HCJ 5239/11

HCJ 5392/11

HCJ 5549/11

HCJ 2072/12

Petitioners in HCJ 5239/11:	1. Uri Avneri
	2. Gush Shalom
Petitioners in HCJ 5392/11	1. Adi Barkai, Adv.
	2. Iris Yaron Unger, Adv.
	3. Anat Yariv
	4. Dr. Adia Barkai
	5. Dana Shani
	6. Miriam Bialer
Petitioners in HCJ 5549/11	1. Arab Movement for Renewal – Ta'al
	2. MK Dr. Ahmed Tibi
Petitioners in HCJ 20172/12	1. Coalition of Women for Peace
	2. Supreme Monitoring Committee for Arab Affairs
	3. Jerusalem Legal Aid and Human Rights Center
	4. Association for Civil Rights in Israel
	5. Public Council against Torture
	6. Hamoked: Center for the Defence of the Individual
	7. Religious Action Center of Reform Judaism
	8. Yesh Din – Volunteers for Human Rights
	9. Adalah – The Legal Center for Arab Minority Rights in Israel

v.

Respondents in HCJ 5239/11	1. Knesset
	2. Speaker of the Knesset
Respondents in HCJ 5392/11	1. Knesset
	2. Speaker of the Knesset
	3. Minister of Finance
	4. Attorney General
Respondent in HCJ 5549/11	Knesset
Respondents in HCJ/2072/12	1. Knesset
	2. Minister of Finance
	3. Minister of Justice
Requester to join:	Legal Forum for Israel

Attorneys for the Petitioners in HCJ 5239/11: Gabi Laski, Adv; Neri Ramati, Adv.

Attorneys for the Petitioners in HCJ 5392/11: Adi Barkai, Adv.; Iris Yaron-Unger, Adv.

Attorneys for the Petitioners in HCJ 5549/11: Osama Saadi, Adv.; Amer Yassin, Adv.

Attorneys for the Petitioners in HCJ 2072/12: Hassan Jabarin, Adv.; Sawsan Zaher, Adv.; Dan Yakir, Adv.

Attorneys for Respondents in HCJ 5239/11,

Respondents 1-2 in HCJ 5392/11,

Respondent in HCJ 5549/11,

and Respondent 1 in HCJ 2072/12: Eyal Yinon, Adv.; Gur Bligh, Adv.

Attorneys for Respondents 3-4 in HCJ 5392/11

and Respondents 2-3 in HCJ 2072/12: Yochi Genesin, Adv.; Uri Kedar, Adv.; Avishai Kraus, Adv.

Attorneys for the Requester to join: Avi Har-Zahav, Adv.; Yifat Segal, Adv.; Tomer Meir Yisrael, Adv.

The Supreme Court sitting as High Court of Justice

Before: President Emeritus A. Grunis, President M. Naor, Deputy President. E. Rubinstein, Justice S. Joubran, Justice H. Melcer, Justice Y. Danziger, Justice N. Hendel, Justice U. Vogelman, Justice I. Amit

Responses to an Order Nisi

Facts: The petitions sought to void the Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011 (hereinafter: the Boycott Law or the Law). The Law attributes tortious liability and establishes various administrative restrictions against anyone who knowingly publishes a public call to impose a boycott on the State of Israel, as defined by the Law. The Petitioners argued that the Law was unconstitutional for infringing various constitutional rights (*inter alia*, freedom of expression, the right to equality, freedom of occupation), without meeting the conditions of the "Limitation Clauses" of Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.

The High Court of Justice, in an expanded bench of nine justices, held:

The Court unanimously decided to void sec. 2(c) of the Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011, and to deny the petitions in regard to secs. 3 and 4 of the Law. Additionally, the majority (*per* Melcer J., Grunis P., Naor P., Rubinstein D.P., and Amit J. concurring) denied the petitions in regard to secs. 2(a) and 2(b) of the Law, against the dissenting

opinion of Danziger J., Joubran J. concurring, and the separate dissents of Hendel J. and Vogelman J.

Justice Melcer: From the language of the Law, we learn that anyone who knowingly publishes a call for the imposition of a boycott against the State of Israel, as defined by the Law, may be deemed to have committed a tort. Moreover, the participation of such a person, or one who has committed to participate in such a boycott, may be restricted, and it is possible that such a person may be prevented from receiving various financial benefits (governmental grants, tax exemptions, state guarantees, etc.). Thus, most of the sanctions imposed by the Law already apply at the speech stage. Therefore, the Boycott Law indeed infringes freedom of expression and is repugnant to the constitutional right to human dignity. However, in the opinion of Justice Melcer, we are not concerned here with an infringement of the core of freedom of expression, even where political speech is concerned, inasmuch as the infringement is relatively limited, and applies only to a call for a boycott against the State of Israel, as defined by the Law, or anyone who commits to participate in such a boycott, which is a legal act that exceeds speech.

However, that constitutional right, like all other constitutional rights in Israel, is not absolute, but rather relative, and may be restricted if the infringement meets the requirements of the "Limitation Clause" in sec. 8 of Basic Law: Human Dignity and Liberty. As is well known, the Limitation Clause comprises four cumulative tests: the infringement of the constitutional right must be made by a law or by virtue of a law; it must befit the values of the State of Israel as a Jewish and democratic state; it must serve a proper purpose; and it may only infringe the right to an extent no greater than is required. The last condition comprises three subtests, which are: the rational connection test, the least harmful means test, and the proportionality "*stricto sensu*" test. For the purpose of this examination, Justice Melcer also made recourse to comparative law.

There is no dispute that the first condition is met. As for the remaining conditions, Justice Melcer was of the opinion that the provisions of the Law that are intended to prevent harm to the State of Israel by means of an economic, cultural, or academic boycott of a person or any other entity, merely due to its connection to the State of Israel, one of its institutions, or an area under its control, fall under the doctrine of "defensive democracy", and promote protection of the state and its institutions, as well as equality and personal liberty, and the Law, therefore, is intended for a proper purpose that befits the values of the State of Israel as a Jewish and democratic state. Justice Melcer was also of the opinion that "calls for a boycott against the State of Israel, as defined by the Law, do not serve the classical purpose of freedom of expression". This view is based upon Justice Melcer's distinction between speech intended to "persuade" and speech employed as a "means of coercion". In his opinion, a call for a boycott is a form of coercive expression, and therefore, it is entitled to less protection that that afforded to other types of political speech.

However, in the context of examining the fourth condition – proportionality – and in accordance with a narrow interpretive approach, Justice Melcer concluded that whereas secs. 2(a), 2(b), 3 and 4 of the Law meet the conditions of the proportionality test, sec. 2(c) of the Law does not meet the demands of the least harmful means test.

In this context, Justice Melcer referred to the chilling-effect doctrine, which addresses a deterrent effect that extends beyond the scope of expression intended by the legislature, and proposed limiting this chilling effect by means of narrow construction that would somewhat restrict the bounds of the tort under sec. 2(a) of the Law. Justice Melcer therefore recommended that the

realization of the "boycott tort" be contingent upon the existence of damage, and a causal connection between the tortious conduct and the damage. However, a potential causal connection would not suffice. Rather, there must be awareness of the reasonable possibility that the call and the circumstances of its publication would lead to the imposition of a boycott, and the right to bring suit must be reserved only to the direct victim of the tort.

By accepting this interpretive approach, sec. 2(b) of the Law would also be constitutional. Pursuant to that, it was further held, *inter alia*, that a person seeking damages under sec. 2(b) of the Law would have to prove not only the element of a call for a boycott, but also the following elements: causation as defined in sec. 62(a) of the Civil Wrongs Ordinance, breach, a causal connection between the boycott and the breach, a mental element of awareness, and monetary loss.

On the other hand, as far as sec. 2(c), concerning damages not contingent upon damage (that might be categorized as "punitive damages") and which are not capped by any ceiling in this regard, Justice Melcer was of the opinion that this section did not meet the second test of the least harmful means test, and must be voided.

Thus, in accordance with this approach, even if a person calling for a boycott be found liable in tort, the damages that would be imposed upon him would not exceed the harm that he actually caused.

In regard to secs. 3 and 4 of the Law, Justice Melcer was of the opinion that the administrative sanctions – preventing participation in tenders and restricting the possibility of obtaining public benefits – constitute merely "second order" infringements of freedom of expression. Accordingly, these are proportionate sanctions in view of the procedures required for the approval of the restrictions, and in view of the state's right to withhold benefits from anyone who employs them against the state. He does not distinguish, in this regard, between a boycott against the state and a boycott against the Area. According to his approach, the constitutionality of secs. 3 and 4 of the Law should not be addressed until specific petitions are filed in the matter of an actual decision by the Treasury, on the basis of a concrete factual foundation.

In conclusion, Justice Melcer drew additional support for the proposed approach, *inter alia*: a construction of a law that places it within constitutional boundaries is preferable to striking it down; respect for the legislature by virtue of deference; the margin-of-appreciation theory; the ripeness doctrine as applied to the matter before the Court requires that, other than the striking down of sec. 2(c) of the Law , the claims of potential claimants or potential defendants in regard to the Law be examined in the course of applied review.

President (Emeritus) A. Grunis, President M. Naor, Deputy President E. Rubinstein, and Justice I. Amit concurred in the opinion of Justice Melcer in separate opinions.

Justice Y. Danziger: The Prevention of Harm to the State of Israel by means of Boycott Law substantially violates freedom of expression. We are concerned with an infringement of the freedom of political expression, which is at the "core" of the constitutional right to freedom of expression, and which forms part of the constitutional right to human dignity. Under his approach, that infringement does not meet the requirements of the Limitation Clause under sec. 8 of Basic Law: Human Dignity and Liberty because the Law does not pass the third subtest of proportionality – proportionality "*stricto sensu*" – particularly in regard to a call for a boycott of

the Area, inasmuch as calling for a boycott of the Area is a subject that is clearly within the bounds of legitimate democratic discourse. In his view, the narrow interpretive approach proposed by Justice Melcer is insufficient.

Despite that conclusion, Justice Danziger was of the opinion that it would be possible to avoid the extreme result of voiding the Law for unconstitutionality through an interpretation that would significantly reduce the Law's infringement and permit the Law to pass the constitutionality tests. This could be accomplished by establishing that sec. 1 of the Law, which is the Law's "entry way", be construed as such that only a boycott of an "institution" or "area" that is a boycott of the State of Israel and derives from the institution or area belonging to the state would fall within the scope of the Law's definition, whereas a boycott of an "institution" or "area" that is not part of a boycott of the State of Israel in its entirety would not fall within the Law's definition. In other words, the Law should be interpreted as applying only to calls for a boycott of the State of Israel in its entirety, but not to calls to boycott the Area alone.

Justice N. Hendel accepted the solution proposed by Justice Melcer as a legitimate interpretation of the Law. However, in his view, section 2 in its entirety – sec. 2(a) establishing boycott as a tort, sec. 2(b) establishing that a person calling for a boycott, as defined by the Law, acts without sufficient justification in regard to the tortious inducement of breach of contract, and sec. 2(c) in regard to damages without proof of damage – does not meet the third constitutional test of proportionality – proportionality *stricto sensu*. Therefore, Justice Hendel was of the opinion that sec. 2 of the Law should be struck down in its entirety for lack of proportionality, but concurred in the approval of secs. 3 and 4 for the time being.

Justice U. Vogelman concurred with the general approach of Justice Danziger, but was of the opinion that the "blue pencil" rule should be adopted in this regard. Accordingly, the words "an area under its control" should be stricken from sec. 1 of the Law. In his view, sec. 2(c), as well, should be struck down, while retaining secs. 3 and 4. Additionally, in his view, the validity of the Law requires that it be interpreted in such a manner that it would apply only to those cases in which the sole reason for the call for "refraining from economic, cultural or academic ties with another person" is the connection to the State of Israel or one of its institutions.

Justice S. Joubran was of the opinion that sec. 2(c) of the Law should be struck down, and that sec. 1 should be interpreted as proposed by Justice Y. Danziger in regard to areas under the control of the state. In addition, like Justices Y. Danziger and I. Amit, he was of the opinion that a distinction should be drawn between calling for a boycott against a person due to his connection to the State of Israel or one of its institutions, and a call for a boycott against a person due to his connection to an area under the control of the state.

Judgment

Justice H. Melcer

1. The Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011 (hereinafter: the Boycott Law or the Law) [https://www.nevo.co.il/law/78646], imposes tortious

liability and establishes various administrative restrictions upon anyone who knowingly publishes a public call to impose a boycott on the State of Israel, as defined by the Law. Does the Law infringe the right to freedom of expression and other constitutional rights? Does that infringement, to the extent that it may exist, meet the tests of the "Limitation Clauses" of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation? These are the questions upon which the petitions before us focus.

I will begin by presenting the relevant, basic information.

2. On July 11, 2011, the Knesset enacted the Boycott Law. Inasmuch as the Law is concise, I will first present its full text:

> *Definition*:
>
> 1. In this law, "a boycott against the State of Israel" means – deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, one of its institutions or an area under its control, such that it may cause economic, cultural or academic harm.
>
> *Boycott – Civil Wrong*:
>
> 2. (a) Anyone who knowingly publishes a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is a reasonable possibility that the call will lead to a boycott, and the publisher was aware of that possibility, commits a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] will apply to him.
>
> (b) In regards to section 62(A) of the Civil Wrongs Ordinance [New Version], anyone who causes a binding legal agreement to be breached by calling for a boycott against the State of Israel will not be deemed as having acted with sufficient justification.
>
> (c) If the court find that a civil wrong, as defined by this law, was committed with malice, it may require the tortfeasor to pay damages that are independent of the actual damage caused (in this section – exemplary damages);

in calculating the sum of exemplary damages, the court will consider, inter alia, the circumstances under which the wrong was carried out, its severity and its extent.

Directives restricting participation in tenders:

3. The Minister of Finance is authorized, with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee, to issue directives in regard to restricting the participation in a tender of anyone who knowingly published a public call for a boycott against the State of Israel, or who committed to participate in such a boycott, including a commitment not to purchase goods or services produced or supplied in Israel, by one of its institutions, or in an area under its control; in this section, a "tender" is defined as any tender that must be administered in accordance with the Mandatory Tenders Law, 5752-1992.

Regulations preventing benefits:

4. (a) The Minister of Finance, in consultation with the Minister of Justice, may decide that someone who knowingly published a public call for a boycott against the State of Israel or committed to participate in a boycott:

(1) Will not be deemed a public institution under clause 46 of the Income Tax Ordinance;

(2) Will not be eligible to receive monies from the Sports Betting Council under section 9 of the Regulation of Sports Betting Law, 5727-1967; exercise of the authority under this section requires the consent of the Minister of Culture and Sports;

(3) Will not be deemed a public institution under section 3A of the Foundations of the Budget Law. 5745-1985, regarding the receipt of support under any budget line item; exercise of the authority under this section requires the consent of the Minister appointed by the Government as responsible for said budgetary line, as stated in

section 2 of the definition of "person responsible for a budget line item";

(4) Will not be eligible for guarantees under the State Guarantees Law, 5718-1958;

(5) Will not be eligible for benefits under the Encouragement of Capital Investment Law, 5719-1959, or under to the Encouragement of Research and Development in Industry Law, 5744-1984; exercise of the authority under this section requires the consent of the Minister of Industry, Commerce and Employment.

(b) In exercising the authority according to subsection (a), the Minister of Finance will act in accordance with regulations that he will promulgate in this regard, with the consent of the Minister of Justice, and with the approval of the Knesset Constitution, Law and Justice Committee; however, if no such regulations have been promulgated, it will not detract from the authority under subsection (a).

Implementation:

5. The Minister of Justice is appointed to implement this law.

Effective Date:

6. Section 4 shall come into force ninety days from the publication of this law.

(For convenience, the tortious liability imposed under section 2 of the Law shall be referred to hereinafter as "the boycott tort", and the provisions established under sections 3 and 4 will be referred to hereinafter as "the administrative restrictions". The three aforesaid sections shall together be referred to hereinafter as "the Law's sanctions").

3. The legislative process of the Law was complex, and I will, therefore, briefly present its steps and what accompanied them, immediately below:

A. On July 5, 2010, the Prevention of Harm to the State of Israel by means of Boycott Bill, 5770-2010, was tabled before the eighteenth Knesset (the text of the Bill was appended to the response of the Knesset as R/1). The Bill was initiated by twenty-five members of Knesset from various parties, both of the coalition and opposition. The Bill was approved in a preliminary reading on July 14, 2010, and was transferred to the Constitution, Law and Justice Committee (hereinafter: the Committee, or the Constitution Committee) for preparation for a first reading.

B. The Committee conducted its first discussion of the Bill on Feb. 15, 2011 (the protocol of the meeting was appended to the response of the Knesset as R/2). The Bill was presented at the outset of the meeting by one of its initiators, MK Zev Elkin, who explained that the original draft of the Bill was broader, but pursuant to the decision of the Ministerial Committee for Legislation in this regard, the scope of the Bill was limited by the removal of sections of the Bill concerning calls for boycott by a party who is not a citizen or resident of Israel, a boycott imposed by an organ of a foreign state, and retroactive force of the legislation. MK Elkin explained that the Law was intended to provide a response to an absurd situation that had arose, in which, as he explained, states friendly to Israel prohibit the imposition of a boycott upon the state, and impose sanctions upon bodies that seek to join a boycott of Israel, while there is no parallel sanction in Israeli law. Accordingly, in his words: "This law is intended to protect the State of Israel, at least minimally. An Israeli citizen who acts against it must know that he will bear the consequences" [*ibid*., p. 3 of the protocol of the meeting].

In the course of that meeting, several members of the Committee expressed their opposition to the Bill. Among other things, they argued that it was an anti-democratic bill that restricted freedom of expression, that boycotting was a legitimate civil means for expressing dissent, and that the Law would ultimately harm the State of Israel. The legal advisor of the Foreign Ministry, Advocate Ehud Keinan, noted that, in his opinion, the Law would not be helpful in the fight against boycotting Israel, and might even harm that effort (*ibid.*, pp. 21-22 of the above protocol). The representative of the Manufacturers Association, Mr. Netanel Heiman, expressed reservations about the Bill, and argued that it should conform to the existing American law on the subject (*ibid*., pp. 22-23 of the above protocol). Similarly, Prof. Mordechai Kremnitzer, who appeared before the committee, noted that "if this bill were constructed along the lines of existing models in the world, I would not have a word to say on the constitutional

level" (*ibid*., p. 28 of the above protocol). Prof. Kremnitzer, however, added that the Bill – in the form presented – infringes fundamental rights, among them the right to freedom of expression (*ibid*., pp. 29-30 of the above protocol).

The representatives of the Ministry of Justice explained at the meeting that even after the removal of certain sections of the Bill, as aforementioned, the prohibitions established under the Bill remain too broad and should be limited (*ibid*., pp. 17-19 of the above protocol). In response, the legal advisor of the Committee, Advocate Sigal Kogut, explained that changes would be made in the wording of the Bill in order to more precisely define the term "boycott" in the Law, as well as the conduct element it comprises (*ibid*., p. 32 of the above protocol). At the end of the meeting, the Committee approved the Bill for a first reading by a majority vote.

C. On Feb. 28, 2011, even before the Bill was tabled before the Knesset for a first reading, the Committee approved a request for a revision of the Bill. Pursuant to that, the Committee was presented a revised draft of the Bill that was the result of discussions between MK Elkin and the Legal Advisors of the Committee and the Knesset (the meeting protocol was appended to the response of the Knesset as R/3). In accordance with the comments of the Knesset Legal Advisor, the definition of the term "a boycott against the State of Israel" in the amended Bill (sec. 1 of the original Bill) was narrowed, and the criminal prohibition of a call for a boycott against the State of Israel was removed (sec. 2 of the original Bill). However, it was agreed that the latter would be reconsidered in the framework of preparing the Bill for a second and third reading (see: the Explanatory Notes to the Bill that were published by the initiating members of Knesset and the Constitution Committee in 5771 H.H. 373, p. 112 of March 2, 2011). Ultimately, at the request of the Committee chair, MK David Rotem, a section was added to the Bill stating that the Minister of Finance, with the consent of the Constitution Committee, may establish provisions restricting the participation of participants in the boycott against the State of Israel in public tenders (*ibid*., pp. 3-4 of the above protocol).

At the end of the meeting, the amended Bill was approved for a first reading by a majority vote with eight supporting and four opposing, and it was also approved by the Knesset plenum in a first reading on March 7, 2011 by a majority of 32 in favor and 12 opposed, with no abstentions. The Bill was then returned to the Constitution Committee for preparation for a second and third reading.

D. On June 27, 2011, the Constitution Committee discussed the Bill in the framework of its preparation for second and third readings (the protocol of the meeting was appended to the response of the Knesset as R/5). Prior to the said meeting, the members of Knesset were presented with an amended version of the Bill, which was prepared in cooperation with representatives of the Ministry of Justice, following the Bill's approval in the first reading. This draft included a list of additional provisions regarding the denial of financial benefits from the state to anyone calling for a boycott against the State of Israel (as defined in the Bill), or anyone undertaking to participate in such a boycott (the text of the amended Bill was appended to the response of the Knesset as R/6).

In the course of the meeting, the Deputy Attorney General (Criminal Affairs), Advocate Raz Nizri, explained that the Bill, as presented to the Committee, accords with the course that "the Attorney General agreed to follow" (protocol of the meeting of June 27, 2011, p. 15). However, Advocate Nizri stressed that the Attorney General's position is that the legal course presented "is very, very marginal" and that it "raises not insignificant problems", and therefore, in his opinion, any further change in the wording of the Bill "endangers this already unstable structure" (*loc. cit.*). In this regard, Advocate Nizri noted the importance of retaining the requirement of a mental element of "malice" as a condition for imposing exemplary damages (sec. 2(c) of the Bill), and for retaining the various conditions established in the Bill in regard to denying benefits provided by the state (*ibid.*, pp. 21-26 of the above meeting protocol). The representative of the Ministry of Justice, Advocate Roni Neubauer, also underlined that in light of the exceptionality of "punitive damages" in the civil law, they should be conditioned upon an element of "malice" on the part of the tortfeasor, and should be limited to situations in which the court wishes to express real abhorrence at the tortfeasor's conduct (*ibid.*, pp. 70-71 of the above meeting protocol).

The representative of the legal department of the Ministry of Foreign Affairs, Advocate Karin Dosoretz, stressed that the Foreign Ministry shared the desire to fight the boycott phenomenon, but the Ministry was of the opinion that the Bill might lead to the opposite result (*ibid.*, p. 58 of the above meeting protocol). The Legal Advisor of the Ministry of Finance, Advocate Joel Baris, emphasized that "the Government decided to support the Bill," and therefore he was speaking "within that framework", however, in continuing, he took the view

that sec. 3 of the Bill was problematic in that it sought to introduce political values into the procedure. He added that that could carry a hidden price that could not be estimated in terms of its budgetary effect. He also expressed his fear of transferring decisions on matters tangential to the political sphere to civil servants (*ibid*., p. 72-73 of the above meeting protocol). It should be noted that, as will be explained below, this comment by Advocate Baris found expression in the final version of the Law, which established that the exercise of the authority by the Minister of Finance under sec. 4 of the Law would be by in accordance with regulations that would require the approval of the Constitution Committee (however, such regulations have not yet been promulgated).

The representative of the legal department of the Ministry of Industry, Commerce and Employment, Advocate Deborah Milstein, explained that the restrictions that the Law established in regard to participating in public tenders do not infringe Israel's international obligations, inasmuch as under the Mandatory Tenders Law, 5752-1992 (hereinafter: the Mandatory Tenders Law), the directives that will be issued under the Law will be subject to the international treaties to which Israel is a party (*ibid*., p. 72 of the above meeting protocol).

In the course of the said meeting, many Knesset members expressed their opposition to the Bill, and some of them argued that even the amended version of the Bill was too broad, infringed freedom of expression, and might accelerate the process of Israel's delegitimization.

As opposed to this, Prof. Gershon (Gerald) Steinberg of Bar Ilan University, who researches the anti-Israel boycott phenomenon, argued before the Committee that "anyone who thinks that the boycott, BDS (Boycott, Divestment and Sanctions) process, is something narrow, something marginal, something that does not harm the continued existence of the State of Israel, does not understand the phenomenon". He added that, in his opinion, anyone who opposes the Bill should suggest an alternative solution for the fight against the boycotts initiated against Israel (*ibid*., p. 63 of the above meeting protocol).

The Legal Advisor of the Committee, Advocate Sigal Kogut, explained that, in her opinion, there is a distinction between imposing restrictions on someone who calls for a boycott *of the State of Israel*, which can be justified, and the restrictions imposed upon someone who calls for the boycotting of a person due to his connection "to an area under its control", which are

problematic, in her view, and constitute "the primary constitutional problem in this tort" (*ibid*., p. 61 of the above meeting protocol).

At the request of MK Plesner, who was of the opinion that the section regarding the denial of benefits granted by the state to anyone who calls for a boycott constitutes "a deviation from the subject", under sec. 120(a) of the Knesset Rules of Procedure (now sec. 85 of the Rules), the meeting of the Committee was adjourned, and the matter was referred to the House Committee for its decision. After the House Committee ruled that the matter did not constitute a "new subject", the Constitution Committee's meeting was resumed, and in the end, all the reservations in regard to the Bill were removed, and the Bill was approved for second and third readings by a majority vote of eight in favor and five opposed (the protocol of the resumed meeting of the Committee was appended to the Knesset's response as R/7).

E. On July 10, 2011, before the Bill was debated in the Knesset plenum, MK Plesner requested that the Legal Advisor of the Knesset state his opinion as to the constitutionality of the Bill. In his response to MK Plesner that same day, the Legal Advisor of the Knesset, Advocate Eyal Yinon, explained the problem that he found in imposing tortious liability upon someone who calls for boycotting a person due to his connection to "an area under the control" of the State of Israel, and wrote, *inter alia*, as follows:

> 3. This tort [in the Law], together with the broad definition of the term "boycott against the State of Israel" […] creates a cause of action in tort for the payment of damages for calls for a boycott that are intended to influence the political dispute in regard to the future of Judea and Samaria, a dispute at the heart of the political discourse in the State of Israel for over forty years.
>
> 4. **Moreover, leaving the section as is in this wording will lead to a situation in which a call for a boycott in regard to one issue, and to one political position, will constitute a tort and grounds for other administrative sanctions, while a call for a boycott for other ideological, social or religious reasons will continue to be legitimate in the framework of public discourse. Thus, for example, a call for a boycott directed at artists who did not serve in the IDF, against universities that do not play the anthem at commencement exercises, against bodies that do not keep kosher, and of late, consumer**

boycotts against manufacturers and supermarket chains that sell products at prices that are viewed as too high, will not constitute grounds for any sanctions whatsoever, while calls for a boycott in regard to the dispute over the future of the areas of Judea and Samaria will be deemed a wrongful act that justifies the payment of damages.

[…]

5. Under these circumstances, we are of the opinion that the definition of "boycott against the State of Israel" in this broad wording, together with the tort, should be seen as an infringement that goes to the heart of freedom of political expression in the State of Israel that brings **these elements** of the Bill to the brink of unconstitutionality, and perhaps even over it.

(Emphasis original – H.M.; The letter of Knesset's Legal Advisor was appended to the response of the Knesset as R/8).

F. On the following day, July 11, 2011, the Bill was brought before the Knesset plenum for second and third readings. In the course of the plenum debate, MK Elkin clarified the reasoning grounding the extending of the Law to calls for boycotts related to Judea and Samaria (hereinafter: the Area), explaining as follows:

Anyone who examines the legislation on the subject of boycotts and the subject of discrimination in the various countries will discover a very simple thing – that even in France, and even in Germany, and even in other countries, there are types of discrimination and types of boycotts that are forbidden and that are permitted. In general, there is a basic list of characteristics of a person that the law forbids to serve as grounds for discrimination and boycott: religion, race, nationality, sex. […] In my view, **a person's citizenship and place of residence are among the most basic characteristics. One can conduct a political struggle, but boycotting a person merely because he is a citizen of the State of Israel, particularly where this causes him injury, is prohibited. And if not prohibited, then at least a person who does so must be ready to bear the cost of the injury.** […] There is no difference between a resident of Ariel and a

> resident of Tel Aviv. You want to use boycott as a means for a political struggle? Boycott. Boycott me, boycott Likud voters, whatever you like. But to boycott a person because of where he lives? […] **The dispute over the borders of the state must be carried out here, and not at the expense of companies, and not at the expense of people who live there at the behest of the State of Israel. Some like it, some do not like it, but [this is] the place for deciding the dispute – not by boycotts** [*ibid*., at pp. 168-169 of the protocol of the plenum debate; emphasis added – H.M.].

Minister of Finance, MK Yuval Steinitz, also explained that he supported the Bill due to his principled objection to boycotts of distinct groups, in view of the belligerent character of this method, stating as follows:

> Boycott of one or another particular community is, in principle, not a proper expression of freedom of expression, freedom of debate, and freedom of speech, because a boycott is belligerent. It is an attempt to use force to harm and defeat a community that thinks differently, and therefore it makes sense for the state to protect itself and its ideological or ethnic communities from such types of boycotts. [Boycott] is a deplorable, belligerent phenomenon that is […] inconsistent with the democratic idea that we debate and decide in accordance with the majority opinion and not in accordance with the power of a group that thinks differently. Not by force, not by boycott, and not by ostracism [*ibid*., at p. 99 of the protocol of the plenum debate].

Many members of Knesset expressed their opposition to the Bill, to a great extent for the same reasons expressed earlier in the meetings of the Constitution Committee referenced above.

G. At the conclusion of the debate, the Bill was approved in a second and third reading by a majority of 47 in favor, 38 opposed, and no abstentions. In the course of the debate, a reservation submitted by the Ministry of Finance was adopted, according to which the exercise of the Minister of Finance's authority under sec. 4 of the Law would be in accordance with regulations that would require the approval of the Constitution Committee, although it was also decided that if such regulations were not established, it would not detract from the authority granted under the section to the Minister of Finance.

4. Following the enactment of the Law, the four petitions before us were filed. Three of the petitions ask for the voiding of the entire Law, while one (HCJ 5392/11) argues only for the voiding of section 2-3 of the Law.

On Dec. 5, 2012, a hearing on the petitions was held before a panel of three justices. Following the hearing, on Dec. 9, 2012, an order nisi was granted, ordering the Respondents to show cause why the Law, or at least sections 2-3 of the Law, should not be voided. In the said decision, it was further decided that the hearing on the responses to the order nisi would be conducted before an expanded panel, which convened on Feb. 16, 2014.

5. Below, I will present the various parties to the petitions, and following that, I will present the responses of the Respondents. I will already state that, for the sake of clarity, and inasmuch as most of the arguments of the Petitioners and of the Respondents are repeated in the four petitions, with various differences in wording and structure, I will make a unified presentation of the gist of the arguments of the Petitioners and of the Respondents.

The Parties to the Petitions

6. Petitioner 1 in HCJ 5239/11 (hereinafter: the Avneri Petition) is one of the founders of Petitioner 2 in this petition, which is an association that, *inter alia*, acts to advance a peaceful solution between the State of Israel and the Palestinians. The Petitioners in HCJ 5392?11 (hereinafter: the Barkai Petition) are citizens and residents of the state who see themselves as potential defendants under sec. 2 of the Law, and ask that they be permitted to call for a boycott of the settlements and products produced there (but not against the State of Israel as such). Petitioner 2 in HCJ 5549/11, MK Dr. Ahmed Tibi, is a member of Knesset on behalf of Petitioner 1 of this petition, which is a political party that was elected to the 19th Knesset (hereinafter: the Ta'al Petition). The Petitioners in HCJ 2072/12 (hereinafter: the Women's Coalition Petition) are various associations that work, *inter alia*, for the realization of human rights and for equality among the citizens of the State of Israel.

Prior to filing the petitions, Petitioner 2 in the Avneri Petition and Petitioner 1 in the Women's Coalition Petition published lists of products originating in Jewish communities in the

Area, in various ways, and called for boycotting them. However, pursuant to the passage of the Law, they ceased to do so, in fear that the Law's sanctions would be enforced against them.

7. The Respondents in the above Petitions are: the Knesset and the Speaker of the Knesset (above and hereinafter: the Knesset), the Minister of Finance, the Minister of Justice, and the Attorney General (hereinafter collectively: the Government), and the Legal Forum for Israel (hereinafter: the Legal Forum), which was heard in the proceedings at its request.

8. The Respondents' claim, upon which the petitions are grounded, is that the Boycott Law is inconsistent with the constitutional standards and values established in Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. However, before addressing the arguments of the parties in regard to the constitutional tests in detail, I will present two preliminary questions raised by the Respondents, and the Petitioners' response to them.

A. The focus of the Petition: According to the Respondents, the Petitioners' arguments in the various petitions focus upon the claim that the Law restricts freedom of political expression in all that concerns the policy of the State of Israel in regard to the Area, and that the Law precludes calling for imposing a boycott due to the connection of a person or party to the Area. That being the case, the Respondents argue that the petitions are not directed at the constitutionality of the Law in its entirety, but are directed solely at the term "an area under its control" in the definition of "boycott against the State of Israel" in sec. 1 of the Law, and can, therefore, only lead to the deletion of those words.

As opposed to this, in the course of the hearing, the Respondents were asked if, indeed their petitions focused only upon the term "an area under its control" in sec. 1 of the Law, and some of them responded that their petitions were directed at the Law in its entirety.

B. Ripeness: The Respondents are of the opinion that the petitions should be denied for lack of ripeness, lack of concreteness, and for generality. According to the Respondents, the Boycott Law has not yet been applied by the courts, and therefore, there is no need to decide the question of its constitutionality at this time. In regard to the tortious liability imposed by the Law, the trial court is granted broad discretion as to the construction of the elements of the tort, as well as in regard to the conditions for awarding damages. That being the case, the need for constitutional review of the Law – before the trial courts have addressed it in a concrete case – has not yet

ripened. This is also the case in regard to the administrative restrictions imposed by the Law, regarding which the Minister of Finance is granted broad discretion in drafting the provisions that would lead to the imposition of the said sanctions. Moreover, at the time of the hearing (and to the best of my knowledge, to this day) the parameters for the Minister's exercise of the said authority have not been established, and none of the Petitioners laid a clear foundation attesting to its having suffered injury as a result of the administrative restrictions. In light of the above, and despite the "chilling effect" that the Law may cause, the Respondents are of the opinion that the petitions are not yet ripe, and that should suffice for their denial *in limine*.

As opposed to this, the Petitioners argue that the question of overturning the Boycott Law is appropriate for consideration. According to the Petitioners in the Avneri Petition, since 1995 they have published lists of products produced in the Area and called for their boycott. Pursuant to the enactment of the Law, they have been forced to desist from that activity. Therefore, the Law has a "chilling effect" upon them, and therefore, as stated, the Petition to void the Law is ripe for decision. The Petitioners in the Women's Coalition Petition joined that argument. In addition, all of the Petitioners argue that the scope of the Boycott Law is sufficiently clear, and there is no reason, in principle, to defer its review until after it is actually implmented.

Arguments in regard to the Constitutional Tests

9. As noted, the Petitioners argue on the merits that the Boycott Law is unconstitutional. In their view, the Law *infringes* various constitutional rights (among them: freedom of expression, equality, and freedom of occupation), *without* meeting the criteria established in that regard in the "Limitations Clauses" of the aforementioned value-based Basic Laws. The Petitioners further note that this argument is also raised in the position expressed by the Legal Advisor of the Knesset (in his letter of July 10, 2011, referenced in para 3(E) above). As opposed to this, the Respondents are of the opinion that the Law meets the constitutional criteria.

Therefore, I will now present the arguments of the parties in accordance with the various stages of the model for constitutional review.

A. *Infringement of a Constitutional Right*

10. First, the Petitioners argue that the Boycott Law infringes the *right to freedom of expression.* Infringing freedom of expression, including freedom of political expression, has been recognized in the case law as an infringement of human dignity. According to the Petitioners, boycotting is a legitimate democratic device, like a demonstration or a protest march, which allows citizens to express their opposition to the policy of a private or public body. Thus, for example, various communities impose a variety of boycotts for such reasons as consumer and religious considerations, and reasons of conscience. Therefore, infringing the possibility of calling for a boycott against the State of Israel, as defined by the Law, by means of imposing sanctions upon anyone who does so, infringes freedom of expression.

According to the Petitioners, the Law also infringes the *right to freedom of occupation*. Sections 3 and 4 of the Law make it possible to exclude a person who calls for a boycott, or commits to participate in a boycott against the State of Israel, from participating in (public) tenders, as defined in the Mandatory Tenders Law, and also permit denying him various economic benefits. In so doing, the Petitioners argue, the Law infringes freedom of occupation.

Moreover, according to the Petitioners, over the last few years there have been states and companies that have objected to the Government's policy in the Area, and that refuse to do business with companies that operate there. As a result, companies that are interested in breaking into foreign markets, or to continue their overseas activities, may be required to declare that they do not manufacture or purchase goods from the Area, and that they do not operate there, and they should be permitted to make such declarations, as otherwise, their business and freedom of occupation will be harmed.

The Petitioners further argue that the Law also infringes the *right to equality*. The right to equality has also been recognized by the case law as deriving from the right to human dignity. The Petitioners argue that the Boycott Law does not oppose boycotts as such, but rather focuses only on those that call for a boycott of the State of Israel, its institutions, or activities conducted in "an area under its control". According to the Petitioners, distinguishing between one boycott and another is unacceptable, and just as boycotts motivated by consumer or religious concerns, matters of conscience, and so forth are tolerated, the Law should similarly view those who call for boycotting the State of Israel, as defined by the Law. They argue that the provisions of the Law also potentially harm only certain sectors of society, due to their political beliefs. They

further note in this regard that the fact that the European Union imposes economic sanctions upon activity in the Area, while Israel nevertheless continues its commercial, cultural and academic relations with EU members, constitutes a form of unequal treatment by the State in regard to citizens and residents of Israel who independently wish to call for a boycott of goods produced in the Area, as opposed to those who are required to do so by foreign governmental agencies, and whose acquiescence, with certain reservations, is not prohibited.

11. As opposed to the Petitioners, the Respondents are divided in regard to the question of whether the law infringes the *right to freedom of expression*. The Attorneys for the Knesset expressed the opinion that while the Law indeed infringes the freedom of expression, that infringement is, in their opinion, proportionate (as will be explained below). As opposed to this, the representatives of the State Attorney's Office are of the opinion, expressed before us by their attorney, that although the tortious liability that may be imposed by the Law indeed constitutes a certain degree of infringement of freedom of expression, the administrative restrictions to not pose such an infringement. The reason for this is related to the fact that, according to the Government's approach, neither a citizen nor any other body has a vested right to enjoy various benefits that the state grants, and clearly, the Government has the right not to transfer funding that may be exploited for activities opposing its policy, or for harming third parties merely due to their connection to the state, one of its institutions, or an area under its control. In regard to the authority to restrict participation in tenders, the Government is of the opinion that although the principle of equality in the participation in tenders must be upheld, that principle is premised upon the obligation to ensure equal, fair distribution of the budgetary "pie". Therefore, these restrictions should be examined in the same manner as the restriction of benefits under sec. 4 of the Law. The Government adds that the state's choice not to grant funding to a particular body does not necessarily lead to an infringement of its freedom of expression or freedom of occupation, as its freedom to act in the manner it chose is not impaired (but only its possibility of obtaining public funding intended for given purposes that a governmental agncy wishes to promote).

In this context of the infringement of freedom of expression, the Respondents add that, actually, calling for and employing boycotts limit freedom of expression in light of their rationales. One of the purposes of the right to freedom of expression is the promotion of a "free

marketplace of ideas". In the opinion of the Respondents, calling for and participating in a boycott introduce economic considerations and constraints into that "marketplace of ideas", and prevent it from functioning as a "*free* marketplace of ideas".

Insofar as the Petitioners' claims in regard to the right to *equality*, the Respondents are of the opinion that the fact that the legislature saw fit to regulate a certain issue in legislation, believing that the matter required an appropriate legislative response (while leaving other issues without parallel regulation) does not give rise to a constitutional cause for annulling the Law by reason of an infringement of equality. They argue that the foundation of the right to equality, as recognized in the case law, is an infringement of "the autonomy of the individual will, freedom of choice, physical and intellectual integrity of the human being and the entirety of a person's humanity". In their opinion, the fact that there is no legislation that addresses matters that are similar or close to the boycotts that are precluded by the Law does not constitute such an infringement.

B. *Is the Law befitting the Values of the State of Israel and intended for a Proper Purpose?*

12. According to the Petitioners, the primary purpose of the Law is to prevent a boycott of the Area, to silence the expression of opposition to the Government's policy, and thereby to intimidate only a particular side of the political map. The Petitioners further argued that the Law advances a punitive purpose that seeks to impose sanctions upon political speech on the basis of its content. In the opinion of the Petitioners, that purpose of the Law is improper in that it limits the democratic tools that a minority possesses for expressing its legitimate opposition to the settlements and the Government's policy.

As opposed to this, the Respondents are of the opinion that the purpose of the Law is to protect the state (or Israeli institutions and entities) against the imposition of a boycott that might harm them merely because of their connection to the state, one of its institutions, or an area under its control. This is a proper purpose, in their view, in that it is an expression of the state's obligation to protect the individuals and institutions connected to it, and to prevent discrimination against Israeli citizens on an illegitimate basis (such as their place of residence). Moreover, an additional purpose of the Law is to prevent harm to the international standing of

Israel, or harm to its relations with other states and its foreign relations, which is also, in the Respondents' view, a proper purpose.

The Legal Forum asked to add in this regard that the scope of the boycott phenomenon and calls for boycotts of Israel and its conduct, and the negative potential that inheres therein, is very significant, and for that reason, the enactment of the Law was necessary in order to prevent significant harm to the state and its citizens. In this regard, the Legal Forum pointed to many extreme publications by the BDS movement throughout the world that call for boycott, divestment and sanctions against Israel, and for the rejection of the existence of the state. In the meantime, prior to the writing of this judgment, many books and articles have been published that treat of this phenomenon in various sectors that it affects, and its dangers for the State of Israel and its institutions. See: Cary Nelson & Gabriel Noah Brahm, eds., *The Case against Academic Boycotts of Israel* (2015) (hereinafter: *The Case against Academic Boycotts*); Ben-Dror Yemini, *The Industry of Lies*, especially pp. 271-290 (2014) (Hebrew); Amnon Rubinstein & Isaac Pasha, *Sdakim Ba'academia* (*Academic Flaws: Freedom and Responsibility in Israeli Higher Education*), especially pp. 117-132 (2014) (Hebrew) (hereinafter: Rubinstein & Pasha, *Academic Flaws*); Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, Is Still Illegal* (January 2015) (unpublished manuscript) (hereinafter: Greendorfer).

C. *The Proportionality Requirement*

13. The Petitioners are of the opinion that the Law does not meet the requirement of proportionality and its three subtests, as shall be detailed below.

(1) *The Rational Connection Test*

14. The Petitioners are of the opinion that the Law does not serve or further its declared purpose. According to them, the Boycott Law is entirely ineffective in the fight against the international boycott that motivates the Law's initiators, and in practice, it may actually amplify the phenomenon of boycotts against Israel, as it will harm Israel's image as a democratic state. The Petitioners add that they are of the opinion that the Law will also not lessen the number of people calling for a boycott of Israel, inasmuch as their motivations are ideological, and it is,

therefore, unreasonable to imagine that the existence of the Law will cause them to refrain from calling for a boycott.

As opposed to this, the Respondents are of the opinion that there is a rational connection between the Law's sanctions and the purpose that the Law seeks to serve. They argue that, on the one hand, the boycott tort and the administrative restrictions may remedy the economic harm, to the extent that it derives from a call to boycott, while on the other hand, they present those who call for boycott with a logical choice between that conduct and the full realization of their freedom of speech (knowing that it may cause harm to third parties), and their desire to enjoy various governmental benefits.

(2) *The Least Harmful Means Test*

15. The Petitioners are of the opinion that there are tools that could ensure the purpose of the Law even without exercising the means set out in the Law, for example, by means of establishing a system for compensating those who are harmed by the boycott from the public purse. The Petitioners further argue that already existing laws can be utilized to achieve the purposes that the Law's initiators sought to promote. For example, in their opinion, a person harmed by the boycott can already directly sue someone who harms their business on the basis of the Civil Wrongs Ordinance [New Version] (hereinafter: the Civil Wrongs Ordinance). In their opinion, in regard to tenders, as well, specific conditions can be established in individual tenders that would prohibit the participation in boycotts against Israel, and therefore there is no need to employ primary legislation for this purpose.

As opposed to this, the Respondents argue that the Law meets the Least Harmful Means Test. According to them, the boycott tort does not normally enable a person to recover more than the actual damage caused to him by the person calling for a boycott (except in regard to damages under sec. 2(c) of the Law, which is limited by the requirement of "malice", as will be explained below). In regard to the administrative restrictions, as well, the sanctions concern only the depriving of *benefits* (which do not constitute vested rights) from a person who calls for a boycott of the State of Israel, and therefore this would appear to be a reasonable infringement, under the circumstances, in regard to those who choose to act that manner.

(3) *The Proportionality Test "Stricto Sensu"*

16. In the opinion of the Petitioners, the interest that Israeli citizens and residents not call for boycotting the State of Israel and the boycotting of produce of the Area is not proportionate to the infringement of the fundamental rights of those who believe that the settlement enterprise in the Area is an impediment to peace and to the future of the State of Israel. The Petitioners further specifically emphasize, in regard to sec. 2(c) of the Law, that under the said section it is possible to impose punitive damages upon a person calling for a boycott even without proof of damage, contrary to the accepted principles grounding tort law.

As opposed to this, the Respondents argue that the Law meets the Proportionality Test *stricto sensu*, in view of "narrowing aspects" in the Law that limit the harm that it might cause to constitutional rights. In this regard, the Respondents refer to the following aspects:

a) The Law does not directly prevent political expression in regard to disputed political issues, but rather it concerns only a call for instituting a (economic, cultural, or academic) boycott against the State of Israel, as the term is defined by the Law, which alone is prohibited.

b) The call for a boycott to which the Law applies must be public and done knowingly in order that liability for it be imposed in principle.

c) The criminal sanction incorporated into the Law in its original version was deleted.

d) The general principles of tort law apply, in principle, to an action under the boycott tort, including the "*de minimus*" proviso, the requirement of proof of damage, and a causal connection between the tort and the damage, as a precondition to obtaining a remedy.

e) In regard to the boycott tort, imposing of damages without proof of damage is conditional upon a mental element of "malice". Therefore, according to the Respondents, this section will only rarely be employed. According to the Respondents, the trial courts asked to award damages under this section will address the Law's malice requirement.

f) In regard to the administrative restrictions, the Law establishes a complex administrative process that involves several relevant actors who can oversee the manner of the exercise of discretion, and all of them are subject to the principles of administrative law.

Additional Arguments that were raised in general

17. The Petitioners also argue that the Law is logically flawed. The reason for this is that, in practice, the Law establishes that a call for a boycott is, in their view, more serious than the boycott itself, inasmuch as while the Law imposes various sanctions upon a person who calls for a boycott, a person's actual choice to institute a boycott (e.g., in regard to products produced in the Area) is not, in their opinion, deemed a tort in the eyes of the Law, and does not, in their view, lead to punitive or administrative sanctions.

The Respondents denied the logical flaw, but added that even if the Petitioners were correct, that would not give rise to a constitutional claim that would lead to the invalidity of the Law. The Government further argued before us that, at times, the call for a boycott may indeed be more serious than the boycott itself, due to the possible influence of the call for a boycott, which can exceed a particular person's individual decision.

18. The Legal Forum addressed the distinction that arose in some of the arguments of some of the Petitioners (to which the Government and the Knesset related, as well), by which – as an alternative to striking down the Law in its entirety – consideration should be given only to the erasure of the term "an area under its control" in sec. 1 of the Law. According to the Legal Forum, even if the term "an area under its control" in sec. 1 of the Law – defining a "boycott against the State of Israel" – were to be erased, that rejection might lead to boycotts against an entire community, and that would suffice to damage the purpose of the Law. Moreover, even if that term were erased, it would still be possible to justify any boycott against the State of Israel, or a community in Israel (such as the residents of the settlements, because they have a connection with the State of Israel).

19. Additional arguments raised by the parties will be addressed in the course of the next chapter, as necessary. However, before proceeding, we should note that in the course of the proceedings, there was a request for an interim order (in the Ta'al Petition), which was denied on July 27, 2011 (in regard to the considerations for granting an interim order against a law in cases of constitutional review, see HCJ 1715/97 *Israel Investment Managers Association v. Minister of*

Finance, IsrSC 51 (4) 367, 380-382 (1997) (hereinafter: the *Investment Managers Association* case).

I shall now examine the case on the merits.

Discussion and Decision

20. I will begin with a necessary observation. The examination that follows will not consider the *wisdom* of the Law (which was even questioned by some of the Government's representatives, as noted in para. 3, above), but only its constitutionality. In this regard, we are guided by the words of President A. Barak in the *Investment Managers Association* case (*ibid*., p. 386), as follows:

> The Court does not come to replace the legislature's considerations with its own. The Court does not put itself in the shoes of the legislature. It does not ask itself what means it would have chosen if it had been a member of the legislative body. The Court performs judicial review. *It examines the constitutionality of the law, not its wisdom. The question is not whether the law is good, effective or just. The question is whether it is constitutional [...] Establishing policy is the role of the legislature, and its realization is the role of the government, which are granted a margin of constitutional appreciation* [emphasis added – H.M.].

In view of the above criteria, and having reviewed the copious material submitted to us, and heard the arguments of the attorneys of the parties, I have concluded that the Law can, for the most part, overcome the requirements of the "Limitation Clause" – although not easily – with the exception of sec. 2(c), which must be struck down, and so I shall recommend to my colleagues.

My reasons for the said conclusions will be set out in detail below. The discussion will proceed as follows: I shall first examine whether or not there is an infringement of a constitutional right, and show that the Law does, indeed, infringe the right to freedom of expression, as well as other constitutional rights. Following that, I will examine whether or not the various provisions of the Law meet the tests established by the "Limitation Clause", while,

inter alia, drawing upon comparative law. Finally, I will provide further support for my conclusion by reference to additional theories that have been developed in the field of constitutional law in regard to the invalidation of laws.

I will now set out my examination from first to last.

Infringement of a Constitutional Right

21. From the language of the Law, presented above in para. 2, we learn that anyone who knowingly publishes a *call* for the imposition of a boycott against the State of Israel, as defined by the Law, may be deemed to have committed a tort. Moreover, the participation of such a person, or one who has committed to participate in such a boycott in public tenders, may be restricted, and it is possible that such a person may be prevented from receiving various financial benefits (governmental grants, tax exemptions, state guarantees, etc.).

Thus we find that most of the sanctions imposed by the Law already apply at the *speech stage*.

It is, therefore, hard to deny that the Boycott Law indeed infringes *freedom of expression* (as argued by the Petitioners, and as Respondent admit, in part), which is "closely and materially bound to human dignity" (as stated by my colleague (then) Justice M. Naor in HCJ 10203/03 *Hamifkad Haleumi Ltd. v. Attorney General*, IsrSC 62 (4) 715, 763 (2008) [English: http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general, at para. 26]; and see: Aharon Barak, *Human Dignity: The Constitutional Value and its Daughter Rights*, vol. 2, pp 708-712 (2014) (Hebrew), [published in English as *Human Dignity: The Constitutional Value and the Constitutional Right* (2015)] (hereinafter: Barak, *Human Dignity*), and the case-law cited there). However, we are not concerned here with an infringement of the core of freedom of expression, even where political speech is concerned, inasmuch as the infringement is relatively limited, and applies *only* to a call for a *boycott against the State of Israel*, as defined by the Law, or anyone who commits to participate in such a boycott, which is a legal act that exceeds speech.

Here we must pause for a moment to explain that the laws concerning calls for (and participation in) a boycott have undergone various incarnations in legal and political history. In

the ancient world – both in Jewish law and in Greece – there was an institution of ostracism under which people who acted contrary to societal rules, or who were feared might undermine the social order, were ostracized (or, at times, exiled) (see *Ha'encyclopedia Ha'ivrit*, vol. 18, pp. 51-59, *s.v*. "*Herem (nidui, schemata) bayahadut*" (Hebrew); *ibid*., vol. 2, pp. 29-30, *s.v*. "Ostracism"; *The Case Against Academic Boycotts*, pp. 4-5). However, even early in those days, many began to sense that the institution of ostracism was problematic and harmful to democracy, and in this regard, the renowned Greek philosopher Plutarch (ca. 45-120 CE), in his monumental work *Parallel Lives*, tells the story of Aristides (a renowned Greek statesman at the beginning of the 5th cent. BCE, of whom Plato declared that "of all the great renowned men in the city of Athens, he was the only one worthy of consideration"). Aristides was called "the Just" in appreciation of his virtues, but Athenian society nevertheless voted to ostracize and exile him. When a common citizen in the crowd was asked why this was done, he replied that he was "tired of hearing him everywhere called the just". (At the end of the story, Athenian society realizes its error and returns Aristides to the community and his status, see: *Ha'encyclopedia Ha'ivrit*, vol. 5, pp. 871-872, *s.v*. "Aristides" (Hebrew); *The Case Against Academic Boycotts*, pp. 4-5).

Since then, and for centuries, religious and political thinking have expressed doubts in regard to ostracism (see, for example, in our sources: *Babylonian Talmud, Tractate Mo'ed Katan* 17a). Nonetheless, modern history has seen boycotts employed from time to time, as for example, in the American Revolution, when (on Dec. 16, 1773) the Boston Tea Party saw a cargo of imported tea thrown into the sea, followed by a boycott of various British goods by Americans who sought freedom and emancipation from England. However, the institution was only "officially" revived and given its "modern" name in the 19th century, following a strike of tenant farmers against Captain Charles Boycott in 1873. After his retirement from the army, Captain Boycott began a campaign to evict Irish tenant farmers from their farms due to their refusal to agree to a raise in rent. The response of the farmers and their supporters was expressed in a successful call to cut off all ties to Boycott, the other landowners, and their produce. The institution has since been called "boycott" in English. In time, criticism and doubts arose in regard to the institution of boycotts, and the 20th century saw the draawing of various distinctions between "permissible boycotts" (such as the Montgomery Bus Boycott, and Gandhi's boycott of British goods), and "impermissible boycotts" that are prohibited by law.

And see: Gary Minda, *Boycott in America: How Imagination and Ideology shape the Legal Mind* (1999), where the author notes (at p. 197):

"Group boycotts may appear to some as acts of political terrorism."

That statement is made even though, in the United States, boycotts against expressions of racism, or in the framework of labor disputes, are deemed permissible. See: *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); and see: *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982) (hereinafter: the *Claiborne* case); also see: Yaniv Meno, "Consumer Boycotts, the Ethical Weapon of the Consumers," 15 *Hamishpat* 729 (2010) (Hebrew); Nili Cohen, "Law, Play, Game - The 'Merchant of Venice' and the 'Breakdown'," 51 *Hapraklit* 407, 433-434 (2012) (Hebrew) http://www.hapraklit.co.il/_Uploads/dbsAttachedFiles/Nili_Cohen_Article.pdf).

22. In light of the finding that we are faced with an infringement of freedom of expression, which is a "daughter right" of human dignity (to adopt the term coined by Prof. Barak in his book *Human Dignity*, *ibid*.), the *sanctions* in the Boycott Law constitute an infringement of a protected constitutional right. However, that constitutional right, like all other constitutional rights in Israel, is *not absolute*, but rather relative, and may be restricted if the infringement meets the requirements of the "Limitation Clause" in sec. 8 of Basic Law: Human Dignity and Liberty (see: Aharon Barak, *Proportionality in Law*, 53 (2010) (Hebrew) (hereinafter: Barak, *Proportionality in Law*) [published in English as: Aharon Barak, *Proportionality – Constitutional Rights and their Limitations*, (Doron Kalir, trans.)]; HCJ 2194/06 *Shinui- The Center Party v. the Chairman of the Central Elections Committee* (2006) (published in Nevo) (hereinafter: the *Shinui* case); HCJ 236/*13 Otzma Leyisrael v. Chairman of the Central Elections Committee for the 19th Knesset* (2013) (published in Nevo)).

I will, therefore, examine below whether the Boycott Law meets the requirements of the "Limitation Clause". But before doing so, I would note that we are aware of many instances of legislative prohibitions that were recognized as valid, even though they infringed freedom of expression *per se*. I would note a few examples: the prohibition of defamation (under the Prohibition of Defamation Law, 5725-1965 [19 L.S.I. 254] , which establishes both a criminal offense and a civil tort); racial incitement (see: sec. 144B of the Penal Law, 5737-1977 (hereinafter: the Penal Law); incitement to terrorism (see: the Prevention of Terrorism Ordinance, 5708-1948, and see: Dafna Barak-Erez & Dudi Zechariah, "Incitement to Terrorism

and the Limits of Freedom of Expression: Between Direct and Indirect Limits," 35 *Iyunei Mishpat* (2012) (Hebrew) (hereinafter: Barak-Erez & Zechariah); sedition (see; sec. 134 of the Penal Law. And see: Mordechai Kremnitzer and Liat Levanon-Morag, "Restricting the Freedom of Expression Due to Fear of Violence – On the Protected Value and Probability Tests in Crimes of Incitement to Sedition and Incitement to Violence in the Wake of the Kahane Case," 7 *Mishpat U'Mimshal* 305 (2004) (Hebrew). A. Dorfman, "Freedom of Speech and the Economic Theory of Uncertainty", 8 *Mishpat U'Mimshal* 313 (2005) (Hebrew). Barak, *Human Dignity*, pp. 737-738); procurement of prostitution (see: secs. 205B and 205C of the Penal Law); publications infringing a person's privacy (see: sec. 2(11) of the Protection of Privacy Law, 5741-1981, and recently: CA 8854/11 *Anonymous v. Anonymous* (April 24, 2014) (published in Nevo); restrictions upon political campaign advertising (see: Elections (Means of Propaganda) Law, 5719-1959, and recently, HCJ 979/15 *Yisrael Beiteinu Party v. Chairman of the Central Elections Committee for the 20th Knesset* (Feb. 25, 2015) (published in Nevo), and note that this judgment is currently pending in a Further Hearing); offences concerning public services *that explicitly include a threat or intimidation by ostracism* (see sec. 161 of the Penal Law; as well as contempt of court (see: sec. 255 of the Penal Law), and insulting a civil servant (see: sec. 288 of the Penal Law. And see: Re'em Segev (under the supervision of Prof. Mordecai Kremnitzer), *Freedom of Expression against Governmental Authorities*, pp. 31-35 (2001) (Hebrew)).

It should be noted that some of the above provisions fall within the scope of the Validity of Laws provision under sec. 10 of Basic Law: Human Dignity and Liberty. On the interpretation of that section, see: Aharon Barak, "Validity of Laws," (to be published in the *Beinisch Volume*); FH 5698/11 *State of Israel v. Mustafa Dirani* (January 15, 2015) (published in Nevo) (hereinafter: the *Dirani* case). Moreover, the case law of this Court has approved restrictions imposed pursuant to expressions (that would be deemed to be within the scope of freedom of expression in the United States) that smacked of racism, even though the restriction had no express statutory support. See: HCJ 4646/08 *Lavi v. Prime Minister* (Oct. 12, 2008) (published in Nevo).

