+

THIS DOCUMENT IS A DRAFT, AND IS SUBJECT TO FURTHER REVISION.

HCJ 6055/95

HCJ 7083/95

Sagi Tzemach

v.

1. Minister of Defense
2. Military Chief of Staff
3. Chief Military Prosecutor
4. Chief Military Police Officer HCJ 6055/95

1. Major Vered Ornstein-Zahavi
2. Major Moshe Kanobler
3. Captain Lior Tomshin
4. Captain Orli Markman
5. Captain Moshe Levi

v.

1. Chief Military Attorney
2. Chief of Military Police HCJ 7083/95

The Supreme Court Sitting as the High Court of Justice

[October 14, 1999]

Before President A. Barak, Deputy President S. Levin, and Justices T. Or, E. Mazza, M. Cheshin, Y. Kedmi, I. Zamir, T. Strasberg-Cohen, D. Dorner, J. Türkel, and D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice.

Petition granted.

Facts: The petitioners, Members of Knesset, reserve military officers, and student organizations, challenged a practice in which the Minister of Defense routinely grants deferrals of and exemptions from required military service to ultra-Orthodox Jewish Yeshiva students who engage in full-time religious study. They claimed the exemptions, granted to an ever-growing percentage of enlistment candidates (8% in the year 1997), violate the principle of equality, exceed the zone of reasonableness, and are disproportionate. They further claimed that the Minister of Defense lacks the authority to regulate the matter and that it must be done so through legislation.

Held: The Knesset, not the executive branch, has the authority to make fundamental decisions on fundamental issues that divide society. The routine granting of exemptions and deferrals to a large group of people is such a decision; it is a primary arrangement that must be addressed through primary legislation, not administrative regulations. Although the Court has upheld the administrative arrangement in the past, relying on a statutory provision authorizing the Defense Minister to grant exemptions "for other reasons," the growing number of students covered by the exemption has pushed the matter beyond his authority. At a certain point, quantity becomes quality. The Defense Minister's current practice of granting deferrals and exemptions is invalid. The Court's declaration of invalidity will take effect 12 months from the date of the decision, in order to give the Knesset time to address the matter.

For the petitioner in HCJ 6055/95—Aryeh Avriel and Yehonatan Ginat
For the petitioners in HCJ 7083/95—Dan Yakir and Moshe Cohen
For the respondents—Malchiel Blass, Deputy State Prosecutor in Charge of High Court Petitions

Basic Laws Cited:
Basic Law: Human Dignity and Liberty, ss. 1, 2, 5, 8, 9, 10.

Israeli Legislation Cited:
Military Adjudication Law-1955, ss. 1 (the phrases, "tribunal officer," "petty tribunal officer," "senior tribunal officer"), 234, 234(a), 235-241, 236, 237, 237A, 237A(a), 237A(b), 237A(c), 237A(d), 239, 241, 243C.
Criminal Procedure Law (Enforcement Authority – Arrests), 1996, ss. 1(c), 29(a), 42, 44.
Military Adjudication Law (Amendment No. 15), 1982.
Military Adjudication Law (Amendment No. 23), 1993.
Military Adjudication Law (Amendment No. 32), 1996, s.8.
Military Adjudication Law (Amendment No. 32) (amended) 1998.
Interpretation Law-1981, ss.1 (the phrase, "day"), 9, 10(a), 10(c), 11.
Criminal Procedure Ordinance (Arrest and Search) [new version], 1969, s.16.

Bills Cited:
Military Adjudication Bill-1949.
Military Adjudication Bill (Amendment No. 16)-1982.
Military Adjudication Bill (Amendment No. 32) (amended)-1998.
Criminal Procedure Bill (Enforcement Authority – Detention, Arrest, and Release)-1995.

Israeli Supreme Court Cases Cited:
[1] HC 73/85 "*Kach" Party v. Speaker of Knesset*, IsrSC 39(3) 141.
[2] HC 2581/91 *Salchat v. Government of Israel*, IsrSC 47(4) 837.
[3] HCJFH 4110/92 *Hess v. Minister of Defense*, IsrSC 48(2) 811.
[4] HC 2320/98 *El-Amla v. Commander of IDF Forces in the Region of Judea and Samaria*, IsrSC 52(3) 346.

[5] CrimApp 3513/95 *Shargai v. Military Prosecutor, Air Force Prosecutor*, IsrSC 51(2) 686.
[6] CA 6821/93 *United Mizrachi Bank. v. Migdal Agricultural Cooperative*, IsrSC 49(4) 221.
[7] APP 4463/94 *Golan v. Prison Services*, IsrSC 50(4) 136.
[8] CrimApp 8087/95 *Zada v. State of Israel*, IsrSC 50(2) 133.
[9] HC 5000/95 *Bartala v. Chief Military Prosecutor*, IsrSC 49(5) 64
[10] CA 88/53 *Kaplan v. Rosenzweig*, IsrSC 9 1296.
[11] HC 1715/97 *Chamber of Investment Managers in Israel v. Finance Minister*, IsrSC 51(4) 367.
[12] HC 405/74 *Bar-Ad v. Captain Madar*, IsrSC 29(1) 54.
[13] HC 243/80 *Madjhinski v. Military Appeals Tribunal*, IsrSC 35(1) 67.
[14] HC 118/80 *Greenstein v. Chief Military Prosecutor*, IsrSC 35(1) 239.
[15] HC 695/88 *Adler v. Military Appeals Tribunal,* IsrSC 35(1) 67.
[16] CrimFH *Ganimat v. State of Israel*, IsrSC 49(3) 589.
[17] HC 5304/92 *Perach 1992 Aid to Victims of Laws and Ordinances for a Different Israel –Nonprofit v. Justice Minister*, IsrSC 47(4) 715.
[18] CrimApp 6654/93 *Binkin v. State of Israel*, IsrSC 48(1) 290.
[19] HC 4541/94 *Miller v. Defense Minister*, IsrSC 49(4) 94.
[20] HC 3648/97 *Stameka v. Interior Minister*, IsrSC 53(2) 728.

Israeli Books Cited:

[21] 3 A. Barak, *Parshanut Bimishpat [Interpretation in Law]*, *Parshanut Chukatit [Constitutional]* (1994).
[22] 3 Y. Kedmi, *Al Haraayot [On Evidence]* (1999).

Israeli Articles Cited:

[23] A. Barak, *Hakonstitutzionilazatzia shel Maarechet Hamishpat Biakvut Chukei Hayesod Vihashlachoteha al Hamishpat Haplili [Constitutionalization of the Legal System – Criminal Law*], 13 Mechkarei Mishpat 5 (1996-1997).
[24] Y. Carp, *Chok Yisod: Kvod Haadam Vicheruto – Biyographia Shel Maavakei Koach [Basic Law – Power Struggles*], 1 Mishpat Umimshal 323 (1992-1993).

[25] A. Gazal, *Pgiya Bizchuot Hayesod "Bichok" o "Lifi Chok" [Violating Basic Rights "By Law" or "According to Law*], 4 Mishpat Umimshal 381 (1997-1998).
[26] A. Bendor, *Pigamim Bichakikat Chukei-Hayesod [Flaws in the Passage of the Basic Laws],* 2 Mishpat Umimshal 443 (1994-1995).
[27] E. Gross, *Hebetim Chukatiim Shel Dinei Hamaatzar Biztava [Military Arrest Laws]*, 5 Mishpat Umimshal 437(2000).

JUDGMENT

Justice I. Zamir

1. These two petitions raise one primary question: the constitutionality of a provision of the Military Adjudication Law, 1955, governing the period of time in which a soldier may be detained by a military police officer before being brought before a military judge.

2. The first petition (HC 6055/95) was brought by a soldier performing mandatory service who was arrested by a military police officer on September 26, 1995 on suspicion of desertion and held in a military jail. After he was detained for five days without being brought before a judge, the petition was brought on his behalf. It alleges that the provisions of the Military Adjudication Law, under which the petitioner was arrested, are null and void because they violate the Basic Law: Human Dignity and Liberty. The petitioner therefore asks the Court to order his release.

Not long after the petition was filed, the petitioner was brought before a military tribunal which decided to extend his detention. An indictment was later issued, the tribunal convicted him, and it sentenced him to two and a half months imprisonment. He served his sentence and was released. He then sought to amend the petition to reflect these developments, and the petition before us asks the Court for a judgment declaring invalid sections 234 and 237A of the Military Adjudication Law, which authorize an adjudication officer to arrest a soldier. That and

no more.

The second petition (HC 7083/95) was brought by five military officers who, at the time the petition was brought, served as military defense lawyers (Petitioner 1: the District Military Defense Lawyer; Petitioner 2: Central Command Defense Lawyer; Petitioner 3: General Staff District Defense Lawyer; Petitioner 4: Air Force and Navy Defense Lawyer; Petitioner 5: Southern Command Defense Lawyer) and by the Association for Civil Rights in Israel (Petitioner 6). This petition also asks the Court to declare sections 234 and 237A of the Military Adjudication Law invalid. It also asks the Court to bar the detention of a soldier unless it is necessary for interrogation purposes or to prevent obstruction of justice or flight.

The first petition is directed against the Defense Minister, the Military Chief of Staff, The Chief Military Prosecutor, and the Chief of Military Police; the second petition is directed against the Chief Military Prosecutor and the Chief of Military Police. Henceforth, they will all be referred to as the respondents.

The Court issued an order-nisi in both petitions and, because they raise the same question, decided to consolidate them.

A Theoretical Petition

3. Both petitions have a theoretical quality. They are not based on a set of facts, and they do not ask for a remedy for a particular instance, but rather raise a legal question, of a general nature, that is not grounded in the facts of a particular case.

It is true that the first petition, when brought, was indeed concrete. It alleged that the petitioner was arrested under a warrant, by a military police officer, which was issued by force of an invalid law. It therefore requested an order releasing the petitioner. Once the arrest was extended by a military tribunal, however, the petition became moot.

As a general matter, once a petition becomes moot, the Court does not hear it, even if it was at one point concrete. In other words, if the case which is the subject of a petition is resolved, by itself or by judicial decision, the Court declines to consider the legal question it raises. Judicial experience warns against establishing a precedent that would seem to hover in the air. The Court needs a foundation of facts, in a given situation, in order to build a precedent.

The second petition was theoretical from the outset: it raised a general question, not grounded in a specific case. The Court generally refuses to rule on these types of questions, preferring to wait until the question arises in the context of a particular case.

That is the rule, but there are exceptions. There have been instances in which the Court has agreed to consider a theoretical question, of a general nature, even though it was not grounded in a particular case. This has usually happened in cases in which the petition raised an important question, but it became apparent that there was no practical way for the court to rule on it unless it was presented as a general question, unconnected to any particular case. *See*, *e.g*., HC 73/85 *"Kach" Party v. Speaker of Knesset* [1] at 145-46; HC 2581/91 *Salhat v. Government of Israel* [2] at 841; HCJFH 4110/92 *Hess v. Minister of Defense* [3].

Such is the case before us. It raises an important question, which implicates principles basic to the rule of law. It is a question of the authority to infringe on personal liberty by arresting and detaining someone without judicial oversight. The question arises every day, year after year, for many soldiers – according to the respondents, close to 10,000 soldiers each year. The question, however, is short-lived: it arises when a soldier is arrested by a military police officer; it is concrete for just a few days, until the soldier is released or brought before a military tribunal to extend his arrest, and then the question dies. If the Court did not agree to consider the constitutionality of the detention, merely because the soldier has been released and the petition has become moot, it would never be able to consider the question. The end result would be to render the decision to detain soldiers immune from judicial review. That

would be a harsh result, inconsistent with the rule of law. In order to avoid such a result, the Court must consider the constitutionality of the detention even after the question has become moot. *Compare*, in the context of administrative detention, HC 2320/98 *Al-Amla v. Commander of IDF Forces in Judea and Samaria* [4] at 353-54.

