HCJ 3429/11

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| **Petitioners** | **1. Alumni Association of the Arab Orthodox School in Haifa**<br>**2. Radwan Badarneh**<br>**3. Ayman Miari**<br>**4. Hazar Hijazi**<br>**5. Ron Shapira**<br>**6. Arik Kirshenbaum**<br>**7. Professor Oren Yiftachel**<br>**8. Adalah – Legal Center for Arab Minority Rights in Israel**<br>**9. The Association for Civil Rights in Israel** |
| | **v.** |
| **Respondents** | **1. Minister of Finance**<br>**2. Knesset** |

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The Supreme Court sitting as the High Court of Justice
[5 October 2011]

*Before President D. Beinisch, Vice President E. Rivlin, Justice M. Naor*

Petitions for an order *nisi* and for an interim order.

**Facts:** The Budget Elements Law was amended in 2011 to include a new section 3b, which provided that if an entity that receives support or budgeting from the government incurs an expense that falls within any of several listed categories, the Minister of Finance can reduce the entity's budget or support by an amount no greater than three times the size of the said expense. Of the categories listed, the petitioners focused their challenge on two of them: the first, sub-section 3b(b)(1), referring to an expense which was "in essence" a negation of the values of the State of Israel as a Jewish and democratic state; and the second, sub-section 3b(b)(4), referring to an expense which was "in essence" a marking of the day of Israel's establishment as a day of mourning. A decision to reduce the budget in accordance with this section requires that the Minister of Finance first receive an opinion from a professional team

composed of representatives from various ministries, the approval of the minister in charge of the budget item through which the entity received funding, and an opinion from the legal adviser to the Ministry of Finance. In addition, he must also grant the relevant entity a hearing on the matter.

The petitioners are the alumni association of an Arab school in Haifa, which runs various activities that are held at the school, dealing with issues of Arab and Israeli identity; several parents of students in a bilingual Arab-Jewish school, whose goals include education about respect for other cultures and in which activities are held that commemorate both Israeli Independence Day and Nakba events; and an academic who is the proponent of a model/theory that describes Israel as an ethnocracy, rather than as a democracy. All the petitioners argued that they could be harmed by the exercise of the Budget Elements Law's provisions; the statutory provisions were also challenged on the ground that they effectively constituted a violation of the right to education, collective identity and freedom of expression and of occupation.

**Held: Justice Naor** held that the petition should be denied on the basis of the ripeness doctrine and because of the availability of an alternative proceeding and remedy. Because the statutory provisions had not actually been implemented against any of the petitioners or any other parties at all, and because there was therefore no way of knowing how the law would be implemented, if at all, against the petitioners, the Court could not reach an informed decision regarding the constitutionality of the manner and scope of its hypothetical application. The uncertainty (and consequently, the absence of sufficient ripeness) was heightened by the fact that the law itself prescribed an extensive process of supervision and review before any decision to reduce funding could be implemented. Justice Naor also found that the petition to the High Court of Justice could be denied because of the availability of an alternative proceeding and remedy; once the Law had been implemented, a petition challenging a reduction in funding could be brought in the Administrative Matters Court. An indirect attack on the constitutionality of the Law would also be permissible in that context. President Beinisch and Vice President Rivlin concurred, with President Beinisch adding that there was no need to decide the matter of the availability of an alternative proceeding and remedy.

Petition denied.

**Legislation cited:**

Budget Foundations Law (Amendment No. 40) 5771 -2011
Administrative Courts Law, 5760-2000
Disengagement Plan Implementation Law, 5765-2005
Civil Wrongs (State Liability) Ordinance (Amendment No. 7), 5765-2005
Public Education Law, 5713-1953

**Israeli Supreme Court cases cited:**

**US Supreme Court cases cited**



For the petitioners — H. Jabarin, S. Zahar, D. Yakir

For respondent 1 — S. Rotsenker
For respondent 2 — Dr. G. Blay, E. Yanun

JUDGMENT

**Justice M. Naor**

The Budget Foundations Law (Amendment No. 40), 5771 - 2011 authorizes the Minister of Finance to reduce the budget of a supported or financed entity under certain circumstances and after a specific procedure; the reduction may be ordered when it is found that the entity has incurred an expense which is, in its essence: a rejection of the existence of the State of Israel as a Jewish and democratic State, or the marking of Independence Day or the date on which the State of Israel was established as a day of mourning. The procedure to be followed before the reduction can be ordered is that the Minister of Finance must first receive an opinion from specified parties, grant a hearing to the entity and obtain the consent of the minister in charge of the matter. The petition before us is directed against the constitutionality of the provisions of this law.

*Background*

On 4 January 2009, the Draft Independence Day Law (Amendment – Prohibition of the Marking of Independence Day or the Date of Israel's Establishment as a Day of Mourning) – 5769-2009 (hereinafter: "the Draft Independence Day Law") was placed before the Knesset. The amendment sought to anchor the prohibition of any activity or event that refers to Israeli Independence Day as a day of mourning or a day of sorrow. This proposed law was abandoned (passively) and on 6 July 2009 its backers placed before the Knesset the Draft Budget Foundations Law (Amendment – Prohibited Expense) 5769-2009 (hereinafter: "the Draft Budget Foundations Law" or "the Draft Law"). This Draft Law was supported by the Ministers Committee on Legislation, subject to coordination of the legislative processes with the Minister of Justice and the Minister of Finance. Coordination between the various parties led to changes being made in the text of the original Draft Law, after which it passed a first reading in the Knesset. After more changes were introduced in the text in anticipation of the second and third readings, the Knesset, on 23 March 2011, passed the Budget Foundations Law (Amendment No. 40), 5771-2011 (hereinafter: "the Law"). The key issue raised in the petition before us is the constitutionality of the provisions of sections 3b(b)(1) and (4) of the Law. The relevant sections provide as follows, with an emphasis added to those parts whose constitutionality is being challenged:

> '1. The following will be inserted after s.3a of the Budget Foundations Law, 5745 -1985:
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> 3b. (a) In this section –
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> "Entity" – a financed or supported entity, as these are defined in s. 21, and a supported public entity pursuant to s. 3a:
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> "Expense" – includes a waiver of income.
>
> (b) If the Minister of Finance finds that an entity has incurred an expense which is in its essence one of the items listed below (in this section – "an unsupported expense"), he may, with the consent of the minister in charge of the budget item pursuant to which the entity is financed or supported, and after affording the entity a hearing, reduce the amounts that are to be transferred from the State budget to that entity pursuant to any law:

(1) *Rejection of the existence of the State of Israel as a Jewish and democratic state*;

(2) Incitement to racism, violence or terror;

(3) Support for an armed struggle or terrorist act, of an enemy state or of a terrorist organization, against the State of Israel;

(4) *Marking of Independence Day or the date of the establishment of the State of Israel as a day of mourning;*

(5) An act of destruction or physical contempt which defiles the State flag or the State symbol;

(c) No reduction pursuant to sub-section (b) may exceed an amount which is three times the size of the unsupported expense.

(d) (1) The Minister of Finance may make a decision pursuant to sub-section (b) after obtaining an opinion from the legal adviser to the Ministry of Finance regarding the fulfillment of the provisions of that sub-section, and after he has received the recommendation of a professional team regarding the scope of the unsupported expense; the consequences of the reduction for the entity or for other parties related to it; and the proper amount of the reduction, given all the circumstances of the matter.

(2) In this sub-section, the term "professional team" shall mean a team appointed by the Minister of Finance whose members include an employee of the Ministry of Justice, at the recommendation of the Minister of Justice; an employee of the Ministry of Finance; and an employee of the ministry whose minister is in charge of the budget item pursuant to which the entity is financed or supported, at the recommendation of that Minister.

*Arguments raised in the petition*

2. Before responding to the petitioners' arguments, I wish to briefly present the seven petitioners in this case. Petitioner 1 is a non-profit organization which includes approximately 90 alumni of the Arab Orthodox

High School in Haifa (hereinafter: "the School"). Petitioner 1 was incorporated for the purpose of supporting the School and increasing cooperation among its alumni. Each year, Petitioner 1 organizes several activities in various areas, which include discussions of the State's identity, the status of its Arab citizens and the "Future Vision of the Arabs in Israel" documents. In addition, Petitioner 1 conducts educational activities dealing with Palestinian history and its activities are carried out in the School. Petitioner 1 believes that some of its activities are likely to fall within the framework of those items that constitute grounds for reduction of its budget pursuant to the Law, and that the size of the School's budget's will consequently be at risk.

3. Petitioners 2-6 are parents of students who study in the "Galil" school in the town of Misgav, which is a bi-lingual and bi-national school (hereinafter: "the Bilingual School") and a formal educational institution that is recognized by the Ministry of Education. It seeks to promote a shared lifestyle as well as education about equality and respect for the cultures of other groups within the society in which the students live. In order to achieve its objectives, the Bilingual School conducts various activities in anticipation of Memorial Day and Independence Day, the purpose of which is to mark both Independence Day and the Nakba events. Petitioners 2-6 fear that the Bilingual School will be forced to restrict its activities and that its abilities to achieve its goals will thus be impaired.

4. Petitioner 7 is an academic who developed a model according to which he argues that the Israeli regime is a type of "ethnocracy". As this model indicates, Petitioner 7 believes that the State of Israel cannot be defined as Jewish and democratic. Petitioner 7 is concerned that the Law will impair the possibility of conducting an academic and public discussion of the model that he has developed, since such a discussion is likely to refer to the negation of the existence of the State of Israel as a Jewish and democratic state. Petitioner 7 is also concerned that the Law will have serious consequences for his writings and publications.

5. We now move on to the petitioners' claims. The petitioners have, as stated, attacked two of the grounds listed in subsection 3b(b). The petitioners argue that the other three grounds set out in the Law for reduction of budgetary support will also create substantial constitutional difficulties in that they restrict freedom of speech. They also see a constitutional difficulty arising from the fact that these sections empower the Minister of Finance to impose measures that are in essence punitive sanctions with respect to actions that are defined as offenses – but without stipulating that a due process

proceeding be held in a court to determine that a criminal offense has been committed. Nevertheless, the petitioners have focused their petition and their constitutional challenge only on the two grounds listed in sections 3b(b)(1) and 3b(b)4. According to the petitioners, the damage done by these sections is "the most harmful".

6. According to the petitioners, the Law harms the historic memory of the Arab minority by allowing the majority to use its power to repress the narrative of the Arab minority with respect to events, facts, feelings and ideologies. According to their argument, there is no difference between the marking of the Nakba, on the one hand, and the non-recognition of the State of Israel or the non-recognition of the self-determination of the Israeli Jews, on the other hand, since the use of the term "Al-Nakba" – which means "the tragedy of all tragedies" – is intended to stress the historic aspect of the tragedy. They argue that the Law seeks to indirectly deter the occurrence and development of a cultural discussion regarding the concept of "Al-Nakba" and the constitutional definition of the State. According to the petitioners, the scope of the damage is very serious, and the Law "uses vague and unclear terms, which creates considerable uncertainty as to how the Minister of Finance and the courts will interpret its provisions."