Thus we see that abstract "freedom of expression" is not the be-all and end-all. Against this background, this Court's case law has, indeed, quoted with approval the words of United States Supreme Court Justice Brennan that "debate on public issues should be uninhibited, robust

and wide-open" (see: CA 723/74 *Ha'aretz Daily Newspaper Ltd. v. Israel Electric Corporation*, IsrSC 31 (2) 281, 296 (1997) *per* Shamgar J.) [English: http://versa.cardozo.yu.edu/opinions/haaretz-daily-newspaper-ltd-v-israel-electric-corporation]; and see: HCJ 399/85 *Kahane* v. *Broadcasting Authority*, IsrSC 41 (3) 255, 280 (1987) (hereinafter: the *Kahane* case). However, when it found that the infringement of the said freedom met *all* of the conditions of the "Limitation Clause" (including the requirement of proportionality) in circumstances in which permitting the expression "could undermine axiomatic foundations in a manner that might threaten the social and national fabric" (HCJ *Bakri v. Israel Film Council*, IsrSC 58 (1) 278, 249 (2003)), the Court held that the restriction *would be approved* (and compare: para. 9 of the opinion of Barak P. in the *Shinui* case).

23. At this point we should note that even the case law of the Supreme Court of the United States – where the First Amendment to the Constitution grants particularly broad protection of freedom of expression – has created exceptions:

First, everyone agrees that protection does not extend to a person falsely shouting "fire" in a packed theater, thus causing unnecessary panic, as Holmes J. stated in *Schenck v. United States*, 249 U.S. 47 (1919):

> The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic.

These words have frequently been quoted in the past and were most recently referred to by my colleague Justice N. Hendel in LCrimA 2533/10 *State of Israel v. Michael Ben Horin* (Dec. 26, 2011) (published in Nevo). I would stress that this exception is somewhat artificial in that there is general consensus that falsely shouting fire in a theater may cause harm (and is therefore not protected), whereas the justification for calling for a boycott against the state is the subject of political debate. Nonetheless, along with this agreed exception, the United States – which is the most liberal in this field – has developed additional exceptions and new approaches, insofar as this has become necessary by changing times and needs. I will address these in para. 24A below, and further on.

24. The *constitutional examination* that will be presented in my opinion will, as noted, focus on the *legal aspects of the relevant provisions of the Law, and will also be aided by comparative law*. However, several additional, basic premises underlying the examinations must be laid out:

(a). It would seem that when expression does not solely concern an *attempt to persuade* the public in regard to facts, beliefs and worldviews, but also calls for *action*, we enter an area that goes beyond mere freedom of expression, and the matter also concerns, *inter alia*, the legality or morality of the referenced act (the boycott), its general context, and other considerations that balance the various interests concerned. Thus, a call to participate in a criminal act, or in a restrictive trade practice, or to breach a contract is generally prohibited (subject to exceptions). Therefore, we do not find a general law treating of boycott, or as Stevens J. stated in the United States Supreme Court decision in the *Claiborne* case, boycott is a concept that has a "chameleon-like" character that presents "elements of criminality and elements of majesty" (*ibid.*, at p. 888). Thus, even in the United States, where freedom of expression enjoys primacy relative to other fundamental rights, sometimes a call for a boycott is permissible and deemed to fall within the scope of "freedom of speech" (see: the *Claiborne* case), and sometimes it is limited or prohibited, despite "freedom of speech" (and see: *International Longshoremen's Association, AFL-CIO, v. Allied International, Inc.*, 456 U.S. 212 (1982); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (hereinafter: the *Holder* case); the latter two cases are closer to the material of the case at bar).

Thus, while almost every expression of opinion is permissible in a democratic state, and the same is true, in principle, in regard to demonstrations (subject to certain restrictions of public safety), a *call for a boycott* is *context-contingent*, and involves, *inter alia*, the "legality" of the said boycott. Thus, for example, a consumer boycott that serves consumer objectives is generally possible (but an "advertising boycott" that harms the freedom of the press is generally deemed to be prohibited, in addition to the antitrust aspects that may be involved), while a boycott for a political end is generally forbidden. (See: Gordon M. Orloff, "The Political Boycott: An Unprivileged Form of Expression," 1983 *Duke L. J.* 1076 (1983) (hereinafter: Orloff, "The Political Boycott"); and see: CA 115/75 *Israeli Association of Travel and Tourism Agents v. Kopel Tours Ltd.*, IsrSC 29 (2) 799 (1975).

Because the determination in regard to a boycott in the United States depends upon its type and circumstances, judicial review in this area is conducted from "the bottom up", and is carried out as applied review rather than as facial review. On these distinctions and their consequences, see Ronen Polliack, "Relative Ripeness: As-Applied or Abstract Constitutional Judicial Review," 37 (1) *Iyunei Mishpat* 45 (Feb., 2014), written following HCJ 3429/11 *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance*, (Jan. 5, 2012) (published in Nevo) [English: http://versa.cardozo.yu.edu/opinions/alumni-association-arab-orthodox-school-haifa-v-minister-finance] (hereinafter: the *Alumni Association* case); and Elena Chachko, "On Ripeness and Constitutionality: HCJ 3429/11 *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance* and HCJ 3803/11 *Israeli Capital Markets Trustees Association v. State of Israel*," 43 *Mishpatim* 419 (2013) (hereinafter: Chachko, "On Ripeness and Constitutionality") (for a detailed discussion of the ripeness doctrine in the context of our discussion, see para. 60, below).

(b). In regard to the issues that are the subject of the petitions at bar, the Law defines itself – even by its name – *as intended to prevent harm to the State of Israel by means of a boycott*. We thus find that we must assume as a basic fact that the Knesset chose to enact legislation to aid in the state's battle against those who seek to ostracize it and its residents.

(c). It would appear that both the legislature and the Petitioners (with the exception of the Petitioners in the *Barkai* Petition), as well as the BDS (Boycott, Divestment and Sanctions) Movement, which acts against Israel, make no distinction between the State of Israel and its institutions, and areas under the control of the state. In calling for such a boycott, those addressed are asked to refrain from any economic, cultural, or academic connection with a person or other body solely *due to their connection* to the State of Israel or its institutions, or to areas under its control, *and not due to their conduct*.

As noted, we addressed questions in this regard to the parties in the course of the hearing. Some of the attorneys for the Petitioners replied that even if the settlements (which are currently the focus of the calls for boycott) did not exist, it would still be permissible, in their opinion, to call for a boycott of the State of Israel, as defined by the Law, as long as Israel continues to conduct itself in a manner that they view as discriminating against the Arab minority, or does not change its character (as a Jewish state). True to this approach, some of the attorneys of the

Petitioners informed us that they believe that it would have been permissible (even prior to the peace accords with Egypt and Jordan, and the "Paris Protocol" with the Palestinian representatives) to call for participation in the Arab League's economic boycott against Israel – a boycott that, at the time, inflicted significant economic harm to the State of Israel and its residents when many international companies refused to trade with Israel, or conduct business in Israel. According to this view, the same legal approach should apply both to the current situation, in which, in the opinion of the Petitioners, it is permissible to encourage participation in boycotts against Israel, even in the future, and even if an arrangement for coexistence is achieved between Israel and its neighbors, as long as all the other "claims" that they see as justifying the call for a boycott continue to exist.

At this juncture, we should recall that the State of Israel was rescued from the said "Arab Boycott", *inter alia*, thanks to specific American and European legislation that prohibited participation in the boycott, or submission to it – *legislation that remains in effect in those countries* (for the details of that legislation, see the surveys prepared by the Knesset Research and Information Center that were presented to the Constitution Committee http://www.knesset.gov.il/mmm/data/pdf/m02861.pdf (Hebrew); and see: Greendorfer in regard to the current situation in the United States. The U.S. legislation that prohibited cooperation with the Arab Boycott was not found to be repugnant to the First Amendment of the U.S. Constitution, see: *Briggs & Stratton Corporation v. Baldridge*, 782 F.2d 915 (7th Cir. 1984); *The Trane Company v. Baldridge*, 552 F. Supp. 1378 (W. Dist. Wisc. 1983). On the situation in Europe, see below, para. 49*ff*.).

25. As we see from the above, a call for participation in *the boycott against the State of Israel*, as defined in the Law, organized by various actors in the United States, Europe, or Israel constitutes *encouragement* to participate in an unlawful act, or conduct that comprises prohibited elements of discrimination, impermissible intervention in contractual relations, or even restrictive trade practices (all in accordance with the relevant law), regarding which, in principle, liability can already be imposed under the existing law. Nevertheless, the Knesset was of the opinion that it would be appropriate to provide a more tightly defined normative framework for the said wrongful conduct, and therefore three principles were established under sec. 2 of the Law:

(a) Publishing a call for imposing a boycott against the State of Israel, as defined by the Law, and subject to the conditions set out in sec. 2(a) of the Law, constitutes a tort (sec. 2(a) of the Law).

(b) In regard to sec. 62(a) of the Civil Wrongs Ordinance, a person who causes a breach of a legally binding contract by calling for a boycott against the State of Israel will not be deemed to have acted with sufficient justification (sec. 2(b) of the Law).

(c) Under sec. 2(c) of the Law, the court may impose damages that are not contingent upon proof of damage (hereinafter: exemplary damages) upon anyone who commits a tort, as defined by the Law.

In addition to the above, the Law establishes that, in the context of secs. 3-4, the Minister of Finance is granted the authority – subject to the conditions stated therein – to restrict the participation in a tender (in accordance with the Mandatory Tenders Law), or to withhold economic benefits as defined in sec. 4 of the Law, in regard to anyone who publishes a call for the imposition of a boycott against the State of Israel, as defined by the Law, or who commits to participate in such a boycott.

I must now examine whether or not the said provisions meet the conditions of the "Limitation Clause". I will put the cart before the horse and state that, in my opinion, secs. 2(a), 2(b), 3 and 4 of the Law can successfully overcome the constitutional "Limitation Clause", whereas sec. 2(c) of the Law fails the required tests.

I will now explain this in orderly detail, but before embarking, I would note that having expressed the view that there is an infringement of freedom of expression, there is no need for a separate examination of the Petitioners' claims in regard to infringement of freedom of occupation and other constitutional rights, inasmuch as all of those infringements in this case derive from the infringement of freedom of expression, and if that infringement meets the criteria of the "Limitation Clause", then the same holds for the other infringements. See: HCJ 6427/02 *Movement for Quality Government in Israel v. The Knesset*, IsrSC 61 (1) 619, 674-675 (2006) *per* Barak P., pursuant to HCJ 4676/94 *Meatrael Ltd. v. Knesset*, IsrSC 50 (5) 206 (1998).

Examining the Provisions of the Law under the "Limitation Clause"

26. Section 8 of Basic Law: Human Dignity and Liberty provides as follows, in what is commonly referred to as the "Limitation Clause":

> *Violation of Rights*
>
> 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.

I will, therefore, examine the provisions of the Law in terms of the conditions of the Limitation Clause.

27. *The first condition* established by the Limitation Clause requires that the violation of a constitutional right "under this Basic Law" be implemented *by a law* (or by virtue of express authorization in such a law). This condition is met in the case before us, as the sanctions established under secs. 2-4 of the Boycott Law are *established in a statute enacted by the Knesset*.

28. *The second condition* established by the Limitation Clause requires that the law *befit the values of the State of Israel*. This clause has been interpreted as pointing, first and foremost, to the values of the State of Israel as a "Jewish and democratic state", which must be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel, as stated in sec. 1 and 1A of Basic Law: Human Dignity and Liberty. Other fundamental values of the State of Israel may also be considered within this framework.

There is tension between the positions of the Petitioners and the Respondents in regard to whether this condition is met. The Petitioners are of the opinion that the Law infringes freedom of expression and detracts from the democratic character of the state. The Respondents, who justify the Law, argue that the Law falls within the scope of the state's need to defend itself against those who would seek to destroy it, or those who seek to change its character, and it is thus an implement that a "defensive democracy" must have in its "tool box". Moreover, the Law is intended to prevent discrimination against the citizens of the State of Israel, whether due to their national identity or due to their residence in areas under the control of the state. This

disagreement will be examined below, and I shall try to provide answers to the said question in that framework.

29. The "defensive democracy" doctrine was recognized – in a majority opinion – in EA 1/65 *Yeredor v. Chairman of the Central Elections Committee for the Sixth Knesset*, IsrSC 19 (3) 365, although at the time, that approach did not have any express statutory underpinning (and see: Amnon Rubinstein & Barak Medina, *The Constitutional Law of the State of Israel*, vol. 2, (6th ed., 2005) pp. 588-591, 604-618). That doctrine must be effected in accordance with the conditions of each state and its residents (see: Jan-Werner Muller, "A 'Practical Dilemma Which Philosophy Alone Cannot Resolve'? Rethinking Militant Democracy: An Introduction," 19 *Int'l J Crit.Dem.Theory* (2012) (hereinafter: Muller, "Militant Democracy"); and see: Svetlana Tyulkina, *Militant Democracy* (2015)). Accordingly, this approach was adopted through the recognition of Israel as a "Jewish and democratic state", and this basic constitutional element was recognized and given expression in the Basic Laws enacted since 1992, as well as in the sub-constitutional normative area (for a list of all the relevant legal provisions, see: Hanan Melcer, "The IDF as the Army of a Jewish and Democratic State," in *Rubinstein Volume* (2014) pp. 347, 349-351). In this regard, we must take note that in the Boycott Law the legislature expressed its intent that the Law's provisions were meant *to prevent harm to the state of Israel by means of boycott*, and thus, on its face, and on the basis of the *presumption of constitutionality* of the Law, it would appear that the Law falls within the scope of the "defensive democracy" doctrine (and moreover, some of the Petitioners declared, as noted, that in their opinion it is indeed legitimate to call for a boycott as long as the character of the state remains unchanged). On the consequences of the "defensive democracy" doctrine, see my opinion in the *Dirani* case, and see: G.H. Fox & G. Nolte, "Intolerant Democracies," 36 *Harv. Int. L. J.* (1995); Barak Medina, "Forty Years to the Yeredor Decision: The Right to Political Participation," 22 *Mehkerey Mishpat* (Bar-Ilan University Law Review) 327-383 (2006) [Hebrew] (hereinafter: Medina, "Forty Years to the Yeredor Decision") which mentions the decision (although the author criticizes it), stating:

> On the basis of the principle regarding "defensive democracy", it is possible to justify governmental restrictions upon elements that seek to harm important interests recognized as fundamental rights [of third parties – H.C.], even if those

> elements are committed to non-violent methods in this regard. [But it is questionable whether this comprises calls for boycott, as I shall explain below – H.M].

30. Moreover, it would appear that a call for a boycott deviates from pure freedom of expression. Thus, for example, as Justice A. Barak wrote in regard to the purposes of freedom of expression in the *Kahane* case:

> The justification for freedom of expression is complex and intertwined. It is the individual's right to realize himself, *to form a worldview and an opinion by giving flight to his spirit*, creative and receptive. It is the freedom of the individual and the community to illuminate the truth through a free and unending struggle between truth and falsity. It is the freedom of society's members to exchange opinions and views *in a spirit of tolerance*, without fear, with *respect for the autonomy* of every individual, and *to persuade one another* in order to strengthen, secure and develop the democratic regime [*ibid*., p. 272 – emphasis added – H.M.].

Freedom of expression is thus intended, *inter alia*, to enhance public discourse and to present even unaccepted views, so that society's political decisions will be made freely and intelligently, through persuasion, with tolerance, and with respect for the autonomy of the other.

Thus, calls for a boycott against the State of Israel, as defined by the Law, do not serve the classical *purpose* of freedom of expression. As opposed to the view of the Petitioners, according to which calls for boycott advance "open and enhanced political discourse", such calls are not actually interested in political decisions on the basis of free will, but seek *to impose views* by means of economic and other means (in the field of contracts, as well, influence by means of economic coercion has been recognized in the law and the case law as contrary to free will, and thus gives rise to a cause for rescission of the contract (see: sec. 17 of the Contracts (General Part) Law, 5733-1973; CA 8/88 *Shaul Rahamin Ltd., v. Expomedia Ltd*., IsrSC 43 (4) 95, 100-101 (1989); CA 1569/93 *Maya v. Panford (Israel) Ltd*., IsrSC 48 (5) 705, 706 (1994); and *cf*. Daniel Friedman & Nili Cohen, *Contracts*, vol. 2, 965 (1992), who include in the scope of coercion: "also threats of 'boycott' or 'blacklisting', whose significance is that suppliers will refrain from transacting with a person, or that customers will refrain from transacting with him,

or that other employers will refuse to employ him", and conclude: "In this area , as well, it is conceivable that the threat, if not made in order to protect a justified interest, may constitute coercion").

This approach of calling for economic, academic and cultural boycott does not, therefore, serve democracy, but rather harms it, as I shall explain:

(A) The Petitioners argue that the Boycott Law violates their freedom to conduct political discourse, but in this regard it would be proper to delineate the distinction between freedom of expression as a means of *persuasion*, which is a cornerstone of a democratic state, and freedom of expression as a means of coercion, which undermines the values of a democratic state. Whereas in order to advance freedom of thought and opinion, a democratic state will seek to encourage a free marketplace of ideas through freedom of expression, when that freedom is employed (by way of calling for boycotts) as a means for violating the right of the individual to choose on the basis of his opinions and beliefs, the protection granted to freedom of expression can be somewhat restricted. See: Orloff, "The Political Boycott" (*ibid.*, pp. 1076-1077):

> A political boycott is a coercive mode of expression that, regardless of its goals, deprives its victims of their freedom to speak and to associate as they please… A political boycott uses economic coercion to force its victims to speak or act politically in a way that furthers the goals, not necessarily of the speaker, but of the boycotter.

Thus, a call for boycott falls within the category referred to in constitutional literature as "the democratic paradox", in which it is *permissible* to limit the rights of those who seek to benefit from democracy in order to harm it (see: EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi*, IsrSC 57 (4) 1, 14-18 (2003), *per* Barak P.). Calling for or participating in a boycott may thus, at times, smack of "political terrorism".

This view can be compared to the provisions of sec. 122 of the Knesset Elections [Consolidated Version] Law, 5729-1969:

> 122. The following shall be liable to imprisonment for a term of five years or to a fine of IL 20,000:

(1) a person who gives or offers a bribe for the purpose of inducing a voter to vote or to refrain from voting, whether generally or for a particular candidates' list;

…

(3) a person who threatens a voter with inflicting harm on him or any other person if such voter votes or refrains from voting, whether generally or for a particular candidates' list;

…

(6) a person who procures a person to vote or refrain from voting, whether generally or for a particular candidates' list, by means of an oath, a curse, shunning, *ostracism* [Hebrew: "*ḥerem*"],[1] a vow, releasing from a vow, a promise to bestow a blessing, or giving an amulet; for the purpose of this section, "amulet" includes any object that some members of the public believe can cause benefit or harm to a person [emphasis added – H.M.].

In explaining the purpose of this law, Justice M. Cheshin wrote as follows:

> The purpose of the law is that voters decide for themselves for whom to vote and for whom not to vote, *after free and informed consideration* of whom they believe worthy of their vote…the purpose of the law is to prevent the improper phenomenon of people voting or refraining from voting for a party or candidate for prime minister while under the influence of extraneous or other improper considerations [EA 11/01 *Pines-Paz v. Shas*, IsrSC 55 (3) 168 (2001); emphasis added – H.M.].

(B) The above is of special concern in regard to the boycotting of Israeli academia. Such a call for the boycotting of the Israeli academic community, or of Israeli lecturers, undermines academic freedom itself and prevents research and instruction whose purpose, *inter alia*, is the search for truth. *It is, in effect, a boycott of intellectualism itself, as boycott silences the*

[1] The Hebrew term "*ḥerem*" is also the term used for "boycott".

discourse. Therefore, the Law that prohibits such activity is appropriate to the values of the State of Israel that, *inter alia*, ensure full academic freedom and advance research and excellence, which underlie Israel's qualitative advantages. See: Rubinstein & Pasha, *Academic Flaws*, pp. 117-119.

31. All of the above arguments can suffice to show that the Law meets the second condition of the Limitation Clause, and also shed light upon the third condition, which I shall now address.

32. *The third condition* established by the Limitation Clause requires that the law under which a protected right is infringed serve a *proper purpose*. It would appear that the Law before us also meets this condition, which in our context also somewhat overlaps the *second condition* (and therefore, to the extent that the matters are shared, I will not repeat them).

As explained in paras. 28-30 above, the Law (without addressing the issue of the wisdom of its enactment) serves purposes that can be explained on the basis of the values of the state, and it is even intended to serve a number of specific purposes that can be viewed as legitimate:

(A) It is intended to prevent harm by means of boycott to the State of Israel, as these terms are defined by the Law.

(B) It delineates what is permitted and forbidden within the framework of freedom of expression, *viz*: it is permissible to express any political opinion and to attempt to persuade; it is permissible to demonstrate; it is forbidden to call for a boycott (which may also involve criminal elements (restrictive trade practices, improper violation of equality, or "boycott prohibitions" *per se*), or tortious elements (tortious inducement of breach of contract; unlawful acts of discrimination), or may be contrary to the fundamental values of the state (or its legal system)). Professor Preuss, in his article "Associative Rights (The Right to The Freedoms of Petition, Assembly, and Association)", suggests an additional distinction according to which the expression of personal political dissent is permitted, whereas calls for collective action is prohibited, and comprises elements of conspiracy (see: Ulrich K. Preuss, "Associative Rights (The Right to The Freedoms of Petition, Assembly, and Association)," in Michael Rosenfeld & Andreas Sajo, eds., *Oxford Handbook of Comparative Constitutional Law*, 948, 963 (2012)). This distinction also provides an answer to the Petitioners' claim of a logical fallacy in the Law.

(C) It advances the values of equality and the prohibition of discrimination.

I will permit myself to expand somewhat in regard to the prohibitions of discrimination, which embody the right to equality insofar as they are related to the questions before us, and in relation to the issue of boycott.

33. As noted, the Boycott Law defines a boycott against the State of Israel as: "deliberately refraining from economic, cultural or academic ties with another person or body *solely because of its connection with the State of Israel, one of its institutions or an area under its control*, such that it may cause economic, cultural or academic harm" (emphasis added – H.M.). This definition does not speak of a boycott against the *conduct* of the object of the boycott, but rather it applies only to their *connection* to the State of Israel, its institutions, or an area under its control.

I am of the opinion that a law that is intended to prevent such a boycott can be said to *advance a proper purpose*, in terms of its legal meaning and consequences, in that, *inter alia*, it expresses the right to equality, which has been recognized in the case law as a fundamental right (see: Barak, *Human Dignity*, at pp. 691-705), as follows:

(A) Boycott shares characteristics of unlawful discrimination. Both boycott and discrimination lead to a reduction of economic and other connections with people on the basis of an interest that may be deemed illegitimate. In the case of the Boycott Law, the basis for the boycott is *a connection to the State of Israel*. A similar basis – *connection to a country of origin* – is recognized by Israeli law as a justified basis for imposing tortious liability in the framework of the tort of discrimination. The Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: the Prohibition of Discrimination Law), which treats of a tort regarding discrimination, states, in sec. 3 and 5, as follows:

> 3. (a) Any person whose business is the supply of products or of public services, or who operates a public place, *shall not – in the supply of products or of public services*, in admitting to a public place or in providing a service in a public place – discriminate because of race, religion or religious group, nationality, *country of*

> *origin*, sex, sexual inclination, opinion, political allegiance, personal status, or parenthood.
>
> …
>
> 5. (a) An act or an omission in violation of sections 3 and 4 constitutes a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] shall apply to them, subject to the provisions of this Law [emphasis added – H.M.].

The Prohibition of Discrimination Law thus establishes that distinctions on the basis of *country of origin* are prohibited, and that a provider of products or services who discriminates on that basis exposes himself to an action in tort. It should further be noted that under the said law, a person's opinion or political allegiance do not constitute a legitimate basis for making distinctions in supplying services or products. In other words, to some extent, the Prohibition of Discrimination Law defines discrimination even more broadly than the Boycott Law.

(B) Here we should further note that the fact that a person politically objects to the policy of a country does no itself justify discrimination on the *basis of country of origin*. Discrimination based upon that justification harms the individual on the basis of acts and conduct that are not contingent upon him: This is "collective punishment" that uses an innocent individual as a means for deterring another (and *cf*: sec. 40G of the Penal Law). Such conduct is unacceptable, just as, for example, boycotting products produced by certain minorities is unacceptable.

34. It would not be superfluous to note that the Boycott Law is not exclusive to Israel, and such laws – expressed in similar language, and comprising prohibitions upon discrimination on the basis of country of origin – can be found in many other countries. In fact, in some of those countries, the scope of the said prohibition upon discrimination is even broader than in Israel. Thus, for example, in France, the Penal Code includes a prohibition upon any discrimination that disrupts normal economic activity (Penal Code, Article 225-2). In England and Germany, the law defines any less favorable treatment of A towards B because of a protected characteristic as direct discrimination (sec. 13 of the Equality Act 2010 and sec. 3 of the General Act on Equal Treatment, respectively).

From all the above we can conclude that the Boycott Law, like the Prohibition of Discrimination Law, also advances a proper purpose of equality in that it is intended, *inter alia*,

to prevent discrimination, which is a purpose grounded in additional Israeli legislation, as well as in the legislation of many other countries.

35. Now that we have established that the Law is consistent with the *values of the State of Israel*, and is intended for a *proper purpose*, it remains for us to examine whether the restriction it imposes upon freedom of expression is "to an extent no greater than is required", which is the *fourth condition* of the limitation clause. I shall now proceed to that examination.

"To an extent no greater than is required" – Proportionality Tests

36. The fourth and last condition for examining the constitutionality of an infringement of a basic right is that the violation be "to an extent no greater than is required". The proportionality of the Law must be examined in light of three subtests of proportionality, as established in the case law: the rational connection test, the least harmful means test, the proportionality test "*stricto sensu*" – sometimes referred to as the "relativity test"— which is a type of "cost-benefit" test (see: the *Hamifkad Haleumi* case, CrimA 8823/07 *Anonymous v. State of Israel* (published in Nevo) (Feb. 11, 2010); my opinion in HCJ 6784/06 *Major Shlitner v. Director of Payment of Pensions* (published in Nevo) (Jan. 12, 2011) (hereinafter: the *Shlitner* case); Barak, *Proportionality in Law*, chaps. 9-12).

We shall address these below.

The Rational Connection Subtest

37. Under the rational connection subtest, there must be a possible rational connection between the proper purpose and the means that the law chose to advance that purpose (see: Barak, *Proportionality in Law*, pp. 373-383 [English: 303-307]; on the method for applying this subtest, see the majority opinion in HCJ 1661/05 *Hof Azza Regional Council v. The Knesset*, IsrSC 59 (2) 481(2005)). In the case at bar, although some of the Petitioners argued that the Law is not effective in advancing the fight against boycotts (and thus it would seem that, in their view, it does not actually infringe freedom of expression), the general tenor of the arguments was that they admit that there is, in effect, a rational connection between the Law and the intention to prevent calls for boycott, inasmuch as that connection (which the Petitioners oppose) motivated

the petitions. Indeed, some of the Petitioners stated that they were affected by the "chilling effect" of the Law, and were therefore forced to desist from publishing lists of products produced by Israeli actors in the Area, for the purpose of boycotting them. It is, therefore, clear that the Law, if only according to its initiators, advances its purpose, at least partially, by acting and helping to prevent harm which, in my view, only if caused would constitute the tort established by the Law in a manner that would permit collecting damages from the person calling for the boycott. Therefore, it is not repugnant inasmuch as the tortfeasor has a choice (as distinct from the provision under sec. 2(c) of the Law, which deems the call for a boycott to be a tort that justifies compensation even without proof of harm – which I believe must be voided).

Thus, the Law passes the first subtest of proportionality. Moreover, one of the objectives of tort law is deterrence (see: Amos Herman, *Introduction to Tort Law*, 4-7 (2006) (hereinafter: Herman); Ariel Porat, *Tort Law*, vol. 1, chap. 6 (Optimal Deterrence), pp. 25-53 (2013) (hereinafter: Porat)).

The Least Harmful Means Subtest

38. Under the second subtest of proportionality, we must examine whether the legislature chose the means that is relatively less harmful to human rights in comparison to the other available alternatives. The requirement is not that the means chosen be that which is absolutely the least harmful, but rather it is sufficient that the means fall within the "margin of proportionality" (HCJ 7052/03 *Adalah v. Minister of the Interior*, IsrSC 61 (2) 202, 234-235, para. 68 *per* A. Barak P. (2006) [English: http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior]; the *Hamifkad Haleumi* case, at p. 784, para. 51, *per* Naor J.), and that its harm be relatively moderate, even if it is not the least possible harm (HCJ 6304/09 *Lahav – Bureau of Organizations of Self-Employed v. Attorney General* (published in Nevo) para. 115, *per* A. Procaccia J. (Sept. 2, 2010)).

As noted, the purposes that the Law advances are the protection of the state and its values, equality, and individual liberty. Therefore, in order to avoid infringing freedom of expression as far as possible, the restriction of the right must be limited to that required in order to prevent those *harms* that might be caused by the boycott and that would intrude upon those

purposes. Therefore, the Law may not create an excessive "chilling effect" upon political speech, as such, that is beyond what is required to prevent harm to the said purposes. Do the means incorporated in the Law meet that requirement? In order to answer that question, we must first consider the principles of the boycott tort as they appear in the Law, and in each of its subsections, and examine whether each means set forth in sec. 2 of the Law meets the least harmful means test. Following that, we must also examine whether the administrative restrictions imposed under the Law pass this subtest, as well. I shall now proceed to do so.

Section 2(a) of the Law

39. This provision comprises several elements that must be examined.

(A) *The application of the Civil Wrongs Ordinance to the Boycott Tort*

Section 2(a) of the Boycott Law establishes as follows:

> Anyone who knowingly publishes a public call for a boycott against the State of Israel … commits a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] will apply to him.

We find language similar to that of this subsection in the Prohibition of Discrimination Law, which also applies the Civil Wrongs Ordinance to the tort that is the subject of that law, as follows:

> 5. (a) An act or an omission in violation of sections 3 and 4 constitutes a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] shall apply to them, subject to the provisions of this Law.

The significant difference between the above laws is that the Prohibition of Discrimination Law states "shall apply to them", that is, to the act and omission, whereas the Boycott Law states "will apply to him", that is, to the *tortfeasor*. I do not think that we should split hairs in regard to how application to the *tortfeasor* as opposed to application to the *tort* might influence the substantive meaning of the Law. There are two reasons for this:

(1) It would be contrary to the *narrow-construction approach* that I have recommended in regard to the Law, which is accepted in constitutional interpretation that tends to prefer narrow construction to voiding a legal provision, and which I will discuss in para. 56, below.

(2) Such an approach would not be consistent with the opinion of Cheshin J. in CFH 5712/01 *Barazani v. Bezeq Israeli Telecommunications Company Ltd.*, IsrSC 57 (6) 385, 408 (2003) (hereinafter: the *Barazani* case), in which he held (para. 30) as follows:

> I also do not find any merit in the arguments of the Consumer Council comparing the phrase "as a tort" in our case to similar but not identical wording in other statutes. Thus, for example, sec. 11 of the Commercial Torts Law, 5759-1999, states "The violation of the provisions of Chapters One and Two is a tort, and the Civil Wrongs Ordinance [New Version] … shall apply to it…" *At times we find this wording and at times other wording, and we will not hang mountains by a hair*.[2] The same is true with regard to other statutes that employ various wordings. See, for example: sec. 28 of the Adoption of Children Law, 5741-1981; sec. 5 (a) of the Prohibition of Discrimination in Products, Services, and Entry into Public Places, 5761-2000; sec. 15 of the Banking (Customer Services) Law, 5741-1981, and others. In my opinion, the purpose of the Law in this case is crystal clear, and comparisons to other laws will not succeed [emphasis added – H.M.].

(B) *A rational connection and damage*: If the approach I have recommended above is accepted, and we would, indeed, apply the principles of the Civil Wrongs Ordinance to the boycott tort, then it would seem to follow that some of the elements of the tort established under sec. 2(a) of the Law *would require damage, and a rational connection between the tort and that damage*, as a condition for obtaining relief. This conclusion derives from the opinion of Cheshin J. in the *Barazani* case. In that case, Justice Cheshin refers to secs. 2(a) and 31(a) of the Consumer Protection Law, 5741-1981 (hereinafter: the Consumer Protection Law). Those sections establish a tort of consumer deceit, but do not expressly state a requirement of damage or of a rational connection, stating as follows:

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[2] Translator's note: The reference is to Mishna Ḥagigah 1:8 "The laws concerning the Sabbath, festival offerings and the trespass of consecrated objects are as mountains hanging by a hair, that have few supporting scriptural verses but many laws".

2. (a) A dealer must not do anything – by deed or by omission, in writing, by word of mouth or in any other manner, also after the transaction has been contracted – which is liable to mislead a consumer in regard to any material element of the transaction (hereinafter – deceit); without derogating from the generality of the aforesaid, the following matters shall be deemed as material for a transaction:

(1) the quality, nature, quantity and category of an asset or service;

(2) the size, weight, shape and components of an asset;

…

31. (a) Any act or omission in violation of Chapters Two, Three, or Four shall be treated as a tort under the Civil Wrongs Ordinance [New Version].

Justice Cheshin noted in this regard that the fact that the requirements of a causal connection and damage do not expressly appear in the above sections does not nullify those requirements, as he states there:

35. … one doctrine is that of causation, under which – in accordance with sec. 64 of the Civil Wrongs Ordinance – there must be a causal connection between a person's act or omission – an act or omission that constitute a tort – and the damage incurred by the victim, for which he seeks redress. As stated in sec. 64 of the Civil Wrongs Ordinance: "… a person shall be deemed to be at fault for such damage when the fault was the cause or one of the causes of the damage …

36. This is also the case in regard to the compensation doctrine. In accordance with sec. 76 of the Civil Wrongs Ordinance, and as has always been the case: *a person is entitled to compensation only for damage caused as a result of the tortious act.* A person will be entitled to compensation only to the extent of the damage incurred, and as stated in sec 76: "only in respect of such damage which may naturally arise in the usual course of things and which directly arose from the defendant's civil wrong". A fundamental principle of tort law is that of *restitutio ad integrum*, and therefore, a person who did not suffer damage will not be

> entitled to compensation… Of course, the legislature is free to deviate from this principle, and decide – for various reasons – that a victim be granted compensation without showing that he incurred damage… However, these are but exceptions to the rule [*ibid*., at p. 401].

This approach is consistent with the *harm principle* of the philosopher John Stuart Mill (see: John Stuart Mill, *On Liberty* (1859); J. Feinberg, *Harm to Others* (Oxford University Press, 1984); and the principles of corrective justice, see: Porat, at pp. 55-56; Herman, at pp. 9-7), and it also contributes to the distinction that I propose that we make between the validity of secs. 2(a) and 2(b) of the Law, and the voidness of sec. 2(c) of the Law.

In view of the above, I am of the opinion that a reasonable construction of the Law leads to the conclusion that the tort created under sec. 2(a) of the Law *requires damage and a causal connection as preconditions to relief*, and that a "potential causal connection" alone would not suffice. Therefore, the requirement of a "reasonable possibility" to show that the call for a boycott might lead to its realization, as it appears in that section, is, in my opinion, a requirement that is *additional* to that of the normally required causal connection, and that *hampers* rather than eases the crystallizing of the tort.

Moreover, from the *absence* of a requirement of damage in sec. 2(c) of the Law (which I believe should be voided), one might infer a *positive* requirement of damage in sec. 2(a) of the Law.

It should be stressed that having found that the boycott tort requires damage as one of the elements of the tort in order for the boycotted party to seek relief from the party calling for a boycott, it is also clear that the tort meets the "near certainty test" (established in HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of the Interior*, IsrSC 7 (2) 871 (1953) [English: http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior] (hereinafter: the *Kol Ha'am* case)). On the relationship between the "near certainty test" and the proportionality requirement, see: Barak, *Proportionality in Law*, pp. 643-650; HCJ 4541/94 *Miller v. Minister of Defense*, IsrSC 49 (4) 94, 141 *per* Dorner J. (1995) [English: http://versa.cardozo.yu.edu/opinions/miller-v-minister-defence]; Medina, "Forty Years to the Yeredor Decision", pp. 377-380; Barak Medina & Ilan Saban, "On the Freedom of a Knesset Member to Oppose the Occupation (following HCJ 11225/03 Beshare v. AG)," 37 *Mishpatim*

(Hebrew University Law Review) 219, 231-232 (2007) [Hebrew]. Under the "near certainty" test, when freedom of expression clashes with another interest, we may prefer the other interest only if there is a high probability that the harm to the interest will actually be realized. From this we learn that in the matter before us, in which the boycott tort gives rise to a right to relief *only after the realization of the damage*, there is no further need to examine the probability of the realization of the infringement of the protected interest, inasmuch as imposing liability is contingent upon *harm that caused damage*.

(C) *Potential Plaintiff*s: Having reached the conclusion that the principles of the Civil Wrongs Ordinance apply to the boycott tort, it is clear that only the *direct victim* of the tort can sue upon it, in accordance with sec. 3 of the Civil Wrongs Ordinance:

> 3. The matters in this Ordinance hereinafter enumerated shall be civil wrongs, and subject to the provisions of this Ordinance, any person who suffers any injury or damage by reason of any civil wrong committed in Israel shall be entitled as against the person committing or liable for such civil wrong to the remedy hereinafter specified.

(D) *Mental element*: The section requires that the publication of the call for a boycott be done "knowingly". This requirement, as well, should be construed as limiting the scope. Thus, in regard to the elements of the tort regarding which there is a requirement of awareness, it must be shown that "according to the content and circumstances of the publication there is reasonable possibility that the call will lead to a boycott" (sec. 2(a) of the Boycott Law).

40. The above demonstrates that the scope of the restriction upon calling for a boycott under sec. 2(a) of the Boycott Law is limited. Only a person directly harmed, who can prove a causal connection between the call and the damage he incurred and the tortfeasor's awareness of the reasonable possibility that the harm would transpire as a result of the boycott, can obtain relief (and see: secs. 10, 64, and 76 of the Civil Wrongs Ordinance). Thus it would appear that we are concerned with a burden of proof not easily met by a claimant. Moreover, the section suffices with establishing a civil wrong, and the Law does not comprise an imposition of criminal sanctions upon a person calling for a boycott (this, for example, as opposed to the similar French legislation, as will be explained in paras. 49-51, below). It would, therefore, appear to me that the legislature reasonably exercised its authority in the framework of the "margin of

proportionality", in order to try to prevent the phenomenon of calls for boycott, which could inflict harm.

Section 2(b) of the Law

41. In order to explain the nature of sec. 2(b) of the Boycott Law, I will first present sec. 62(a) of the Civil Wrongs Ordinance, which treats of the tort of causing a breach of contract:

> 62. (a) Any person who knowingly and without sufficient justification causes any other person to breach a legally binding contract with a third person commits a civil wrong against such third person; provided that such third person will not recover compensation in respect of such civil wrong unless he has suffered pecuniary damage thereby.

In other words, in order to pursue a cause of action for causing a breach of contract, the claimant must prove five elements (see: CA 123/50 *Bauernfreud v. Dresner*, IsrSC 5 (1) 1559 (1950)): (a) the existence of a binding contract; (b) a breach of the contract (which realizes the harm, in principle); (c) causation – comprising a causal connection between the causative act and the breach; (d) "knowingly" – awareness of the contract and of the causative connection between the cause and the breach; (e) without sufficient justification. Additionally, the section establishes that a "third person will not recover compensation in respect of such civil wrong unless he has suffered pecuniary damage thereby".

Although much has been written on the nature of these five elements, and about the requirement of damage (see: Nili Cohen, *Inducing Breach of Contract* (1986) (Hebrew)), what has been said thus far is sufficient for the purpose of this discussion.

We will now proceed to interpret sec. 2(b) of the Boycott Law, which establishes as follows:

> In regards to section 62(A) of the Civil Wrongs Ordinance [New Version], anyone who causes a binding legal agreement to be breached by calling for a boycott against the State of Israel will not be deemed as having acted with sufficient justification.

What sec. 2(b) of the Boycott Law means is that if a person called for a boycott and caused financial harm, the person who incurred that harm can sue the person who called for the boycott, and the tortfeasor will not have recourse to the defense of sufficient justification. However, the claimant will still have to prove the additional elements of the tort in order to recover damages. That being so, a person wishing to recover damages by virtue of sec. 2(b) of the Law will also have to prove the following elements in addition to the element of a call for a boycott: causation, as defined under sec. 62(a) of the Civil Wrongs Ordinance, breach, a causal connection between the call for boycott and the breach, the mental element of awareness, and pecuniary damage. Thus to the extent that we find that sec. 2(a) of the law is constitutional, sec. 2(b) of the Law will, accordingly, also be constitutional. I am therefore of the opinion that sec. 2(b) also meets the second subtest.

Section 2(c) of the Law

42. Section 2(c) of the Boycott Law establishes as follows:

> (c) If the court find that a civil wrong, as defined by this law, was committed with malice, it will may require the tortfeasor to pay damages that are independent of the actual damage caused (in this section – exemplary damages); in calculating the sum of exemplary damages, the court will consider, inter alia, the circumstances under which the wrong was carried out, its severity and its extent.

The damages awarded under the above section *are not contingent upon damage*, and as such, they *do not* realize the normal rule of tort law in regard to "*restitution as integrum*". That being the case, it would be correct to characterize them as "punitive damages", which are a type of hybrid creation grounded upon purposes both from the civil area and from the criminal area (see: Elyakim Rubinstein, "Punitive Damages – A View from the Bench," in *Orr Volume – Articles in Honor of Justice Theodore Orr*, 99, 99-105 (2013) (Hebrew) (hereinafter: Rubinstein, "Punitive Damages")). My colleague Justice Rubinstein also addressed the rationale grounding the granting of punitive damages in his opinion in CA 9656/03 *Estate of Marciano v. Zinger*, (published in Nevo) (April 11, 2005) (hereinafter: the *Estate of Marciano* case):

> The rationale behind punitive damages is not to "rectify" or "repair", in accordance with the usual approach of tort law, but to punish and deter. This

> rationale is neither simple nor self-evident in civil law, but can be justified in particularly severe cases or instances of infringement of constitutional rights, and it can serve to reinforce effective deterrence where the criminal law does not apply [*ibid*., para. 34].

43. Punitive damages are not generally awarded. The courts are reticent to grant such damages, which are imposed upon the wrongdoer only in exceptional cases (see: the *Estate of Marciano* case; CA 140/00 *Estate of Ettinger v. Company for the Reconstruction and Development of the Jewish Quarter in the Old City of Jerusalem Ltd*., IsrSC 58 (4) 486 (2004) [http://versa.cardozo.yu.edu/opinions/ettinger-estate-v-jewish-quarter-company]; CA 2570/07 *Lam v. Hadassah Medical Organization* (published in Nevo) (July 7, 2011); CA 9225/01 *Zeiman v. Qumran* (published in Nevo) (Dec. 13, 2006), and *cf*: Rubinstein, "Punitive Damages", p. 117). Even where the legislature chose to establish damages that are not contingent upon damage, it generally set limits to such damages, and did not leave them "unlimited", as in the case before us (see, e.g.: sec. 31A of the Consumer Protection Law, sec. 4 of the Right to Work while Sitting Law, 5767-2007; sec. 11 of the Aviation Services (Compensation and Assistance for Flight Cancellation or Change of Conditions) Law, 5772-2012).

Thus, the imposition of a regime of unlimited punitive damages in regard to the boycott tort *deviates, in my opinion, from the bounds of proper proportionality*. Where a delicate balance must be achieved in order to ensure minimal infringement of the basic right of freedom of expression, and to refrain as far as possible from creating any unnecessary "chilling effect" upon political expression and vibrant public debate, recourse should not be made to tools that are exceptions in civil law, and that deviate from the classic requirement of damage that is generally a condition for the imposition of a civil obligation, and one of the primary jurisprudential justifications for governmental intervention in the affairs of the individual (see: Mill, *On Liberty*; the *Holder* case). Imposing punitive damages would thus make the boycott tort unnecessarily proximate to the criminal sphere, and would overly deter expression (to the extent that it does not have the potential for causing proven harm to society or an individual).

In light of the above, in my opinion, sec. 2(c) of the Boycott Law *does not* meet the requirements of the second, least-harmful-means, subtest, and must be declared void.

Sections 3 and 4 of the Law

44. I will first cite the language of sections 3 and 4 of the Law:

> *Directives restricting participation in tenders*:
>
> 3. The Minister of Finance is authorized, with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee, to issue directives in regard to restricting the participation in a tender of anyone who knowingly published a public call for a boycott against the State of Israel, or who committed to participate in such a boycott, including a commitment not to purchase goods or services produced or supplied in Israel, by one of its institutions, or in an area under its control; in this section, a "tender" is defined as any tender that must be administered in accordance with the Mandatory Tenders Law, 5752-1992.
>
> *Regulations preventing benefits*:
>
> 4. (a) The Minister of Finance, in consultation with the Minister of Justice, may decide that someone who knowingly published a public call for a boycott against the State of Israel or committed to participate in a boycott:
>
> (1) Will not be deemed a public institution under clause 46 of the Income Tax Ordinance;
>
> (2) Will not be eligible to receive monies from the Sports Betting Council under section 9 of the Regulation of Sports Betting Law, 5727-1967; exercise of the authority under this section requires the consent of the Minister of Culture and Sports;
>
> (3) Will not be deemed a public institution under section 3A of the Foundations of the Budget Law. 5745-1985, regarding the receipt of support under any budget line item; exercise of the authority under this section requires the consent of the Minister appointed by the Government as responsible for said budgetary line, as stated in section 2 of the definition of "person responsible for a budget line item";

(4) Will not be eligible for guarantees under the State Guarantees Law, 5718-1958;

(5) Will not be eligible for benefits under the Encouragement of Capital Investment Law, 5719-1959, or under to the Encouragement of Research and Development in Industry Law, 5744-1984; exercise of the authority under this section requires the consent of the Minister of Industry, Commerce and Employment.

(b) In exercising the authority according to subsection (a), the Minister of Finance will act in accordance with regulations that he will promulgate in this regard, with the consent of the Minister of Justice, and with the approval of the Knesset Constitution, Law and Justice Committee; however, if no such regulations have been promulgated, it will not detract from the authority under subsection (a).

From the language of the Law, we learn that the *administrative restrictions* imposed thereunder are contingent upon a procedure that involves supervision by the Government and by the Knesset. Thus, in order for the Minister of Finance to issue directives that would restrict participation in a tender of someone who calls for or committed to participate in a boycott, as defined by the Law, he must first obtain the consent of the Minister of Justice and the approval of the Knesset Constitution Committee. Denying benefits to someone who calls for or committed to participate in a boycott must be done in consultation with the Minister of Justice, and issuing directives in that regard requires the consent of the Minister of Justice and the approval of the Knesset Constitution Committee. It would seem that the above procedures, required in order to approve the imposition of the restrictions, would serve to lessen the possible infringement of freedom of expression, if only by ensuring that the restrictions would not be imposed arbitrarily.

But over and above this procedural restriction, I am of the opinion that the infringement caused by preventing the participation in a tender, and all the more so the infringement caused by denying state benefits, are inherently second order infringements, inasmuch as, in principle, the Government enjoys broad discretion in choosing with whom to do business, or to whom to grant financial support. Thus, in the matter of financial support granted by the state, it has been held on more than one occasion that a person or body does not have a vested right to receive state grants.

See, in this regard: HCJ 1438/98 *Masorti Movement v. Minister of Religious Affairs*, 53 (5) 337, 385 (1999), where we find:

> The state is entitled to grant or not grant support. The state is authorized to provide – or not provide – this and that activity with financial support, and in granting support to a particular activity, to decide how much money it will receive.

And also see, *inter alia*: HCJ 5264/05 *Shavei Shomron Yeshiva v. Minister of Education, Culture and Sport*, (published in Nevo) (Nov. 16, 2005).

We should further note that in regard to the participation in tenders, sec. 3B of the Mandatory Tenders Law states as follows:

> The government, with the approval of the Knesset Foreign Affairs and Defense Committee, may direct, by order, that the State or a government corporation may not enter into a contract for the execution of a transaction as stated in section 2 with a particular foreign country or with a particular foreign supplier for reasons of foreign policy.

If the Government may do so by *order* (with the approval of the Knesset Foreign Affairs and Defense Committee), it would seem, *a fortiori*, that the Knesset may enact a *statute* (like that before us) in regard to the possibility of denying participation in tenders to certain bodies for reasons that are, by nature, related to reasons of foreign policy or defense of the state (preventing a boycott of the State of Israel, as defined by the Law).

45. One may also deduce the power of the state to deny benefits from those who use them against the state by analogy to the judgment in HCJ 10104/04 *Peace Now – Shaal Educational Enterprises v. Ruth Yosef, Supervisor of Jewish Settlement in Judea and Samaria*, IsrSC 61 (2) 93 (2006), which held that local and regional councils in the Area could not use government grants to finance protest activity against the Disengagement Plan. In this regard, Deputy President Cheshin wrote (*ibid*., pp. 185-186):

> We cannot accept that a local council may use support funding provided by the state in order to fight against a state-initiated plan. *A person will not be permitted to slap the hand extended to help him.*
>
> I concur with the opinion of Justice Dorner and with the opinion of my colleague Justice Rubinstein that it is improper and unacceptable *that monies that the state granted to a local authority in support of its day-to-day municipal activity be used to fund the council's struggle against a state decision.* A local council that fights against a state plan, and funds that fight with support funding given by the state for other purposes, does something that should not be done. Such conduct by the council is incompatible with the principle of fairness, as well as with the rules of good governance. *This rule is self-evident, and I think there is no need to elaborate* [emphasis added – H.M.].

Indeed, the prohibition of "ingratitude" is everywhere a matter of conventional wisdom – both moral and legal –and various cultures have idiomatic expressions for it (in the U.S. "Do not bite the hand that feeds you", in traditional Jewish sources: "To act like Zimri and be rewarded like Pinchas" (*Babylonian Talmud, Sanhedrin* 82a).

Moreover, the administrative restrictions against those who call for a boycott have a kind of internal logic of their own, inasmuch as how can people who call for a boycott request aid from the very bodies that they believe should be boycotted? In this regard, the standard that the Law applies to those who call for a boycott is the standard that they themselves suggest.

I would further emphasize that the infringement caused by the administrative restrictions also meets the "near-certainty" test. As I shall explain below.

46. In the context of this case, the "near certainty" test requires that the in order to permit an infringement of freedom of expression, a nearly certain infringement of the protected interest must be shown to exist. Thus, for example, the *Kol Ha'am* case held that it must be proven to a near certainty that, under the circumstances, granting freedom of expression would cause "nearly certain" harm to public security.

In the matter before us, the protected interest is not public security. As explained, one of the purposes of the *administrative restrictions* is the interest in preventing the funding of

organizations or persons who call for a boycott against the State of Israel, as defined by the Law, in a manner that discriminates against the state's citizens by coercive means that, in effect, infringe the free marketplace of ideas, and seeks to impose the views of the boycotters upon those harmed by the boycott. In addition, the *administrative restrictions* seek to prevent a situation in which a person or organization would "bite the hand that feeds them", and act with premeditated ingratitude in seeking to exploit the benefits they would receive in order to *expand* their activities against the one who granted them those very benefits (and compare: the *Holden* case, and see: Barak-Erez & Zachariah, pp. 574-575).

Thus, in the event that the benefits and various grants would be given to those who call for a boycott against the State of Israel, the said interest would certainly be harmed. That would be the case whether or not the call would lead to real damage. The reason for this is that, as noted, the very granting of the benefits to those who call for a boycott would involve *a transfer of state resources* to the benefit of organizations seeking to harm the state and discriminate among its citizens. This is a separate category, also recognized in comparative law, which permits authorities to predetermine situations of "expected ingratitude", and deny benefits in advance. See: *South Dakota v. Dole* 483 U.S. 203 (1987; *Regan v. Taxation with Representation* 461 U.S. 540 (1983); *Rust v. Sullivan* 500 U.S. 173 (1991) (hereinafter: the *Rust* case), which held:

> A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.

That rule was somewhat narrowed by the majority in *Agency for International Development et al. v. Alliance for Open Society International, Inc., et al*. 570 U.S 1 (2013), in that it held that an organization receiving governmental funding to fight AIDS abroad, cannot be forced to publicly profess – in accordance with the Government's policy – that it does not support legalizing prostitution, or provide funding for organizations that have not explicitly declared that they are opposed to prostitution. However, that case differs from the one at bar, inasmuch as our case does not require that those who call for a boycott *support* the Government's policy against the boycott, but only *not* to encourage the boycott, and such cases fall within the scope of the rule enunciated in *Rust* (and compare: HCJ 7245/10 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Ministry of Social Affairs*, (published in Nevo)

(June 4, 2013) [English: http://versa.cardozo.yu.edu/opinions/adalah-%E2%80%93-legal-center-arab-minority-rights-israel-v-ministry-social-affairs], and in Jewish law in regard ingratitude: *Babylonian Talmud, Avoda Zara* 5a-b. And see: Nili Cohen, "On Parents, Children and Ingratitude: The Transaction of King Lear," 14 *Hamishpat* 381 (2011) (Hebrew); Nili Cohen, "Law, Morality and Ex Turpi Causa," *Orr Volume* 259 (2013) (Hebrew)).

In light of all the above, it would appear that the infringement caused by the *administrative restrictions* also meet the least-harmful-means subtest.

The Proportionality Stricto Sensu Test

47. Even after finding that the Law serves permissible purposes and falls within the "margin of proportionality" in achieving those purposes, it remains that we examine the Law's proportionality "*stricto sensu*", which is the third subtest of "proportionality". Prof. Barak explains that the comparison here is not between the advantage in realizing the law's purpose and the harm caused by infringing the right. "Rather, the comparison focuses only on the marginal effects – on both the benefits and the harm – caused by the law. In other words, the comparison is between the margins". In this regard, he adds: "we must consider the hypothetical proportional alternative to the limiting law. If indeed, such an alternative exists, then the comparison between the marginal benefits and marginal harm is made in light of that proportional alternative. *Although this alternative was not adopted by the limiting law itself, the lawmaker can still adopt it as an amendment to the limiting law*." (See: Barak, *Proportionality in Law*, p. 432 [English: p. 350] (emphasis added – M.C.); and see my opinion in the *Shlitner* case).

At this stage, we must therefore examine whether the balance between the harm caused to freedom of expression by the Law and the values grounding the Law, and ultimately decide whether one can say that the Boycott Law does not deviate from the proper balance between those values and interests, and therefore passes the "relativity" subtest. In this regard, I am of the opinion that the Law manages, if just barely, to meet the third subtest of relativity, as I shall now explain.

48. As noted, the Boycott Law applies to those who call for the imposition of a boycott against anyone who has a connection to the State of Israel or an area under its control. In so

doing, a person calling for a boycott may inflict harm upon an individual and violate his liberty. Imposing tortious liability upon a person whose call may cause harm to another is not exceptional in Israeli law. For example, sec. 12 of the Civil Wrongs Ordinance states as follows:

> 12. For the purposes of this Ordinance, any person who joins or aids in, authorises, counsels, commands, procures or ratifies any act done or to be done, or any omission made or to be made, by any other person will be liable for such act or omission.

The above section also presents a certain infringement of freedom of expression, in that a person who procures another (even if only by speech) to commit a tort is exposed to a tort suit, see: CA 5977/07 *Hebrew University of Jerusalem v. Schocken Publishing House Ltd*. (published in Nevo) (June 20, 2014); CA 10717/05 *Florist de Kwakel B.V v. Baruch Hajaj*, (published in Nevo) (Sept. 3, 2013) [English: http://versa.cardozo.yu.edu/opinions/de-kwakel-bv-v-hajaj]; Paul S Davis, "Aid, Abet, Counsel or Procure," *in* Chamberlain, Neyeres & Pitel, eds., *Tort Law: Challenging Orthodoxy* 413 (2013).

Thus we see that in weighing the overall considerations, the legislator of the Law before us was of the view that the interest in preventing harm justified imposing tortious liability upon the wrongdoer, even at the expense of a certain infringement of freedom of expression. This constitutes something of a complement to the long-accepted principle in our case law that where a person encourages illegitimate discrimination by wrongful speech, the law recognizes the possibility of limiting his freedom of expression. Thus, for example, there is a provision in the Prohibition of Discrimination Law (sec. 4) that somewhat infringes freedom of expression in order to protect the right of an individual to equality:

> 4. A person, whose business is the supply of products or of public services, or the operation of a public place, *shall not publish any advertisement* that includes any discrimination prohibited under section 3 [emphasis added – H.M.].

However, the infringement of freedom of expression caused as a result of the Boycott Law is somewhat different from the infringement resulting from the torts listed above, inasmuch as the Law may have a "chilling effect" on the freedom of political expression, which is of particular importance in the public arena (see, for example: HCJ 606/93 *Kidum Enterprises and*

Publishers (1981) Ltd. v. *Broadcasting Authority*, IsrSC 48(2) 1, 12 (1994)). It therefore remains for us to examine whether such an infringement nevertheless meets the requirements of the third subtest of proportionality. On this freighted point, I will "travel" abroad to bring back support from decisions that treated of related subjects and concluded that *the infringement is, indeed, proportionate.*

49. The European Court of Human Rights in Strasbourg addressed the infringement of freedom of political expression in the context with which we are concerned, and this is the story:

In the course of a town-council meeting, Jean-Claude Fernand Willem, the mayor of the French town of Seclin, called for a boycott of Israeli products (primarily citrus juice) due to Israel's policy towards the Palestinians. That call was also published on the town's Internet site. Pursuant to that call, a criminal complaint was filed against the Mayor with the public prosecutor, who decided to bring criminal charges against the Mayor for provoking discrimination on national, racial and religious grounds, which is an offense under secs. 23-24 of the French Law on the Freedom of the Press (Loi sur la liberté de la presse du 29 juillet 1881), which establish as follows:

> Article 23: Seront punis comme complices d'une action qualifiée crime ou délit ceux qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication au public par voie électronique, auront directement provoqué l'auteur ou les auteurs à commettre ladite action, si la provocation a été suivie d'effet.
>
> Cette disposition sera également applicable lorsque la provocation n'aura été suivie que d'une tentative de crime prévue par l'article 2 du code pénal.
>
> Article 24: …Ceux qui, par l'un des moyens énoncés à l'article 23, auront provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou

> de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, seront punis d'un an d'emprisonnement et de 45 000 euros d'amende ou de l'une de ces deux peines seulement.

And in English translation:

> Article 23: Will be punished as accomplices to an action qualified as a crime or a misdemeanor, those who, either by speech, calls or threats spoken in public places or public assemblies, or by writing, printed, drawings, engravings paintings, emblems, images or all other written support (format), spoken format, or visual image sold or distributed offered for sale or exposed in (public) places or public assemblies, either through billboards or via posters exposed for public access (viewing), or by any method of communication to the public by electronic means, which would have directly provoked the perpetrator (instigator) (single) or perpetrators (instigators)(plural), if the provocation was followed by the effect (or followed by a reaction).
>
> This clause will be equally applicable in situations where the provocation would have been followed just by an attempted crime as provided by section 2of the penal code.
>
> Article 24: … Those who, by one of the methods outlined in article 23, did provoke to discrimination, to hatred or to violence towards a person or towards a group of people by reason of their origin or of their membership (part of) or of their non-membership to a determined ethnic group, a nation, a race or a religion. Will be punished by a one year prison sentence and of a 45 000 Euro fine, or to either of these sentences alone.

The Mayor was acquitted by the Lille Criminal Court, but the Court of Appeals ruled that the Mayor's *call* was tainted by *discrimination* on national, racial and religious grounds, found him guilty, and imposed a fine of 1000 Euro. That decision was later upheld by the French *Cour de Cassation*.

50. The Mayor appealed the judgment to the European Court of Human Rights, which denied the Mayor's appeal (see: *Willem v. France* (application no. 10883/05), 10.12.2009).

