or a list of candidates is an extreme measure that infringes upon the electorate’s right to vote and the candidates’ right to participate in an election. To justify such a disqualification, the Committee must satisfy a heavy evidentiary burden. The candidates’ participation in activities prohibited by the Basic Law must be a dominant and central feature of their public lives, and they must undertake measures in order to accomplish the prohibited aims. The Court proceeded to discuss in obiter dicta the possibility of interpreting the Basic Law to require proof of probable success in achieving the prohibited aims (the probability element).

Due to the grave implications of the disqualification procedure, Israel’s characteristics as a “Jewish state” and “democratic state” should not be applied too broadly in this context. The core elements of a Jewish state include the right of every Jew to immigrate to Israel, in which there is a Jewish majority; the establishment of Hebrew as the official language; and the centrality of Jewish heritage in Israel’s state culture, as reflected in its national holidays and symbols. However, Israel’s Jewish character must not contradict the fact that all of its citizens, Jews and non-Jews alike, have a right to equality. The core elements of a democratic state include free and equal elections, basic human rights, separation of powers and the rule of law. Drawing upon these interpretive principles, Israel may prohibit incitement to racial hatred and may prohibit political candidates from supporting an armed struggle against Israel.

A majority of the Supreme Court overturned the Committee’s decision to disqualify Bishara and the N.D.A. list of candidates. It held that although the aims of Bishara and the N.D.A. were clearly not Zionist, they did not necessarily contradict the core elements of Israel as a Jewish

state. While there was some evidence of support by Bishara and the N.D.A. for the general struggle by Palestinians and Lebanese against Israel, the Court doubted whether that included support for an armed struggle as required by the Basic Law, and found that such doubt should be resolved in favour of the candidates. The minority opinion would have upheld the disqualifications, based on its conclusion that the evidence established Bishara and the N.D.A. aimed to abolish Israel as a Jewish state, had undertaken actual measures to accomplish that aim, and had in fact supported the armed struggle of terrorist groups against Israel.

The Court unanimously overturned Tibi's disqualification, citing the lack of evidence in support of the Committee's decision.

Finally, a majority of the Court ruled that the Committee had acted reasonably in accepting Merzel's assertion that he no longer espoused the racist views of the Kach movement. In contrast, a minority of the Justices found that the Committee had abused its discretion in permitting his candidacy, pointing to evidence suggesting Merzel's recent involvement in racist activities.

The Court decided the case on 9 January 2003. The elections took place on 28 January 2003, with the participation of Bishara, the N.D.A. list of candidates, Tibi, and Merzel. The Court's reasons were published on 15 May 2003.

Cross-references:

- E.Ap. 1/65 *Yardor v. The Chairperson of the Central Election Committee* 19(3) Isr.S.C. 365;
- E.Ap. 2/84 *Neiman v. The Chairperson of the Central Election Committee* 39(2) Isr.S.C. 225 (also available in English at the Court site www.court.gov.il);
- E.Ap. 1/88 *Neiman v. The Chairperson of the Central Election Committee* 42(4) Isr. S.C. 177;
- E.Ap. 2/88 *Ben Shalom v. The Central Election Committee* 43(4) 221 Isr. S.C. 221.

Languages:

Hebrew, English (translation by the Court).

ISR-2003-2-007

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 22-01-2003 / **e)** CrimA 3852/02 / **f)** John Doe v. District Psychiatric / **g)** [2003] IsCR 57(1) 900 / **h)**.

Keywords of the Systematic Thesaurus:

- 2.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – National rules from other countries.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Psychiatric disturbance, degree / Psychiatric institution, criminal commitment, duration.

Headnotes:

Holding a patient in commitment infringes his or her rights of liberty and dignity, guaranteed under the Israeli Basic Law on Human Dignity and Liberty. Such an infringement may be justified if it is intended for the protection of the accused as well as for the protection of others.

The law must strike a reasonable balance between Patient no. 8217's rights and the public interest.

Forced criminal commitment becomes unreasonable when its duration exceeds the amount of time a patient would have served in prison had he or she been convicted.

Summary:

The petitioner, Patient no. 8127, after being charged with assault, was found unfit to stand trial. He was criminally committed to a psychiatric institution. Under Israeli law, criminal commitment restricts a patient's liberty more than civil commitment, *inter alia*, in that criminal commitment continues indefinitely until the District Psychiatric Board orders the discharge of the accused. The petitioner remained in criminal commitment in the psychiatric institution for a period longer than his sentence would have been had he actually stood trial and been convicted.

The petitioner asserted, *inter alia*, that that arrangement was unconstitutional. He asserted that he could not be held in commitment indefinitely. The respondent countered that the nature of his mental illness required that the petitioner remain in commitment indefinitely. The respondent also asserted that the petitioner could not be held in civil commitment, as the civil commitment system did not provide for adequate control and supervision.

The Court held for the petitioner. The Court noted that holding the petitioner in commitment for any length of time infringed his rights of liberty and dignity, guaranteed under the Israeli Basic Law: Human Dignity and Liberty. However, the Court noted that such an infringement might be justified where it is intended for the protection of the accused as well as for the protection of others. However, the Court noted that the law must strike a reasonable balance between Patient no. 8217's rights, on the one hand, and the public interest, on the other. The Court held that forced criminal commitment becomes unreasonable when its duration exceeds the amount of time the patient would have served in prison had he been convicted. In reaching its judgment, the Court relied on comparative law from the United States, Canada and Australia.

The Court stated that the court that issues the original criminal commitment order should, when the duration of criminal commitment becomes unreasonable, transfer a patient to civil commitment. The Court noted that the patient himself might approach the court, assert that the period of criminal commitment has become unreasonable, and ask to be transferred to the civil track. However, the Court added that the Attorney-General might act as proxy for the patient, where the patient does not approach the Court himself.

Languages:

Hebrew, English (translation by the Court).

ISR-2003-1-006

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 05-02-2003 / **e)** H.C.J. 3239/02 / **f)** Iad Ashak Mahmud Marab v. IDF Commander in the West Bank / **g)** 57(2) IsrSC 349 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 4.18 **Institutions** – State of emergency and emergency powers.
- 5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
- 5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.
- 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
- 5.3.13.24 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the reasons of detention.
- 5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Terrorism, fight / Detention, duration / Detention, judicial review.

Headnotes:

A delicate balance must be struck between, on the one side, the liberty of the individual (who enjoys the presumption of innocence) and, on the other side, public peace and safety.

There must be an individual cause for detention against each specific detainee. However, it makes no difference whether that cause applies to an isolated individual or to that individual as part of a large group.

A judge is an “internal” part of the detention process. It is the judge that must determine whether there are sufficient investigative materials to support the continuation of the detention.

Detainees may be prevented from meeting with lawyers as long as there are significant security considerations in preventing such a meeting.

A lack of resources is not a sufficient reason for denying fundamental rights.

Summary:

In an attempt to combat rising Palestinian terrorism, the Israeli government decided to initiate an extensive military operation: Operation Defensive Wall. In the context of that operation, the Israeli Defence Forces (IDF) entered various areas of the West Bank with the intention of detaining wanted persons as well as members of several terrorist organisations. As of 5 May 2002, about 7 000 persons had been detained. Many of those persons were quickly released after initial screening and identification. Those who were not released after screening were moved to permanent detention facilities.

In the context of that operation, the IDF promulgated Order 1500, which provided that a detainee could be held up to 18 days without a judicial detention order. This period could be extended with a judicial detention order. Moreover, during the original 18-day period, there was to be no judicial review of the detention order, and the detainee could be prevented from meeting with a lawyer. Order 1500 also allowed a detainee to be held for up to 8 days without being given an opportunity to challenge his detention.

Order 1500 was later amended by Order 1505, which shortened the initial 18-day period to 12 days. Order 1505 provided that a detainee could only be prevented from meeting with a lawyer for four days, not the 18 days provided for by Order 1500. Subsequently, Order 1518 shortened that period to 2 days. Order 1518 also provided that a detainee could be held up to 4 days without being given the opportunity to state his opinion, not 8 days as set out originally in Order 1500.

The petitioners, ten non-governmental organisations and detainees, asserted that Order 1500, as well as the subsequent amending Orders, were illegal under international and Israeli law. In their first claim, the petitioners asserted that international law only provided for two types of detention: either ordinary criminal detention or preventative internment. Both types of detention, according to the petitioners, had to be based on specific suspicions relating to an individual person. The petitioners asserted that, by contrast, those Orders set up a system of collective or mass detention, under which people could be held even though the authorities could not set out individualised suspicions against each detainee. In their second claim, the petitioners asserted that the Orders provided for an excessively long period before judicial intervention. In their third and fourth claims, the petitioners contested provisions of the Orders that prevented detainees from meeting with lawyers without being given a chance to challenge the situation.

The respondent asserted that all the Orders were legal under international law. Moreover, the respondent asserted that Palestinian terrorists had chosen to work from population centres. As such, it was often impossible to distinguish, in normal times as in combat situations, between members of terrorist organisations and innocent civilians. That being so, persons who were found at the sites of terrorist activity or combat under circumstances that gave rise to suspicion of their involvement in those activities were detained. The respondent asserted that the Orders were a reasonable response to the need to detain large numbers of people in the course of the fight against terrorism. Moreover, the State noted that as soon as the situation allowed, it had issued amended orders that significantly relaxed the original provisions of Order 1500.

The Court noted that with regard to detentions for security reasons, a delicate balance must be struck between, on the one side, the liberty of the individual (who enjoys the presumption of innocence) and, on the other side, public peace and safety. In that context, in response to the petitioners' first claim, the Court held for the respondents, stating that the Orders did not allow for the detention of persons without individualised reasons. Instead, the Order only allowed for

detentions where there was an individual cause for detention against a specific detainee. It made, however, no difference whether that cause applied to an isolated individual or to that individual as part of a large group. The size of the group had no bearing on the matter. Rather, what mattered was the existence of circumstances that gave rise to the suspicion that the individual detainee presented a danger to security.

With regard to the petitioners' second claim, the Court held the Orders were illegal: judicial intervention could not be delayed for 18 days. According to the Court, appearing before a judge is an "internal" part of the detention process. It is the judge that must determine whether there are sufficient investigative materials to support the continuation of the detention. With regard to the petitioners' third claim, the Court held that the Orders were legal. Detainees could be prevented from meeting with lawyers as long as there were significant security considerations in preventing such a meeting, such as ensuring that lawyers were not brought into a combat zone, that they would not be exposed to injury and that they would not relay messages back to the combat zone. The Court emphasised, however, that such security considerations must be significant. Regarding the petitioners' fourth claim, the Court noted that the respondent had argued that a lack of resources prevented it from hearing the detainees' claims earlier. The Court rejected that argument and found for the petitioners on the ground that a lack of resources was not a sufficient reason for denying fundamental rights.

Languages:

Hebrew, English.

ISR-2003-1-005

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 23-01-2003 / **e)** H.C.J. 651/03 / **f)** Association for Civil Rights in Israel v. Chairman of the Central Elections Committee / **g)** 57(2) IsrSC 62 / **h)**.

Keywords of the Systematic Thesaurus:

- 1.2.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Non-profit-making corporate body.
- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 3.18 **General Principles** – General interest.
- 4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
- 4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Election, campaign, restrictions / Flag, picture, use in electoral campaign / Public petitioner, special interest in bringing legal proceedings.

Headnotes:

The standing of public petitioners who have not themselves been injured has been recognised in several areas, including matters of a public nature that concern the rule of law, matters that

concern the enforcement of constitutional principles or where judicial intervention is necessary to repair a substantial error in government operations.

Public petitioners have standing even if they are not joined by non-public petitioners with ordinary standing.

Due to the importance of regular and proper elections to the democratic process, the standing of a public petitioner should be recognised in the context of election law, despite the existence of specific individuals who have standing. This is true even if they are not joined by non-public petitioners.