7. The Petitioners then point to a list of rights that they argue are violated by the Law's provisions. I will discuss their arguments only briefly, because I see no need to discuss the details more extensively, given my ultimate conclusion regarding the issue raised in the petition. The argument made is that the Law violates the freedom of political, artistic and academic expression. It is argued that the prohibition of political expressions on the basis of their content alone is inconsistent with the "near certainty test" for permitted prohibitions of expression, as established in the case law. They argue further that the Law is likely to violate freedom of artistic expression, which has also been given special broad protection even when real offense is given to the sensitivities of a part of the public, and even when such freedom clashes with official political positions. It is also argued that the violation of freedom of expression is especially sweeping in that a single act which falls within the scope of either of the two challenged grounds for budget reduction, even if only marginal, will be sufficient to justify the imposition of a financial sanction.

8. In addition, the petitioners argue that the Law violates their right to equal treatment because it discriminates on the basis of nationality and on the basis of social or political ideology. According to this argument, there is a serious concern that the Law will prevent Petitioner 1 from carrying out those

of its communal and cultural activities that have a cultural-political character – activities that are directed at developing a discussion of the status of Arab citizens and of the historic wrong that has been done to them. In contrast, the Law will have no impact on the alumni organizations of Israeli schools which conduct various activities relating to the identity and Jewish character of the State. The Law will not affect activities directed at commemoration of the Jewish-Zionist narrative, either. It is also argued that the violation of the right of Petitioners 2-6 to equal treatment is reflected in the fact that the bilingual schools such as the school in which these petitioners' children study will not be able to realize their central and essential objectives – objectives that include the exposure of Jewish and Arab students to the nationalist narratives of groups other than their own. In contrast to this, other special schools will be able to continue their activities that are directed at the achievement of their educational objectives. In addition, it is argued that Petitioner 7 will suffer from discrimination based on his scientific and academic research, and that his position within the academic world is likely to be substantially impaired. In contrast, it is argued, academics who promote undemocratic positions that refer to Israeli Arabs as constituting a demographic threat will continue to maintain their academic status, without any infringement of their work.

9. The petitioners argue that a budgetary statute that discriminates on the basis of nationality or political ideology through the adoption of a nationalist-ethnic ideology is an unconstitutional discriminatory statute. It is further argued that although the Law is worded in a neutral manner and applies equally to the activities of both Arabs and Jews and to both Arab and Jewish institutions that receive state financing or support, it is clear that the intention is to impact primarily on Arab citizens.

10. Another argument made is that the Law violates the right to education. The Law will prevent the children of Petitioners 2-6 and others from receiving an education based on the Palestinian nationalist narrative, and is thus in violation of the objective of public education, as such is defined in s. 2(11) of the Public Education Law, 5713-1953. It is also argued that the violation will maintain and even increase the suppression that has developed because of the Ministry of Education's strict monitoring of the education provided in Arab schools. An additional claim made is that the Law violates the right of the students' parents to freely choose an educational institution for their children in accordance with their own educational ideology and philosophy.

11. The petitioners also argue that the Law's provisions lead to a violation of the right to freedom of occupation for all those who in the

framework of their work are involved in a critical examination of the nature of the state as a Jewish state (such as Petitioner 7 and the teachers in the Bilingual School). It is also claimed in this context that Petitioner 7's right to equal treatment in exercising his freedom of occupation is restricted, as opposed to other academics with political perspectives that conform to the views of the majority.

12. Finally, the petitioners claim that the Law violates the right of Arab citizens to collective dignity. It is argued that the Palestinian narrative is an integral part of the identity of most Israeli Arabs, and that the attempt embodied in the Law's provisions to restrict the discussion of this narrative violates a constitutive element of the identity of these Arab citizens. It is also argued that the attempt to prevent opposition and legitimate protest against the values of the state as a Jewish and democratic state violates the collective dignity of the Arab citizens because it prevents them from objecting to the fact of the discrimination to which they are exposed. It is argued that the Law seeks to shape and outline the values and perspectives of the Arab minority, as well as its behavior, by using a tool that is tied to the state budget.

13. The Petitioners argue that the Law does not comply with the provisions of the limitations clause of the Basic Law: Human Dignity and Liberty. The Law gives the representative of the executive branch broad discretion, in that its provisions do not provide clear criteria that indicate when a budget reduction will be allowed; the Law's sections are broad, vague, ambiguous and general. It is argued that these statutory provisions do not comply with the tests for primary legislation arrangements as established in this Court's case law, and that the violation of constitutional rights therefore contravenes the provisions of the Basic Law: Human Dignity and Liberty, which require that any violation either be anchored in a statute or permitted pursuant to a statute. It is also argued that the violation of these constitutional rights does not have an appropriate objective, in that the violation is caused in an arbitrary fashion, it involves political considerations and it penalizes the petitioners in particular and the Arab population in general. It is also argued that the Law has no proper objective because it violates the public interest – an interest which specifically requires protection of the principle of cultural pluralism, freedom of expression, equality, freedom of occupation and dignity. It is further argued that the Law lacks a proper objective because it violates democratic values and indirectly allows the imposition of collective punishment, since the entire group of those benefitting from a particular service may be harmed because of a single act, or because of the act of a single individual. According to the petitioners, in

light of the fact that the Law is not a statute as defined in the Basic Law, and because it lacks an appropriate purpose, there is no need to examine the matter of whether it is proportionate, since the Law's purpose is the starting point for the three-part test for proportionality.

14. Finally, it is argued that the Law has a "chilling effect" and deters certain activities, because of a concern that such activities will be covered by the Law's provisions, and will thus lead to the imposition of budgetary sanctions.