The panel of the European Court of Human Rights, composed of judges from Denmark, France, Germany, Liechtenstein, Monaco, Macedonia and the Czech Republic, held, in a majority ruling of 6 to 1 (the Czech judge), that the Mayor was not convicted for his political opinions, but rather because he called for discrimination against Israeli producers and their products. The European Court of Human Rights also found that the French law met the conditions of the European limitation clause, which is essentially similar to the Israeli "Limitation Clause". The European Court of Human Rights further held that under the French Law, the Mayor was not entitled to undermine the French governmental authorities by calling for an "embargo" on the products of a foreign country, and noted that the penalty imposed upon him was relatively moderate.

The European Court of Human Rights further held that the decision of the French courts to convict the Mayor was not inconsistent with the right to freedom of expression enshrined in sec. 10 of the European Convention on Human Rights. According to the European Court of Human Rights, the fine imposed upon the Mayor was lawful and intended for a proper purpose – protection of the rights of Israeli producers. The Court based its decision *(ibid*., para 20), *inter alia*, on another decision of the French Constitutional Court, in which it was held that a declaration made by a French company that sought to contract with another company from the United Arab Emirates, according to which it would not trade with Israel or transfer goods to it, was unlawful under sec. 225-1 and 225-2 of the French Penal Code. And see: the decision of the European Court of Human Rights in *Leroy v. France*, Application no. 36109/03 of Oct. 2, 2008.

51. A similar matter, adjudicated in France and similarly decided, concerned the conviction of Saquina Arnaud-Khimoun by the Criminal Court in Bordeaux for labeling Israeli products with the sticker "Boycott Apartheid Israel". The court held that Khimoun had hindered the normal exercise of economic activities by making a distinction on the basis of nationality. After the verdict was affirmed by the Appeals Court of Bordeaux, an appeal was filed with the *Cour de Cassation* (No B 10-88.315), which, in May 2012, reaffirmed the decision of the Appeals Court. For a discussion of the matter, see Rubinstein & Pasha, *Academic Flaws*, at pp 118-119, which also provides some answer to the Petitioners' argument that the above cases differs from the Law under consideration, in that the European judgments concerned sanctions imposed upon persons calling for a boycott of a foreign state, whereas the Israeli Law imposes a prohibition upon

persons calling for a boycott of their own state. In their book, the learned authors address the exceptional phenomenon of calling for a boycott of one's own state, and suggest that this is the reason why there are no direct precedents on the matter, stating:

> We have not found a parallel example in the United States [to Israeli calls for boycotting Israeli academia – M.C] of academic calls for boycotting the United States – not even in the turbulent times of the Vietnam War. Not even after four students were killed by the National Guard at Kent State University [*ibid*., p. 118].

52. Having touched upon comparative law, it would be appropriate to add that in American law, in which freedom of expression is particularly broad, the call for a boycott in the *Claiborne* case was not disallowed due to the fact that the objects of the boycott had themselves behaved in a discriminatory manner towards African-Americans, and the boycott was intended to eradicate that discriminatory phenomenon by a focused attack upon those boycotted. As opposed to that, in the matter at bar, those being boycotted *merely have a connection to the State of Israel*, and it is *the state* that those who call for the boycott claim acts illegitimately. Therefore, *it would seem that such a case, to the extent that it results in harm, would not fall within the scope of freedom of expression even in the United States* (see the reasoning in the *Holder* case, as well as the article of Dafna Barak-Erez & Dudi Zechariah, *ibid*.).

53. We may thus conclude that in accordance with the above European decisions and the approach we may deduce from the American *Holder* case, the Law that is the subject of the Petitions falls within the "legislative discretionary space", sometimes referred to as the "margin of proportionality" or "zone of proportionality" (see: Barak, *Proportionality in Law*, pp. 505-508) [English: pp. 415-418]). Therein, the question posed before us is not whether the chosen arrangement is the best, but rather whether the chosen arrangement is lawful, that is, whether it falls within the "discretionary space" in which the legislature may act (see my opinion in the *Shlitner* case).

I am of the opinion, as stated, that in this case, the arrangement enacted in the framework of the Boycott Law falls within the "legislative discretionary space", even if one might say that it is at the outer limit of that space.

The Law, in this case, does not impose a criminal prohibition upon political expressions as such, and the tort that the Law creates applies only to a *call for the imposition of a boycott*, but does not attribute tortious liability to a person who expresses the political views that underlie the call for a boycott (as long as they do not constitute a call for a boycott). Moreover, the injury to the person calling for a boycott is, as noted, limited: in order for a cause of action for relief under the tort to reach fruition, many conditions must be met: proof of harm, a causal connection between the tort and the harm, and awareness of a reasonable possibility for the realization of the harm. In addition, if tortious liability is attributed to a person calling for a boycott, the damages imposed upon him will not exceed the actual harm that he caused (subject, of course, to my holding as to the unconstitutionality of sec. 2(c) of the Law). The administrative restrictions imposed upon a person calling for a boycott are also proportionate, in view of the procedure required for their approval, and particularly in view of what I pointed out in paras. 44-45 above in regard to the broad discretion granted to a government in regard to the allocation of benefits and grants.

54. The above holding can also be supported by several additional doctrines *that all lead to the same result*, which serves to show that in terms of *jurisprudence* (particularly in the field of public law), the conclusion is correct (see: my opinion in CA 4244/12 *Haaretz Newspaper Publication Ltd. v. Major General Ephraim Bracha* (published in Nevo) (February 19, 2014)). I will refer to those doctrines below.

Additional Approaches supporting the Proposed Conclusion

55. The conclusion that I have reached is also required by additional constitutional law theories on the subject of annulling laws, which will now be surveyed.

An Interpretation of a Statute that upholds its Constitutionality is preferable to one that would annul it

56. The above proposition validates the approach that nullifying a law should be the *last resort*, which should be adopted only when there is no other choice, as Justice Rivlin stated in HCJ 9098 *Ganis v. Ministry of Building and Housing*, IsrSC 59 (4) 286 (2004) (English: http://versa.cardozo.yu.edu/opinions/ganis-v-ministry-building-and-housing] (hereinafter: the

Ganis case). In this regard, our case law has developed a preference for the interpretive approach described by Justice Beinisch in the *Ganis* case:

> Everyone agrees that when the validity of a statute is questioned and a doubt arises as to its constitutionality, the court should first consider whether it is possible to find a reasonable interpretation that will make it unnecessary to decide upon its constitutionality and will allow the statute to exist in harmony with the basic principles of the constitution and the legal system. [*ibid*., at pp. 290-291, and see the sources cited there in support of that proposition; and see HCJ 5113/12 *Friedman v. Knesset*, (published in Nevo) (Aug. 7, 2012) (hereinafter: the *Friedman* case)].

That is the approach that was adopted by the expanded panel in HCJ 3809/08 *Association for Civil Rights in Israel v. Israel Police*, (published in Nevo) (May 28, 2012) (hereinafter: the *Association for Civil Rights* case). Thus, the path of *narrow construction* that I proposed for the provisions of sec. 2(a) and 2(b), and secs. 3 and 4 of the Law is preferable to invalidating the said provisions.

At this point, three additional comments would be appropriate:

(A) Certain matters are indeed unclear in the provisions of sec. 2 of the Law. However, as noted, that lack of clarity can be mitigated through interpretation. Moreover, ambiguity does not constitute grounds for voiding a law. As a rule, in judicial review we must be careful to observe the difference between the grounds for review under constitutional law (in which the grounds are much more limited) and administrative law (where the grounds are inherently broader). See the *Association for Civil Rights* case.

(B) The fear expressed that it might be possible to exercise prior restraint upon a call for boycott by means of a restraining order under the boycott tort is unfounded, inasmuch as it has already been held in a related matter that prior restraint in matters of freedom of expression must be very limited (see: CA 214/89 *Avneri v. Shapira*, IsrSC 43 (3) 840 (1989); and also *cf*: Avigdor Klagsbald, "Criminal Offense and Prior Restraint," 2 *Plilim* 93 (1991)).

(C) My proposal to void sec. 2(c) of the Law shows that there are limits to interpretation, and in the absence of an interpretive solution, the provision must be annulled.

The Legislature should be granted Deference

57. In his book *Proportionality in Law* (*ibid*., pp. 488-491) [English: 396-399], Prof. Barak sought to reject the doctrine of deference that is accepted in many countries (both in Europe and in the United States), and that constitutes a certain constraint upon the judicial review of laws. Consequently, he characterized the concept of deference as "*submission*".

Justice E. Rivlin – who called for the adoption of this doctrine in appropriate cases – took the view that the term deference should be referred to as *respect* (for the legislature), see: HCJ 466/07 *MK Zahava Gal-On v. Attorney General* (published in Nevo) (Jan. 11, 2012), paras. 20-24 of his opinion [English: http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]. A similar position was adopted by my colleague Justice E. Rubinstein in the *Friedman* case.

I would like comment in this regard that I believe that the Deference Doctrine can be situated in the framework of the proportionality tests (as for possible alternatives to the legislation – these would be examined in the framework of the second subtest, and the "overall relativity" would be examined in the framework of the third subtest – see: Alan D.P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach*, 30-34 (2012)).

If we apply this approach to the matter before us, the result that I have proposed is necessary.

The "Margin of Appreciation" Theory also justifies the Proposed Result

58. The Margin of Appreciation Theory was developed in European law, beginning with the decision of the European Court of Human Rights in *Handyside v. The United Kingdom*, App. No. 5493/72, 1 EHRR 737 (1979). It was held in that case that the margin of appreciation grants preference to the *national legislature* and the authorities of the state (that is part of the European Union), including its courts, in interpreting and applying domestic law, by reason of the relevant constitutional principles and circumstances of that state. On the development of the Margin of

Appreciation Doctrine over the years, see: John Wadham, Helen Mounfield, Caoilfjionn Gallagher & Elizabeth Prochaska with Anna Edmundson, *Blackstone's Guide to The Human Rights Act 1998*, 40-42 (5th ed., 2009).

In his book *Proportionality in Law*, Prof. Barak explains the distinction between the "margin of proportionality" [which Barak terms the "zone of proportionality" – ed.] and the "margin of appreciation" as follows:

> The notion of the zone of proportionality examines the constitutionality of a limitation on a human right from a national standpoint. It determines the framework of factual and normative data from which the legislator may derive a valid limitation on a human right. The doctrine of the "margin of appreciation" examines the constitutionality of the limitation of a right from the standpoint of the international community. It determines the framework of factual and normative data whose existence allows the international community to provide considerable weight to the factual and normative determinations made by contracting state actors. (*ibid*., p. 511) [English: pp. 419-420].

Against the background of the similarity and difference between the two doctrines, Prof. Barak considers the place of the "margin of appreciation" in national (domestic) law, and finds that examining this doctrine is important in that it explains the international and foreign case-law to the local judge, and comparative law has a recognized place in constitutional interpretation (see: Barak, *Proportionality in Law*, pp. 91-94). He concludes:

> First, the study of the concept is of major importance, as it may explain and clarify much of the international law decisions and rulings that can also apply locally…But these contributions conclude the role of the concept of margin of appreciation for the national (domestic) judge (see: Rivers "Proportionality and Variable Intensity of Review" 65 Cambridge L.J 175 (2006)). While ruling on domestic issues, the judge should base his or her decisions on the notion of the "zone of proportionality." At the basis of such a decision is that legal system's

notion of the proper balance between the public interest and individual human rights. (*ibid*., p. 512) [English trans., p. 421].

However, there those who are of the opinion that the margin of appreciation theory can also be situated in the "proportionality tests", and that the "margin of appreciation" even applies to the relationship between domestic law and international law (see: Andrew Legg, *The Margin of Appreciation in International Human Rights Law*, 194-196 (2012); Paola Bilancia, *The Dynamics of The EU Integration and The Impact on The National Constitutional Law*, 147 (2012)).

In view of the decisions of the European Court of Human Rights cited above, it would seem that the provisions established by the Israeli legislature in secs. 2(a) and 2(c) of the Law fall within the Israeli "margin of proportionality", particularly in light of the "margin of appreciation". And *cf*. my opinion in AAA 5493/06 *Emanuel Peled v. Prison Service* (published in Nevo) (Oct. 12, 2010).

Moreover, a contrary holding by this Court might undermine the "margin of appreciation" that the European Court of Human Rights has recognized (in regard to France) in connection with the boycott against the State of Israel.

The Claim of Discrimination in regard to the enactment of the Boycott Law (in comparison to other boycotts not prohibited by law) must be dismissed

59. The Petitioners argue that the Knesset chose to enact only a law against calling for a boycott against the State of Israel, as defined by the Law, but refrained from legislatively prohibiting other forms of boycott (such as consumer boycotts, religious boycotts, etc.), which constitutes a form of discrimination that should result in the voiding of the Law.

This argument is of no merit. As a rule, a claim of discrimination cannot be raised against the legislature for choosing to address a specific subject while refraining from addressing another, similar situation.

Such an administrative cause of action cannot be claimed against the legislature, even if we ignore the subject of "lacuna", "negative arrangement", and legislative void in constitutional contexts. See: the *Association for Civil Rights* case.

The Ripeness Doctrine in Constitutional Law, as applied to the Matter at Bar, requires that other than the voiding of Section 2(c), the Claims of the Potential Claimants and Potential Defendants in regard to the Law will be examined in Application

60. The Ripeness Doctrine was adopted into Israeli constitutional law in the *Alumni Association* case, and was further developed of late in HCJ 2311/11 *Uri Sabah v. Knesset* (published in Nevo) (Sept. 17, 2014) (hereinafter: the *Acceptance Committee* case), and see: Chachko, "On Ripeness and Constitutionality". This doctrine "allows the Court to decide that a decision in regard to a constitutional question before it will be made at a later stage, if at all" (see: HCJ 7190/05 *Lobel v. State of Israel* (published in Nevo) para. 6 of the opinion of M. Naor J. (Jan. 18, 2006) (hereinafter: the *Lobel* case)), "due to the absence of a complete set of clear, concrete facts necessary for making a fundamental judicial decision" (the *Lobel* case, para. 4 of the opinion of M. Naor J.)). Also see: HCJ 3803/11 *Israeli Capital Markets Trustees Association v. State of Israel* (published in Nevo) (Feb. 5, 2012); HCJ 5440/11 *David Hananel (Chen) v. Minister of Justice* (published in Nevo) (March 11, 2012); HCJ 7872/10 *Jaffa Moslem Council v. Prime Minister* (published in Nevo) (June 7, 2012); the *Acceptance Committee* case.

In his article cited in para. 6(A) above, Ronen Polliack tried to show that this doctrine should be applied in a relative manner, such that two additional pathways be added, which he views as preferable to the existing pathway: applied judicial review by the High Court of Justice, and applied judicial review by the trial court. In his opinion, the proposed model reflects a more careful balance between applied review and facial review, a subject that has recently been the subject of considerable discussion in the United States (see: Richard H. Fallon, Jr., "Fact and Fiction about Facial Challenges," 99 *Calif. L. Rev* 915 (2011)).

In fact, a similar approach was adopted in the decision in the *Acceptance Committee* case.

In my opinion, applying the constitutional ripeness doctrine to the matter before us requires that – other that the striking down sec. 2(c) of the Law – the claims of potential

claimants and potential defendants in regard to the Law should be subjected to applied review in the trial courts in the course of suits that may be filed in regard to secs. 2(a) and 2(b), or alternatively, when individual petitions are filed in regard to secs. 3 and 4 of the Law against a concrete decision of the Minister of Finance. We would thus follow the accepted American approach in which constitutional issues generally arise and are examined in the course of an "indirect challenge" and "from the bottom up". This approach is also accepted in Continental Europe, as we see from the evolution of the case concerning the French mayor, which began in the local criminal court and reached the European Court of Human Rights. This development is particularly apt in the matter before us because, as I have explained, the law views boycotting as a "chameleon concept" that is sometimes acceptable and sometimes prohibited. This approach affects the legal outcome, which is also contingent upon the circumstances.

Conclusion

61. In light of all the above, only sec. 2(c) of the Law should be struck down, while the remaining provisions should be left in force. This conclusion does not preclude the possibility of raising constitutional questions that have not been decided here at the "applied stage" (when actions brought under the law are examined), however, it would seem that it would be preferable to follow the American and European approach under which cases regarding "calls for boycott" begin in the trial courts (where the claims are examined in the context of concrete facts), and the matter then rises through the judicial system.

62. Before concluding, I would add that I have, of course, read the opinions of my colleague the President, the Emeritus President, and my other colleagues, and I naturally agree with all of the reasons of those who concur with my position and added other considered reasons to it, as they saw fit. I also have the greatest respect for the views of those who disagree with me, but I have chosen not to open a round of responses and counter-responses, so as not to further lengthen my opinion, and inasmuch as the main points are set out for all, and now that we have decided, the reader can review and criticize in the appropriate forums.

63. I will conclude in stating – above and beyond the result that I have reached – that, as a rule, it is preferable to follow the historical approach that saw fit to restrict boycotts in their various forms, at home or abroad, except for limited exceptions (among which the boycott

against the State of Israel, as defined in the Law, is not included),. Boycotts are generally bad for the entire state (including the Jewish State), and bad both for democracy and for society.

Justice Danziger:

I have received my colleague Justice Melcer's comprehensive opinion, read it, and concluded that I hold a different opinion. In my view, the Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011 (hereinafter: the Law or the Boycott Law) substantially infringes the right to freedom of expression. In my opinion, that infringement does not meet the tests under the Limitation Clause in sec. 8 of Basic Law: Human Dignity and Liberty. Despite this conclusion, I believe that the degree of that infringement can be substantially lessened by means of interpretation, such that the Law can successfully ford the constitutional tests. Therefore, if my opinion were accepted, we would order that the Law be understood such that – as I shall explain more fully below – only a boycott of an "institution" or "area" that is a boycott against Israel, and that derives from their connection to the state, would fall within the scope of the Boycott Law, whereas a boycott against an "institution" or "area" that is not part of a boycott against the State of Israel would not fall within the scope of the Law's definition.

1. My colleague Justice Melcer surveyed the Law's provisions in detail, as well as its legislative background and the arguments of the parties, and I see no need for repetition. The Petitioners present constitutional arguments. They ask that we strike down the Boycott Law for being repugnant, in their opinion, to Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. The examination of these claims must be carried out in three stages. At the first stage, the question to be examined is whether a constitutional right is violated. If so, then we must proceed to the second stage of constitutional review, in which the constitutionality of the violation is examined in light of the tests set out in the Limitation Clause. In the third stage, which would be addressed only if the Law were to be found unconstitutional, we would decide the consequences of that unconstitutionality (HCJ 10203/03 *Hamifkad Haleumi Ltd. v. Attorney General*, IsrSC 62 (4) 715, 757 (2008) [English: http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general] (hereinafter: the *Hamifkad Haleumi* case); HCJ 1661/05 *Hof Azza*

Regional Council v. The Knesset, IsrSC 59 (2) 481(2005) (hereinafter: the *Hof Azza Regional Council* case).

The Boycott Law and its Infringement of Political Freedom of Expression

2. My colleague Justice Melcer is of the opinion, with which I concur, that the Boycott Law infringes freedom of expression, and that it, therefore, violates the constitutional right to human dignity. However, my colleague believes that "we are not concerned here with an infringement of the nucleus of freedom of expression, even where political speech is concerned" (para. 21 of his opinion). I cannot agree.

3. Freedom of expression is a constitutional human right. Its strict defense is an inseparable part of the Israeli constitutional tradition. Freedom of expression was granted far-reaching protection even before the enactment of the Basic Laws. It was made clear already then that freedom of expression is a "supreme value", and that it "constitutes the pre-requisite to the realisation of almost all the other freedoms" (HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of the Interior*, IsrSC 7 (2) 871, 878 (1953) [English: http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior] (hereinafter: the *Kol Ha'am* case)). It has further been held that it is "the apple of democracy's eye" (CrimA 255/68 *State of Israel v. Ben Moshe*, IsrSC 22 (2) 427, 435 (1968)). With the enactment of Basic Law: Human Dignity and Liberty, freedom of expression was established as a constitutional right. A long line of decisions by this Court have established that certain aspects of freedom of expression – including freedom of political expression – are part of the constitutional right to dignity (see, for example: CA 4534/02 *Schocken Chain Ltd. v. Herzikowitz*, IsrSC 58 (3) 558, 565-566 (2004); HCJ 2557/05 *Majority Camp v. Prison Service*, IsrSC 62 (1) 200, 215-218 (2006) [English: http://versa.cardozo.yu.edu/opinions/majority-camp-v-israel-police] (hereinafter: the *Majority Camp* case); PPA 4463/94 *Golan v. Prison Service*, IsrSC 50 (4) 136, 156-157 (1996); LCA 10520/03 *Ben Gvir v. Dankner* (published in Nevo) para. 10 *per* E. Rivilin J. (Nov. 12, 2006) (hereinafter: the *Ben Gvir* case); the *Hamifkad Haleumi* case, paras. 22-26 *per* M. Naor J, at pp. 760-763; Aharon Barak, *Human Dignity: The Constitutional Value and its Daughter Rights*, vol. 2, pp 708-712 (2014) (Hebrew), [published in English as *Human Dignity: The Constitutional Value and the Constitutional Right* (2015)] (hereinafter: Barak, *Human Dignity*).

4. The importance of freedom of expression can be learned from its purpose. In its extensive case law on the subject of freedom of expression, this Court has presented three primary purposes grounding the right (see, for example: Ilana Dayan-Orbach, "The Democratic Model of Freedom of Speech," 20 *Iyunei Mishpat* 379-384 (1996) (Hebrew); Aharon Barak, "The Tradition of Freedom of Speech in Israel and its Problems," in Aharon Barak, *Selected Essays*, (H. Cohn & I. Zamir, eds.) vol. 1, 531, 535-536 (2000) (Hebrew)).

The *first purpose* is the search for truth. Grounding this purpose is the approach by which "sunlight is said to be the best of disinfectants". Only in a free, spirited, and "sophisticated" marketplace of ideas and opinions allows the truth to overcome lies. John Milton expressed this justification in his famous saying: ""Let her [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?" (John Milton, "Areopagitica; A speech for the Liberty of Unlicensed Printing, to the Parliament of England," quoted by Dorner J. in HCJ 316/03 *Bakri v. Israel Film Council*, IsrSC 58 (1) 249, 270 (2003) [English: http://versa.cardozo.yu.edu/opinions/bakri-v-israel-film-council] (Hereinafter: the *Bakri* case); the *Kol Ha'am* case, p. 877).

The *second purpose* of freedom of expression concerns autonomy and individual self-fulfillment. "Without the freedom to be heard and to hear, to write or read, to speak or be silent, the individual's personality suffers, as a person's spiritual and intellectual development depends upon the ability to freely shape one's worldview" HCJ 399/85 *MK Rabbi Meir Kahane v. Managing Board of the Israeli Broadcasting Authority*, IsrSC 41(3) 255, 274 (1987) (hereinafter: the *Kahane* case); and see: CA 8954/11 *Ploni v. Plonit*, (published in Nevo), para. 62 *per* N. Sohlberg J. (April 24, 2014)). Freedom of expression allows the individual, in the words of Agranat J., "to nurture and develop his ego to the fullest extent possible; to express his opinion on every subject that he regards as vital to him; in short, to state his mind, in order that life may appear to him to be worthwhile" (the *Kol Ha'am* case, p. 878).

The *third purpose* concerns democracy. "The principle of freedom of expression is closely bound up with the democratic process" (the Kol Ha'am case, p. 876, *per* Agranat J.; and see: HCJ 372/84 *Klopfer-Naveh v. Minister of Education and Culture*, IsrSC 38 (3) 233, 238 (1984) (hereinafter: the *Klopfer-Naveh* case)). Freedom of expression is a precondition for the free flow of the information relevant to living as a community. Indeed, "elections in a democratic

system would be unimaginable without a prior exchange of opinions and mutual persuasion" (the *Klopfer-Naveh* case, p. 239, *per* Shamgar P.). "A regime that usurps the right to decide what the citizen should know, will ultimately decide what the citizen should think. There is no greater contradiction than this for a true democracy that is not 'guided' from above" (HCJ 243/62 *Israel Film Studios v. Levy*, IsrSC 16 2407, 2415-2416 (1962)). The exchange of opinions and ideas in the free marketplace of speech is a condition for the possibility of changing the government. It is vital to preventing tyranny of the majority. It makes participation in the democratic process possible, and it is, therefore, fundamental to the political community. The right to freedom of expression ensures the legitimacy of the regime. Moreover, freedom of expression provides a means for "letting off steam" that might otherwise be stored up and vented in undesirable ways for lack of a legitimate avenue for release (see: the *Bakri* case, p. 262).

5. These objectives of freedom of expression define its scope and the strength of its defense. Freedom of expression comprises a broad spectrum of speech. It applies to commercial and artistic expression, comprises political speech and news reporting, it extends to lies, tasteless statements, pornography, and even racism. But its wide range is met with differing levels of protection of the particular forms of expression. "A violation of the very heart of the right is not equivalent to a violation at its periphery" (the *Hamifkad Haleumi* case, pp. 760-761, para. 22, *per* Naor J.). Thus, as a rule, commercial speech will be afforded less protection than artistic expression. Racist speech will generally receive especially less protection. Political speech stands at the top of the ladder. "Freedom of political expression lies at the heart of the right to freedom of speech" (the *Hamifkad Haleumi* case, p. 761, para. 23, *per* Naor J.); and see: HCJ 6226/01 *Indor v. Mayor of Jerusalem*, IsrSC 57 (2) 157, 164 (2003) (hereinafter: the *Indor* case); the *Kahane* case, p. 293). The protection of political speech, more than any other form of expression, ensures a free exchange of the opinion and positions relevant to our communal life. Freedom of political expression allows the individual to express himself within his community. It allows the individual to advance his views and objectives. It is a precondition to political assembly and association. Freedom of political expression is also "more exposed to political harassment by the regime than any other form of expression", and therefore its protection is of particular importance (HCJ 6396/96 *Zakin v. Mayor of Beer Sheva*, IsrSC 289, 303, *per* Zamir J. (1999)).

6. And so we arrive at the Law before us.

The Boycott Law prohibits – in the manner set out therein – "a public call for a boycott" and "committing" to participate in a boycott. In general, a boycott may have various objectives. For example, a boycott may be motivated by economic, consumer or political considerations. The boycott that is addressed by the Law is a political-ideological boycott. The purpose of such a boycott is to "reflect the ethical position of the imposers of the boycott" and "express ideological discontent" (Nili Cohen, "Nili Cohen, "Law, Play, Game - The 'Merchant of Venice' and the 'Breakdown'," 51 *Hapraklit* 407, 433-434 (2012) (Hebrew) http://www.hapraklit.co.il/_Uploads/dbsAttachedFiles/Nili_Cohen_Article.pdf) (hereinafter: Nili Cohen, "Law, Play, Game")). By means of the boycott, the boycotter refrains from supporting and encouraging actions that, in its opinion, are unworthy of its support. In certain senses, the boycott testifies to the "seriousness" of the expression, in that it embodies a readiness to act or refrain from acting. In addition, there are characteristics of a boycott that are not merely declaratory. Boycott is meant to lead change. It advances a practical result. The "tools" of the boycott are economic and social pressure. Boycott is a non-violent means for political change. It is intended to change, lessen or condemn the boycotted conduct.

A call for a boycott, and a political boycott itself, are consistent with the three primary purposes of freedom of expression. Thus, the call for a boycott contributes its underlying political position to the marketplace of ideas. It allows the boycotting position to vie for its place, attempt to influence other positions and succeed or fail in that attempt. Theresa J. Lee addressed this in her article "Democratizing the Economic Sphere: A Case for the Political Boycott", 115 *W. Va. L. Rev*. 531 (2012) (hereinafter: Lee, "Political Boycott").

> 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. The boycott is precisely a means to persuade others to action, including those being targeted and those inspired to join. This "free trade" in persuasion is why the boycott finds a natural home under the marketplace of ideas theory…
>
> In addition, even when a boycott does not necessarily achieve its ultimate end, it remains a vehicle for forcing the dissemination of an idea. Boycotts make the perhaps otherwise latent dissent visible to a greater number of participants in the

marketplace of ideas, highlighting not only their position but also the very existence of the debate [*ibid.*, p. 549].

In the democratic context, political boycott is a means for achieving political objectives by peaceful means. "Indeed, public boycotting is a tool in the democratic game: it seeks to engender change by non-violent means, and it can be as effective as a legal sanction" (Nili Cohen, ""Law, Play, Game," p. 433; and see: Lee, "Political Boycott," pp. 553-556). The political boycott is also a means for self-fulfillment. It allows an individual to express his political views, influence his future, and decide for himself what values will be supported by his resources (see: Lee, "Political Boycott," pp. 556-558); for further discussion of political boycotts, see: Notes, "Political Boycott Activity and the First Amendment," 91 *Harv. L. Rev*. 659 (1977-1978)).

7. My colleague Justice Melcer is of the opinion that "calls for a boycott against the State of Israel, as defined by the Law, do not serve the classical purpose of freedom of expression" (para. 30 of his opinion). The source of this position is the distinction that my colleague made between the terms "persuade" and "means for coercion". According to his approach, a call for a boycott is a coercive form of expression, and therefore it should be afforded less protection than that granted other forms of political speech. I do not agree with that position. As I stated, I believe that calling for a boycott is consistent with the objectives of freedom of expression. Indeed, calling for a boycott, like imposing a boycott, comprises coercive characteristics. Calling for a boycott seeks, *inter alia*, to influence the object of the boycott to change its policy or conduct by inflicting economic, cultural or academic harm. However, that is not its sole purpose. A boycott expresses revulsion for the boycotted conduct. It testifies to a lack of desire to support and finance conduct that the boycotter finds objectionable. These characteristics of boycott justify its protection as a form of expression. True, we should not ignore the coercive elements of boycotting. A boycott can make political discourse superficial. It may put a "price tag" on political or other conduct that is inconsistent with the views of the boycotter. That can result in a "chilling effect" that will remove the boycotted expressions from the marketplace of opinions and ideas. However, as stated, that is not the only characteristic of boycotts. Along with the chilling effect, political boycott also has the potential of enriching the marketplace of opinions. Moreover, even if boycotting harms the boycotted positions, that is insufficient to automatically

justify infringing it as a form of expression. The "harm" to the boycotted view as a result of the boycott is imposed by the members of society in the framework of their free activity in the marketplace of ideas. Prohibiting boycotts is not part of the free competition in the marketplace of ideas. As Lee aptly explains in "Political Boycott":

> Claims that boycotts fail to satisfy the values of the marketplace of ideas because they coerce others into not speaking, thus depriving the market of those ideas, must fail. Such claims give the boycott too much credit. Boycotts are only one voice among many; they are a costly form of speech for the speaker and within the market, they can be combated with further speech. As the Court has often made clear, just because one voice is louder does not mean that other voices are being silenced, and even if the danger of drowning out arises, the way to combat it has never been to temper the louder voice… [*ibid*., p. 549].

And further on:

> While a successful boycott may appear to drown out another position, the remedy is not to silence the boycott but instead for those on the other side to endeavor to make themselves 'louder' [*ibid*., p. 550].

8. The decision of the United States Supreme Court in *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, (1982) (hereinafter: the *Claiborne* case) reflects this position. In 1966, Afro-American residents of Claiborne County declared a boycott against white businessmen in the county. The purpose of the boycott was to persuade the government to act against racial discrimination and to promote integration. The boycott inflicted financial harm upon the white businessmen, some of whom filed suit against the boycott's organizers and its supporters. The businessmen won the suit, and 92 of the boycotters were ordered to pay the businessmen damages in a total amount of 1.25 million dollars. The case ultimately reached the Supreme Court of the United States, which reversed the judgment. The Court held that boycotting, organizing a boycott, and supporting it are activities that fall within the compass of protected speech under the First Amendment of the Constitution. In so doing, the Court also held that the fact that the purpose of the boycott was to persuade others to change their views or conduct, and even to coerce them to do so, does not change its character as protected speech. As Justice Sevens wrote:

> Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action [*ibid*., p. 909-910].

And further on:

> The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper… Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability [*ibid*., p. 911].

And see: Barbara Ellen Cohen, "The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis: NAACP v. Claiborne Hardware Co.," 1984 *Wis. L. Rev*. 1273 (1984).

9. The Boycott Law is not directed at any political boycott in general. It treats only of a boycott of a specific type – "a boycott against the State of Israel". The Law defines this term as "deliberately refraining from economic, cultural or academic ties with another person or body solely because of his connection with the State of Israel, one of its institutions or an area under its control, such that it may cause economic, cultural or academic harm (sec. 1 of the Boycott Law). According to its plain meaning, it "grasps" several types of boycotts. The first, self-evident, "type" is a comprehensive boycott against the State of Israel as such. An additional "type" of boycott that is apparently included in the definition is a boycott applying solely to the areas of Judea and Samaria (hereinafter: the Area), even when not ancillary to a boycott of the entire state. Such a boycott would appear to be deemed one that harms an individual or other element solely for its connection to "an area under its control" by the State of Israel. The future of the Area and the settlements located there is the subject of heated political and public debate in Israel. Many publics largely define their political loyalties by their stand on this debate. It

would not seem an exaggeration to count the "subject of the territories" as one of the most politically disputed issues in Israel. Indeed, this issue has held a central place in Israeli public discourse for a generation (and compare: Kalman Neuman, *Territorial Concessions as an Issue of Religion and State*, Policy Paper No. 96, (IDI, 2013) (Hebrew) [http://en.idi.org.il/media/2108337/PP96.pdf]; Yael Hadar, Naomi Himeyn-Raisch, and Anna Knafelman, "Doves and Hawks in Israeli Society: Stances on National Security," (2008) [http://en.idi.org.il/analysis/articles/doves-and-hawks-in-israeli-society-stances-on-national-security/]; Ephraim Yaar & Zev Shavit, eds., *Trends in Israeli Society*, vol. 2, 1165, 1224 (2003); Menachem Hofnung, *Israel - Security Needs vs. the Rule of Law*, 282-283 (Nevo: 1991) (Hebrew); Tamir Magal, Neta Oren, Daniel Bar-Tal & Eran Halprin, "Views of the Israeli Occupation by Jews in Israel: Data and Implications,: *in* Daniel Bar-Tal & Itzhak Schnell, eds., *The Impacts of Occupation on Israeli Society* (2013) (Hebrew) [http://lib.ruppin.ac.il/multimedia_library/pdf/45558.pdf]; Elisha Efrat, "Return to Partition of the Land of Israel," in 23 *New Directions* 78, 81 (2010) (Hebrew); Chaim Gans, "Is There a Historical Right to the Land of Israel?" 24 *Tchelet* 103, 118 (2006) [English: 27 *Azure* (2007) http://azure.org.il/article.php?id=32]). And as Justice D. Beinisch so aptly described this in HCJ 7622/02 *Zonschein v. Military Advocate General*, IsrSC 57 (1) 726 (2002) [English: http://versa.cardozo.yu.edu/opinions/zonstien-v-judge-advocate-general]:

> Political conflicts in Israeli society agitate its most sensitive nerves. Israeli society is characterized by its intense ideological conflicts, including conflicts based on reasons of conscience and reasons of religious faith [*ibid.*, p. 735].

In that case, this Court addressed the lawfulness of the Chief of Staff's decision not to exempt the Petitioners from military reserve duty in the Area (on this, compare: Chaim Ganz, "Right and Left: Ideological Disobedience in Israel," 36 *Israel L. Rev*. 19 (2002)).

Calling for a boycott in order to express dissatisfaction with the Government's policy in regard to the Area, to refrain from supporting that policy, or to persuade others to oppose that policy is a form of speech that clearly falls within the scope of political expression, and that is entitled to the full protection that our constitutional regime grants to political speech.

The Constitutionality of the Infringement

10. Even expression that falls within the scope of political expression can be limited by the legislature. Various statutes limit, in one way or another, the voicing of political statements. Many of those laws were surveyed in the opinion of my colleague Justice Melcer (para. 21 of his opinion). That is clear. In spite of its importance, freedom of expression, like other constitutional rights, is not absolute. Other rights and interests may justify its restriction. In order for an infringement of freedom of expression to be constitutional, it must meet the criteria of the Limitation Clause in sec. 8 of Basic Law: Human Dignity and Liberty. As is well known, the Limitation Clause comprises four cumulative tests: the infringement of the constitutional right must be made *by a law or by virtue of a law*; it must *befit the values of the State of Israel* as a Jewish and democratic state; *it must serve a proper purpose*; and it may only infringe the right *to an extent no greater than is required*. The last condition comprises three subtests, which are: the *Rational Connection* test, the *Least Harmful Means* test, and the *Proportionality "Stricto Sensu"* test.

11. The application of these criteria differs in accordance with the infringed right. In the case before us, we are concerned with freedom of political expression. I addressed the importance of this right above. Particularly careful, strict review is required in order to justify an infringement of political expression. Justice D. Dorner addressed this in HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance*, IsrSC 51 (4) 367 (1997) (hereinafter: the *Investment Managers Association* case):

> As for the test in regard to matching the means to the purpose, the degree of certainty that will be required for matching the means and its effectiveness is influenced by the importance of the right and the reasons that ground it. Where we are concerned with an important right, "near certainty", perhaps even nearly absolute, that the means will effectively and comprehensively realize its purpose may be required. As opposed to this, where a less important right is concerned, it may be possible to suffice with a "reasonable possibility" for the promotion of the purpose.
>
> As for the test regarding the choice of the means that infringes the right to the minimally required extent, which as noted, is not an absolute test, the choice will

be influenced by the infringed right. Where a particularly important, fundamental right is concerned, we will be stricter as to the choice of a means that only minimally infringes it, even if this means choosing a means of significant cost. The rule may be different where a less important right is concerned, whose protection will not require that the state adopt means that may be particularly burdensome.

As for the test in which a balance is struck between the benefit achieved by the purpose and the harm caused by the means for its achievement, that test will be applied – as accepted in the case law that I addressed above, treating of decisions of administrative authorities – in consideration of the nature of the relevant right, the reasons that ground it, and the values and interests harmed in the specific case [*ibid*., pp. 422-423].

12. I will already state that, in my opinion, the Boycott Law disproportionately infringes the constitutional right to freedom of expression. This conclusion makes an examination of the other criteria of the Limitation Clause superfluous. In short, I will note that I concur with my colleague Justice Melcer that the Boycott Law befits the values of the State of Israel, and that it is intended to serve a proper purpose. I will address the proper purposes that I believe ground the Law in greater detail in addressing the third subtest of proportionality, when I examine whether the benefit from achieving the purpose justifies the infringement of freedom of political expression. Needless to say, the infringement of the right to freedom of expression by the Law is "by a law" or "by virtue of a law".

Proportionality – Rational Connection

13. In my view, the Boycott Law meets the first subtest of proportionality – the *rational connection test*. That test examines whether the means chosen by the Law serve the purposes that the Law is intended to achieve (see, e.g.: Aharon Barak, *Proportionality in Law*, 373-376 (2010) (hereinafter: Barak, *Proportionality in Law*)). The purpose of the Law, which I shall address at greater length below, is the prevention of harm to the State of Israel by means of boycott. That purpose is clearly promoted by the Law, the provisions of which are intended to impede the

conduct of those calling for a boycott against the State of Israel, and to encourage them to refrain from doing so. On this point, we should note that some of the Petitioners pointed to various statements made by some persons or others in the course of the Knesset deliberations prior to the completion of the legislative process. From these statements, it would seem that those persons were of the opinion that the Law would not promote its intended purpose. An example of such a statement is the position taken by the representative of the Ministry of Foreign Affairs at a meeting of the Constitution, Law and Justice Committee (hereinafter: the Constitution Committee) on Feb. 15, 2011, according to which: "Not only does this bill not help in the fight against the international boycott, it may even harm it". Another example is the position expressed by the representative of the legal department of the Ministry of Foreign Affairs in the Constitution Committee on June 27, 2011, according to which: "This bill, if passed, may yield the opposite result of its purpose, and increase the boycott phenomenon". I do not think that we can learn from these statements that there is no rational connection between the provisions of the Law and its purpose. First, the purpose of the Boycott Law is not limited to preventing harm to the State of Israel by an international boycott, but is also intended to apply, perhaps primarily, to "homegrown" boycotts. Moreover, other professional positions were expressed beside those of the representatives of the Ministry of Foreign Affairs. Indeed, as my colleague Justice Melcer pointed out, the fact that some of the Petitioners reported that they, themselves, had been influenced in practice by the Law, and had ceased to call for boycotting products from the Area after its enactment, testifies to a rational connection between the provisions of the Law and it objective of preventing boycotts.

Proportionality – the Least Harmful Means

14. I am of the opinion that the Boycott Law, in all its parts, also meets the requirements of the second subtest of proportionality – the *least harmful means test* (also referred to as the "necessity test"). This second subtest examines whether the legislative means adopted least infringes the constitutional right from among the possible means that would realize the proper purpose of the Law. President Barak addressed this test in the *Investment Managers Association* case:

> The legislative means can be compared to a ladder that the legislature climbs in order to reach the legislative purpose. The legislature must stop at that rung at which the legislative purpose is achieved, and that least harms the human right. The legislature must begin at the least harmful "rung", and slowly climb until it reaches that rung that achieves the proper purpose without infringing the human right more than is required [*ibid*., p. 385].

This subtest is grounded upon two premises. The first examines whether there is a hypothetical alternative that can achieve the "same level" of the purpose grounding the law. "However, if a hypothetical alternative means that equally advances the law's purpose does not exist, or if this alternative means exists but its limitation of the constitutional right is no less than that of the limiting law, then we can conclude that the limiting law itself is necessary. The necessity test is met" (Barak, *Proportionality in Law*, p. 399) [English: p. 323]. "The second element of the necessity test examines the question whether the hypothetical alternative limits the constitutional right to a lesser extent than the limiting law" (Barak, *Proportionality in Law*, p. 405) [English: p. 326]. It has been held in this regard that "the means chosen must be of a kind whose infringement of the human right is moderate, but not necessarily the least possibly harmful in the range of possibilities" (HCJ 6304/09 *Lahav – Bureau of Organizations of Self-Employed and Businesses in Israel v. Attorney General*, (published in Nevo), para. 115, *per* A. Procaccia J.); and see: HCJ 4769/95 *Menachem v. Minister of Transportation*, IsrSC 57 (1) 235, 280 (2002); the *Investment Managers Association* case, p. 420).

15. It would appear that the Boycott Law meets these criteria. The Petitioners did not propose alternative means that might equally achieve the purpose – preventing harm to the State of Israel by means of a boycott – while harming freedom of political expression to a lesser degree. Thus, some of the Petitioners suggested that the state treasury compensate anyone who is harmed by a boycott against the state as a less harmful means. In my view, such a measure cannot yield the same measure of protection to the purpose. That suggested means, as opposed to the arrangements in the Law, could not be expected to deter those calling for a boycott from continuing to do so. Therefore, it cannot be expected to result in the same chilling effect as the Boycott Law. In practice, in this case, the Law's infringement of rights and its effectiveness are closely tied. The harm that the Law causes to those who call for a boycott, which is expressed in

civil and administrative sanctions, is the means that the legislature chose to achieve the Law's purpose. Lessening the harm to those who call for a boycott would inevitably result in a lessening of the chilling effect, and would thus render the Law less effective in achieving its purpose. Additionally, compensating those private actors harmed by the boycott would not result in fully attaining the Law's purpose. The Law is not solely meant to prevent harm to citizens and private actors. The boycott phenomenon harms the public in its entirety. Imposing the costs of the boycott on the public pocket, as the Petitioners suggest, would indeed lessen the harm to private actors, but would not lessen the public harm. In practice, the public harm, in turn, would translate into harm to the pockets of the citizens of the state. It is elementary that "harm to the public pocket … harms the public in its entirety" (CFH 3993/07 *Jerusalem Assessment Officer 3 v. Ikafood Ltd*., (published in Nevo), para 10, *per* E. Arbel J. (July 7, 2011)). In this regard, my colleague Justice Rubinstein aptly wrote in AAA 7335/10 *Rehabilitation Officer, Ministry of Defense v. Lupo*, (published in Nevo) (Dec. 29, 2013), in regard to the importance of public resources:

> It is elementary that the public pocket is not infinitely deep. Slicing and distributing the budgetary pie is like a blanket that is too short to cover the entire bed in view of the responsibilities and challenges facing the state in the fields of education, security, public welfare, etc. [*ibid*., para. 27].

Another of the Plaintiffs' claims is that there are existing legal devices that would suffice to achieve the Law's purpose without infringing constitutional rights. This argument is not persuasive. Even if existing legal apparatuses could make it possible to contend with the boycott phenomenon to some extent, they cannot realize the said purpose to a similar extent. The fact that the Petitioners think that the existing apparatuses are less harmful to those calling for boycotts demonstrates this problem and shows that even according to the Plaintiffs' approach, the chilling effect created by the existing law is not equivalent to that created by the Boycott Law.

16. My colleague Justice Melcer takes the view that sec. 2(c) of the Law does not meet the criterion of the least harmful means. I, too, believe that this section unjustifiably infringes freedom of political expression and must be struck down. However, in my opinion, the reason for this is a lack of proportionality "*stricto sensu*", and not a failure to meet the least harmful means

test. It should be emphasized that the conclusion that there are no alternative means to be found that would achieve the Law's purpose to the same "extent" while posing a lesser threat to freedom of political expression, does not mean that the Law is constitutional. However, "the same is true in those cases where the alternative, less limiting means are available, but the advancement of the law's purpose is lesser than that of the limiting law. Here, too, the necessity test is of no assistance to the limited right" (Barak, *Proportionality in Law*, p. 415 [English: p. 338]). In such a case, the focus of constitutional review moves to the third subtest. As Barak writes in his book *Proportionality in Law*:

> Judges should be honest with themselves. They must speak the truth and the truth is that in many cases the judge reveals that an alternative means that limits the right in question to a lesser extent does exist; but upon further examination it turn out that these means may not achieve the law's purpose in full, or that in order to achieve those purposes in full the state has to change its national priorities or limit other rights. In those cases, the judge should rule that the law is necessary, and that the less limiting means cannot achieve the intended legislative purpose. Then, the judge must proceed to the next stage of the examination – and determine the constitutionality of the law within the framework of proportionality stricto sensu [*ibid*., pp. 416-417 [English: pp. 338-339]].

We will now turn to the application of this subtest.

Proportionality – Proportionality "Stricto Sensu"

17. The third subtest – that of proportionality "*stricto sensu*" – is a balancing test. "This is the most important of proportionality's tests" (Barak, *Proportionality in Law*, p. 419 [English: p. 340]). It examines the proportionality between the social benefit inherent in achieving the Law's purpose and the harm that may be caused to the protected right – in this case, freedom of political expression – as a result of the Law's application. It focuses upon the marginal addition – positive and negative – of the examined law. This subtest addresses the "comparison between the proper purpose before and after the enactment of the law, and the situation of the human right

before and after the enactment of the law" (Barak, *Proportionality in Law*, p. 433). Conducting this comparison requires an examination of the extent of the harm to the constitutional right, on the one hand, and the social benefit from achieving the legislative purpose, on the other. After placing the harm and benefit on the scales, they must be balanced, and it must be decided thereby which is to be afforded the greater weight. As noted, the balancing equation changes in accordance with the nature of the infringed right. In the matter before us, we are concerned with a "heavy" right – freedom of political expression. We are thus concerned with the "*Kol Ha'am* equation", which requires a "near certainty" of real harm to an important public interest in order to justify infringing freedom of expression (the *Kol Ha'am* case, pp. 893-887; and see: the *Bakri* case, p. 263; Barak, *Proportionality in Law*, p. 631).

Proportionality "Stricto Sensu" – The Infringement of the Right

18. The Boycott Law clearly and directly infringes the right to freedom of political expression. It establishes civil and administrative sanctions for political statements. The right to freedom of expression indeed includes the right not to be harmed by its realization (compare: the *Majority Camp* case, pp. 218-219). In the instant case, we are concerned with a particularly severe infringement, inasmuch as it is premised upon the content of the speech (compare the American rule of thumb, by which "[An] act would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" (*McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) *per* Roberts CJ). The Boycott Law does not prohibit every type of call for a boycott. For example, it does not prohibit a call for a boycott of a person by reason of his association with any political position, whatever it may be. It also does not prohibit calls for boycotting a person by reason of his place of residence, wherever it may be. Its effect is limited to calling for a boycott against a person by reason of his connection to the State of Israel or the Area. In the Israeli political reality, calls for boycotting the State of Israel, and primarily calls for boycotting the Area, are voiced by only one side of the political map. A content-based limitation of freedom of expression, especially freedom of political expression, is particularly suspect. It comprises a breach of the neutrality that the state should exercise when acting as a "regulator" of the marketplace of ideas. Such intervention in the "rules of the game" endangers the marketplace of ideas and the free flow of

information. It violates the democratic process. It undermines the protection that freedom of expression provides against tyranny of the majority. Discrimination also inheres in such a breach of state neutrality. It reflects a measure of preference for one opinion as against another. Such a preference harms the ability of those who hold a "silenced" political position" to compete on an even playing field for the place of their view in public opinion (and compare the *Indor* case, which struck down a decision by the Jerusalem Municipality to prohibit the publication of an advertisement due to its content).

19. The rejection of content-based restrictions on freedom of expression while creating viewpoint discrimination, is a fundamental principle of American constitutional law. The principle has two main purposes. The first is the prevention of governmental action motivated by extraneous considerations or improper justifications. The second is the prevention of skewing the marketplace of ideas (see: Cass R. Sunstein, "Half-Truths of the First Amendment," 1993 U. *Chi. Legal. F*. 25, 26-27 (1993) (hereinafter: Sunstein); and see the discussion of these purposes in Amnon Reichman, "The Voice of America in Hebrew – The US Influence on Israeli Freedom of Expression Doctrines," in Michael Birnhack, ed., *Quiet, Someone is Talking: The Legal Culture of Free Speech*, 185, 192-193 (2006) (Hebrew) (hereinafter: Reichman); and see: Elena Kagan, "The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion," 1992 *Sup. Ct. Rev. 29* (1992)). As Sunstein explains:

> The notion that the First Amendment bans skewing effects on public deliberation is connected with the idea that government may not distort the deliberative process by erasing one side of a debate. Above all, government may not distort the deliberative process by insulating itself from criticism. The very freedom of the democratic process depends on forbidding that form of self-insulation [*ibid.*, p. 27].

Indeed, in a long line of decisions, the United States Supreme Court held that content-based prohibition of expression is incompatible with the First Amendment of the Constitution. Thus, for example, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) concerned the review of an ordinance that prohibited the placing of symbols – including a burning cross or a swastika – on private or public property in a manner that arouses anger, alarm or resentment in others on the basis of

race, color, creed, religion or gender. The Court held that the ordinance was incompatible with the right to freedom of speech. The Court found that the statute prohibited only "fighting words" that could insult or provoke violence, and it is, therefore, possible that the government could comprehensively prohibit such expressions. However, the government is not permitted to prohibit only certain expressions of this type while permitting others. In this case, expressions arousing anger or resentment on the basis of race were prohibited, while, for example, expressions arousing anger or resentment on the basis of, for example, political views or sexual orientation were not prohibited. As Justice Scalia explained:

> [T]he ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects… [*ibid*., p.391].

The Supreme Court further held that the problem with the ordinance was, *inter alia*, that it prohibited the use of certain expressions – "fighting words" – only on one side of the political divide. Thus, one side is permitted to "fight freestyle" while the other side must show good sportsmanship, and fight by the Marquis of Queensberry rules. Justice Scalia wrote:

> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender – aspersions upon a person's mother, for example – would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and

> provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules [*ibid*., p. 391-392].

These words are also appropriate to the matter before us. The Boycott Law does not prohibit all forms of boycotts. It only prohibits a specific type of boycott that expresses a particular political view. The law thereby creates viewpoint discrimination. Such discrimination grants an advantage to one side of the political divide, while forcing only one of the sides to act according to the Marquis of Queensberry rules in the political arena. Such influence is particularly serious when the view protected by the law is, in effect, the view of the government. In this regard, the words of Justice Kennedy (who was in the minority in regard to the result in the case) in *Hill v. Colorado*, 530 U.S. 703 (2000) are appropriate:

> Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against [*ibid*., p. 787].

20. My colleague Justice Melcer is of the opinion that the administrative sanction – preventing participation in a tender and restrictions on obtaining benefits – constitute merely "second order" infringements of freedom of expression. Indeed, as my colleague notes, the state enjoys broad discretion in deciding with whom to transact and which entities to support. Private entities do not enjoy a vested right to government support (see: HCJ 1438/98 *Masorti Movement v. Minister of Religious Affairs*, 53 (5) 337, 384 (1999) (hereinafter: the *Masorti Movement* case); HCJ 5364/05 *Shavei Shomron Yeshiva v. Minister of Education* (published in Nevo) (Nov. 16, 2005) (hereinafter: the *Shavei Shomron case*); HCJ 11020/05 *Panim For Jewish Renaissance v. Minister of Education, Culture and Sport* (published in Nevo) (July 16, 2006) para. 10 (hereinafter: the *Jewish Renaissance* case)). However, once the state has decided to support a certain type of activity, it must do so in accordance with the rules of administrative law. In doing so, it must employ "relevant considerations grounded upon considerations that relate to the substance of the supported activity, as distinct from the entity receiving the support" (HCJ 11585/05 *Israel Movement for Progressive Judaism v. Ministry of Immigrant Absorption* (published in Nevo) May 19, 2009) para. 11) (hereinafter: the *Movement for Progressive Judaism* case)). It must distribute the support monies "among public institutions of the same type

on the basis of equal criteria" (Sec. 3A of the Budget Foundations Law, 5745-1985). An authority is not allowed to distinguish among entities that are substantively members of the same "equality group" in a discriminatory manner, and may not make distinctions that violate protected fundamental rights. Justice I. Amit addressed these principles in AAA 343/09 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality* (published in Nevo) (Sept. 14, 2010) (hereinafter: the *Open House* case) [English translation: http://versa.cardozo.yu.edu/opinions/jerusalem-open-house-gay-pride-v-jerusalem-municipality]:

> As a rule, no entity has a vested right in the receipt of support from the state ... However, once an authority has declared its intent to provide support and establishes criteria under which institutions will receive support, these criteria must comport with the principle of equality... The same principle applies to both support in general and to any specific benefit [*ibid*., para. 34].

Justice Amit further stated in the *Open House* case that in distributing financial support or subsidies "require the administrative authorities to exercise their powers in a manner that protects the values protected by said Basic Laws" (*ibid*., para 35).

21. These principles are a common thread in a long line of decisions treating of criteria for granting support (see, e.g: HCJ 59/88 *MK Tzaban v. Minister of Finance*, IsrSC 42 (4) 705, 706-707 (1989); HCJ 2196/00 *Israel Camerata Jerusalem Orchestra v. Minister of Science, Culture and Sport*, IsrSC 58 (4) 807, 814-816 (2004); HCJ 3354/12 *Zankol Ltd. v. Government of Israel* (published in Nevo) (Aug. 18, 2014) para. 15; HCJ 2021/11 *Vaaknin v. Minister of Finance* (published in Nevo) (June 6, 2013) para. 16). Thus, for example, the *Movement for Progressive Judaism* case addressed the validity of the rules for the distribution of support to conversion institutes. Those rules established that only Orthodox conversion institutes would be eligible for support. This Court held that the state is not required to support private conversion institutions. However, having decided to support such institutions, it must distribute the funds on the basis of relevant considerations, and without creating distinctions that violate fundamental rights. Therefore, it was held that the state was not permitted to discriminate against the Progressive Movement's private conversion institutes on the basis of their religious views. It was held that such a distinction violated the right of the Reform conversion institutes to freedom of religion. As President D. Beinisch wrote:

> It would appear undeniable that, in practice, the state does not wish to support the Petitioner because it has a religious outlook that is different from the one the state chooses to advance. That is an irrelevant criterion for funding, on its face. Furthermore, by doing so, the government shows preference for one religious outlook over another, consequently causing inappropriate damage in the proper "free market" of religious views that should be preserved. This leads to the conclusion that the criteria for funding stand in contradiction to the state's duty to protect the religious freedom of the Petitioner, and discriminate on the basis of its religious outlook [*ibid*., para. 16].

The above also applies to the matter before us. Just as the state may not discriminate among entities on the basis of their religious beliefs, so it cannot discriminate among them on the basis of their political statements. Both the first form of discrimination and the second form of discrimination constitute a violation of a constitutional right. Both harm the "free marketplace" of ideas. In the absence of relevant justification related to the nature of the supported activity, the state's duty to maintain neutrality in exercising its regulatory authority does not permit it to distinguish among entities seeking support due to the manner by which they realize their right to freedom of expression. It must be emphasized that the state may support one type of activity but not another, It may promote its policy, *inter alia*, by providing financial support for matters that are the subjects of public debate. But, having decided to support an activity – no matter how hotly debated – the state may not distinguish among entities involved in such activity on the basis of considerations that are not relevant to the purpose of the support and that might violate constitutional rights. Thus, for example, the state may allocate funds in support of Torah study institutes, a matter that may be the subject of public debate (see: the *Shavei Shomron* case; the *Masorti Movement* case), but it may not distinguish among institutions operating in that area without relevant justification related to the purpose of the support. It cannot, for example, distinguish between two otherwise identical institutions, even in terms of their religious merits, simply because one of the institutions publicly expresses support for the political views of the ruling party or of a coalition partner, while the other does not.

22. An example of this distinction can be found in *Agency for International Development. v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013). In that decision, the United

States Supreme Court addressed a law that provided generous federal grants to private agencies working to fight the spread of the HIV virus and AIDS. The law required that in order to receive the funding, the supported agency must adopt a policy explicitly opposing prostitution. The United States Supreme Court held that the restriction violated the constitutional right to free speech. It held that, as a rule, the fact that activity does not receive funding does not violate the rights of an entity that does not receive support. However, in order for a restriction related to the applicant's views to be valid, it must be relevant to the funding program, and must be related to the funded activity itself. A restriction that lies "outside the contours" of the program in a manner that "leverages" the grant in order to interfere in the marketplace of ideas may not stand up to constitutional review. As Chief Justice Roberts wrote:

> [T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize – and conditions that seek to leverage funding to regulate speech outside the contours of the program itself [*ibid.*, p. 2328].

The Court further held that the said restriction conditioning the grant upon adopting the government's position on prostitution did not meet the tests of constitutionality. It was held that such a restriction was not relevant to the definition of the nature of the supported activity – in this case, the fight against AIDS/HIV – and was intended to influence those receiving the funding in a manner unrelated to that fight. As Chief Justice Roberts explains:

> By demanding that funding recipients adopt – as their own – the Government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program"… A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient [*ibid.*, p.2330].