Summary:

During elections for the Sixteenth Knesset (Parliament), the Chairman of the Central Elections Committee disqualified portions of the election campaign broadcasts of Ra'am and Balad, two parties running for election. Those portions were disqualified for including pictures of the Palestinian flag. The petitioner, the Association for Civil Rights in Israel, asserted that the disqualification of the portions constituted an infringement of the freedom of speech of Ra'am and Balad, as well as an infringement of the voters' right to view political messages uncensored. Ra'am and Balad did not themselves petition against the disqualification. However, they were added to the petition as respondents by the Court. The Attorney-General, as an *amicus curae*, contended that petitioner did not have standing to bring a petition, as it was not injured by the decision of the Chairman of the Elections Committee. Moreover, the injured respondents, Ra'am and Balad, could have brought the petitions themselves.

The Court held that the petitioner had standing as a public petitioner. In general, however, the standing of a public petitioner has not been recognized where there is a specific individual who has been injured and has ordinary standing.

The Court held that in the context of election law, the standing of a public petitioner should be recognised, despite the existence of specific individuals who have standing. The Court asserted that the extended right of standing should be recognised due to the importance of regular and proper elections to the democratic process. According to the Court, the regularity of the election process is the concern of the entire public and goes beyond the direct concern of the individual injured by government action. Moreover, the Court contended that all voters have an interest in receiving the political messages of the candidates. The voters' rights, therefore, are connected to those of the candidates running for election. As such, the Court held that a direct injury to a party may also constitute an injury to the voter and give rise to the latter's standing to bring his or her concern before the courts.

As to the merits of the petition, the Court observed that restrictions on speech are only justified where the expression at issue has the potential to cause substantial and severe harm to other protected interests. The Court held that under the circumstances, the appearance of the Palestinian flag in the broadcasts would not cause injury to viewers. The Court noted that the Palestinian flag could potentially be identified with groups involved in terrorist activities against Israeli civilians. Even so, the Court noted that in both broadcasts, the Palestinian flag only appeared for a split-second. Moreover, the appearance of the flag was not accompanied by aggressive or hostile words. That being so, the Court held that the appearance of the Palestinian flag would not cause substantial and severe harm to the viewing public. The Court went on to quash the decision of the Chairman of the Central Elections Committee and permit the broadcast of the disqualified portions of the broadcasts.

Languages:

Hebrew.

ISR-2003-1-004

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 22-01-2003 / **e)** CrimA 3854/02 / **f)** Anonymous v. District Psychiatric Board for Adults / **g)** 57 (1) IsrSC 900 / **h)**.

Keywords of the Systematic Thesaurus:

- 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
- 5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Mental disturbance, degree / Psychiatric report, use / Internment, psychiatric, duration.

Headnotes:

Holding a patient in commitment infringes his or her rights of liberty and dignity, guaranteed under the Israeli Basic Law: Human Dignity and Liberty. Such an infringement may be justified if it is intended for the protection of the accused as well as for the protection of the individual.

The law must provide for a reasonable balance between the patient's rights and the public interest.

Forced criminal commitment becomes unreasonable when its duration exceeds the amount of time the patient would have served in prison had he been convicted.

Summary:

After being charged with assault, the petitioner was found unfit to stand trial. He was criminally committed to a psychiatric institution. Under Israeli law, criminal commitment restricts the patient's liberty more than civil commitment. One of the ways it does so is that criminal commitment continues indefinitely until the District Psychiatric Board orders the discharge of the accused. The petitioner remained in criminal commitment in the psychiatric institution for several years, a period longer than his sentence would have been had he actually stood trial and been convicted.

The petitioner asserted, *inter alia*, that the arrangement was unconstitutional. He asserted that he could not be held in commitment indefinitely. The respondent countered that the nature of his mental illness required him to remain in commitment indefinitely. The respondent also asserted that the petitioner could not be held in civil commitment, as the civil system did not provide for adequate control and supervision.

The Court held for the petitioner. It held that forced criminal commitment becomes unreasonable where its duration exceeds the amount of time the patient would have served in prison had he or she been convicted. In reaching that judgment, the Court relied on comparative law from the United States, Canada and Australia.

In the holding, the Court stated that the court issuing the original criminal commitment order should, where the duration of criminal commitment becomes unreasonable, transfer the patient to civil commitment. The Court noted that the patient himself could approach the court, assert that the period of criminal commitment had become unreasonable and ask to be transferred to the civil track. However, the Court also held that the Attorney-General could act as proxy for the patient, if the patient did not approach the Court himself.

Languages:

Hebrew, English.

ISR-2003-1-003

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 16-01-2003 / **e)** H.C.J 212/03 / **f)** / **g)** 57(1) IsrSC 750 / **h)**.

Keywords of the Systematic Thesaurus:

- 1.2.2.4 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Political parties.
- 1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
- 4.2.1 **Institutions** – State Symbols – Flag.
- 4.2.3 **Institutions** – State Symbols – National anthem.
- 4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.
- 4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Election, campaign, access to media / Media, broadcasting, restrictions.

Headnotes:

The absence of a statutory grant may be a lacuna in the law, rather than a conscious decision by the legislature, and, as such, can be filled through judicial interpretation.

The applicable test for the constitutionality of prior restraint on speech is whether there is near certainty that if the expression in question were to occur, the public interest would suffer serious and substantial injury. This standard also applies to the decisions of the Central Elections Committee.

Summary:

The National Jewish Movement Herut is a political party that ran in Israel's recent national elections. During those elections, Herut wished to broadcast, over both radio and television, a commercial that superimposed Arabic words – words heavily laden with anti-Israel symbolism – over Israel's national anthem. In the television version of the commercial, those words were accompanied by a picture of an Israeli flag, waving above the Israeli parliament, gradually changing into a Palestinian flag.

In Israel, the Chairman of the Central Elections Committee has some statutory authority to bar the broadcast of election commercials. For example, the relevant law places explicit restrictions on the appearance of children, the Army and terror victims in political election commercials. The Chairman used this authority to disqualify Herut's commercial, asserting that the commercial could lead to incitement and provocation, and that it showed contempt towards Israel's flag and national anthem. Herut appealed the Chairman's decision to the Supreme Court.

In its petition, Herut presented several legal grounds for having the Chairman's decision quashed. First of all, Herut pointed out that the law contained no explicit provision that granted the Chairman authority to bar radio – as opposed to television – commercials. Second, Herut asserted that the law granted the Chairman the authority to intervene only on the basis of limited grounds in the content of election commercials. Third, Herut also asserted that the Chairman's decision violated Herut's right to free speech, a right protected by Israel's semi-constitutional Basic Law: Human Dignity and Liberty. In his counterclaim, the Chairman of the Elections Committee asserted that there was no statutory basis for the judicial review of his decision by the Supreme Court.

Despite its unanimous agreement on several of the arguments presented, the Court disagreed regarding whether to overturn the decision of the Chairman, with a majority of the sitting justices refusing to overturn his decision. Regarding Herut's first argument, the sitting panel of three Justices agreed that a proper interpretation of the law granted the Chairman the right to interfere in the content of radio election commercials, even though he was only explicitly granted the right to intervene in the content of television commercials. The Court considered the absence of a statutory grant to interfere in the content of radio broadcasts as a lacuna in the law, rather than a conscious decision by the legislature, and, as such, saw fit to fill that lacuna through judicial interpretation. Similarly, the Court also ruled that the Chairman's authority to intervene in the content of broadcasts extended beyond the grounds explicitly enumerated in the law. The Court asserted that such an interpretation was necessary for the proper regulation of election commercials. The Court also noted that, in the past, the Chairman has acted in accordance with that broader interpretation.

Similarly, the Court unanimously agreed that it had the jurisdiction to review the decision of the Chairman. Though the election law explicitly negated the authority of Israeli courts to review the decision of the Chairman, the Court asserted that the constitutional status of the arguments put forward were paramount to the ordinary status of the election law. As such, as the Supreme Court had authority to hear all constitutional actions, the Court held that it had jurisdiction to hear the case.

The Court, however, split regarding the question of whether the decision of the Chairman was an unreasonable violation of Herut's freedom of speech. Even here, the Court agreed that the applicable test for the constitutionality of a prior restraint on speech was whether there is near certainty that, if the expression in question were to occur, the public interest would suffer serious and substantial injury. The majority of the Court asserted that the Chairman's decision was a reasonable response to the possibility of provocation and incitement presented by the election commercial. In dissent, one justice asserted that any such provocation and incitement presented by the commercial would be tolerable in a democratic society, and that there were no grounds for banning the commercial.

Languages:

Hebrew, English.

ISR-2003-1-002

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 03-09-2002 / **e)** H.C.J 7015/02 / **f)** Ajuri v. IDF Commander / **g)** 56(6) IsrSC 352 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.16 **General Principles** – Proportionality.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 4.18 **Institutions** – State of emergency and emergency powers.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Terrorism, fight / Residence, assigned / Geneva Convention of 1949.

Headnotes:

The framework for examining the legality of the actions of the Commander of the Israeli Defence Forces (IDF) can be found in the provisions of international law and the laws that apply to belligerent occupation.

Article 78 of the Fourth Geneva Convention provides that every person has a basic right to retain his place of residence and to prevent a change of that place. However, international law itself recognises that there are circumstances in which this right may be overridden by other interests, such as imperative reasons of security.

An essential condition for assigning a person's residence is the existence of a reasonable possibility that the person himself presents a real danger, and that assigning his place of residence will help to avert this danger. One cannot assign the residence of an innocent relative who does not present a danger, even if it is proved that assigning his residence may deter others from carrying out terrorists acts. One cannot assign the residence of someone who no longer presents a danger. Assigning someone's place of residence may be done only on the basis of

clear and convincing administrative evidence. It must be proportionate. One must also examine, in each case, whether it is not possible, instead of assigning someone's place of residence, to file a criminal indictment against that person, which will avert the danger that assigned residence is intended to avert.

Summary:

The Israeli Defence Force Commander in Judaea and Samaria (hereafter: the IDF Commander) issued an order against three petitioners. According to the orders, the place of residence of the petitioners – residents of Judaea and Samaria – would be assigned to the Gaza Strip, for a period of two years. The reason underlying the orders was the danger presented by the petitioners because of their involvement in terrorist activities, mainly in their help to family members who were involved in terrorism and carried out many terrorist attacks, and assigning their place of residence would avert this danger.

In the judgment of the Supreme Court, which was written by the President A. Barak, with the agreement of all the members of the panel, it was decided that the IDF Commander was indeed competent to make orders to assign residence. The Court pointed out that the circumstances of the case should not be regarded as a deportation or a forcible transfer (within the meaning of Article 49 of the Fourth Geneva Convention) but as assigned residence which is permitted under Article 78 of that Convention. Article 78 of the Fourth Geneva Convention begins:

“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”

The Court further held that in the circumstances of the case, the preconditions set out in Article 78 of the Fourth Geneva Convention allowing someone's place of residence to be assigned were fulfilled. Judaea and Samaria and the Gaza Strip should be regarded as one territory subject to a belligerent occupation, and therefore the case did not involve a transfer of a person outside the area subject to the belligerent occupation. It further held that the requirements of the Convention were fulfilled both with regard to an appeal procedure (which was indeed held before the Appeals Board) and with regard to a reconsideration of the decisions (which in the circumstances of the case was to be held every six months).

Against this background, the Supreme Court proceeded to consider the principles governing the IDF Commander's discretion in making assigned residence orders under Article 78 of the Fourth Geneva Convention. The Court emphasised that although the IDF Commander has broad discretion in deciding to assign someone's place of residence, it is not absolute discretion. It was held in that respect that an essential condition for exercising this authority is the existence of a reasonable possibility that the person himself presents a real danger, and that assigning his place of residence will help to avert that danger.

The Supreme Court held further that if it is proved that a person presents a real danger to the security of the area, it is permissible also to take into account considerations of deterring others. It was held that where the condition of a person presenting a danger exists, it is justified to take into account – when deciding whether to assign his place of residence – the impact of that measure in deterring others from carrying out terrorist acts and helping those carrying out terrorist acts. That consideration could also be taken into account, for example, when choosing between internment and assigned residence. That result, the Court stated, is required by the harsh reality in which the State of Israel and the territory find themselves, in that they are

exposed to an inhuman phenomenon of “human bombs” that is engulfing the area. In this respect, the Court accepted the position of the IDF Commander that assigned residence is an effective measure in the struggle against the plague of suicide bombers.