We therefore decided to consider the two petitions on the merits.

The Problems

4. On the merits, the two petitions raise three questions:

a. According to section 234(a) of the Military Adjudication Law, "An adjudication officer may issue an arrest warrant for a soldier ranked lower than him who is suspected or accused of committing an offense, for a period of no longer than seven days." Does this section violate the Basic Law: Human Dignity and Liberty?

b. According to section 237A(a) of the Military Adjudication Law, "Notwithstanding the provisions of section 234(a), an adjudication officer who is a military police officer may issue an arrest warrant for any soldier, for a period of no longer than 96 hours …" Does this section violate the Basic Law: Human Dignity and Liberty?

c. May an adjudication officer arrest a soldier or hold a soldier in custody, where such detention is not required for interrogation purposes or to prevent obstruction of justice or flight?

5. In effect, the petitioners, and hence the respondents, focused their arguments on the second question, in other words, whether section 237A(a) violates the Basic Law: Human Dignity and Liberty.

The arguments of both sides regarding the first question, whether section 234(a) violates the Basic Law: Human Dignity and Liberty, were insufficiently comprehensive and thorough to serve as the basis for a decision on the constitutionality of the statute. This is especially the case

when dealing with a theoretical petition, not based on the facts of a specific case, but rather seeking adjudication of a legal question of a general nature.

As far as can be gleaned from the petitioners' legal briefs, that first question appears to be of secondary, if not marginal, importance to the petitioners, within the context of this petition.

In any event, because the arguments regarding this question are not as comprehensive and thorough as they need to be, our ability to decide the question is substantively impaired. Substantively, there is a big difference between the power of arrest authorized by section 234 and the power of arrest authorized by section 237A. The arrest power authorized by section 237A is the arrest power of a military police officer. It is primarily intended to facilitate investigations of suspects. In that sense, with the changes appropriate for a military context, it is similar to the arrest power of a civilian police officer. We can therefore draw a comparison between the military and civilian power of arrest, in order to evaluate the authority to infringe on personal liberty in light of the Basic Law: Human Dignity and Liberty. On the other hand, the arrest power in section 234 is unique to the military; clearly disciplinary in nature, it gives a military commander, whether or not he or she is a military police officer, the power to arrest a soldier under his or her command, if the soldier is suspected of committing an offense of a disciplinary or other nature. For example, it authorizes a military commander in any unit to arrest a soldier who disobeys an order, including in a combat situation. There is no civilian parallel to this power. In order to accurately evaluate the essence of the power, to determine its purpose, and to decide if it disproportionately harms the soldier, the Court must know a lot more about the power than is addressed in the legal briefs submitted in this petition. Moreover, according to the respondents, this power is rarely used to arrest soldiers for longer than a day. We therefore decline to rule on the question for now. Of course, the question may return to the Court at another time, when it is ripe for adjudication. On this issue, see paragraph 11, *infra*.

6. The third question (which arose only in the second petition, HCJ 7083/95) addresses the grounds for arresting soldiers. It essentially asks whether there is room to distinguish the grounds for arresting a soldier under the Military Adjudication Law from the grounds for arresting a civilian under the Criminal Procedure Law (Enforcement Authority – Arrests), 1996. For example, can a soldier be arrested for violating rules of military discipline? The question came before the Court in CrimApp 3513/95 *Shargai v. Military Prosecutor, Air Force Prosecutor* [5], but the Court declined to rule on it.

In this case, too, we decline to rule on the question. First, the question of which circumstances constitute grounds for arrest in the military should arise in the context of a specific case before a military tribunal, after which it may reach us through an appeal (or petition) of a decision by the appellate military tribunal. The principle of alternative remedies mandates this result. If a soldier wishes to claim that there are no legal grounds to hold him or her in custody, the ordinary and correct way to do so is to raise the claim before the body authorized to approve or extend the arrest. In this case, there is no reason to circumvent this route by leapfrogging to this court via a direct petition. On the contrary: The Court should consider the question on the merits only after the appellate military tribunal has examined it and made a decision. Second, on this question, too, the parties failed to submit the complete and thorough arguments appropriate for such a difficult and important question, particularly in light of the fact that it is submitted as a theoretical question. The arguments submitted before the Court do not constitute a proper foundation on which to build the case law.

7. As noted, the only question comprehensively and thoroughly argued before the Court is the second question: whether section 237A(a) of the Military Adjudication Law, authorizing an adjudication officer who is a military police officer to arrest a soldier for 96 hours, violates the Basic Law: Human Dignity and Liberty.

That is the question we will discuss and answer in this judgment.

In order to respond to this question, we must first present the evolution of section 237A of the Military Adjudication Law into its current form.

Section 237A of the Military Adjudication Law

8. In the original version of the Military Adjudication Law, passed in 1955, only one section, section 234, authorized an "adjudication officer" to arrest a solder "who is suspected or accused of an offense."

The power of arrest imparted to an adjudication officer, like the parallel power given to a civilian police officer, has always been designed to allow the adjudication officer investigate a suspected offense. See the Explanatory Note to the Military Adjudication Bill, 1949 at 114.

The original version of section 1 of the Military Adjudication Law, like today's version, defines an adjudication officer as "a junior adjudication officer and a senior adjudication officer." A junior adjudication officer is "a unit commander ranked no lower than captain who is not a senior adjudication officer, or another officer whom the military chief-of-staff has imparted with the authority of a junior adjudication officer." A senior adjudication officer is "a unit commander ranked no lower than lieutenant colonel, or another officer whom the military chief-of-staff has imparted with the authority of a senior adjudication officer."

According to additional sections of the law (sections 235-241), an adjudication officer who issues an arrest warrant must immediately present it to another adjudication officer whose rank is no lower than lieutenant colonel. If the second officer does not approve the warrant, the soldier must be released within 96 hours of the issuance of the warrant. The maximum period of arrest under the warrant is 15 days, but, with the approval of an adjudication officer ranked no lower than lieutenant colonel, it may be extended for additional 10-day periods. Section 241 of the law limited the maximum total period of arrest under an arrest warrant issued by an adjudication officer to two months, "unless the accused is

brought before a [legally-trained – trans.] judge of the appellate military tribunal who issues an arrest warrant for an additional period, to be determined at the time of each extension."

In addressing the power of arrest, the original version of the statute did not distinguish between an adjudication officer who is a military police officer and any other adjudication officer. It also did not then distinguish, and still does not now distinguish, between types of offenses, i.e. between military offenses, including disciplinary violations, and other offenses.

9. For 27 years, these were the provisions of the statute. Only in 1982 did the Military Adjudication Law first draw a distinction between the arrest power of an adjudication officer who is a military police officer and that of another adjudication officer, via the Military Adjudication Law (Amendment No. 15), 1982. The amendment added section 237A. Under this section, which is the focus of the petition, an adjudication officer who is a military police officer (hereinafter – military police officer) may, with the approval of an adjudication officer whose rank is no lower than lieutenant colonel, issue an arrest warrant for a soldier for a period of no more than 15 days and may extend the warrant twice, for a period of 10 days each time, with the advance written approval of a military attorney. The maximum period of detention under an arrest warrant issued by a military police officer is therefore 35 days.

Reducing the maximum period of detention to 35 days under the amended law, as opposed to 60 days under the previous law, was, in the words of then-Defense Minister Ariel Sharon, "… a very important amendment which really corrected a lot of injustices that were allowed to occur under the previous law." *See* Knesset Record 92 (5742-1982) at 1058.

Members of Knesset welcomed the proposed reduction of the period of detention, and some even proposed reducing it further, in light of the significantly shorter period of detention (at the time, 48 hours) which may be ordered by a civilian police officer. "Procedure," quoted

Member of Knesset Shevah Weiss, "… is the Magna Carta of the accused." *Id.* at 1061.

The amended law from 1982 also reduced the maximum period of arrest for which an adjudication officer who is not a military police officer may issue a warrant. Under the new version of section 237, arrest authorized by such a warrant may be for no longer than seven days, although such period may be extended for eight additional days, with the advance written permission of a military attorney. In other words, no more than 15 days of detention may be authorized by an adjudication officer who is not a military police officer.

Why did the legislature distinguish between a military police officer, who is authorized to arrest a soldier for a maximum period of 35 days, and an adjudication officer who is not a military police officer, who is authorized to arrest a soldier for no longer than 15 days? A look at the Explanatory Note to the Military Adjudication Bill (Amendment No. 16), 1982 provides the answer:

> In making the new arrangement reducing the period of pre-trial detention, it became clear that it was necessary to distinguish between arrest by the military police, pursuant to investigating an offense, and arrest by a commander, because of a disciplinary violation.
>
> Experience shows that the military police requires, on average, up to 35 days to complete an investigation, collect the material, and hand the prosecution a properly prepared case.
>
> …
>
> A commander who arrests a soldier for an offense of a disciplinary, as opposed to criminal, nature, generally requires much less time to examine the circumstances of the incident and decide whether to hold a disciplinary hearing or

> turn the matter over to a military attorney to consider a trial before a military tribunal.
>
> On the other hand, there are cases in which the commander authorized to judge the soldier for an offense is not nearby at the time (for example: an offense committed at the home base, when the unit is in training or serving outside the base), and it takes a few days or sometimes a week or more for him or her to return, figure out the circumstances surrounding the incident, and decide what to do.

Id. at 65-66.

10. It took 11 years for section 237A to be amended by the Military Adjudication Law (Amendment No. 23), 1993. Under the amendment, a military police officer may issue an arrest warrant for no more than ten days, and the warrant may be extended, with advance written permission by a military attorney, for a maximum total period of 25 days. In other words, the amendment reduced the maximum period of detention that could be ordered by a military police officer from 35 to 25 days.

The amendment also reduced the maximum period of detention that an adjudication officer who is not a military police officer (under section 234 of the law) could order: before the amendment, the maximum was 15 days; the amendment limited it to no more than seven days.

11. Three years later, section 237A was again amended, this time by the Military Adjudication Law (Amendment No. 32), 1996, which limited the maximum detention period under an arrest warrant issued by a military police officer to eight days. Furthermore, the amendment required the approval of a military attorney within 96 hours, in order to continue to hold a soldier through an arrest warrant issued by a military police officer (previously, the law had required the detention to be approved by another adjudication officer at the rank of lieutenant colonel or higher). The military attorney may reduce the period of detention and even release the soldier. If the arrest warrant is not subjected to review by the military attorney, the soldier must be released. Under the amendment

(section 237B), if the military attorney decided that it was necessary to extend the detention beyond eight days, he or she could order a military attorney or military police officer to request an extension from a district military tribunal.

The amendment also phased in a reduction of the periods of detention within two years of passage. Sec. 8. First, the maximum detention period that was to be ordered through an arrest warrant by a military police officer was to be "four days." Second, the arrest warrant would need to be reviewed by a military attorney within "forty-eight hours of arrest." On July 26, 1998, therefore, the maximum period of detention that could be ordered by a military police officer, through an arrest warrant, was supposed to be "four days."

The amendment left unchanged the maximum period of detention via an arrest warrant by an adjudication officer who is not a military police officer: the maximum period of detention was and remains seven days. However, under section 236 of the amendment, the arrest warrant would expire within 96 hours (and within two years of passage, within 48 hours) of issuance, unless it was approved by an adjudication officer ranked at least as high as lieutenant colonel or if no complaint was issued and no investigation was begun.

The amendment created an odd state of affairs: prior to the amendments in 1982 and 1993, a military police officer could detain someone through an arrest warrant for much longer than an adjudication officer who is not a military police officer could. The reason is that arrest by a military police officer requires more time, for purposes of investigation, than arrest by another kind of adjudication officer. Nevertheless, currently, under the 1996 amendment, an adjudication officer who is not a police officer may issue an arrest warrant and detain someone for almost twice as long as a military police officer. This odd result warrants an inquiry, and one would hope that such inquiry will be forthcoming, first from the Chief Military Attorney and then from the Defense Minister, who is charged with executing the Military Adjudication Law.