That is consistent with the view of this Court in the cases cited above. In my opinion, they also serve to show that the Law's administrative sanction substantially violates freedom of political expression. In sec. 4, the Boycott Law authorizes the Minister of Finance to establish that a person who publishes a call for a boycott against the State of Israel will not receive various governmental benefits. The Law does not limit its scope to those activities and forms of support that are relevant to the boycott phenomenon or to promoting the international standing of the State of Israel. The general authorization that it grants for denying support to any entity that calls for imposing a boycott against the State of Israel, and primarily, to any entity that calls for the imposing of a boycott against a person by reason of his connection to the Area, permits *a priori* consideration of the political views of the funded entity, divorced of any connection to the purpose of the actual grant. This problem can be demonstrated by means of sec. 4(a)(2) of the Boycott Law. This section authorizes the Minister of Finance, with the consent of the Minister of Culture and Sports, to decide that anyone calling for a boycott against the State of Israel will not be entitled to receive funds granted under sec. 9 of the Regulation of Sports Betting Law, 5727-1967 (hereinafter: the Regulation of Sports Betting Law). Section 9 of the Regulation of Sports Betting Law establishes that monies distributed thereunder be used "to promote and develop physical culture, physical education, and sports in Israel". The subsections of sec. 9(b1) of that law itemize the particular details of that purpose, establishing that grant funds be used, *inter alia*, to support "the basic infrastructures of sports"; "sports associations and clubs"; "women's sports and sports in areas of national priority"; and to support "popular amateur sports". The declared political view of a funded entity is a consideration that deviates from the above criteria. The fact that a particular entity calls, for example, for a boycott of certain products produced in the Area is irrelevant to its contribution "to promote and develop physical culture, physical education, and sports in Israel". It is a consideration that concerns the funded entity and not the nature of its funded activities. Taking account of that consideration in the context of the Regulation of Sports Betting Law violates the funded entity's freedom of expression and forces it to refrain from realizing its constitutional rights in areas that are unconnected to its funded activities. As earlier noted, taking that consideration into account may even lead to discrimination against those who call for a boycott against the State of Israel or the Area as opposed to those that hold other political views, even if they choose to express those views by means of calling for imposing a

boycott. This situation can be compared, for example, to denying benefits to entities that have a particular religious character.

23. *It is fitting in this context to draw a distinction between calls for a boycott against the State of Israel and calls for a boycott against the Area*. The question of Israeli control over the Area is a subject of heated political debate (see para. 9 above, and the references cited there). Calling for a boycott against the Area is "within" the Israeli political debate, and is not comparable to calls for a boycott of the entire state. Therefore, one might be of the opinion that while the consideration of preventing a boycott of the Area is irrelevant to the purposes of some of the types of funding mentioned in the Boycott Law, the consideration of preventing a boycott of the State of Israel might be deemed relevant to such funding. That relevance is grounded upon the general principle that a democratic state may defend itself against those who seek to do it harm. Indeed, in the past, this Court has recognized the authority of administrative authorities to weigh general public considerations, even when such considerations are not directly connected to the exercised authority. Thus, for example, in HCJ 612/81 *Shabo v. Minister of Finance*, IsrSC 36 (4) 296, 301 (1982), the Court held that the Director of Customs and Excise may weigh road-safety concerns as "general public considerations". In AAA 8840/09 *Bauer v. National Planning and Building Board Appeals Subcommittee* (published in Nevo) (Sept. 11, 2014) para. 13 *per* H. Melcer J., it was held that planning boards could take account of considerations of harming religious sentiments as a "general consideration". It has also been held that planning authorities may weigh general considerations "of protection of the rule of law and deterrence of criminal behavior" (AAA 9057/09 *Inger v. Hashmura Ltd*. (published in Nevo) (Oct. 20, 2010) *per* U. Vogelman J.), and that in declaring a particular phenomenon to be a "natural disaster", the Minister of Agriculture may weigh, as a "general consideration", the financial burden on the state treasury (HCJ 3627/92 *Israel Fruit Growers Association Ltd. v. Government of Israel*, IsrSC 47 (3) 387, 391 (1993)). In the instant case, no significant question of authority arises, inasmuch as the consideration of preventing boycotts is explicit in the Boycott Law. However, by analogy to the above decisions, one might take the view that the consideration of preventing a boycott against the State of Israel may be a general consideration that would justify withholding governmental support from those who frontally oppose the state. That general consideration is not extraneous to any provision authorizing administrative agencies to grant support, inasmuch

as it derives from the general principle that permits the state to refrain from directly supporting those who oppose it.

24. My colleague Justice Melcer is of the opinion that the administrative sanctions in the Boycott Law are consistent with "the power of the state to deny benefits from those who use them against the state" (para. 45 of his opinion). My colleague does not distinguish in this regard between a boycott against the state and a boycott against the Area. He basis that position on HCJ 10104/04 *Peace Now – Shaal Educational Enterprises v. Ruth Yosef, Supervisor of Jewish Settlement in Judea and Samaria*, IsrSC 61 (2) 93 (2006) (hereinafter: the *Peace Now* case), which addressed the question of whether a local council in Judea and Samaria could use its budget in order to oppose the implementation of the Disengagement Plan. The opinion of the Court was divided in that case. Deputy President Cheshin, who was in the minority in this matter, was of the opinion that local councils, as statutory bodies, *were not authorized* to act against the Disengagement Plan, inasmuch as, in his opinion, that plan would not directly affect the municipal welfare of the residents of the local councils. Justice Cheshin further held that even if the local councils were authorized to do so, they could not use state funding for that purpose. Justice Cheshin held that a local council's use of state funds in order to oppose governmental policy "is inconsistent with the fairness doctrine and the principles of good government". In doing so, Justice Cheshin adopted the view of Justice D. Dorner in HCJ 2838/95 *Greenberg v. Katzrin Local Council*, IsrSC 53 (1) 1, 23 (1997) (see the *Peace Now* case, p. 186, para. 39, per M. Cheshin DP), in which Justice Dorner noted that "indeed, the possibility of protesting against the Government's policy is vital to a democratic state, but it is not within the scope of authority of local councils". Thus, Justice Cheshin's opinion in the *Peace Now* case was based upon the fact that the authorities that were the subject of the opinion were statutory bodies that are subject to the principle of administrative legality. That is the general context of the decision, which primarily focused upon the question of authority. The opinion of Justice D. Beinisch in the *Peace Now* case clarifies in this regard:

> In my view, we must distinguish between the clear interests of the residents in regard to their continued residence and life in the area of the local council and the interest of the local council in this regard. A decision to dissolve the local council may be of decisive importance in the lives of its residents. They may, of course,

> adopt every lawful democratic means at their disposal to fight the Government's decision in regard to the local council. However, the local council itself was established in order to realize the purposes that inhere in the powers granted to it by law, and therefore, its continued existence as a local council is not, in my view, an independent purpose [*ibid*., p. 200, para. 3, *per* D. Beinisch J].

Such reasoning is not relevant to private entities, and they – and not administrative agencies – are the objects of the Boycott Law. In regard to private entities, the legality principle applies in reverse (and *cf*: LCrimA 10141/09 *Ben Haim v. State of Israel* (published in Nevo) (March 6, 2012) para. 3 of my opinion). Individuals in a society, as opposed to local councils, are not part of the government. Their opposition to its policies does not violate the rules of good governance. It does not give rise to the problem inherent in an action of an organ against the body to which it belongs. Moreover, as opposed to a local council, individuals enjoy the constitutional right to freedom of expression in its full scope. While the role of governmental agencies is, in the sphere of their authority, to ensure the freedom of speech to the members of the society (sec. 11 of Basic Law: Human Dignity and Liberty), the members of that society are the subjects of that right, not its defenders. Therefore, even if it is possible to countenance a certain limitation upon funding those who call for a boycott against the State of Israel, that restriction cannot be based upon the reasoning of the *Peace Now* case. That is not to say that it would not be proper to recognize a general principle that, in certain cases, would justify refraining from granting support to those who call for action against the supporting body – in this case, the state. Where a boycott against the State of Israel is concerned, such a justification may be derived from the principle of defensive democracy, which I shall address presently. However, inasmuch as the Boycott Law is directed at private entities, and because the Law substantially infringes freedom of political expression, that infringement must pass the tests of the Limitation Clause and be justified by a substantial interest in preventing nearly certain, substantial harm to an important public interest.

25. One might further add that the tortious and administrative sanctions of the Law, which impede those who call for a boycott against the State of Israel, and particularly those who call for a boycott against the Area, are inconsistent with the principle of pluralism. This principle, which has been recognized in the case-law of this Court as an expression of the principle of equality

(the *Progressive Judaism* case, para. 17), supports granting a voice to the entire spectrum of views and positions of society. Pluralism is tightly bound to freedom of expression. Without freedom of expression, there can be no pluralism. Without granting the possibility of expressing different opinions, including extreme positions that are not at the heart of the consensus, pluralism and the democratic process suffer. In this regard, the words of Justice I. Zamir in the *Masorti Movement* case are apt:

> In a democratic society, different groups among the public, including spurned minorities, have the right to express themselves in the fields of culture, religion and tradition, each in its own way, and each according to its own beliefs. Moreover, it is advantageous to society that there be a variety of beliefs, lifestyles and institutions. Variety enriches. It expresses vitality; it contributes to the improvement of life; it gives practical meaning to freedom. Freedom is choice. Without the possibility of choice between alternative paths, the freedom to choose one's path is mere rhetoric. This is the heart of pluralism, which is a vital, central element of democratic society not only in politics, but also in culture and religion: a variety of paths and the possibility to choose among them [*ibid*., pp. 375-376].

And see Justice E. Arbel in the *Jewish Renaissance* case:

> The assumption is that pluralism is a basic, vital element of proper democratic life, because it is variety that expresses democracy in practice. A democratic state respects all of its streams, views and differences, grants them the space to live and thrive, and even supports them equally. A democratic society cannot merely suffice in providing the possibility for allowing different streams to exist; it must grant equal financial support to all of them. This does not mean that the state must support any particular activity. But once the state has decided to support a certain activity, it cannot discriminate against a particular group that performs that activity simply because of its identification with a particular stream [*ibid*., para. 90].

26. Additionally, I would note that, in my opinion, no analogy can be drawn in this matter fron sec. 3B of the Mandatory Tenders Law, 5752-1992, to which my colleague Justice Melcer referred. That provision authorizes the Government to prevent governmental agencies from

transacting with "a foreign state" or "a foreign supplier" "for reasons of foreign policy". As opposed to that provision, the Boycott Law is not limited to reasons of foreign policy. It also applies, and perhaps primarily applies, to the residents and citizens of the state. It acts to prevent boycotting of the State of Israel, as well as boycotting of the Area. Of course, in regard to the residents and citizens of the state – who are members of Israeli political society and who enjoy the full scope of the constitutional right to freedom of expression – a significantly more substantial justification is required than that needed to categorically restrict the possibility of certain foreign actors to participate in tenders (and in regard to the consideration of a person being a foreigner, *cf.*, for example: HCJ 5627/02 *Saif v. Government Press Office*, IsrSC 58 (5) 70, 75 (2004) [English trans: http://versa.cardozo.yu.edu/opinions/saif-v-government-press-office]; and on the different treatment due to an enemy detained by the state as opposed to an enemy operating from a foreign state: CFH 5698/11 *State of Israel v. Dirani* (published in Nevo) (Jan. 15, 2015)).

27. We thus see that the Boycott Law prohibits the voicing of statements based on their content. It does so by means of *ex post* harm to a person expressing himself in a manner prohibited by the Law, by imposing civil and "administrative" sanctions. Along with this, the Law also comprises an *ex ante* harm that is expressed in the deterrent, chilling effect created by its provisions. Freedom of expression can, of course, be infringed by restricting it in advance. That is the case, for example, with censorship (and *cf.*, for example: HCJ 4804/94 *Station Film Co. Ltd. v. Film Review Board*, IsrSC 50 (5) 661 (1997) [English trans: http://versa.cardozo.yu.edu/opinions/station-film-co-v-film-review-board]; the *Bakri* case), when holding a demonstration is prohibited (see, e.g: HCJ 153/83 *Levi v. Commander of the Southern Police District*, IsrSC 38 (2) 393 (1984)), when posting advertisements is prohibited (e.g: the *Indor* case, p. 164), or when voicing statements in any other way is prohibited (*cf.*, for example: HCJ 2194/06 *Shinui - The Center Party v. Chairman of the Central Elections Committee* (published in Nevo) (June 28, 2006); the *Mifkad Haleumi* case; HCJ 7192/08 *Hamateh Lehatzalat Ha'am Veha'aretz v. Second Authority for Television and Radio* (Oct. 10, 2009)). It is customarily said that prior restraint of speech has a "chilling effect" on freedom of expression. However, freedom of expression can be indirectly harmed by imposing *post facto* burdens on the speaker or deterring expression. Such deterrence may cause those who might otherwise express themselves in a particular way to refrain from doing so in fear of being harmed. In this manner,

potential speakers are harmed, the marketplace of ideas is impoverished, and democracy suffers. Justice A. Barak addressed the distinction between prior restraint of freedom of expression and *ex post* burdening of the speaker in HCJ 806/88 *Universal City Studios Inc. v. Film and Theater Review Board*, IsrSC 43 (2) 22 (1989):

> The restriction of freedom of expression takes various forms. The most severe restrictions are those which prevent the expression in advance. An *a priori* ban prevents publication. The damage caused to freedom of expression is immediate. A less severe restriction is the criminal or civil liability of the person uttering the expression. The expression sees the light of day, but the person uttering the expression bears the responsibility "*post-facto*". If the *a priori* prohibition "freezes" the expression, then after-the-fact responsibility "chills" it… [*ibid.*, p. 35].

The chilling effect's infringement of freedom of expression has been recognized in the decisions of this Court. For example, it was held that a chilling effect upon freedom of expression may be relevant to establishing the extent of liability under the Prohibition of Defamation Law, 5725–1965 (hereinafter: the Prohibition of Defamation Law) and the application of the defenses that it provides, and may affect the interpretation of the provisions of the law (see, in regard to the defenses under that law, e.g., LCA 3614/97 *Avi Yitzchak, Adv. v. Israel News Co. Ltd*., IsrSC 53 (1) 62, 71-72 (1998); LCA 1104/07 *Advocate Hir v. Advocate Gil*, IsrSC 63 (2) 115, 517-518 (2009); CFH 2121/12 *Ploni v. Dr. Dayan Urbach* (pubished in Nevo) (Sept. 18, 2014) paras. 38, 50, 55, 78 and 83 *per* A. Grunis P.) (hereinafter: the *Dayan* case); the *Ben Gvir* case, para. 33, *per* E. Rivlin J. (dissenting). On the interpretation of sec. 4 of the Prohibition of Defamation Law, see: CA 8345/08 *Ben Natan, Adv. v. Bakri* (published in Nevo) (July 27, 2011), paras. 45-54 of my opinion, and para. 8 of the opinion of I. Amit J.). In regard to calculating the amount of damages, see: CA 89/04 *Dr. Nudelman v. Scharansky* (pubished in Nevo) (Aug. 4, 2008) para. 61; CA 5845/05 *Hoter-Yishai v. Gilat* (publlished in Nevo) (Sept. 20, 2007) *per* E. Rivlin DP (dissenting on the matter of damages)). Also, in his dissent in HCJ 6706/14 *MK Zoabi v. Knesset Ethics Committee* (published in Nevo) (Feb. 10, 2015) para. 15, (hereinafter: the *Zoabi* case), S. Joubran J. expressed his opinion that in a disciplinary hearing of a Knesset member for statements made by that member, the Ethics

Committee must consider the chilling effect that may result from its decision. The minority in CrimFH 7383/08 *Ungerfeld v. State of Israel* (published in Nevo) (July 11, 2011) para. 29 (hereinafter: the *Ungerfeld* case), expressed the view that the possibility of a chilling effect is a relevant consideration in interpreting the offense of insulting a public servant under sec. 288 of the Penal Law, 5737-1977. In addressing the danger of a chilling effect on political expression as a result of imposing sanctions on a speaker, Deputy President E. Rivlin aptly wrote (concerning criminal sanctions in the *Ungerfeld* case):

> Criticism directed against governmental policy, even if expressed before a public servant, is at the heart of freedom of expression. Its contribution to democracy, to enriching the marketplace of ideas, to the search for truth, and to the advancement of the principle of individual self-fulfillment is significant and central. It is also important to the very ensuring of the proper and appropriate functioning of government. A chilling effect upon criticism of the government would be destructive to the democratic system [*ibid*., para 29, *per* E. Rivlin DP].

28. The chilling-effect doctrine has also earned a place in American law. In a long line of decisions, the United States Supreme Court recognized the possibility of violating freedom of expression through the creating of a chilling effect (see, e.g: Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," 58 *B.U. L. Rev*. 685 (1978) (hereinafter: Schauer); Notes, "The Chilling Effect in Constitutional Law," 69 *Colum. L. Rev*. 808 (1969); Monica Youn, "The Chilling Effect and the Problem of Private Action," 66 *Vand. L. Rev*. 1473 (2013); Leslie Kendrick, "Speech, Intent, and the Chilling Effect," 54 *Wm. & Mary L. Rev*. 1633 (2013)).

29. In my opinion, both aspects of the Boycott Law – the tortious and the administrative – may create a substantial chilling effect. As regards the tortious sanctions, the matter would appear to be self-evident. Imposing tortious liability for expression increases the "price" of expression in the estimation of the potential speaker. It adds an additional consideration – tortious liability – to the relevant set of considerations. This additional possible cost may cause a lessening of motivation to speak out, and may even cause certain potential speakers to entirely refrain from expressing themselves in "prohibited" ways. In practice, this deterrent effect is one

of the objectives of tort law. Israel Gilead addressed this effect in his book *Tort Law: Limits of Liability* (2012) (Hebrew):

> Imposing tortious liability on a wrongdoer is, by its nature, usually accompanied by a deterrent result. Deterrence, in this regard, is a change in the patterns of conduct of one who is influenced by the tortious liability.
>
> First and foremost, deterrence affects potential wrongdoers, in other words, those involved in activity that results or may result in future liability. Imposing liability in tort, and the associated discomfort, are a sort of notice to anyone who may undertake such activity that he will bear the burden of any damage that the tortious activity may cause. That notice raises the price of the activity, inasmuch as bearing the cost of the damage for which liability will be imposed is added to the cost of the activity. Making the activity more expensive may lead to all of the following: a cessation of the activity if and to the extent that increased cost makes it not worthwhile for the potential wrongdoer; a change in the activity so that the cost of liability will be lessened; attempts at risk protection through of insurance or other means [*ibid*., pp. 45-46].

The presence of a chilling effect in this case is not at all speculative. The creation of a chilling effect is the primary means chosen by the legislature for achieving the Law's purpose. The state even addressed this in its response to the petition. It noted in regard to the "rational connection" that "it is clear that creating a cause of action in tort and imposing administrative sanctions on those who call for a boycott against people for their connection to the State of Israel or a area under the control of the State of Israel will deter such actors from acting to impose such a boycott, and will make the phenomenon less common".

30. My colleague Justice Melcer proposed that the chilling effect be reduced by means of narrow construction that would somewhat limit the boundaries of the tort under sec. 2(a) of the Law. To that end, my colleague proposed that the realization of the "boycott tort" be contingent upon actual damage; the existence of a causal connection between the tort and the damage; awareness of the reasonable possibility that the call and the circumstances of its publication would lead to the imposition of a boycott; and reserving the right to bring suit only to the direct victim of the tort. In my opinion, that construction, narrow as it may be, does not significantly

reduce the Law's chilling effect. The above "restricting" provisions are, as my colleague also notes, part of general tort law. They apply, as a rule, to most torts. Inasmuch as tort law is understood as promoting deterrence, and capable, as such, of directing human conduct, I do not think that applying the "regular" restrictions of tort law to the boycott tort is sufficient to significantly lessen the Law's chilling effect.

Nonetheless, I wish to note that I agree with my colleague's proposed interpretation that the Law's requirement of a "reasonable possibility that the call will lead to a boycott" (sec. 2(a)) joins with the requirement of the regular causal connection. It adds an additional requirement to the existence of general causation, which examines "whether the negligence was *likely* to cause damage of the type incurred by the claimant" (CFH 4693/05 *Carmel-Haifa Hospital v. Maloul* (published in Nevo) (Aug. 29, 2010), para. 128 *per* Naor J.). The potential causal connection does not replace the requirement for the standard causal connection. Justice Naor addressed this in regard to a negligence suit for exposure to poisonous substances (CA 1639/01 *Kibbutz Maayan Zvi v. Krishov* (published in Nevo) (June 2, 2004):

> We have addressed the traditional rule that a person is held liable only for the harm that he caused: accordingly, when the question of the potential factual causation arises, the claimant must show not only potential factual causation (the exposure was capable of causing illness), but also specific factual causation (the exposure connected to the defendant caused the claimant's illness) [*ibid*., para. 14 *per* M. Naor J].

31. Another reason why I believe that the restrictive interpretation proposed by my colleague Justice Melcer is insufficient is the chilling effect caused by the very existence of the boycott tort. The existence of a tort of calling for a boycott, regardless of its scope, exposes those who call for a boycott to the possibility of a civil suit. That possibility creates uncertainty by its very nature. Indeed, a legal proceeding is not a sterile laboratory – "all litigation, and indeed the entire legal process, is surrounded by uncertainty" (Schauer, p. 687). A person calling for a boycott may have difficulty in assessing the results of the possible proceedings that may await him. That uncertainty increases the cost of his expression. It comprises the theoretical possibility of the imposition of liability where it is unjustified. It exposes the speaker to the possibility of bearing the heavy financial and emotional costs of litigation. That exposure, itself, imposes a burden

upon potential speakers in a manner that creates a chilling effect. In this regard, Justice S. Joubran (dissenting) aptly noted in HCJ 1213/10 *Nir v. Knesset* (Feb. 23, 2012):

> It should be noted in this regard that, in many cases, even if some law is not enforced, a law can create a chilling effect upon the performance of a particular action, and indirectly violate human rights… [*ibid*., para. 16 *per* S. Joubran J].

And see the relevant statement of Justice Scalia in *Virginia v. Hicks*, 539 U.S. 11 (2003), which addressed the constitutionality of a policy that prohibited trespass on certain streets:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech… harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas [*ibid*., p. 119].

A relevant example for our case can be found in *Thornhill v. Alabama*, 310 U.S. 88 (1940). In that case from the past, the United States Supreme Court considered an Alabama law that prohibited "loitering or picketing" near a place of business with the intent of influencing others to refrain from purchasing its products or to conduct business with it. In that, the law addressed in the *Thornhill* case is not unlike the one before us, inasmuch as it, too, concerns expression – demonstrating – in order to persuade a person to refrain from commercial trade with another, as in the case of a boycott. The United State Supreme Court found the law to be unconstitutional for violating freedom of political speech. The Court explained that the violation of freedom of speech derived from the very existence of the law itself, as just the possibility of imposing sanctions upon speech could deter a person from speaking, much as the actions of a censor. Justice Murphy, delivering the opinion of the Court, wrote:

> The existence of such a statute… results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship [*ibid*., p. 98].

On the chilling effect created by imposing tortious liability, also see, e.g: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

32. Those words are appropriate to the three types of tort sanctions in sec. 2 of the Boycott Law. I agree with my colleague Justice Melcer's statement that "to the extent that we find that sec. 2(a) of the law is constitutional, sec. 2(b) of the Law will, accordingly, also be constitutional" (para. 41 of his opinion). Therefore, the conclusion in regard to the violation of freedom of expression by sec. 2(a), even under the "narrow" interpretation, is relevant to sec. 2(b), as well. Moreover, clearly the chilling effect created by the Law is particularly significant in the case of exemplary damages without proof of damage. On this point, I agree with my colleague's conclusion that sec. 2(c) of the Law does not meet the proportionality tests. I also agree with my colleague's reasoning that damages in the absence of proof of damage are an "exception" that deviates from the basic rules of civil law, and comprise an element of punitive fine. For these reasons, I am of the opinion that sec. 2(c) must be struck down.

The administrative sanctions may also have a chilling effect of freedom of expression. The source of that effect is the possible fear of groups entitled to support to express themselves in the manner prohibited by the Law out of a fear of being denied support. The broad application of the administrative sanction creates a real danger of a broad violation of political views.

33. We have addressed the Law's infringement of freedom of expression. It is now time to evaluate its benefits.

Proportionality "Stricto Sensu" – The Social Benefit Aspect

34. The Boycott Law comprises several purposes. One clear purpose, as its title testifies, is "prevention of harm to the State of Israel by means of boycott". One aspect of this purpose is to be found in the desire to protect the citizens and residents of the state against economic, cultural, and academic harm. It would appear that the Law is primarily directed at combatting the BDS movement, which my colleague Justice Melcer addressed at length. Indeed, the damage caused by the boycott phenomenon is not inconsiderable (see, e.g: Lior A. Brinn, "The Israeli Anti-Boycott Law: Balancing the Need for National Legitimacy Against the Rights of Dissenting Individuals," 38 *Brooklyn J. Int'l L.* 345, 352 (2012); Marc A. Greendorfer, "The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, is Still Illegal," (2015)

(Available at SSRN: http://ssrn.com/abstract=2531130) (hereinafter: Greendorfer)). Mitigating the damage of this phenomenon is a proper and important purpose.

35. However, it should be noted that the Boycott Law is an Israeli municipal law. Its sanctions are therefore intended primarily to influence calls for boycott "performed" in Israel. This is primarily so in regard to the Law's tort sanctions. The rules of choice of law in tort law establish that the applicable law in regard to torts is the place of the performance of the tort – *lex loci delicti* (CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an*, IsrSC 59 (1) 345, 372-374 (2004) (hereinafter: the *Yinon* case); CFH 4655/09 *Schaller v. Uviner* (published in Nevo) (Oct. 25, 2011) para. 8, *per* Rivlin DP). Therefore, as a rule, the tort law of the State of Israel – including the Boycott Law – apply to "boycott torts" perpetrated in Israel. Of course, there are several exceptions to this rule. In the *Yinon* case, it was held that "when the place in which the tort was perpetrated is a fortuitous factor, lacking any real connection to the event" it is possible to apply tort law that is not the *lex loci delicti* (the *Yinon* case, p. 374). Moreover, it is not inconceivable that the development of additional exceptions may, under certain circumstances, allow for the application of Israeli law to torts that affect the State of Israel (*cf*. the "effect doctrine" that might make it possible, under certain circumstances, to apply Israeli law to acts occurring outside the borders of the state if their perpetration negatively impacts the state. (On the application of this doctrine on restrictive trade practices, see, e.g: Michal Gal, "Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)," *New York University Law and Economics Working Papers* No. 09-03 (2009)). Inasmuch as we may assume that the "tortious" effect of the Law will be more focused upon its influence on internal Israeli political discourse, and less upon its influence on international calls for boycotting Israel or the Area, this would somewhat reduce the Law's potential contribution to the fight against international boycotts and the BDS movement. In addition, the arguments presented by the parties before us show that the "type" of boycott relevant to the internal Israeli discourse is, primarily, a boycott against the Area rather than a boycott against the State of Israel in its entirety. The result is that a call for a boycott against the Area will, it would seem, be prohibited when performed in Israel, and of a type that would be hard to prevent by means of the Law if it were performed outside on the state. This is a problematic result wherein protests that are permissible in international discourse would be prohibited internally, and a form of protest

recognized in international discourse will be prohibited precisely to those seeking to advance their political views "internally", within our political public rather than externally.

36. Another aspect of the purpose of preventing harm to the State of Israel concerns the principle of defensive democracy. The declarations of some of those calling for a boycott of the State of Israel express a rejection of the state as such. Those speakers do not act within the Israeli political discourse, but rather seek to deny it. Some find such characteristics in the BDS movement. Greendorfer addresses this:

> The BDS Movement is not a grass roots movement, nor is it a peace movement. In charitable terms, the BDS Movement is simply the latest iteration of the longstanding Arab League mandate to eliminate the only non-Arab state from the Middle East. In less charitable terms, the BDS Movement is the non-violent propaganda arm of the modern Islamist terror movement [*ibid*., p. 35].

These characteristics are not unique to the BDS movement. Greendorfer is of the opinion that some of the global players calling for a boycott of Israel share those views. "While the names change, the objectives of many such groups remain the same: the demonization, marginalization and destruction of Israel" (*ibid*., p. 29).

Defense against those who oppose the state is a proper and important purpose. Moreover, the very call for a boycott of the State of Israel, regardless of the objectives and characteristics of the caller, is a serious phenomenon that the state cannot ignore. I am of the opinion that the state may have a justified interest in restricting such calls. That interest can be premised upon the principle of defensive democracy. That principle permits the restricting of fundamental rights – including freedom of political speech, and even the right to vote and to run for office – in order to protect the fundamental principles of the democratic state (see, e.g: in EA 1/65 *Yeredor v. Chairman of the Central Elections Committee for the Sixth Knesset*, IsrSC 19 (3) 365, 390 (1965); EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi***,** IsrSC 57 (4) 1, 66 (2003) (hereinafter: the *Tibi* case); HCJ 6339/05 *Matar v. IDF Commander in the Gaza Strip* (published in Nevo) (Aug. 1, 2005) para. 10; and *cf*. the *Zoabi* case, which held that a call by a member of Knesset for the imposition of a blockade against the State of Israel justifies imposing disciplinary sanctions of suspension from plenum and committee sessions. And see: Barak Medina & Ilan Saban, "Widening the Gap? On the Freedom of a Knesset Member to

Oppose the Occupation (following HCJ 11225/03 *Beshara v. AG*)," 37 *Mishpatim* (*Hebrew University Law Review*) 219, 229 (2007) (Hebrew) (hereinafter: Medina & Saban, "Widening the Gap"). Justice A. Barak addressed this in EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, IsrSC 39 (2) 225 (1985), IsrSJ 8, 83 [English trans: http://versa.cardozo.yu.edu/opinions/neiman-v-chairman-elections-committee]:

> On the one hand, the fundamental right to political expression is not to be denied merely because of the nature of the political view. Quite the contrary, the power of democracy lies in the freedom it allows to express opinions, however offensive to others. On the other hand, democracy is allowed to protect itself, and it need not commit suicide so as to prove its vitality [ibid., p. 315, (English trans: para. 12)].

37. However, the purpose concerning defensive democracy does not apply in the same manner and to the same extent to all the various forms of expression that fall within the compass of the Boycott Law. While one can accommodate applying that principle to calls for a boycott against the State of Israel *per se*, it is hard to harmonize that principle of defensive democracy with calls for a boycott only against the Area. A boycott of the Area is not directed at denying the State of Israel's right to exist, but rather expresses opposition to one of the "expressions of its policy". Israel's policy in regard to the Area is not one of the fundamental characteristics of the state, like it Jewish character or its democratic regime, and opposing that policy is not equivalent to opposing the state's right to exist. One can learn something about this from the decision in the *Tibi* case, in which the Court did not approve the decision of the Central Elections Committee to bar Knesset Member Tibi from participating in the elections. In so doing, it was held that MK Tibi's statements reflecting non-violent opposition to the "occupation" did not justify disallowing his candidacy. President A. Barak wrote:

> Knesset Member Tibi does not deny that he opposes the occupation and envisions its end. At the same time, he expressly and unambiguously declares that the opposition that he supports is not armed struggle, but rather non-militant, popular resistance. That is a form of opposition that does not involve the use of weapons. Indeed, the evidence before us does not reveal expressions or actions that evoke support for the armed struggle against the State of Israel…

> For these reasons, the decision of the Elections Committee disallowing Knesset Member Tibi's participation in the elections cannot be approved [*ibid*., pp. 49-50].

I am of the opinion that, as a rule, great care should be taken in making recourse to the "defensive democracy" principle as justification for violating freedom of political expression. "Defensive democracy" draws rigid lines between legitimate and illegitimate views – between those views that are part of the political discourse and those that should properly remain outside of it. Drawing those lines is no easy task. "If the line is drawn too far, democracy will not endure, and to the regret of its supporters, it will collapse. But if the line is drawn too close, the apple of its eye will suffer, and those who cherish it will no longer recognize it. The resilience of the state in which democracy abides makes a decisive contribution to deciding the location of the borderline. The stronger the state, the further away the line, and vice versa" (EA 2600/99 *Erlich v. Chairman of the Central Elections Committee*, IsrSC 53 (3) 38, 48 (1999) *per* Y. Kedmi J). Restricting calls for boycott against the entirety of the State of Israel infringes freedom of expression. But such calls reside in a "gray area" that may justify their restriction in order to protect the state's power to defend itself against those who seek to do it harm. However, calls for boycotting the Area are clearly located within the boundaries of legitimate democratic discourse. Calling upon the principle of defensive democracy in order to infringe non-violent political expression against a particular state policy is unacceptable.

38. Another proper purpose grounding the Boycott Law is the prevention of discrimination. Calling for a boycott is not merely an expression of an opinion. Calling for a boycott is a call to action (or, more precisely, to refrain from performing an action) – the imposition of a boycott. Bboycott action harms the objects of the boycott. That harm may not be worthy of the protection of freedom of expression. Thus, clearly, a call for a boycott that would prevent the provision of products or services to publics on the basis of race, or for racist motives, would be deemed wrong. That would also be true for a boycott based upon "religion or religious group, nationality, country of origin, sex, sexual inclination, opinion, political allegiance, personal status, or parenthood" (sec. 3(a) of the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: the Prohibition of Discrimination Law). And see sec. 4 of that law, as well as sec. 12 of the Civil Wrongs

Ordinance [New Version]). Indeed, boycotting a person solely by reason of his connection to the State of Israel is a discriminatory act. It is an instance of treating a person differently – ostracizing him – by reason of his belonging to the group of which he is a member. In addition, the boycott that the Law addresses is a "secondary" boycott". It is not directed at harming the state – for example, by refusing to trade with it – but at harming those who have a "connection" to the state. Such harm, arising from connection or membership, does not relates to the unique characteristics or conduct of the person ostracized. Such harm is particularly severe because a person's connection to the state (despite the theoretical possibility to emigrate) may be viewed as an immutable characteristic. In that sense, a distinction based upon a connection to a state is comparable to a wrongful distinction based upon "country of origin", which is included in the list of prohibited distinctions in the Prohibition of Discrimination Law.

39. The state sought to argue that this reasoning also applied to a call for a boycott against the Area. It argued that calling for a boycott against a person due to his connection to the area is, in practice, discrimination on the basis of place of residence. To its thinking, such discrimination is wrongful, *inter alia*, because a person's place of residence is "inherent to a person's identity". In this context, it should be noted that place of residence is considered to be "more" given to a person's choice than connection to his state. In addition, and this is the main point, the Boycott Law does not prohibit discrimination on the basis of place of residence, or even the boycotting of a person due to his place of residence (for bills in that spirit, see: Employment (Equal Opportunities) Bill (Amendment No. 22) (Prohibition of Discrimination due to Place of Residence), 5773-2012, *H.H*. 499). The Boycott Law only prohibits calling for a boycott due to residence in the Area. Therefore, we are not concerned with "classic" anti-discrimination law, but rather with state intervention in the field of political debate. The attempt to clothe that in the garb of preventing discrimination can only fail. Anti-discrimination law must, by its very nature, be neutral. We cannot countenance a law prohibiting discrimination on the basis of one sexual orientation but not another, or a law prohibiting discrimination against one race while permitting discrimination against another (a certain exception to this is found in the principle of affirmative action, but that principle is justly viewed as promoting equality. See, in this regard, e.g: HCJ 10026 *Adalah Legal Center for Arab Minority Rights in Israel v. Prime Minister of Israel*, IsrSC 57 (3) 31, 38-40 (2003); HCJ 453/94 *Israel Women's Network v. Government of Israel*, IsrSC 48 (5) 501, 516-521 (1994) [English trans: http://versa.cardozo.yu.edu/opinions/israel-

women%E2%80%99s-network-v-government-israel]). The Boycott Law does not show such neutrality. Therefore, I am of the opinion that one cannot "muster" the full force of the interest in preventing discrimination in its defense.

This conclusion does not apply to a boycott directed against the state in its entirety. While the Law does not prohibit boycotting a person by reason of his connection to any state whatsoever, but only in regard to his connection to the State of Israel, the state has a justified right to prevent discrimination between its citizens and residents and those of other countries. However, it must act in an equal, pertinent manner towards the residents of the various areas of the state and the areas under its control.

Proportionality "Stricto Sensu" – A Final Balance

40. As we have seen, the Boycott Law infringes the right to freedom of expression. We are concerned with the infringement of freedom of political expression, which is at the "core" of the constitutional right to freedom of expression, and constitutes part of the constitutional right to human dignity. This infringement results from the complex of the Law's provisions as a whole. The tort sanction and the administrative sanction retroactively harm anyone who calls for the imposition of a boycott against the State of Israel or the Area. We are concerned with a severe infringement, as it specifically applies only to those who express political opinions of a certain type. The Boycott Law also infringes freedom of expression by deterring potential speakers from expressing themselves politically. These infringements of freedom of political speech are most severe in regard to calling for boycotting the Area. The "territories issue" is a subject of heated public debate. The viewpoint harmed by the Law is one that is critical of the Government's policy. Changing the rules of the game in a manner that harms this viewpoint is inconsistent with the state's obligation to maintain neutrality in regulating the "marketplace of ideas". In order to justify these infringements of the constitutional right to freedom of political expression, the public benefit of the law must outweigh its harm. That balance must be struck in accordance with the near-certainty formula for significant harm to a public interest. Indeed, the Law does promote some important public purposes. The Boycott Law is expected to lessen the phenomenon of boycotting the State of Israel. That phenomenon inflicts economic, cultural, and academic harm upon the citizens and residents of the state. It challenges the fundamental principles of the state,

and it harms equality between the objects of the boycott and those who are not exposed to it. The social benefit of the Law changes in accordance with the character of the specific boycott under consideration. Preventing a boycott against the State of Israel is consistent with the state's right to defend itself against those who seek to do it harm. That is not the case in regard to a boycott directed at the Area. A boycott of this type concerns an internal Israeli political issue (although various entities around the world also express their opinions on this issue). Such a boycott cannot be deemed as targeting the state *per se*. It clearly falls within the bounds of legitimate political discourse.

It would appear that the Law's infringement of freedom of expression is particularly severe, but I am of the opinion that the method of interpretation that I shall propose below can prevent the extreme result of declaring the Law unconstitutional. Indeed, the Law serves several important purposes, but I do not believe that it is necessary in order to prevent the nearly certain realization of real harm, and that is certainly the case in regard to the Law's effect in regard to calls for boycotting the Area. The sanctions imposed upon those who express themselves in this manner lead to a severe infringement of freedom of political speech. Lessening the prevalence of such calls yields a social benefit that is significantly less than the benefit inherent in imposing restrictions upon boycotts against the state in its entirety.

Consequences of Unconstitutionality

41. I have considered the possibility that it might be proper to go over the Law with a "blue pencil", in a manner that would let it ford the constitutionality tests. By this I mean writing out of the Law the words "or an area under its control" in the definition of a "boycott against the State of Israel". This would abate the Law's primary harm inherent in intervening in the political discourse by prohibiting calls for boycotting the Area. Eliminating that phrase would remove such boycotts from the Boycott Law. Indeed, "The Court is not liable to order the voidance of the law in its entirety. It may order the law to be split, so that those provisions of the law that suffer from a constitutional defect are declared void, while the other provisions remain valid" HCJ 7052/03 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior*, IsrSC 61 (2) 202, 350 *per* A. Barak P. (2006) [English trans: http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-

interior]. And see HCJ 9098/01 *Ganis v. Ministry of Building and Housing*, IsrSC 59 (4) 241, 267-268 (2004) [English trans: http://versa.cardozo.yu.edu/opinions/ganis-v-ministry-building-and-housing] (hereinafter: the *Ganis* case); Aharon Barak, *Interpretation in Law – Constitutional Interpretation*, 736 (1994) (hereinafter: Barak, *Constitutional Interpretation*)). But the blue-pencil rule should not be employed when the result will upset the law's internal balance and its purposes (HCJ 2605/05 *Academic Center of Law and Business, Human Rights Division v. Minister of Finance*, IsrSC 63 (2) 545, 638 (2009) [English trans: http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance]; Barak, *Constitutional Interpretation*, p. 737).

42. Ultimately, I have come to the conclusion that this approach should not be adopted. The reason for this, in my view, is that a similar result can be achieved through interpretation, without having to strike down one of the Law's provisions. In my view, the interpretive solution is a proportionate one that limits judicial intervention in Knesset legislation, giving appropriate weight to the principle of separation of powers among the branches of government. The Knesset is the legislative branch. But the Court is the authorized interpreter of every piece of legislation. Indeed, "upon the completion of the legislative process, the law leaves the courtyard of the legislature. It lives independently, and its interpretation – in the broad meaning of the term – falls, at the end of the day, to the courts, and to them alone" LCrimA 1127/93 *State of Israel v. Klein*, IsrSC 48 (3) 485, 501 (1994) *per* Cheshin J.). And see: HCJ 73/85 *Kach Faction v. Shlomo Hillel – Speaker of the Knesset*, IsrSC 39 (3) 141, 152 (1985); Aharon Barak, *Interpretation in Law – Statutory Interpretation*, 57-58 (1993) (hereinafter: Barak, *Statutory Interpretation*). This approach is expressed in the well-known talmudic story of the "Oven of Akhnai" (*TB Bava Metzia* 59b). In that story, according to one of the interpretations, God the Legislator "admits" – saying "My sons have defeated Me, My sons have defeated Me", for even though God was of the opinion that a particular interpretation – that of Rabbi Eliezer – was the correct one, the decision was not His but was in the hands of the Sages. Thus, after the norm is created, its creator loses the power to interpret it. The authorized interpreter may declare that it is not bound by a later interpretation presented by the legislator – "It is not in heaven").[3]

[3] *TB Bava Metzia* 59b, citing *Deut.* 30:12.

Indeed, this Court has held in a long line of decisions that interpretation is the preferred solution for resolving constitutional problems. In this manner, we can resolve the apparent contradiction between the law under examination and the constitutional norm without activating the "doomsday weapon" of declaring total or partial voidance (see, e.g: HCJ 5771/12 *Moshe v. Board for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements (Agreement Authorization & Status of the Newborn Child) Law, 5756-1996* (published in Nevo) (Sept. 18, 2014) para. 5 of the opinion of H. Melcer J. [English trans: http://versa.cardozo.yu.edu/opinions/moshe-v-board-approval-embryo-carrying-agreements-under-embryo-carrying-agreements-law]; HCJ 2311/11 *Sabah v. Knesset* (published in Nevo) (Sept. 17, 2014) para. 5 of the opinion of H. Melcer J.; LCA 7205/06 *Erlich v. Advocate Bartal* (published in Nevo) (Aug. 22, 2012) para. 40 of the opinion of H. Melcer J.; HCJ 5113/12 *Friedman v. Knesset*, (published in Nevo) (Aug. 7, 2012) para. 5 of the opinion of E. Arbel J.). Grounding this approach is the idea that every legislative act is intended to advance – in addition to the concrete purposes that the legislature sought to promote – the fundamental values of our regime. Those fundamental values include the principles of democracy and the protection and advancement of human rights. The practical effect of this approach is expressed in the presumption that "the purpose of every legislative enactment is to realize the principles of the system and advance human rights within it" (HCJ 693/91 *Dr. Efrat v. Director of the Polulation Registry in the Ministry of the Interior*, IsrSC 47 (1) 749, 763 (1993) *per* A. Barak J.), and the presumption according to which "the legislature is presumed to be aware of the contents of the Basic Laws and their ramifications for every statute that is enacted subsequently" CrimA 6659/06 *Anonymous v. State of Israel*, IsrSC 62 (4) 329, 351 (2008) per D. Beinisch P. (hereinafter: the *Anonymous* case) [English trans: http://versa.cardozo.yu.edu/opinions/v-state-israel-1]).

43. One of the primary techniques that enable the Court to employ interpretation to remove apparent contradictions between a "regular" law and the provisions of a Basic Law is narrow construction. By this approach, the normative effect of the law is limited such that the semantic field that does not stand in contradiction to the Basic Laws is isolated from among the linguistic possibilities (see, e.g: Aharon Barak, "Judicial Lawmaking," 13 *Mishpatim* 25, 30-32 (1983) (Hebrew); the *Ganis* case, p. 273; HCJ 4562/92 *Zandberg v. Broadcasting Authority*, IsrSC. 50 (2) 793, 808 (1996); HCJ 4790/14 *Torah Judaism – Agudath Yisrael – Degel HAtorah v.*

Minister of Religious Affairs (published in Nevo) (Oct. 19, 2014) para. 26 of the opinion of U. Vogelman J; HCJ 3809/08 *Association for Civil Rights in Israel v. Israel Police* (published in Nevo) (May 28, 2012) para. 15 of the opinion of D. Beinisch P.; Barak, *Constitutional Interpretation*, p. 737). Justice Barak's words in the *Zandberg* case are apt in this regard:

> Indeed, the judge must not "sit on his hands" and observe the failure of the legislative purpose. He must interpret the law in accordance with its purpose. At times, that interpretation will lead to the conclusion that the language of the law can be broadly construed. At times – as in the case before us – that interpretation leads to the conclusion that the law must be narrowly construed…
>
> Thus, where the language of the statute is broad, the judge is permitted and competent to give it a narrower meaning, which extends only to some of the options inherent in the language, provided that by doing so he realizes the purpose of the legislation. [*ibid*., p. 811].

And see President Barak's opinion in the *Ganis* case:

> Is the interpreter permitted to narrow the broad language of the text in order to achieve the purpose of the text? When the text provides a legal arrangement that applies to "every person","with regard to "every object" or "in all circumstances", may the interpreter — who wishes to achieve the purpose underlying the text — interpret the text in such a way that it does not apply to a particular class of persons (not "every" person) or such that it does not apply to a particular class of objects (not "every" object) or such that it does not apply in a particular class of circumstances (not "all" circumstances)? The answer given to this question in Israel and in comparative law is yes [*ibid*., p. 277].

44. As for the matter before us, sec. 1 of the Boycott Law, which establishes its scope, is the entry way into the Law. Only a boycott that can be deemed "a boycott against the State of Israel", as defined in that section, allows for the imposition of the Law's tortious or administrative sanction upon the caller. Establishing the dimensions of the entry way in sec. 1 of the Law is an interpretive endeavor. It is carried out with the interpretive tools. First and foremost, we must address the language of the Law, which is the starting point of any

interpretive endeavor. But the language of the Law is not necessarily the end point. The interpretation of the Law must take its purpose into account. In so doing, one must, as noted, address the specific purpose of the Law, but also, as explained above, the fundamental principles of our legal system and the general purpose of protecting human rights.

45. I am of the opinion that the dimensions of that normative "entry way" in sec. 1 of the Law should be construed narrowly. The interpretation must allow only a certain "type" of boycott to cross the threshold – a general boycott of the State of Israel as such. As opposed to that, we must establish that other "types" of calls for boycott – primarily calls for the boycotting of the Area alone – will not cross the threshold, and not be deemed a "boycott against the State of Israel".

Section 1 of the Law instructs as follows:

> In this law, "a boycott against the State of Israel" means – deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, one of its institutions or an area under its control, such that it may cause economic, cultural or academic harm.

Thus we find that in order to enter the compass of the Law, the boycott must be "because of its connection" to the State of Israel, one of its institutions, or an area under its control. The relationship between the "State of Israel" and the institutions and areas mentioned in the definition in sec. 1 is *a relationship of belonging*. In order for a boycott against a person due to his connection to an institution to enter into the compass of the law, the institution must be "one of the institutions" of the state. In order for a boycott against a person due to his connection to an area to enter this definition, the area must be "under its control" of the state. In my view, that belonging of "the institution" or "the area" to the State of Israel cannot remain merely technical. That requirement must be given normative significance. The *belonging requirement* must pertinently connect the boycott "against the State of Israel" and the boycott of the institution or the area. Its effect is the broadening of the scope of belonging, such that it also extends to the relationship between the boycott against the state and the boycott against the institution or against the area. Therefore, *not every boycott of an institution or an area physically "belonging" to the state will fall within the definition of the Law. Only a boycott of an institution or of an area because of the boycotting of the state in its entirety should fall within this definition.*

Actually, this is a necessary interpretation. Clearly, the Boycott Law was not intended to apply, for example, to a call to boycott a public institution because of that institution's particular characteristics. Consider, for example, a call to boycott a person due to his connection to a public institution because that institution conducts experiments on animals. Or, for example, a call to boycott a person due to his connection to a public institution because that institution promotes a policy that harms the environment. Or a call to boycott a person due to his connection to an Israeli community (which is "an area under [the state's] control") because of the community's policy in regard to membership (*cf.* the *Sabah* decision). On its face, according to the language of the Law, such boycotts might fall within the scope of the law and be prohibited by it. The reason for this is that they are calls for a boycott against a person merely because of his connection to one of the state's institutions or an area under its control. Clearly, however, that was not "what the author had in mind". The purpose of the Boycott Law, as its name shows, is to prevent harm to the State of Israel by means of boycotts. The law is intended to contend with the phenomenon of boycotts against the state. It is not intended, for example, to harm those who call for a boycott of an institution because of its destruction of natural treasures simply because that institution, coincidentally, "belongs" to the State of Israel and is not a private body. The fact that the institution in the example is a public institution may, of course, show that the policy that is the target of the boycott is a public policy. However, it would not be proper to interpret the Law as opposing calls for boycotts targeting any public policy, when the boycott does not comprise a dominant factor of opposition to the state as such. As the state's attorneys noted before the Court, the Boycott Law is not intended, for example, to affect calls to boycott cottage cheese. I am of the opinion that this conclusion must stand even if it transpires that some of the boycotted cottage-cheese producers are state owned.

46. Therefore, the terms treating of an "institution" and "area" were not intended to direct the Law at "new" types of boycotts. They were intended to reinforce the arrangement treating of the typical boycott with which the Law was intended to contend – a boycott against the State of Israel. Their purpose is to create a tight arrangement that will not permit calls for boycotting the State of Israel to evade the Law simply by targeting institutions or areas. In order to achieve that purpose, while not extending the Law beyond its proper scope, the connection between the "institution" and the "area" to the State of Israel must be interpreted as a material connection that also extends to the nature of the boycott. *Only a boycott against an "institution" or "area" that*

is part of a boycott against the State of Israel and derives from the connection of the institution or area to the State of Israel will fall within the compass of the Boycott Law. As opposed to this, a boycott of an institution or area that is not part of a boycott against the State of Israel will not fall within the scope of the Law's definition.

The practical result of this distinction is the application of the Boycott Law only to calls for a boycott against the State of Israel in its entirety or as such. Accordingly, a call to boycott one of the state's institutions, which is not accompanied by a call for a comprehensive boycott of the State, would not fall within the compass of the Law. Similarly, calls for boycotting areas under the state's control, including boycotting the Area, that are not accompanied by a call to impose a boycott on the State of Israel, will not fall within the Law's definition. This result is also applicable to the interpretation of the phrase "a commitment not to purchase goods or services produced or supplied in Israel, by one of its institutions, or in an area under its control" in sec. 3 of the Law.

This interpretation is consistent with the language of the Law. It is "dependent" upon the relationship of a connection between the State of Israel and its institutions or areas under its control. It is consistent with the plain meaning of the phrase "boycott against the State of Israel" in colloquial language (see: Barak, *Statutory Interpretation*, pp. 117-118, 587-589). This phrase is the Law's linguistic center of gravity. It impacts all of the Law's provisions, including the definition of the very term "boycott against the State of Israel" in sec. 1 of the Law. It shows that the main point of the Law is the prevention of a boycott against the State of Israel, and not a boycott against its institutions or areas under its control. This interpretation does not make reference to institutions and areas superfluous. Without such reference, some calls for boycotting a person for his connection of an Israeli institution or area under the state's control as part of a call for a boycott of the entire state might evade the Law's embrace. That would be the case, for example, where the person under discussion has a connection only to the institution or controlled area, but lacks a direct connection to the state.

This interpretation is also consistent with the Law's purpose. The Law's main purpose, as its name testifies, is the prevention of harm to the State of Israel by means of a boycott. This purpose is clearly delineated by applying the Boycott Law to calls for boycotting the State of Israel. It is not entirely realized when a boycott of the Area is concerned. Calls for a boycott of

the State of Israel are directed at the state as such. The state may defend itself against such boycotts. A boycott against the State of Israel, as such, discriminates against the residents of the state on the basis of their connection to the state. The state may prohibit such discrimination. However, a boycott of the Area is not directed at the state, as such, but against one manifestation of its policy. Prohibiting boycotts of the Area cannot be justified by a desire to prevent discrimination, as it would not represent a comprehensive prohibition of boycotting or discrimination on the basis of place of residence. And primarily, the future of the Area is a matter of heated public debate. The "objective purpose" of the Boycott Law, and the presumption in regard to its consistency with the Basic Laws, cannot tolerate an interpretation that "lowers" the Law to the level of political debate in a manner that would limit the available arsenal of expressions to one side of the debate alone. That purpose would not be consistent with an irrelevant infringement of the possibility of those holding a particular political view to obtain government funding or to participate in tenders, on the basis of considerations that are unrelated to the nature of the funded activity, and while placing a burden on the constitutional rights of the funded entities. That purpose is also inconsistent with creating a chilling effect that would act as a deterrent to voicing one particular view from among the competing political views.

47. In addition, as we know, the purpose of a Law is derived both from the objective purpose noted above – in regard to the objectives and values that a legislative act is meant to realize in a democratic society – and from the subjective purpose – in regard to the objectives that the legislature sought to realize by means of the legislation. Thus, we learn a law's subjective purpose from its language, legislative history, and the historical, social, and legal background at the time of its enactment (see, e.g: Barak, *Statutory Interpretation*, pp. 201-202; CA 8622/07 *Rothman v. P.W.D. - National Roads Company of Israel Ltd.* (published in Nevo) (May 14, 2012) para. 49 of the opinion of U. Vogelman J.; HCJ 10771/07 *Gewirtzman v. National Insurance Institute* (published in Nevo) (Feb. 1, 2010) paras. 56-59 of my opinion). In this case, the parliamentary history of the Law shows that the proposed interpretation would seem to contradict the positions held by some of the members of Knesset who were involved in its legislation, and is consistent with the positions held by others (see, e.g: Protocol of meeting no. 342 of the Constitution, Law and Justice Committee of the 18th Knesset, 4-5, 25-27 (Feb. 15, 2011) Protocol of meeting no. 416 of the Constitution, Law and Justice Committee of the 18th Knesset, 49, 61 (June 27, 2011); Protocol of session no. 259 of the 18th Knesset, 167 (July 11,

2011)). However, legislative history is but one source that the interpreter may use to learn the legislative purpose. President Barak aptly observed in this regard:

> We are not interested in the judgment of the members of the legislature, but rather in their legislative act…The data about the legislative purpose that can be discovered in the parliamentary history are not "binding"; they are not the final word for all investigation and examination; they do not override the purpose that arises from the language of the law or other sources…the relative weight of this source depends on its importance and its reliability relative to other sources [Barak, *Statutory Interpretation*, p. 372].

I am of the opinion that no great weight should be assigned to this interpretive source in this case. This, *inter alia*, because various views were expressed about the purposes of the Law in the committee meetings and in the plenum debate, and as President Barak goes on to state:

> *It is very difficult to separate "personal" opinions of members of the legislature about what is ideal, and "institutional" opinions about what is real.* This is especially true of spontaneous responses expressed in the legislature in the absence of extensive research or reflection. But even "considered" responses are sometimes expressions of the subjective view of the speaker…The interpreter must be able to distinguish between the wheat and the chaff, between personal opinions of members of the legislature in regard to the meaning of the law, and objective opinions about its purpose. *The weight to be given to the results of the examination will change in accordance with the reliability that can be attributed to the sources of that examination* [*ibid*., p. 380, emphasis added – Y.D.].

Thus, it would seem appropriate, in my view, to interpret the Law such that it would apply only to calls for boycotting the State of Israel in its entirety, but not to calls for boycotting the Area alone. Although this interpretive result contradicts the express position of some of the Law's initiators, the subjective views of the members of Knesset who took part in the legislative process does not obligate the Court. Indeed, interpretation concerns the "analysis" of the law, and not the "psychoanalysis" of the legislature (the *Sabah* case, para. 26 of the opinion of Grunis P.; HCJ 246/81 *Agudat Derekh Eretz v. Broadcasting Authority*, IsrSC 35 (4) 1, 17 (1981), IsrSJ 8 21 [English trans: http://versa.cardozo.yu.edu/opinions/agudat-derekh-eretz-v-broadcasting-

authority]). As noted, the position of one Knesset member or another, or even the view of those who proposed and initiated the Law, does not necessarily reflect the view of "the legislature", which is a body composed of many members, and who represent the spectrum of political views of the state's citizens. Thus we have the well-known approach according to which: "We must not seek to establish a Knesset Member's attitude towards a particular problem confronting us from the legislative history of an enactment. The solution of such problems is our responsibility, and ours alone" HCJ 428/86 *Barzilai, Adv. v. Government of Israel*, IsrSC 40 (3) 505 (1986) 593; IsrSJ 6 1 [http://elyon1.court.gov.il/files_eng/86/280/004/Z01/86004280.z01.pdf]. Along with the interpretive sources offered by the parliamentary history, we have such additional interpretive sources as the language of the law, its normative context, and the principles of the fundamental rights that stretch a "normative umbrella" above it. Justice A. Barak addressed this is HCJ 142/89 *Laor Movement v. Knesset Speaker*, IsrSC 44 (3) 529 (1990):

> Legislative history, in general, and parliamentary history, in particular, are among the sources that we may turn to in seeking and discovering the legislative purpose. Nevertheless, legislative history should not be viewed as the end-all, and its overall weight in establishing the purpose and in interpreting the law is not significant. Indeed, the information that it provides about the law's purpose must be integrated into the information about the law's purpose that derives from the language of the law and other reliable sources, such as its structure, the legal system, and the various presumptions about the purpose of the law, and the overall sense of the matter. Moreover, a judge seeks information about the purpose of the law from the legislative history. He does not seek the interpretive understanding of the members of Knesset and how they understood a concept or term, or how they would solve the legal problem facing the judge … [*ibid.*, p. 544].

I am of the opinion that there is no alternative in the case before us but to find that, despite various statements made in the course of the legislative process, the language of the Law and its purposes, including its objective purpose, do not allow the Law's application to boycotts directed solely at the Area.

48. In conclusion, it only remains to address several matters raised in the opinion of my colleague Justice Melcer.

Gleanings

49. *Ripeness* – My colleague Justice Melcer is of the opinion that the petitions – with the exception of the part concerning sec. 2(c) of the Law – are not ripe for decision. My colleague believes that the Petitioners' claims should be examined in the "applied review" track, attendant to suits or petitions directed against the concrete application of the Law (para. 59 of his opinion). The ripeness doctrine has, indeed, been incorporated into Israeli constitutional law (see, e.g: HCJ 3429/11 *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance*, (published in Nevo) (Jan. 5, 2012) paras. 26-33 of the opinion of M. Naor J. [English: http://versa.cardozo.yu.edu/opinions/alumni-association-arab-orthodox-school-haifa-v-minister-finance] (hereinafter: the *Alumni Association* case); HCJ 7190/05 *Lobel v. State of Israel* (published in Nevo) (Jan. 18, 2006) para. 6 of the opinion of M. Naor J.; Elena Chachko, "On Ripeness and Constitutionality: HCJ 3429/11 *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance* and HCJ 3803/11 *Israeli Capital Markets Trustees Association v. State of Israel*," 43 *Mishpatim* (2013)). The ripeness doctrine permits the Court to refuse to hear a petition directed against a statute by reason of the fact that it has not been applied in practice, and therefore there are no "factual grounds" that would allow for an adequate evaluation of its harm or benefit. However, when the constitutional question raised is primarily legal, there is no justification for "waiting" until factual foundations have been laid, inasmuch as that foundation may not be relevant to the final disposition of the case. That is the case, for example, when "the Court is persuaded that any future application of it will lead to an infringement of a constitutional right or when the harm that will result from the law in the future is certain" (the *Sabah* case, para. 15 of the opinion of Grunis P.). Even when assembling a factual foundation may contribute to the final disposition of the dispute, there are a number of exceptions that justify addressing a petition on the merits despite that fact. One of those exceptions is when the law under scrutiny may have a chilling effect. By means of the chilling effect, the law infringes the violated right by its very existence. In addition, the chilling effect can create a vicious circle in which the Court refrains from addressing the law's constitutionality in the absence of actual application, but the

law is not applied due to the chilling effect, which deters – sometimes unlawfully – actions contrary to the law. President A. Grunis addressed this in the *Sabah* case:

> The best known exception to addressing the constitutionality of a law even before it has been put into effect is the fear of a "chilling effect" … What we are referring to is situations in which allowing the law to remain in force may deter people and cause them to refrain from otherwise lawful conduct due to the fear of the enforcement of the law. In such cases, the very existence of the legal authority may violate constitutional rights, and therefore the Court's review is required even before the law is applied. The chilling effect is cited in American case-law as an exception that justifies examining a matter even if it is not yet ripe. For the most part, the exception is applied to petitions in regard to the violation of freedom of speech … [*ibid.*, para. 16 of the opinion of A. Grunis P.).