Against this background, the Court examined the three cases before it. It was decided, as stated, that the IDF commander has the authority in principle to assign residence under international law. The Court decided not to intervene in the decision of the IDF Commander to assign the residence of two of the petitioners: Amtassar Muhammed Ahmed Ajuri who, it was found, had helped her terrorist brother Ahmed Ajuri directly, *inter alia*, by sewing explosive belts; and Kipah Mahmad Ahmed Ajuri, who, it was found, had helped his brother (the terrorist Ahmed Ajuri), *inter alia*, by helping him live in a hide-out apartment and by acting as look-out when his brother and members of his group moved two explosive charges from one place to another. With regard to those petitioners, it was held that it had been proved that they were involved in terrorism to the extent required for them to present a reasonable possibility of a real danger, which would be averted if they were to be removed from their place of residence. Therefore, the Court found no reason to intervene in the decision of the IDF Commander to assign their residence.

It was however decided that with regard to the petitioner Abed Alnasser Mustafa Ahmed Asida – the brother of the terrorist Nasser A-Din Asida – the measure of assigned residence could not be adopted. The reason was that even though it was proved that the petitioner knew of the deeds of his terrorist brother, his involvement amounted merely to lending his brother a car and giving him clean clothes and food at his home, and no connection had been established between the petitioner’s acts and the terrorist activity of the brother. It was therefore held that there was an inadequate basis for the finding that the petitioner had reached a sufficient level of danger for his residence to be assigned.

Languages:

Hebrew, English.

ISR-2003-1-001

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 25-07-2002 / **e)** H.C.J. 4112/99 / **f)** Adalla v. Tel Aviv Jaffa Municipality / **g)** 56(1) IsrSC 393 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 4.3.1 **Institutions** – Languages – Official language(s).
- 4.3.4 **Institutions** – Languages – Minority language(s).
- 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
- 5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Language, minority, municipality, imposition of use / Language, co-official / Sign, use of language.

Headnotes:

Hebrew and Arabic are the official languages of the State of Israel. Hebrew is the primary language of the State of Israel, as that language that represents the Jewish character of the state.

There is a right to the freedom of language, especially in a location where a significant minority group resides.

Municipalities have a duty to post signs in Arabic as well as in Hebrew, in places where there are significant Arab minorities.

Summary:

The petitioners sought a declaration that four respondent municipalities were under an obligation to post all signs within their municipal boundaries in both Arabic and Hebrew. The petitioners noted that the existing signs in these municipalities are posted only in Hebrew and claimed that this situation discriminated against the Arab minority in each of the respondent cities. The petitioners also contended that the existing situation was in contradiction to the status of Arabic as one of the official languages of the State of Israel.

The Court granted the petition and declared that all the respondent municipalities are under an obligation to post all signs within their precincts in both Arabic and Hebrew. The Court noted that its decision was based on striking a balance between the relevant interests. These interests included the status of Hebrew as the primary language of the State of Israel, as the language that represents the Jewish character of the state. The Court also noted that using a single language served the interests of national unity. Other important interests included the right to freedom of language, especially in a location where a significant minority group resides, as well as the interest that street signs present correct and safe information.

President Barak held that the balance of all these factors necessitated that signs in Arabic also be posted in municipalities where there are significant Arab minorities. He emphasised that parallel Arabic writing would not impair Hebrew's status as the primary language in Israel, and would allow Arab residents proper access to the information presented by street signs. In this context, President Barak also noted that Arabic was the language of the largest minority in Israel. Justice Dorner joined the opinion of President Barak. Her opinion, however, was based on the status of Arabic as an official language in Israel. According to Justice Dorner, the official status of the Arabic language originates in law from the period of the British Mandate, is anchored in several Israeli statutes and draws strength from the language of Israel's Proclamation of Independence. This status, according to Justice, meant that the state was obligated to give its Arabic minority the opportunity to use the language throughout its daily life.

Justice Cheshin dissented. He asserted that, though Arabic was indeed an official language of the state, that status could not affirmatively put the respondent cities under an obligation to post all signs in Arabic. Moreover, the Justice noted that the petitioners had not presented any evidence that Arab residents of the respondent municipalities were actually harmed by the lack of Arabic street signs.

Languages:

Hebrew, English.

ISR-2002-3-005

a) Israel / b) High Court of Justice / c) Panel / d) 30-12-2002 / e) H.C. 7622/02 / f) Zonenstein v. The Chief Military Advocate / g) not yet published / h).

Keywords of the Systematic Thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 3.20 **General Principles** – Reasonableness.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.26 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Conscientious objection, selective, recognition / Military service, dismissal.

Headnotes:

Conscientious objection is a part of every person's right to dignity. Conscientious objection should be recognised even in cases where the objection concerns a specific military operation ("Selective Objection"). The right to object should be balanced against other rights. However, in the current situation in Israel, there is no cause to intervene in the Minister of Security's discretion and decision not to dismiss "selective Objectors" from military service.

Summary:

The Supreme Court dismissed the petition of eight reserve soldiers, which was presented against a decision of the Chief Military Advocate upholding their convictions under disciplinary jurisdiction for refusing to serve in the occupied territories.

The petitioners' main claim before the Supreme Court was that they enjoyed the basic right of freedom of conscience, which encompassed the right of "selective conscientious objection". They claimed the nature of military service in the occupied territories compelled them to engage in operations, which went directly against their consciences. The respondent claimed that the conscientious argument was actually a disguise for an ideological-political stance. The respondent further claimed that selective conscientious objection did not fall under the protected freedom of conscience. It should not have been recognised under the circumstances in Israel at the time, as it would have resulted, with probable certainty, in substantial harm to the security of the state. In addition, the respondent claimed, the army was not required to consider selective conscientious objections, since they were the subject of an ideological-political conflict.

The Court held that the Minister of Defence certainly had the primary authority to exempt a person from active or reserve military duty for conscientious reasons. That authority, which also exists in many other countries, is based on the balance between two competing considerations. The first is the freedom of conscience every person enjoys. It stems from the Declaration of

Independence, the democratic character of the state, Basic Law: Human Dignity and Liberty and the recognition of the values of humanism and tolerance. The second consideration is the injustice in exempting part of the population from a general duty imposed on all, especially since this duty entails risking one's life and as the exemption might jeopardise national security, result in unjust administrative effects and discrimination.

How should selective conscientious objection, the objection to carry arms and fight in a particular war or military activity, as opposed to "complete" conscientious objection, the objection to participate in war in any form, be treated? The Court ruled that there is no reason to intervene in the Minister of Defence's decision not to grant exemptions from active or reserve duty due to selective objection. The Court held that in using his discretion while making decisions regarding exemptions based on selective objection, the Minister balances different considerations. Both the selective objector and the "complete" objector are motivated by real conscientious reasons and are, in that sense, similar. However, there are several distinct characteristics of selective conscientious objection – unlike "complete" conscientious objection – which tip the balance against the recognition of selective conscientious objection. In this respect, the Court noted that the weight of the considerations against the recognition of conscientious objection is much heavier in selective conscientious objection than in "complete" conscientious objection. The Court added that the seriousness of an exemption from a general duty is apparent. The phenomenon of selective conscientious objection is by its nature wider than that of "complete" objection, and it raises in all its intensity the sensation of discrimination between "one blood to another". Moreover, the Court was of the opinion that in a society as pluralistic as Israel, the recognition of selective conscientious objection might loosen the links that hold us together as a people and turn the people's army into an army of peoples, made up of different units, each having its own spheres in which it can act conscientiously, and others in which it cannot. The Court noted that in a polarised society this consideration carries considerable weight. Furthermore, the ability to distinguish between those who claim conscientious objection in good faith and those who oppose the government's or parliament's policy is more difficult in selective objection. This is because there is a fine line between opposing a certain state policy and a conscientious objection to carry out that policy. Sometimes that line is extremely difficult to draw. Moreover, the ability to run an administrative system that would operate in a non-discriminatory and biased manner is extremely complicated with selective conscientious objection.

On the basis of those considerations, the Court held that due to the different character of selective conscientious objection, it requires a balance to be struck that is different from that of complete conscientious objection. Within that balance there is no reason for intervening with the Minister of Defence's use of his discretion. This would be true even if the Court were to adopt the balance of probability ("near certainty") of significant harm to public interest test, which has not been decided. Not granting exemptions for selective conscientious objections during this time of division in Israel is a balance that a reasonable Minister of Defence who acts proportionately was entitled to strike.

The Court also noted that at this time when Israeli society is polarised and split, and has groups and individuals with strong conscientious beliefs, it is difficult to determine the legitimate bounds of conscientious objection. The line between selective conscientious objection and a public policy perception is fine. Moreover, the considerations of state security and the integrity of Israeli society must be considered against the arguments of conscience and belief. The State of Israel has been engaged in fighting throughout its existence, conducted according to the perception of national security by the different governments. The questions raised by the fight against terrorism are at the crux of an intense political debate. Were this debate to be conducted

within the army, it might result in serious and substantial harm. Therefore, taking into account the wide discretion given to the Minister of Defence set out in the Basic Law: The Army, there is no cause for intervening in the Minister's decision that gives overwhelming weight to security needs in the face of real concern for the expected harm to military mechanisms, were selective conscientious objection to be recognised.

Languages:

Hebrew.

ISR-2002-3-004

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 18-12-2002 / **e)** H.C. 5591/02 / **f)** Yassin and others v. Commander of Kziot Military Camp – Kziot Detention Facility / **g)** not yet published / **h)**.

Keywords of the Systematic Thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.18 **Institutions** – State of emergency and emergency powers.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
- 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Detention, administrative, conditions / Terrorism, military operation.

Headnotes:

According to international law and Israeli domestic law, persons held in administrative detention – even during a massive military operation against terror facilities and infrastructures – are entitled to at least a minimum standard of detention conditions. That minimum standard is derived from the concept of human dignity and the presumption of innocence.

Summary:

The Supreme Court ruled on a petition presented against the conditions of detention of those persons detained in the area of Judea and Samaria during the Operation “Protective Wall” and were held in the Kziot Camp in Israeli territory.

As a result of great terrorist activity in both that area and in Israel, the government decided to initiate a large-scale military operation against the Palestinian terrorist infrastructure in Judea and Samaria. Many arrests were made within the framework of this operation. The arrested persons were initially brought to temporary detention facilities. After their initial screening, some of the detainees were moved to the Ofer Camp, a detention facility in that area. As a result of overcrowding in that camp, it was decided to move some of the detainees to the detention facility at Kziot in the South of Israel. Most of those held there are administrative detainees.

A petition against the detention conditions in the Kziot Camp was presented to the Court. The petitioners claimed that the conditions of detention were unsuitable and did not satisfy the minimum standards set by Israeli and international law. The respondents (the head of the facility and the Minister of Defence) argued that, though the conditions in the facility were not comfortable, they were reasonable with respect to the reality in Israel. During the first days of the operation of the facility, which had been opened urgently and without warning, there had been deficiencies. However, with time, the facility underwent many improvements. The conditions, as they were at the time the petition was before the Court, did not substantially differ from conditions under which soldiers lived who carried out detention operations and security functions, or the facilities in which many IDF soldiers lived. Those standards were in accordance with the minimum standards set by both Israeli and international law.

The Court held that it should be recognised that the persons concerned are administrative detainees, who have not been brought to trial or convicted. They should enjoy the presumption of innocence. The Court emphasised that although administrative detention denies the detainees their liberty, it does not strip them of their humanity. The balance between an individual's rights on the one hand and national security on the other, as well as the fundamental idea of human dignity, the principles of the State of Israel as a Jewish and democratic state, and the requirements of international law, all require that detainees be treated humanely and in recognition of their human dignity. These minimum requirements, which must be met during detention, emerge from both Israeli Law (Basic Law: Human Dignity and Liberty, as well as other statutes and Supreme Court decisions) and the directives of international law, to which Israel is subject.

Against this background, the Court held that, on the basis of the affidavits filed with it, it appeared that the opening of the detention facility in Kziot had been done hastily and without preparation. Moreover, at first, detention conditions did not meet minimum standards. The Court noted that this deviation was unjustified. Operation "Protective Wall" was planned in advance. It should have been obvious that one of the consequences of the operation would be a large number of detainees. It was therefore necessary to prepare in advance detention facilities that would satisfy minimum standards. However, the Court added, the detention conditions were eventually improved, such that the conditions provided there now satisfy the required minimum standards and, in some cases, exceed them.