12. Finally, the Military Adjudication Law (Amendment No. 32) (amended), 1998 amended section 237A again, changing the maximum period of detention from "four days" to "96 hours." The amendment, according to the bill's Explanatory Note, was designed "to avoid any misunderstanding regarding the precise length of detention." This was necessary because the Interpretation Law, 1981, defines a "day" as beginning at midnight and ending at midnight the following night. See the Explanatory Note to the Military Adjudication Bill (Amendment No. 32) (amended), 1998, p. 452.

Whatever the goal of the amendment, in practice, "96 hours" is generally shorter than "four days." See section 10(a) and 10(c) to the Interpretation Law. Therefore, the amendment benefits soldiers who have been arrested.

13. Taking into account all these amendments, section 237A to the Military Adjudication Law, in its current version, reads as follows:

> (a) Notwithstanding the provisions of section 234(a), an adjudication officer who is a military police officer may issue an arrest warrant for any soldier, for a period of no longer than 96 hours; such adjudication officer, who issued an arrest warrant for less than 96 hours, may extend the arrest for additional periods of time, so long as the maximum period does not exceed 96 hours.
>
> (b) If a soldier has been arrested by a warrant as outlined in subsection (a), such arrest shall be brought before a military attorney for review within 48 hours of arrest.
>
> (c) A military attorney may approve the detention period in the arrest warrant, reduce it, or order the soldier released.
>
> (d) If the provisions of subsection (b) are not implemented, the soldier shall be released from detention.
>
> (e) The provisions of this section shall not apply to an arrest

> warrant issued by a military police officer exercising his or her authority as an adjudication officer over a soldier in his or her unit and under his or her command, unless the offense for which the solider is arrested has been reviewed by a reviewing officer as delineated in section 252(a)(3).

Basic Law: Human Dignity and Liberty

14. The petitioners claim that the current version of section 237A of the Military Adjudication Law restricts liberty, in violation of section 5 of the Basic Law: Human Dignity and Liberty, and is therefore null and void. According to section 5 of the Basic Law:

> There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition, or otherwise.

In principle, it would seem as though the petitioners are right that section 237A, in authorizing the arrest of a person, violates section 5 of the Basic Law: Human Dignity and Liberty. That claim, however, is problematic. Under section 10 (Validity of Laws) of the Basic Law: Human Dignity and Liberty, "This Basic Law shall not affect the validity of any law [*din* – trans.] in force prior to the commencement of the Basic Law." Hence, the Basic Law could not invalidate section 237A of the Military Adjudication Law as it was formulated prior to the commencement of the Basic Law, even though that section authorized a military police officer to arrest a soldier for up to 35 days.

The Basic Law: Human Dignity and Liberty may, of course, invalidate a statute passed subsequent to the Basic Law. However, the amendments to section 237A of the Military Adjudication Law, which was passed after the Basic Law entered into force, reduced the maximum period of detention. The version of section 237A in effect at the time the petitions were filed limited the maximum period of detention to 25 days. During the course of the court proceedings, the statute was amended three times, to further reduce the detention period: the first time – to eight days; the second time – to four days; the third time – to 96 hours. Each amendment limited the power to restrict liberty. As a practical matter,

therefore, the statute authorizing a military police officer to issue an arrest warrant for 96 days only is a statute that benefits, rather than infringes [on liberty – trans.]. As a legal matter, can we nevertheless say that section 237A, in its current version, restricts liberty, in violation of section 5 of the Basic Law: Human Dignity and Liberty?

A Beneficial Statute as an Infringing Statute

15. Can a statute that benefits – in other words, a statute that limits the infringement on a right protected by the Basic Law: Human Dignity and Liberty – be considered a statute that infringes on such a right, in violation of the Basic Law? The question is, should we evaluate the beneficial statute in light of the previous statute, such that the beneficial statute does not infringe on a right but rather advances it, or should we evaluate the beneficial statute in light of the Basic Law: Human Dignity and Liberty? That is the question in this case. If the Military Adjudication Law (Amendment No. 32) (amended) (hereinafter: "the amending statute"), which reduced the maximum period of arrest to 96 hours, is evaluated in light of the previous statute, or, *a fortiori*, in light of the statute as it existed prior to the enactment of the Basic Law, then there is no violation. On the contrary: It restricts the infringement on personal liberty. However, if we evaluate the amending statute in light of the Basic Law: Human Dignity and Liberty, then there is some validity to the claim that arresting a soldier for 96 hours, before he or she is brought before a military tribunal, infringes on the right to personal liberty, in violation of the Basic Law. What, then, is the correct evaluation?

16. This Court has yet to rule on that question. We considered a similar issue in CA 6821/93 *United Bank Mizrachi Ltd. v. Migdal Agricultural Cooperative* [6] (hereinafter: *Bank Mizrachi* [6]), in which the Court held that it has the authority to invalidate a new statute that violates the Basic Law: Human Dignity and Liberty. There, the issue was the constitutionality of a statute amending another statute passed prior to the Basic Law. The claim was that because the amending statute was integrated into the existing statute and became part of it, it enjoyed the

protection for existing laws granted by section 10 ("Validity of laws") of the Basic Law. The court rejected that argument:

> In terms of its purpose, at the present stage, the Basic Law seeks to preserve the status quo; it does not, however, spread its protective wing over what is to come, because to do so would empty the Basic Law of its content and purpose. If we accepted the rule that the new statute is to be evaluated as if section 10 applied to it, as is the case for statutes enacted prior to the passage of the Basic Law, one would simply have to dress every new statute in the garb of an amendment to an existing law in order to exempt it from the application of the Basic Law …
>
> Finally, an amendment to a statute, like any statutory provision, is a separate and new law, to which the non-applicability provision of section 10 of the Basic Law does not apply.
>
> Practically, too, we should draw clear dividing lines, rather than allow ourselves to be dragged into foggy distinctions. Attempting to determine the extent to which a statutory amendment innovates and its innovative implications on legislation as a whole would create an endless system of debate and interpretation. Instead, we should draw a simple line, clear and unambiguous, based on the time at which the amendment was passed. The watershed event is the date at which the Basic Law came into force.

Id. at 263 (Shamgar, P.).

In *Bank Mizrachi* [6], the Court considered the legality of an amending statute that was not a beneficial statute: the amending statute aggravated the infringement on the right to property. However, the logic of President Shamgar's holding in that case also applies to a beneficial amending statute, meaning an amending statute that limits the extent to which the prior law infringes on a basic right.

When the legislature enacted the amending statute, it was aware of the obligation imposed on it by the Basic Law: Human Dignity and Liberty, namely not to infringe on a basic right in contradiction of the Basic Law. The job of the Court is to evaluate whether the amending statute fulfils that obligation. In other words, the Court must evaluate the amending statute in light of the Basic Law.

Furthermore, the distinction between an amending statute which benefits and an amending statute which does not benefit is not easy to draw. Sometimes, an amending statute combines beneficial provisions with ones that infringe. A single provision may benefit in some ways and infringe in others, and the two kinds of results may be inseparable. The difficulties inherent in determining which provisions benefit and which do not may create a substantial and complex debate, undermining the stability and certainty of the law. That is another reason for saying that every amending statute passed after the Basic Law is subject to review under the Basic Law, whether or not the statute benefits.

President Barak expressed this view in his book, *Parshanut Bimishpat*:

> The question arises as to whether to establish more lenient requirements – with respect to the clause on proportionality – in reviewing new legislation that amends an old statute. Indeed, if we apply the ordinary requirements of the limitation clause, the new legislation – which advances human rights, compared to the old law – may be constitutionally infirm. The result would then be to return to the old law, whose infringement on human rights is sevenfold worse. What, then, is the point of the amendment? On this line of thought, there should be a special limitation clause for a new statute which amends an old law. The counter-argument is that the Basic Law: Human Dignity and Liberty does not contain two limitation clauses, one for an "ordinary" new statute and one for a new statute which amends an old law. It contains just one limitation clause.

> Furthermore, the distinction between a "new" new statute and a new statute that amends an old statute is difficult and is likely to constitute a source of uncertainty. Finally – and this is the most important point, in my opinion – the limitation clause should not be diluted. It establishes certain minimum requirements which the legislature must follow, and those requirements should apply to every new piece of legislation to come out of the legislature's study. Invalidating new legislation that amends an old law, because the new provisions do not fulfill the requirements of the limitation clause, is not a green light for legislative omissions. It should serve as a catalyst for deeper change, consistent with the conditions set forth in the limitation clause.

Parshanut Bimishpat [Interpretation in Law],, Parshanut Chukatit [Constitutional] [21] at 563.

See also A. Barak, *Hakonstitutzionilazatzia shel Maarechet Hamishpat Biakvut Chukei Hayesod Vihashlachoteha al Hamishpat Haplili [Constitutionalization of the Legal System, Criminal Law*], 13 Mechkarei Mishpat 5 (1996-1997) [23] at 16, 25.

It should be noted that even the respondents, in their briefs, do not challenge the authority of the Court to review the legality of an amending statute, even a beneficial statute, in light of the Basic Law: Human Dignity and Liberty. However, they argue that the Court should use restraint in exercising such authority, limiting it to the most extreme cases in which the beneficial law still infringes on a basic right to an intolerable degree.

I am prepared to agree that the Court, in reviewing the legality of a statute in light of the Basic Law: Human Dignity and Liberty, should, where appropriate, accord significance to the fact that we are talking about a beneficial law. However, the fact that the statute benefits does not render it immune from judicial review under the Basic Law.

Having said that, we must now evaluate whether the amending statute, under which a soldier can be held under arrest for up to 96 hours, infringes on personal liberty in a way that contradicts the Basic Law: Human Dignity and Liberty.

Personal Liberty

17. Section 5 of the Basic Law: Human Dignity and Liberty constitutionalizes the right to personal liberty. Furthermore, personal liberty is a constitutional right of the utmost importance, and as a practical matter, it is a condition for exercising other basic rights. Violating personal liberty, like throwing a stone into a lake, creates expanding circles of infringements of additional basic rights: not just freedom of movement, but also freedom of expression, the right to privacy, property rights, and others. See APP 4463/94 *Golan v. Prison Services*, IsrSC 50(4) 136 [7] at 153. Under section 1 of the Basic Law: Human Dignity and Liberty, "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel." Only a free person can fully and properly exercise his or her basic rights. And personal liberty, more than any other right, is what makes a person free. For that reason, denying someone personal liberty is a particularly serious infringement. Indeed, denying personal liberty through imprisonment is the harshest punishment that a well-ordered state imposes on criminals.

Detention by an administrative agent, like a police officer, is the most serious infringement on personal liberty. In contrast to imprisonment, such detention is not imposed by a court as the result of a judicial proceeding, as punishment for a crime. It is imposed by an administrative agency, based on suspicion alone, on a person who still enjoys the presumption of innocence. See, e.g., CrimApp 8087/95 *Zada v. State of Israel* [8] at 144.

In principle, the level of protection accorded to a basic right must be directly proportional to the importance of the right and the degree to

which it is infringed upon. Therefore, there may, for example, be a difference between the level of protection accorded to personal liberty and that accorded to the right to property, just as there may be a difference in the protection accorded in cases of complete denial of personal liberty, versus those involving a limited infringement on freedom.

The conclusion: because personal liberty is a constitutional right of special importance, it deserves special protection against infringement via detention at the hands of an administrative agency. This is the kind of infringement that occurs when a military police officer arrests a soldier for 96 hours, under section 237A of the Military Adjudication Law.