*The position taken by Respondent 1*

15. Respondent 1 argues that the petition challenges the constitutionality of a law before the manner of its implementation and application has been examined by the authorized parties; Respondent 1 argues further that the petition is based on various extreme scenarios that the petitioners presented, even though the likelihood of their occurrence is completely unknown and it is also unknown whether the Law will in fact apply to them. Respondent 1 therefore argues that it is too early to reach a decision regarding this petition, because as of the current time, the Minister of Finance has not yet been asked to implement the Law in any concrete situation and no interpretative content has yet taken form with respect to his authority pursuant to the Law; and that this petition is thus overly generalized and theoretical. Respondent 1 emphasizes that pursuant to the provisions of the Law, a professional team must be established in order to exercise the granted authority, and the Minister of Finance must receive an opinion from the legal adviser to his Ministry and hold a hearing for the entity regarding which he is considering exercising his authority. In addition, the Law requires that the Minister of Finance obtain the approval of an additional minister (other than himself) – the minister who is in charge of the relevant budgetary item. Regarding this issue, Respondent 1 cites the position that I took in HCJ 7190/05 *Lobel v. Government of Israel* [1], in which I chose to make use of the "ripeness" doctrine that has been applied in the past in the field of constitutional law. According to this doctrine, a court may refrain from deciding an abstract dispute if there is no clear and complete factual background that has been presented to the court with respect to the issue facing the court.

16. Respondent 1 offered an additional threshold argument, relating to the legal forum in which the petition should have been brought. The argument is that even if a concrete decision to reduce a budget had been reached pursuant to the Law, the proper forum for the deliberation of the issues raised regarding such a decision would be the Administrative Matters Court, as provided in Item 40 of the First Schedule to the Administrative

Courts Law, 5760-2000 (hereinafter: "the Administrative Courts Law"). Respondent 1 argues that this Court cannot take the place of the entity that is authorized pursuant to that law, and issue a forward-looking legal opinion with regard to the manner in which the authority granted in the Law should be exercised.

17. The argument is also made that the Law, on its face, does not apply to the petitioners, as they do not fall within the Law's definitions of a "financed entity" or a "supported entity".

18. In light of the conclusion I have reached, I see no need to respond at length to Respondent 1's substantive arguments. I will note briefly that Respondent 1 believes that this Court's intervention would not be justified, as the Law passes the test set out in the limitations clause for a statute's constitutionality. Respondent 1's argument is that the Law fits into Israel's framework of statutes that sustain its existence as a Jewish and democratic state, while preserving the state's right to protect its basic principles. Respondent 1 also argues that the state has the prerogative to direct the allocation of its budget and not to finance activities the purpose of which is to undermine the basis for its existence. The core principles on which the state is based are a legitimate consideration in terms of the distribution of budgets, and the state may choose not to finance activities that are not consistent with these core principles. In addition, it is argued that the Law establishes a mechanism of restraint, balance and supervision through which decisions about budget reductions are reached. The intention is not to have the Law apply to marginal or minimal activity, but instead only to those activities which in their essence negate the character and existence of the state, including its character as a Jewish and democratic state.

19. Regarding the petitioners' claim that there has been a violation of various basic rights, Respondent 1 argues that the Law does not violate freedom of expression. Respondent 1 argues that the supported or budgeted entity retains the right to choose whether or not to carry out those activities that conflict with the grounds for budget reduction that are stipulated in the Law, but the Law allows the Minister of Finance to decide – when dealing with a supported or budgeted entity that engages in such activity – that the state will not finance the entity's activity that falls within the categories listed in the Law. For this reason, it is also argued that there is no violation of a right to collective dignity. In addition, the Minister of Finance argues that even if there is a violation of freedom of expression, that violation nevertheless complies with the terms of the limitations clause of the Basic Law: Human Dignity and Liberty. Regarding the petitioners' argument that

the Law violates the principle of equality, Respondent 1 argues that the Law applies to any supported or financed entity whose activities are covered by one of the grounds enumerated in the Law. Respondent 1 notes that a claim that the Law may be abused, in that it might be enforced in an arbitrary fashion, is only a theoretical claim. Respondent 1 argues that the claim regarding a violation of the right to education should also be rejected. It is argued in this context that, *inter alia*, the state may and is entitled to promote those goals that it wishes to emphasize and to budget resources for the purpose of achieving those objectives. In the instant case, the relevant objectives are the goals of public education and the principles underlying the Declaration of Independence. In response to the claim concerning a violation of freedom of occupation, Respondent 1 argues that this is again a remote and theoretical concern – one that is not based on the facts. Respondent 1 argues, at length, that even if there has been a violation of a constitutional right, it is a violation which is permitted pursuant to the conditions set out in the limitations clause.

*Response of Respondent 2*

20. Respondent 2 describes at length the reasons that justify a denial of the petition. Some of its claims are similar to those of Respondent 1, and there is therefore no need to repeat them, as they have already been noted above in the discussion of Respondent 1's claims.

21. Regarding the right to equality, Respondent 2 argues that this case involves a budget reduction for certain entities, pursuant to the Law, which is carried out on the basis of the relationship between the activities of such entities and the basic principles of the state, and without any connection to the national identities represented by those entities. Respondent 2 also notes that there are Jews who wish to deny the Jewish character of the state, such as Petitioner 7. Respondent 2 argues that the Petitioners' claim is far-reaching and suggests that any time that the state wishes to promote Zionist or Jewish values, even without discriminating directly against individuals on the basis of their nationalities, it will be seen as discriminating against members of the Arab nationality. Respondent 2 argues further that the state of Israel recognizes its Jewish and Zionist values alongside its democratic values and its constitutional framework. Thus, the granting of a particular position to these values within the framework of the state's laws is presumptively not an unlawful discriminatory act.

22. Next, Respondent 2 argues that even if the right to education (a right that the petitioners claim is also being violated) is recognized as a constitutional right, this Court has held in the past that the State may

determine different levels of financing for educational institutions in accordance with their compliance with the core studies program established by the Ministry of Education; this Court has held that such a determination is neither discriminatory nor a violation of the right to equal education. Accordingly, Respondent 2 argues that even though the petitioners are free to promote a curriculum which is based on the Palestinian national narrative, the State is not required to finance that curriculum.