50. An example of the application of the chilling-effect exception can be found in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In that case, the United States Supreme Court reviewed a federal law that prohibited corporations from providing funding to campaigns for or against a candidate for election. The United States Supreme Court held that corporations could not comprehensively be forbidden to expend monies in that manner, as such a restriction was repugnant to the constitutional right to freedom of speech. One of the arguments of the respondents in the case was that the constitutional claims raised by Citizens United should be considered "as applied". The Court rejected that argument. It held, *inter alia*, that postponing the hearing of the claims would lead to a chilling effect upon freedom of speech. The Court explained that substantial litigation of the law's provisions could require a lengthy process. In the meantime, the right to freedom of speech might be violated as a result of the chilling effect, which might also result in potential petitioners not challenging the law. This effect is particularly problematic where political speech is involved, and where the restriction under review concerns speech in regard to elections. Justice Kennedy wrote:

> [S]ubstantial time would be required to bring clarity to the application of the statutory provision on these points in order to avoid any chilling effect caused by some improper interpretation... Here, Citizens United decided to litigate its case to the end. Today, Citizens United finally learns, two years after the fact, whether it

> could have spoken during the 2008 Presidential primary--long after the opportunity to persuade primary voters has passed [*ibid*., pp. 333-334].

These word are also appropriate in the case before us. As explained above, the Boycott Law may have a real chilling effect on freedom of political speech. Such a violation of freedom of expression exists whether or not the Law's sanctions are actually put into effect. Denying the petition for lack of ripeness, and waiting for the law to be given effect in practice would allow this ongoing violation to continue. In practice, the chilling effect may even lead to extending the time that would pass until the "case-by-case" examination of the Law, or until enough data is collected to justify its review in the framework of a petition to this Court. The chilling effect deters potential speakers from calling for a boycott as defined by the Law in a manner that reduces the number of those who might bring the Law before the courts. In my opinion, the Boycott Law violates freedom of expression by its very enactment. Therefore, we should review its constitutionality now, and not wait, as my colleague proposes, for its review "indirectly" or "from the bottom up".

51. *Comparative Law* – My colleague Justice Melcer referred to a number of laws of different countries that treat of calls for boycott in one way or another. Indeed, various countries have arrangements for limiting the imposition of boycotts in one way or another. Thus, for example, the American Export Administration Act, 50 USCS Appx (1977) (hereinafter: EAA) empowers the President to establish directives that would prohibit participating in a boycott declared by a foreign state against a friendly state. I do not believe that this legislation is relevant to our discussion. The purpose of the EAA, as presented by the state in its response to the petition, is the protection of American foreign policy. The EAA does not directly address "private" boycotts, and it appear not to directly treat of boycotts related to the specific policies of the friendly state, such as Israel's policy in regard to the Area. As opposed to the arrangement in the EAA, the Boycott Law – particularly the arrangement in regard to the Area – does not exclusively concern Israeli foreign policy, but rather imposes restrictions on internal Israeli public discourse. My colleague also referred to the "anti-discrimination law" of various countries, including France and Germany. In my opinion, these, too, are irrelevant to the matter before us. Even if there is justification for prohibiting calls for boycott that comprise certain discriminatory aspects, as can be seen in those comparative law provisions, and even in Israeli

anti-discrimination laws, there is no justification for doing so only in regard to a certain type of political positions.

52. *A comment on recourse to American law* – In my opinion, I referred several times to doctrines and cases from American law. It should be noted in this regard that there are significant differences between our legal system and the American legal system in regard to the scope of protection granted to freedom of expression. As a rule, the protection granted to freedom of expression in the United States is broader. The constitutional balancing equations employed in the United States in cases of violation of freedom of speech are different from those that we employ, particularly in regard to content-related restrictions on freedom of speech (see, e.g.: *United States v. Alvarez*, 132 S. Ct. 2537, 2543-2544 (2012); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2733 (2011); Reichman, pp. 192-193; Aharon Barak, "The American Constitution and Israeli Law," in *Selected Essays*, vol. 1, 385, 388-391 (2000)). In view of those differences, it should be clear that the American rules cannot be applied as such. However, the principles and methods of analysis that were presented are relevant to the matter before us. They allow us to examine the challenges that the American legal system confronted in regard to freedom of expression, and they can shed light on the relevant problems. Thus, for example, reference to American law elucidates the dangers attendant to content-based state intervention in the marketplace of expression. It focuses a spotlight on some of the relevant considerations for protection (or lack of protection) of coercive speech. It proposes a equilibrium point between freedom of expression and the state's power to decide whom to fund, and sheds light on the various considerations relevant to invoking the ripeness doctrine. The decisions of the United States Supreme Court in these matters are, in my opinion, worthy of examination and study, even if we ultimately decide not to adopt them. In any case, the final decision is one "made in Israel". It is founded upon Israeli legal principles, and upon the Israeli constitutional tradition. These Israeli principles – and only they – ground my above opinion.

53. *Public trust* – The Boycott Law concerns one of the most heated and charged political issues in Israeli society. My conclusion is rooted in legal considerations. It derives from the supreme importance of freedom of political expression. However, despite its being a legal conclusion, our decision in regard to this petition will be of political significance. Leaving the

Law intact, as written, will be celebrated by part of the public, while striking it down or restricting it will be welcomed by another part of the public. Every result may negatively affect public trust in the judiciary. We have no control over that. However, "the desire to ensure public trust in the judicial system does not mean that a judge must decide contrary to his conscience. Judges must know how to ignore the passing winds of the moment, which sometimes blow in one direction and sometimes in another, sometimes as a blessing and sometimes a curse" (CrimA 8080/12 *State of Israel v. Olmert* (published in Nevo) (July 6, 2014) para. 12 of my opinion). In this regard, we may return to the relevant insight of Justice M. Landau in HCJ 390/79 *Dwiekat v. Government of Israel*, IsrSC 34 (1) 1 (1979):

> In this instance, we have appropriate sources for ruling and we have no need, and indeed we must not, when sitting in judgment, take our personal views as citizens of the country into account. Yet, there is still grave concern that the Court would appear to be abandoning its proper place and descending into the arena of public debate, and that its ruling will be applauded by some of the public and utterly, vehemently rejected by others. In this sense, I see myself here as one who's duty is to rule in accordance with the law on any matter lawfully brought before the Court. It forces me, to rise above the disputes that divide the public, knowing full well in advance that the wider public will not note the legal argumentation but only the final conclusion, and that the appropriate status of the Court, as an institution, may be harmed. Alas, what are we to do when this is our role and our duty as judges [*ibid*., p. 4].

54. In conclusion, if my opinion be heard, we would instruct that the Law be interpreted as stated in paras. 45-47 of my opinion, in order to avoid the severe result of striking down the Law as unconstitutional.

Justice N. Hendel

The Constitutional Discourse in this Case

1. A constitutional petition may take many forms. At times, it concerns the boundary of a legal norm, and at times it may accentuate the importance of a particular legal value that may

have been neglected. And sometimes a petition contends with a conflict created by the clash of two revered, fundamental values. Such a conflict may counterpose the one and the many, the individual and the public, as opponents in a constitutional contest. That is the case in the matter before us. It places freedom of political expression on one side, and Israeli society's desire to protect itself against harmful activities that continually harass it, on the other.

2. Freedom of expression is the lifeblood of democracy. In my view, it is a substantive, practical factor that distinguishes a democratic society from one that is not. It should come as no surprise that, already in the early days of the state, freedom of expression was established as a fundamental constitutional principle (HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of the Interior*, IsrSC 7 (1) 871, 878 (1953), IsrSJ 1 90 [http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior] (hereinafter: the *Kol Ha'am* case). That case was decided long – some forty years – before the enactment of Basic Law: Human Dignity and Liberty. Judicial recognition of the singular importance of freedom of expression came into being decades before the modern constitutional discourse that now characterizes Israeli society and many others.

Of course, freedom of expression is not an absolute right. It must be balanced and weighed opposite other rights and interest of independent importance, even if not necessarily of the same weight and power. I will address this below. Nevertheless, as I pointed out in the Further Hearing in the *Ilana Dayan* case:

> The preeminent status of freedom of expression in the State of Israel cannot be questioned. As early as the *Kol Ha'am* case, freedom of expression was deemed a "supreme value" that "constitutes the pre-requisite to the realisation of almost all the other freedoms" (HCJ 75/73 *Kol Ha'am Co. Ltd. v. Minister of the Interior*, IsrSC 7 (1) 871, 878 (1953)). That is the first example of recognition of a constitutional right "*ex nihilo*", as is only proper for the first days of creation [CFH 2121/12 *A v. Dayan*, (published in Nevo) para. 3 of my opinion].

And as my colleague Deputy President E. Rivlin wrote in the decision that was the subject of the Further Hearing:

> This liberty, which is not second to none but which nothing precedes, was intended, first and foremost, to allow a person to express his personal identity.

> Freedom of expression allows every person to express his personal feelings and characteristics, to express his concerns, and thereby to develop and cultivate his identity […]. In that sense, freedom of expression is part of human autonomy, part of one's right to self-definition, and part of one's ability to give expression to one's uniqueness. It is the right to self-fulfillment [CA 751/10 *A v. Dayan* (published in Nevo) (Feb. 8, 2012) para. 62].

This is especially true in all that concerns freedom of political expression, that is: the individual's right to express his opinions and views on various aspects of governance in a clear voice. In practice, the primary rationales grounding the recognition of freedom of expression are all the more pertinent in regard to freedom of political speech. In this regard, Justice Agranat's word in the *Kol Ha'am* case are particularly apt:

> The principle of freedom of expression is closely bound up with the democratic process. In an autocratic regime, the ruler is looked upon as a superman and as one who knows, therefore, what is good and what is bad for his subjects. Accordingly, it is forbidden openly to criticise the political acts of the ruler, and whoever desires to draw his attention to some mistake he has made has to do so by way of direct application to him, always showing an attitude of respect towards him. Meanwhile, whether the ruler has erred or not, no one is permitted to voice any criticism of him in public, since that is liable to injure his right to demand obedience […]. On the other hand, in a state with a democratic regime - that is, government by the "will of the people" - the "rulers" are looked upon as agents and representatives of the people who elected them, and the latter are entitled, therefore, at any time, to scrutinize their political acts, whether with the object of correcting those acts and making new arrangements in the state, or with the object of bringing about the immediate dismissal of the "rulers", or their replacement as a result of elections [p. 876 (English: para. "A", *per* Agranat J.)].

And let us emphasize: Freedom of expression is not practically tested when we are concerned with the expression of views that are at the very heart of the consensus. The problem arises when a person wishes to express opinions that are somewhat – or even very – remote from society's accepted views. Those are views that the majority may see as extreme, outrageous, and

even harmful. “A strong, true democracy must ensure that the manner for confronting such opinions not be by way of prohibition of their dissemination from on high, but rather through free, open debate in which every member of society can arrive at his own opinion” (HCJ 399/85 *MK Rabbi Meir Kahane v. Board of the Broadcasting Authority*, IsrSC 41 (3) 255, 310 (July 27, 1987), *per* G. Bach J.). Thus we find that the *Kol Ha’am* decision stands tall when an individual voice confronts the nation on a political matter.

The great importance of freedom of political expression is premised upon a number of grounds.

First, the claim that freedom of expression aids in the exchange of opinions is of particular importance in the political arena. The most significant and influential normative arrangements in the political public are established in that forum.

Second, freedom of expression aids in realizing the democratic component of majority decision. According to various conceptions, the value of the election process rises to the extent that the public votes intelligently, on the basis of a position grounded in familiarity with facts and various claims of the candidates. One might even say that the centrality of freedom of political expression derives precisely from the fact that there is no right answer to political questions. In this area, there is no examination of facts or desire to reach the absolute truth. Politics treats of questions that can and should be the subjects of debate. The hope in a democratic society is that the majority is right. But a 51% majority does not guarantee that the majority view is necessarily more intelligent than that of the minority. Therefore, the ideological “give and take”, the discourse of different views – including those that reside at the periphery – is necessary in the extreme. Freedom of expression is important not only on Election Day, but always, as the public debate continually influences the decision making of the leaders of the political branches.

This second ground for the great importance of freedom of political expression also comprises the *third*. The latter serves as a means for the constant monitoring of the activities and decisions of the various governmental agencies.

Fourth, according to certain approaches, the participation of individuals in the political process is of independent value. This derives from a recognition of their dignity and their role as

social creatures with values. This ground stand on its own, and goes beyond the influence upon the decisions actually made (see: Re'em Segev, *Freedom of Expression: Justifications and Restrictions*, 124-148 (2008)).

On a more general level, freedom of political expression is protected not only because we are a democratic state, but also because we are a Jewish state. Thus from the earliest days of our existence. We are told that our Patriarch Abraham was called "*Ivri*" ["Hebrew"] because he maintained his opposition to the idolatrous regime: "And told Abram the Hebrew [*ha-'ivri*] … Rabbi Judah said: The whole world was on one side [*'ever*], and he was on the other side [*'ever*]" (*Genesis Rabba* 48:8). The first holiday of the Jewish nation – in fact, its constitutive holiday – is Passover. It is a holiday that counterposes individual liberty and the slavery regime of the Egyptian Pharaoh. These points accentuate the centrality of freedom of political speech as integral to freedom of the individual confronted by the existing regime that limits his choice. The issue is not only the "marketplace of ideas", but a person's right to freedom of expression in opposition to the ruling political regime. The power of the individual to make his own decisions and express his views without society – even a democratic society – deciding for him in the public's name.

I note these matters first, because the petitions before the Court require that we examine the borders of freedom of expression. The petitions all focus upon the constitutionality of the Boycott Law, while emphasizing different aspects. It would seem that our decision in this matter may depend upon the weight to be accorded to freedom of political expression.

3. As the bill explains, the purpose of the Law is "to prevent harm caused by the phenomenon of imposing boycotts on various entities due to their connection to the State of Israel. The boycotts may harm commercial, cultural or academic activity that is the object of the boycott, or inflict serious loss thereto" (H.H. 373 (2.3.2011).

It is clear that the Law's initiators considered the importance of freedom of political speech. Thus, for example, the final version of the Law does not include a criminal sanction against a person calling for a boycott. Another example is that the Law is not directed at every person calling for a boycott, but only one who "knowingly publishes a public call for a boycott against the State of Israel" (hereinafter: the "caller" or the "call for a boycott"). My colleague Justice Melcer also provided an excellent review of additional aspects of the values comprised by

the Law, for example the desire to prevent discrimination on the basis of a connection to a country of origin (para. 32 of his opinion). Nevertheless, the matter in its entirety must be examined from the perspective of constitutional judicial review.

The decision in this case is not an easy one. It raises legal, extra-legal and social questions. As judges, our role is, first and foremost, to examine the law as it is. In other words, the conflict –which must be evaluated and decided – arises in a concrete manner, and affects particular aspects of specific rights. It concerns a particular legal text. That text – the Boycott Law, in the matter before us – is the basis for that decision.

The Law consists of a number of provisions. First, it defines the boycott (sec. 1), which is the cornerstone of the other provisions of the Law. That is followed by a number of sanctions that may apply to a person calling for a boycott under the established conditions. The sanctions can be divided into three categories: torts (sec. 2), prevention of participation in tenders (sec. 3), and denial of benefits (sec. 4). I will separately address each element in that order.

Definition of the Boycott

4. Section 1 of the Law states:

> In this law, "a boycott against the State of Israel" means – deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, one of its institutions or an area under its control, such that it may cause economic, cultural or academic harm.

It should be noted that the definition comprises three elements: *refraining* from economic, cultural or academic ties; *connection* with the State of Israel, one of its institutions or an area under its control; economic, cultural or academic *harm*.

As noted, the definition section focuses upon “boycott”. However, one cannot learn from that, alone, what action by an individual might lead to the imposition of the three sanctions. The answer to that may be found in the relevant sections, 2-4. Common to all of those is that the particular sanction – payment of damages, prevention from participating in a tender, or denial of benefits – will apply to one who knowingly publishes a public call for a boycott. To complete the picture, it should be noted that sections 3-4 also refer to one who committed to participate in a

boycott. The emphasis is upon the commitment, and not on the participation. Either way, this means that in order to fall within the scope of the sanctions, the very call for participation in a boycott suffices, even in the absence of any actual participation. Participation in a boycott is not required in order to fall within the purview of the sanctions. A concrete examination of the Law reveals that it targets freedom of expression in the range of freedom of political expression – for example, the State as such, or even parts of it. We thus see that the Law is intended to restrict the freedom of political expression. However, when we look at the call, we find that that we are not concerned with the highest degree of freedom of expression, which is the pure expression of an opinion or a position, or the publication of facts. The Law does not apply to an individual's expression by which he, personally, imposes a boycott on Israel, as defined by the Law. The expression is calling for a boycott by another. But still, we are concerned with a "call", which is clearly part of freedom of expression (on this point, see the para. 6 of opinion of my colleague Justice Y. Danziger, as well as the references to the articles by Theresa J. Lee and Prof. Nili Cohen). Moreover, we are not concerned with a call for the perpetration of a criminal offense or a civil tort. As noted, a boycott, itself, is not prohibited by the Boycott Law. Therefore, even if there are more "pure" expressions of freedom of political expression, we are still within its compass, with all that derives therefrom in terms of the recognition of the proper weight of the infringement. That is to say, the type of infringement and its importance are of significance in a democratic state.

As noted, the right to freedom of expression stands at the highest level. I have elsewhere expressed my opinion that when the Court conducts judicial review, it is important to consider the location of the relevant right on the scale of rights. I believe that even if this is not the place to decide a hierarchic structure of rights, and even if that may not be desirable in a relative and proportionate constitutional system, it would be proper – even in accordance with the instructions of the legislature in sec. 8 of Basic Law: Human Dignity and Liberty – to consider the type of right being infringed, while establishing principles. That is also the case in the United States, where three levels of rights are customarily distinguished for the purpose of deciding the requisite level of judicial review. In short, one can summarize that the Rational Basis Test is employed in regard to an arbitrary governmental decision; discrimination on the basis of age or sex will be judicially reviewed through Intermediate Scrutiny; while racial discrimination – which is viewed as a particularly severe form of discrimination – will be subjected to Strict

Scrutiny (see: HCJ 466/07 *Galon v. Attorney General* (published in Nevo) (Jan. 11, 2012), para. 4 of my opinion [http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]).

This is the required approach. To paraphrase George Orwell's *Animal Farm*, one might say that "not all rights are equal; some rights are more equal than others". This is all the more so when the Court must examine a law under the proportionality test, in both its broad and narrow senses. Clearly, this does not mean that due to the importance of freedom of expression, or even freedom of political expression, it will always prevail in any competition with another right. However, the status of freedom of expression does influence the constitutional analysis in the concrete case.

Reference to American law may help sharpen the point. That system recognizes the restriction of freedom of expression in certain cases. However, the list of cases is very limited, and focuses primarily upon a situation in which one person's freedom of expression causes harm to another. The leading case in this regard is *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which established when certain expression crosses the line distinguishing protected speech and a criminal offense. It was held that there is a two-part test: direct incitement, and likelihood of imminent lawless action. A causal connection must be shown between the speech under review and the expected harm or unlawful conduct.

There are, of course, Israeli laws that limit freedom of expression, such as the Prohibition of Defamation Law, 5725-1965, sec. 12 of the Civil Wrongs Ordinance [New Version], or sec. 122 of the Knesset Elections [Consolidated Version] Law, 5729-1969. The restriction in those laws was intended to prevent harm of a certain magnitude, for example, limiting freedom of speech that disgraces or humiliates another person. Here we are concerned with speech that may harm income, occupation, employment, and academic research. But in the background, and not only there, we should again emphasize that a public call for a boycott will suffice to fall within the scope of the sanctions, even if the caller does no participate in the boycott. We point this out not so as to reject such a distinction *a priori*, but only to show that the Law, as drafted, was primarily intended to limit freedom of expression. That, in my opinion, provides a different perspective of the Boycott Law, as per its language. Just as the law depends upon the facts, so judicial review depends upon the legal text – upon what is says and what it does not say.

A Civil Wrong – Section 2

5. The section, whose heading is "Civil Wrong", states as follows:

> (a) Anyone who knowingly publishes a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is a reasonable possibility that the call will lead to a boycott, and the publisher was aware of that possibility, commits a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] will apply to him.
>
> (b) In regards to section 62(A) of the Civil Wrongs Ordinance [New Version], anyone who causes a binding legal agreement to be breached by calling for a boycott against the State of Israel will not be deemed as having acted with sufficient justification.
>
> (c) If the court find that a civil wrong, as defined by this law, was committed with malice, it may require the tortfeasor to pay damages that are independent of the actual damage caused (in this section – exemplary damages); in calculating the sum of exemplary damages, the court will consider, inter alia, the circumstances under which the wrong was carried out, its severity and its extent.

In effect, sec. 2 comprises three different elements: creating a new tort treating of a call for imposing a boycott (ss. (a)); a determination in regard to a certain element of the tort of inducement of breach of contract (ss. (b)); establishing the possibility of awarding damages without proof of damage (ss. (c)). I will begin by stating that, in my opinion, section 2 in its entirety does not stand up to constitutional review, and should therefore be struck down. In order to understand that position, I will make it clear that I am willing to assume that the Law passes the three preliminary tests: by a law and for a proper purpose befitting the values of the State of Israel. I am also willing to assume that the Law passes the first two subtests of proportionality – that of a rational connection and of an alternative, less harmful means. Nevertheless, I am of the opinion that sec. 2, in its entirety, does not pass the third subtest of proportionality: proportionality *stricto sensu*. I will first examine subsections (a) and (c), which would seem to be more closely related.

6. The elevated status of freedom of political expression requires a detailed examination of the innovation introduced by the Law, which infringes that right. At first glance, it would appear that sec. 2 of the Law makes it easier for a plaintiff seeking damages in two ways.

First, damages can be awarded without proof of damage – subsection (c). It is true that this possibility is contingent upon the tort being committed with malice. However, this would not appear to be a sufficiently high bar. The term "malice" is not defined by the Law. It would seem that the legislative intent was to remove cases of negligence or cases in which there was awareness of the possibility of a boycott without intention to cause it (compare with the malice requirement in sec. 131 of the Tenant Protection Law [Consolidated Version], 5732-1972, which was interpreted as referring to an intentional act. See, e.g.: CA 774/80 *Badawi Arslan v. Daad Fahoum*, IsrSC 35 (3) 584 (1981); LCA 4740/02 *Ibrahim Halil Alamad v. Muhammad Zaki Albudari* (published in Nevo) (June 23, 2005)). Alternatively, it may be that the requirement refers to a particularly negative motive – a desire to cause harm, like the requirement of malice in the Civil Wrongs Ordinance (see: Israel Gilead, *Tort Law: The Limits of Liability*, 1160-1162(2012) (Hebrew) (hereinafter: *Gilead*); Izhak Englard, *The Law of Civil Wrongs – The General Part*, 2nd ed., 130, 150 (Gad Tedeschi, ed.) (1976) (Hebrew)). However, practically speaking, the action of calling for a boycott generally indicates – by its nature – the publisher's intention that his call will lead to an actual boycott, which fulfils the requirement of a negative motive. That is true even if it is employed as a means for achieving another end, and not with the ultimate objective of harming those boycotted. Thus, the question of how hard it would be to prove the element of malice arises in all its force. It would appear, without making any definitive statement on the issue, that the answer is that it would not present any great difficulty.

Second, *prima facie*, it would appear that, under the language of sec. 2(c), it would be possible to impose tort liability without proving some of the classic elements of a tort – a causal connection and causing damage – and that, *prima facie*, this would also be true under the language of sec. 2(a). Liability could be imposed under the latter when, according to the content of the call and the circumstances of its publication, there "is a reasonable possibility that the call will lead to a boycott, and the publisher was aware of that possibility". In other words, there is no requirement of proof of causal connection between the call for a boycott and the damage in accordance with the balance of probabilities, but only proof of a reasonable possibility. It would

be germane to ask whether lightning the burden of proof in a civil suit, while eroding and infringing freedom of political expression, is proportionate. It has the potential for excessively limiting freedom of political speech. That freedom requires constitutional protection. The legislature chose the sanction of tortious liability while abandoning the approach of criminal responsibility, and rightly so. However, one might argue that this two-pronged relaxing of the tort requirements makes the tort quasi-punitive.

I find this disturbing, but I accept the solution proposed by my colleague Justice Melcer to be a legitimate interpretation. His position is that sec. 2(c), treating of exemplary damages, should be struck down, and that the elements of the tort under sec. 2(a) be construed in a manner consistent with the elements of a tort as established by the Civil Wrongs Ordinance. In other words, in proving a tort under the Boycott Law, the plaintiff would be required to show both damage and a causal connection between the call and that damage he incurred. In my view, one might ask whether that proposed interpretation is necessarily what the legislature subjectively intended. However, the interpretation of sec. 2(a) proposed by my colleague is possible under the language of the Law (and there is even some support for it in the bill). It is the accepted rule that a construction that prevents the voiding of a law is preferable to one that renders it void. According to the proposed approach, the phrase "[according to] circumstances of the publication there is a reasonable possibility that the call will lead to a boycott, and the publisher was aware of that possibility" is an additional condition. In other words, it places an additional hurdle before proof of the tort. However, "Anyone who knowingly publishes a public call for a boycott … commits a civil wrong and the provisions of the Civil Wrongs Ordinance will apply to him". In other words, the tests for the causal connection and the proof of damage derive from the Civil Wrongs Ordinance. That interpretation renders sec. 2(c), regarding the imposition of exemplary damages, void, while sec 2(a) – boycott as a tort – is preserved subject to the requirement of proof of a causal connection and damage as required under tort law.

However, this is not the end of the road. In other words, while I accept the proposed construction, I do not believe that sec. 2(a) meets the requirements of constitutionality. My focus will now be upon the third test of proportionality – proportionality *stricto sensu*, harm versus benefit.

Section 2(a) – The Proportionality Stricto Sensu Test

7. My conclusion that this section does not pass the proportionality *stricto sensu* test rests upon a number of tiers. First, there is the near-certainty test. My colleague Justice Melcer explained that an infringement of freedom of expression in order to protect a competing interest must meet the criterion of near certainty. Under this test, the call under discussion must have a high probability of infringing the protected interest (see: the *Kol Ha'am* case, pp. 887-889). But he argues that this presents no difficulty in in the present case. The reason for this is that having established the need for proof of a causal connection between the conduct and the damage, we are no longer concerned with a near certainty of damage, but rather with certainty. This clever argument appears logical. However, I am not sure that it is precise. The reason for this is that the factual causal connection test examines the relationship between the speech and the result *ex post*. It does not examine the *a priori* reasonableness of the connection. As opposed to this, the near certainty test is a substantive test that applies *ex ante*, at the time of the call for a boycott. It is intended to filter from the scope of liability those expressions that should not be prevented. The quasi-evidentiary test is meant to regulate conduct or speech in "real time". The information collected thereafter is but hindsight.

Consider, for example, a call for a boycott in a closed, small forum of students. It might "leak" out and actually lead to the boycotting of a large commercial company. Near certainty is absent at the moment of speaking, but there may be a causal connection. Indeed, the *legal* causal connection test is meant to address this. In its framework, the situation is examined at the time of the call itself. That is also true of the "reasonable possibility" test established under sec. 2(a) of the Law. But those tests are not of "near certainty", but rather are more lenient tests. We thus find that the substantive requirement of near certainty need not be met in order to give rise to the "tort of calling for a boycott". I am aware that my reservation is not entirely free of doubt, and it, too, is clever. I will, therefore, buttress my conclusion that the constitutional harm exceeds the benefit of retaining sec. 2(a) even without granting weight to this argument, although I believe it has merit.

The second tier is that we are concerned with the creation of a new tort. The assumption is that in enacting the Law, and particularly sec. 2(a) – a tort of calling for a boycott -- the legislature intended an innovation. Inasmuch as this innovation infringes freedom of political

speech, as earlier noted, this requires careful constitutional examination. That examination must attribute the proper weight to the infringement, on the one hand, and to the proper purpose of preventing harm to the State of Israel by means of a boycott, on the other hand. The innovative nature of the Law cannot be denied. As the bill stated:

> This bill is intended to establish a new tort that would also apply to cases that do not fall within the scope of the said torts [of inducing breach of contract and negligence], and will make it possible for a person or other entity harmed as a result of a boycott imposed upon it due to its connection to the State to sue for his injury.

In other words, the legislature did not wish to reiterate what already existed, but rather to break new ground.

8. The third tier, and with the purpose of thus pinpointing the innovation, treats of the uniqueness of sec. 2(a) as opposed to secs. 3 and 4. The former provides a tool for an individual to sue another individual in tort for his call for a boycott. The latter concern administrative sanctions by the state. This distinction is very significant. Granting such a tool to an individual does not create a proportionate balance between the (proper) purpose and the infringement of freedom of political expression. The reason concerns the relative ease in filing and conducting the suit. Imagine that a person calls for a boycott as defined by the section. During the course of the following three months, there is a drop in the profits of the factories and stores in the boycotted area. That would be sufficient to ground filing a tort suit against the caller, which, *prima facie*, would meet the threshold requirements. After all, there is a call for a boycott, and injury. The plaintiff can attempt to prove the causal connection in regard to the entire loss: assuming a twenty-percent loss, it may be argued that the entire loss derived from the call. Alternatively, it may be argued that only part of the loss derived from the call – for example, fifty percent. In the latter example, the plaintiff would be able to claim that even though three was a recession during the relevant period, were it not for the call, the loss would have amounted only to fifteen percent. Such a suit could be brought by every factory, business and store in the area. Even a profitable factory would be able to argue that were it not for the call for a boycott, the profit would have been greater, and therefore it incurred damage.

I am willing to assume that there will be suits in which the damage would be proven by means of the regular tests of tort law. However, many suits would become an instrument – a means for filing suits in order to create a new, harsh reality for various people and entities. The harm of such a situation would be inflicted even if the suit does not succeed. One may even assume that various lawyers will muster for this, also as part of an ideological struggle. Such suits will become a means for political "goring", with the courts serving as the horns. The harsh result will be a chilling effect that will influence freedom of expression, particularly in the case of an individual defendant. He will have to evaluate (in every sense) his conduct before calling for a boycott, and this in relation to freedom of political speech. As Justice Danziger put it: "The presence of a chilling effect in this case is not at all speculative. The creation of a chilling effect is the primary means chosen by the legislature for achieving the Law's purpose" (para. 29 of his opinion). And see the clear, comprehensive summary in his opinion, as well as the opinion of my colleague President (Emeritus) Grunis in HCJ 2311/11 *Sabah v. Knesset* (published in Nevo) (Sept. 17, 2014) para 16 of his opinion).

This point highlights the difference between the tort under sec. 2, and the administrative sanction under secs. 3 and 4. The latter is exercised by the state, which is entrusted with protecting the interests of the entire general public and of specific groups. As such, it must act in accordance with the criteria of public and administrative law in regard to such matters as selective enforcement, establishing criteria and internal procedures, reasonableness, the rules of natural justice, and so forth. An individual is under no similar duty. This point is expressed both in Israeli and comparative law.

In Israeli law, we can point to the arrangement under sec. 4 of the Prohibition of Defamation Law [19 L.S.I. 254]:

> Defamation of a body of persons, or any group, other than a body corporate […] shall not be a ground for a civil action or private complaint.

An individual cannot sue another individual for a publication defaming a public of which he is a member. He also cannot file a private complaint. This arrangement does not derive from the view that groups do not require protection of their good name, or under an assumption that the members of a group are not harmed by a publication that disparages or humiliates the group.

Those are protected by a criminal prohibition. Why, then, is a member of the group prevented from making recourse to the courts in regard to the publication?

There are several reasons for this. Among other things, there is a fear that such cases may have a chilling effect upon freedom of expression. Due to this fear, the ability of individuals to "flood" the publisher with civil suits is denied. This is so even in regard to a low degree of expression – "a public falsity" that disparages an entire public (see CA 8345/08 *Ofer Ben Natan v. Muhammad Bakri* (published in Nevo) (July 27, 2011) para. 8 of the opinion of Justice I. Amit). The proper balance between the conflicting values grants the state the power to institute proceedings. The assumption is that, from the outset, it will wield its power in an appropriate, balanced manner that will prevent a chilling effect and harm to freedom of expression. An additional reason is the view that the protection of a particular public – of the entire public – is a governmental rather than an individual interest. That interest should be protected by the authorities, and not be "privatized" and granted to individuals (*ibid*.; Khalid Ghanayim, Mordechai Kremnitzer & Boaz Shnoor, *Libel Law: De Lege Lata and De Lege Ferenda*, 250 (2005) (Hebrew) (hereinafter: *Libel Law*).

To return to the matter at hand, a call for a boycott differs from a "publication of a public falsehood". There, we may be may be concerned with a false fact. Here, we are concerned with expression that is similar to an opinion. There, the publication may be of no public value. Here, we are concerned with political speech. We should learn from this that if the legislature exercised caution in regard to the less severe case, we should be exponentially more careful in regard to the more severe case. It would not be superfluous to recall that the subject of defaming the public arose in the debate on amending the Defamation Law. The possibility of establishing a civil tort was barely mentioned. As opposed to that, there was support for the view that even establishing a criminal offense would be extreme. Similar situations can be found throughout the world (see: *Libel Law*, at pp. 248-240). Protecting the public interest – yes. But, at the same time, entrusting it to the authorities and not to the public. And this due to the care that must be exercised in regard to limiting freedom of expression. Let me put this differently. One of the defenses to a defamation suit is a plea of truth (sec. 14 of the Defamation Law). That defense cannot be sustained in reply to political speech because, as explained above, we are concerned with an opinion rather than a fact.

As for comparative law, my colleagues Justice Melcer and Justice Danziger presented a broad comparative picture of legislation and case law. In my opinion, comparative law is of particular importance in this case. The reason is that the background of the Law includes acts for and against the boycotts, including boycotts against the State of Israel. It should come as no surprise that the bill's Explanatory Notes refer to the American Export Administration Act of 1979 (hereinafter: EAA). However, in my opinion, even if we were to accept the comparative law analogies in this regard, they concur with and lend support to my position. The comparative examination reveals that the sanctions in the other legal systems are not between individuals, as in the case of a tort suit, but are granted to the state, for example, in the form of administrative sanctions. Consider, for example, the United States. The two primary pieces of legislation referred to by the Respondents are the EAA and the Ribicoff Amendment to the Tax Reform Act of 1976 (hereinafter: TRA). These pieces of legislation were enacted against the background of the Arab Boycott against the State of Israel, and were intended to help protect the interests of the State of Israel and the United States. In both laws one can find sanctions directed at anyone who participates in a boycott against a country that the United States does not boycott. Thus, in the framework of the amendment to the TRA, certain tax benefits are denied to anyone participating in a boycott (26 USC § 908). In addition, administrative sanctions can be imposed upon such a participant by virtue of sec. 11(c) of the EAA. The law does not comprise a section permitting a citizen who views himself as harmed by the boycott to file a civil suit. Additional laws that appear in the survey submitted to the Constitution Committee also do not establish calling for or participating in a boycott as a civil wrong (see: http://www.knesset.gov.il/mmm/data/pdf/m02861.pdf).

According to the Boycott Law Bill, it is not the only legislation treating of calls for a boycott. According to that view, a suit can be filed for the torts of negligence or inducement of breach of contract. Even if we were to assume that to be wholly or partly correct in accordance with the circumstances, we are, in any case, concerned with exceptions that certainly do not allow for suits to the extent and in the circumstances permitted under the current language of section 2 of the Law. That is true both for Israel and for other countries. Let us again consider the situation in the United States. Attempts to sue for calling for a boycott, even under existing tort causes of action, failed due to the importance of freedom of expression. My colleague Justice Danziger addressed the *Caliborne* case, in which a similar tort suit was denied, at some length.

In that case, as noted, residents boycotted a group of merchants in order to influence governmental policy. As a result, those merchants suffered financial losses. As was held: "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action". And even if it were possible to present circumstances or an example in which such a suit might prevail – which would appear to be the position of my colleague Justice Melcer – that claim should not be accepted in its comprehensive form. The Supreme Court's case law has recognized the conflict between opposing the boycott and the right to freedom of expression, and has preferred the latter over the former. To return to our legal system, the language of the section is broad – too broad. The criteria of the proportionality *stricto sensu* test are not met. So it would seem to be in the entire world, and so in the State of Israel.

And note that I am not stating that we must follow in the footsteps of American law in regard to the judicial review of sec. 2. In the United States, the result derives from the force of the First Amendment to the Constitution, whereas in our legal system, the Law is examined in accordance with the constitutional test under sec. 8 of Basic Law: Human Dignity and Liberty. Of course, however, the status of freedom of political expression is recognized by this Court, and weight can be given to the American approach in that regard. From this perspective, both in principle and in practice, I am of the opinion that the harm is greater than the benefit of the Law. The section does not meet the test of proportionality *stricto sensu*.

9. The fourth tier is of a practical nature. There is, in my opinion, a problem created in terms of judicial policy considerations. Sec. 2 of the Law requires that the court contend with additional factors as a trial court of first instance rather than an instance performing administrative review and examining the margin of proportionality. For example, the court must weigh the content of the call and the circumstances of its publication (sec. 2(a)), as well as the circumstances of the commission of the tort, its severity and its scope (sec. 2(c)). Experience shows that in quantifying various forms of damage, a court must get into the thick of things and perform various estimates. For example, in order to decide the fate of a private complaint before it, it will have to evaluate, compare and distinguish different cases and calls for boycotts of various scopes and types. In that regard, the judicial task differs from evaluating suffering or even libel, regarding which there are factual issues rather than disagreements in the political arena. There is a fear that the new Law will require – or, at least may drag – the courts examining

tort suits – the Magistrates Court and the District Court – to delve into and decide purely political matters. In my opinion, it would be better that such tasks not be performed within their walls.

Another aspect of this tier is the problematic nature of the Law from a tort-law perspective. The Law makes it possible for a large number of plaintiffs to sue for purely economic damage. Questions relating to proving the necessary causal connection were not clarified. It would seem that sec. 2 suffers from inherent ambiguity. Even if that does not lead to invalidation, the ambiguity carries weight in the constitutional review of freedom of political expression in a civil proceeding. In this regard, we should note the American doctrine of "void for vagueness" in regard to criminal offenses. Nevertheless, it carries weight in constitutional review of civil proceedings. Of course, if I were of the opinion that the section could survive constitutional review, then considerations of judicial policy – or more precisely, policy considerations in regard to the judicial task – would probably not tip the scales on their own. But, inasmuch as I do not believe that to be the case, it would be worthwhile to present the said problem. This information reinforce the possibility of a violation of freedom of political expression. The more fundamental the infringed right, and the more severe its ramifications, the greater the need for precision in its delineation. The language of sec. 2 does not meet that requirement.

The fifth tier is the very statement that we are treating of a tort. This is related to the innovation in the enactment of sec. 2. The bill stated:

> In order to prevent such damage, it is proposed to establish that knowing publication of a public call for the imposition of a boycott on any entity due to its connection to the State of Israel be deemed a tort to which the provisions of the Civil Wrongs Ordinance [New Version] will apply. In other words, it will be possible to seek damages for the damage caused by the tort … Even now, a person harmed as the result of such a boycott may sue in tort, in the appropriate circumstances, for the tort of inducement of breach of contract or the tort of negligence.

Without setting anything in stone, I would say that I am not convinced that it would be possible, at present, to file a negligence suit, except, perhaps, in exceptional cases. A central element of that tort is the existence of a duty. Is a person normally subject to a duty not to call for

a boycott? This is not comparable to calling for prohibited conduct like racism (*cf*. LCrimA 2533/10 *State of Israel v. Michael Ben Chorin* (published in Nevo) (Dec. 26, 2011) paras. 5-7). It is also not comparable to procuring a civil wrong under sec. 12 of the Civil Wrongs Ordinance. In the above examples, a person calls for the perpetration of an act that is, itself, an offence or a tort. Calling for a boycott, at least in some of situations, is a person's basic right of conscience. There are people whose conscience will not permit them to purchase an automobile produced by a certain country. Others are upset by the very thought of patronizing certain stores that sell non-kosher products alongside kosher ones. They do not wish to empower those that they perceive as "offenders". To each his choices, and to each his conscience. Such choices stand at the core of a person's freedom to realize his values in his lifestyle. At times, a call for a boycott is a call to act in accordance with one's conscience. Conscience may be the compass of freedom of expression, including the freedom of political expression. Various policy considerations may indeed justify prohibitions upon the imposing of boycotts, and more widely, calls for boycotts. It is not my intention to loosen all restraint. The weight on each side of the scales will decide.

10. Looked at in its entirety, and for all the reasons stated, it is my opinion that a detailed examination of sec. 2(a) of the Boycott Law leads to the conclusion that the harm caused by the infringement of freedom of political speech exceeds the benefit accruing from the protection it affords to the purpose of the Boycott Law. I would again emphasize that the freedom of political speech does not grant comprehensive immunity. There are possible situations in which the call would justify its restriction by appropriate means. In that, sec. 2(a) – which establishes a civil wrong – differs from secs. 3-4 and their administrative sanctions. These section are consistent with the necessary balance required by proportionality *stricto sensu*, as I shall explain in greater detail.

Section 2(b) – Proportionality Stricto Sensu

11. Section 2(b) establishes that a person calling for a boycott, as defined by the Law, does not act with sufficient justification in regard to the tort of causing a breach of contract. Does this meet the requirements of the proportionality *stricto sensu* test? Pursuant to the above, I am of the opinion that this section of the Boycott Law passes the other tests set out by the Limitation Clause, and therefore, I shall proceed to examine proportionality *stricto sensu*.

The tort of causing a breach of contract is set forth in sec. 62 of the Civil Wrongs Ordinance [New Version] as follows:

> *Unlawfully Causing Breach of Contract*
>
> 62. (a) Any person who knowingly and without sufficient justification causes any other person to break a legally binding contract with a third person commits a civil wrong against such third person; Provided that such third person will not recover compensation in respect of such civil wrong unless he has suffered pecuniary damage thereby.

The rationale is clear – protecting performance of contracts. We cannot discount the possibility that a statement or commercial act may cause a breach of contract. Therefore, the legislature limited tortious liability by means of two primary liability filters: the first, a requirement of a mental element of subjective awareness that the conduct would cause a breach of conduct, and the second, the requirement of a lack of sufficient justification (and *cf*. *Gilead*, at p. 1168, fn. 53). Thus there is recognition of the complex – protection of contracts along with "sufficient justification". The nature of the justification is not explicitly stated in the law. An examination of Israeli law, comparative law, and the legal literature reveals that we are concerned with a "safety-valve concept" [*Ventilbegriffe*; *concetti volvola*] in the scope of which concerns of justice and various interests may be considered (see: CA 406/59 *Lindsay v. Scheiber*, IsrSC 14 (3) 2422, 2427 (1960); *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 495-496, [1942] 1 All ER 142 at 175, HL, *per* Lord Porter). Not surprisingly, the opinion has been expressed that "this element is the most difficult to delimit", and "it requires that the court exercise broad discretion" (Nili Cohen, *Inducing Breach of Contract* (*The Law of Civil Wrongs – The Particular Torts*, G. Tedeschi, ed., 207 (1986)) (Hebrew) (hereinafter: *Cohen*).

12. Despite the complexity of the Law's provisions and the subject, I would conclude that a call for a boycott for political reasons is constitutionally protected. The reasons given in regard to sec. 2(a) also hold in regard to the existing tort of causing breach of contract. Therefore, there cannot but be a similar result. I will clarify my position.

The emphasis of this discussion will center upon the element of justification, which is the core of the amendment in the Boycott Law. As the language of the Law states: "In regards to

section 62(A) of the Civil Wrongs Ordinance [New Version], anyone who causes a binding legal agreement to be breached by calling for a boycott against the State of Israel will not be deemed as having acted with sufficient justification." In other words, the consideration of freedom of political speech by means of a call for a boycott, as defined by the Law, does not grant a person who causes a breach of contract a justification that would exempt that action from the compass of tortious liability.

Several types of justification have been recognized in the case law in Israel and abroad. One type concerns causing a breach that is desirable, or by the exercise of a lawful right. One example is the case of conflicting contracts. The first buyer who insists upon his rights, justifiably causes a breach of contract with the second buyer, inasmuch as his right has priority (See *Cohen*, p. 219). Another example is the "necessity defense", as in causing a person to breach an employment contract in order to save the life of another (see *Cohen*, pp. 212-218). Another type of defense may be available to a person causing a breach of contract even when the breach itself is not deemed justified or desirable. A person may have a justification if he acted in good faith (see: CA 3668/98 *Best Buy Marketing Ltd. v. PDS Holdings Ltd*, IsrSC 53 (3) 180, 189-190 (1999); *Cohen*, pp. 233-235). In other situations, a public interest can lead to an exemption from tortious liability. In CA *Yosef Etzion v. Naftali Stein*, IsrSC 45 (3) 554, 560-561 (1991), it was held that a lawyer has a defense of justification for giving advice to a client that causes a breach of contract. The reason for that is desire to prevent a chilling effect that would harm a lawyer's ability to properly protect his client's interests. Another example can be found in sec. 62 of the Civil Wrongs Ordinance itself, which establishes that "a strike or lockout will not be deemed to be a breach of contract". That may be viewed as a sort of defense intended to protect the ability of workers to realize the freedom to strike (see: Ruth Ben-Israel, "Tort Liability for Strike Action," 14 *Iyunei Mishpat* (*Tel Aviv University Law Review*) 149, 169-170 (1989) (Hebrew)). Does the protection of the freedom of political expression also serve as justification?

In the United States, tortious interference with contractual relations, under sec. 766 of the Restatement of Torts (Second) (hereinafter: the Restatement), has been addressed in the context of political boycotts. This tort has been interpreted, *inter alia*, as including an action lacking justification (see sec. 767 of the Restatement). Whereas a boycott for economic reasons may fall

within the scope of this tort, it was held that a political boycott is protected by the constitutional right to freedom of speech. In *Environmental Planning & Information Council v. Superior Court*, 36 Cal. 3d 188 (1984) (hereinafter: the EPIC case), the California court addressed this issue and concluded:

> Most of the cases in which claims of tortious interference have been considered have involved either pure commercial relationships or union-management relationships. There is a paucity of authority in the application of common law principles to a situation such as this, in which a group organized for political purposes allegedly undertakes a consumer boycott to achieve its ends. What authority does exist in this arena strongly suggests, even apart from constitutional doctrine, that such action will not give rise to liability [p. 194].

In other words, most cases of tortious interference in contracts are connected to purely economic relationships or labor relations. As opposed to this, the case law supports the conclusion that, even in the absence of constitutional doctrine, a politically motivated boycott does not create liability. The court arrived at this conclusion, *inter alia*, after surveying the relevant case law, including the *Claiborne* case. It would not be superfluous to quote Justice Stevens, delivering the opinion of the Court, whose words were considered there, and which are appropriate to the case before us, as well:

> While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467. "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75. "There is a profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 [p. 913].

Freedom of political expression in public matters merits the greatest protection. Incidentally, we should note the reference to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, whose principles have been adopted in our legal system in the law of defamation (see: CA

323/98 *Sharon v. Benziman*, IsrSC 56 (3) 245, 266 (2002)). To return to the tension between causing a breach of contract and freedom of expression, the EPIC case held that that in the typical case of causing a breach of contract for commercial reasons, the court must balance the interests of the parties and of the public. However, where the "defendant's activities constitute a 'politically motivated boycott designed to force governmental and economic change,'" the Court is "precluded by the First Amendment itself from gauging the degree of constitutional protection by the content or subject matter of the speech: '[There] is an equality of status' in the field of ideas'" *(ibid*. at p. 197). In other words, when we are concerned with acts that constitute a political boycott intended to bring about a change in the policy of the authorities, the law will protect freedom of political speech. There is an equality of status in the field of ideas. Under this approach, the court will not decide by "grading", so to speak, one political opinion as opposed to another. As may be recalled, the true test of freedom of political expression is not when it is in the consensus, or even near it, but when it is very far from it, and not merely by a stone's throw.

This is also true in regard to a call for a boycott as defined in the Boycott Law, and also when the call is intended to cause a breach of binding contracts, as for example, in the case of *Cincinnati Arts Association v. Jones et al*., 120 Ohio Misc. 2d 26; 2002-Ohio-5428. In that case, the defendants called for a boycott following the death of a person at the hands of the police. In the framework of that boycott, there was a call for artists to cancel their appearances in the city concerned. The court held that the call was constitutionally protected, and dismissed the tort suit filed by the promoters of the events that were cancelled.

13. The result arrived at by the American courts should come as no surprise. The balance that we performed in the examination of sec. 2(a) of the Boycott Law also holds in regard to the examination of the constitutionality of sec. 2(b). Practically speaking, many calls for boycott concern existing contractual relations – calls for artists to cancel their appearances, calls for the media to cancel existing commercial ties, and so forth.

True to my above approach, constitutional review is not conducted in light of the First Amendment of the United States Constitution. We are concerned with the proportionality test established under sec. 8 of Basic Law: Human Dignity and Liberty, in general, and at this stage, the proportionality test *stricto sensu*, in particular. From that standpoint, entrusting the power to impose sanctions for the expression of a political position in the hands of an individual is not

proportionate. I will refer to the reasons given above in regard to the constitutional analysis of the tort established in sec. 2(a), including the chilling effect that derives from filing a suit by one individual against another. As stated, there is no effective "filter" that would prevent the filing of multiple, political tort suits in the various judicial instances. An after-the-fact dismissal of a suit by the court will not prevent the overall influence of the effect upon freedom of expression. It is *a priori* improper to conduct political debates in the courts. And it is also certainly undesirable, in terms of judicial policy, to allow such conflicts to be brought before the courts for judicial decision. It should again be emphasized that we are concerned, *inter alia*, with subjects that are at the heart of the political debate. This is as opposed to entrusting this sensitive matter in the hands of the government, which enforces the protection of the interests of the boycotted group while employing a filter from the start, as will be explained below. This allows for the achievement of a proportionate balance between the purpose and the means adopted to protect it. Moreover, judicial review can be conducted in advance, by examining the directives or criteria established by the authorities.

One might raise objections to this approach. One possible argument is that it cannot definitively be stated that a politically motivated call for a boycott will always be immune to a claim of inducing breach of contract. "Justification" is a broad safety-valve concept. Within its bounds considerations of justice, personal interests and public interests are examined. The scope of judicial discretion is broad and flexible. Moreover, sec. 62(a) of the Civil Wrongs Ordinance comprises other elements – "knowingly" and "causal connection". Each of the elements comprises a broad spectrum of situations. As for knowingly, in one case a person converses with another and asks him to breach a specific contract. In another case someone makes a general call for the breach of contracts in a particular field, knowing that people may respond to the call. The causal connection may also be complicated and difficult to untangle. Is it sufficient that the defendant presented convincing arguments in expressing his political position? Is procuring required? Is there a difference between a situation in which the caller for a boycott initiates the call, and one in which the party in breach asks his opinion? (See and compare: CA 123/50 *Bauernfreud v. Dresner*, IsrSC 5 (1) 1559, 1573 (1951), *Cohen*, pp 233-236).

From these question we see that, even absent the condition of justification, it is possible that the tests of causal connection ("caused") and mental element ("knowingly"), each

independently erects challenging hurdles in the path of proving the tort of inducing breach of contract by means of a call for a boycott. The three terms have mutual influence. The terms "knowingly", "causation", and "justification" must be defined against the background of their mutual interaction. Moreover, Israeli legal experience shows that plaintiffs have not made broad recourse to this section on the basis of political stands. This, as opposed to commercial considerations. And we would again recall what was held in the American EPIC case, according to which the case law in this area strongly supports the thesis that, even without recourse to constitutional considerations, it is doubtful whether a call for a political boycott, by its nature, would result in tortious liability (the EPIC case, p. 194).

Of course, these considerations are not primary, but are a helpful device for understanding the nature of the issue. We should not forget that according to the language of sec. 2(b), the Boycott Law enters the lion's den of conditions for proving the tort of inducing a breach of contract. The position adopted is one sided – freedom of political expression in the form of a call for a boycott is never a justification. Even if we were to assume that, under certain circumstances, the justification would not be available to a person causing the breach, it would appear that the comprehensive result is not proportionate. We are, after all, concerned with the test of proportionality *stricto sensu* under sec. 8 of Basic Law: Human Dignity and Liberty. The assumption is that the section is intended for a proper purpose. However, a proper purpose does not ensure that the law is proportionate in the narrow sense. We should bear in mind that we are concerned with a suit filed by one individual against another. This situation reinforces the need to maintain the accepted principles of tort law, and not so sharply deviate therefrom. This is particularly so when the need to protect freedom of political speech is poised on the other side of the scales. Section 2, together with its subsections, is aimed at the person calling for a boycott and not the boycotter. A call for participation in a boycott focuses the debate in the field of freedom of expression. Freedom of political speech is center stage. The prohibition created under the Boycott Law treats not of the action but of the call. The rule is that it is easier to restrict the freedom of political speech when it is intended to promote an unlawful purpose. And at its most fundamental level, it would appear that the disproportionality of sec. 2 derives from the concrete form that it takes in regard to freedom of political expression: granting an individual a means for suing another individual on the basis of his position on a political issue.

The end of a section: From the perspective of interpretive harmony, there is no room for drawing distinctions among the subsections of sec. 2 of the Boycott Law. In our view, even if some distinctions might be found among them, they would be distinctions without a constitutional difference. I therefore join my colleagues Justice Melcer and Justice Danziger, though each following his own approach. My conclusion is that sec. 2 – as drafted – is not proportionate, and it must be struck down in its entirety. On the scales of proportionality *stricto sensu*, the value of freedom of political expression must prevail, both in principle and in practice. On the level of principle, a different outcome may inadvertently deprive freedom of political speech of its proper protection. Of course, I am aware that the enacting of the Law reflects the position of the majority of the Knesset that a call for a boycott of the State of Israel and its academic institutions, or part of its territory, is a severe matter that harms the state. Nevertheless, the real test of freedom of political speech is precisely when freedom of speech is "problematic" and may even anger. A defensive democracy must also protect its character by protecting freedom of speech. On the practical level, an approach that would not invalidate the Law might open a door. The majority will be left to decide, in accordance with its view, when to create a chilling effect by means of a civil suit against political positions. Such an approach is inappropriate to a democracy. I would therefore recommend to my colleagues that sec. 2 must be struck down.

Section 3 – Denying Participation in a Tender

14. Common to sections 3 and 4 of the Law is the imposition of administrative sanctions. Section 3 treats of the precluding participation in tenders. Section 4 concerns provisions in regard to the denial of certain benefits, for example, denying tax incentives Just as there is a connection between the constitutional analysis of sections 2(a) and 2(b), there is a connection between sections 3 and 4. I will begin by examining sec. 3. This section, entitled "Directives restricting participation in tenders", establishes as follows:

> The Minister of Finance is authorized, with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee, to issue directives in regard to restricting the participation in a tender of anyone who knowingly published a public call for a boycott against the State of Israel, or who

committed to participate in such a boycott, including a commitment not to purchase goods or services produced or supplied in Israel, by one of its institutions, or in an area under its control; in this section, a "tender" is defined as any tender that must be administered in accordance with the Mandatory Tenders Law, 5752-1992.

Thus, a connection is created between a public call for imposing a boycott or a commitment to participate in a boycott and restricting the participation in a tender. I am of the opinion that, as opposed to sec. 2, this section clears the constitutional hurdle. The infringement is by a law; the purpose of preventing harm to the State of Israel by means of boycott – which appears in the Law's title – is a proper purpose that befits the values of the State of Israel.

As for proportionality *stricto sensu*, I believe that there is a rational connection between the means and the purpose. Moreover, there would not appear to be a less harmful means that would achieve the same purpose. That, bearing in mind the objective of giving real expression to the consequences of calling for a boycott or committing to participating in a boycott.

15. As for the third subtest, I will say as follows. In general, a careful distinction should be drawn between sec. 2, which treats of a civil tort, and sec. 3, which treats of participation in a tender. Taking a broad view, this section differs from sec. 2 in two primary ways: the first is the character of the harm to the publisher or the person committing to participate in the boycott. The second is the identity of the entity that initiates the process.

As for the first sense, both sections impose a restriction upon freedom of political speech. However, in my opinion, it is easier to restrict freedom of expression by means of restricting participation in a public tender than by creating a new tort or a sweeping principle concerning the tort of inducing breach of contract. By nature, a tender establishes conditions for participation. That does not mean that any condition may be imposed. However, in the matter at hand, there would appear to be a certain logic to an approach by which a person wishing to participate in a state-sponsored tender cannot oppose the state while enjoying absolute immunity.

As for the second sense, I explained above the problematic nature of granting a legal permit to individuals to act against other individuals on the basis of political expression. For the same reasons, when the entity imposing restrictions upon the caller for a boycott is the state,

there are mechanisms that make the sanction more proportionate. As noted, the state is subject to the principles of administrative and public law, including the principles of natural justice, fairness and reasonableness. These two considerations – the character of the infringement and the identity of the initiating party – join at the point where the process meets the criteria for a proportionate action. We thus find that the combination of the character of the infringement – a tender as opposed to a tort suit, and the identity of the party initiating the process – the state as opposed to an individual, points to the advantage of sec. 3 over sec. 2 of the Boycott Law in all that relates to proportionality *stricto sensu*.

As I will explain in detail below, the balance inherent in sections 3 and 4 between the sanction and the act that invites it also meets the comparative-law test. For the moment, I will suffice in referring to a law of the State of New York that comprises a similar sanction in the context of boycotts. Section 139-h of the New York State Finance Law establishes that contracts with the state will include a clause in regard to any contractor that "has participated or is participating or shall participate in an international boycott", where such participation is prohibited. A contract with an entity that meets that criterion is deemed void. On one hand, the clause does not concern one who calls for a boycott, but rather a participant or one who will participate in the future. On the other hand, the clause does not only prohibit participation in a tender, but establishes a mechanism that leads to the voiding of contracts that have already been signed.

16. Nevertheless, I am of the opinion that two elements of sec. 3 may raise a constitutional problem: the first – the need for due process, and the second – the lack of directives or rules may lead to the absence of a rational relationship between the denial of participation and the call for boycott. I will explain.

I will begin with the issue of due process. The Law authorizes the Minister of Finance, with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee, to issue directives in regard to participation in a tender. In this regard, account should be taken both of the infringement of freedom of political expression and the infringement of equality. I extensively discussed the importance of freedom of expression above. As for equality, the significance of the provision is that were it not for call for boycott, the bidder might have met the other threshold conditions of the tender. In other words, he will only be

prevented from participating due to the call for a boycott. It should be borne in mind that a public tender supports the principle of equality. It is, therefore, vital to ascertain whether there is a legal mechanism that allows such a bidder, whose bid was rejected for non-fulfillment of the conditions of sec. 3, to challenge the decision.

It would seem that the answer to that is in the affirmative. The key to this conclusion is to be found in sec. 5(1) of the Administrative Affairs Courts Law, 5760-2000. That section concerns the Administrative Court's jurisdiction over various matters. The section refers to Appendix 1, and sec. 5 of that Appendix addresses tenders. Therefore, on the face of it, a person deprived of the possibility of participating in a tender on the basis of a call for a boycott has the right to bring the matter before the Administrative Court, and in accordance with the rules of procedure, even submit an appeal to this Court.