Of course, not every infringement on personal liberty violates the Basic Law: Human Dignity and Liberty. Like all basic rights, the right to personal liberty is not absolute. Personal liberty may, and in some cases must, be restricted, in order to protect other rights or to protect the public. The Basic Law recognizes this need and sets conditions for fulfilling it. The limitation clause of the Basic Law establishes these conditions. In any case involving infringement on personal liberty, the question is therefore whether the infringement meets the conditions established in the limitation clause, which serves as the line of defense for basic rights, including the right to personal liberty. The Court comes to protect personal liberty from a statute that infringes on it, only when the statute breaks through the line of defense drawn by the limitation clause.

Limitation clause: the General Clause and the Security Clause

18. The general limitation clause of section 8 of the Basic Law: Human Dignity and Liberty reads as follows:

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.

However, immediately after the general limitation clause, the law adds a special limitation clause for security forces. Section 9 of the Basic Law contains this clause (under the heading, "Reservation regarding security forces"):

> There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defense Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service.

Because section 237A of the Military Adjudication Law restricts the personal liberty of soldiers, clearly it is also subject to the security limitation clause of section 9 of the Basic Law: Human Dignity and Liberty.

19. How does the security limitation clause of section 9 of the Basic Law: Human Dignity and Liberty differ from the general limitation clause of section 8 of the Basic Law?

There is no doubt that the Basic Law: Human Dignity and Liberty makes everyone's basic rights into constitutional rights. The security limitation clause was not, by itself, designed to restrict the basic rights of those serving in the security forces. As President Barak said in CrimApp 3513/95 [5] at 688-99:

> There is no question that the human rights protected in the Basic Law are also the rights of the soldier. The uniform does not divide the soldier from his or her constitutional human rights. Human rights are part of the rights that a soldier enjoys as a human being …

20. If so, what is the special purpose of the security limitation clause? On its face, the security limitation clause sets special conditions for infringing on the basic rights of those serving in the security forces.

These conditions differ from those established by the general limitation clause for infringing on the basic rights of others. What are these special conditions?

First, under the security limitation clause, the basic rights of those serving in security forces may be infringed through enacting regulations such as military orders. How? The original version of section 8 of the Basic Law did not allow basic rights to be violated except "by a law," until the 1994 amendment to that section also allowed basic rights to be violated "by regulation enacted by virtue of express authorization in such law." In contrast to section 8, from the outset, section 9 allowed for the infringement on basic rights also "by virtue of a law," in other words, through administrative regulations. See section 9 of the Interpretation Law, 1981. See also, Y. Carp, *Chok Yisod: Kvod Haadam Vicheruto – Biyographia Shel Maavakei Coach [Basic Law – Power Struggles*] [24] at 372; A. Gazal, *Pgiya Bizchuot Hayesod "Bichok" o "Lifi Chok" [Violating Basic Rights "By Law" or "By Virtue of a Law"]* [25] at 401-02.

Today, the semantic difference between the way section 8 and section 9 address infringements on basic rights through administrative regulation remains: Section 8 allows such infringement only "by a law or by regulation enacted by virtue of express authorization in such law," while section 9 allows infringement merely "by virtue of a law." Is there a substantive difference between the two? The Court has not yet ruled on this question. Nor is there a need to do so in this case, because the statute itself, and not implementing regulations, authorizes the infringement on personal liberty by arresting a soldier.

21. There are additional semantic differences between section 8 and section 9 of the Basic Law. The most obvious one is that section 9, as opposed to section 8, does not require, as a condition for violating the right, that the violating law be "befitting the values of the State of Israel," and that it be "enacted for a proper purpose." Does that mean that a statute, or regulations enacted "by virtue of a law" that infringes on the basic rights of those serving in the security forces, may not befit the values of the State of Israel or may be enacted for an improper purpose?

The language of the statute must be interpreted according to the purpose of the statute. If we take the purpose of the statute into consideration, we must reject this interpretation, because it is likely to frustrate the purpose of the Basic Law, namely, that basic rights are the constitutional rights of every person, including, of course, a person serving in the security forces. It cannot be reconciled with section 1 of the Basic Law, under which the basic rights of a person in Israel – every person – "… will be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel." Nor can it be reconciled with section 1A of the Basic Law, which states its purpose to be establishing "the values of the State of Israel as a Jewish and a Democratic State." The purposive interpretation of section 9 of the Basic Law is therefore that a statute cannot infringe on the basic rights of those serving in the security forces unless it befits the values of the State of Israel and is enacted for a proper purpose. The same is true, *a fortiori*, of administrative regulations. If a statute or administrative regulations infringe on the basic rights of those serving in the security forces in a way that does not befit the values of the State of Israel or for an improper purpose, then we can determine that they violate these rights to an extent "greater than what is required by the nature and character of the service," contradicting the language of section 9 of the Basic Law. *See* A. Bendor, *Pigamim Bichakikat Chukei-Hayesod [Flaws in the Passage of the Basic Laws* [26] at 450.

22. The question therefore arises as to whether section 237A of the Military Adjudication Law, which authorizes a military police officer to arrest a soldier for a period of 96 hours before bringing him before a military judge, meets the requirements of consistency with the values of the State of Israel and designation for a proper purpose. The answer is that the arrest of a soldier who has committed an offense is recognized and accepted, in certain instances, as an essential means of protecting public safety. Public safety is one of the basic values of the state, and its protection is a proper purpose. That principle holds true when a civilian police officer arrests a person who is not serving in the security forces as well as when a military police officer arrests a soldier. Arresting a soldier may serve the additional purpose of maintaining the necessary discipline in the military, which is also a proper purpose. Furthermore, we can also say that the amendments made to section 237A after the passage of the

Basic Law: Human Dignity and Liberty meet the requirements of values and purpose because they were passed in order to reduce the period of detention, and thus to limit the infringement on personal liberty. We may therefore conclude that, in terms of values and purpose, section 237A of the Military Adjudication Law passes constitutional muster.

Indeed, the petitioners do not object to the very authority of a military police officer to arrest a soldier, but rather to the period of detention which can be ordered by a military police officer. The petitioners claim that an arrest warrant authorizing 96 hours of detention, before a soldier must be released or brought before a judge to extend the detention, is disproportionately long. Therefore, they claim, it infringes on the right to personal liberty to an extent greater than is required under section 9 of the Basic Law: Human Dignity and Liberty.

23. Semantically, there is a difference between the proportionality test established in section 9 of the Basic Law: Human Dignity and Liberty (security limitation clause) and the proportionality test established in section 8 of the Basic Law (general limitation clause). Section 8 prevents a limiting statute from violating basic rights except "to an extent no greater than is required."

In contrast, section 9 bars the limiting statute from infringing on basic rights except "to an extent no greater than is required by the nature and character of the service." What are the implications of these different choices of language?

The proportionality test is flexible. In every case and for every issue, "the extent required" of an infringement on rights depends on the context of the case and issue, whether it is a context of time or place, status or role, or the like. This is true, for example, of prisoners. The Basic Law: Human Dignity and Liberty does not establish a special test for determining the proportionality of an infringement on prisoners' rights. The implication is that infringement on a prisoner's rights is subject to the general proportionality test. Nevertheless, the proportionality of an infringement on prisoners' rights, like their right to

freedom of expression or privacy, clearly is measured in light of the context of prison, primarily the nature and character of the status of prisoner. See, e.g., APP 4463/94 [7]. The principle holds true for a person of another status. It is therefore clear that the proportionality of the harm to a person serving in the security forces is influenced by the nature and character of the service. This means that applying the general proportionality test of section 8 of the Basic Law to those serving in the security forces would have to take into consideration the nature and character of the service, even if section 9 of the Basic Law did not explicitly say so. Thus, section 9 of the Basic Law simply states the obvious. It also, however, serves to clarify and remove any doubt: The proportionality of infringing on the rights of those serving in the security forces depends on the nature and character of the service, and it is therefore likely to be different from the proportionality of infringing on the rights of a person who is not serving in the security forces. Furthermore, the proportionality is likely to vary among types of service even within the security forces. For example, the proportionality of infringing on the rights of a person serving in the military is likely to be different from the proportionality of infringing on the rights of a person in the Prison Services. As President Barak said in CrimApp 3513/95 [5]:

> The military context is unique in its own right. This uniqueness justifies recognizing the possibility of a more widespread restriction of the human rights of a soldier, relative to what would be permitted for a non-soldier.
>
> …
>
> The question is whether the infringement on a soldier's human rights is proportional, considering the nature and character of military service, including its uniqueness in light of the goals of the military. Comparative law from systems which have addressed similar problems will be useful. We should, however, give expression to the special nature of the Israeli military, which is a people's army,

> defending the state against real dangers that lurk each and every day.

Id. at 689.

See also HC 5000/95 *Bartala v. Chief Military Attorney* [9] at 73, 75.

The primary question raised by these petitions, therefore, is whether the authority to arrest a soldier under the Military Adjudication Law withstands the proportionality test, taking into consideration the nature and character of the military service. Is it possible to reduce the period of arrest, without undermining its purpose?

Burden of Proof

24. The answer to the question of proportionality depends, in large part, on the evidence. Has lawful evidence proven to the Court that it is possible to reduce the period of detention, thus limiting the infringement on personal liberty, without undermining the purpose of the arrest? In order to answer that question, we must first clarify who bears the burden of proof in demonstrating proportionality: the petitioners or the respondents.

The Court has yet to rule on the question of burden of proof in demonstrating proportionality, although it has arisen in prior cases. The justices have been divided on the issue. They expressed their disagreement in *Bank Mizrachi* [6]. *Supra* para. 16. In the judgment, the justices distinguished between two burdens within the burden of proof: the primary burden, which is the burden of persuasion, and the secondary burden, which is the burden of production. On these burdens, see 3 Y. Kedmi, *Al Harayot [On Evidence]* [22] beginning on pp. 1217 and 1273. One opinion expressed in *Bank Mizrachi* [6] is that the burden of persuasion passes from party to party, depending on the stage of argument. At the first stage of argument, the question is whether the statute being reviewed infringes on a constitutional right. At this stage,

the statute enjoys a presumption of constitutionality. The burden of persuasion, therefore, is on the party contending that the statute infringes on a right, meaning it is generally on the person or body who is harmed by the statute. At the second stage, the question is whether the infringement on a constitutional right is legal, meaning, in accordance with the limitation clause: by law or by virtue of a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required. At this stage, the burden of persuasion that the infringement is legal falls on the party arguing for the constitutionality of the infringement, meaning it is generally on the administrative agency acting by force of the statute. See Justice Barak's opinion, *Id.* at 492-98; Justice D. Levin, *Id.* at 458-459. An opposing opinion is that at every stage of the argument, every statute enjoys a presumption of constitutionality, and therefore, at both stages, the burden of persuasion is on the party claiming otherwise. *See* Justice Goldberg's opinion, *Id.* at 577; Justice Bach's opinion, *Id.* at 586. Another opinion, taking a middle course, divides the burden of proof at the second stage. In other words, the burden of persuasion at the second stage is on the party arguing for the constitutionality of the statute, generally the administrative agency acting by force of the statute. On the question of proportionality, however, the burden of production is on the party claiming that the infringement is not proportional, meaning it must bring evidence showing the existence of alternatives that effect a more moderate infringement on the right. See Justice Shamgar, *Id.* at 348; Justice Mazza, *Id.* at 578-79. See also a similar opinion by Justice M. Cheshin, *Id.* at 570. At the end of the day, however, the disagreement between the justices in *Bank Mizrachi* [6] remained unresolved.

Parenthetically, I will note my doubt that case law on the burdens of proof in criminal and civil law has the same application in public law. It is true that in public law, like civil law, the applicable rule is that he who would take from his friend bears the burden of proof. Therefore, at the first stage of argument in public law, the burden of raising a substantial doubt over constitutionality is on the petitioner claiming the unconstitutionality of a statute, regulation, or administrative decision.