23. With respect to the claim that there has been a violation of the freedom of employment, Respondent 2 argues that this right is a protective right which is intended to ensure for each individual an area in which he can support himself without interference from others. It is therefore argued that the Law does not violate the right to freedom of employment, as it does not prohibit the employment of teachers or lecturers who wish to promote values that deny the Jewish and democratic nature of the State, and who mark Independence Day as a day of mourning. The Law also does not prevent any individual from teaching content that falls within the definition of such activity. The Law only provides that the State will not participate in the financing of such activities.

*Discussion and determination*

24. My position is that at this stage, the petition should be denied without any decision being made regarding the constitutional questions presented to us, and I will suggest to my colleagues that we so hold. I do not deny that the petition before us raises important and fundamental questions and issues. Despite the importance and complexity of these issues, this is not the time to respond to their substance. I will explain myself as follows:

25. As is known, the power granted to the High Court of Justice pursuant to s. 15(c) and (d) of the Basic Law: The Judiciary is a power that the Court may or may not exercise, in accordance with its own discretion (see: HCJ 731/86 *Micro Daf v. Israel Electric Corp.* [2], at p. 456; HCJ 6163/92 *Eisenberg v. Minister of Construction & Housing*, [3], at p. 243; HCJ 991/91 *David Pasternak Ltd. v. Minister of Construction & Housing* [4], at pp. 58-59; and HCJ 2009/07 *Klein v. American Friends of Israel Scouts* [5], at para. 11). Over the years, rules have been developed regarding the circumstances in which this discretion may be exercised in the form of the rejection of a petition. These rules do not constitute a *numerus clausus*, and they can be changed and given new content as needed at a specific time and location (see: HCJ 453/84 *Iturit Communications Services Ltd. v. Minister of Communications* [6], at p. 620). The rules allow for the rejection of a petition under, *inter alia*, the following circumstances: when alternative relief is

available, when there has been a previous petition or when there may be a theoretical later petition regarding the same matter, when there has been delay or an absence of clean hands on the part of the petitioner, when a petition is overly general, or when the route for legal proceedings has not been fully exhausted, etc. This is not, as stated, a *numerus clausus*. Justice A. Barak referred to these rules, which qualify as "judicial creations", in his remarks in HCJ 217/80 *Segal v. Minister of Finance* [7], at p. 440, in which he noted that they are intended to regulate the pace at which appeals are addressed to the Court.

26. As noted, the above-mentioned list of grounds for rejecting a petition is not a *numerus clausus*. In *Lobel*, the petitioners sought to attack the constitutionality of the Disengagement Plan Implementation Law, 5765-2005 (hereinafter: "the Disengagement Law") by challenging the section of that law which permitted the imposition of criminal sanctions on parties who were being removed from the Gaza Strip, and who remained in the area after the removal day. An expanded panel of this Court summarily rejected the petition, on the ground that there was an alternate remedy: the constitutional claims could be raised in the framework of a criminal proceeding brought against an individual who had violated the Disengagement Law. Note that in that case, the state, at the end of the day, decided not to prosecute residents who had violated only the provisions of the Disengagement Law. The criminal sanctions were imposed only against those few residents who used violence against the security forces, and who committed additional criminal offenses. The circumstances of that case led me to the conclusion that the petition should be rejected because of the availability of an alternate remedy, and I therefore joined in President Barak's opinion; however, I also supported a rejection of the petition because the issue it presented was not yet ripe. In my view, there was no reason at that stage to decide an issue of principle in the framework of a direct constitutional attack on the Disengagement Law in the High Court of Justice. And I stress that the ripeness doctrine was not used for the first time in the *Lobel* opinion cited by the state here. It had already been mentioned in this Court's earlier case law. Thus, in *Segal* [7], Justice A. Barak remarked that the grounds established by this Court for a summary dismissal included the ripeness doctrine as well:

> 'We may also mention the doctrine relating to an academic or unripe issue, or an issue that is not justiciable. These doctrines attempt to give the court – each from a different perspective – legal mechanisms with which the court can lock its gates when it believes that the particular matter should not be dealt with' (*Segal* [7], *ibid.*, at p. 440).

Indeed, from time to time, we encounter petitions that we decide to reject on the grounds that, for various reasons, the questions they present are not ripe for decision. Non-ripeness as a ground for dismissal has been mentioned both in response to petitions relating to administrative cases and, often, in response to petitions relating to constitutional matters. (For examples of petitions that were submitted in connection with administrative cases and were rejected on the grounds that they were not ripe, see the following: in HCJ 1842/04 *Michai v. Ministry* [8], this Court held that as the competent authority had not yet decided the petitioners' case, the petition was early and unripe; in HCJ 1431/05 *Orian v. Minister of Transportation* [9], we rejected a petition that was general and theoretical, and was for that reason held to be unripe for decision; and in HCJ 128/09 *Basiso v. Minister of Defense* [10], the petitioner asked that she be allowed to return to her home in the Gaza Strip. This Court rejected the petition because we found that the petitioner had just left the country, and that the planned time for her stay abroad had not yet passed; it was therefore held that her petition regarding her ability to return to her home was not ripe for decision. In HCJ 6556/11 *Glickman v. Major-General Sami Turjeman, Commander of IDF Land Forces* [11], the Court rejected an appeal that was directed, *inter alia*, at a Chief of Staff Order concerning the service of male and female soldiers together. We held that under the circumstances of that petition, there was no need to study the interpretation of the order or its applications, because a staff team was still working on a study of the subject. In such a situation, it was held, a petition seeking to subject the army's instructions to judicial review was not yet ripe. For examples in which petitions dealing with constitutional issues have been rejected on the ground that they were not yet ripe, see *Lobel* [1] and HCJ 8276/05 *Adalah – the Legal Center for the Rights of the Arab Minority in Israel v. Minister of Defense* [12], ("*Adalah I*") discussed below.