The second problem concerns the specific provisions that will be established in regard to restricting the participation in a tender. It must be assured that the application of the section to a bidder will be rational. We would emphasize that we are not referring to the second test of proportionality – rational connection. In my opinion, as explained, sec. 3 passes this test. But here we are concerned with the application of the third subtest – harm versus benefit. In this regard we may ask if it is imaginable that, for example, anyone who calls for a boycott would automatically be prevented from participating in a tender. But one can even learn from the language of the Law that such is not the intention. Otherwise, how are we to understand the various levels of the mechanism for establishing directives for the purpose of making individual decisions – the involvement of three different authorities?

It should again be emphasized that the decision is that of the Minister of Finance, subject to the consent of the Minister of Justice and the approval of the Knesset. This is a structured administrative process that may justify the belief that the decision will be made thoughtfully. Nevertheless, it would seem that it will be necessary to show a rational connection between the nature of the tender and the nature of the call for a boycott. I will present an example that is not intended as a basis for my decision but only to illustrate the complexity: The owner of a transportation company calls for a boycott – as defined by the Law – against the Judea and Samaria territories. Despite that conduct, he submits a bid in a tender for the transport of school children in Ariel. In another case, the tender is for the transport of school children in Tel Aviv,

and the bidder calls for denying services to the residents of Judea and Samaria. It would appear that from the viewpoint of a rational connection, it would be easier to justify the first case as opposed to the second. This would seem to be the difference that must be taken into consideration. As noted, it is not my purpose to permit precluding participation in the tender in the first case, or to deny it in the second. But I do believe that we can expect some rational relationship between the nature of the tender and the nature of the call for a boycott.

17. Any other result might intensify the infringement of freedom of political expression in an unjustifiable manner. And note that I am not defining what a "rational relationship" might be. But, clearly, this must be expressed in the directives that the Minister is required to establish.

To allay any doubts, I would like to clarify the matter of the Minister's duty to establish directives as a condition for restricting participation in tenders. Section 3 states: "The Minister of Finance is authorized… to issue directives…" I would address two points in this regard. First, there is no need in this context to address the linguistic difference between "directives", "criteria" or "internal procedures". In any case, criteria will have to be established, which will be published, and that will allow various entities to plan their steps accordingly. The Law itself says as much. A tripartite mechanism is established that requires the consent of the Minister of Justice, approval of the Constitution, Law and Justice Committee, and the establishing of the directives. We can learn from this that the Law requires the exercise of discretion. That discretion is "fortified" by the consent of the Minister of Justice and the approval of a Committee, as opposed to mere consultation with those entities whose concern is the field of law. Secondly, it is clear from the language of the Law that authority granted the Minister permits him to establish or not establish directives. He does not have authority to prevent participation in a tender without establishing directives. That is to say, the promulgation of procedural directives, as provided in the section, is a precondition to precluding participation in a tender. This interpretation is reinforced by the language of sec. 4, which expressly states that the Minister may exercise his authority under that section even without promulgating regulations. A similar provision in regard to directives does not appear in sec. 3. In any case, criteria that will accompany and preceed any decision are required for any decision by the Minister.

Therefore, there is an infringement of freedom of political expression, but even if the case is liminal, it would appear that the legislature's decision is within the boundaries of the constitutional margin.

17. To summarize this chapter: There is a complex administrative mechanism for establishing the directives for restricting participation in a tender. In addition, there is a mechanism for judicial review. I am, therefore, not of the opinion that sec. 3 should be struck down. This view is based upon the nature of the sanction and the identity of the party initiating the proceeding. Additionally, the comparative-law review supports imposing sanctions of this type as a response to participating in a boycott and other activities associated with it. This matter is somewhat complex, and operates in two directions in all that relates to calling for a boycott. I will address this below. In any case, nothing in the conclusion not to void this section would prevent judicial review of the manner of its application. On the contrary, in the absence of directives at this stage, judicial review may be necessary. I believe that sec. 3 of the Law should be understood such that the directives that the Minister is meant to establish must reflect – in manner and in some level of detail – a rational relationship, as explained. It should be noted that in this matter, as opposed to sec. 2, I believe that we may take the path of constitutional interpretation – for example, the need for a rational relationship – rather than voiding the section. This difference derives from the fact that in regard to sec.3, we are at most concerned with a lacuna, whereas the language of sec. 2 is clear and does not leave room for alternative interpretation, in my view.

Subject to the aforesaid, I would recommend that my colleagues deny the petitions to the extent that they concern sec. 3.

Section 4 – Denial of Benefits

18. This section concerns "Regulations preventing Benefits":

> (a) The Minister of Finance, in consultation with the Minister of Justice, may decide that someone who knowingly published a public call for a boycott against the State of Israel or committed to participate in a boycott:

(1) Will not be deemed a public institution under clause 46 of the Income Tax Ordinance;

(2) Will not be eligible to receive monies from the Sports Betting Council under section 9 of the Regulation of Sports Betting Law, 5727-1967; exercise of the authority under this section requires the consent of the Minister of Culture and Sports;

(3) Will not be deemed a public institution under section 3A of the Foundations of the Budget Law. 5745-1985, regarding the receipt of support under any budget line item; exercise of the authority under this section requires the consent of the Minister appointed by the Government as responsible for said budgetary line, as stated in section 2 of the definition of "person responsible for a budget line item";

(4) Will not be eligible for guarantees under the State Guarantees Law, 5718-1958;

(5) Will not be eligible for benefits under the Encouragement of Capital Investment Law, 5719-1959, or under to the Encouragement of Research and Development in Industry Law, 5744-1984; exercise of the authority under this section requires the consent of the Minister of Industry, Commerce and Employment.

(b) In exercising the authority according to subsection (a), the Minister of Finance will act in accordance with regulations that he will promulgate in this regard, with the consent of the Minister of Justice, and with the approval of the Knesset Constitution, Law and Justice Committee; however, if no such regulations have been promulgated, it will not detract from the authority under subsection (a).

The heart of the matter is the denial of five benefits: tax credits for contributions; funding from the Sports Betting Council; support from the state budget; state guarantees; and benefits under the Encouragement of Capital Investment Law.

For the reasons set out in regard to sec. 3. I am of the opinion that this section, as well, clears the first hurdles of constitutional review – "by a law" and for a proper purpose that befits the values of the state. It also passes the rational connection and the least harmful means tests. Our focus, then, is on the third subtest, and again the spotlight is upon the infringement of freedom of political speech. Section 4 is similar to sec. 3 in important ways. Both are distinguished from sec. 2 in the character of the sanction and the identity of the initiator of the process. I will make three comments in regard to sec. 4 that are intended to show that the problems related to sec. 4 are greater than, or at least different from the problems that characterize sec. 3.

The first comment concerns the nature of the sanction. In my view, from a constitutional standpoint, it is easier to limit participation in a tender than to deny benefits established by law. A tender inherently includes a variety conditions. As a result, every tender creates group that is defined by the conditions of the tender as precluded from participation. As opposed to that, benefits are directed at known groups whose activity is constantly influenced by the benefits provided by law. Of course, the state is not required to grant benefits. But once it has decided to do so, that decision comprises an obligation to allocate those benefits in an equal manner. I shall put that that differently. What is common to sections 3 and 4 – denying benefits and limiting participation in tenders – is the allocation of resources, but in two different ways. A participant in a tender is interested in profiting from a framework established by the state. As opposed to this, the various benefits of sec. 4 derive from the public character of the organizations, or from the public interest in their activities. In general, the conduct of such organizations is more closely connected to the public benefits to which they are entitled in accordance with the existing legal criteria. Such harm to the expectations of such groups it more severe than the commercial and general harm of sec. 3 to entities interested in winning a public tender.

But why do I believe that the Law clears the hurdle of proportionality despite this observation? According to my approach, the weight of the considerations stated in regard to sec.3 tilt the scales: the difference between a civil action for damages by an individual as opposed to a denial of benefits by governmental authorities. That serves to limit the harm to freedom of political expression and balance the scales of proportionality. Moreover, although the sanctions under sec. 4 are more severe than those under sec. 3, they have an "advantage" over

them in another area. The benefits under discussion are intended to promote objectives that the state views positively by granting benefits or funding to organizations that work to realize them. If the organization also – or only – works to undermine those desired objectives – for example, economic prosperity -- then denying the benefit can contribute to their achievement. Such a rational connection does not necessarily exist between permitting participation in a tender and the realization of various objectives. In that regard, the administrative sanction is "external" to the tender and does not derive from its character. The overall result is that even if sec. 4 is more borderline than sec. 3 from the constitutional point of view of freedom of political speech, it meets the test of proportionality.

19. A second comment. With a view to restraining the Minister of Finance, the Law requires that he *establish regulations*. This is a proper approach. The regulations provide context for the exercise of the Minister's discretion. Nevertheless, the end of sec. 4(b) raise a problem – even if regulations are not established, it will not detract from the Minister's authority to implement the Law. Section 4(b) requires that the Minister of Finance promulgate regulations, with the consent of the Minister of Justice and the approval of the Knesset Constitution Committee. In other words, the procedural mechanism we also find under sec. 3, except that here it concerns regulations rather than directives. The requirement of establishing regulations may clarify what needs to be clarified. But the end of sec. 4(b) – stating, as noted, that notwithstanding the requirement for regulations, the Minister can deny benefits even without establishing those regulations – remains.

In my opinion, the possibility that the Minister might act in the absence of regulations, and without the consent of the Minister of Justice and the Constitution Committee is problematic where the sensitive issue of freedom of political expression is concerned. Moreover, it would hardly be an exaggeration to say that legislative experience shows that time – even a long time -- may elapse before regulations are promulgated. As long as the Law permits the Minister to exercise his authority under sec. 4 in the absence of regulations, the problem remains. On the other hand, this Court has not adopted an approach of making the implementation of a law contingent on the promulgation of regulations, except where the language of the law and its purpose show that it cannot be implemented in their absence (see: Itzhak Zamir, *Administrative Authority*, vol. 1, 209-210 (2nd ed., 2010) (Hebrew); HCJ 28/94 *Bezalel Zarfati v. Minister of*

Health, IsrSC 49 (3) 804, 815, 825 (1995)). In the present case, the Law expressly states that there is no requirement of establishing regulations. It would be far-reaching to prevent the possibility of implementing the Law for this alone, when the Law otherwise clears the constitutional hurdle.

We know arrive at the third comment – the procedure for denying the benefit by the Minister of Finance. Section 3 authorizes the Minister to issue directives, and conditions denying participation in a tender on their issuance. The directives must receive the consent of the Minister of Justice and the approval of the Constitution Committee. As opposed to this, sec. 4 grants the Minister of Finance himself the authority to deny a benefit, and not merely to establish directives. Moreover, in exercising that authority, he is required *to consult* with the Minister of Justice. To "consult", without need for approval or consent. Even if this consultation is substantive and not formal, the discretion is that of the Minister of Finance alone. The mechanism falls upon his shoulders. This comment is particularly important in a situation in which the Minister might exercise his authority in the absence of regulations established with the consent of the Minister of Justice and the approval of the Constitution Committee. But this comment is also of importance even if the Minister were to act after the establishing of regulations. The reason for this is that the person responsible for making a legal decision is not one who fulfils an operative legal function. In any case, it is clear that this third comment is of greater weight if regulations are not promulgated.

But if my conclusion is that the Law is proportionate, what are the consequences of the second and third comments? My answer to this is that it is important to point out the necessity for establishing regulations, to the extent possible. It is not clear why the Minister of Finance is given the broadest authority particularly in regard to the more "harmful" sec. 4. It may be that the legislature thought that the harm inflicted by sec. 3 is greater for the reason stated above or for other reasons. In any case, establishing regulations is needed even if not required. Moreover, the legislature did not establish how the Minister of Finance might exercise his authority in the absence of regulations. There is no linguistic basis for interpreting the Law as saying that the procedure established under sec. 3 – promulgating directives with the consent of the Minister of Justice and the approval of the Constitution Committee – is required. However, we can learn the nature of the requirement from those procedures – at the very least, the establishment of

directives or procedures. The criteria that will be established will have to meet the rationality and reasonableness tests (see and compare HCJ 4540/00 *Labar Abu Afash v. Minister of Health* (published in Nevo) paras. 5-6 (May 14, 2006)). One might say that precisely because sec. 4 does not require the consent or approval of the Minister of Justice or the Constitution Committee, the rules to be established are of greater importance. In my opinion, serious consideration should, perhaps, be given to not implementing the Law until regulations have been promulgated. Although the Law allows for its implementation even without regulations, and while the legislature's word should, of course, be respected, the matter is given to the discretion of the executive branch. What this means is that if regulations are not promulgated, the Court will have to exercise stricter scrutiny, not as an incentive for promulgating regulations at an earlier date, but rather in response to the situation that will be created prior to their promulgation. While the Minister of Finance indeed enjoys broad discretion, which is properly exercised in the context of taxation and benefits, we are here concerned with a restriction upon freedom of expression. One cannot exaggerate the care that must be exercised in this regard.

An additional point is that of appropriate adjudicative procedures. The matter should properly be arranged expressly in the regulations, and without wishing to prejudice the issue, one might consider that the matter initially be addressed by a trial court, such as the District Court or the Administrative Affairs Court.

19. To summarize, I am of the opinion that the petitions should be denied in regard to sections 3 and 4. However, section 3 is borderline, and section 4 even more so. I have explained my reasons for that. In my view, in order to meet the proportionality *stricto sensu* test, the mechanisms for establishing the criteria for the implementation of the sections must be put into operation in accordance with the interpretive guidelines that have been delineated.

In order to present the complete picture, recourse should be made to comparative law, both in regard to sections 3 and 4, as well as in regard to the entire Law.

More on Comparative Law

20. We are concerned with a transnational legal issue. The issue is the right to freedom of political expression versus protecting the state against the imposition of a boycott upon it, or

upon part of it, or upon its institutions. As we shall see, the "Made in Israel" version of the Boycott Law has unique characteristics that more directly and clearly affect freedom of political speech. Nevertheless, an examination of comparative law will be helpful in deciding this case. Over and above the fact that recourse to comparative law is accorded a place of honor in our legal system, such recourse appears especially justified in the case at bar. The reason for this is that the State of Israel is the object of a boycott in certain states, whereas other states have enacted laws in order to combat the phenomenon. My colleagues, and the various parties to the petition, dived deeply into the waters of American law. This was also given significant emphasis in the Explanatory Notes of the original bill (the Prohibition of Boycott Bill, 5770-2010, was presented to the Speaker of the Knesset on July 5, 2010. The Explanatory Notes can be found on the Knesset website: knesset.gov.il/privatelaw/data/18/2505.rtf). The Explanatory Notes begin by saying that "in the United States there is a similar law protecting its friends against third-party boycotts, with the basic assumption that a citizen or resident of the country should not call for a boycott against his own state or its allies … if the United States protects its friends by law, then *a fortiori*, Israel has a duty and right to protect itself and its citizens by law" (this part does not appear in the official Explanatory Notes). In view of the aforesaid, and considering the impressive American tradition of defending freedom of speech, and freedom of political speech in particular, it would, therefore, be useful to examine the American laws on point.

As noted, the two primary American laws treating of boycotts are the Export Administration Act of 1979 (EAA), and the Ribicoff Amendment to the Tax Reform Act of 1976 (TRA). We will briefly review what is stated in those laws. Both laws relate to participation in a boycott (other than a boycott imposed by the United States), or the performance of acts connected to the imposing of such a boycott, the nature of which will be explained below (see para 8, above). By virtue of the EAA, criminal sanctions of imprisonment or fine can be imposed, as can various administrative sanctions, such as an administrative fine. By virtue of the amendment to the TRA, certain tax benefits can be denied. Additional laws have been enacted by various states. We have seen an example of that in the state of New York. As noted, sec. 9 of the New York STF establishes that contracts between the state and bodies that have participated or are participating or shall participate in a prohibited boycott are void. Several laws address this issue in the state of California. For example, sec. 16649 of the California Government Code

includes a reference to the Arab League boycott of the State of Israel. *Inter alia*, various sanctions are imposed upon the use of state funds in the framework of contracts with companies participating in that boycott. The state of Florida prohibits, *inter alia*, the transfer of information requested for the purpose imposing a boycott. The possible sanctions include a fine or imprisonment (Florida, Statues, Title XXXIII §542).

Comparing the Boycott Law and the various American laws is instructive. It will aid in clarifying what they share in common and in what they differ. This will sharpen the delicate balances that the Law strikes between the protected interest and the scope of its protection, and the extent of the harm to freedom of expression.

21. The most salient difference is the absence of a civil tort of calling for a boycott in the American legislation. Those laws do not permit a party harmed by a boycott to initiate a civil suit. It should be emphasized that the legislation also relates to situations in which one company refuses to contract with another company within the United States (see, e.g., sec. 8(a)(1)(A) of the EAA: "Refusing… to do business with… any other person, pursuant to… a request from… the boycotting country"). The law does not recognize situations in which another person incurs damage as exceptions. As opposed to this difference, there is a striking *similarity* in the authority's ability to impose sanctions that are comparable to those appearing in sections 3 and 4. The state's right to act to protect its interests is recognized, even at the expense of restricting various forms of self-expression. Nevertheless, it is both proper and important that we emphasize the differences in this regard, as well.

The emphasis of the Israeli Boycott Law is upon the call for a boycott. Sections 3 and 4 retain the prohibited call alongside the alternative of an undertaking to participate in a boycott. It is not clear whether this refers to a legally binding commitment, such as a contractual obligation. Moreover, it is unclear whether the phrase "who committed to participate in such a boycott" refers to present participation in a boycott, or even to a commitment to participate in a boycott the future. In either case, it would seem that the alternative of committing to participate in a boycott is shared in common by the Boycott Law and its overseas cousins. Thus, sec. 999(a)(3)(A) of U.S. Code 26 gives the following definition: "For purposes of this section, a person participates in or cooperates with an international boycott if he agrees as a condition of doing business… with… a company… to refrain from doing business with… companies of that

country [which is the object of the boycott]". In other words, a person who agrees to refrain from doing business with companies from a certain country as a condition to doing business with another company is considered as participating in a boycott. Thus also the alternative "…has participated or is participating or shall participate in an international boycott" in sec. 9 of the New York STF. It should come as no surprise that a commitment to participate in a boycott is commonly found in boycott legislation. We are more concerned with a (legal) act than a mere expression. It would seem no coincidence that the legislature established a requirement of a "commitment" as opposed to a general declaration or non-binding expression of desire.

The alternative of calling for a boycott presents a different picture. There is not prohibition upon calling for a boycott. While some laws do refer to actions related to boycotts other than active participation, they do not reach the level of a "call". For example, the alternatives in the EAA define the prohibited conduct as "refusing" or "requiring another person to refuse" (sec. 8). As we see, the section concerns a demand from a third party to participate in a boycott in the course of a transaction. Section 16649 of the Cal. Gov. Code addresses a party that expresses "Compliance with the Arab League's economic boycott of Israel". Similar language can be found in other laws. One can also find restrictions concerning freedom of speech, or at least indirect, non-participatory support of a boycott in American law. Thus, for example, sections 8(a)(1)(D-E) of the EAA impose a prohibition upon providing information about persons or bodies where the information is intended to lead to boycotting. A similar alternative can be found in Florida: "It is an unlawful trust and an unlawful restraint of trade for any person… to… furnish information with regard to… a person's… national origin… in order to comply with, further, or support a foreign boycott" (Florida, Statues, Title XXXIII §542.34). Nevertheless, there is a difference between providing information for the purpose of a boycott and calling for a boycott. Providing information is part of the boycott activity itself – in the sense of "aiding" or "participation in a common purpose". As opposed to this, a call remains in the sphere of "procuring" – addressing another with the purpose of persuasion. Therefore, restrictions upon the latter directly infringe freedom of political expression. Nevertheless, one might say that the prohibition upon providing information – without participating in the boycott – reduces the distance between the two. Ultimately, the two laws are comparable for other reasons as well. For example, the Israeli law does not impose a criminal sanction, as opposed to the above-mentioned laws.

And now to return to sections 3 and 4 of the Boycott Law. As I noted above, a comparative examination of these provisions is complex. As opposed to sec. 2, secs. 3 and 4 also extend to one who commits to participate in a boycott. This approach, including its sanctions, is consistent with the comparative law. The problem lies in the first alternative – calling for a boycott. I noted above my belief that whereas sec. 2 does not succeed in overcoming the constitutional hurdle, secs. 3 and 4 do. There are four reasons for this. The first consists of the reasons stated above in regard to the identity of the party initiating the process and the nature of the harm (see paras. 15 and 18 above). The second, although not a primary reason, is that while these sections do not establish a prohibition upon participating in a boycott, they do establish a prohibition upon committing to do so. This paves the way for a certain leniency as opposed to sec. 2. We should not ignore the fact that there are sanctions for participating in a boycott and for other actions, which is not the case in our system, and rightly so. Overall, the American law strikes various balances that decrease the distance between the United States and Israel.

A third reason is that there are states, like France, that adopt a closer approach to calls for boycott (see, e.g., the survey presented to the Constitution Committee, para. 8 above, at pp. 12-13). Although we are speaking of legislation that prohibits discrimination on the basis of origin or nationality, and I am not sure that the two are necessarily congruent, it does carry some weight. Fourth, some weight must be given to the fact that the State of Israel is the object of a boycott in various countries. This influences the proportionality *stricto sensu* of secs. 3 and 4, which infringe freedom of political expression to a lesser degree than sec. 2. The test is one of benefit versus harm, and one cannot ignore the harm to the State of Israel as a result of these boycotts. This is also true when the boycott is directed at a particular, law-abiding public, which the state is duty-bound to protect. The above can serve to justify secs. 3 and 4 in the face of constitutional review, even if they are borderline, as is particularly the case in regard to sec. 4. We should recall the statement made by Prof. Mordechai Kremnitzer before the Constitution Committee: "if this bill were built along the lines of existing models in the world, I would not have a word to say on the constitutional level" (p. 28 of the protocol of the session of Feb. 15, 2011). That position falls upon open ears. Even if one may take the view that the balance achieved abroad differs from that appropriate to the Israeli system, there is a constitutional margin in this regard, and secs. 3 and 4 of the Israeli Law fall within its bounds, subject to the reservations expressed above.

At the end of the day, section 3 is borderline. Section 4 pushes the limits. But both remain – even if just barely – on the constitutional side of the border. I have, therefore, added the requirement of a rational relationship in regard to the implementation of those provisions, and I emphasized the need for close review of the implementation of the Minister of Finance's authority under sec. 4. For example, it would appear that the criteria to be established must take account, *inter alia*, of the nature of the call, its content, character and force.

As opposed to that, all of the above reinforce my conclusion in all that regards sec.2 of the Law. Overall, that provision is deviant even in terms of comparative law, which should come as no surprise inasmuch as its danger greatly exceeds the relief that it provides.

22. I shall now move from legislation to case law. My colleagues and I addressed the *Claiborne* case at length. My present purpose is not to reiterate, but rather to address the reservations expressed and the distinctions suggested. My colleague Justice Melcer expressed the opinion that two precedents erode that rule – the *Holder* case and *Longshoremen's* case. I do not agree with him in all that concerns the interpretation and development of American law. In my opinion, that also arises from the cases themselves.

In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the plaintiffs sought to aid groups that were designated as terrorist organizations. Their claim was that the aid was intended solely for lawful purposes and to promote peace. The aid involved the study of various legal practices. The petition challenged a law that prohibited providing support to foreign terrorist organizations. The majority opinion of the Court held that the case concerned providing support for a terrorist organization, which was provided in the form of "speech". Therefore, that speech was not protected under the First Amendment of the Constitution. The opinion of the Court does not refer to the *Cliaborne* rule, and that rule has neither been overturned nor eroded. Israel, too, has a criminal offense of providing support to a terrorist organization. Support by means of "political expression" is not protected. However, no analogy can drawn between this and calling for a boycott by peaceful means. The case of *International Longshoremen's Association, AFL-CIO, v. Allied International, Inc*., 456 U.S. 212 (1982) concerned stevedores who refused to handle cargoes from ships arriving from or destined for the Soviet Union, against the background of its invasion of Afghanistan. The Court held that the case concerned an illegal boycott prohibited by the National Labor Relations Act. This did not concern freedom of political

expression, but rather conduct that did not amount to a political boycott, and it was certainly not a call for a boycott. Moreover, the context was conduct contrary to labor laws that directly addressed the subject. In other words, the relevant considerations concerned the special status of the labor union. Its power in relation to the employer is so great that it was held that the powers afforded it should not be extended to third parties in commercial relationships with the employer that are unrelated to the labor union. That is to say that no analogy can be drawn from this case to boycotting that is part of normal public discourse, and the related issue of freedom of political expression.

The cited decisions do not, therefore, detract from the *Claiborne* rule. As opposed to this, Orloff does express a different opinion in his article cited by my colleague Justice Melcer (see Gordon M. Orloff, *The Political Boycott: An Unprivileged Form of Expression*, 1983 Duke L. J. 1076 (1983)). However, that view can be seen as an isolated opinion that was written about a year after the *Claiborne* decision. The author expressly states that he disagrees with it on the merits. But those reservations have not been adopted in practice. In the thirty years that have passed since the publication of that article, the courts of the United States have charted their course for the protection of freedom of speech. My colleague suggests that we see those two cases as proposing a different direction for the future. In my opinion, a different conclusion is indicated. In any case, the current case case law clearly disagrees with that view, as I shall explain below.

Truth be told, the *Claiborne* case did not introduce a revolutionary innovation. For the purpose of illustration, let us consider the case of *Missouri v. Nat'l Org. for Women, Inc*., 620 F.2d 1301 (8th Cir. 1980). In that case, which preceded *Claiborne*, women's groups boycotted states that had not ratified the Equal Rights Amendment. As a result, businesses in the state of Missouri were harmed. Their tort suit was denied on First Amendment grounds. The situation following *Claiborne* remains unchanged. The background of the dispute in *Searle v. Johnson*, 709 P.2d 328 (Utah 1985) was a call by the defendants for a tourism boycott of Uinitah County. Their purpose was to raise public awareness of the poor conditions and suffering of animals in the county dog pound. The court exempted the defendants from tortious liability in reliance upon *Claiborne*. While other cases did not expressly refer to the *Claiborne* rule, freedom of political speech was shielded against tortious liability (see, e.g., *Hotel Saint George Assocs. v.*

Morgenstern, 819 F. Supp. 310 (S.D.N.Y. 1993); *A Fisherman's Best v. Rec. Fishing Alliance*, 310 F.3d 183 (2002)).

23. Another decision that received significant attention was that of the European Court of Human Rights in Strasbourg in the matter of the mayor of Seclin (*Willem v. France* (application no. 10883/05), 10.12.2009). As may be recalled, the court denied the mayor's appeal of his conviction for discrimination on national, racial and religious grounds. I will briefly refer to two point in this matter. The first is that the case concerned a sanction imposed by the state. We are not aware of the granting of damages in favor of any of the companies whose products gathered dust on supermarket shelves in Seclin. This result is, therefore, not at odds with the striking down of sec. 2, which establishes a civil tort.

The second is the uniqueness of the judgment. We learn from the court's reasoning that the conviction was grounded upon the combination of the defendant's identity and the circumstances of the call for a boycott. Paragraph 32 of the decision emphasizes that "the fact that the applicant is the mayor is central to this case" (translation here and below are mine – N.H.). Paragraph 37 explains that "as mayor, the applicant has duties and responsibility. In particular, he is required to maintain neutrality…in municipal matters, in which he represents the public". In addition, para. 36 refers to the special circumstances of the call: "Consideration must be given not only to the oral declaration of a boycott in the city council, but also to the announcement published on the municipal website. This announcement intensified the discriminatory character of the call for a boycott, and the use of controversial expressions in that regard". Thus, it was the combination of circumstances that led to the finding that the conviction did not disproportionally infringe freedom of political expression. The call for a boycott defined in the Israeli Law does not apply solely to such circumstances, but encompasses every person or body without consideration of personal status or public function. Without wishing to express a definitive opinion on the matter, it would seem that the question of how to deal with a call for a boycott of the state by an individual is different from the question of how to deal with a mayor who allocates public funds in contravention of the requirements of administrative law.

24. Conclusion. The situation with which we are concerned is not simple. The State of Israel was unwillingly drawn into it even in the international arena. The conclusion I have reached – the striking down of sec. 2 and the approval of secs. 3 and 4, subject to certain reservations –

gives what I believe to be a balanced, proportionate expression to all the conflicting values and interests. At the same time, it recognizes the legitimate interest of the *state* to defend itself and its communities. It does not leave the state vulnerable to the actions of those who seek to harm it or any particular pubic that it is duty bound to protect. It merely draws the boundaries within which the legislature may act without leading to a disproportionate result. We can summarize this as follows: The state is allowed to contend with the boycott phenomenon by means of appropriate administrative sanctions, whereas an individual cannot do so by means of a new tort against the freedom of political expression. And note that this is an integrated change. It is not merely "the state versus the individual", but rather an administrative sanction depriving a benefit as opposed to exposure to a new kind of tort suit. This, in particular, when a call for a boycott is an element of that tort, while there is no prohibition upon participating in it.

It can be said that this result creates a defensive democracy that defends itself against those who rise up against it, but that preserves the democratic character of society and the ideal of freedom of expression. This is an important element that distinguishes between a democratic state and one that is not. The meeting of real and ideal can make for a rocky path. That path, with all its prohibited entries and its permitted ones, is also subject to judicial review. I would, therefore, recommend to my colleagues that we strike down sec. 2 in its entirety. As opposed to that, I believe that, in the context of this petition, we should not order the revocation of the other sections of the Law.

Deputy President E. Rubinstein:

Preface

1. The Yom Kippur prayers begin with a declaration called *Kol Nidre*, for which the entire evening is referred to as the Kol Nidre service, and which concerns the revoking of vows, among them ostracism [*ḥerem*]:

"All vows, obligations, oaths, and ostracisms, restrictions or interdictions, or by any other name, which we may vow, or swear, or pledge, or whereby we may be bound … we do repent. May they be deemed absolved, forgiven, annulled, and void, and made of no effect; they shall not bind us nor have power over us. The vows shall not be reckoned vows…" What the Knesset

sought to achieve in the Law that is the subject of this proceeding is, in short, a battle against ostracism, a malignant disease of which Israel is a victim. The focus of this petition is boycotts [*ḥerem*][4], not the freedom to use the term.

2. I concur in the learned, comprehensive opinion of my colleague Justice H. Melcer, and would like but to add a few observations. I must begin on the level of principle. We are concerned with a central subject in the political history of the State of Israel and the region. This Court's expertise in this regard is limited. We must, therefore, be particularly careful in considering whether constitutional intervention is appropriate. This Court decided not to intervene in the matter of the disengagement (HCJ 1661/05 *Hof Azza Regional Council v. Knesset*, IsrSC 59 (2) 481) in regard to the decision on the disengagement itself, as opposed to the extent of compensation for those displaced, first and foremost because it concerned a political matter, even though it involved infringement of basic – and not merely economic – rights of the Israeli residents of Gaza and northern Samaria who were forcibly evicted from their homes. The judgment stated (pp. 575-596) that the issue concerned a disagreement "that was of broad scope, pertaining to entire range of dangers and prospects related to the solution of the Israeli-Palestinian dispute. It is not at all possible to expect that this Court – and we may go as far as to say: any other court in the world – will decide these questions. The probability of the realization of the objectives of the disengagement plan rests at the heart of political, national and security activity. The Court cannot take any stand except in extreme, exceptional cases". The matter before us concerns a delicate, sensitive situation in which the State of Israel finds itself hounded by boycotts by organizations like BDS (see the examination of the NGO Monitor website) that are not offended merely by settlement in Judea and Samaria, but by the very existence of the State of Israel, as my colleague Justice Melcer noted, and – in my opinion – the Court must not adopt an approach that may, God forbid, be viewed by a large part of the public as if "they join also unto our …" (Exodus 1:10). My colleague Justice Danziger addressed the issue of the Court's duty, following the unforgettable words of Deputy President Landau in the *Dwiekat* case (HCJ 390/79 *Dwiekat v. Government of Israel*, IsrSC 34 (1) 1 (1979)). Indeed, at times, human rights must be defended even when that defense is unpopular. However, it seems to me that the Law under review represents a kind of cry and fear for the human rights of the citizens and residents of the State of Israel, and not only those residing in Judea and Samaria, and

[4] The Hebrew term for both "ostracism" and "boycott" is *ḥerem*.

this carries great weight in light of what is occurring in many countries in their regard, as if to say, if someone comes to boycott and even destroy you, arise to combat him first.[5] That is the Law, that is its purpose, even if there may be other or additional means for defense, and it must be examined with a broad view and eyes open to reality. I respect the fear for freedom of expression. The right to freedom of expression is very broad in the State of Israel, but as we shall see below, the picture is complex, and the situation is not one sided.

A brief history

3. My colleague Justice Melcer also addressed history (para. 23). We cannot ignore the sad facts, which have been forgotten by some with the passing years, that the Arab Boycott against the State of Israel began even before its establishment (in a 1946 decision by the Arab League imposing a boycott against the Jewish community in Palestine), was especially broadened in 1951, and has formed a particularly severe element of the pressure placed by the Arab states upon Israel over the course of many years. The boycott was run from a central office in Damascus, and operated against thousands of international firms and others that, as a result, refused to conduct business in Israel. Eventually, various states enacted laws against the boycott, particularly the United States, and the State of Israel itself fought with all its might against the boycott in various ways.

It should be added that immediately following the Six Day War, on July 27, 1967, the military commander promulgated the Order concerning the Revocation of the Boycott Laws against Israel (Judea and Samaria) (No, 71) 5727-1967, which establishes (sec.2) that "all boycott laws against Israel are void" (sec. 1 enumerated those laws) (and see E. Zamir & E. Benvenisti, *The Legal Status of Lands Acquired by Israelis before 1948 in the West Bank, Gaza Strip and East Jerusalem*, (1993) 140 (Hebrew)). The peace agreements between Israel and Egypt – the Camp David Accords of Sept. 19, 1978 and the Peace Treaty of March 26, 1979 – included an obligation to normal relations between the two states, including "termination of economic boycotts and discriminatory barriers to the free movement of people and goods" (Camp David Accords, and art. 3(3) of the Peace Treaty). That is also the case in regard to the

[5] Based upon the rabbinic statement, "If someone comes to kill you, arise to kill him first" (see, e.g, Numbers Rabba (Vilna) Beha'alotekha 15:16, Pinhas 21:4; TB Berakhot 58a, 62b; TB Yoma 85b; TB Sanhedrin 72a).

Peace Treaty between Israel and Jordan, in which art. 7(2)(a) includes the obligation "to remove all discriminatory barriers to normal economic relations, to terminate economic boycotts directed at each other, and to co-operate in terminating boycotts against either Party by third parties". As a result of these, the boycott was significantly eased, but did not disappear (see E. Kaufman, "Analysis of the Possible Consequences of an Economic Boycott of Israel," (Knesset Research and Information Center), presented to the Knesset Finance Committee on Dec. 31, 2014 (Hebrew); Haya Regev & Dr. Avigail Oren, *The Arab Boycott* (1995) (Hebrew)).

On the Boycott and Freedom of Expression

4. At this point we should note, as does my colleague Justice Melcer, that even though our colleague Justice Danziger emphasizes the distinction between calling for boycotting Israel in general and calling for a boycott of products of the Jewish settlements, the attorneys for the Plaintiffs were not willing to state that they would retract their petition if the section concerning the territories were removed. In other words, even a boycott against the State of Israel, of the old sort that Israel – and other states, with the United States at the forefront – worked to combat, falls within the scope of freedom of expression. Woe unto such freedom of expression if its objectives be achieved. It might join – without drawing a comparison – Holocaust denial and antisemitic and racial slurs, which I do not believe should enjoy the protection of freedom of expression. We are not the United States, we are not obligated to an extreme interpretation of the First Amendment to the Constitution of the United States, and no one can truly claim that Israel does not enjoy exceptional freedom of expression. On Holocaust denial and its close relationship to the denial of the State of Israel, see Professor Elhanan Yakira's instructive book, *Post-Holocaust, Post-Zionism: Three Essays on Denial, Forgetting, and the Delegitimation of Israel*, (Am Oved, 2006) pp. 40-53 [English: Cambridge, 2007]; and my essay "On Antisemitism" (Information Center, Ministry of Education and Culture, 1990), also published in Moshe Yegar, Yosef Guvrin & Arye Oded, eds., *The Ministry of Foreign Affairs: The First Fifty Years* (2002) 930, which treated of the Israeli government's tracking of this subject.

5. Therefore, I do not find any great difficulty in deciding this case along the lines of the overall approach of Justice Melcer's opinion. In the broad context, if Israel's enemies who seek to do it harm do not distinguish in this regard between "little" Israel and the territories it controls,

and if the Petitioners, in their own right, were unwilling to do so, as arose in the hearing before us, why should we be making that distinction, with all due respect to the good intentions of my colleagues who support freedom of expression. One who has, like us, been scalded by boiling water, may also blow on cold water, and all the more so on boiling water.

6. As my colleague Justice Melcer noted, freedom of expression is a two-way street. Indeed, calling for a political boycott of Israel is presented in the petitions as realizing that freedom of expression that is granted to all, and the legislation they argue against is, therefore, repugnant. My colleagues Justices Danziger and Hendel are fearful for freedom of speech, including that of those who call for boycotts, which explains their (different) opinions. But it is the call for boycott itself that may clearly silence the discourse and harm freedom of expression, such that those boycotted will be deprived of true expression for their positions in fear for their livelihoods and property, which is not to be taken lightly. Thus, because as opposed to other courses of action, boycotting is a means for *imposing* the boycotter's view upon those who disagree, rather than *persuading* the other of its justice. This type of coercion may have severe consequences:

> "The coercive power of a political boycott should not be underestimated. Merchants depend on sales for their livelihood; an effective boycott of their stores deprives them of their source of income. Although attempts to persuade individuals to act are usually protected by the first amendment, attempts to *coerce* individuals to act are not so immunized" (Gordon M. Orloff, "The Political Boycott – an Unprivileged Form of Expression," *D.Law.Jour*. 1076, 1092 (1983)) (hereinafter: *Orloff*).

7. Even American law, which is undeniably one of the most liberal legal systems in all that pertains to freedom of expression under the First Amendment of the United States Constitution, which is foundational to the American public existence, does not grant blanket permission to political boycotting. Thus, for example, some American courts distinguish between a political boycott intended to protect legally or constitutionally protected values, such as racial discrimination, and other political boycotts. The protection afforded freedom of expression is greater in regard to the former as opposed to the latter (see, e.g., Note, "Political Boycott and the First Amendment," 91 *Harv. L. Rev*. 659, 661 (1977-1978); Isaiah Madison, "Mississippi's Secondary Boycott Statutes: Unconstitutional Deprivations of the Right to Engage in Peaceful

Picketing and Boycotting," 18 *Howard L.J.* 583, 593-594 (1973-1975)). In the *Claiborne* case, as well, although on its face, the United States Supreme Court appeared to broaden protection for political boycotts significantly, the case concerned a boycott in protest of racial discrimination, with the purpose of compelling the state and the commercial sector to grant equal rights to the African-American public. The Court emphasized that that fact justified the broad protection of the boycotters:

> Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself" (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914, *per* Justice Stevens (1982)).

8. In addition, American federal law in the field of labor relations prohibits a secondary boycott, establishing, *inter alia*, that a labor union is prohibited from adopting a course of action intended to *compel* a person to refrain from commercial ties with another (Labor Management Relations Act of 1947, s. 8(b)(4)(B)). In the *Allied* case, it was held that the said prohibition also includes the possibility of a political boycott by a labor union – in that case, a boycott within the company in which the union operated, in order to express its opposition to the foreign policy of the Soviet Union and its invasion of Afghanistan. As a result, the union was found liable for the harm that it caused to the company in which it operated, owing to the political boycott it imposed. Of particular interest is the following statement in regard to the relationship between the First Amendment to the Constitution of the United States, which enshrines freedom of speech, and a political boycott:

> It would seem even clearer that conduct [a political boycott – E.R] designed not to communicate but to coerce merits still less consideration under the First Amendment… There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others (*Int'l Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212, 226-227, *per* Justice Powell (1982)).

Although this was stated in the concrete circumstances of labor law, as I will explain below, the same logic applies in the matter before us. I would further note that Justice Melcer rightly pointed out that Israeli law comprises restrictions upon freedom of expression, as in regard to defamation.

From the general to the particular

9. My colleague Justice Melcer noted that in seeking to protect the State of Israel against those who seek to boycott it, the Boycott Law meets the tests of the Limitation Clause in that it is intended for a proper purpose, befits the values of the State of Israel as a Jewish and democratic state, and proportionately infringes freedom of expression. As I have already stated, I concur with that view, but in my opinion, although the Petitioners unreservedly insist upon their right to call for the imposition of a boycott against the State of Israel itself, we cannot ignore the fact that an additional purpose of the Law, which the Petitioners addressed at length, as did my colleague Justice Melcer, is the protection of businesses specifically operating in the areas of Judea and Samaria, such that a "boycott against the State of Israel" is defined under sec. 1 of the Law as one that includes a boycott against "an area under its control", and those objecting to the Law are particularly opposed to that clause. It was not the Law's central purpose at present – we do not know what the future may bring – to protect businesses in Tel Aviv, or the Negev or the Galilee, but rather to protect against boycotts of businesses in the Jewish settlements in Judea and Samaria, which are indeed suffering economically due to those calling to boycott them, at home and from abroad. In this regard, see the exchange in the Knesset Constitution, Law and Justice Committee from Feb. 15, 2011, between the committee chairman MK David Rotem and MK Dov Henin:

> Chariman David Rotem: My dear sir, Dov Henin, this law is intended to protect the settlement that you call "illegal", and I call "residence".
>
> Dov Henin: Then tell the truth.
>
> Chairman David Rotem: On Jewish residence in Judea, Samaria, and the Gaza Strip (p. 27 of the protocol).

10. Thus, in certain ways, the Law grants preference to the freedom of expression of one political group as opposed to another. For example, a person who – in theory – calls for a boycott of those who support returning areas of Judea and Samaria to the Palestinians in order to achieve peace would not be exposed to the tort sanction of the Law, whereas a person who calls for a boycott of a person who chose to reside in the Judea and Samaria area would be exposed to the tort sanction. Indeed, this creates an apparent infringement – creating a constitutional problem – of the freedom of expression afforded the former as opposed to the latter, although we should not exaggerate the extent of that infringement. In my view, as far as sec. 2(a) and sec. 2(b) are concerned, it is certainly a proportionate infringement, and as opposed to my colleagues Justices Danziger and Hendel, I believe that it meets the proportionality *stricto sensu* test. The Law restricts political expression in a very limited way, in that it its provisions reserve the tort sanction to one who calls for a boycott of another "s*olely* because of their connection with the State of Israel … or an area under its control" (emphasis added – E.H.). Thus, on its face, a person calling for the boycott of a factory operating in the Judea and Samaria Area for reasons other than its connection to the Area, would not necessarily be exposed to the tort sanction under the Law, as, for example – legally speaking, and the example being theoretical – in the case of a call to boycott a factory operating improperly towards the local population.

11. As opposed to this, the Law will help in providing tort protection for anyone who has chosen to act in a place that the state sees as permissible for Jewish settlement against *those who harm them solely because they are located there*. It would not be superfluous to note that settlement in the Judea and Samaria area over the years was not the policy of governments from one side of the political map, but rather all of Israel's governments supported it in one way or another. These and those provided support, in the form of various incentives, to settlement in the Judea and Samaria area, as well as in Gaza, from the Six Day War and to this very day. And we should not forget that in the view of many of those calling for a boycott, even the Jewish neighborhoods in East Jerusalem fall within the scope of the boycott. It therefore seems very reasonable to me that a person who acted lawfully and in accordance with government policy be entitled to the legislature's protection. Moreover, in addition to the examples presented by my colleague Justice Melcer, and those that I presented from American Law, above, we are not actually concerned with a boycott intended to defend a legal or constitutional right under Israeli law, but rather to attack the subjects of the boycott solely because of where they are located. And

I would again emphasize that the law does not impose any restrictions upon boycotting a person or party for its opinions or actions. In other words, we continue to "respect" the desire of a person who does not wish to visit Israel or Judea and Samaria, or purchase their products. All that the Law seeks to do is to restrict those who call for a boycott "solely" due to a connection to the state or an area under its control, that and nothing more. That does not, in my opinion, involve that "silencing" of which the learned M. Kremnitzer and A. Fuchs have spoken (see Amir Fuchs, Dana Blander & Mordechai Kremnitzer, *Anti-Democratic Legislation in the 18th Knesset* (2015) and the material presented in their opinion at pp. 66-71 (Hebrew)).

12. In the same vein, according to my approach the logic grounding the *Allied* case is applicable here, as well. The parties that the Law seeks to protect are not "punished" for their actions or views. They are punished *solely as a means* for influencing the policy of the State of Israel, primarily on the issue of the territories, *by means of calling for a boycott against them*, which is a hypocritically coercive means by its very nature. As was noted in the in the *Allied* case, when an individual seeks to impose his views upon another by the callous means of calling for a boycott against him, as opposed to persuasion, the protection of his right to freedom of expression will clearly be diminished *a priori*. To paraphrase what was stated in that case, there are many ways for the Petitioners to continue to express their political views – and an undeniably broad spectrum of possibilities is available to them in Israel – but without infringing the rights of those whose only sin is that they chose to reside and act in an area permitted them by the State of Israel. If any should nevertheless choose to call for a boycott of companies conducting business in the State of Israel or in an area under its control solely by reason of their connection with the state or the Area, they will be exposed to a tort action for damage caused. The limited restriction of their freedom of expression is meant to protect third parties harmed through no fault of their own, but rather due to a political boycott against a policy of the state:

> In prohibiting or providing recovery for damages caused by secondary political boycotts the government is not seeking to ban certain ideas. It is attempting only to outlaw a mode of expression which by its nature injures third parties regardless of the ideas it happens to communicate (*Orloff*, at p. 1084).

Indeed, why should a person who chose to live or act in the Area pay the price of the policies of successive Israeli governments by granting "free reign" to those who call for a boycott against them?

13. The Petitioners further argue that the Law leads to a legal anomaly by creating a tort of calling for a boycott, while actual boycotting is legally permitted. I cannot accept that argument. In my view, and as my colleague Justice Melcer noted, this is similar to the situation in the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: the Prohibition of Discrimination Law). That law clearly distinguishes – in practice – between an individual's conduct in the private domain and his conduct in the public domain. A person may decide, for personal reasons, that he does not wish to shop in a particular market because he is does not accept the seller's sexual preference, or because he is of a different race, or does not share his religious beliefs. One may strongly criticize or object to that, but it remains that person's privilege. However, the seller cannot act in that manner. He is required to sell without discriminating on the basis of sexual preference, racial origin, or religion, for example, on the basis of sec. 3(a) of the Prohibition of Discrimination Law (also see in this regard, F. Raday, "Privatising Human Rights and the Abuse of Power," 23 *Mishpatim* (2004) (Hebrew) [English: 13 *Canadian Journal of Law and Jurisprudence* 103 (2000)]). The reason for this is not – of course – that the legislature wishes to encourage the former conduct, but rather because the individual's freedom of conduct in the private domain is far broader than in the public domain, and a situation in which the enforcement and judicial authorities would enquire into a person's intentions in not patronizing a particular establishment is problematic in a democratic society, not to mention the practical difficulty, and as M. Cohen-Elia noted in this regard:

> The purpose of the accepted liberal distinction between the "public" and the "private" is to limit the areas in which the state may employ its coercive power in the public, political domain, and to allow citizens greater freedom in private spheres. The liberal demand that the state refrain from intervening in the private domain is essentially intended to realize the individual's right to privacy, which is generally justified primarily by reason of autonomy. A person who enjoys privacy is autonomous, inasmuch as the right to privacy affords him a sense of security

from governmental intrusion into those most intimate areas in which he forms the values and positions of his worldview (Moshe Cohen-Elia, "Liberty and Equality in the Prohibition of Discrimination in Products and Services Law," 3 *Alei Mishpat* 15, 28 (2003) (Hebrew); and see: Barak Medina, "Economic Justifications of Antidiscrimination Laws," 3 *Aley Mishpat* 37, 44-46 (2003) (Hebrew)).

In my view, that is the difference between one who personally boycotts and one who calls for a boycott in this context. We cannot – and the Knesset's attorney addressed this in the hearing before us – prevent a person from boycotting some entity or another, whatever his reasons, and whatever our opinions. The reasons for this are constitutional – the broad freedom granted an individual when he acts in the private domain, as well as evidentiary – the practical impossibility of knowing a person's intentions in choosing not to buy a product from someone. Thus, in transitioning from boycotting to calling for a boycott, an individual largely removes himself form the private sphere and into the public sphere. Therefore, in my view, it is not at all unreasonable that the legislature would find it proper to impose greater obligations upon him for that conduct, including a prohibition upon calling for the boycott of a person or other entity by reason of its place of residence or activity, which as I and my colleague Justice Melcer noted, is discriminatory in nature.

Sections 3 and 4 of the Law

14. We will now address sec. 3, which restricts the participation in a public tender of a person who calls for a boycott, subject to directives to be established by the Minister of Finance, with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee, and sec. 4, which restricts granting state benefits to a person calling for a boycott, subject to regulations to be promulgated by the Minister of Finance, with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee, and the decisions of the Minister of Finance accordingly. I will already state that I do not see any reason to declare them unconstitutional.

First, as a preliminary comment, I am doubtful as to whether the constitutionality of these provisions should be addressed at this stage. As is well known, this Court will not lightly strike down a law enacted by the Knesset that, by its very nature, reflects the public will (HCJ 7111/95 *Center for Local Government v. The Knesset*, IsrSC 50(3) 485, 496 (1996); HCJ 3434/96 *Dr. Menachem Hoffnung v. Knesset Speaker*, *Prof. Shevach Weiss*, IsrSC 50(3) 57, 67 (1996); HCJ 8425/13 *Eitan – Israeli Immigration Policy Center v. Government of Israel*, (published in Nevo), para. 23 of the opinion of Vogelman J. (2014) [English: http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184]). In the matter before us, as long as the Minister has not established directives, has not promulgated regulations, and has not issued decisions, and needless to say, it is not yet clear what the nature of the above will be, how they will restrict participation in public tenders, and which benefits will be denied, there is no place for the exceptional intervention of this Court in the form of striking down a statutory provision. In effect, this is an *a fortiori* application of the ripeness doctrine, under which the Court must refrain from striking down a law when the constitutionality of the law is contingent upon the manner of its implementation in concrete circumstances which have not yet come into being (HCJ 2311/11 *Sabah v. Knesset*, (published in Nevo) paras. 11-23 of the opinion of Grunis P. (2014) (hereinafter: the Admissions Committees case); HCJ 8276/05 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Defense*, (published in Nevo) para. 31 of the opinion of Barak P. [English: http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-defense]; and see: Elena Chachko, "On Ripeness and Constitutionality: HCJ 3429/11 *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance* and HCJ 3803/11 *Israeli Capital Markets Trustees Association v. State of Israel*," 43 *Mishpatim* 419 (2013) (hereinafter: Chachko)). In the matter before us, not only do we lack concrete circumstances in which the Law has been implemented, but at present it is not actually possible to implement these provisions (with the exception of sec. 4(b), which will be discussed below). Establishing directives and promulgating regulations is required for the legislation to proceed to the stage of implementation, and therefore the matter would seem unripe.

Indeed, as my colleague Justice Melcer noted, a chilling effect has been recognized as possible grounds for the annulling of a law, even in the absence of ripeness (the *Admissions Committees* case, para 16; Chachko, at p. 446; and see Notes, "The Chilling Effect in

Constitutional Law," 69 *Colum. L. Rev*. 808 (1969)). As I will explain below, this argument can be considered in regard to sec. 2(c) of the Law. However, I believe that the force of this argument is diminished in regard to secs. 3 and 4, as noted. The directives and regulations that might create a chilling effect have not yet been established, we do not know when they will be, if at all, and if and when they are established, what there scope might be. The idea that someone might choose to speak or not speak in a particular way on the basis of directives and regulations that do not exist is not, in my opinion, well founded. Therefore, I cannot agree with the opinion of Justice Danziger in this regard, according to which "the broad application of the administrative sanction creates a real danger of broad violation of political views" (para. 32 of his opinion). Such a sanction has not yet emerged – with the exception of the end of sec. 4(b), which will be addressed presently – and as noted, we cannot know what it may be and to what extent it may infringe anyone's freedom of expression. I will go one step further: I do not think that the expression "chilling effect" is the end all. In my opinion, there are forms of expression for which "chilling" is appropriate. No one would deny that a call for violence is an example. No one would deny that shouting "fire" in a crowded theater is another. Therefore, the test is contingent upon the circumstances, and in my opinion, a call for racism – for example – is also such a case. All of these are "fighting words".

Nevertheless, as my colleague Justice Hendel emphasized, the end of sec. 4(b) of the Law permits the Minister to deny the benefits enumerated in sec. 4(a) even in the absence of appropriate regulations. I would concur with my colleague's comment in that I agree that the regulations should be promulgated promptly so that matters may be appropriately clarified. However, the Law, as it presently stands, permits the Minister to act as stated, and therefore it is nevertheless necessary that we examine whether sec. 4 meets the tests for constitutionality. Over and above that need, we will also examine sec. 3 from a constitutional perspective.

15. On the merits, I am of the opinion that sec. 3 and sec. 4 meet the tests of the Limitation Clause. In HCJ 10104/04 *Peace Now – Shaal Educational Enterprises v. Ruth Yosef, Supervisor of Jewish Settlement in Judea and Samaria* IsrSC 61(2) 93 (2006) (hereinafter: the *Peace Now* case), which treated of the use of public funds to oppose the Disengagement Plan, which was cited by Justice Melcer and Justice Danziger, the conclusion was as follows (p. 201):

(1) By the majority opinion of President Barak and Justices Grunis and Rubinstein, and as opposed to the dissenting view of Deputy President (Emeritus) Cheshin and Justice Beinisch, that under the circumstances before the Court, a local authority may transfer funds to another entity or other entities in order to oppose the implementation of the Disengagement Plan;

(2) By the majority opinion of President Barak, Deputy President (Emeritus) Cheshin, and Justices Beinisch and Grunis, and as opposed to the dissenting view of Justice Rubinstein, that in every case in which a local authority transfers monies to the opposition of the implementation of the Disengagement Plan, the state may set off from the funding of that council a sum equal to the amount of money that the authority transferred to another entity or other entities for the purpose of that campaign. Justice Rubinstein, dissenting, was of the opinion that monies for the campaign could be taken only from the municipal taxes of the residents of the authority, and in such a case, there should be no set off.

Deputy President Cheshin stated, *inter alia* (p. 186):

> …that we not decide that the local authority use the support granted to it by the state in order to oppose a plan initiated by the state. A person will not be permitted to bite the hand that feeds him.

My colleague Justice Danziger is of the opinion that no analogy should be drawn between the *Peace Now* case and the matter before us, inasmuch as that case concerned statutory bodies, whereas the matter before us applies to all, including private bodies. I respectfully disagree. I am of the opinion that what was said in the *Peace Now* case applies *a fortiori* to the matter before us. Clearly, if the state is permitted to withhold funds from a public authority, which is an organic element of the state by its very nature, when it uses the monies to act against the state, then the state is also permitted to withhold benefits from private bodies when they do so, as "no entity that carries out activities has a vested right in the receipt of governmental support" HCJ 11020/05 *Panim For Jewish Renaissance v. Minister of Education, Culture and Sport* (published in Nevo) para. 10 of the opinion of Justice Arbel (2006); and see: HCJ 1438/98 *Masorti Movement v. Minister of Religious Affairs*, 53 (5) 337, 385 (1999); AAA 343/09 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality*, (published in Nevo), para. 34 (2010)

[http://versa.cardozo.yu.edu/opinions/jerusalem-open-house-gay-pride-v-jerusalem-municipality].

I will unequivocally state: in my opinion, the state would have to be the world's greatest fool to grant benefits at its expense to private entities, or to contract with private entities, that call to boycott individuals or companies by reason of their connection to the state, one of its institutions, or areas under its control. It is like a victim giving his assailant a stick to hit him harder. In the words of Justice Barak: "A constitution is not a prescription for suicide, and civil rights are not a stage for national extinction" EA 2/84 *Neiman v. Chairman of the Elections Committee*, IsrSc 39 (2) 225, 311 (1985) [http://versa.cardozo.yu.edu/opinions/neiman-v-chairman-elections-committee], and with all due respect for pluralism and freedom of expression, I do not think that this requires granting funding and various benefits to, or that the state contract by means of public tenders with, those who act against state policy, and in effect, against the state itself, as if to thank those who spit upon you for the blessed rain. Even insanity requires some sense (see in this regard, D. Barak-Erez and G. Sapir, "The Anger and Insult Law," *Ha'aretz* (July 18, 2011) (Hebrew); or to quote Justice Melcer, as if to "bite the hand that feeds them" (para. 46). And note that this is being stated in view of the said unique character of a call for a boycott – a *coercive measure* that may have far-reaching and even existential consequences – and in no way affects anyone's ability to express criticism, protest, or attempt to convince of is rightness by means of the many means that a democratic regime puts at his disposal, without fear that the state might deprive him of benefits or refrain from contracting with him by reason of such criticism or protest. Therefore, like my colleagues Justice Melcer and Justice Hendel, and as opposed to the view of my colleague Justice Danziger, I am of the opinion that to the extent that sec. 3 and sec. 4 infringe the Petitioners' freedom of expression, that infringement is proportionate and clearly meets the tests of constitutionality, as long as they are implemented in a proper, transparent manner. I find no need to elaborate on the additional tests, which my colleagues agree are met in this case, and I, of course, do not disagree.

Section 2(c)

16. After all the preceding, how does sec. 2(c) differ? It would seem that it goes one step too far. The primary purpose of tort law is the restoration of the victim, to the extent possible, to his situation prior to the commission of the tort. This is achieved by awarding damages for the harm

he incurred as a result of the tortious conduct (I. Englard, A Barak & M. Cheshin, *The Law of Torts – The General Theory of Torts*, 571-574 (G. Tedeschi ed.) (2nd ed., 1977) (Hebrew)); I. Gilead, *Tort Law: The Limits of Liability*, vol. I, 78-79 (2002) (Hebrew) (hereinafter: Gilead). Damages without proof of damage – sometimes called statutory damages, or also punitive damages – are an exception. Their purpose is to express society's condemnation of the tortfeasor's conduct in severe cases by means intended to deter the tortfeasor, or others like him, from such tortious conduct, even in the absence of damage, or at least, where damage, or its extent, has not been proven (CA 140/00 *Ettinger v. The Company for the Reconstruction and Development of the Jewish Quarter*, IsrSC 58 (4) 486 (2004) paras. 73-9 [http://versa.cardozo.yu.edu/opinions/ettinger-estate-v-jewish-quarter-company]; CA 9656/03 *Estate of Marciano v. Zinger*, (published in Nevo) (April 11, 2005) para 34; CA 89/04 *Dr. Nudelman v. Scharansky* (published in Nevo) (Aug. 4, 2008) para 45; Gilead, 44-44; T. Kremerman, "Ruling Damages with No Damage in the New Amendment to the Israeli Defamation Law," 43 *Mishpatim* 899, 907-908 (Hebrew)). Thus, for example, over the years the legislature provided for the possibility of awarding damages without proof of damage in regard to sexual harassment or persecution (sec. 6(b) of the Prevention of Sexual Harassment Law, 5758-1998); discrimination in the providing of a service or product on the basis of religion, race or sexual inclination, etc. (sec. 5(b) of the Prohibition of Discrimination Law); and publishing anything likely to humiliate or debase a person due to his conduct, actions, religion, etc. (sec. 7A(b) and sec. 7A(c) of the Defamation Law, 5725-1965). Thus, we are concerned with conduct that is deemed improper by a broad social consensus, and that should be deterred even at the price of deviating from the basic principle of tort law that a victim should be compensated only for the damage incurred (and see the Explanatory Notes to the Prevention of Sexual Harassment (Amendment 8) (Damages without Proof of Harm) Bill, 5758-1998; and in regard to punitive damages, also see the sources cited by my colleague Justice Melcer in paras. 41-42 of his opinion).