However, once the petitioner has raised this doubt (whether or not an order-nisi has been issued), the Court need not make do with the evidence brought by the petitioner. For example, if the petitioner succeeded in raising a substantial doubt over the reasonableness of an administrative decision or the legality of the considerations that went into it but did not produce enough evidence for the Court to definitely determine the legality of the decision, the Court need not reject the petition for lack of evidence. It may, *sua sponte*, require the agency to answer certain questions or present additional specified evidence, such as affidavits, documents, and the like. This is one of the differences between an administrative proceeding and a criminal or civil proceeding. First, the difference stems from the nature of an administrative proceeding: it deals with a decision taken by an agency acting in the name of the public and for the sake of the public. In principle, therefore, the public has a right to know the facts and reasons at the basis of the decision. Second, the difference stems from the principle of rule of law; in an administrative proceeding, the Court is not just supposed to adjudicate a dispute between two parties but also to preserve the principle of rule of law. This principle requires that, if substantial doubt has been raised over the legality of an administrative decision, such doubt should be clarified, to avoid leaving an illegal decision in effect. This is also the source of the difference in the burden of proof in an administrative proceeding versus a criminal or civil proceeding. In an administrative proceeding, more than in a criminal or civil proceeding, the Court is likely to initiate actions that may be necessary to strengthen the body of evidence so that it can decide the legality of the administrative decision on the merits. Therefore, once a doubt has been raised about the legality of an administrative decision at the start of an administrative proceeding, the question of burden of proof does not arise again in the proceeding.

That is not always the case. Sometimes, even at the end of the proceeding, the body of evidence vacillates such that the Court cannot use it to make the findings necessary to decide the legality of the administrative decision. In this situation, rather than decide the legality of the administrative decision on the merits, the Court may be forced to do

so by ruling on the issue of the burden of proof. However, even a decision on that issue will likely be influenced by the special nature of administrative proceedings. It is likely to be influenced by considerations of rule of law, the presumption of the constitutionality of statutes and legality of administrative decisions, the importance of the right infringed and the severity of the infringement, administrative efficiency, and other public interests. The relative weight given to these considerations may determine whether the petitioner, who seeks something from the agency, bears the burden of proof, or whether it passes to the agency. This may explain, if only partially, the differences of opinion among the justices in *Bank Mizrachi* [6] over the question of the burden of proof.

In any event, in this case, as in *Bank Mizrachi* [6], we need not resolve the dispute over burden of proof. I will therefore leave it to be examined at another time. This is possible because, after the order-nisi was issued, and at the Court's request, the respondents produced all the necessary evidence on the question of proportionality. The evidence produced before the Court is sufficient to allow it to rule on the proportionality of the statutory provision authorizing a military police officer to arrest a soldier for up to 96 hours, without having to rule on the issue of burden of proof. As Justice Sussman held in CA 88/53 *Kaplan v. Rosenzweig* [10] at 1301, "If the body of evidence allows a judge to make a finding of fact, it matters not at all which party bears the burden of proof."

In light of the evidence, does the statutory provision authorizing a military police officer to arrest a soldier for a period of 96 hours withstand the proportionality test? As a preliminary question, we must ask: what determines the proportionality test.

The Proportionality Test

25. In a few decisions in recent years, the Court has answered the question of what determines the proportionality test. It recently repeated the answer in HC 1715/97 *Chamber of Investment Managers in Israel v.*

Finance Minister [11], in which the Court invalidated a certain provision in a new statute because it disproportionally infringed on the right to freedom of occupation. In order to reach its decision, the Court presented the proportionality test. This test, as the Court held, is divided into three secondary tests, as President Barak held:

> The *first* secondary test is the test of suitability or rational connection. A legislative means that infringes on a constitutional human right – in our case, the right to freedom of occupation – is proper if it is suited to achieving the objective. There must be a suitable connection between the ends and the means. The legislative means must rationally lead to achieving the legislative objective … the *second* secondary test is the test of the least violative means. A legislative means that infringes on a constitutionally protected human right – in our case, the right to freedom of occupation – is proper only if the legislative objective cannot be achieved by another means whose infringement on the human right is less severe … The legislative means is like a ladder on which the legislature climbs in order to achieve the legislative purpose. The legislature must stop at the rung of the ladder which achieves the legislative purpose through a means least violative of the human right. "The legislature must start with the 'step' that is least violative, and slowly ascend the stairs, until it reaches the step at which the proper legislative purpose is achieved without infringing on the human right more than is necessary" … "If, under the circumstances of the case, the moderate condition, which causes less damage, is insufficient to achieve the objective, the agency may set a more burdensome condition, in order to achieve the goal" … The *third* secondary test is the test of the proportionality of the means (in the narrow sense). Even if the means chosen is (rationally) suited to achieving the objective, and even if there is no means more moderate, there must be a proper

> relationship between the benefit it will create and the scope of the infringement on a constitutionally-protected human right … this is the test that evaluates the result of the legislation, and the effect it has on the constitutional human right. If using a legislative means causes a severe infringement on a human right, and the benefit it is expected to give the public is minimal, the legislation may exceed the extent necessary (in the narrow sense).

Id. at 385.

26. The arguments in this petition focused on the second secondary test: the choice of the least violative means. The petitioners do not claim that a military police officer's arrest of a soldier for a maximum of 96 hours before the soldier must be released or brought before a judge, fails the first secondary test, namely a suitable means, or the third test, namely a proportional means. However, they contend that a military police officer's arrest of a soldier for 96 hours cannot be reconciled with the second test, the test of the least violative means. They argue that such detention infringes on personal liberty beyond what is necessary, because it is possible and appropriate to reduce the period of detention without undermining the purpose of the arrest.

The Proportion Applied in Civilian Arrests

27. What, then, is a proportional period for which a military police officer may detain a soldier? The petitioners claim that the proportional period for a military police officer to detain a soldier is the same period as that for which a civilian police officer may detain any person, regardless of whether he or she is a soldier. At the relevant time, the Criminal Procedure Ordinance (Arrest and Search) [new version], 1969 (hereinafter – Arrest and Search Ordinance) established the period for which a civilian police officer may detain someone. Section 16 of the that ordinance imparted a civilian police officer with the authority to arrest a person for no longer than 48 hours, after which the person must

be released from detention or brought before a judge with a request to extend the detention. Such authority had existed for many years, including at the time these petitions were brought before the Court. The petitioners claimed that there was no justification for distinguishing between the arrest authority of a civilian police officer and that of a military police officer, for purposes of determining the maximum period of detention. The nature and character of military service does not justify detention by a military police officer for a longer period of time. When a military police officer arrests a soldier for 48 hours, he or she infringes on the personal liberty of the soldier, but no more than is necessary; detention for a longer period of time infringes on personal liberty to an extent beyond what is necessary. Hence, because it infringes on personal liberty beyond what is necessary, the statute authorizing a military police officer to detain a soldier for longer than 48 hours is null and void.

28. The Criminal Procedure Law (Enforcement Authority – Arrests), 1996 (hereinafter – Enforcement Authority Law) rescinded (in section 42) section 16 of the Arrest and Search Ordinance and reduced the period of detention by a civilian police officer. Under section 29(a) of that law, "a person arrested by an officer appointed under section 27 shall be brought before a judge as soon as possible, and within no more than 24 hours." The Explanatory Note to the Criminal Procedure Bill (Enforcement Authority – Detention, Arrest, and Release), 1995 offered the following reason for reducing the period of detention: "This is part of a trend to protect human rights, to guarantee that a person is detained only when detention is an essential measure, and to give the court judicial review over the investigatory activities undertaken, until the detainee is brought before it." *Id.* at 316. Under section 1(c) of the Enforcement Authority Law, the provisions of the law apply to detention under any law, unless otherwise provided for by law. To remove any doubt, section 44 of the Enforcement Authority Law adds a provision to the Military Adjudication Law (section 243C), under which the provision limiting detention by a civilian police officer to 24 hours does not apply to detention by a military police officer under the Military Adjudication Law.

29. The reduction, under the Enforcement Authority Law, of the maximum period for which a civilian police officer may detain someone from 48 hours to 24 hours did not change the position of the petitioner in HC 6055/95. After the Enforcement Authority Law was passed, the petitioner submitted an amended petition (on June 26, 1996) taking the position that the proper period for detaining soldiers, in accordance with the Basic Law: Human Dignity and Liberty, is 48 hours. Subsequently (on March 11, 1998), the petitioner even notified the court that he was not seeking to reduce the period of detention to less than 48 hours. The suggestion is that either the petitioner believed that the nature and character of military service justify arresting a soldier for 48 hours, even though a civilian police officer is not authorized to detain a person for longer than 24 hours, or he believed that the military would require a period of adjustment to prepare for a maximum detention of 24 hours, and he was therefore prepared to make do with a maximum period of 48 hours.

30. In contrast, the petitioners in HC 7083/95 submitted an amended petition (on July 2, 1996) in which they asked to limit the detention of soldiers to no more than 24 hours. In response to a brief by the respondents, the petitioners submitted that, "The petitioners again ask the honored Court to hold that detention for longer than 24 hours without a hearing before a judge is unconstitutional. Even if the honored Court decides that the minimal constitutional standard is 48 hours, the principle of equal application of basic rights requires limiting the period of detention to 24 hours."

On this issue, however, the petitioners made a mistake. The principle of equal application of basic rights applies to equal situations. The situation of a soldier's personal liberty is not equal to the situation of a non-soldier's personal liberty. This court gave expression to that principle in a few cases. *See e.g.*, HC 405/74 *Bar-Ad v. Captain Madar* [12] at 56; HC 243/80 *Madjhinski v. Military Appeals Tribunal* [13] at 72; HC 118/80 *Greenstein v. Chief Military Attorney* [14] at 243; HC 695/88 *Adler v. Military Appeals Tribunal* [15]; HC 5900/95, *supra* [9] at 72-74. The Basic Law: Human Dignity and Liberty also expressed that difference in section 9 (the security limitation clause), under which the

basic rights of those serving in the security forces may be violated to an extent required "by the nature and character of the service."

Therefore, the question that will decide these petitions is not the question of equality in the periods of detention for soldiers and non-soldiers, but rather whether detaining a soldier for 96 hours infringes on personal liberty to an extent greater than is required by the nature and character of military service.

The Proper Proportionality in Detaining Soldiers

31. The question of proportionality is the kind of question which has no precise answer. At what point does the infringement on a soldier's personal liberty exceed the necessary extent? Proportionality cannot be measured. Indeed, how could we measure, in quantitative data, the level of harm caused to a soldier by detention or another infringement on personal liberty? We have no machine or formula that can measure the force or weight of the harm caused by denying personal liberty, via arrest, for one hour or one day. Nor do we have a machine or formula that can measure the profit or benefit of reducing the infringement on personal liberty by reducing the detention by an hour or a day. Similarly, there is generally no precise way to measure the cost, be it economic or social, of reducing the infringement on the right. For example, what is the social and economic cost of shortening detention by a civilian police officer from 48 hours to 24 hours? There would seem to be no way to quote a price, even in terms of money or human resources. There is certainly no way to quote a price in terms of public order and crime prevention.

Indeed, human rights and public interests are not potatoes which can be weighed on a scale, one against the other, to see which side tips the scale. Because we cannot weigh, we must estimate. We must make an effort, in every situation, to correctly estimate the relative weight of human rights, on the one hand, and public interests, on the other. The proper balance between them is what determines proportionality. The greater the importance of the right infringed, and the more serious the infringement, the stronger the public interest must be, in order to justify the infringement. A severe infringement on an important right, designed

to protect but a weak public interest, is likely to be considered an infringement beyond the extent required.

We may imagine the relationship between the right and the public interest on one hand, and the proportionality on the other, as an equation. In contrast to a mathematical equation, however, the value of each term of the equation is not precise, and in any event, it cannot be measured. We determine the value by estimating, and an estimate is subject to dispute. Someone may disagree. However, even when the estimation is in dispute, a decision is still necessary. The Court must make a decision. Such is the role and authority of the Court. Such is also its skill. The Court is accustomed to evaluating the relative weight of competing rights and interests in a variety of contexts, based on the body of data and considerations presented, in order to arrive at the proper balance.