For the reasons stated above, the petition was dismissed.

Languages:

Hebrew.

ISR-2002-2-003

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 03-09-2002 / **e)** HCJ 7015/02; 7019/02 / **f)** Ajuri v. IDF Commander in Judaea and Samaria / **g)** Not yet published (in Hebrew); to be published in [2002] IsrLR 1 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.

- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.19 **General Principles** – Margin of appreciation.
- 3.24 **General Principles** – Loyalty to the State.
- 4.7.11 **Institutions** – Judicial bodies – Military courts.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
- 5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
- 5.3.13.3.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – *Habeas corpus*.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Danger, community / Residence, place, assignment / Terrorist, act, support / Terrorist, family member / Geneva Convention, 1949, Protection of Civilian Persons in Time of War / Hague Convention, Fourth, 1907, respecting the Laws and Customs of War on Land, 1907.

Headnotes:

Although every person has a basic right to retain his place of residence and to prevent a change of that place of residence, international law itself – in Article 78 of the Fourth Geneva Convention – recognises that there are circumstances in which this right may be overridden by other interests, namely “imperative reasons of security”.

In the circumstances of the case, the preconditions set out in Article 78 of the Fourth Geneva Convention allowing someone’s place of residence to be assigned were fulfilled, as Judaea and Samaria and the Gaza Strip should be regarded as one territory subject to a belligerent occupation. Therefore, the case did not involve a transfer of a person outside the area subject to the belligerent occupation.

Furthermore, although the Israeli Defence Forces (IDF) Commander has broad discretion in deciding to assign someone’s place of residence, this is not absolute discretion. An essential condition for exercising this authority is the existence of a reasonable possibility that the person himself presents a real danger, and that assigning his place of residence will help to avert this danger. The residence of an innocent relative who does not present a danger cannot be assigned, even if it is proved that assigning his residence may deter others from carrying out terrorists acts. The residence of someone who no longer presents a danger cannot be assigned. The decision to assign someone’s place of residence may be made only on the basis of clear and convincing evidence. It must be proportionate. One must also examine, in each case, whether it is not possible, instead of assigning someone’s place of residence, to file a criminal indictment against that person, which will avert the danger that assigned residence is intended to avert.

Summary:

The Supreme Court, with an expanded bench of nine judges, passed judgment on two petitions concerning orders made by the IDF Commander in Judaea and Samaria (hereinafter: the IDF Commander) against three petitioners. According to the orders, the place of residence of the petitioners – residents of Judaea and Samaria – would be assigned to the Gaza Strip, for a period of two years. The reason behind the orders was said to be the danger presented by the petitioners because of their involvement in terrorist activities, mainly in their help to family members who were involved in terrorism and carried out many terrorist attacks. Assigning their place of residence was intended to avert this danger.

The Supreme Court, in its judgment written by President A. Barak, all members of the bench concurring, ruled that the IDF Commander was indeed competent to make orders to assign residence. The Court pointed out that the basic framework for examining the legality of the actions of the IDF Commander can be found in the provisions of international law and the laws that apply to belligerent occupation. Within this framework, the Court found that the circumstances of the case should not be regarded as a deportation or a forcible transfer (within the meaning of Article 49 of the Fourth Geneva Convention) but as assigned residence, which is permitted under Article 78 of that Convention.

Article 78 of the Convention begins:

“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”

The Court further held that in the circumstances of the case, the preconditions set out in Article 78 of the Convention, allowing someone’s place of residence to be assigned, were fulfilled. It further held that the requirements of the Convention were fulfilled both with regard to an appeals procedure (which was indeed held before the Appeals Board) and with regard to a reconsideration of the decisions (which in the circumstances of the case was to be held every six months).

Against this background, the Supreme Court proceeded to consider the principles governing the IDF Commander’s discretion in making assigned residence orders under Article 78 of the Fourth Geneva Convention.

The Supreme Court held that if it is proved that a person presents a real danger to the security of the area, it is permissible also to take into account considerations of deterring others. When the condition of a person presenting a danger exists, it was held that it was justified to take into account – when deciding whether to assign his place of residence – the impact of this measure in deterring others from carrying out terrorist acts and helping those carrying out terrorist acts. This consideration could also be taken into account, for example, when choosing between internment and assigned residence. This result, the Court said, “is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of “human bombs” that is engulfing the area”. In this respect, the Court accepted the position of the IDF Commander that assigned residence is an effective measure in the struggle against the plague of suicide bombers.

Against this background, the Court examined the three cases before it. It ruled that the IDF commander has the authority in principle to assign residence under international law. The Court decided not to intervene in the decision of the IDF Commander to assign the residence of two of the petitioners: Amtassar Muhammed Ahmed Ajuri, who was found to have helped her terrorist

brother Ahmed Ajuri directly, *inter alia*, by sewing explosive belts; and Kipah Mahmad Ahmed Ajuri, who was found to have helped his brother (the terrorist Ahmed Ajuri), *inter alia*, by helping him to subsist in a hide-out apartment and by acting as look-out when his brother and members of his group moved two explosive charges from one place to another. With regard to these petitioners, the Court found that it had been proved that they were involved in terrorism to such an extent that they presented a reasonable possibility of a real danger, which would be averted if they were removed from their place of residence, and that therefore there was no reason to intervene in the decision of the IDF Commander to assign their residence.

The Court, however, ruled that the measure of assigned residence could not be adopted with regard to the third petitioner, Abed Alnasser Mustafa Ahmed Asida – the brother of the terrorist Nasser A-Din Asida. The reason for this was that even though it was proved that this petitioner knew of the deeds of his terrorist brother, his involvement amounted merely to lending his brother a car and giving him clean clothes and food at his home, and no connection had been established between the petitioner's acts and the terrorist activity of his brother. It was therefore held that there was an inadequate basis for determining the petitioner to be sufficiently dangerous to justify assigning residence in his case.

In the result, then, the petitions of two of the petitioners against the assigned residence orders made against them were dismissed, and the petition of one petitioner was granted, since it was held that his residence could not be assigned on the basis of the evidence against him and the law.

At the end of its judgment, the Court stated:

“The State of Israel is undergoing a difficult period. Terror is hurting its residents. Human life is trampled upon. Hundreds have been killed. Thousands have been injured. The Arab population in Judaea and Samaria and the Gaza Strip is also suffering unbearably. All of this is because of acts of murder, killing and destruction perpetrated by terrorists... The State is doing all that it can in order to protect its citizens and ensure the security of the region. These measures are limited. The restrictions are, first and foremost, military-operational ones. It is difficult to fight against persons who are prepared to turn themselves into living bombs. These restrictions are also normative. The State of Israel is a freedom-seeking democracy. It is a defensive democracy acting within the framework of its right to self-defence – a right recognized by the charter of the United Nations... not every effective measure is also a lawful measure... Indeed, the position of the State of Israel is a difficult one. Also our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle...” (paragraph 41 of the judgment).

Languages:

Hebrew, English (translation by the Court).

ISR-2002-1-002

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 02-05-2002 / **e)** H.C. 3451/02 / **f)** Almadani v. Minister of Defence / **g)** 56 Is.S.C. 30 (Official Digest) / **h)**.

Keywords of the Systematic Thesaurus:

- 1.1.4.3 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Executive bodies.
- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.3.5.14 **Constitutional Justice** – Jurisdiction – The subject of review – Government acts.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.1.4.1 **Sources of Constitutional Law** – Categories – Written rules – International instruments – United Nations Charter of 1945.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 3.3 **General Principles** – Democracy.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Terrorism / Self-defence / Military, intervention / Hostage / Civilian, differentiation from combatants / Holy place, protection / Church, protection / Value, Jewish / Humanitarian law, international / Geneva Convention, 1949, Protection of Civilian Persons in Time of War / Victim, International Armed Conflicts, protection / Victim, Non-International Armed Conflicts, protection / Red Cross, access / Drug / Medical treatment / Negotiation, under way / Burial, decent, right / War, occupation.

Headnotes:

Combat activities do not take place in a normative void. International law applying to combat activity must be upheld during such activity.

The upholding of international law during combat activities expresses the difference between a democracy fighting for its life, and the fighting of terrorists rising up against it. The State fights in the name of the law, while upholding it; the terrorists fight against the law, while breaking it.

The upholding of international law during combat activities also expresses Israel's values as a Jewish and democratic state.

Summary:

The Israeli Cabinet decided to carry out a military operation against the Palestinian terror infrastructure, to prevent recurrence of terrorist attacks which plagued Israel. As the Israel Defence Forces (I.D.F.) entered Bethlehem, Palestinians on Israel's "most wanted" terrorist list overtook the Church of the Nativity, while shooting, and were joined by unarmed civilians. The I.D.F. surrounded the church compound, and called to those inside, informing them that those

not “wanted” were free to leave unharmed, and that those “wanted” could choose either to be tried in Israel or to quit Palestinian Authority controlled areas.

By the time of the hearing, many in the compound had left. Negotiations for a solution were already being held between the Palestinian side and Israel, and a previous petition regarding the events in the compound had been rejected for that reason.

In the present petition, filed by the Governor of Bethlehem, who was present inside the compound, and two Israeli members of Knesset (parliament), against the Israeli Minister of Defence and the Chief of the General Staff and the Commander of the Central Command of the I.D.F., the Petitioners requested that the Red Cross be allowed to enter the compound, transfer food and medicine, collect bodies, and provide medical care. Of these issues, agreement had already been reached, by the time of the hearing, on all issues except water and food.

Respondents’ counsel relayed to the Court that there was a well in the compound; Palestinians who left the compound had relayed that there were bags of rice and vegetables inside; but it was clear that there was a shortage of food.

The Petitioners argued that depriving the Palestinians in the compound of food is a severe breach of international law; the Respondents claimed that the subject of the petition is not institutionally justiciable, that there is no basis for judicial intervention while negotiations are taking place, and, on the main issue, that they are upholding the rules of international law.

Regarding the civilians: the Respondents had been informing them that they may leave the compound unharmed, but the Petitioners claimed that the armed Palestinians were preventing them from doing so, and thus, the only way to ensure the rights of those civilians was to bring in enough food for all present in the compound. The State replied that there was already enough basic food in the compound for all present, and that it was not possible to bring in extra food and ensure that it not be eaten by the armed Palestinians.

The Court ruled:

1. Israel is acting according to its right of self-defence (Article 51 of the United Nations Charter), in response to a raging wave of terrorism. However, the combat activity is not taking place in a normative void, rather according to international law, which provides rules for combat activity. The maxim “when the cannons roar, the muses are silent” is not correct; the strength of society to withstand its enemies is based on its recognition that it is fighting for values worthy of defence, and the rule of law is one of those values.
2. That approach expresses the difference between a democratic state fighting for its life, and the fighting of terrorists rising up against it. The State fights in the name of the law, upholding the law. The terrorists fight against the law, breaking the law. In addition, Israel is a Jewish and democratic state, and national goals and human rights are harmonious, not conflicting.
3. Regarding the armed Palestinians, the Respondents are acting in accordance with international law, and proportionally, not entering the compound, allowing those who leave without their weapons to do so without being hurt, only arrested (Articles 17 and 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949).

4. Regarding the civilians: Respondents agreed, during the hearing, that the civilians were free to leave the compound, receive extra food, and return to the compound. Considering the presence of water and basic food inside the compound, this fulfils international law.
5. It is difficult to describe the gravity of the overtaking of a holy place by armed Palestinians, defiling its sanctity and holding civilians hostage (Geneva Protocol I, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977; Geneva Protocol II, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts).
6. The solution to the situation in the compound must be found through negotiations. The responsibility for this rests with the executive branch. The Court will take no stand regarding the way the combat activity is being conducted.

Cross-references:

- H.C. 3436/02 *La Custodia Internazionale di Terra Santa v. Government of Israel* (unpublished);
- H.C. 168/91 *Marcus v. The Minister of Defense* 45 P.D. (1) 467, 470-471;
- H.C. 3114/02 *Barakeh, M.K. v. The Minister of Defense* (not yet published);
- H.C. 320/80 *Kawasma v. The Minister of Defense* 35 P.D. (3) 113, 132.