17. The matter would appear to be different in all that regards sec. 2(c). As noted, the main reason – but certainly not the only one – for the enactment of the Law is the protection of the residents of Judea and Samaria from the harm caused them by the actions of those who call to boycott them, which is a subject of public debate in Israel. This, as noted, is of significance in the context of damages without proof of damage and punitive damages (see, also, E. Rubinstein,

"Punitive Damages – A View from the Bench," in A. Barak, R. Sokol, O. Shaham (eds.), *Orr Volume* 97, 102-105 (2013)). Sections 2(a) and 2(b) are sufficient for achieving that purpose, and as stated, do not disproportionately infringe the Petitioners' freedom of expression by imposing an obligation to compensate those harmed by their actions. Section 2(c) upsets this delicate balance. It significantly restricts the Petitioners' freedom of expression by creating an intensified chilling effect, even for someone who, like myself, holds a more moderate view of the fear of chilling effects, while protecting the objects of the call for a boycott, even if they incur no damage. It would therefore appear that there is an alternative means that would serve the purpose that the Law's intended purpose while infringing the Petitioners' right to freedom of expression to a lesser extent. That is sufficient for determining that sec. 2(c) is unconstitutional.

Before Concluding

18. Out of a love of Jewish law, I would add that while it does recognize the concept of boycott [ostracism] as a prerogative of the public, it is imposed for the purpose of facilitating societal life rather than its division, in order to prevent misconduct by means of an act that is not legally required or prohibited (see: *HaEncyclopedia HaTalmudit*, vol. 17, *s.v. Ḥerem* (*Ḥaramei Tzibbur*) 343 (Hebrew)). As Gideon Libson writes in his article "The Ban and Those under It: Tannaitic and Amoraic Perspectives," *Annual of the Institute for Jewish Law*, vol. VI-VII (1979) 177–202 (Hebrew):

> In our sources, we find not only a rejection of the ostracism of sages or a denial of facts that deprives an act of the justification for employing ostracism, but even apology for the use of ostracism and an explanation of its need. Thus, Rabban Gamaliel apologizes for ostracizing Rabbi Eliezer ben Hyrcanus, according to the Babylonian Talmudic tradition regarding the ostracizing of Rabbi Eliezer ben Hyrcanus: "Sovereign of the Universe! You clearly know that I have not acted for my honor, nor for the honor of my paternal house, but for your honor, so that divisiveness may not multiply in Israel." We have before us various expressions of the sensitivity displayed by the Sages in regard to the ostracizing of their fellows: rejection of ostracism itself, denial of the facts that would ground its imposition, apology for its imposition. All of these express reticence and reservation in regard to the use of ostracism.

19. As stated above, I concur in the opinion of my colleague Justice Melcer, according to which the Boycott Law meets the tests for constitutionality, with the exception of sec. 2(c) that would appear to infringe freedom of expression disproportionately, and which must, therefore, be struck down. I respect the differing views of my colleagues Justices Danziger and Hendel (which differ in their results). But in my opinion, the balance struck by my colleague Justice Melcer is more appropriate to the circumstances of the State of Israel. In conclusion: these lines are written on the eve of Passover. The Passover haggadah speaks of the Divine promise of the survival of the Jewish People in spite of its enemies – "It is this promise that has sustained our ancestors and us, for not just one enemy has arisen to destroy us; rather in every generation there are those who seek our destruction, but the Holy One, praised be He, saves us from their hands." There is nothing wrong with Israel's Knesset giving legal expression to the fight against those who would seek our destruction.

20. After writing and distributing my opinion, I came across an article by Prof. Lawrence Summers, President Emeritus of Harvard University and Secretary of the Treasury under the Clinton administration, who also held other senior economic positions. The article is entitled "Academic Freedom and Antisemitism" (ISGAP Policy Paper Series No. 1, March 2015), and I would like to quote the abstract:

> In the broader context of rising antisemitism on college campuses, the response of universities to proponents of Israeli boycotts, divestiture, and sanctions must unite the preservation of academic freedom with a clear and forceful condemnation of the vilification of Israel. During his tenure as president of Harvard, the author delivered a set of widely noticed remarks in which he described the calls for divestiture and boycott as "antisemitic in their effect if not their intent." Refusing to frame his critique in more generic terms, the author instead drew attention to the way in which divestment advocates focused solely on Israeli universities and scholars. The more recent intensification of pressure for boycotts, divestment, and sanctions against Israel, as evident in the American Studies Association boycott, likewise calls for a morally clear rejection of the demonization of Israel. Rather than resorting to overly broad language that criticizes boycotts in general, universities should specifically reject the singling out of Israel for persecution, and

> should take steps to dissociate themselves from any organizations or movements that do so. A zealous minority that utilizes the resources and prestige of the academy to pursue antisemitic objectives poses a genuine threat to academic freedom. Protecting academic freedom demands that this threat be addressed directly.

At the end of the article, Prof. Summers concludes (p. 10):

> If zealous minorities, no matter how well intentioned, are able to hijack the prestige and resources of the academy in pursuit of objectives that are parochial and bigoted, why should the broader society refrain from seeking to set the academy's agenda. The right to say, advocate, or propose anything must always be protected. But it must come with the right or even obligation of others to call out words and deeds that threaten the community and the values of moral concern and rational inquiry for which it stands.

Simply stated: even freedom of expression has its limits. This, I believe, should be borne in mind, *a fortiori*, in the matter before us.

Justice I. Amit

1. The strength of a state is the product, *inter alia*, of its standing among the nations of the world, the legitimacy of its existence and its actions, and its economic strength. Over the last years, the State of Israel has faced the three D's: Demonization, Dehumanization, and Delegitimization, and the BDS (Boycott, Divestment, Sanctions) movement is the vanguard of these three (some recommend a different reading of the acronym BDS: Bigoted, Dishonest and Shameful, as suggested in Gabriel Noah & Asaf Romirowsky, "Anti-Semitic in Intent if not in Effect: Questions of Bigotry, Dishonesty and Shame," in Cary Nelson & Gabriel Noah Brahm (eds.), *The Case Against Academic Boycotts of Israel* 75, 80 (2015).

However, the Israeli legislature was of the opinion that it lacked capacity to combat those who called for a boycott against Israel abroad, and therefore, the Prevention of Harm to the State of Israel by means of Boycott Law, 5771-2011 (hereinafter: the Prevention of Boycott Law, or

the Law) is directed internally, at citizens and residents of the state who call for an academic-cultural-economic boycott against their own state.

Does the Law withstand the "test of fire" of the Limitation Clause of the Basic Laws?

2. My colleagues Justices H. Melcer, Y. Danziger and N. Hendel each set their own course, and I will begin by stating that I concur with the opinion of Justice Melcer according to which the Law passes – albeit with great difficulty – the proportionality test, with the exception of subsec. 2(c), which treats of punitive damages.

I, too, am of the belief that the Law infringes freedom of political expression, which stands at the heart of freedom of expression. However, in my opinion, a close examination of the matter leads to the conclusion that although our subject is freedom of political expression, when a public *call* for boycott is concerned, we are not faced with a high level of freedom of expression, and the infringement is less than it initially appears. In view of the Law's purpose to protect the rights of Israeli citizens to dignity and property – which are also rights of the first order – I believe that the Law meets the tests of the Limitation Clause, with the exception of subsec. 2(c).

Inasmuch as my colleague Justice Melcer reviewed the elements of the Law, the background of its enactment, and the arguments of the parties in detail, I will not reiterate. I shall proceed as follows: I will begin with a preliminary remark and a remark in regard to comparative law, and then continue with the reasons grounding freedom of expression, and that a call for a boycott stands in contradiction to some of those rationales, which has consequences for the extent of the infringement of freedom of expression, I will address the second and third subtests in view of the purposes of the Law and the secondary harm to the objects of the boycott, I will consider the Law from the standpoint of tort law and in the context of the "chilling effect", and I will conclude with a brief consideration of secs. 3 and 4 of the Law and the interpretation proposed by my colleague Justice Danziger.

Preliminary Remark

3. The Law has prepared a "masked ball" for us, both in regard to the legislature and the Petitioners. I will explain.

By its language and declared purpose, the Law is intended to protect the State of Israel against cultural-academic-economic boycotts. But the Knesset proceedings and the background of the Law reveal that its midwives were motivated by a desire to protect industries and institutions in the Area against internal and external boycotting, which is why the phrase "or an area under its control" was added to the definitions section (the bill was introduced at the height of a public debate that arose following a call to boycott the public auditorium in Ariel – see Amir Fuchs, Dana Blander & Mordechai Kremnitzer, *Anti-Democratic Legislation in the 18th Knesset*, 59 (Israel Democracy Institute, 2015)).

For their part, the Petitioners made hay of the phrase "or an area under its control". The Petitioners complained up and down their petitions that the Law infringes freedom of expression in regard to a subject that stands at the center of Israeli political debate. But in the course of the hearing, they removed their masks and showed their true colors. With the exception of the Petitioners in HCJ 5392/11 (the *Barkai* petition), it turned out that the other Petitioners do not distinguish between the State of Israel and the Area. As far as the Petitioners are concerned, even a call to join the Arab Boycott that was imposed on Israel at the time, is a call that falls within the scope of freedom of expression that should not be restricted, such that their position would remain unchanged even if the legislature were to remove the phrase "or an area under its control" from the definition of "a boycott against the State of Israel". In other words, it is not the protection of institutions, organizations and industries in the Area that keeps the Petitioners up at night, but the restriction of the very right to call for a boycott against the State of Israel for any reason whatsoever.

With all due respect for the subjective intention of the legislators and the intentions of the Petitioners, as my colleague Justice Danziger pointed out, the business of this Court is analysis of the law and not psychoanalysis of the legislature. Therefore, even if the legislature primarily intended to combat the boycotting of industries and institutions in the Area, the law that it enacted was expressly intended to combat boycotts against the state, and it is in that light that we must examine its provisions.

On Comparative Law

4. Before embarking upon an examination of the Law's infringement of the constitutional right to freedom of expression, I will devote a few words to the use of comparative law in legal interpretation. The debate unfolding on these pages on the subject of freedom of expression and its infringement is bursting at the seams with references to foreign cases, particularly from American law. Indeed, no one would deny that the study of foreign law and cross-pollination is good and desirable. "It is appropriate for an interpreter to be open to the fundamental principles of enlightened legal systems 'that form the world's cultural view'" (Aharon Barak, *Interpretation in Law – Constitutional Interpretation*, 236 (1994) (hereinafter: Barak, *Constitutional Interpretation*). However, "the use of comparative law in our case — like in every case — must be made sensitively and carefully, after thorough examination as to whether the legal arrangements practiced in one country or another are compatible with the law in Israel and the reality of life with which we contend" (HCJ 7052/03 *Adalah v. Minister of the Interior*, IsrSC 61 (2) 202, 419 (2006) *perm*. Cheshin D.P. [English: http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior]). As my colleague Justice Danziger noted, the protection afforded freedom of expression, in general, and freedom of political expression, in particular, is broader in the United States than the protection afforded freedom of expression in Israel. There are many reasons for this difference, and I will note one central reason, which is the constitutional text that is the source of the right.

The right to freedom of expression in American constitutional law derives from the First Amendment to the Constitution, which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The right to freedom of expression in the American Constitution thus comprises the right to freedom of the press, the right to assemble, and the right to petition for governmental relief. This special constitutional context led the United States Supreme Court to emphasize, for reasons that are at the foundation of freedom of expression, the reason of defense of the democratic regime (see: Eric Barendt, *Freedom of Speech*, 48 (2nd ed., 2005), and see: Laurence H. Tribe,

American Constitutional Law, 804 (2nd ed., 1988) (hereinafter: Tribe)). This explains the centrality of freedom of political expression in the American constitutional system, as well as the severe requirements that American law has established for justifying an infringement of that right. In the United States, freedom of speech is directly connected to the freedom of political expression.

As opposed to this, in Israeli constitutional law, freedom of expression is a right that is inferred and derived from the right to dignity in Basic Law: Human Dignity and Liberty, as a subsidiary of human dignity. This reflects the concept that "what is human dignity without the basic liberty of an individual to hear the speech of others and to utter his own speech; to develop his personality, to formulate his outlook on life and realize himself?" (CA 4463/94 *Avi Hanania Golan v. Prison Service*, IsrSC 50 (4) 136, 153 (1996) *per* Mazza J. [http://versa.cardozo.yu.edu/opinions/golan-v-prisons-service]). The source of Israeli freedom of expression is human dignity, and the core of Israeli freedom of expression is human dignity (Aharon Barak, *Human Dignity: The Constitutional Value and its Daughter Rights*, vol. 2, 730 (2014) (Hebrew), [published in English as *Human Dignity: The Constitutional Value and the Constitutional Right* (2015)] (hereinafter: Barak, *Human Dignity*); "the right under discussion – freedom of political expression – is, according to our juridical conception, closely and materially bound to human dignity", HCJ 10203/03 *Hamifkad Haleumi Ltd. v. Attroney General*, IsrSC 62 (4) 715, 753 (2008) *per* Naor J. [http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general]).

The source of the right to freedom of expression, along with many additional reasons that I see no need to address, result in a different approach to freedom of expression in general, and freedom of political expression in particular, in the United States and the State of Israel, and to different balancing formulas (Barak, *Constitutional Interpretation*, p. 236).

In American law, a finding that something is protected speech is often the end of the road, which is not the case in our legal system, with its various balances between freedom of expression and other conflicting values. It is, therefore, appropriate to learn from other countries that have liberal democratic legal systems and values similar to our own. Israel is not an island unto itself, and we should not adopt an approach according to which "we have nothing to gain in this regard from foreign fields" (HCJ 5771/93 *Citrin v. Minister of Justice*, IsrSC 48 (1) 661, 676

(1994) *per* Mazza J. in a different context). However, we should bear in mind that recourse to foreign law is an additional resource from among many interpretive resources, and "the status of comparative law is no different than a good book or a good article. Its bearing is determined by the quality of its rationale" (Barak, *Human Dignity*, 195 [English edition: p. 93]). Enrichment from such sources must, therefore, be approached with care, and with due consideration of the differences between the foreign system and our own.

In conclusion, we can enjoy and be inspired by American law on the subject of freedom of expression, but we cannot entirely adopt it in the matter before us. Some say that boycotts are impressed upon the American DNA, as a nation whose founding fathers employed boycotting in their struggle for independence (Yaniv Meno, "Consumer Boycotts, the Ethical Weapon of the Consumers," 15 *Hamishpat* 729, 756 (2010) (Hebrew) (hereinafter: Meno "Consumer Boycotts")). However, it should be noted that while *consumer* boycotting is well-developed and protected in the United States, that is not the case in regard to *political* boycotting, despite, or perhaps because of the special place of freedom of expression in the United States. We do not make this "cautionary note" to derogate from the value and importance of freedom of expression in Israeli law, which I will address below.

The Reasons for the Right to Freedom of Expression

5. It would be hard to exaggerate the importance of freedom of expression in general, and freedom of political expression in particular. Even prior to the enactment of Basic Law: Human Dignity and Liberty, this Court recognized the importance of this "supreme value" HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of the Interior*, IsrSC 7 (2) 871, 878 (1953) [English: http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior] (hereinafter: the *Kol Ha'am* case)). With the enactment of Basic Law: Human Dignity and Liberty, the right to freedom of expression won supra-legal constitutional status as a right derived from human dignity:

> The case law has repeatedly established that freedom of expression forms an inseparable part of the right to dignity, inasmuch as freedom of expression is essential to personal development and the fulfillment of one's human potential.

> We are the heirs to a longstanding legal tradition that views freedom of expression as a constitutional freedom that derives from the fundamental values of the State of Israel as a Jewish and democratic state. Freedom of expression and democracy have a reciprocal relationship – democracy is a necessary condition for freedom of expression, and freedom of expression gives democracy its meaning. It is not without reason that freedom of expression has been referred to as a "supreme value", the "apple of democracy's eye"… and other such expressions and idioms that have been coined, and praises that have been sung over the years in honor of "that giant that is called freedom of expression"… (my opinion in CA 751/10 *A. v. Dr. Ilana Dayan-Orbach* (published in Nevo) para. 4 (Feb. 8, 2012) (hereinafter: the *Ilana Dayan* case)).

6. My colleagues addressed the reasons underlying freedom of expression, and I will only briefly mention them: freedom of expression is an end in and of itself, it is a part of human dignity and the right to autonomy that makes it possible to realize one's potential and express one's opinions; freedom of expression is a means for achieving social and democratic objectives, inasmuch as only the public can only form its opinions through free, open debate; freedom of expression serves to promote knowledge and uncover the truth in a competitive free marketplace of ideas and opinions, and the assumption is that the best opinion is the one that will survive, and the truth will conquer lies (see, e.g., the *Ilana Dayan* case, para 17, *per* Vogelman J., and the references there).

Distilling the above shows that freedom of expression rests upon three primary, intertwined and integrated rationales: human self-fulfillment; exposing the truth; ensuring a democratic regime (and see: Barak, *Human Dignity*, 712-719 and references there). The cumulative force of those three reasons grants freedom of expression a place of honor in our liberal democratic conscience, and in our constitutional legal system. But note that not every form of expression corresponds with all three of those reasons. There are forms of expression that promote scientific or other "truths" that are unrelated to a democratic regime. There are forms of expression that express a person's "credo", but do not make any special contribution to the free marketplace of ideas. However, that neither adds nor detracts from the value of such forms of expression nor from the extent of their constitutional protection. Nevertheless,

considering the rationales grounding freedom of expression helps us achieve a better understanding of what it is that we seek to protect in the framework of freedom of expression. Expression that is unconnected to any of those reasons, or that is only tenuously connected to one or another, may be granted different weight when we examine the proportionality of its infringement. It is at this juncture that we arrive at the Law before us.

The Prevention of Boycott Law and the Infringement of Freedom of Expression in light of the Rationales grounding Freedom of Expression

7. The Prevention of Boycott Law establishes that "anyone who knowingly publishes a public call for a boycott against the State of Israel" commits a civil wrong (sec. 2 of the Law), and his right to participate in public tenders or receive benefits or funding from the state may be denied (secs. 3 and 4 of the Law). According to the Petitioners, the law infringes, *inter alia*, their right to freedom of expression because the Law "expropriates […] the right of a certain part of Israeli society to state its opinion in opposition to the lawfulness […] of actions performed by the Government of Israel and/or the State of Israel in the territories that were conquered […]" (para. 10 of the petition of the Petitioners in HCJ 5549/11). The Petitioners point out that imposing a boycott is an important democratic tool, and that "there are those who choose to boycott in obedience to the dictates of their conscience, which does not permit them to use a particular product […and] there are those who choose to boycott in order to apply pressure upon the object of the boycott so that it will change its course" (para. 18 of the petition in HCJ 5239/11). These arguments are, indeed, consistent with the reasons grounding freedom of expression. However, in my opinion, the provisions of the Law do not prevent the Petitioners from realizing their right to freedom of expression. I shall explain.

8. I will begin in praise of the boycott. Boycotting is considered a tool for the voicing of non-violent opposition of a type that has the potential for initiating change in various areas, such as in the political and consumer areas. It can serve society's weaker groups, and it also realizes the right to assemble, such that it may be seen as one of the tools of the democratic process.

As noted, no one disputes that the Law infringes the Petitioners' right to freedom of expression. However, the Law does *not* apply to a person who publishes criticism of the State of Israel, its policy in the Area, or of entities or persons who support that policy. The law does *not* apply to a person who boycotts the State of Israel or an area under its control. As opposed to the

impression that might be gained from reading the petitions, the Law does *not* prevent any person or entity from expressing a position on the question of continued Israeli control of the Area, and does not prevent anyone from boycotting a particular dairy or winery due to its connection to the State of Israel or the Area. The Law does not prohibit or in any way restrict expression against any particular institution or factory, and does not even prevent action to boycott, and therefore, a person can persuade another not to purchase goods from a particular factory. The Law only prohibits *publishing a public call*. A person can boycott and participate in a boycott, but cannot publicly call for a boycott, just as a person may hold racist views, but may not publish incitement to racism, and a person may identify with a terrorist or violent act, but may not call for or support such acts (see secs. 144B and 144D (2) of the Penal Law, 5737-1977 (hereinafter: the Penal Law)). A distinction should therefore be drawn between using words to express an opinion, and the use of words as a form of action. While we are, indeed, concerned with a call for a boycott, which American law would categorize as speech, as opposed to participation in a boycott, which is deemed as conduct, in my opinion, a call for a boycott – as a motivation to action – is not normal speech, but rather falls within the interstice between speech and conduct.

The Law therefore applies solely to a publically *calling* for a boycott. It is through this lens that I will examine the question of whether a call for a boycott, as distinct from participation in a boycott, corresponds with the reasons grounding freedom of expression enumerated above, and if so, to what extent.

9. *Autonomy and self-fulfillment*: Participation in a boycott involves an element of self-fulfillment. It can provide a feeling of inner satisfaction that is something of an end in itself (Meno, Consumer Boycotts, 750-751). But a call for a boycott, as a form of expression intended to motivate a specific action by another, is expression that is outwardly directed. The purpose of a call for boycott is to change the conduct of others – to cause part of the public to boycott, and to cause the objects of the boycott to change the conduct at which the boycott is directed. This aspect of a call to boycott is not at the core of the rationale of a person's self-fulfillment and autonomy. As noted, the Law does not prohibit a person from obeying the dictates of his conscience and refrain from purchasing from a factory located in the Area, just as a person who objects to animal testing may refrain from using products produced on the basis of animal testing. Indeed, no one denies that the ability to motivate others and bring about a change of their

conduct is part of a person's "selfhood", but infringing this rationale is less severe, considering that a person has many options at his disposal for expressing his opinion in the marketplace of ideas, and other possibilities for explaining and for persuading another of the justice of his cause. There are even those who are of the opinion that boycotting, and certainly cultural-academic boycotting, should be the last arrow – if it is there at all – in the quiver of a person who believes in freedom of expression. The Law can also not be said to infringe the dictates of a person's conscience. Conscience is threatened when a person is required and actively compelled to act against the principles in which he believes. Restricting a person from calling others or preventing others to act in a manner that he conceives to be improper is not an infringement of conscience (Daniel Statman & Gidi Sapir, *State and Religion in Israel*, 120 (2014) (Hebrew)).

In conclusion, while the Law does infringe the reason of fulfillment of selfhood underlying freedom of expression, that infringement is not as great as us claimed by the Petitioners.

10. *Exposing the Truth and Defending Democracy*: A call for a boycott is a form of expression intended to motivate a specific action (boycott) by others, as opposed to expression that concerns persuasion, study and the stating an opinion. As opposed to the Petitioners' claim, the right of part of society to have its say has not been "expropriated", and they may express their opinion aloud, even and especially on subjects that are the subject of debate, like the state's control of the Area. The Law does not contradict the statement that "debate on public issues should be uninhibited, robust, and wide-open" (*New York Times v. Sullivan* 376 U.S. 254, 270 (1964) *per* Brennan J.) (hereinafter: the *Sullivan* case). Therefore, it would appear that the Law does not substantially infringe the first reason grounding freedom of expression – exposing the truth.

11. But the Petitioners argue that restricting the ability to call publically for boycotting deprives them of a key tool in the democratic toolbox of freedom of expression.

It cannot be denied that a boycott can serve to bring pressure to bear upon various bodies and, in the short or long term, bring about dramatic change. However, it is hard to conceive of a call for boycotting as serving the "exposure of the truth", which is also of consequence in regard to the motive of defending democracy, and as will be explained, the two motives are closely related.

Freedom of expression protects democracy in two primary ways. The *first* is closely tied to the principle of exposing the truth and the free marketplace of ideas. "Only by considering '*all*' points of view and a free exchange of '*all*' opinions is that 'truth' likely to be arrived at" (*Kol Ha'am*, p. 877, *per* Agranat J. (emphasis original – I.A.)). Without freedom of expression, we cannot know what is good for us, we cannot persuade others of the rightness of our ideas, and we cannot arrive at wise decisions and chart our course. The *second* way that freedom of expression protects democracy is in providing a safe, agreed platform for expressing disagreements and attenuating public tensions (see Barak, *Human Dignity*, 716). Indeed, "thanks to freedom of expression, social pressure can be vented in words rather than deed" (HCJ 399/85 *Kahane v. Broadcasting Authority*, IsrSC 41 (3) 255, 276 (1987)). Freedom of expression primarily concerns speech rather than actions. Freedom of expression primarily concerns the expression of opinions through discourse, and not through coercion.

12. Boycott is an exceptional tool in the freedom-of-expression toolbox. It is intended to impose change through harmful means. Rather than debate and discuss conflicting views, a boycott is intended to oppose a particular policy by silencing other opinions, whether by economic means or through cultural and academic ostracism. Rather than respect the opinion of others and grant them a place in the free marketplace of ideas, a person calling for a boycott denies the legitimacy of those holding opposing views, and banishes them.

My colleague Justice Danziger holds the view that boycotting is an effective democratic tool, and he marshalled support from the legal literature, as follows (para. 7 of his opinion):

> While a successful boycott may appear to drown out another position, the remedy is not to silence the boycott but instead for those on the other side to endeavor to make themselves "louder" (Theresa J. Lee, "Democratizing the Economic Sphere: A Case for the Political Boycott," 115 *W. Va. L. Rev*. 531, 550 (2012)).

I cannot agree with that statement, neither in terms of the free marketplace of ideas, nor in regard to the protection of democracy. It would seem that in the learned author's marketplace of ideas, opinions are measured in decibels rather than their merits. The sellers in the author's market do not try to persuade buyers, but rather to drown out the competition. But democracy is not a shouting match. It is a forum for discourse, for sharing opinions, and for patient, tolerant attention to differing views.

Bearing in mind the rationale of the free marketplace of ideas as a means for exposing the truth – a rationale that undergirds our adulation of freedom of expression – there is something Orwellian to the Petitioners' argument that the Law restricts freedom of expression. An academic-cultural boycott muzzles expression in the plain meaning of the term. Granting a monopoly to one stand in the marketplace of ideas is the absolute antithesis of freedom of expression and the idea of a free marketplace of opinions. The cultural-academic boycott of Israel is intended to paralyze and silence political expression, impose one opinion and one "truth" (on the "facts" that guide the BDS movement, see Ben-Dror Yemini, *The Industry of Lies* (2014) (Hebrew); and Cary Nelson & Gabriel Noah Brahm (eds.), *The Case against Academic Boycotts of Israel* (2015)). Against this light, the Boycott Law appears to *promote* freedom of expression, and defend it against those who would seek to restrict it. Voltaire was ready to fight for an opponent's freedom of expression, but surely would not have been willing to shed his own last drop of blood to defend that opponent's right to silence him. The academic-cultural boycott is largely symbolic. It is a crude device that targets the entire academic community and the institution itself, without distinction, and as such, in flagrant contradiction of academic freedom, and it is worthy only of contempt (for an in-depth argument against academic boycotts, see Martha Nussbaum, "Against Academic Boycotts," in Cary Nelson & Gabriel Noah Brahm (eds.), *The Case Against Academic Boycotts of Israel* 39 (2015)).

From this perspective, it is somewhat naïve to compare political and consumer boycotts. We conceive of freedom of political expression as more exalted than the freedom of commercial-consumer expression. In view of that very importance of political expression, a consumer boycott of a factory that exploits child labor or the environment – which is essentially an economic boycott – is unlike a boycott intended to silence another political opinion, including a cultural-academic boycott. It is the supreme value of freedom of expression that justifies placing restrictions upon calls for boycott that are intended to silence the expression of the other.

13. As we see, boycott is an aggressive device in the democratic toolbox, whose legitimacy in extreme cases does not derive from reasons based upon freedom of expression. Similarly, the right to strike is a democratic tool, but the case law has rejected its forceful use. Thus, in HCJ 525/84 *Hativ v. National Labour Court* IsrSC 40(1) 673 (1986) (hereinafter: the *Hativ* case), this

Court addressed the issue of political strikes, and rejected the plaintiffs' argument that it was a legitimate democratic device:

> The political strike — which attempts to force an act or an omission on government authorities that they would not have tolerated had it not been for the strike — raises many constitutional and social problems: in a democratic regime, this opens the gates for strikers to impose their will on democratically elected institutions, and to direct processes by means of the coercive power of organizations outside the government and even of minority groups who in practice have such coercive power. There may be countries where a national electric power cut, including for electricity being supplied to hospitals and nurseries, can compel the legislator to enact any legislation required of him. But there is no doubt that, together with the collapse of morality, this also harms most seriously the functioning of democracy as such (*ibid*., at p. 703).

This is also true, by analogy, of the coercive force of an economic-academic-cultural boycott.

In summary, the Prevention of Boycott Law infringes freedom of expression primarily in terms of autonomy and fulfillment of "selfhood", but does so with less force than may appear at first glance. I shall now address the second stage of constitutional review: whether the Law meets the conditions of the Limitation Clause.

The Limitation Clause

14. In order to decide whether a law that infringes constitutional rights meets the conditions of the Limitation Clause, we must examine the whether the arrangement established by the law falls within the "margin of proportionality". This margin delineates the boundaries of legislative discretion. The Court does not examine whether the arrangement established by the law is optimal, or whether the Court would have chosen that arrangement were it the legislature. It is common knowledge that the Court will not replace the legislature's discretion with its own, and "will not place itself in the authority's shoes to select the appropriate alternative from among the possible choices" (HCJ 6304/09 *Lahav – Bureau of Organizations of Self-Employed v. Attorney General* (published in Nevo) para. 113, *per* A. Procaccia J. (Sept. 2, 2010)). The legislature is

granted the power to choose among the possible alternatives in the "margin of limitation", and the Court will show judicial restraint – although not judicial torpidity – in regard to the legislature's choice (HCJ 1715/97 97 *Israel Investment Managers Association v. Minister of Finance*, IsrSC 51 (4) 367, 389 (1997) *per* Barak P.).

We must, therefore, exercise restraint in navigating the Limitation Clause. We will not annul a provision of a law merely because we are uncomfortable with it, as long as that law falls within the margin of proportionality. Even if we do not find the form and concept of the law to be attractive, this Court is not a plastic surgeon who erases wrinkles and removes fat upon request. It is, of course, good for a law to be attractive, balanced and optimal, but it is solely *required* to meet the conditions of the Limitation Clause. As my colleague Justice Melcer emphasized in his opinion, we are concerned with the constitutionality of the law, and not with the legislature's wisdom in equating a winery in the Area with one in the territory of the State of Israel. "The Court must determine the constitutionality of the law, not its wisdom. The question is not whether the law is good, efficient, or just. The question is whether the law is constitutional" (CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* IsrSC 49 (4) 221, 438 (1995), IsLR 1995 (2) [English: http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-bank]; and see HCJ 8425/13 *Eitan – Israeli Immigration Policy Center v. Government of Israel* (published in Nevo) (Sept. 22, 2014), para. 1 of the opinion of Grunis P. [English: http://www.refworld.org/cgi-in/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184]).

15. My colleagues Justices Melcer, Danziger and Hendel examined the Law under the proportionality tests, and I, too, am of the opinion that the Law is consistent with the values of the State of Israel as a Jewish and democratic state, that it is intended for a proper purpose, and that there is a rational connection between the Law and its purpose. On the issue of the matter of the third subtest of proportionality – proportionality *stricto sensu* – I concur in the opinion of my colleague Justice Melcer.

Proportionality Stricto Sensu

16. In examining the proportionality of the infringement of a right (*stricto sensu*), we balance the benefit of realizing the law's purpose against the harm it poses to the right. We place the benefit and the probability of achieving it on the positive side of the scales, and balance it against

the importance of the right, and the severity and probability of its violation on the negative side of the scales (see: Aharon Barak, *Proportionality in Law* 438-445 (2010) (Hebrew)).

17. On the negative side, I would note our point of departure that the Law infringes the fundamental right of freedom of expression. To that we must add the Law's chilling effect, which I will address below. However, in examining the infringement of freedom of expression, we do not consider the harm in abstract terms, but rather in terms of the concrete context of its circumstances (Barak, *Proportionality* 440). We earlier noted that a call for a boycott of Israel does not "correspond" with the reasons undergirding freedom of expression, and that infringing the possibility for publically calling for a boycott – as opposed to participating in a boycott – as one of the tools available in a democratic system, is not a significant violation.

18. On the positive side, I would point to my colleagues' opinions that addressed the purposes of the Law in preventing harm to the State of Israel by means of boycott, and the protection of its citizens form economic, cultural and academic harm. These objectives concern constitutional rights of the citizens of Israel, like the right to freedom of expression, the right to property, the right to freedom of occupation, the right to equality, and the right to human dignity, some of which the state is obligated to defend (sec. 4 of the Basic Law states: "All persons are entitled to protection of their life, body and dignity").

An academic or cultural boycott of Israel infringes the freedom of expression of every individual connected with the institutions that are the objects of the boycott. It harms the ability for a lecturer in a boycotted academic institution to participate in academic discourse, it harms the ability of an actor in boycotted theater to express his "selfhood" by means of stage performance. A boycott against Israel harms the property rights of the boycotted individuals and companies, their vocation and freedom of occupation. The matter is clear, and I see no need to elaborate.

19. A public call to boycott a person due to his connection to the State of Israel violates the core of human dignity by exploiting that person as a means for achieving a political end (HCJ 10843/04 *Hotline for Migrant Workers v. Government of Israel*, IsrSC 62 (3) 117, 147 (2007) *per* E. Levy J. [http://versa.cardozo.yu.edu/opinions/hotline-migrant-workers-v-government-israel]. This conception, referred to as the "object formula" in philosophical and legal literature, views a specific person as a means or an object for achieving the goals of another, and seriously

violates the dignity of that person (on the object formula, see Barak, *Human Dignity*, 64, 254, 453).

We have noted that a boycott is intended to pressure the object of the boycott in order to cause him to change his ways. Boycotting a clothing manufacturer for violating the rights of workers is intended to cause *that* manufacturer to change its ways and treat it workers properly. Boycotting a bus company that discriminates against blacks is intended to cause *that* company to change its ways and treat all of its customers properly. Such is not the case in regard to the boycott against the State of Israel, which is intended to apply pressure to the objects of the boycott – persons with a connection to the State of Israel – in order that they might, in turn, apply pressure upon a third party (the state) in order that the *state* will change its ways. When A calls for a Boycott of B for the racist opinions he disseminates among his students, there is an identity between the purpose of the boycott and its object. Those who call for a boycott of the State of Israel take aim at the State of Israel and its policies, but the individuals who are the objects of the boycott are the ones who pay the price, and serve solely as a means for achieving the ends of those who call for the boycott. That constitutes a severe violation of the dignity of the objects of the boycott, who are discriminated against, through no fault of their own, as victims of a secondary boycott.

Secondary Boycotts

20. A secondary boycott inflicts harm upon a party that is not directly connected to the reason underlying the call for a boycott, and who is not always able to respond to the boycotters' demands for a change of general political policy (in the consumer-economic sphere, a distinction is customarily drawn between a direct, first-order boycott, such as when a manufacturer refuses to supply a product to a particular distributer, and a secondary boycott, in which a business refuses to purchase a product from a particular manufacturer who continues to supply the product to a boycotted competitor – Yitzchak Amit, "Prohibition of Unfair Competition Bill," 23 *HaPraklit* 223, 231 (1996) (Hebrew) (hereinafter: "Prohibition of Unfair Competition")).

The United States Supreme Court addressed this in *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982) (hereinafter: the *Claiborne* case), mentioned by my colleague Justice Hendel as a decision that recognized the constitutional protection of political boycotting as free speech, which stated: "Secondary boycotts and picketing by labor unions may be prohibited, as

part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife’” (p. 912). The Court cited the case *of International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212, 222-223 (1982) (hereinafter: the *Longshoremen* case), to which my colleague Justice Hendel referred. In that case, American stevedores refused to unload cargo from the Soviet Union in protest its invasion of Afghanistan. The Supreme Court held that the boycott was secondary and political, and therefore prohibited by law.

There would appear to be two differences between the matters discussed in *Claiborne* and *Longshoremen* that explain the different conclusion arrived at by the Court, and which are of consequence in the matter before us. First, the former case addressed a consumer boycott for racially discriminatory conduct that was aimed directly at the employer (although some of the demands were directed at the state), whereas the *Longshoremen* case concerned a purely secondary boycott in the sense that the victim was not the Soviet government, but rather third-party merchants. Second, the cause of action in *Claiborne* was a common-law tort, whereas the secondary boycott in *Longshoremen* was prohibited by an express statute – sec. 8(b)(4) of the National Labor Relations Act – that provides:

> **8(b) Unfair labor practices by labor organization**
> It shall be an unfair labor practice for a labor organization or its agents:
> —
> **(4)**
> —
> **(ii)** to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
> —
> **(B)** forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products **of any other producer, processor, or manufacturer, or to cease doing business with any other person,** or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees […]

This section was examined in light of the First Amendment of the United States Constitution on several occasions, and was not found to be constitutionally repugnant to freedom of speech. In the *Longshoremen* case, Justice Powell even wrote: "Application of 8(b)(4) to the ILA's activity in this case will not infringe upon the First Amendment rights of the ILA and its members. We have consistently rejected the claim that secondary picketing by labor unions in violation of 8(b)(4) is protected activity under the First Amendment. […] It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" (*ibid*., 226). The import of these distinctions for the case before us, in which we are concerned with the constitutionality of an express statutory provision prohibiting secondary boycotts, should, I believe, be self-evident (for a comparison of the *Claiborne* and *Longshoremen* cases, and a critique of the Supreme Court's decision in *Claiborne,* see: Gordon M. Orloff, "The Political Boycott: An Unprivileged Form of Expression," *Duke L. J.* 1076, 1089 (1983)).

The parallel drawn in *Claiborne* between a secondary boycott and a political boycott, as cited above, is not accidental. In both situations, the direct victim is not a party to the dispute, but rather someone "caught in the crossfire" between the party choosing to employ economic power to bring about political change by deviating from the democratic highroad and the state. This problematic aspect of political boycotts has long been recognized by the case law, and it has been held that one who employs his coercive power to influence political policy indirectly is not entitled to the protection of the law (see: the *Hativ* case; HCJ 1074/93 *Attorney General v. National Labor Court*, IsrSC 49 (2) 485 (1995) [English: http://versa.cardozo.yu.edu/opinions/attorney-general-v-national-labour-court]; HCJ 1181/03 *Bar-Ilan University v. National Labor Court* (published in Nevo) (April 28, 2011) [English: http://versa.cardozo.yu.edu/opinions/bar-ilan-university-v-national-labor-court] (hereinafter: the *Bar-Ilan* case)). The accepted view is that a purely political boycott does not enjoy the protections of the freedom to strike against an employer (on the distinctions between an economic boycott and a political boycott, also see: Ruth Ben-Israel, "Strikes as Reflected in Public Law: Strikes, Political Strikes and Human Rights," *Berenson Commemorative Volume*, vol. III, 111 (2007) (Hebrew); Michal Shaked, "A Theory of Prohibition of the Political Strike," 7 *Yearbook of Labor Law*, 185 (1999) (Hebrew); Frances Raday, "Political Strikes and Fundamental Change in the Economic Model of Labor Law," 2 *HaMishpat* 159 (1994)

(Hebrew). For a comparative survey of the law prohibiting political strikes, see: Haim Berenson & Assaf Berenson, "Sympathy Strike – Its Status and Proportionality," *Berenson Commemorative Volume*, vol. II, 763 (2000) (Hebrew)). American judge Learned Hand addressed this in stating: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it" (*International Bhd. of Elec. Workers v. NLRB*, 181F.2d 34, 37 (2d Cir. 1950)).

21. We can draw an analogy to our case from the inapplicability of the usual defenses of the right to strike to political strikes. A call for a secondary boycott is a form of expression intended to coerce the authority to adopt decisions in an extra-democratic manner, while secondarily harming third parties who are the objects of the boycott. Therefore, a call for such a boycott is not a form of expression over which Olympian freedom of expression will fully spread its aegis.

The realization of the purposes of preventing harm to the State of Israel and the protection of the constitutional rights of the objects of the boycott as against a moderate violation of one of the grounds freedom of expression that is achieved by the unpopular means of a call for a boycott, should be given weight in the framework of the balancing required under the third subtest of proportionality.

22. The Prevention of Boycott Law stands on three operative legs: a tort – sec. 2 of the Law – non-participation in public tenders – sec. 3 of the Law, and withholding State benefits and support – sec. 4 of the Law. Against this background, I will turn to an examination of the tort.

Section 2 of the Law – The Civil Wrong

23. Like the tort of defamation, the tort established under the Prevention of Boycott Law is one that restricts expression. The tort is distinctive in transferring the issue to the civil-law arena, and thus "privatizing" the fight against calls for boycott. Section 2 of the Law creates a new tort, and it is therefore appropriate to address the tort from the tort-law perspective. That perspective will aid us in evaluating whether the provision meets the proportionality tests.

24. I will begin by reminding the reader of the wording of the tort:

> *Boycott – Civil Wrong*:

2. (a) Anyone who knowingly publishes a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is a reasonable possibility that the call will lead to a boycott, and the publisher was aware of that possibility, commits a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] will apply to him.

(b) In regards to section 62(A) of the Civil Wrongs Ordinance [New Version], anyone who causes a binding legal agreement to be breached by calling for a boycott against the State of Israel will not be deemed as having acted with sufficient justification.

(c) If the court find that a civil wrong, as defined by this law, was committed with malice, it may require the tortfeasor to pay damages that are independent of the actual damage caused (in this section – exemplary damages); in calculating the sum of exemplary damages, the court will consider, inter alia, the circumstances under which the wrong was carried out, its severity and its extent.

The section, in its current wording, suffers from a lack of clarity and ambiguity that impede an evaluation of the scope and implementation of the tort. I harbored some uncertainty as to whether that should lead to a conclusion that the petition should be dismissed for lack of ripeness in regard to the tort, due to its abstract nature and the absence of a clear set of facts that could be addressed in examining the elements of the tort. In any case, my colleague Justice Melcer discussed the primary problems raised by the tort at some length, and skillfully suggested an interpretation that resolves a major part of the difficulties, while leaving an examination of arguments concerning implementation for such time that they may arise (para. 58 of his opinion). That being said, I shall briefly address the main points, and conclude with an examination of whether the defects and flaws that I shall enumerate would justify annulling the tort in its entirety, as recommended by my colleague Justice Hendel.

25. As a rule, torts are thought of as a closed list, to which various statutes contribute new torts such as consumer protection, violation of privacy, defamation, and so forth. We have before us a new particular tort that, at first sight, would appear to address a tort of conduct rather than result. But a more in-depth examination shows it to be a tort intended to protect against pure economic loss, that is, harm expressed in financial loss without any physical harm to the person or to property (on the reticence of Anglo-American law to impose liability for the negligent infliction of pure economic loss, see Ariel Porat, *Tort Law*, vol. I, 223-230 (2013) (Hebrew) (hereinafter: *Porat*). As opposed to this, pure economic loss is not foreign to Israeli law. On the contrary, denying liability for purely economic harm is the exception (see: Israel Gilead, *Tort Law: The Limits of Liability*, vol. II, 806 (2012) (Hebrew) (hereinafter: Gilead, *Limits of Liability*)). By its wording, the tort before us demonstrates some of the characteristic problems of a tort that concerns pure economic loss, such as increased litigation, over deterrence, causal connection, the nature of the victim (direct or indirect), etc. (on the policy considerations and the various categories of pure economic loss, see Tamar Gidron, "The Non Liability of a Bank (in England) and the (Potential) Liability of the State (in Israel): Pure Economic Loss in Light of Recent Developments - A Comparative Analysis and Evaluation," 50 *HaPraklit* 95 (2008) (Hebrew) [English: https://www.researchgate.net/publication/228141641_The_Non_Liability_of_a_Bank_in_England_and_the_Potential_Liability_of_the_State_in_Israel_Pure_Economic_Loss_in_Light_of_Recent_Developments_-_A_Comparative_Analysis_and_Evaluation]; Tamar Gidron, "The Duty of Care in the Tort of Negligence and Pure Economic Loss," 42 *HaPraklit* 126 (1995) (Hebrew). On pure economic losses incurred by a secondary plaintiff as a result of harm to the primary victim, see Ronen Perry, *Economic Ricochets: Pure Economic Losses deriving from Tortious Harm to the Person or Property of a Third Party or Ownerless Property* (2002) (Hebrew)).

26. *Expanding the plaintiff pool*: According to the plain language of the section, any Israeli citizen can join a dispute in which he has no personal interest, and sue a person who called for a boycott against some bank that has a branch in Judea and Samaria. That would appear to be so in light of the tort's wording "…*commits* a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] will apply to him". In other words, the tort would appear to apply to the tortfeasor-defendant rather than the victim-complainant. We may arrive at this conclusion through a comparison of other particular torts external to the Civil Wrongs Ordinance, such as

sec. 31 of the Consumer Protection Law, 5741-1981, which establishes: "Any act or omission in violation of Chapters … *shall be treated like* a wrong under the Civil Wrongs Ordinance [New Version]" (and see similar wording in sec. 31B of the Protection of Privacy Law, 5741-1981 – "… *shall be a wrong* under the Civil Wrongs Ordinance [New Version]", and sec. 11 of the Commercial Torts Law, 5759-1999 (hereinafter: the Commercial Torts Law) "… *is a tortious act*, and the Civil Wrongs Ordinance [New Version] shall apply …"). It might be argued that the fact that the same language was not adopted in sec. 2(a) of the Law shows that the Law applies the Civil Wrongs Ordinance to the tortfeasor-defendant rather than the plaintiff, such that a person might join a fight that is not his own.

My colleague Justice Melcer addressed this problem in his opinion, and concluded that we should not parse the language, and I concur with that conclusion, which is based upon the legislative intent and the Law's Explanatory Notes that state that the Law is intended to allow a suit by *one who is harmed* as a result of a boycott.

In any case, even according to that construction granting a cause of action only to one actually harmed by the call for a boycott, we are concerned with a tort that expands the potential plaintiff pool.

27. *Causal connection*: One of the inherent problems of pure economic loss is that of the causal connection between the tortious conduct of the tortfeasor and the infliction of the pure economic loss. Policy considerations justify caution in awarding damages for pure economic loss, and one of the proposed solutions in this regard is not to suffice with the normal burden of proof required under tort law (*Porat*, p. 230, fn. 443).

My colleague Justice Melcer concluded that the near-certainty test could be applied, and in his opinion, the plaintiff would also be subject to an additional burden above and beyond the regular burden of proof. However, based upon the language of the tort, it would appear that no causal connection at all need be shown between the call for a boycott and the harm resulting from the boycott. Rather, "a reasonable possibility that the call will lead to a boycott" would suffice. According to the plain meaning, the plaintiff need prove, only at the level of probability, the potential of the imposition of a boycott, while the requisite causal connection between the call for a boycott and the imposition of the boycott, as opposed to a causal connection between the call for a boycott and the damage incurred as a result of the boycott (compare to the language

of sec. 144D2(a) of the Penal Law, concerning the publication of incitement to violence or terror, which refers to a person publishing a call to commit an act of violence or terror "and because of the inciting publication's contents and the circumstances under which it was made public there is a *real possibility* that it will result in acts of violence or terror …").

Here, too, I am willing to concur with my colleague Justice Melcer, and read a requirement of a causal connection to the damage into the tort, as this Court did in regard to the consumer tort of deception mentioned by my colleague (CFH 5712/01 *Barazani v. Bezeq Israeli Telecommunications Company Ltd.,* IsrSC 57 (6) 385 (2003) (hereinafter: the *Barazani* case). If the legislature, cognizant of the *Barazani* rule, was of the view that there is no need of proving a causal connection to the damage, we would expect that it would have been stated expressly (compare sec. 1144B(b) of the Penal Law, concerning publication of incitement to racism, which states that "it does not matter whether or not the publication did cause racism..."). Having recognized the need for proof of damage, as will be explained in the next paragraph, the question of the probability that the damage will result would appear to become irrelevant, as it has already been realized. But that is not the case. The purpose of the tort is deterrence. It is a tort intended to direct an individual's conduct in real time – at the time of the publication of the call for a boycott, when the content of the call is examined in terms of the probability that it will lead to the imposition of a boycott (that will later result in damage). And note: the legislature chose the reasonable possibility test, rather than a real possibility or near certainty test. Bearing in mind that we are concerned with a type of political expression, this low threshold has a chilling effect, and I will not deny that on that basis I seriously considered following the approach of my colleague Justice Hendel, who was of the opinion that the tort should be annulled in its entirety. However, in light of the special nature of a call for a boycott in the arsenal of means and forms of expression, which we addressed above, and in view of the moderating construction proposed above, I have concluded that the tort passes the third test of proportionality, if just barely (the legislature refrained from including a criminal sanction in the law, which would have raised the question of the appropriate test with full force).

Clearly, it is not easy to prove a causal connection in regard to a tort of pure economic loss with a large plaintiff pool. Thus, there may be many reasons for a particular reduction in the sales of a factory operating in area threatened with a boycott, and in order to estimate the loss,

the element of the call for a boycott must be isolated from among all the reasons. As opposed to this, a plaintiff might argue that when there is an "ambiguous reason", in terms of the number of possible reasons for the harm, the plaintiff's evidentiary burden is to prove the relative weight of the boycott among the total number of possibilities (the chances for the success of such an argument are not high, inasmuch as ambiguous causality is currently recognized in the framework of only three doctrines – loss of chance, inherent evidential damage, and recurring distortion – Guy Shani, "Loss of Chance, Evidential Damage and Recurring Distortion: Points of Concurrence and Sites of Conflict among the Models for Resolving the Ambiguous Causation Problem," in A. Grunis, E. Rivlin & M. Karayanni (eds.), *Shlomo Levin Book: Essays in Honour of Justice Shlomo Levin* 395 (2013) (Hebrew)).

28. *Damage*: The question of the causal connection is related to the requirement of damage. It might be argued that applying the Civil Wrongs Ordinance to the tort does not necessarily imply that the requirement of proving damage be read into the tort. There are torts in the Civil Wrongs Ordinance, like assault and false imprisonment (secs. 23 and 26 of the Ordinance), in which damage does not constitute an element of the tort. When the legislature wished to establish damage as an element of a tort, it did so expressly. For example, the tort of negligence (sec. 35 of the Ordinance) states: "Any person who causes damage to any person by his negligence commits a civil wrong". In the torts of trespass to immovable property and trespass to movable property (secs. 29 and 31 of the Ordinance), the legislature took care to state: "Provided that no plaintiff will recover compensation in respect of trespass to immovable/immovable property unless he has suffered pecuniary damage thereby".

In this matter, as well, I am willing to accept the conclusion of my colleague Justice Melcer that the legislature did not waive the requirement of damage, by analogy to the consumer tort under the *Barazani* rule. I would also draw an analogy to the provisions of the Commercial Torts Law, in which the legislature details a list of specific torts (passing off, false description, unfair interference) by reference to the Civil Wrongs Ordinance, and regarding which it is self-evident that damage is an element of the torts. To this we may add the position of the Plaintiffs and the Explanatory Notes of the Law according to which the Law was intended to compensate the objects of the boycott for *damage*. In light of all the above, I am of the opinion that the tort of calling for a boycott can easily be construed to comprise an element of damage.

My colleague also bases his conclusion in regard to the damage requirement upon the fact that sec. 2(c) of the Law does not require damage where the tort is perpetrated with malice. From this he infers that damage is required under subsec. (a). In theory, punitive damage can be awarded even in the absence of damage, where the legislature seeks to punish and compensate for malicious conduct. However, normally, punitive damages are awarded for torts that involve damage, and the punitive award goes beyond the damage. Subsection 2(c) of the Law permits the court to impose punitive damages that are *not contingent upon damage*, but that does not necessarily imply that the legislature waived the demand for damage. On the contrary, one of the considerations in awarding punitive damages – alongside the tortfeasor's malicious conduct – is the damage caused by that tortious conduct, which I will address presently (and see: Israel Gilead, "Comments on the Tort Provisions in the Proposed New Civil Code," 36 *Mishpatim* 761, 811 (2007) (Hebrew) (hereinafter: Gilead, "Comments on Tort Provisions"), in which the author distinguishes between compensation for damages the extent of which is unknown, and "situations of compensation that is not for damage, such as punitive damages". From this one might conclude that the author is of the opinion that punitive damages are awarded even in the absence of any damage. However, that would not appear to be the author's view, and see: Gilead, *Limits of Liability*, vol. I, 221, where the author notes as self-evident that, as a rule, "punitive damages" are awarded in situations of intentional causing of damage).

29. *The mental element – the difference between ss. 2(a) and ss. 2(c)*: In subsection (a), the legislature refers to one who "knowingly" publishes a call for a boycott, where the publisher is "aware" of the reasonable possibility that the call will lead to a boycott, whereas subsection (2) refers to committing the tort with "malice".

How are we to understand the term "knowingly"? In this regard, I am hesitant to draw an analogy form criminal law to tort law. The term "knowingly" alludes to a subjective, intellectual knowledge, while the term "malice" alludes to an emotional attitude towards the result. While that may be so in theory, in practice it is difficult to avoid associating an element of intent to the term "knowingly". For example, the tort of assault, under sec. 23 of the Civil Wrongs Ordinance, which is one of strict liability, is defined as follows: "Assault consists of *intentionally* applying force of any kind … to the person of another". The drafters of the new Israeli Civil Code chose to replace the term "intentionally" in the tort of assault with the term "knowingly", as can be

seen from Part IV, Chap. I, sec. 388 of the Civil Law Bill, 5771-2011 (hereinafter: the Civil Code):

> Assault it the knowing use of direct or indirect force against the person without his consent, or a real threat to use such force.

In the tort of unlawfully causing breach of contract, under sec. 62(a) of the Civil Wrongs Ordinance, the legislature employs the same term – "Any person who *knowingly* and without sufficient justification causes any other person to break a legally binding contract with a third person" – where the term "knowingly" is understood, in practice, to mean intent (Nili Cohen, *Inducing Breach of Contract* (1986) (Hebrew). The author is of the opinion that the mental element required under the tort is no less than required under English law, which also initially speaks of malice, and then of intention or causation accompanied by intention and knowledge). Similarly, sec 7A(a) of the Civil Wrongs Ordinance grants immunity from tortious liability to a public servant, except for "action *knowingly committed with the intent to cause damage* or carelessness of the possibility of causing said damage". In other words, the legislature reserved the term "knowingly" to the mental element of intention to cause damage, as opposed to indifference/carelessness/willful disregard/recklessness to the realization of the result.

If we interpret the term "knowingly" in subsection (a) as intention to cause damage, then the question of the difference between "knowingly" in subsection (a) and "malice" in subsection (c) automatically arises. I would note that the element of malice is mentioned in regard to two torts in the Civil Wrongs Ordinance – that of "injurious falsehood" under sec. 58, concerning "the publication maliciously by any person of a false statement", and the tort of "malicious prosecution" under sec. 60, concerning "actually and maliciously … instituting or pursuing" frivolous proceedings. The tort of malicious prosecution was left out of the Civil Code (along with the tort of fraud requiring an element of intent), and the tort of injurious falsehood has, in any case, become irrelevant and has been replaced by the tort of "false description" under sec. 2 of the Commercial Torts Law, which does not require malice (Gilead, *Limits of Liability*, vol. II, p 1168, fn. 53).

The term "malice" is ambiguous. It is not clear whether it refers to intentional causing of damage arising from an improper motive, or to any intentional causing of damage, whether even carelessness would be deemed malice (Gilead, "Comments on Tort Provisions" 810), or whether

only damage deriving from an intention to harm another is "malice", as opposed to "intent" to cause damage that is not motivated by a desire to inflict harm upon another (*ibid.*, 1160-1661). The term "malice" indeed suggests a higher level of moral culpability, a desire to inflict harm upon another, and I am, therefore, willing to assume that the legislature sought to distinguish between "malice" and "knowing", with the latter indicating a lesser mental element. But it is hard to imagine a call for a boycott being carried out negligently, recklessly or carelessly, and not intentionally. In the normal course of events, a person who calls for a boycott does so with direct intention, such that it is unclear what difference there might be between doing so "knowingly" or "with malice". There is, therefore, a fear that every call for a boycott may automatically fall within the compass of subsec. (3), which allows for punitive damages. The exception would thus become the rule, along with an attendant "excess" chilling effect, which I will address below. For this reason, as well, I concur with my colleague Justice Melcer that subsec. (3) should be annulled. In other words, in order to fall within the scope of the tort of calling for a boycott against Israel, the call must reflect an "intention", "desire" or "purpose" of achieving a result. This interpretation is consistent with the deterrent purpose of the tort, deterrence being one of the recognized purposes of tort law.

30. *A specific tort and a framework tort*: The specific torts enumerated in the Civil Wrongs Ordinance or elsewhere do not detract from the scope of incidence of the tort of negligence, by which liability can be imposed even in situations addressed by a specific tort requiring a mental element or actus reus. A prime example is the "circumvention" of the malice requirement in the tort of malicious prosecution (CA 243/83 *Jerusalem Municipality v. Gordon*, IsrSC 39 (1) 113 (1985)). Above, we arrived at the conclusion that the tort under subsec. (a) should be understood as requiring a mental element of intent or desire to achieve a result, like the requirement of "malice" in subsec. (c) of the Law. Can this mental element be circumvented by means of the tort of negligence? And what consequences might flow from the possibility of employing the new tort as a basis for the framework tort of breach of statutory duty? These are questions lacking clear answers at this stage.

31. *Defenses*: Will the defenses provide by the Civil Wrongs Ordinance apply? For example, would the defense of contributory fault, under sec. 68 of the Civil Wrongs Ordinance, or the defense of "conduct of plaintiff", under sec. 65 of the Civil Wrongs Ordinance, apply?

> 65. Where a defendant has caused damage by his fault, but his fault was brought about by the conduct of the plaintiff, the court may exempt him from liability to pay compensation or may reduce the amount of compensation payable, as the Court may think just.

I fear that raising such claims by a defendant in an action for the boycott tort might drag the courts, against their will, into the political arena – a fear addressed at length by my colleague Justice Hendel. As opposed to this, just as the legislature barred the justification defense in subsec. 2(b) in regard to sec. 62(a) of the Civil Wrongs Ordinance, it would also be possible to deny the above defenses by analogy. Thus, for example, a defendant's claim of contributory fault against the plaintiff, by reason of his erecting his factory in the Area, or for prominently printing on the label that his product was "made in Israel", or such like, would be denied.

32. *Remedies*: The Civil Wrongs Ordinance grants both damages and injunctive relief (sec. 72 of the Ordinance). Consequently, it would be possible, under sec. 2 of the Law, to request preliminary relief in the form of an injunction preventing a person to call for a boycott, which would be deemed "prior restraint" and an ever more serious infringement of freedom of expression. My colleague Justice Melcer addressed this in his opinion, and I am willing to concur with his conclusion that the Court will refrain from granting preliminary injunctive relief in light of the case law regarding prior restraint of expression. I would note that in the more than twenty years that have passed since the adoption of Basic Law: Human Dignity and Liberty, the case law has not deviated from the rule established in CA 214/89 *Avneri v. Shapira*, IsrSC 43 (3) 840 (1989) (and see LCA 10771/04 R*eshet Communications and Productions (1992) Ltd. v. Professor Ettinger*, IsrSC 59 (3) 308, 319 (2004) (between marginal letters E-F) *per* Beinisch J.).