The Court does this generally, and proportionality is no exception. Making an evaluation based on the relevant data and considerations is the only way to determine whether a particular infringement on a particular right exceeds what is necessary. This is the right way to determine whether the detention of a soldier by a military police officer for 96 hours infringes on personal liberty beyond the extent required by the nature and character of military service.

32. The respondents of course recognize the special importance of the personal liberty of a soldier, like that of any person, and they do not dispute the appropriateness of limiting the infringement on such liberty as much as possible, taking into consideration the nature and character of military service. In that spirit, they point to the impressive reduction of the detention period that has taken place gradually, since the original version of the Military Adjudication Law permitted two months of detention by a military police officer. Just a few years ago, when these petitions were submitted to the Court, the amended law still allowed detention by a military police officer for up to 25 days. The respondents viewed even that period as longer than is proportional. Thus, even before the petitions were submitted, the military, on its own initiative, began to examine the possibility of a further reduction in the period of detention.

Furthermore, even today, when the maximum period of detention by a military police officer is 96 hours, the respondents believe that it is appropriate and possible to continue to reduce the period. In the concluding paragraph of their written briefs submitted to the Court, the respondents said that:

> The military authorities are aware of the need to continue trying to reduce the maximum period for which soldiers may be detained prior to being brought before a military judge. The respondents have worked to amend the law gradually, on an experiential basis, as part of a trend toward harmonizing the detention period, as much as possible, with that customary for the detention of civilians.

This trend was expressed during a 1996 debate in the Knesset over a proposed amendment to the Military Adjudication Law that would set the maximum period of detention by a military police officer at eight days, to be reduced to four days within two years. Member of Knesset Moshe Nissim, speaking for the Knesset Committee on Foreign Affairs and Security, said:

> One may ask, why didn't we completely equate it with the period accepted in civilian life? I agreed with the military attorney's office that there is a difference that we are still not equipped to address, other than gradually. In civilian life, when we are dealing with the civilian plane, the police are equipped with a station and authorized people and agreed-upon agencies scattered throughout the country. In the IDF [Israel Defense Forces – trans.], the agreed-upon agencies are not scattered among all the bases. Currently, there is no possibility of immediate communication, as there is among civilian agencies. The Foreign Affairs and Security Committee therefore completely agreed with the military attorney's office to continue progressing toward the final reduction, but not right now. In other words, before we reach the final step of total equalization between the military agency and the civilian agency, we continue to march

> forward significantly, but still have not reached absolute equalization …
>
> I see this as significant progress, and I believe the attorney's office, which declared to us – and I want that declaration to be recorded in the "Knesset Record" – that they will initiate, within a short period of time, relatively quickly – it's impossible to set a deadline – to continue to improve this issue and to achieve nearly complete or complete equality within a reasonable time. I believe they will do it. I saw their initiative, and I believe that the military attorney's office should be applauded for its attention to this issue.

Knesset Record 155 (1996) 5784.

33. If this is the case, why do the respondents oppose the petitions? The respondents offer a few reasons to support their position. We will discuss each of them, one by one, beginning with the lightest and moving to the heaviest.

One reason offered by the respondents is that the current situation is essentially better than the situation set forth by the law. The military tries not to hold soldiers in custody for the maximum period allowed, 96 hours, unless there is a need to hold them in custody for the entire period. Similarly, the Chief Military Attorney, through the Chief Military Prosecutor, instructed all military attorneys (on July 14, 1996) "to make every effort to bring the matter of arrested soldiers to a military judge *as soon as possible*."

Such is indeed the case. But there is nothing remarkable about that. The period of detention established in the statute is the maximum period designed for a particular purpose, primarily to conduct investigatory activities, before releasing the soldier or bringing him or her before a military judge in order to extend the detention. These activities, like any exercise of administrative power, must be done with the proper speed. See section 11 of the Interpretation Law. Once these activities have been completed, and there is no longer any purpose to the detention, the soldier must be released, even if the maximum period of detention has

not yet elapsed. And even if there is justification for continuing to detain the soldier, the law requires that he or she be brought before a military judge as soon as possible, in order to extend the detention. Compare section 29(a) of the Enforcement Authority Law. This obligation, however, even if fully fulfilled in practice, still does not justify a statutory provision that establishes a maximum period of detention which is longer than is necessary.

Furthermore: we have no data to show how many of the soldiers arrested are held in custody for the maximum allowed period, meaning 96 hours, and whether they are held in custody when necessary or when not necessary. The petitioners assume that it is common practice for soldiers who are arrested to be held in custody until the end of the maximum period. In any event, the answers to these questions have no bearing on the result of the case. Even if we were presented with data showing that relatively very few soldiers are held in custody for the entire maximum period, it would not sufficiently answer the claim that the maximum period of detention is longer than is necessary. Such an answer could not justify a maximum detention period of two months or eight days. Such an answer could not, at the relevant time, have prevented the reduction in the maximum period of detention by a civilian police officer from 48 to 24 hours. The proportionality test for the detention period also relates to the maximum period of detention, meaning the period established by the statute, and not just the period of detention in practice for this or that soldier. If the maximum period infringes on personal liberty beyond what is necessary, that is the case even if it infringes on the liberty of just a few people. Even the personal liberty of a single individual is worthy of protection as though it were the liberty of the entire world.

In any event, this claim raised by the respondents appears to have failed to convince even the respondents themselves, because they concede the appropriateness of reducing the period of detention from what is it today.

34. The respondents raise an additional claim, in a similar vein, that, de facto, the infringement on personal liberty of a soldier arrested by a military police officer is not so severe. As they said in their briefs to the

Court, “In evaluating the proportionality of the provisions for judicial review of the detention of soldiers, one should also consider the provisions which supplement judicial review – the review of arrests which military attorneys and senior adjudication officers exercise, and the right to appeal an arrest warrant.” They point to a number of sections of the Military Adjudication Law which establish a complicated arrangement for internal review of an arrest warrant issued by a military police officer. First, under section 238(a), a soldier who has been arrested may submit an appeal to a military attorney. Second, under sections 237A(b) and 237A(d), even if the soldier does not submit an appeal, the arrest must be brought before a military attorney for approval within 48 hours of the arrest, and if the arrest is not brought for such approval, the soldier is released. Third, under section 237A(c), a military attorney may order a reduction in the period of detention or the release of the soldier. Fourth, if the military attorney decides not to order the soldier’s release, the soldier may, under sections 238(b) and 238(d), submit a request for reconsideration to the military attorney. If the military attorney decides not to grant the request or appeal (under section 238(a)), he or she must bring the matter to the decision of the Chief Military Attorney or his or her deputy. And, under section 239, the Chief Military Attorney may rescind any warrant issued by an adjudication officer.

However, according to the petitioners, this complicated and impressive system of internal review of the arrest of soldiers does not sufficiently address the charge of a disproportional infringement on the personal liberty of the soldier arrested. First, the general rule is that arrest by virtue of an arrest warrant issued by a police officer, whether civilian or military, must be reviewed by a judge as soon as possible. True, a military attorney is a senior officer at the rank of lieutenant colonel, with legal training and legal experience, holding a respected position and even enjoying professional independence within the chain of command. However, he or she is not a judge. Review by a military attorney is internal review; review by a judge is external review. Internal review takes place in the office of the military attorney, based on documentary evidence; external review takes place in a courtroom, in the presence of the detainee. There is a substantial difference between the two. Because the arrest severely infringes on the right to liberty, it must be reviewed

externally. This rule is important in principle and also in practice: the military attorney's role, as part of the system of military justice and as a representative of the military prosecution, is likely to influence the way he or she reviews an arrest warrant.

Second, the large number of arrests, coupled with the tight schedule of each arrest, creates practical difficulties for a military attorney seeking to exercise review, as the statistics demonstrate. The Court requested and received statistics from the respondents (for the years 1996 and 1997) about soldiers arrested on suspicion of desertion (which account for more than 90% of arrests by a military police officer) and released prior to the maximum period of detention, pursuant to decisions by military attorneys. The statistics show that only 6% of the soldiers arrested and brought before military attorneys were released prior to the expiration of the maximum period of detention, either because the military attorney rescinded the arrest warrant or because a military attorney failed to approve the arrest warrant within the statutorily required period.

It would seem, then, that internal review by a military attorney, important as it is, and as much as it affects the question of proportionality, is not an adequate substitute for external review by a military judge.

We thus return to the original question: Does a period of detention of no more than 96 hours infringe on the personal liberty of a soldier, as the respondents claim, to an extent no greater than is required by the nature and character of the military service?

35. Both the respondents as well as the petitioners seek to bolster their claims with examples from legal systems in other countries. The parties presented the Court with numerous sources from English, U.S., Canadian, and other case law and legal literature. If truth be told, however, it is difficult to glean any clear message or make effective use of examples from foreign legal systems. Indeed, in each of these systems, commanders have the power to arrest soldiers under certain circumstances, subject to review of the arrest within a short period of

time. The review conducted, however, is generally internal, by commanders who do not necessarily have legal training, rather than by judges. The respondents apparently correctly point out that in none of the countries they investigated does the law require review by a military judge within 24 or even 48 hours. In contrast, the German Military Discipline Law of 1972 requires (in section 17) the release of a soldier arrested for a disciplinary violation no later than the end of the day of his or her arrest, unless a judge issues an arrest warrant, and for a criminal violation, there is no difference between the period of detention authorized for soldiers and non-soldiers.

In any event, the law in Israel requires us to evaluate the proportionality of the period of detention in light of the nature and character of military service in Israel. The nature and character of military service in Israel differ from those of military service in other countries. Therefore, and particularly because the law regarding review of the arrest of soldiers differs from country to country, comparative law would not appear to be terribly useful to the issue at hand.

36. In that case, do the nature and character of military service in Israel require or justify authorizing a military police officer to detain a soldier for 96 hours before bringing him or her before a military judge? During the course of oral arguments (in July of 1997), the Court asked the respondents if they would agree to draft an amendment to the Military Adjudication Law that would, by 1998, reduce the maximum period of detention of a soldier by a military police officer to 48 hours. The respondents notified the Court (on September 30, 1997) that, after holding consultations on that question at the highest levels of the military and with the State Prosecutor and Attorney General, they reached the following conclusion:

> 4. The military authorities in charge of the issue concluded that it would be almost impossible to reduce the initial period of arrest to 48 hours, beginning in July of 1998 … first, the military needs to learn its lessons from the transition to the current legal situation of bringing soldiers before a judge within 96 hours …

…

6. The military law enforcement system is unprepared to implement the proposed transition to extending the period of arrest within 48 hours, and an attempt to do so risks undermining the military's system of law enforcement and discipline. The issue is not just the financial significance of expanding human resources to handle the anticipated yearly increase of thousands of arrest procedures and arrest appeals. It is also a question of formulating working rules for the different players within the military system who need to make sure that soldiers who are supposed to remain in custody are not released simply because the system has not yet taken steps to implement the new legislation.

7. The military system has a real fear that a transition, within a year, to a requirement that the arrest be extended within 48 hours, before the system has taken steps to properly prepare, will result in a variety of undesirable situations. These include not having enough time to complete essential investigations and collect evidence in cases involving soldiers who desert or go absent without leave. It may become impossible to summon the commanders of these soldiers to adjudicate their cases through disciplinary hearings, and investigatory activities will have to cede to increased attention to procedures involving extensions of arrest. If this happens, more soldiers are likely to absent themselves from military service, undermining military discipline, obstructing investigations, and causing other kinds of damage.