Languages:

Hebrew, English (translation by the Court).

ISR-2002-1-001

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 28-04-2002 / **e)** H.C. 2117/02 / **f)** Physicians for Human Rights v. IDF Commander in the West Bank / **g)** 56 Isr.S.C. 26 (Official Digest) / **h)**

Keywords of the Systematic Thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.1.2.3 **Sources of Constitutional Law** – Categories – Unwritten rules – Natural law.
- 3.3 **General Principles** – Democracy.
- 3.17 **General Principles** – Weighing of interests.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.

Keywords of the alphabetical index:

Military, intervention / Medical service, protection / Medical establishment, protection / Medical unit, protection / Ambulance, protection / Humanitarian law, international / Geneva Convention, Wounded and Sick in Armed Forces in the Field / Guerrilla / Camouflage / Value, Jewish.

Headnotes:

International law provides protection for medical establishments and units against attack by combat forces. However, the Medical Service has the right to full protection only when it is engaged exclusively in the search for, collection, transport and treatment of the wounded or sick. Humanitarian requirements must be balanced with the dangers expected by fighters camouflaged as medical teams.

Article 21 of the First Geneva Convention provides that the protection of medical establishments shall cease if they are being used to commit, “outside their humanitarian duties, acts harmful to the enemy”, on the condition that “a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded”.

Commitment to humanitarian rules is appropriate not only according to international law, but in light of Israel’s values as a Jewish and democratic state.

Summary:

The case involved a petition brought by the Physicians for Human Rights. The group argued that the I.D.F. soldiers fired on Red Crescent ambulances and wounded medical teams during combat operations in the Palestinian Authority. The Court was requested to order the State to explain the shooting and order that it be stopped.

The Court asked the State to inquire about these claims. The State responded only in part because there was little time available and combat made inquiries difficult. It committed to continue its inquiry. While the State agreed that shots had been fired at a Palestinian ambulance, it claimed that this action was triggered by the behaviour of the Palestinians, who in the past had used ambulances to transfer explosives. However, the State re-emphasised the I.D.F.’s obligation to act in accordance with the international laws regarding morality and utility. The State claimed that combat forces had been and were being instructed to act within those laws.

The focus of the case involved the right under international law for the protection of those involved in medical activities. The Court looked to Article 19 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949 (hereinafter, “The First Geneva Convention”). It forbids the attack on fixed establishments and mobile medical units of the Medical Service. This includes hospitals, medical warehouses, evacuation points for the wounded and sick, ambulances, etc.

The Court contrasted this with Articles 24 and 26 (which expands the protection to the Red Cross and other similar societies) of the First Geneva Convention, which apply the right of the Medical Services to protection only when it is engaged exclusively in the search for, collection, transport and treatment of the wounded or sick, and the like. The Court further contrasts this to Article 21 of the First Geneva Convention which provides that these protections end if they are being used to commit, “outside their humanitarian duties, acts harmful to the enemy”, on condition that “a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded”.

The Court ruled that Israeli forces must follow the international humanitarian rules and the values of a democratic and Jewish state regarding the treatment of the wounded, ill, and deceased. It instructed the I.D.F to provide concrete instructions to its forces to prevent, even in severe situations, activities which are against the rules of humanitarian aid. This includes the requirement to warn medical teams in a reasonable and fair time. But the Court also ruled that according to international law, these humanitarian requirements must be balanced with the dangers expected by the Palestinian fighters camouflaged as medical teams. The Supreme Court included in this balance, the extent to which the danger is immediate and severe.

Cross-references:

- H.C. 2936/02;

- H.C. 2941/02;

- H.C. 2936/02.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-3-011

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 14-04-2002 / **e)** H.C. 3114/02, 3115/02, 3116/02 / **f)** Mohammed Barakeh, M.K v. the Minister of Defence / **g)** / **h)**.

Keywords of the Systematic Thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.1.2.3 **Sources of Constitutional Law** – Categories – Unwritten rules – Natural law.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 4.18 **Institutions** – State of emergency and emergency powers.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Respect for the dead / Body location, evacuation, identification and burial / Combat / Red Cross.

Headnotes:

Responsibility for the location, identification, evacuation and burial of bodies in areas of combat during battle belongs to the army. This responsibility stems from international law.

Location, identification and burial of bodies are important humanitarian acts, which stem from the principle of respect for the dead. The principle of respect for the dead – all dead – lies at the base of Israel's values as a Jewish and democratic state.

Summary:

After terrorist attacks in Israel's cities, Israel engaged in a military operation to prevent the recurrence of these attacks. According to the information provided by the Respondents, a widespread terror infrastructure had developed, among other places, in the city of Jenin and its adjacent refugee camp. More than 23 suicide bombers had come from that area, about one fourth of all of the suicide bombings. Thus, the Israel Defence Forces (I.D.F.) entered the Jenin refugee camp as part of the operation.

As I.D.F. forces entered the refugee camp, they called out a general appeal to residents to leave their houses; only days later did approximately 100 people leave the camp. In order to apprehend the terrorists, weapons and explosives, I.D.F. forces began combat activity from house to house, a technique adopted to prevent massive casualties to innocent civilians. A skirmish developed, and 23 Israeli soldiers fell in battle. According to the Respondents, after a call was given to evacuate the houses, bulldozers destroyed houses during the fighting, and some Palestinians were killed.

Bodies of Palestinians remained in the camp. When the camp was under control, a search for bodies began, during which the explosive charges which the Palestinians had scattered around the refugee camp were neutralised and removed. Up to the point when the petitions were served, 37 bodies had been found. 11 bodies had been given over to the Palestinian side. Twenty-six bodies had not yet been evacuated.

As the operation was underway, two Knesset (parliament) members and two human rights organisations brought three petitions against the Prime Minister, Minister of Defence, Chief of the General Staff of the I.D.F. and other military commanders. The Court was asked to order the Respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp, and from burying the bodies of those determined to be terrorists in a cemetery in the Jordan Valley. The Petitioners requested that location and collection of bodies be performed by medical teams and the Red Cross, and that family members be allowed to bring their dead to burial.

The Court's point of departure was that in the circumstances of the case, the responsibility for the location, identification, evacuation and burial of the bodies belonged to the Respondents, according to international law. In response to the question of the Court, the Respondents declared their willingness to include representatives of the Red Cross, and to consider the participation of a representative of the Red Crescent in the location and identification process. The Court suggested that a representative of the Red Crescent be included, subject to the judgments of the military commanders. It was also acceptable to the Respondents that the process of identification, including standard photography and documentation, would include local representatives. The Court instructed, and the Petitioners agreed, that these activities were to be done as quickly as possible, with respect for the dead and while safeguarding the security of the acting forces.

The Court ruled that after identification, burial would begin. The Respondents agreed that burial would be performed in a timely manner, by the Palestinian side. The Court commented that if the Palestinian side does not perform burial immediately, the possibility of bringing the bodies

to immediate burial by the Respondents – in light of the concern that such a situation would compromise national security – would be weighed. The Court mentioned the agreed position that such burial, if performed by the Respondents, would be done in an appropriate and respectful way, while ensuring respect for the dead, with no differentiation between located bodies, or between bodies of armed terrorists and civilians.

The Court ruled that there was no real argument between the parties, as the location, identification and burial of bodies are very important humanitarian acts; that these acts are deduced from the principle of respect for the dead – respect for all dead; and that these acts are at the base of Israel's values as a Jewish and democratic state. In order to prevent rumours, the Court saw it fitting to include Red Crescent representatives during the location stage and Palestinians during the identification stage, and that burial should be performed respectfully, according to the religious customs, by local Palestinians, all in as timely a manner as possible, subject to the security situation in the field, and to the judgment of the Military Commander.

The Petitioners claimed that a massacre had been committed in Jenin, but the Respondents disagreed most strongly, and the Court ruled that the Petitioners had not lifted the burden of evidence. The Court ruled that in Jenin there was a battle, in which many Israeli soldiers fell. The army fought from house to house, not by bombing from the air, in order to prevent, to the extent possible, civilian casualties. The Court noted the Respondents' claim that they have nothing to hide, a position expressed by the pragmatic agreement reached.

The Court viewed the understanding reached as desirable, as it respects the living, and the dead, and avoids rumours. The Court recorded the Respondents' declaration that the army is constantly advised by the Chief Military Attorney, and emphasised that even during combat, the law applying to combat must be upheld, and that all must be done in order to protect the civilian population. The Court stated that it will take no position regarding the way the combat is being managed, and that as long as the soldiers' lives are in danger, these decisions will be made by the commanders.

In light of the arrangement detailed above, it was acceptable to all the parties before them that the petitions be rejected.

Cross-references:

H.C. 2901/02, H.C. 2936/02, H.C. 2977/02, H.C. 3022/02.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-010

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 03-07-2001 / **e)** H.C. 9070/00 / **f)** Livnat v. Rubinstein / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 55(4), 800 / **h)**.

Keywords of the Systematic Thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions
– Legislative bodies.

- 1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
- 3.3 **General Principles** – Democracy.
- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 4.5.4 **Institutions** – Legislative bodies – Organisation.
- 4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
- 5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
- 5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Parliament, committee, hearing / Parliament, action, internal / Judicial restraint.

Headnotes:

In a constitutional democracy, parliamentary actions are subject to the rule of law, including judicial review. Courts must be cautious in exercising review over internal parliamentary actions and can review internal parliamentary actions only if they cause actual harm to the fabric of democratic life.

Postponing a committee hearing on elections, which had the effect of making it difficult for a political candidate to make plans to run for office, did not constitute a harm to the fabric of democratic life.

Summary:

A member of parliament (*Knesset*) petitioned the Supreme Court, acting as the High Court of Justice, to order the chairman of parliament's Constitution, Law and Justice Committee to accelerate the date for committee hearings over different bills calling for new governmental elections. The petitioner claimed that a delay in the hearings prevented her from competing for her party's candidacy for prime minister. The petitioner would only run for prime minister if parliament approved a certain bill that had the effect of barring a rival's candidacy. The petitioner claimed that the delay in holding hearings undermined her right to run for office and the public's right to vote.

The Court ruled that in a constitutional democracy, parliamentary actions are subject to the rule of law, including judicial review. However, the status of parliament as the elected representative of the people requires the Court to apply caution and restraint in exercising judicial review of internal parliamentary actions. The scope of judicial review over parliamentary action depends on the nature of the action; courts exercise broader judicial review over final acts of parliament, like statutes, than they do over internal parliamentary activities, like the schedule for committee hearings. Internal parliamentary activities are subject to judicial review only in exceptional cases in which they cause actual harm to the fabric of democratic life.

The Court held that postponing the committee hearing would not harm the fabric of democratic life or the structural foundations of a democratic regime. The harm to the petitioner lay in the lack of coordination between the parliamentary hearings and the petitioner's party's internal elections. The Court suggested that the solution, in this case, is not judicial intervention but

rather a change in the internal timetable of the petitioner's party. The Court dismissed the petition.

Languages:

Hebrew.

ISR-2001-1-009

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 18-06-2001 / **e)** H.C. 1514/01 / **f)** Gur Aryeh v. Channel Two Television and Radio Authority / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 55(4), 267 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.3 **General Principles** – Democracy.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Religion, practice, coercion / Religion, belief / Religion, sensibility, respect / Media, television, broadcasting / Tolerance, level.

Headnotes:

A corporation created by statute must exercise its discretion in accordance with the principles of Israeli public law. The protection of freedom of speech takes priority over protections for religious sensibilities unless the offence to religious sensibilities is nearly certain, actual, and severe.

Broadcasting interviews with religious Jews on the Sabbath is an offence to their religious sensibilities, but it does not exceed the level of tolerance that individuals are expected to endure as the price of living in a pluralistic, democratic society. Nor does it violate their right to freedom of religion because it does not prevent them from fulfilling the customs or commandments of their religion or from living according to their religion.

Summary:

Four Orthodox Jews petitioned the Supreme Court, sitting as the High Court of Justice, to order a quasi-public broadcasting corporation be prevented from airing, on the Sabbath, interviews given by the petitioners. Orthodox Jewish law prohibits Jews from watching or broadcasting television programmes on the Sabbath. The petitioners claimed that the broadcast would offend their religious sensibilities and violate their right to freedom of religion by forcing them to take part in a Sabbath television broadcast.