33. *Joint tortfeasors*: In order for a call for a boycott to be effective, it must be published, and thus in subsec. (a): "Anyone who knowingly *publishes* a public call for a boycott against the State of Israel …". Might the application of the Civil Wrongs Ordinance also lead to imputing liability as joint tortfeasors to broadcast media that publish the call? In my opinion, it would not. Had the legislature so desired, it should have said so explicitly, as it did in sec. 11 of the Defamation (Prohibition) Law, 5725-1965 [19 L.S.I. 254; amended 21 L.S.I. 132, 38 L.S.I. 176] (hereinafter: the Defamation Law), which imposes liability upon "… the editor of the

communication medium and the person who actually decided upon the publication of the matter, and civil liability shall be borne also by the person responsible for the communication medium".

34. *Private Enforcement*: Section 4 of the Defamation Law establishes:

> *Defamation of a Group*
>
> 4. Defamation of a body of persons, or any group, other than a body corporate, shall be treated in like manner as the defamation of a body corporate, provided that it shall not be a ground for a civil action or private complaint. An information for an offence under this section shall only be filed by, or with the consent of, the Attorney General.

In the Defamation Law, the legislature chose to deny an individual's right to bring civil action, preferring to grant the state power to bring criminal action. I was disturbed by this central point raised by my colleague Justice Hendel. The tort of calling for a boycott represents a kind of "privatization" of tort law by providing that individuals initiate actions that would seem to be within the state's province, as is attested by the Law's title: "Prevention of Harm to the State of Israel by means of Boycott Law". This, as opposed to the approach adopted under sec. 4 of the Defamation Law.

However, several distinctions can be drawn between the tort of defamation of a public and that of a call for a boycott, which I will briefly address: Section 4 of the Defamation Law raises a question of interpretation in regard to the terms "public" and "body of persons", and in regard to the identification of the injured group and the injured members of that group. Recognizing an individual right to sue in regard to statements made about a group would result in a broad "chilling effect" upon freedom of expression, bearing in mind that, in most cases, such statements about a "public" or "group" consist of criticism or the expression of an opinion concerning social phenomena or matters of public interest. In the case of a false statement about a public, the harm is "diluted" and dispersed among all the members of the group, such that the *power* of the false statement is mitigated by the size of the group. And most importantly, when we are concerned with a false statement about a group, it is not the individual who should bear the burden of defending the public, and therefore, "privatization" of the right to sue by granting it

to individuals would be inappropriate (see the matter concerning the film "Jenin-Jenin" in CA 8345/08 *Ofer Ben-Natan v. Muhammad Bakri* [published in Nevo] (July 27, 2011)).

That is not the case in regard to a call for a boycott against Israel, which may be either a general call or a specific call for the boycott of particular enterprises, institutions or products that are connected with Israel. The harm is not inflicted solely upon the state, but rather, as we have already noted, the direct harm is incurred by the individual, the business whose sales are affected, the academic who is denied a research grant, or the ballet company whose performance is cancelled as the result of a call for a boycott. We might make an analogy to the tort of "unfair interference" under sec. 3 of the Commercial Torts Law, under which: "A business shall not unfairly prevent or burden the access of customers, employees or agents to the business, goods or services of another business". One form of unfair interference is the imposition of a boycott by one business against another (Amit, "Prohibition of Unfair Competition," p. 231). From this perspective, calling for an economic boycott against a particular enterprise is equivalent to unfairly preventing or burdening access to the business, and inasmuch as it is the business that is harmed by the call, it should be permitted the right to sue. This can justify the distinction between sec. 4 of the Defamation Law and sec. 2 of the Boycott Law that allows a person or private body to bring suit in tort for a call to boycott.

35. *Interim summary*: From the perspective of tort law, the specific tort of calling for a boycott raises a number of issues as a result of the ambiguous language adopted by the legislature in defining the tort. But ambiguity and questions of interpretation do not justify annulling a law on constitutional grounds. This was addressed by my colleague Justice Melcer, who chose not to await the coming of Elijah the Prophet to provide the answers to unresolved questions, but rather suggested interpretive solutions for some of the problems raised above, while adopting a reserved approach to the elements of the tort.

For the above reasons, I have decided not to join Justice Hendel's dissent that would annul the entire tort of calling for a boycott. Rather, I concur with the view of my colleague Justice Melcer that sec. 2(c) of the Law be annulled, as I shall explain below.

Section 2(c) of the Law – Exemplary Damages

36. Section 2(c) of the Law permits the court to impose "damages that are independent of the actual damage caused (in this section – exemplary damages)" upon a person maliciously calling for a boycott against Israel. The intention is to punitive damages, and three distinctions should be drawn in this regard: regular damages (monetary and non-monetary), damages without proof of damage, and exemplary (punitive) damages.

Two principle reasons may be adduced to justify the imposing of damages without proof of damage: the absence of the possibility of proving the precise extent of the damage caused by the tort, and the desire to deter potential tortfeasors (CA 3559/02 *Toto Zahav Subscribers Club v. Sports Betting Board*, IsrSC 59 (1) 873, 903 (2005) (hereinafter: the *Toto Zahav* case)). The Israeli legislature allows the imposing of damages without proof of damage when the damage is inherent to the tort or the injurious act, and there is a high probability of concurrence of both of the above conditions, as for example: sec. 7A of the Defamation (Prohibition) Law, 5725-1965; sec. 10 (a) of the Employment (Equal Opportunities) Law, 5748-1988; sec. 6 (b) of the Prevention of Sexual Harassment Law, 5758-1998; sec. 13 (a) of the Commercial Torts Law, 5759-1999; and sec. 56 (a) of the Copyright Law, 5768-2007. Both of the conditions are met in regard to the tort of "calling for a boycott". Due to the difficulty in proving the causal connection between the call for a boycott and the resultant damage incurred by the boycotted party, and due to the difficulty in precisely quantifying the damage, it can be argued that not permitting the court to impose damages without proof of damage arising from the tort, would lessen the Law's deterrent value and prevent the Law from achieving its purpose.

However, the legislature did not establish "damages without proving damage" in the Law, but rather employed the term "exemplary damages", with the intent of *punitive damages*. That is precisely the term currently employed in sec. 461 of the Civil Code Bill, titled "Exemplary Damages", which states that "the court may award the victim damages that are not contingent upon damage, if it find that the violation was perpetrated with malice" (for laws establishing exemplary damages, see: sec. 33K (b) (1) of the Collective Agreements Law, 5741-1981; sec. 26A (b) (1) of the Wage Protection Law, 5718-1958; sec. 31A of the Consumer Protection Law, 5741-1981; sec. 30A (j) (1) of the Telecommunications (Bezeq and Broadcasts) Law, 5742-1982; sec. 3 (a) (1) of the Protection of Employees (Exposure of Offences, of Unethical Conduct and of Improper Administration) Law, 5757-1997; sec. 5 (b) (2) of the Notice

to Employee (Terms of Employment, Vetting Procedures and Hiring Process) Law, 5762-2002; sec. 4 (b) (1) of the Right to Work while Seated Law, 5767-2007; sec. 11 (a) of the Aviation Services (Compensation and Assistance for Flight Cancellation or Change of Conditions) Law, 5772-2012). (I would note that all of these laws establish a ceiling for damages). Punitive damages, as a type of retribution from the tortfeasor, is not among the primary purposes of tort law (Gilead, *Limits of Liability*, vol. I, 224), and it constitutes an exception to the principle of *restitutio ad integrum* underlying tort law. Punitive damages are intended to achieve two objectives: punishment and deterrence (CA 140/00 *Estate of Ettinger v. The Company for the Reconstruction and Development of the Jewish Quarter in the Old City of Jerusalem Ltd*., IsrSC 58 (4) 486, 564 (2004) *per* Rivlin J. [http://versa.cardozo.yu.edu/opinions/ettinger-estate-v-jewish-quarter-company] (hereinafter: the *Ettinger* case). Punitive damages are not common in our legal system, and are viewed as "exceptionally exceptional" to the usual remedial damages in cases that are particularly egregious (see, for example: CA 2570/07 *Lam v. Hadassah Medical Organization* [published in Nevo], para. 5 and the citations there (Jan. 29, 2009); LCA 9670/07 *Plonit v. Ploni* [published in Nevo], paras. 24 and 26 *per* Rubinstein J, and the opinion of Danziger J (July 6, 2009)). Punitive damages are intended to express society's condemnation and extreme revulsion in regard to the tort, and not without reason it concerns violent crimes or heinous sexual offenses (CA 4576/08 *Ben-Zvi v. Hiss* [published in Nevo], para. 45, *per* Rivlin J. (July 7, 2011)).

The punitive aspect of the damages requires that some moral blame attach to the tortfeasor's conduct, which is expressed in a mental element of malice that reflects contempt for the victim's right. There are those who are of the opinion that punitive damages are justified in only three primary situations: when the tort is committed with intent/malice; when the damage is the result of conduct that has no redeeming social value; and when the tort causes catastrophic damage and the tort is shameful in terms of its result (Orr Karsin, "The Doctrine of Punitive Damages in Israeli Law – A Re-examination," 29 *Mehkerey Mishpat* 571, 582-583, 640-644 (hereinafter: Karsin); and on exemplary damages, see, e.g: Amos Herman, *Introduction to Tort Law* 413 (2006). On calls for exemplary damages as a means for restoring mutual respect to individuals in society, see: Avihay Dorfman, "What is the Point of the Tort Remedy?" 55 *Am. J. Juris.* 105, 140 (2010)).

Exemplary damages are an accepted, recognized tool of tort law in the common-law world (see: A. Burrows, "Damages," in Michael A Jones (ed.), *Clerk & Lindsell on Torts*, 1965 (20th ed., 2010); W.V.H Rogers, *Winfield & Jolowicz on Tort*, 948 (12th ed., 2006). For the recommendation of the English Law Commission to expand the use of exemplary damages, see: Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com. ([247] (1997)). For a similar recommendation for the expansion of the circumstances that would justify imposing punitive damages in Israeli law, see Karsin, above).

37. We have already noted that, in practice, under the current wording of the Law, every call for a boycott against Israel, as defined by the Law, would fall within the scope of sec. 2(c), and would expose the defendant to the possibility of punitive damages, with all the special characteristics of such damages. At the bottom line, the punitive character of sec 2(c) places the defendant in a *worse* situation than would a criminal sanction, first, due to the lower evidentiary burden in civil cases, second, because civil law does not afford a defendant the defenses available in criminal law, and third, because a criminal procedure is instituted by the state, while a civil tort action can be initiated by anyone.

If that were not enough to explain why sec. 2(c) should be annulled, I would add that the absence of a cap on exemplary damages (as opposed to the situation in the other laws cited above that place a limit on exemplary damages), further intensifies the "chilling effect", which I will address below.

The Chilling Effect

38. At times, the legislature adopts legal arrangements that infringe an individual's freedom of expression, but with a proper purpose, as in the case of prohibiting the publication of defamatory material (see: the *Sullivan* case), or a law prohibiting publications that may incite to violence (see: *Winters v. New York* 333 U.S. 507 (1948); and see *Tribe*, p. 863). These arrangements infringe an individual's freedom of expression, but the infringement does not present a constitutional problem as long as it is proportionate. However, an arrangement intended to restrict certain forms of expression may have a deterrent effect that extends beyond the scope of the conduct targeted by the sanction, and deter other forms of expression that are beyond the legislature's original intent. For example, a law that imposes a civil or criminal sanction for

publishing defamatory statements may deter people from expressing their opinions in fear of the publication being deemed defamation.

The chilling-effect doctrine was developed in the United States in the context of the restriction of constitutional rights (such as freedom of assembly, *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971); freedom of movement, *Thompson v. Shapiro*, 270 F. Supp. 331, 336 (D. Conn. 1967); due process, *Bankers Life & Casualty Co. v. Crenshaw* 486 U.S. 71 (1988), *Colautti v. Franklin*, 439 U.S. 379 (1979), *Berger v. New York*, 388 U.S. 41 (1967); privacy, *Lankford v. Gelston* 364 F.2d 197 (4th Cir. 1966)), and especially in the context of the First Amendment right to freedom of speech. "A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity" (Fredrick Schauer, "Fear, Risk, and the First Amendment: Unraveling the Chilling Effect," 58 *B.U.L. Rev*. 685, 693 (1978) (hereinafter: Schauer). As noted, the chilling-effect doctrine concerns unintentional deterrence, that is, a deterrent effect that exceeds the scope of expression intended by the legislature, and thus allows for the striking down of the entire arrangement due to the unintended deterrence ("the chilling effect").

In an ideal world, the question of the chilling effect would not arise. The legislature would adopt an arrangement that would limit certain forms of expression in a proportionate manner, and anyone who would deviate from that arrangement established by law would expose himself to a civil or criminal sanction. But in practice, it is not possible to ascertain in advance what forms of expression will be caught up in the net of the arrangement established by the law, and which will fall outside the scope of that arrangement. An arrangement may be drafted in a vague manner, such that an individual seeking to adapt his conduct will not be able to know with certainty whether some expression falls within the ambit of the arrangement. Or an arrangement may be entirely clear but overbroad, such that it also applies to forms of expression that the legislature did not intend, and whose infringement deviates from the scope of proportionality (see: Schauer, p. 698; *Tribe*, p. 1030). One of the early cases in the development of the chilling-effect doctrine, *Walker v. City of Birmingham*, 388 U.S. 307, 342 (1967) concerned an order prohibiting parades and demonstrations supporting the rights of blacks in the city of Birmingham, Alabama. Justice Brennan noted:

> We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

There is almost no legal arrangement that is unaffected by a chilling-effect halo, inasmuch as reality is almost never absolutely clear (Schauer, p. 700), and uncertainty is inherent to the interpretation of the legal arrangement. Therefore, in order to strike down an arrangement by reason of its inherent chilling effect, that effect must be substantial, and not some negligible chilling (see: *Tribe*, p. 1024). "Overbreadth […] must not only be real, but substantial as well, judged in relation to the statutes' plainly legitimate sweep" (*Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

39. In the matter before us, sec. 2(c) indeed "chills" freedom of expression by means of over-deterrence and punishment of a call for "a boycott against the State of Israel" as defined by the Law. We have addressed the vagueness of the wording of the tort, and *inter alia*, the mental element of intent that it requires, as well as the possibility that every call for a boycott might be ensnared in the net of sec. 2(c). The ambiguity in regard to the scope of the tort, in and of itself, raises a fear of an "excess" chilling effect upon freedom of expression. This fear is particularly forceful in regard to subsec. (c), which permits the awarding of exemplary damages without any criteria and without any cap. The combined effect of the ambiguity of the tort and a sanction that is unrestricted in any direction doubles and triples the halo of the Law's attendant chilling effect in the form of over-deterrence. Inasmuch as we are concerned with tort law, and inasmuch as the primary purpose grounding the tort is deterrence, we would recall that maximal knowledge is a precondition to effective deterrence. A tortfeasor who despises risks that present unquantifiable "price" cannot carry out a loss-benefit calculation in choosing his conduct and words, such that he is subject to absolute deterrence, or over-deterrence at the very least, and such deterrence presents a particularly strong "chilling effect" (see: John C. Coffee, Jr., "Paradigms Lost: The Blurring of the Criminal and Civil Law Models and What Can Be Done About It," 101 *Yale L.J.* 1875, 1882 (1992)).

This, too, must be taken into account in subjecting the section to the crucible of the second subtest of proportionality. Fixing defined damages in the absence of proof of damage as opposed to exemplary damages, or capped exemplary damages, as established in other laws, might have served to blunt somewhat the extent of the infringement. But as currently drafted, the marginal benefit of the arrangement established under sec. 2(c) of the Law is smaller than the infringement of freedom of expression, in view of the uncertainty and ambiguity of the boycott tort together with the severe chilling effect that derives from the uncertainty in regard to the scope of exemplary damages.

40. *Interim Summary*: Considering that the mental element of intent is inherent to a call for boycott, such that there is a fear that every call for a boycott would fall within the ambit of sec. 2(c) of the Law and place the defendant at risk of punitive damages; considering that punitive damages is a stepchild of the normal purposes of tort law, and to date, has only been awarded in exceptional, outrageous cases that engender contempt and revulsion; considering that a call for boycott falls within the scope of freedom of expression, and realizes some of the rationales of freedom of expression, such that it cannot be said that a call for boycott is of no social benefit; considering the centrality of freedom of expression; and considering that uncapped punitive damages may lead to absolute deterrence, and at the very least, to a broad chilling effect in the sense of over-deterrence – considering all of the above, sec. 2(c) does not pass the third subtest of proportionality. At the bottom line, I therefore concur with the opinion of my colleague Justice Melcer that the harm caused by sec. 2(c) of the Law to freedom of expression exceeds what is required.

Sections 3 and 4 of the Law – Restricting Participation in Public Tenders, Tax Benefits and Subsidies

41. My colleagues are unanimous in the view that secs. 3 and 4 meet the criteria of the Limitation Clause, and I concur.

At first glance, one might be struck by the shamelessness, and even hypocrisy of a person who calls for a boycott of the state – and thus harms the state economy and the livelihood and employment of others – knocking at the state's door asking to enjoy state benefits and subsidies. There is even something of the absurd in the Petitioners' suggestion that the state treasury bear the costs of the harm inflicted by the boycott upon private entities, that is, that the state should

directly subsidize the call for boycotting it. In general, harm to the state economy, and harm to the property of a citizen or resident of the state, as such, is viewed as a serious matter, such that it should come as no surprise that sec. 13 of the Penal Law, 5737-1977 establishes extraterritorial jurisdiction in regard to such offences:

> *Offenses against the State or against the Jewish people*
>
> 13. (a) Israel penal laws shall apply to foreign offenses against –
>
> > (4) State property, its *economy* and its transportation and communication links with other countries;
>
> (b) Israel penal laws shall also apply to foreign offenses against –
>
> > (1) the life, body, health, freedom or *property* of an Israel citizen, an Israel resident or a public servant, *in his capacity as such*;

(Hanan Melcer, "The I.D.F. as the Army of a Jewish and Democratic State," in *Law and the Man, Festschrift for Amnon Rubinstein*, 347, 354 (2012)).

42. As my colleague Justice Melcer noted, a person does not have a vested right to receive a benefit or subsidy from the state, and when the state grants a subsidy or benefit, it must examine whether the receiving entity serves the public with the monies it receives. Thus, when the state grants an entity a tax advantage by defining it as a "public institution" for the purposes of sec. 46 of the Income Tax Ordinance, it recognizes that entity as one fulfilling an important public function that is worthy of public funding. It is difficult to imagine that the public would participate in funding an entity that calls for harming the public, and as noted, a call to boycott a person solely due to his connection to the State of Israel constitutes a serious violation of that person's rights, and even a violation of our democratic system. "Recognition of a body as a 'public institution' reduces the state's revenues from taxes, and is equivalent to increasing the state's expenses by means of distributing funds. Recognition of a 'public institution', and thus recognition of a 'public purpose' as well, must be carried out in a reasonable, relevant manner, while strictly maintaining equality" (HCJ 637/89 *A Constitution for the State of Israel v. Minister of Finance*, IsrSC 46 (I) 191, 200 (1992); and also see: HCJ 10893/08 *Vipassana Association v. Minister of Finance*, [published in Nevo], para 29 (Aug. 23, 2012)). My colleague Justice

Danziger is of the opinion that the state is not permitted to discriminate among entities on the basis of their political statements. I, of course, agree. But the Law does not claim to deny a benefit or subsidy by reason of political expression, and not even for political boycott, but rather for a public call for boycott – a call intended to motivate others to harm others on the basis of their connection to the state. Thus, a particular theater may decide that it is unwilling to stage its productions in one of the auditoriums in one of the settlements in the Area without fear that sec. 4 of the Law might apply to it.

A part of that "reasonableness and relevance", the state may, and indeed must, distinguish between entities that contribute to the public and entities that seek to *harm* the public or a particular group that is part of that public. For example, in 1970, the American Internal Revenue Service (IRS) decided not to grant tax exemptions to educational institutions that maintained a discriminatory policy toward black students. As a result of that decision, the definition of "charitable organization" was changed in the tax regulations, such that it applied to non-discriminatory educational institutions. Bob Jones University, a religious university that, for religious reasons, maintained a policy that discriminated against blacks, lost certain tax exemptions, and petitioned on the basis of the claim that the IRS lacked the authority to amend the definition of a "charitable institution" as it had, and that the amendment had violated the institution's right to freedom of religion. In *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983), Chief Justice Burger held: "The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred". That is all the more the case when the reason for harming that group is the connection of the group's members to the state itself.

43. Nevertheless, I do not believe that the time is ripe to decide that the provisions of secs. 3 and 4 of the Law are necessarily constitutional (and obviously they do not render the responsible minister "immune" from judicial review in exercising his authority under these provisions). In my view, this would require that we examine the application of the Law's provisions and the minister's exercise of authority in regard to a concrete set of circumstances, when the appropriate case arises. This brings me back to the ripeness doctrine to which I referred at the outset of my examination of sec. 2 of the Law (para. 24, above), and connects me to the end of the opinion of Justice Melcer. Inasmuch as the matter has already been addressed by him, I will be brief.

44. Sections 3 and 4 of the Law grant the Minister of Finance powers, while establishing a mechanism for their exercise. Thus, sec. 3 provides that the decision of the Minister of Finance in regard to restricting participation in a tender must be made "with the consent of the Minister of Justice and the approval of the Knesset Constitution, Law and Justice Committee", while sec. 4(a) of the Law provides that a decision by the Minister of Finance to deny benefits must be made "in consultation with the Minister of Justice", and in some of the cases, also requires the consent of the responsible minister (the Minister of Culture and Sport (sec. 4(a)(2)); the minister appointed by the Government as responsible for relevant budgetary line (sec. 4(a)(3)); and the Minister of Industry, Commerce and Employment (sec. 4(a)(5)).

We should also bear in mind that sec. 4(b) of the Law, which provides that the exercise of the Minister of Finance's authority under sec. 4(a) must be "in accordance with regulations that he will promulgate in this regard, with the consent of the Minister of Justice, and with the approval of the Knesset Constitution, Law and Justice Committee" (and I am not unaware of the provision at the end of sec. 4(b) that not promulgating such regulations will not detract from the authority granted under sec. 4(a) of the Law).

45. Thus we find that while the powers established under secs. 3 and 4 are granted to the Minister of Finance, before he may exercise those powers he must obtain the consent of the relevant organs and confer with them, and it would also be appropriate that he do so after promulgating regulations. In any case, even if the provisions of secs. 3 and 4 of the Law remain in force, that would not necessarily mean that the powers granted under those provisions will be exercised in the near future, and it is conceivable that they may never be exercised.

This point recently formed the basis for this Court's decision in HCJ 3429/11 *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance*, (Jan. 5, 2012) (published in Nevo) [English: http://versa.cardozo.yu.edu/opinions/alumni-association-arab-orthodox-school-haifa-v-minister-finance] (hereinafter: the *Alumni Association* case), in which the ripeness doctrine was expressly invoked. There would appear to be certain similarities between the circumstances of that case and the matter at bar. Both raised the problem of the tension between freedom of (political) expression and economic sanctions that might infringe it in all its force, and the issue of ripeness arose in both.

46. As may be recalled, the *Alumni Association* case focused upon a provision of the Foundations of the Budget (Amendment no. 40) Law, 5771-2011. That provision granted the Minister of Finance the power to decrease the budget allotted by the state to a budgeted or supported body in a number of situations, such as when that body expended monies in regard to marking the day of the establishment of the state as a day or mourning. Similar to secs. 3 and 4 of the Boycott Law, the relevant provisions of the Foundations of the Budget Law comprised a mechanism for exercising the authority granted therein (a mechanism that included obtaining the consent of the responsible minister, holding a hearing for the relevant body, obtaining an opinion from the legal adviser of the Ministry of Finance, and obtaining a recommendation from a professional team in regard to the scope of the relevant expenditure and the consequences of the budget decrease).

Ultimately, this Court denied the petition on the grounds that the case was not yet ripe for decision, or in the words of Justice Naor:

> 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*, 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*, at para. 6. See also HCJ 3248/09 *Sari v. Minister of Justice*, at para. 3; HCJ 6972/07 *Lakser v. Minister of Finance*, 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 *Alumni Association* case, para. 29].

In my opinion, applying the ripeness doctrine in the case before us – as it was applied in the *Alumni Association* case – leads to a similar result in regard to secs. 3 and 4, and deciding the Petitioners' constitutional arguments requires that we wait for petitions directed against a

concrete decision by the Minister of Finance, on an appropriate factual basis. As Justice Naor noted, "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 … 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" (*ibid.*, para. 32 of her opinion). As stated, this I true for the case before us, as well.

47. And note: secs. 3 and 4 of the Law differ in this regard from the tort established under sec. 2 of the Law. Whereas the implementation of the provisions established in secs. 3 and 4 are contingent upon the Minister of Finance's choice to exercise his authority, obtain the consent of the relevant ministers, and confer with them (and to promulgate regulations, as well), sec. 2 of the Law permits any person who deems himself harmed by a call for a boycott to initiate a tort suit, the submission of which is not subject to the rules of administrative law or any review mechanism, but entirely contingent upon the desire of the plaintiff. Hence the severe infringement of freedom of expression posed by sec. 2 of the Law, which, if allowed to stand, has the potential for creating a real chilling effect, and which must, therefore, be struck down (on the two-stage evaluation of the ripeness of a petition, and on the recognition of the need to proceed with its examination where a chilling effect may be created, see HCJ 2311/11 *Sabah v. Knesset* (published in Nevo), paras. 16-17, *per* Grunis P. (Sept. 17, 2014); on the doctrine of partial ripeness, which draws a distinction between different arguments directed at different provisions, some of which may be ripe while others not, see *ibid.*, paras. 3-8, *per* Hendel J, and para. 3, *per* Naor J.).

I therefore concur with the opinion of my colleague Justice Melcer that, for the present, the issue of the constitutionality of secs. 3 and 4 of the Law must wait until a specific petition challenges a concrete decision by the Minister of Finance on the basis of concrete facts.

"Or an area under its control" – The Opinion of my Colleague Justice Danziger

48. I began my opinion with the "masked ball" presented to us by the Law, with the above phrase at its center, as part of the definition of "boycott against the State of Israel", which would appear to have been the primary concern of the Law's initiators, and was the focus of the Petitioners' attack on the Law. For the reader's convenience, here is that definition:

> In this law, "a boycott against the State of Israel" means – deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, one of its institutions or an area under its control, such that it may cause economic, cultural or academic harm.

Those words ["an area under its control"] address an issue that is at the heart of an Israeli political debate, and it is not surprising that the Petitioners' arrows centered on the claim that the Law intervenes in political speech in such a highly charged issue among the Israeli public. My colleague Justice Danziger proposed a creative interpretation in an attempt to square the circle, in employing – in practice, although not in law – a sort of "blue pencil" for the phrase, such that, according to his approach, only a call for a boycott of Israel *per se*, only a boycott of an institution or area deriving from their connection to the state, as part of a boycott of the state *per se*, would fall within the scope of the definition. In support of that view, my colleague presented a call for a boycott of a person due to his connection to a public institution involved in animal experimentation as an example of a call that might fall within the scope of the Law, inasmuch as that institution is connected to the state. But that fear is unwarranted in light of the requirement that the call for a boycott be "*solely* because of their connection with the State of Israel, one of its institutions or an area under its control". The word "solely" means that the *only* reason for the boycott – and it would not be sufficient that it be the dominant reason among others – be the connection to the state. Therefore, if the reason for the boycott derives from environmental harm or animal experimentation, the boycott would not fall within the scope of the definition.

The construction proposed by my colleague deviates, in my opinion, from the plain meaning. Indeed, the phrase "boycott against the State of Israel" shows that the primary concern of the Law is preventing a boycott of Israel, and the legislature established "anyone who knowingly publishes a public call for a boycott against the State of Israel …", and defined what would constitute a boycott against the State of Israel by an accepted legislative technique (compare, for example, the definition of "road accident" in the Compensation for Victims of

Road Accidents Law, 5735-1975, as "an occurrence in which bodily damage is caused to a person as a result of the *use of a motor vehicle*", and thereafter defines what would constitute use of a motor vehicle). On the main point, my colleague acknowledges that the state may defend itself against boycotts, but bodies, institutions and people stand behind the state. According to my colleague's approach, a call to boycott a particular bank because it has a branch in the Area, or a call to boycott an Israeli university because of a scientific experiment it conducted in the Area, or because its academic staff did not adequately express solidarity with universities in the Area, would not fall within the scope of the tort. Such a result would eviscerate the tort.

For this reason, and despite the weighty reasons raised by my colleagues Justice Danziger and Justice Vogelman, at the end of the day I have chosen to prefer the approach of my colleague Justice Melcer, rather than the effective nullification of the loaded words "an area under its control".

Summary and Conclusion

49. The Law serves a proper purpose, although there is no denying that it causes "collateral damage" in restricting and chilling one of the tools in the democratic arsenal in an area at the core of Israeli political debate.

At the bottom line, I find that the Law can pass the proportionality filter – even if not easily – *inter alia*, for the following reasons:

(-) The Law does not prohibit the expression of an opinion concerning the state or the Area, and does not prohibit participating in a boycott, but only prohibits a public call for a boycott, which is an act in the interstice between expression and conduct.

(-) While calling for a boycott is one of the tools in democracy's toolbox, it is a coercive tool, and as such, it does not enjoy the full protection afforded to freedom of expression.

(-) A call for a boycott does not meet or correspond with most of the reasons grounding freedom of expression.

(-) A call for a boycott infringes the constitutional rights of the objects of the secondary boycott, and inflicts direct harm upon them.

(-) The narrow construction given to the civil wrong in sec. 2 of the Law, including the demand for a causal connection and damage, together with the annulment of sec. 2(c) of the Law.

(-) Lastly, taking a comprehensive overview: The United States has legislation prohibiting or restricting a boycott of Israel. The European courts, including the Court for Human Rights, are willing to recognize that calling for a boycott of Israel constitutes a criminal offense, such that Israel, all the more so, may decide that a call by its own residents and citizens for a boycott against their own state and country of origin is a civil wrong.

Justice U. Vogelman:

I have read the comprehensive opinions of my colleagues, and in my opinion, the appropriate constitutional relief should be a declaration annulling sec. 2(c) of the Law, as well as the erasure of the phrase "or an area under its control" in sec, 1 of the Boycott Law (in the spirit of the proposal of my colleague Justice Y. Danziger). In addition, in my opinion, upholding the Law requires that it be construed as applying solely to such cases in which the *only reason* for the call for "deliberately refraining from economic, cultural or academic ties with another person or body" is its *connection* to the State of Israel or one of its institutions. These are the reasons grounding my conclusion.

1. The Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011 (hereinafter: the Law or the Boycott Law) establishes three arrangements that, each in its own way, infringe constitutional rights, primarily the right to freedom of expression. The first – a civil wrong that would apply to "anyone who knowingly publishes a public call for a boycott against the State of Israel" (sec. 2 of the Law); the second – restricting the participation in a public tender "of anyone who knowingly published a public call for a boycott against the State of Israel, or who committed to participate in such a boycott" (sec. 3 of the Law); the third – provisions denying various benefits from the state treasury to "someone who knowingly published a public call for a boycott against the State of Israel or committed to participate in a boycott" (sec. 4 of the Law). The question before us is whether these arrangement pass constitutional review. In

view of the reasons addressed by my colleague Justice Danziger (para. 49 of his opinion), I, too, am of the view that the Petitions are ripe for decision.

2. As we know, every expression is protected in the framework of the constitutional right to freedom of expression (see, for example, HCJ 4804/94 *Station Film Co. Ltd. v. Film Review Board*, IsrSC 50 (5) 661 (1997) [English trans: http://versa.cardozo.yu.edu/opinions/station-film-co-v-film-review-board]; HCJ 316/03 *Bakri v. Israel Film Council*, IsrSC 58 (1) 249, 270 (2003) [English: http://versa.cardozo.yu.edu/opinions/bakri-v-israel-film-council]; CA 9462/04 *Mordov v. Yediot Aharonot Ltd.*, IsrSC 60 (4) 13, 26 (2005), but we have a deeply entrenched rule that political expression enjoys particularly broad constitutional protection, as such expression enables the very existence of political debate, and is an indispensable condition of democracy (HCJ 869/92 *Zvili v. Chairman of the Central Elections Committee*, IsrSC 46 (2) 692, 703 (1992); HCJ 6226/01 *Indor v. Mayor of Jerusalem*, IsrSC 57 (2) 167, 164 (2003); HCJ 10203/03 *Hamifkad Haleumi Ltd. v. Attorney General*, IsrSC 62 (4) 715, 761 (2008) [English: http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general]. Among the forms of expression that fall within the scope of the Boycott Law are expressions concerning calling for a boycott of the Judea and Samaria area (hereinafter: the Area). Calling for a boycott of the Area is pure political expression. My colleague Justice Y. Danziger addressed at some length the fact that the subject of Israel's belligerent occupation of the Area has been the subject of political debate among various sectors of the Israeli public for decades. Indeed, the question of the Area's future and the status of its residents has been defined as "the cardinal question of Israeli public debate", that has disrupted the system of internal alliances and understandings that existed on issues of state, society and economy, and has led "to the creation of a party system whose primary variable for defining the left-right continuum, and for the creation of political alliances is the moral stand on the question of the future of the administered territories" Menachem Hofnung, *Israel - Security Needs vs. the Rule of Law*, 282-283, 2nd ed. (1991) (Hebrew)).

3. This debate, in and of itself, does not arouse a constitutional problem. The constitutional problem is in the Law (see and compare: HCJ 1661/05 *Hof Azza Regional Council v. The Knesset*, IsrSC 59 (2) 481, 543 (2005)). The Law infringes freedom of political expression. The Law may silence political expression concerning the Area. The very enactment of the Law places a dilemma before a person seeking to express himself: if he should choose as he wishes, he will

be exposed to the sanctions provided by the Law. If he refrains from expressing his opinions due to the "chilling effect", the Law will do its job, and expression will be prevented. What is the appropriate scope of protection in this regard? My colleague Justice Melcer is of the opinion that because calls for a boycott of the State of Israel, as defined by the Law, "are not actually interested in political decisions on the basis of free will, but seek *to impose views*", "the protection granted to freedom of expression can be somewhat restricted" (paras. 30 and 30(A) of his opinion, emphasis original, and see para 6 of the opinion of my colleague Deputy President Rubinstein). I do not concur with that view. Indeed, a boycott can apply pressure, and such pressure may lead the person boycotted to change his position. But applying pressure is not the same as coercion. Repeated demonstrations in front of a person's office can also pressure him to do something. Would we therefore argue that a demonstration is "coercive expression"? After all, the boycotted person (or one who is the object of a demonstration) can stick to his position and refuse to change his conduct. No one prevents him from doing so. In any case, as my colleague Justice Danziger notes, a call for a boycott is consistent with the purposes of freedom of expression (para. 7 of his opinion). Freedom of expression is not meant to protect only accepted views. Its primary importance is precisely in defending the ability to express and hear opinions that deviate from the social consensus and that grate on the public ear (HCJ 6126/94 *Szenes v. Broadcasting Authority*, IsrSC 53 (3) 817, 838-839 (1999) [English: http://versa.cardozo.yu.edu/opinions/szenes-v-matar]. As we pointed out in another affair: "We must again reiterate and again recall that the primary purpose of freedom of expression is to guarantee protection particularly for extreme expression that gives rise to dispute and even disgust. Pleasantries that are pleasing to the ear, pleasurable to watch and easy to digest do not require the protection of freedom of expression" (LCA 10520/03 *Ben Gvir v. Dankner*, (published in Nevo) para 33 (Nov. 12, 2006); CA 4534/02 *Schocken Chain Ltd. v. Herzikowitz*, IsrSC 58 (3) 558, 573 (2004)). As the power of the interest, so the power of the defense (see and compare: AAA 3782/12 *Tel Aviv-Jaffa District Police Commander v. Israel Internet Association*, (published in Nevo) para. 10 of my opinion (March 24, 2013) [English: http://versa.cardozo.yu.edu/opinions/tel-aviv-jaffa-district-commander-v-israel-internet-association]).

4. Do the provisions of the Boycott Law infringe freedom of expression? The Boycott Law does not prohibit calling for a boycott of the Area in the sense that such a call would constitute a

criminal offense. Nevertheless, the Law establishes economic sanctions that can be imposed upon a person making such a call. The infringement of freedom of expression is thus carried out by *placing a burden* upon the possibility for expression, inasmuch as a person may be liable in tort for his call, and he may even risk not being able to participate in a public tender or being denied various benefits granted by the state. Each of the responses established by the Law imposes a significant burden upon anyone seeking to realize his right to expression. A person who chooses to continue to call for a boycott of the Area risks economic harm and the loss of possible employment through winning a public tender published by the authorities. These are significant consequences:

> Such a result has the effect of "shutting mouths" that has no place in a democratic regime, as what is the message of such silencing? The very knowledge that expressing an unpopular opinion may eventually have consequences in an area that is professionally related, even in regard to the awarding of a prize, is inconsistent with a culture of freedom of expression in a democratic regime [HCJ 2454/08 *Legal Forum for the Land of Israel v. Minister of Education*, (published in Nevo) para. 10 (April 17, 2008)].

5. Freedom of expression is not only infringed by the expected reaction to a case of calling for a boycott (both by another individual who may sue the person calling for a boycott, and by the state). The very fact that the legislature chose to create specific arrangements in regard to the said expression gives rise to an infringement of freedom of expression. A legislative act has a known declarative effect. Laws are intended to direct behavior. Most law-abiding citizens will choose to act in a manner consistent with the law's provisions (compare the significance attached to the repeal of the Penal Law's prohibition upon homosexual acts, despite the preexisting policy not to enforce it: Yifat Bitton, "The Effect of Basic-Law: Human Dignity and Liberty on the Legal Rights of Homosexual Couples," 2 *Kiryat Hamishpat L. Rev*. 401, 403-404 (2001) (Hebrew)).

6. My colleagues discussed at length the purposes that the right to freedom of expression is intended to realize, and there is no need to repeat that discussion. For our purposes, I would only emphasize that the restrictions that the Law imposes upon a call for a boycott of the Area infringe each of those purposes. As for the purpose of *uncovering the truth*, the Law's

restrictions prevent public debate, and do not allow for fair competition among differing ideological views. A person seeking to boycott can not display his "wares" in the marketplace of ideas, and others cannot be exposed to his position, or reinforce or change their own position through discourse. Mill addressed this as follows:

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race […] those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they [those who oppose the opinion – U.V.] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (John Stuart Mill, *On Liberty*, chap. 2; and see: HCJ 399/85 *Kahane v. Managing Board of the Israeli Broadcasting Authority*, IsrSC 41 (3) 255, 273 (1987)).

7. Along with that, restricting political expression, and in the matter before us – indirectly – the act of boycotting the Area, which is a non-violent response to a particular policy, also infringes the *democratic process*. My colleague Justice Danziger correctly pointed out: "The exchange of opinions and ideas in the free marketplace of speech is a condition of the possibility of changing the government. It is vital to preventing tyranny of the majority" (para. 4 of his opinion). Moreover, the Law does not, indeed, prohibit the act of boycotting itself. A person may continue to express his political dissent. However, the Law harms the possibility of a person disseminating his views and making them heard by others (who may be persuaded that their views are mistaken), as well as the possibility for others to respond and decide how they wish to act. The Law chills expression. Freedom of expression is also an essential part of an individual's right – the listener as well as the speaker – to realize his *autonomy*. That is a person's ability to tell the story of his life, to state opinions, and express his worldview. That autonomy is part of the human dignity enjoyed by all, and is a condition for spiritual and intellectual development (see and compare: HCJ 8425/13 *Eitan – Israeli Immigration Policy Center v. Government of Israel*, (published in Nevo), para. 121 (Sept. 22, 2014) [English: http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184]).

8. In light of all the above, I concur with the conclusion of my colleague Justice Y. Danziger – for his own reasons – that in all that concerns expressions related to the Area, the

infringement of expression does not meet the tests of the Limitation Clause. My colleague is of the opinion that this problem can be resolved through interpretation. He proposes that we read the law such that "Only a boycott against an 'institution' or 'area' that is part of a boycott against the State of Israel and derives from the connection of the institution or area to the State of Israel will fall within the compass of the Boycott Law. As opposed to this, a boycott of an institution or area that is not part of a boycott against the State of Israel will not fall within the scope of the Law's definition" (para 46 of his opinion). Indeed, as a rule, a construction that upholds the law should be preferred to annulling it. "[…] the law still expresses the intent of the sovereign, which is the people, and therefore it is the law that goes before the camp, of which the Court is also a part" HCJ 7111/95 *Center for Local Government v. The Knesset*, IsrSC 50(3) 485, 496 (1996)). However, in the absence of an appropriate linguistic foothold, the appropriate relief, in my view, is the erasure of the phrase "or an area under its control" from the Boycott Law, in a manner that would separate the invalid part of the Law from the healthy, valid one (see and compare: HCJ 9098/01 *Ganis v. Ministry of Building and Housing*, IsrSC 59 (4) 241, 267-268 (2004) [English trans: http://versa.cardozo.yu.edu/opinions/ganis-v-ministry-building-and-housing]).

9. We are, therefore, left with the question of the constitutionality of a call for a boycott against the State of Israel or one of its institutions. Would it be constitutional that such a call give rise to a civil wrong, and prevent participation in a public tender and a restriction upon receiving state subsidies?

10. In my opinion, an interpretive path can be found that would preserve the validity of the Law (which, of course, is preferable to striking it down). Before addressing that proposed interpretive path, I would like to clarify one matter. My colleague Justice Melcer noted: "Boycott shares characteristics of unlawful discrimination" (para. 33(A) of his opinion). I only agree with that statement in part. Not every boycott comprises characteristics similar to unlawful discrimination. I will demonstrate this with an example: In one type of boycott, A wishes to boycott B because he is a member of a minority. In another type of boycott, A wishes to boycott B, who is a member of a minority, because B does not pay his employees fair wages. Do both types of boycott comprise characteristics similar to unlawful discrimination? The answer is no. A boycott of the first type is like that form of "generic" discrimination that is at the "hard core" of discrimination, which derives solely from a characteristic of a person's identity (for example, his

religion, ethnicity or gender). Such discrimination has been described as "mortally wounding human dignity" (HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Welfare* [1998] IsrSC 52(3) 630, 658-659 (1998); AAA 343/09 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality*, IsrSC 64 (2) 1, 41-41 (2010) [English: http://versa.cardozo.yu.edu/opinions/jerusalem-open-house-gay-pride-v-jerusalem-municipality]). The prohibition of such discrimination is anchored in various areas of law (see, for example, sec. 1A(a) of the Equal Rights for Women Law, 5711-1951; sec. 2(a) of the Equal Opportunity in Employment Law, 5748-1988; sec. 3(a) of the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000; and see: Aharon Barak, *Human Dignity: The Constitutional Value and its Daughter Rights*, vol. 2, 685-688 (2014)). As opposed to that, a boycott of the second type does not express unlawful discrimination. It expresses a critical view of B's conduct, rather than of B himself.

11. In my opinion, an interpretation that would preserve the validity of the Boycott Law would lead to the conclusion that the Law applies only to boycotts of the first type, *viz*., boycotts directed against the State of Israel or one of its institutions *as such*. I shall explain. Section 1 of the Boycott Law, the "definition" section of the Law (worded in accordance with the constitutional approach that I propose), would read as follows:

> Definition:
>
> 1. In this law, "a boycott against the State of Israel" means – deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, [or] one of its institutions, such that it may cause economic, cultural or academic harm.

12. What, then, is a boycott according to this section? A boycott under this section is the refraining from (or termination of) one of the relationships listed in the Law (economic, cultural or academic ties) with someone for *one reason alone*: due to its connection to the State of Israel or one of its institutions. The emphasis in this regard is one the word "solely" in the definition: "refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, [or] one of its institutions, such that it may cause economic, cultural or academic harm". What does "solely" normally mean? It means "for this, and only for this". If a person does not buy merchandise "solely" because of its price, that means

that if its price were different, he would buy it; if a person does not wear an item of clothing "solely" because of its color, it means that were its color different, he would wear it, etc. Adding the word "solely" removes from the Law's incidence a person who intentionally calls for refraining from the connections listed in the law for "mixed reasons": *both* due to the connection to the state *and* for other reasons – for example, the policy of the State of Israel in regard to some other matter.

13. This is an important distinction. Whereas "mixed" expression expresses a critical view of the state's *policy* (or one of its institutions) in a particular area, the other form of expression (that is "solely" due to the connection of one of these) is criticism regarding the *very existence* of the State of Israel (or one of its institutions). For example, a person declares: "Do not buy 'made in Israel' products. Israel's policy in the Judea and Samaria area is wrong". What would that person do if Israel were to change its policy in the Area? He would no longer call for avoiding Israeli products. In other words, that person does not seek to boycott the State of Israel as such. If Israel's control of the Area were brought to an end, that person would no longer call for a boycott. When the caller does not call for a boycott due to the connection to the State of Israel (or one of its institutions *per se*, but calls for a boycott, for example, due to the policy of the authorities in regard to the Area, the caller is not calling for a boycott "solely" due to the connection to the State of Israel or one of its institutions, but rather expresses a critical view of the state's conduct. His conduct does not, therefore, fall within the purview of the Law. As opposed to this, if a person were to call for a boycott of a body or person solely due to the connection to Israel – for example, if a person were to call for a boycott of Israeli businesses because they are Israeli businesses, and for that reason alone, such that some change in circumstance, whether political or otherwise, would not change his position – that call, which is essentially similar to a discriminatory call, would fall within the scope of the Boycott Law. It would seem that that was what my colleague Justice Danziger intended in saying that the practical result of his proposed interpretation of the Law is "the application of the Boycott Law only to calls for a boycott against the State of Israel *in its entirety or as such*" (emphasis added – U.V.). I would add that this position is consistent with the manner in which the Law's purpose was presented by the Knesset. The Knesset emphasized that "combatting discrimination directed at a citizen of Israel as such, is a proper purpose", and explained that this purpose is consistent with the various provisions regarding the prohibition of discrimination in Israeli legislation.

14. I would emphasize: My colleagues Deputy President E. Rubinstein and Justice I. Amit also stressed the importance of the word "solely" in interpreting the Law. However, there would seem to be a difference in our interpretive approaches. My colleagues presented examples of boycotts for reasons that are not "the connection to the Area". My colleague Deputy President E. Rubinstein addressed a case of "a call to boycott a factory operating improperly towards the local population (referring to a factory operating in the Area; para. 10 of his opinion). My colleague Justice I. Amit explained that "if the reason for the boycott derives from environmental harm or animal experimentation, the boycott would not fall within the scope of the definition" (para. 48 of his opinion). While it is clear that those examples would not fall within the scope of the Boycott Law, in my view, they do not exhaust the situations that should be removed from the purview of the Law. As earlier stated, in my opinion, even when the call for a boycott is a "mixed" critical call, the Law should not apply.

15. Having arrived at the interpretive conclusion that the Law "catches" only expression that is essentially very similar to *discriminatory* statements, and subject to the change proposed in regard to sec. 1 of the Law, it cannot be said that this Law, by which the state seeks to contend with such forms of expression by creating a civil wrong (sec. 2 of the Law) or by means of the distribution of its resources (secs. 3 and 4 of the Law) does not meet the requirements of the Limitation Clause (also see paras. 36-37, 46 of the opinion of my colleague Justice Y. Danziger, which point out that the restrictions established there are an expression of "defensive democracy"). I would add that this conclusion also derives from the fact that I concur with the opinion of my colleague Justice H. Melcer in regard to the application of the Civil Wrongs Ordinance to the boycott tort and the interpretation he proposes for sec. 2 of the Law, and therefore, for the reasons addressed by my colleague, I am of the opinion that there is no alternative to striking down sec. 2(c) of the Law.

In conclusion, subject to the annulling of sec. 2(c) of the Law and the erasure of the phrase "or an area under its control", and subject to the interpretation according to which the Boycott Law would apply only when the *sole reason* for the call for "deliberately refraining from economic, cultural or academic ties with another person or body" is its connection to the State of Israel or one of its institutions, I find no reason to fully annul the Law that is the subject of this case.

President M. Naor:

1. I share the view of my colleague Justice H. Melcer and of my colleagues who concurred in his opinion. That being the case, my comments will be brief.

2. Freedom of political expression enjoys enhanced protection. My colleagues have already addressed this, and there is no need for me to elaborate. Indeed, every person in Israel can express his views in regard to what is referred to by the Law as "an area under its [the state's] control". Every person can publically call for a withdrawal from what he views as "occupied territories", while others may call for the extension of Israeli law, jurisdiction and administration over the entire area of "Judea and Samaria". Both, and all the hues between them, are views that one may express without fear in a democratic state.

3. Although a call for a boycott also falls within the scope of freedom of political expression, it is a special type of expression. Our colleague Justice Y. Danziger described it well in this case, in saying: "Calling for a boycott is not merely the expression of an opinion. Calling for a boycott is a call to action (or, more precisely, to refrain from performing an action) – the imposition of a boycott. The boycott action harms the objects of the boycott. That harm may not be worthy of the protection of freedom of expression. Thus, clearly, a call for a boycott that would prevent the provision of products or services to publics on the basis of race or for racist motives would be deemed wrong" (para. 38 of his opinion). At the same time, under certain circumstances, a call for a boycott may be deemed a non-violent means of protest, intended to encourage others to take action that the law does not prohibit. Clearly, freedom of expression does not merely comprise the possibility of stating an opinion or providing information, but also allows taking such actions as demonstrating and striking, and permits a person to harness others to such actions.

4. In light of the above, the Boycott Law does, indeed, infringe freedom of political expression. However, even the freedom of political expression may be infringed if the conditions of the Limitation Clause, by which constitutional review is conducted, are met. As my colleague Justice Melcer noted, we are not called upon to examine the wisdom of a law in the course of judicial review, but only its constitutionality. It would appear that many of my colleagues do not

dispute that the *state* may adopt *proportionate* measures to prevent harm to *itself* by a call to boycott. The State of Israel finds itself defending itself against boycotts in the international arena, and its attempts to defend against the various harms that may be caused as a result is a proper purpose. At the bottom line, our disagreement concerns the proportionality of the provisions of the Law under review in the petitions before us. I will return to this disagreement further on. In my opinion, there is no reason to intervene in the legislature's decision not to distinguish between a call for a boycott of the state and a call for a boycott due to a connection to an area under the state's control. We should bear in mind that the prohibition in regard to the Area applies *solely* to a call for a boycott due to the connection to an area under the state's control. A classic example of this is a call to boycott the products of an industrial enterprise for the sole reason that it is located in the Area. Such a call may lead to the imposition of the Law's sanctions. As opposed to that, if, for example, a factory located in an area under the state's control were to discriminate between Jews and Arabs, and the call for a boycott was premised upon *that*, it would not incur the imposition of the Law's sanctions. In my opinion, that would also be the case if the factory were located in an illegal settlement of the type that has been or that must be evacuated in accordance with the decisions of this Court due to its location on the private land of Palestinian residents. In my opinion, calling for a boycott of such a factory because the settlement was built illegally *would not* lead to the imposition of the Law's sanctions. That would not be a call for a boycott due to a connection to the Area, but rather due to unlawful conduct. However, a call for a boycott solely due to a factory having a connection with an area under state control falls within the scope of "a boycott against the State of Israel", as defined by the Law.

In my opinion, as noted, there are no grounds for intervening in the legislature's decision not to distinguish between a connection to the Area and a connection to the state. Ultimately, the calls for a boycott of the state are often tied and linked to the matter of the state's connection to an area under its control. The close relationship between a boycott of the state and a boycott of the area held by it is attested to by the approach of most of the Petitioners, who made it clear that they insist upon the repeal of the sanctions for a call for a boycott of the state. I also believe that the analogy made by my colleague Deputy President E. Rubinstein to our non-intervention in the question of the disengagement from the Gaza Strip (HCJ 1661/05 *Hof Azza Regional Council v. The Knesset*, IsrSC 59 (2) 481(2005)) is apt. The views of the Israeli public on the relationship

between the state and the Area are not merely those of extremes. There is broad spectrum of views among the public. There are those who, apparently like the Petitioners, are of the view that the state should leave the Area, while others are of the view that the Area should be made an indivisible part of the state, while others would say that they would like to hold on to the Area, but that it is not possible, and still others would say that the state should wait and continue to hold the Area as a bargaining chip in the framework of a political settlement. In my opinion, we should stay out of that political debate in all that relates to the Area, while recognizing that in the margin of discretion granted to the legislature, there are no grounds for the Court to prevent it from defending against a boycott not only of the state itself, but also of enterprises and institutions erected in the rea with the consent of the state, and at times, with its encouragement, as part of the Government's overall policy, and that of the Governments that preceded it. The law-abiding residents of the Area are entitled to the state's defense of their property and income.

5. As for the question of proportionality, I fully concur with my colleagues who found that secs. 3 and 4 of the Law establish a proportionate arrangement, while making it clear that it will be possible to attack the arrangements that will be made, if they be made, under those sections. As for sec. 2(c), like my colleagues, I am of the opinion that the section does not meet the proportionality tests. I deliberated in regard to the other provisions of sec. 2 of the Law, primarily concerning the question raised by my colleague Justice N. Hendel on the matter of leaving enforcement in the hands of individuals rather than the state. However, the construction of the section proposed by my colleague Justice H. Melcer limits its scope to the necessary minimum, and it is better to interpret it as he does than to annul it.

6. I therefore concur in the opinion of Justice H. Melcer and those who joined him.

President (Emeritus) A. Grunis:

1. I have read the various opinions of my colleagues. The opinions reflect a broad spectrum of views concerning the constitutionality of the Prevention of Harm to the State of Israel by means of Boycott Law, 5771-2011 (hereinafter: the Law). My opinion on the matter is like that of my colleague Justice H. Melcer, who presented his view in thorough detail. I will, therefore, only add brief observations.

2. A point that I believe should be emphasized, and which justifies striking down sec. 2(c) of the Law alone, concerns the effect of a boycott. Indeed, "the boycott silences the discourse" (Amnon Rubinstein& Isaac Pasha, *Academic Flaws: Freedom and Responsibility in Israeli Higher Education* 118 (2014) (Hebrew)). The fear of a "boycott against the State of Israel" (as defined in sec. 1 of the Law) may result in reducing the discourse on the future disposition of the Judea and Samaria area. While a call for a boycott, including, of course, a public call, falls within the scope of freedom of expression, the fear of the harm inflicted by the boycott may, itself, harm freedom of expression. A person who holds a view that differs from that of one calling for a boycott may fear that if he makes his views on the political debate known, he may find himself or his business boycotted. In other words, the view of my dissenting colleagues leads to a paradoxical situation: the freedom of expression of the person calling for a boycott may infringe the freedom of expression of a person holding a different view. In other words, freedom of expression may become a means for silencing the other. For this reason, as well, secs. 2(a) and 2(b) of the Law pass the constitutional tests, even if just barely, at this stage, prior to the implementation of the Law and in the absence of concrete facts.

3. However, and due to the fear of infringing freedom of expression, if and when a tort action is brought on the basis of sec. 2(a) of the Law, or if another proceeding is instituted in regard to the implementation of the Law, it may be expected that, against the background of the factual background of a concrete case, the Court may construe the Law very narrowly. This, in order to mitigate any possible violation of the right to freedom of expression of a person claimed to have made a public call for a boycott against Israel.

4. As stated, I concur in the opinion of my colleague Justice H. Melcer.

Justice S. Joubran:

1. The law before us, the Prevention of Harm to the State of Israel by means of Boycott Law, 5771-2011 (hereinafter: the Law), raises a number of complex legal issues. My colleagues discussed these issues in broad detail, including various references to the history of the institution of boycotts in general, and the legislative history of boycott law in particular, drawing upon far-reaching comparisons, and examining the principles of tort law. My colleagues did so

while separately evaluating the civil wrong under sec. 2 of the Law and the administrative sanctions established under secs. 3 and 4 of the Law. At the end of day, the opinions of my colleagues present a number of approaches: President (Emeritus) A. Grunis, President M. Naor, and Justices E. Rubinstein, H. Melcer and I. Amit are of the opinion that only sec. 2(c) should be struck down, and that the Law's remaining provisions should be upheld, while for the present, the question of the constitutionality of secs. 3 and 4 should await the submission of specific petitions against them. My colleague Justice N. Hendel is of the opinion that sec. 2 should be annulled in its entirety, but concurs in upholding secs. 3 and 4 of the Law for the present. My colleague Justice Y. Danziger is of the opinion that sec. 2(c) should be annulled, and that the infringement of freedom of political expression can be mitigated by means of interpretation in regard to a call for a boycott of a person due to his connection to an area under the control of the state. And lastly, my colleague Justice U. Vogelman concurs with the spirit of Justice Y. Danziger's interpretation, but is of the opinion that we should make recourse to the "blue pencil" rule in this regard, and accordingly strike out the phrase "an area under its control" in sec. 1 of the Law. According to his approach, as well, sec. 2(c) of the Law must be annulled, and secs. 3 and 4 upheld. For my part, I would note that my opinion is as that of my colleagues Justices Y. Danziger and U. Vogelman in all that relates to a call for a boycott against a person or other entity by reason of its connection to the Area under the control of the state, as I shall explain.

2. Like my colleagues, I, too, am of the opinion that sec. 2(c) of the Law must be annulled. Moreover, like my colleagues Justices Y. Danziger and U. Vogelman, I am of the opinion that a distinction must be drawn between a call for a boycott of a person due to his connection to the State of Israel and a call for a boycott of a person due to his connection to an area under the state's control. In my view, the approach that should be adopted is that of my colleague Justice Y. Danziger in regard to the expressions related to the connection to "an area under its control". As my colleague noted, the relationship between the "State of Israel" and the institutions and areas mentioned in the definition in sec. 1 of the Law is one of belonging. The requirement of belonging must relevantly connect the boycott of the state to the boycott of the institution or the Area. Therefore, only a boycott of an institution or of an area because of a boycott of the state in its entirety should fall within the scope of this definition. The practical outcome of this distinction is the application of the Law solely to calls for a boycott of the State of Israel in its entirety and as such (and see, in depth, paras. 45-47 of the opinion of my colleague Justice Y.

Danziger). As opposed to this, my colleague Justice U. Vogelman chose to strike out the phrase "an area under its control" from the language of the Law, rather than preferring an interpretive path.

3. As for the administrative sanctions established under secs. 3 and 4 of the Law, like my colleagues, I, too, am of the opinion that they meet the conditions of the Limitation Clause, and that at this stage – before the Minister of Finance has exercised his authority to implement the provisions of the Law – there are no grounds for their annulment.

4. Therefore, in my opinion, sec. 2(c) of the Law should be struck down, and sec. 1 should be construed in the spirit of the interpretation proposed by my colleague Justice Y. Danziger in regard to areas under the control of the State.

The Court therefore unanimously holds that section 2(c) of the Prevention of Harm to the State of Israel by means of Boycott Law, 5771-2011, be annulled, and to deny the petitions in all that regards sections 3 and 4 of the Law. In addition, by a majority decision of President (Emeritus) A. Grunis, President M. Naor, Deputy President E. Rubinstein, and Justices H. Melcer and I. Amit, to deny the petitions in regard to sections 2(a) and 2(b) of the Law, contrary to the dissenting opinions of Justices Y. Danziger and S. Joubran and the separate opinion of Justice N. Hendel and the separate opinion of Justice U. Vogelman.

Given this 26th of Nissan 5775 (April 15, 2015).