27. The source of the ripeness doctrine is American constitutional law (see *Lobel* [1], *per* Justice Naor, at para. 5). The United States Supreme Court faced the issue in *Abbott Laboratories, et. al. v. Gardner* [24] at pp. 148-149, when it held that the rationale at the basis of the doctrine is the Court's need to avoid deciding issues before the time is ripe for the Court to do so:

> 'Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been

formalized and its effects felt in a concrete way by the challenging parties.'

28. I believe that the circumstances here justify the application of the ripeness doctrine. At this stage, the issue raised by the petition is not yet ripe for a judicial determination, due to the absence of a clear, complete and concrete set of facts – the type of fact pattern that is essential if a judicial determination of the principle of the issue is to be properly made. The importance of a crystallized dispute for the purpose of making a determination regarding a constitutional issue has been discussed by my colleague, Vice President E. Rivlin, in his opinion in HCJ 7052/03 *Adalah – the Legal Center for the Rights of the Arab Minority in Israel v. Minister of the Interior* [13] ("*Adalah II*"), at para. 6:

'The deliberation is not fruitful when it takes place too early, before the dispute is known, or when it has not yet crystallized.'

The Minister of Finance has not yet, on any occasion, carried out those sections that the petitioners wish to have stricken, and we cannot know whether, when and in what circumstances the Minister will make use of the powers that these sections confer upon him. The mechanism established in the Law provides that before the Minister of Finance decides to impose the financial sanction, the issue must go through several stages of review and approval. The Minister's decision will only be carried out in coordination with various other parties, and only after their opinions are obtained. Thus, for example, the Law requires that in order for a financial sanction to be imposed, the minister in charge of the budgetary item through which the entity in question is either budgeted or supported must agree to the imposition of that sanction. Additionally, the budgeted or supported entity that will be affected must be given a hearing before the sanction can be imposed. Furthermore, pursuant to sub-section (d) of the Law, the Minister of Finance can only reach a decision to reduce funding after receiving an opinion from the legal adviser to the Ministry of Finance and only after the specially-appointed professional team has made its recommendation. The Law provides that the professional team will be composed of an employee of the Ministry of Justice, an employee of the Ministry of Finance, and an employee of the ministry whose minister is charged with the budget item through which the entity is either budgeted or supported. I note here that the mechanisms established in the Law were the fruit of various discussions held in the Knesset's Committee on the Constitution, Law and Justice. As may be recalled, the original draft law placed before the Knesset was the Draft Independence Day Law – a draft law which sought to prohibit any activity or

event which includes a marking of Independence Day or a reference to the fact of the establishment of the State of Israel as a "day of mourning" or a "day of tragedy". This prohibition was accompanied by a penal sanction of up to three years imprisonment. This proposal was abandoned, as stated, and the Budget Foundations Law was tabled in its place. However, the Draft Budget Foundations Law also went through many changes before it was enacted in its final form; for example, Respondent 1's Response indicates that the definition of a "prohibited expense" was narrowed and it was determined that it would apply only to activities which were *in their essence* the equivalent of one of the grounds listed in the section and not for every expense that "*could*" fit within one of those grounds. The Law also provides for a controlled and careful decision-making process, which I have noted above – a process that includes, as stated, professional opinions, a hearing, and the consent of the minister in charge of the relevant budgetary item. The Law also provides that the budget reduction for the supported or budgeted entity may not be of an amount greater than three times the amount of the expense that has led to the imposition of the sanction. (Originally, the amount of the reduction was up to twenty times that amount, which was then reduced to ten times the amount of the expense).

29. Thus, the Law requires that a long road must be travelled before the sanction created by the Law can be imposed. I will not take any position at this stage regarding the mechanism established in the Law or regarding the Law's constitutionality. However, at this stage, before the Law has been implemented and when the mechanism established therein has also not yet entered into operation, I do not believe that there is any reason to engage in speculations and estimations regarding the manner in which the power granted in the Law will be exercised. As I noted in *Lobel* [1], a well-informed judicial determination must be tightly connected to concrete facts that are presented in the case before the court, even if a constitutional question has arisen. (See: *Lobel* [1], at para. 6. See also HCJ 3248/09 *Sari v. Minister of Justice* [14], at para. 3; HCJ 6972/07 *Lakser v. Minister of Finance* [15], at para. 26). In this case, there have not yet been any incidents in which a question has arisen regarding the application of the Law, its interpretation or its consequences. The situation was similar in *Adalah I* [12], in which this Court was asked to decide the issue of the constitutionality of the Civil Wrongs Ordinance (State Liability) (Amendment No. 7), 5765-2005. With regard to the provisions of that law, President (emeritus) A. Barak held, and his colleagues concurred, that s. 5c of the law was invalid. However, it is his discussion of s. 5b of that law that is relevant to our discussion here.

Regarding that section, it was held that the issue presented in the petition was not yet ripe. Some of the remarks made in that case are also pertinent here:

> 'The question of the constitutionality of s. 5b of *Amendment 7* arose before us in a marginal manner only . . . We were not presented with any cases in which the question of its application arose. All this reflects upon the question of the constitutionality of the section. In these circumstances, as long as these questions have not been properly addressed, the time has not come to decide the constitutionality of s. 5b. Much depends on the manner in which it is implemented and the interpretation that is given to the provisions of the section. . . . Naturally, the parties have the right to raise their arguments concerning the constitutionality of s. 5b as it will arise in specific cases. The civil courts are competent, in specific tort cases, to examine arguments concerning the constitutionality of the section. In the circumstances of this case, we see no reason to decide the question of the constitutionality of s. 5b of Amendment 7. (Emphasis in the original – M.N.) (*Ibid*. [12], at para. 31).