8. The position of the IDF should be noted*: bringing a soldier for extension of arrest within 48 hours is a desirable goal*. However, achieving that goal requires the military to evaluate the practical aspects and the arrangements necessary to implement it. The military has therefore decided to take a year to evaluate the new 96-hour requirement, beginning when the amendment to that effect enters into force in July, 1998. At the

> end of that year of evaluation, as 2000 draws near, the military will propose another amendment which will reduce the maximum initial period of arrest, before review by a judge, to 48 hours, so long as circumstances do not require an additional, brief delay of the amendment.

At the Court's request, the respondents itemized the changes and resources that the military would need in order to prepare to reduce the period of arrest to 48 hours. They said that it would need to reinforce the means of transporting detainees, assign more people to guard detainees being transported, bolster human resources in the legal system (judges, prosecutors, defense lawyers, etc.) speed the process of transmitting legal material (via fax and other means), and the like. They estimate needing another 40 professional soldiers and another 40 drafted soldiers, as well as another 40 vehicles for transporting prisoners, eight buses, communications devices, computer systems, construction, and the like. The respondents did not provide data or explanations to serve as a basis for their estimate.

37. These resources would be necessary to reduce the period of arrest primarily because of the current system in place for arresting soldiers, interrogating detainees, extending arrest, and trying soldiers in a disciplinary hearing or criminal procedure. However, it may be possible to change the current procedures (if necessary, via legislation) and improve the current practices in such a way as to reduce substantially the amount of financial and human resources necessary while simultaneously conducting proceedings more quickly. For example, a primary reason for the difficulty in extending the arrest of soldiers is the practice of bringing the soldier to the military tribunal in the judicial district of the unit in which he or she serves. For example, a soldier serving in the Northern Command who commits an offense (such as desertion) and is arrested by a military police officer in southern Israel, will be taken to the Northern Command tribunal which sits in Haifa, rather than to a tribunal close to the place of arrest. We might question whether this is the optimal practice, considering the resources it requires. Perhaps if this practice is changed, and the military improves the means of electronic

communication available to legal officials to facilitate the transfer of legal materials relating to detainees, it will be possible to conserve the resources which, according to the respondents, would currently be necessary to reduce the period of detention. For example, after making arrests, couldn't the military quickly bring detainees to a single military detention center in the center of Israel? Or, perhaps it could bring them to two or three centers, each of which would house the necessary number of military attorneys and judges who could quickly review requests to extend the period of arrest?

However, as long as the practices of arrest and extension of arrest do not infringe on the rights of soldiers, they are the concern of the military, and it is for the military to evaluate them and decide what to do. For purposes of our question, namely whether a 96-hour period of detention is required by the nature and character of military service, we will accept the military's estimate of the resources currently necessary to reduce the period of detention and the possible results of the reduction.

38. The petitioners claim that the nature and character of military service poses no special considerations that require a detention period of 96 hours. They further claim that there is nothing in a shorter period to undermine the nature and character of military service.

This claim of the petitioners gives an unduly narrow interpretation to the nature and character of military service. The nature and character of military service include maintaining military discipline, cracking down on absenteeism, and the like. That is why the security limitation clause of section 9 of the Basic Law: Human Dignity and Liberty allows a soldier's rights to be infringed if it is necessary, for example, to maintain military discipline, so long as the infringement is to an extent no greater than required to serve that purpose.

This is the very claim of the respondents, that reducing the period of detention, at this stage, is likely to undermine military discipline, exacerbate the phenomenon of absenteeism, and lead to other consequences destructive of the nature and character of military service.

39. However, the respondents do not present these negative consequences as inevitable. They acknowledge that they can be prevented. In order to prevent these consequences, they say, they need two things: time and resources. The question is therefore whether at this time, these needs justify not reducing the period of detention.

First, we will evaluate the need for resources. Can the need for resources obstruct a reduction in the period of detention? In principle, it is possible that the scope of the resources required can, as a practical matter, prevent a reduction in the period. Indeed, as the saying goes [under the system of assigning a numerical value to the letters in Hebrew words – trans.], the gap between "desirable" and "feasible" equals "money."

The respondents submitted to the Court an itemization of the resources necessary to reduce the period of detention. Para. 36, *supra*. These resources, while in no way negligible, are not beyond the means of the military. We must compare the scope of the necessary resources (assuming they cannot be reduced) with the scope of the infringement on the soldiers' rights to personal liberty. Each year, military police officers arrest approximately 10,000 soldiers (mostly for the offense of desertion). What tips the scales? The answer primarily depends on the relative weight of the liberty and the resources. What, then, is that relative weight? That question puts Israeli society to the test: society is judged, among other things, according to the relative weight it accords to personal liberty. That weight should be expressed not just in lofty declarations and not just in law books, but also in the budget ledger. Protecting human rights generally has a cost. Society should be prepared to pay a reasonable price for protecting human rights. As Justice Dorner held in CrimFH *Ganimat v. State of Israel* [16] at 645, "A basic right, by its very nature, imposes a social cost … preserving basic human rights is not just an individual issue but rather the concern of society as a whole, and it determines the character of society." See also HC 5304/92 *Perach 1992 Aid to Victims of Laws and Ordinances for a Different Israel – Nonprofit v. Justice Minister* [17] at 759; CrimApp 6654/93 *Binkin v. State of Israel* [18] at 295; HC 4541/94 *Miller v. Defense Minister* [19] at

113, 122; APP 4463, *supra* [7] at 169-70. See also Barak, *supra* [21] at 528.

Considering the special weight accorded to reducing the infringement on the personal liberty of soldiers, the price that must be paid in human and financial resources to reduce the existing period of detention appears to be reasonable. This would hold, *a fortiori*, if additional inquiries reveal that it is possible (and this seems only logical) to change the system and practices concerning the arrest of soldiers, such that the price will go down. In any event, this price is an insufficient reason for violating the personal liberty of so many soldiers, beyond the extent required by the nature and character of military service.

Indeed, reducing the period of arrest by a civilian police officer from 48 hours to 24 hours required the police to make the appropriate adjustments, including expenditures of financial and human resources. That cost did not stop the legislature from reducing the period of arrest, out of its willingness to pay a price for the protection of individual liberty. *See* para. 28, *supra*. Justice Cheshin's comments in HC 3648/97 *Stameka v. Interior Minister* [20] at 777 make this point ("our strict insistence on proportionality from the agency is directly proportional to the importance of the right infringed or the severity of the infringement on the right"). *See also* Justice Dorner's comments in HC 1715/97 *Chamber of Investment Managers in Israel v. Finance Minister* [11] at 421-23.

It is worth noting that Professor Emmanuel Gross, who served as the President of the Military Tribunal for five years, takes the same position, as he wrote in *Hebetim Chukatiim Shel Dinei Hamaatzar Biztava* [27]. In his opinion (ch. 7, para. 1), the statutory provision permitting 96 hours of detention does not pass constitutional muster and should therefore be repealed and replaced with a shorter period. On this issue, he says, *inter alia*, that:

> The State of Israel is a small state geographically, and therefore there is not and could not be a logistical obstacle, stemming from the character of military service, to bringing

> a solder before a judge sooner. Nor should we abide any other explanation, such as the excuse that an overworked military adjudication system is not currently prepared to handle the anticipated number of requests stemming from arrests. In my opinion, there is no justification for extending the detention of a soldier or civilian, without a judicial order, simply because the legal system is not prepared to handle it appropriately.

Id. at 459.

40. We still must address the military's need for time in order to make the necessary preparations for reducing the period of detention, without undermining the discipline of the military and without exacerbating the phenomenon of absenteeism.

The respondents notified the Court (in September, 1997) that following the then-planned reduction in the maximum period of detention to 96 hours in July, 1998, they would need a year to evaluate the new arrangement. After making the evaluation, as 2000 was to draw near, they would propose an amendment to the statute "which will reduce the maximum initial period of arrest, before review by a judge, to 48 hours, so long as circumstances do not require an additional, brief delay of the amendment." Para. 36.

Because the military itself recognized the desirability and feasibility of reducing the period of arrest, it had substantial time to prepare for reducing the period, throughout the proceedings in these petitions. So far, however, the respondents have not notified us of steps they have taken or are taking to reduce the period of time. In any event, we have not received a draft of a law proposing such reduction, although the end of the year is near, and the year 2000 is approaching. Apparently, the Court must rule on the issue.

Conclusion

41. The conclusion is that the amending statute setting 96 hours as the maximum period for which a military police officer may detain a

soldier no longer meets the proportionality test. As of today, it infringes on a soldier's personal liberty beyond the extent required by the nature and character of military service.

What remedy flows from this conclusion? This Court has repeatedly said that it exercises caution and restraint in declaring that a statutory provision violates the Basic Law: Human Dignity and Liberty and is therefore invalid. In this case, however, even the respondents acknowledge that the amending statute infringes on the personal liberty of soldiers beyond the extent required and desirable and that the statutorily-mandated period should be reduced to no more than 48 hours. The dispute between the petitioners and respondents appears to be over the resources necessary to achieve what they agree is desirable. Indeed, the resources required, according to the respondents' calculations, are not of an unreasonable scope, and the respondents even agree that it is possible and desirable to invest in those resources. Considering the special significance of personal liberty, and considering that the statute at hand applies to the arrest of approximately 10,000 soldiers each year, the resources necessary are not so extensive as to prevent or even to delay amending the statute to reduce the period of time for which a military police officer can detain a soldier, to the point where the infringement on personal liberty no longer exceeds the extent required.

42. We therefore declare that the provision of the amending statute that sets the maximum period of detention at 96 hours infringes on the Basic Law: Human Dignity and Liberty, because it infringes on the right to personal liberty, as set out in section 5 of the Basic Law, to an extent greater than is required by the nature and character of military service. The provision is invalid.

43. What statutory provision should replace the invalid provision? In other words, how long can a military police officer detain a soldier, before bringing him to a military judge, without violating the soldier's personal liberty to an extent greater than is required by the nature and character of the military service? In this case, the Court need not answer the question, because the respondents themselves concluded, in their submission to the Court, that the statute should set a maximum

period of 48 hours. Does a period of 48 hours pass the proportionality test? The legislature has the authority to set the period of detention, and it has discretion to decide what period of time is required, so long as that period does not exceed the zone of proportionality. It would seem that if the legislature set a maximum period of 48 hours, as the respondents suggested, as of today, a good argument could be made that such period would not deviate from the zone of proportionality mandated by the Basic Law: Human Dignity and Liberty. At this point, the Court need not give a more binding answer.

44. As is well known, the Court's declaration that a statute or statutory provision is invalid need not immediately take effect. It may be prospective, if circumstances justify it, in order to allow for the appropriate steps to be taken in order to prepare for the invalidity. *See e.g.* HC 1715/97 [11] at 417. The circumstances of this case warrant our deferring the effective date of the declaration of invalidity, in order to give the respondents enough time to propose the necessary bill to the Knesset, to give the Knesset enough time to debate the bill, and also to give the respondents enough time to prepare the military for the expected legislative changes. Therefore, the declaration of invalidity will not take effect until six months from the date of this decision. The respondents will pay a total of 10,000 NIS in costs to the petitioner in HC 6055/95 and a total of 10,000 NIS in costs to the petitioners in HC 7083/95.

President A. Barak

I agree.

Deputy President S. Levin

I agree.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice M. Cheshin

I agree.

Justice T. Strasberg-Cohen

I agree.

Justice D. Dorner

I agree.

Justice J. Türkel

I agree.

Justice D. Beinisch

I agree.

Justice Y. Kedmi

1. Introduction

Regretfully, I cannot join the opinion of my colleague, Justice Zamir, even though, in principle, I agree with the theoretical analysis that underlies his decision. The reason for my dissent is, in my opinion, "procedural," and it is two-fold: First, I see no justification in hearing these two petitions, because they are theoretical. Second, at this stage, I see no justification for intervening in the military's years-long process of amending a statute, in an effort to equalize, to the extent possible, the period of detention with-no-judicial-order (hereinafter: arrest-without-order) to that adopted in the civilian context.