The petitioners were interviewed for a documentary film to be shown as part of a weekly documentary programme created by a private television company and broadcast on Israel's Channel Two Television and Radio Authority (the Authority), a quasi-public corporation created by statute. The Court found that there had been no agreement not to broadcast the programme on the Sabbath. The petitioners claimed that such broadcast would force them to participate in the desecration of the Sabbath, against their religious beliefs. The Authority claimed it had no weekday time slot in which to broadcast the programme.

The Court noted that Israeli society is based on both Jewish and democratic values and protects public sensibilities in general, and religious sensibilities in particular. A pluralistic, democratic society cannot exist without mutual tolerance of diverse beliefs, including protections for religious sensibilities. Against these protections stand several variations of the right to freedom of speech. The Authority has a right to freedom of speech as both a speaker and a platform for speech, the company that created the documentary and the documentary's director and producer have an artistic right of expression, and the public has a right to know.

The Court ruled that as a corporation created by statute, the Authority must exercise its discretion in accordance with principles of Israeli public law.

The Court held that in balancing between protecting the petitioners' religious sensibilities and defending the respondents' freedom of speech, freedom of speech takes precedence unless the offence to religious sensibilities is nearly certain, actual, and severe, such that it exceeds the level of tolerance that holders of religious beliefs are expected to endure as the price of living in a pluralistic, democratic society. The Court found that while the offence to religious sensibilities was certain, it was not severe enough to limit the respondents' right to freedom of speech. The Court suggested that religious Jews wishing to avoid this kind of injury to their religious sensibilities can condition their participation in television programmes on a guarantee that the programme will not be broadcast on the Sabbath.

The Court also found that broadcasting the interviews on the Sabbath would not violate the petitioners' right to freedom of religion. Freedom of religion protects the right to believe, to act according to one's beliefs, and not to be forced to act against one's religious beliefs. It includes the right to express oneself by dressing according to one's religious principles and other freedoms that allow a person to express his/her religious identity. Broadcasting the interviews on the Sabbath does not violate a person's right to religious beliefs, nor his/her freedom to act according to them. The right to freedom of religion is violated only when a person is prevented from fulfilling the commandments of his/her religion and beliefs, or from living his/her life as a religious person. The Court warned that unfettered expansion of the right to freedom of religion would ultimately cheapen religious freedom and empty it of its content.

The Court dismissed the petition and noted that the respondents agreed to air the programme with subtitles explaining that interviews with the petitioners had been filmed on a weekday.

In a dissenting opinion, Justice Dalia Dorner held that airing the interviews on the Sabbath violated the petitioners' right to freedom of religion. A rabbi consulted by the petitioners ruled that participation in a television programme to be aired on the Sabbath would violate Jewish law. The dissent found that it is up to individual holders of religious beliefs, not the Court, to decide what constitutes a violation of religious law. If petitioners believe that airing the programme on a Saturday would implicate them in the desecration of the Sabbath, the dissent held, such broadcast would violate the petitioners' right not to be forced to act against their religious beliefs. The dissent also found that granting the injunction would only minimally

infringe on the Authority's freedom of speech because the Authority could air the programme during the week. Therefore granting the injunction would appropriately balance the petitioners' right to religious freedom and the Authority's right to freedom of speech

Languages:

Hebrew.

ISR-2001-1-008

a) Israel / **b)** Supreme Court / **c)** Nine Judge Panel / **d)** 12-04-2000 / **e)** F.H. 7048/97 / **f)** Plonim v. Ministry of Security / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 54(1), 721 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.13.3.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Detention, administrative, bargaining chip / Soldier, missing in action, negotiations / National security, threat.

Headnotes:

The principles of human dignity and freedom mandate that a person who does not pose a threat to national security may not be placed in administrative detention for later use as a “bargaining chip” in exchange for soldiers missing in action or prisoners of war. Even if the principles of human dignity and freedom did not so mandate the principle of proportionality would dictate that the state demonstrate detention was likely to lead to the release of soldiers and prisoners of war.

Summary:

Between the years of 1984-1987, a number of Lebanese civilians were detained and tried in a court of law. Each was sentenced to prison for a fixed number of years. After the Lebanese prisoners had served their sentences in an Israeli prison, they were not released. Rather, the Minister of Defence ordered that they be held in administrative detention (“preventive detention”). The reason for the prisoners' detention was the negotiations between Israel and various organisations suspected of holding Israeli soldiers missing in action and prisoners of war, or suspected of having information regarding the soldiers' whereabouts. The prisoners

themselves posed no threat to national security. The sole purpose for their detention was for use as “bargaining chips” in the context of those negotiations.

According to the 1979 Law of Emergency Powers (detentions), when the country is in a state of emergency, the Minister of Defence is authorised to hold a person in administrative detention if the Minister is convinced that “the interest of national security or public safety mandates that a person be held in detention” (Article 1079.2 of the Law of Emergency Powers (detentions)). The detention may be for up to six months, after which time it may be continuously extended for six month periods. According to the 1979 Law of Emergency Powers, after 48 hours from the time the person is detained and after every three months of detention, the arrest warrant is reviewed by the President of the District Court. His decision may be appealed to the Supreme Court.

In 1994, after the President of the District Court extended their administrative detention for another six months, a number of Lebanese prisoners submitted an appeal to the Supreme Court. The prisoners argued that the law of emergency powers does not give the Minister of Defence the authority to place a person in administrative detention who does not himself pose any threat and where the sole purpose of his detention is the desire to use him as a “bargaining chip” during negotiations.

The Supreme Court, sitting as a panel of three judges, rejected the prisoners’ appeal by a vote of 2-1. The Court accepted the Minister of Defence’s position, by which the “interest of national security” referred to in the second clause of the 1979 Law of Emergency Powers included the supreme interest of the return of prisoners of war and soldiers missing in action. Therefore, the Minister of Defence is authorised to detain the Lebanese civilians in administrative detention. The dissent argued that the authority granted by law does not include the detention of a person who does not himself pose any threat where the only purpose of his detention is to hold him as a bargaining chip.

The prisoners submitted an application for a further hearing. The case was heard by an extended panel of nine judges. The Supreme Court reversed the District Court’s judgment and its own previous judgment. In a 6-3 vote, the Court held that the Minister of Defence does not have the authority to place a person in administrative detention when the person does not pose a threat to national security and the sole purpose for his detention is to use him as a “bargaining chip”. The majority held that protecting human dignity and freedom and the proper balance between the rights of citizens and national security, is such that the law must be interpreted in such a way that does not give the Minister of Defence the power to place someone in administrative detention when that person does not pose a threat to national security. Such an interpretation is also required by international law. Moreover, the prisoners’ detention was illegal, even if the Minister of Defence had the aforementioned authority. The use of administrative detention was not proportional because it was not based on sufficient evidence to prove that holding the prisoners in administrative detention would lead to the release of prisoners of war and soldiers missing in action. On the basis of these two arguments, the Supreme Court held that the prisoners must be released immediately.

The dissent held that the authority granted by law to the Minister of Defence includes the power to place a person in administrative detention who does not himself pose a threat to national security. This is because the “interest of national security” referred to in the second clause of the 1979 Law of Emergency Powers includes the return of prisoners of war and soldiers missing in action. As long as there was a chance that the prisoners of war and soldiers missing in action might be returned, there is justification for holding the prisoners in administrative detention. Moreover, the dissent argued that the administrative detention in this particular case was

proportional because there was sufficient evidence to prove that holding the prisoners in administrative detention would lead to the release of prisoners of war and soldiers missing in action.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-007

a) Israel / **b)** Supreme Court / **c)** Five Justice Panel / **d)** 08-03-2000 / **e)** H.C. 6698/95 / **f)** Ka'adan v. Israel Land Authority / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 54(1), 258 / **h)**.

Keywords of the Systematic Thesaurus:

3.13 **General Principles** – Legality.

5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.

5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.

Keywords of the alphabetical index:

Land, allocation, principles / Discrimination, third party / Settlement, communal, establishment.

Headnotes:

The principle of equality prohibits the state from allocating land directly to its citizens on the basis of religion or nationality. The state may not indirectly discriminate against its citizens by allocating land to a third party who will in turn distribute it on the basis of religion or nationality.

Summary:

The petitioners were an Arab couple who live in an Arab settlement. They sought to build a home in Katzir, a communal settlement in the Eron River region. This settlement was established in 1982 by the Jewish Agency in collaboration with the Katzir Cooperative Society, on state land that was allocated to the Jewish Agency (via the Israel Land Authority) for such a purpose. The Katzir Cooperative Society only accepts Jewish members. It refused to accept the petitioners and permit them to build their home in the communal settlement of Katzir. The petitioners claimed that the policy constituted discrimination on the basis of religion or nationality and that such discrimination is prohibited by law with regard to state land.

The Court examined the question of whether the refusal to allow the petitioners to build their home in Katzir constituted impermissible discrimination. The Court's examination proceeded in two stages. First, the Court examined whether the state may allocate land directly to its citizens on the basis of religion or nationality. The answer is no. As a general rule, the principle of equality prohibits the state from distinguishing between its citizens on the basis of religion or nationality. The principle also applies to the allocation of state land. This conclusion is derived both from the values of Israel as a democratic state and from the values of Israel as a Jewish state. The Jewish character of the state does not permit Israel to discriminate between its

citizens. In Israel, Jews and non-Jews are citizens with equal rights and responsibilities. The state engages in impermissible discrimination even if it is also willing to allocate state land for the purpose of establishing an exclusively Arab settlement, as long as it permits a group of Jews, without distinguishing characteristics, to establish an exclusively Jewish settlement on state land (“separate is inherently unequal”).

Next, the Court examined whether the state may allocate land to the Jewish Agency knowing that the Agency will only permit Jews to use the land. The answer is no. Where one may not discriminate directly, one may not discriminate indirectly. If the state, through its own actions, may not discriminate on the basis of religion or nationality, it may not facilitate such discrimination by a third party. It does not change matters that the third party is the Jewish Agency. Even if the Jewish Agency may distinguish between Jews and non-Jews, it may not do so in the allocation of state land.

The Court limited its decision to the particular facts of this case. The general issue of use of state land for the purposes of settlement raises wide-ranging questions. This case is not directed at past allocations of state land.

The Court stated that there are different types of settlements, for example, *kibbutzim* and *moshavim*. Different types of settlements give rise to different problems. The Court did not take a position with regard to these types of settlements. Special circumstances, beyond the type of settlement, may also be relevant. The decision of the Court is the first step in a sensitive and difficult journey. It is wise to proceed slowly and cautiously at every stage, according to the circumstances of each case.

With regard to the relief requested by the petitioners, the Court noted various social and legal difficulties and ordered that the state was not permitted, by law, to allocate state land to the Jewish Agency for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews. It was further ordered that the state must consider the petitioners’ request to acquire land for themselves in the settlement of Katzir for the purpose of building their home. This consideration must be based on the principle of equality, and considering various relevant factors – including those factors affecting the Jewish Agency and the current residents of Katzir. The state must also consider the numerous legal issues. Based on these considerations, the state must determine with deliberate speed whether to allow the petitioners to make a home within the communal settlement of Katzir.

President A. Barak filed an opinion in which Justices T. Or and I. Zamir joined. Justice M. Cheshin concurred in the judgment and filed an opinion. Justice Y. Kedmi dissented in the judgment and filed an opinion.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-006

a) Israel / **b)** Supreme Court / **c)** Nine Judge Panel / **d)** 06-09-1999 / **e)** H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99 / **f)** Public Committee Against Torture in Israel et. al. v. State of Israel et. al. / **g)** *Piskei Din Shel Beit Hamishpat Ha’Elion L’Yisrael* (Official Report), 53(4), 817 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Interrogation, methods / Suspect, physical pressure against / Necessity, defence / Terrorism, fight.

Headnotes:

The authority which allows a state security or police officer to conduct an investigation does not allow for torture, cruel, inhuman or degrading treatment. The law does not sanction the use of interrogation methods which infringe on the suspect's dignity for an inappropriate purpose or beyond the necessary means.