30. The United States Supreme Court dealt with a similar issue in *United Public Workers of America (C.I.O.) et. al. v. Mitchell et. al*. [25]. In that case, the plaintiffs, who were all federal employees, challenged a statute that prohibited their participation in political activities. Except for one employee, none of the plaintiffs had actually violated the statute, but they had all declared their intention to become involved in political activity of the type that had been prohibited by the statute. The Court held that other than the issue presented by the single plaintiff who had already violated the statute, there was no legal question that could properly be decided. The Court noted the employees' concern that if they did violate the law they would lose their jobs, but held that because the employees had not yet violated the statute, this was a purely hypothetical-speculative concern which did not justify a judicial determination or the granting of judicial relief:

> 'The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to

> adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other' (*ibid.* [25], at p.89-90).

Justices Douglas and Black presented the minority view, and wrote that the dispute could be adjudicated. Justice Douglas wrote that the plaintiffs did not need to wait until they actually lost their jobs. To remove doubt: I also believe that there can be cases in which even in the absence of a concrete foundation for a dispute, it would be wrong to postpone the adjudication of a particular petition until a specific factual background – one that can cause substantial harm to the petitioners – has arisen, and in such cases it would be proper to decide a question even if it has not yet become fully ripe. However, even if we agree with the minority view in *United Public Workers* [25], the outcome in our case would not change. In the instant case, even if the Law's provisions had been put to use, the impact on the petitioners would not be immediate. As stated, because of the complex decision-making mechanism prescribed by the Law, a multi-staged process separates the initial decision by the Minister of Finance and its actual implementation. In any event, if the Minister does exercise his power pursuant to the Law and such exercise is likely to harm some of the Petitioners, the option of initiating legal proceedings remains open. It should also be noted that one element of the mechanism established in the Law is the holding of a hearing for an entity that is likely to be harmed.

31. As stated, not every petition that lacks a concrete factual foundation should be summarily dismissed on the ground that it is unripe. Each case must be judged on its merits. As noted, the lack of ripeness is a threshold ground for dismissal, and a court may exercise discretion in deciding whether or not to rely on it. It is certainly possible that on some occasions, even in the absence of a concrete factual background, a court should nevertheless address the issue raised in the petition. We can draw an analogy to the fact-pattern of *United Public Workers* [25], and find that the Court's intervention at an early stage would be justified if the circumstances are such that if a petitioner is asked to wait for his case to become ripe, he will pay too heavy a price. Thus, for example, if the Draft Independence Day Law had been enacted as law, and if the petitioners had sought to attack its constitutionality, this Court might have responded to the petition even before use had been made of its provisions in a concrete case. This judicial response would have been needed because of the harsh criminal sanction that was contained in Draft Independence Day Law (three years imprisonment). However, this does not

mean that whenever a petition challenges the constitutionality of a law which contains a criminal sanction, this Court must address it despite its lack of ripeness. (Regarding this matter, see *Lobel* [1], opinion of Justice Naor.) As I have noted, the Court must exercise its judgment in each case, based on the specific circumstances that are presented.

32. Moreover, the Response submitted by Respondent 1 indicates that we cannot be certain that the Law will apply to the petitioners in this case. In addition, even if the Law does apply to the petitioners, there is still uncertainty regarding the degree to which it will apply to them or to others, and in what circumstances it will apply. The use of the ripeness doctrine does not mean that the courthouse doors are permanently closed before the petitioners or before others, or that the Court will not deliberate the issue in the future. It may be that in the future – if and when the Law's provisions are put into use and the petitioners or others feel that they have been harmed by that use – the petitioners will be able to address the competent tribunals who will adjudicate their claims. In such a situation, and on the basis of a concrete factual background, the disputed issue will certainly be more coherent, and this will make the deliberation more efficient; the Court will be able to render a wiser decision, based on concrete facts (see HCJ 1468/11 *Ben Sa'adon v. Minister of Religious Affairs* [16]). Nevertheless, it may also be the case that the passage of time will render a deliberation of a petition irrelevant, as the petitioners' concerns may never be realized (compare, *Lakser* [15]) – either because the Minister of Finance may fail to exercise the power conferred upon him by the Law, or because the provisions will be exercised in a manner that does no harm to the petitioners; other factors may allay the petitioners' original concerns as well. However, in the current situation, the operative significance of the Law is not yet clear and it is not yet the right time for us to respond to the substance of the claims (compare *Ben Sa'adon* [16]).

33. I wish to add the following to these remarks: the ripeness doctrine is, as stated, one of the tools that this Court can use to establish the pace at which petitions are brought before it. It allows the Court to regulate, to a certain degree, the flow of matters submitted to it and to refrain from deciding matters when the Court believes that there is no justification at that particular time for determining the issues presented (see *Segal* [7], *supra*). The Court has discretion to determine the circumstances in which it will apply the doctrine, in the framework of the power the legislature has conferred upon it in s.15 of the Basic Law: The Judiciary. When it weighs the various considerations for and against the deliberation of a particular petition, the Court must also consider the need to organize its time, given that the time

available to us is a finite resource. When this Court is faced with a petition that is particularly urgent, we work night and day to decide the issue that is before us. However, when the submission before us is a petition that is not yet ripe – a petition that does not include a clear, complete and concrete set of facts – the Court must consider whether a theoretical adjudication is justified at that particular stage.