During the arguments in this case, the military made it clear that it is committed to reducing the period of arrest-without-order in the military context, and it even gave the year 2000 as a desirable target date. The amendment requested – and anticipated, once the military finishes preparing for it – will reduce the maximum period of arrest-without-order under section 237A of the Military Adjudication Law to 48 hours. The petitions before us are not only "theoretical," they also fail to go beyond the period of time to which the military has already agreed. I therefore see no need for us to accelerate the legislative process, which is the practical result of our decision.

2. *Theoretical Petitions*

As my colleague notes in his opinion, the two petitions at hand are theoretical petitions. As a general matter, this court "does not consider petitions … once they become theoretical or moot" because "judicial experience warns against establishing a precedent that would seem to hover in the air."

The practical – the actual – implications of a court decision often serve as a standard or test of whether the decision is "correct" and grounded in reality. It is generally not a good idea to give up on this test of implementation, except under the most exceptional circumstances: an issue of special importance, on which our failure to rule would burden the public, that would justify turning the Court into an "academic" commentator, rather than the adjudicator of an actual dispute.

Turning to the case at hand – and acknowledging the special importance of the basic right to individual liberty and freedom of movement which it addresses – I do not think the two petitions submitted meet the exceptional criteria which would justify hearing arguments in the abstract and relinquishing the test of implementation from which we benefit when we resolve an actual problem.

I do not think that postponing discussion of the length of arrest-without-order in the military context to an actual case – if such case exists – will create "immunity from judicial review," as my colleague states.

The military authorities have declared that they recognize the need to harmonize these arrests in the military with civilian arrests. As a result, in practice, the system of review established by the Military Adjudication Law will be working on this issue. There is therefore no practical need for a judicial declaration of the invalidity of section 237A of the Law, before the military has completed its efforts on this front. Our intervention at this stage shows a lack of confidence in the military; accelerating legislation without the proper preparation will unnecessarily undermine the performance of the military's system of law enforcement.

3. *Exercising the Authority to Invalidate*

The Court does not evaluate acts of legislation on their merits, but rather interprets them according to their language. When interpretation of a piece of legislation reveals that it does not meet the criteria set out in a Basic Law, it must be invalidated. Invalidation of this sort stems from the intent of the legislature, which established criteria for the constitutionality of a statute and left the Court with the authority to conduct constitutional review by interpreting the statute.

The effort –from different directions – to present the Court as a "superlegislature" was doomed to fail from the outset. Legislative acts are the exclusive province of the legislature. The Court does not step into the shoes of the legislature but rather interprets its statutes. In this respect, the court is the "servant" of the legislature, implementing its instructions. This role does not change, even when judicial interpretation of a piece of legislation leads to its invalidity, because the statute did not meet the constitutional criteria established by the legislature itself. Interpretation of a law, at the end of the day, reflects the purpose for which it was enacted. Where the language of the statute does not properly express the purpose of its enactment and leads to its invalidity because it is "unconstitutional," the legislature retains the authority to amend the statute and put things back to where they should be. This is generally the situation, including in cases of constitutional interpretation, whose result may lead to a law being invalidated because it is unconstitutional. The Court is the constitutional gatekeeper, while the legislature dictates the rules of gatekeeping.

Evaluating whether a piece of legislation withstands the constitutional test of proportionality is not a mechanical task. It requires a thoughtful and delicate balance of interests. Usually, the decision does not delineate a border "line" between "proportional" and "disproportional," but rather a "zone of proportionality" and steps which exceed that zone. In my opinion, the Court should invalidate a statute solely because it is "disproportional" only when the statute clearly and unequivocally exceeds the zone of proportionality.

This court established its authority to invalidate a law in CA 6821/93 (*Bank Mizrachi* [6]). I see no reason to establish such authority for theoretical petitions. In any event, in my opinion, such authority should not be implemented, as a practical matter, when it is not necessary to solve an actual problem. The authority to invalidate is a unique and special power, stemming from the will of the legislature to ensure objective, external review of its statutes for compliance with the constitutional criteria it creates for itself. It is not a question of invalidating an "*ultra vires*" administrative decision, and we should resist any attempt to compare the two. The starting point for hearing any claim on the supposed "constitutional infirmity" of a statute is the "presumption of constitutionality": the presumption that when the legislature passed the statute, it considered the requirements of the Basic Laws and ensured that the statute met them. Therefore, the Court can adopt a different position only if the legislature's mistakes are clear, unequivocal, and cry out for correction. The less this power is used, the more confidence the legislature will have in the reviewer who wields it, pulling the rug from under table of those who criticize the reviewer and the review it exercises.

An amending statute that benefits – like a new statute – enjoys the "presumption of constitutionality," which is based on the assumption that the legislature examined, evaluated, and concluded that the piece of legislation it creates meets the requirements of the "constitution." The Court's intervention in this issue tells the legislature that it erred. I personally doubt that the legislature erred in *gradually bringing an old statute into conformity* with the requirements of constitutional

proportionality which are not required of an old statute. That is the case raised by the two petitions.

Because of this character of judicial review based on constitutionality, it should be used only in the most exceptional cases, when intervention is *unavoidable*. In this case, the military authorities recognized the need to continue amending the statute – to the extent possible, without undermining the performance of the military's system of law enforcement – to bring it into conformity with the legislation governing civilian arrest-without-order. In this case, intervention is "avoidable."

4. An Aside

I would have chosen to deny the petitions on the grounds they are theoretical and do not, at this stage, justify conducting constitutional review of the latest amending provision of section 237A of the Military Adjudication Law. However, I see fit to briefly address four of the issues that my colleague discussed in his extensive and instructive opinion:

a. Reviewing the Constitutionality of an Amending Statute

In my opinion, it is a mistake to exercise constitutional review over provisions of an unquestionably "beneficial" amending statute. Rather, for purposes of constitutional review, it should be treated as part of the original statute which it amends. Doing so will encourage the enactment of beneficial amending statutes. That is especially the case for a beneficial amending law that is part of a process of bringing an old statute into conformity with the constitutional requirements that came into effect only after the statute was enacted. Paving the way for constitutional review of a "beneficial" amending statute will deter the legislature from gradually amending old statutes, freezing them in their current form. In my opinion, it is in the public interest to leave room for "improving" burdensome provisions in an "old" statute, in order to bring it closer to provisions which meet the progressive standards of the Basic Law.

As a matter of interpretation, it will often be difficult to characterize an amending statute as "beneficial" or "non-beneficial." The desire to avoid interpretive difficulties, however, cannot trump the public's interest in a process of "beneficial revision" – generally, and particularly as a stage in the process of gradually amending "old" laws which the Basic Laws buttressed from constitutional review.

However, "exacerbating" infringements of rights protected by the Basic Laws is unacceptable. The same public interest that requires us to protect a "beneficial amendment," in order to encourage such amendments, mandates "constitutional" intervention in cases of an "amendment-exacerbating-the infringement" of a basic right. Exacerbating the infringement reflects an "innovation," and it contradicts the Basic Law. On the other hand, moderating the infringement reflects "progress," is consistent with the Basic Laws, and advances the purpose of their enactment.

In the case at hand, the amending statute "benefits" in every possible aspect. In my opinion, that is reason enough to deny the petitions and leave the military authorities to continue their efforts to bring their practices into conformity with the rules for civilian arrests. It is consistent with my objection to subjecting a beneficial amending statute to the requirements of the Basic Laws. It also flows, in my opinion, from the restraint required of the Court on this issue. That would be true even if we accepted the principle that a beneficial statutory amendment – like an "exacerbating" statutory amendment – is subject to the constitutional conditions dictated by the Basic Laws.

b. Limitation Clause: General and Military

I accept my colleague's opinion that section 9 of the Basic Law: Human Dignity and Liberty includes the requirement of section 8, namely that a violating law must "befit … the values of the State of Israel" and be "enacted for a proper purpose," although section 9 does not explicitly say so.

The difference between the two limitation clauses of sections 8 and 9 is the additional, binding requirement of section 9: "by the nature and character of the service." In our case, it is service in the IDF. As my colleague pointed out in his opinion, "The proportionality of infringing on the rights of those serving in the security forces depends on the nature and character of the service, and it is therefore likely to be different from the proportionality of infringing on the rights of a person who is not serving in the security forces."

In the military, the length of the arrest-without-order – designed to investigate the suspicion underlying the arrest, so that a decision over whether to extend the arrest can be made – is in large part dictated by a series of factors linked to "the nature and character of the service." Among other factors, two stand out. The first is the interaction between the deployment of the military and the location of its legal institutions, in light of their jurisdiction over the soldier arrested. The military has a special interest in maintaining authority and jurisdiction within the different forces and according to the existing command structure. The second factor is the geographical distances that generally exist between the place of arrest and the location of witnesses who must be questioned as part of a preliminary investigation of the suspicions underlying the soldier's arrest-without-order.

Reducing the period requires preparation and investment in resources. It may also require amendments to related legislation. Considering the nature and character of the service, it may become apparent that the ability to reduce the time period is limited, such that the end result will be different from its civilian counterpart. That is apparently the reason that the petitioner in HC 6055/95 limited his request to reducing the period of arrest-without-order to 48 hours, even though the civilian period had been shortened to 24 hours.

Indeed, as my colleague pointed out, a factor in determining the scope of the proportionality requirement is "the feasibility test." The military declared its aspiration to attain a "reduced period" of 48 hours but requested time to prepare, including time to obtain the required budgetary resources. The military requested an "extension" in order to

make the systematic changes that would “allow” it to reduce the period to 48 hours. Naturally, the “feasibility” test can be conducted only after the military has completed its preparations, and there is no claim that the IDF is dragging its heels.

c. The Economic “Cost”: A Consideration of Proportionality

I personally think that the “economic cost” should not necessarily be disqualified as a consideration in determining what is proportional. I disagree with the rule that “proper” proportionality – as a conceptual standard – justifies and requires paying any price.

If meeting the objective-conceptual, constitutional demands of proportionality puts a heavy burden on public economic resources, at the expense of other public interests, that “cost” cannot be ignored. It is one of the factors that delineate the zone of proportionality. In my opinion, we cannot rule out a situation in which the “economic cost” significantly influences where to draw the boundaries of the zone of proportionality.

d. The Results of Invalidating a Beneficial Amending Statute

As the *Bank Mizrachi* [6] decision stated, invalidating a beneficial amending statute has the effect of “returning the situation to the status quo.” In other words, the constitutional situation “will worsen,” despite the legislature’s attempt to benefit. We have no real guarantee that, once we invalidate an amending statute that only “partially” benefits, the legislature will complete the “benefit” by bringing the old statute into complete conformity with the requirements of the Basic Laws. Nor can we require the legislature to do so, because provisions of an “old” statute are protected by the Basic Law: Human Dignity and Freedom.

Indeed, from a public interest standpoint, invalidating a provision of a beneficial amending statute will encourage a public movement to press for amending legislation that immediately – not gradually – conforms to the requirements of the Basic Laws. To me, it is clear that invalidating a beneficial amending statute does more harm than good to

the public interest. In any event, the Court should take these consequences into consideration before intervening to invalidate beneficial amending legislation.

5. Conclusion

In conclusion, if my opinion were to win a majority, we would not intervene to invalidate a beneficial amending provision, in a situation in which the relevant executive authority has declared its intention to continue a gradual path of bringing the statute into compliance with the requirements of the Basic Laws. This is especially true where, as is the case here, the executive authority has thus far been true to its word.

Exercising our authority to invalidate in this case is likely to undermine the “uniqueness” and “specialness” of that authority, which is expressed, in part, by limiting its exercise to rare circumstances when using it is “unavoidable.” It is likely to put that authority on par with the authority to invalidate an *ultra vires* administrative provision. I personally would avoid that result, as much as possible.

Decided by a majority, as per the opinion of Justice Zamir, with Justice Kedmi dissenting.

October 14, 1999.