The "necessity" defence in Article 34.11 of the Penal Law does not constitute a basis for allowing interrogation methods involving the use of physical pressure against a suspect. The defence is available to an officer facing criminal charges for the use of prohibited interrogation methods. It does not authorise the infringement of human rights.

The fact that an action does not constitute a crime does not in itself authorise police or state security officers to employ it in the course of interrogations.

Summary:

The petitioners brought suit before the Supreme Court (sitting as the High Court of Justice), arguing that certain methods used by the General Security Service ("GSS") – including shaking a suspect, holding him in particular positions for a lengthy period and sleep deprivation – are not legal. An extended panel of nine judges unanimously accepted their application and held that the GSS is not authorised, according to the present state of the law, to employ investigation methods that involve the use of physical pressure against a suspect.

The Court held that GSS investigators are endowed with the same interrogation powers as police investigators. The authority which allows the investigator to conduct a fair investigation does not allow him to torture a person, or to treat him in a cruel, inhuman or degrading manner. The Court recognised that, inherently, even a fair interrogation is likely to cause the suspect discomfort. The law does not, however, sanction the use of interrogation methods which infringe upon the suspect's dignity, for an inappropriate purpose, or beyond the necessary means. On this basis the Court held that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position, force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation.

Additionally, the Court held that the “necessity” defence, as it appears in Article 34.11 of the Penal Law (which negates criminal liability in certain circumstances), cannot constitute a basis for allowing GSS investigators to employ interrogation methods involving the use of physical pressure against the suspect. A GSS investigator may, however, potentially avail himself of the “necessity” defence, under circumstances provided by the law, if facing criminal charges for the use of prohibited interrogation methods. The Attorney General may instruct himself with respect to the circumstances under which charges will not be brought against GSS investigators, in light of the materialisation of the conditions of “necessity.” At the same time, the “necessity” defence does not constitute a basis for authorising the infringement of human rights. The mere fact that a certain action does not constitute a criminal offence does not in itself authorise the GSS to employ this method in the course of its interrogations.

The judgment relates to the unique security problems faced by the State of Israel since its founding and to the requirements for fighting terrorism. The Court highlights the difficulty associated with deciding this matter. Nevertheless, the Court must rule according to the law, and the law does not endow GSS investigators with the authority to apply physical force. If the law, as it stands today, requires amending, this issue is for the legislature (Knesset) to decide, according to democratic principles and jurisprudence. Therefore, the court held that the power to enact rules and to act according to them requires legislative authorisation, by legislation whose object is the power to conduct interrogations. Within the boundaries of this legislation, the legislature may express its views on the social, ethical and political problems connected to authorising the use of physical means in an interrogation. Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects, suspected of involvement in hostile terrorist activities, thereby harming the latter’s dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. The question of whether it is appropriate for Israel to sanction physical means in interrogations, and the scope of these means is an issue that must be decided by the legislative branch. It is there that various considerations must be weighed. It is there that the required legislation may be passed, provided, of course, that a law infringing upon the suspect’s liberty is “befitting the values of the state of Israel”, enacted for a proper purpose, and to an extent no greater than is required (Article 8 of the Basic Law concerning Human Dignity and Liberty).

In a partly concurring opinion, Justice Y. Kedmi suggested the judgment be suspended for a period of one year. During that year, the GSS could employ exceptional methods in those rare cases of “ticking time bombs”, on the condition that explicit authorisation is given by the Attorney General.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-005

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 13-04-1997 / **e)** H.C. 50196/96 / **f)** Horev v. The Minister of Transportation / **g)** *Piskei Din Shel Beit Hamishpat Ha’Elion L’Yisrael* (Official Report), 41(4), 1; *Israel Law Reports* / **h)**.

Keywords of the Systematic Thesaurus:

- 3.13 **General Principles** – Legality.
- 3.17 **General Principles** – Weighing of interests.

- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Religion, coercion / Religion, sensibility, protection / Road, closure during prayer times / Tolerance, threshold.

Headnotes:

An administrative authority may take religious sensibilities into account in deciding whether to open or close roads to traffic, so long as such consideration does not amount to religious coercion. Restricting human rights in order to protect religious sensibilities may only be done when the offence to sensibilities exceeds the “threshold of tolerance” that every individual in a democratic society is expected to withstand. Freedom of movement may be restricted to protect religious sensibilities only if the harm to religious sensibilities is severe, grave, and serious, if the probability that such harm will materialise is nearly certain, and if such protection serves a substantial social interest.

The harm to the religious sensibilities of ultra-Orthodox residents caused by vehicular traffic in the heart of their neighbourhood on the Sabbath exceeds the level of tolerance that individuals in a democratic society are expected to endure.

Summary:

A group of citizens, politicians, and political and civic organisations petitioned the Supreme Court, acting as the High Court of Justice, to block an order by the Minister of Transportation to close Bar-Ilan Street, a major Jerusalem road, to vehicular traffic during prayer times on the Jewish Sabbath. The issue had sparked violent clashes between ultra-Orthodox Jewish residents of the area who claimed that the movement of motor vehicles on the Sabbath, in violation of Orthodox Jewish law, offended their religious sensibilities, and secular residents, who claimed the street’s closure would infringe on their freedom of movement. Numerous attempts at compromise, including proposals by governmental committees, failed.

The Court held that the Transportation Ministry may take religious sensibilities into account in exercising its administrative authority to open or close roads to traffic, so long as such consideration does not amount to religious coercion. Such consideration is in accordance with Israel’s values as a Jewish and a democratic state, values that attained constitutional status with the passage of the Basic Law, concerning Human Dignity and Freedom. Restricting human rights, however, can be justified only when the offence to hurt feelings exceeds the “threshold of tolerance” that every individual in a democratic society is expected to withstand.

The Court held that freedom of movement may be restricted to protect religious sensibilities only if the harm to religious feelings is severe, grave, and serious, the probability that the harm will materialise is nearly certain, such protection serves a substantial social interest, and the extent of harm to freedom of movement does not exceed that which is necessary to protect religious sensibilities.

The Court found that the harm to ultra-Orthodox residents from vehicular traffic in the heart of their neighbourhood on the Sabbath is severe, grave, serious, and nearly certain. The prevention of such harm is a proper public purpose. The Court also found that closing the street to through traffic during prayer times did not exceed the measure necessary to protect religious sensibilities, particularly as it would delay drivers forced to use alternate routes by less than two minutes. Thus, the Court concluded, the Minister of Transportation's decision to close the street during prayer times was a reasonable restriction on freedom of movement for drivers seeking to use it as a through street. The reasonableness of such closure is subject to three conditions:

1. that alternate routes remain open on the Sabbath;
2. that the street remain open on the Sabbath during non-prayer times; and
3. that the street remain open to security and emergency vehicles even during prayer times.

If the violence were to continue, rendering the street impassable to cars even during non-prayer times, the balance would be undermined, and Bar-Ilan Street would have to be re-opened to traffic during the entire Sabbath.

The Court determined, however, that in deciding to close the street, the Minister of Transportation did not adequately consider the needs of secular residents living near the street who depend on the road to reach their homes. Therefore, the Court quashed the Minister's order closing the street during prayer times until the Minister addressed the plight of secular residents and their guests who would not be able to reach their homes during the closures.

Two justices concurred in the decision, three justices held that the street should be open during the entire Sabbath and one justice held that it should be closed during the entire Sabbath.

Concurring, Justice S. Levin noted that the Court was not asked to decide what arrangement it would choose but rather whether the decision reached by the current Transportation Minister was a reasonable exercise of administrative discretion. Justice E. Mazza noted that closing the street during prayer times depended on the availability of alternative routes, and that if those routes were to be closed, too, it would have to be re-opened.

Dissenting, Justice T. Or held that in determining traffic arrangements, the Minister of Transportation must give primary consideration to facilitating traffic, and only secondary consideration to general interests like the protection of religious sensibilities. The offence to religious sensibilities created by vehicular traffic on the Sabbath does not exceed the level of tolerance that ultra-Orthodox residents are expected to endure. The street should remain open during the entire Sabbath to avoid violating the right to freedom of movement. Justice M. Cheshin held that the Transportation Minister exceeded his authority. An administrative body cannot give religious considerations primary status in making a decision unless authorised to do so by parliament. In addition, closing the street amounts to confiscating public property, which also requires statutory authorisation. Furthermore, the Transportation Minister interfered with the independence of the Traffic Administrator by co-opting his authority over street closures, rendering the decision to close the street invalid. Justice D. Dorner held that parliament has the authority to restrict human rights in consideration of religious sensibilities, but administrative bodies may do so only if explicitly authorised. The Transportation Minister acted without authorisation, in a random response to violence. His decision should therefore be quashed.

In a separate dissenting opinion, Justice T. Tal argued that a counter-petition requesting closure of the street during the entire Sabbath should have been accepted. Closing the street on the Sabbath did not violate the right to freedom of movement, but rather caused a minor inconvenience to secular residents, in contrast to the religious residents' right to the Sabbath, which is nearly absolute. Closing the street during prayer times did not unreasonably burden secular residents of the area, who could drive to their homes during non-prayer times.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-004

a) Israel / **b)** Supreme Court / **c)** Three Judge Panel / **d)** 10-04-1995 / **e)** H.C. 1074/93 / **f)** Attorney General et. al. v. National Labour Court in Jerusalem et. al. / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 49(2), 485 / **h)**.

Keywords of the Systematic Thesaurus:

- 3.3 **General Principles** – Democracy.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
- 5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.
- 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Strike, political / Strike, economic.

Headnotes:

The right to strike is a fundamental principle in Israeli law and is entrenched in the Basic Law, concerning Human Dignity and Liberty. However, purely political strikes are illegal while economic strikes are legal.

In between purely political and purely economic strikes is an additional form of workers' protest, primarily directed at the Sovereign power known as a "quasi-political strike". The "quasi-political strike" relies heavily on the dominant purpose test, as the employees are striking over a matter that is not directly connected to their work conditions in a narrow sense, but affects them directly nonetheless. The "quasi-political strike" confers the right to engage in a short protest strike only.

Summary:

A strike by employees of the Bezeq phone company was directed at a pending amendment to the telecommunications law which sought to open the Israeli economy to competition and privatisation.

The question is whether the work sanctions undertaken by the employees in this case should be deemed a "strike", within the definition of this term under labour law. The right to strike is

securely enshrined in the Israeli legal system and is now incorporated in Sections 1, 2 and 4 of the Basic Law, concerning Human Dignity and Liberty. However, a distinction has traditionally been made between economic strikes which are aimed at the employer and deemed to be legal and a purely political strike which is aimed at the Sovereign and are illegal. These two polarised forms of strike are joined by an additional form of workers' protest, known as a quasi-political strike, which is primarily directed at the Sovereign power.

An economic strike is generally directed at an employer seeking to impair the rights of its workers, or who refuses to improve their working conditions. Such a strike may also be directed at the Sovereign when the latter acts in the capacity of an employer, or uses its sovereign powers to intervene in order to change existing employer-employee arrangements, or to prevent such agreements from being reached.

At the other end of the spectrum lies the pure political strike, directed at the Sovereign, not in its capacity as employer, but as the body responsible for determining overall economic policy. Such a strike is deemed illegitimate since it seeks to undermine the sovereign's ability to set economic policy and apply broad public welfare considerations. Instead force is applied to get it to submit to the particular demands of the employees. This is a strike designed to interfere with the legitimate legislative process and is illegal.

Finally, a quasi-political strike is situated at the mid-point between these two extremes. In these cases, the test of the "dominant purpose" becomes increasingly important. If it is determined that the dominant purpose of the strike concerns the employees' rights, even a strike directed at the Sovereign shall be deemed a "quasi-political strike". This confers the right to engage in a short protest strike only.

In the present case, the strike is not economic in nature. If the employees wish to benefit from the protections conferred on economic strikes they bear the burden of persuading the Court that the policy according to which different fields in telecommunication will be open to competition, as proposed in the Government Bill, is liable to directly harm them and their working conditions in the narrow sense. No convincing evidence that restricting Bezeq's monopoly may cause direct and immediate harm to Bezeq employees was presented. Thus, this strike is at most a "quasi-political" strike, which may only continue for a short duration.