34. Furthermore, I believe that alongside the above-mentioned threshold ground for dismissal based on a lack of ripeness, the petition here should also be denied because an alternative proceeding and remedy are available. In *Lobel*, I noted that the ripeness doctrine is sometimes combined with other threshold grounds for dismissal, such as the availability of an alternative proceeding and remedy. This is because the ripeness required for an informed determination concerning the constitutional issues is likely to take shape in the context of the pursuit of an alternative remedy (see *ibid*., at para. 8). That is the case here. In the framework of the amendment of the Law, the Knesset also amended the Administrative Matters Court Law, such that the list included in First Schedule of that law was expanded to include a new item 40; this item confers on the Administrative Courts the power to adjudicate petitions dealing with the reduction of financial support pursuant to a decision by the Minister of Finance. It is black-letter law that the granting of power to the Administrative Matters Courts does not negate the power of this Court (see HCJ 2208/02 *Salameh v. Minister of the Interior* [17], at p. 953; HCJ 212/03 *Herut National Movement v. Chairman of the Central Committee for the Election of the 16th Knesset* [18], at p. 756). However, the choice to petition the Administrative Matters Court is a choice to take the intended main road. Of course, the petitioners may also raise their claims regarding the constitutionality of the Law in the context of a petition to the Administrative Matters Court. The authority of the High Court of Justice to adjudicate claims regarding unconstitutionality does not prevent a deliberation of such claims in an "ordinary" court (see HCJ 2426/08 *Ben Atar v. State of Israel – Ministry of Transportation* (2008) (unreported) [19], *per* Justice Naor, at para. 3; HCJ 6715/10 *Hina v. State of Israel, Ministry of Defense, Department of Rehabilitation* [20], at para. 5; HCJ 2055/02 *Sheikh Abed Al Karim Abayet v. Minister of Defense* [21], at para. 5; HCJ 1076/07 *Maman Eilat Group Ltd. v. Minister of Finance* [22]; *Adalah I,* supra). A party who believes that he has been harmed by the implementation of a law may thus turn to the Administrative Matters Court by filing a petition. In the context of such a petition, the party may use an indirect attack to present arguments regarding the constitutionality of the particular law. It has already

been held that trial courts can adjudicate a particular litigant's matter through an indirect attack, even if the litigant can, in principle, submit a petition to the High Court of Justice. This has also been allowed in cases in which the "indirect attack" was brought by the litigant who initiated the proceeding, and did not use it as a defensive claim (see: HCJ 6090/08 *Berger v. Minister of Justice* [23], at para. 5; *Hina*, *supra*; *Lakser* [15], at para. 29). The ability to present their claims in the form of an "indirect attack" also gives the petitioners the ability to pursue an alternative remedy (see: *Hina*, *supra*; *Berger* [15]; *Orian*, *supra*; and see: *Sheikh Abed Al Karim Abayet*; and see: *Lobel* [1], *per* President A. Barak, at para. 12, and *per* Justice Naor, at para. 1). And furthermore: in the context of an administrative petition, it will be possible to ask for temporary relief in the form of an order for the non-implementation of the sanction.

35. The existence of an available alternative proceeding and remedy in this case reinforces the conclusion that this petition is not ripe for decision by this Court. If a petition does need to be filed, it will be filed in the Administrative Matters Court, and to the extent necessary, it will be based on a concrete factual background, and not on hypothetical scenarios, as is the case in the petition which is before us now. The concrete facts will also allow that court to decide whether or not a concrete interpretation of the Law justifies the particular decision reached by the Minister of Finance, or whether the constitutional question needs to be decided.

36. In conclusion: the petition before us contains complex questions that are of public importance, but at this stage, there is no need to render a judicial decision concerning the claims that have been presented. The petition is not ripe because of the absence of a concrete factual background – and we must have a concrete factual background in order to reach a decision regarding the various issues raised by the petitioners. In addition, if the petitioners or any of them or others are harmed as a result of the Law's implementation, they have an alternate proceeding and remedy available to them in the Administrative Matters Court, where they will also be able to file an application for an order *nisi* preventing the implementation of the Law with respect to them.

37. I propose to my colleagues that the petition be denied without an order regarding expenses.

*President D. Beinisch*

I agree with my colleague Justice M. Naor that the petition before us raises complex questions which are of public importance. I stress that these questions can, in certain circumstances, reach the core of the problems that

currently divide Israeli society. However, I accept my colleague's position that the petition before us is not ripe for judicial review. At a declarative level, the Law raises, on its face, difficult and complex questions, but the constitutionality of the Law is largely dependent on the interpretive content that is given to its provisions, and the nature of this content will only become clear when the Law is implemented by the relevant authorities.

Before a judicial determination can be made regarding the circumstances to which the Law will apply and the scope of its implementation, the executive needs to be allowed to set the boundaries and procedures for its implementation. The petitioners have painted various scenarios of hypothetical possibilities, and we cannot yet determine the likelihood that any of these scenarios will be realized. We do not know to whom they will apply, whether they will indeed relate to the petitioners, or what event will justify the implementation of the Law. We must therefore leave for a later time a deliberation of the constitutionality of the Law's provisions – if indeed there is a need for such at the stage when they are put to concrete use, if such a stage is reached, and if the chosen form of implementation passes through the relevant filters established in the Law itself.

As of now, I also do not see a need to decide the question of the availability of an alternative remedy, and whether, when the time comes, a decision reached pursuant to the Law should be deliberated in the Administrative Matters Court or in this Court. That question will also be decided in the future, on the basis of the particular circumstances that arise.

I therefore join in the result reached by my colleague.

*Vice President E. Rivlin*

I join in the judgment of my colleague Justice M. Naor. I believe that under the circumstances, we are far from the concrete stage of the implementation of the law. This is because according to the law itself, a long way must be travelled between the occurrence of an event mentioned in the Law and the actual imposition of a sanction – and there are many obstacles to overcome over the course of this distance. Furthermore, it is not at all certain that the Law will actually apply to the petitioners. With respect to constitutional judicial review, this natural selection is the result of the absence of factual circumstances which raise the constitutional question. In foreign systems which implement concrete factual examinations, this natural selection *precedes* constitutional review. Such examination often renders the actual constitutional review redundant.

For these reasons and for the reasons described by my colleague Justice M. Naor and those listed in the judgment written by my colleague President Beinisch, I join in their decisions.

Decided as *per* Justice M. Naor

10th of Tevet 5772.

15 January 2012.