Justice M. Cheshin concurred but expressed two reservations. First, the traditional dichotomy that classifies the strike as either an "economic strike", understood within the narrow confines of the employer-employee relationship, and the "political strike" is increasingly falling into disuse. We are in a period of transition. It is suggested that the Court adopt the terminology of "quasi-political" strike which appears to be appropriate as a model for this case. This having been said, it is best to refrain from adopting a single model for all cases. In this case, the strike exceeds the scope of a strike that may be recognised as legitimate. It would harm the democratic character of the state. While the right to strike is one of the cherished pillars of the Israeli legal system, it is not self-evident that the freedom to strike is derived from "human dignity", enshrined in the Basic Law, concerning Human Dignity and Liberty. Justice Ts. A. Tal concurred but also emphasised that this strike would harm the democratic character of the state. He left open the issue of whether the right to strike is entrenched in the Basic Law.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-003

a) Israel / **b)** Supreme Court / **c)** Civil Appeals / **d)** 24-11-1993 / **e)** C.A. 506/88 / **f)** Shefer v. The State of Israel / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 48(1), 87; *Israel Law Reports*, I, 157 (2001) / **h)**.

Keywords of the Systematic Thesaurus:

- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Euthanasia / Right to die / Pain, prevention / Suicide, assisted, crime / Intent, presumed, doctrine / Medical treatment, refusal.

Headnotes:

In ruling on issues like euthanasia, Israeli courts must synthesise democratic values of personal autonomy and individual freedom with Jewish values of the sanctity of human life.

Life cannot be assessed by only considering its quality or expected length. The interest in preventing pain and suffering, and the patient's wishes are also relevant considerations. However, a right to die may become an obligation to die, if terminally ill patients feel pressured to refuse treatment in order to spare their relatives pain or expense.

A person's right to ownership over her body is subservient to the state's interest in protecting human life. Interfering in the life of a child who is in a vegetative state but is not in pain and is able to cry when uncomfortable would contradict the values of a Jewish and democratic state.

Summary:

A minor child, via her mother, petitioned the Tel Aviv-Yaffa District Court for a declaratory judgment allowing the child to refuse to accept medical treatment for neurological degeneration caused by Tay Sachs disease, a genetic disease that kills children by the age of three. On appeal, the Supreme Court affirmed the District Court judgment refusing the request.

The Supreme Court based its decision on the Basic Law, concerning Human Dignity and Freedom, which protects both human life and human dignity as supreme values. Those values must be interpreted according to the values of the state of Israel as a Jewish and a democratic state. After an extensive survey of Jewish rabbinical rulings on medical treatment for terminally ill patients, the Court established that Jewish law puts primary importance on the sanctity of life. This is the point of departure in Jewish law for discussing euthanasia. Under Jewish law, life

cannot be assessed only by considering its quality or expected length. The interest in preventing pain and suffering and the patient's wishes can also be considered.

In contrast, democratic values put a priority on personal autonomy and individual freedom, to be balanced by the state's interest in preserving human life and the integrity of the medical profession, and the pain and suffering of the patient. The Court held that the synthesis between these Jewish and democratic values forbids active euthanasia – actions intended to hasten a patient's death. Further, these combined values give people the right to cling to life so long as it has any value whatsoever. The Court noted that a right to die may become an obligation to die, if terminally ill patients feel pressured to refuse treatment in order to spare relatives pain or expense.

Under Israeli penal law, murder and assisted suicide are among the most severe crimes, suggesting that a person's ownership over her body is subservient to the state's interest in protecting the sanctity of life. The Court noted that Israeli precedent has refused to recognise mercy killing as valid under Israeli law (D.C. (T.A.) 555/75, *State of Israel v. Hellman*).

The Court held that while Israel's Capacity Law recognises the doctrine of "presumed intent" in allowing parents to make decisions on behalf of their minor children, in applying that doctrine to parental refusal of medical treatment on behalf of their children, courts run the risk that such decision will reflect the wish of the child's relatives, not the child herself. Furthermore, the Capacity Law's presumption that one parent agrees with the actions of another unless the contrary has been shown does not apply to such a fateful decision as the right to refuse medical treatment. For issues that serious, the clear and express agreement of both parents is necessary. In any event, in this case the presumption of consent is overcome by the behaviour of the father, who did not appear before the Court but who visited the child daily and told the child's doctor that he still hoped his daughter's condition would improve.

The child was terminally ill and in a vegetative state but was able to cry out when uncomfortable and was not in pain. In such a condition, the child's dignity was preserved, such that the sole determining value was the sanctity of her life, although it was terminal. Encroachment on that life would contradict the values of a Jewish and democratic state. For these reasons, the Court dismissed the petition.

In a concurring opinion, Justice H. Ariel said that in principle, a terminally ill person, including a minor, can petition the court to refuse futile medical treatment in order to spare herself pain, suffering or degradation. Relatives or friends can also petition the court on behalf of the patient. The Capacity Law does not prevent one parent from requesting the right to refuse medical treatment on behalf of a minor, although the consent of both parents is required. The legislature should create clear and detailed criteria outlining the circumstances under which a person can refuse medical treatment.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-002

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 25-08-1993 / **e)** H.C. 4481/91 / **f)** Bargil v. The Government of Israel / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 47(4), 210; *Israel Law Reports*, I, 141 (2001) / **h)**.

Keywords of the Systematic Thesaurus:

- 1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 3.4 **General Principles** – Separation of powers.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Political question, review / Justiciability / Issue, dominant character.

Headnotes:

A petition challenging the government's settlement policies in the occupied territories is not justiciable because it does not present a concrete dispute. The issue is a political question, and considering it would violate the principle of separation of powers.

The Court will not hear abstract political arguments but rather only defined and specific disputes and conflicts.

In determining whether an issue is justiciable, the Court should decide whether the dominant character of the issue in dispute is legal or political.

Summary:

Peace activists petitioned the Supreme Court, acting as the High Court of Justice, to issue an injunction barring the state from using public and quasi-public funds to construct buildings, roads and other types of infrastructure in territories held by the Israeli army by virtue of belligerent occupation, except for infrastructure needed for security reasons.

The petitioners alleged that settlement activity in the occupied territories, other than that required for security, violates:

1. international law, particularly the Geneva Convention Relating to the Protection of Civilian Persons in Time of War 1949 and the Hague Convention Respecting Laws and Customs of War on Land 1907, which prohibit transferring civilian populations to occupied land and establishing a new public order in occupied land;
2. Israeli administrative law prohibiting administrative activity that is tainted with an improper purpose; and
3. Israeli constitutional law, because settlement activity negates Israel's fundamental principles as a state guided by norms of equality and democracy.

The Court dismissed the petition as not justiciable for three reasons: First, considering the petition would violate the principle of the separation of powers by deciding issues that are under the authority of the executive and legislative branches of government. Second, the petition does

not present a concrete dispute, but rather attacks a general governmental policy. Third, the dominant character of the issue is political.

The Court held that it will not hear abstract political arguments but rather only defined and specific disputes or conflicts. The Court cannot make foreign policy decisions, but it can rule on which branch of government should decide the issue. In determining justiciability, the Court should decide whether the dominant character of the issue in dispute is legal or political.

In partly concurring opinions, Justice E. Goldberg held that while the petitioners have standing to address the issue, the Court must defer to the political process, which is better equipped to decide the issue in dispute. Ruling on the petition would shake the public's confidence in the impartiality of the judiciary. Justice T. Or held that a petition that fails to address a specific set of facts and circumstances is not justiciable.

Languages:

Hebrew, English (translation by the Court).

ISR-2001-1-001

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 23-03-1993 / **e)** H.C. 6163/92 / **f)** Eizenberg v. Minister of Construction and Housing / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 47(2), 229; *Israel Law Reports*, I, 11 (2001) / **h)**.

Keywords of the Systematic Thesaurus:

- 1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
- 1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
- 3.9 **General Principles** – Rule of law.
- 3.17 **General Principles** – Weighing of interests.
- 3.20 **General Principles** – Reasonableness.
- 4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
- 4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.
- 4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.

Keywords of the alphabetical index:

Public service, public trust / President, pardon / Offender, rehabilitation, duty / Offender, re-integration / Evidence, administrative, principle / Jurisdiction, concurrent / Civil servant, criminal record.

Headnotes:

In considering a person's criminal past as a bar to public service appointment, the government must consider the need to rehabilitate offenders and help re-integrate them into society as well as the importance of public trust in the public service.

It would be unreasonable to appoint a candidate who has committed criminal offences under grave circumstances to a senior office in the public service.

The principle of “administrative evidence” allows the government to infer a criminal past based on proof upon which any reasonable person would have relied. A presidential pardon does not preclude the government from considering a candidate’s criminal past for purposes of public service appointments.

Summary:

Two citizens petitioned the Supreme Court, sitting as the High Court of Justice, against the nomination of Y. G. (the respondent) to the position of Director General of the Ministry of Construction and Housing. They claimed that the government illegally exercised its discretion in appointing the respondent to the post, in light of offences he committed in the past.

As a General Security Services (GSS) agent, the respondent was involved in an incident in which two Palestinian hijackers of a civilian bus were captured alive but later shot to death, while in custody, by GSS agents. The respondent was also involved in covering up the role of the GSS in the deaths. He received a presidential pardon for his role in the case. In a separate incident, the respondent headed a GSS interrogation team whose members used illegal methods to interrogate a prisoner suspected of treason. He also committed perjury before a military tribunal that convicted the prisoner. A commission that studied the incident recommended that the perpetrators not be indicted, in part because of the damage it would cause the GSS. The respondent was not tried for his involvement in the incident.

The Court rejected claims by the respondent that the District Labour Court had exclusive jurisdiction over the petition, holding that the High Court of Justice had concurrent jurisdiction over the petition. Section 15.c of the Basic Law, concerning the Judiciary, gives the High Court broad jurisdiction to review the legality, correctness, and reasonableness of actions by public authorities. The fact that the Labour Court was given specific jurisdiction over claims involving hiring does not derogate from the jurisdiction of the High Court over those issues. The High Court retains discretionary authority to hear cases such as this in exceptional circumstances in which its intervention is warranted. The outcome of this case, the Court held, raises a legal problem of first instance with profound ramifications for the rule of law and public confidence in the state. Thus, the Court decided to hear the petition.

The Court held that while there is no statutory norm barring the government from appointing a candidate with a criminal past, it must consider the criminal past in making an appointment. In considering a person’s criminal past as a bar to public service appointment, the government must consider the need to rehabilitate offenders and help re-integrate them into society as well as the importance of public trust in the public service. It should consider the nature and severity of the offence, whether it was committed for personal gain or in service to the state, the age of the offender at the time of the offence, whether the offender expresses regret, the amount of time that has passed since the offence, the nature of the position for which the offender is being considered, and whether other candidates could fill the same position.

Reasonableness lies at the essence of the rule of law. It requires a governmental authority to exercise discretion to find the appropriate balance among the values, principles and interests of a democratic society. The government’s elevated position as the state’s executive branch does not empower it to act unreasonably. If the government makes an unreasonable decision, the Court must invalidate it.

The Court held that it would be unreasonable to appoint a candidate who has committed offences under grave circumstances to a senior public service office. Such a candidate would not

set a good example for subordinates, would have a hard time meeting the basic standards demanded of every public servant, and would not project integrity and trust to the public at large. Although the respondent was not convicted of a crime, “the principle of administrative evidence” allows the government, for the purposes of deciding an appointment, to infer a criminal past using proof upon which any reasonable person would have relied for drawing conclusions. A presidential pardon does not preclude the government from considering the respondent’s criminal past.

The Court held that the respondent’s past offences – perjury, obstructing legal procedures, and violating individual liberty – undermined the basic foundations of the social structure and of the judicial or quasi-judicial institution’s ability to do justice. The 11 years that passed since the respondent’s last offence were insufficient to heal the wounds caused by those incidents. Other candidates could fill the position. The Court therefore found the government’s appointment of the respondent to be manifestly unreasonable, as it failed to properly balance the relevant considerations. The government failed to accord the correct weight to the damage that the respondent’s appointment would cause to the public service.

The Court issued an order barring the appointment.

Languages:

Hebrew, English (translation by the Court).