HCJ 2109/20

HCJ/2135/20

HCJ 2141/20

Petitioner in HCJ 2109/20:		**Shachar Ben Meir, Adv.**
Petitioner in HCJ 2135/20:		**Association for Civil Rights in Israel**
Petitioners in HCJ 2141/20:	1.	**Adalah – Legal Center for Arab Minority Rights in Israel**
	2.	**The Joint List**
Petitioner in HCJ 2187/20		**The Union of Journalists in Israel**
		v.
Respondents in HCJ 2109/20	1.	**Prime Minister**
	2.	**Government of Israel**
	3.	**Israel Security Agency**
	4.	**Israel Police**
	5.	**Ministry of Health**
	6.	**Attorney General**
	7.	**Ministry of Justice Privacy Protection Authority**
	8.	**Knesset**
	9.	**MK Gabi Ashkenazi**
Respondents in HCJ 2141/20:	1.	**Prime Minister**
	2.	**The Government**
	3.	**Israel Security Agency**
	4.	**Israel Police**
	5.	**Ministry of Health**
Respondents in HCJ 2141/20	1.	**Prime Minister**
	2.	**Israel Security Agency**
	3.	**Israel Police**
	4.	**Ministry of Health**

Attorney for the Petitioner in HCJ 2109/20: *Pro se*
Attorneys for the Petitioner in HCJ 2135/20: Dan Yakir, Adv., Gil Gan-Mor, Adv.
Attorney for the Petitioner in HCJ 2141/20: Hassan Jabareen, Adv., Suhad Bishara, Adv.
Attorney for the Petitioners in HCJ 2187/20: Moran Svorai, Adv.
Attorney for Respondents 1-7 in JCJ 2109/20 & Respondents in HCJ 2135/20: Reuven Eidelman, Adv., Shosh Shmueli, Adv.
Attorney for Respondents 8-9 in HCJ 2109/20: Avital Sompolinsky, Adv.

Petitions for order nisi and interim order

Israeli Supreme Court cases cited:

[1] HCJ 2435/20 *Yedidya Loewenthal, Adv. v. Prime Minister*, (April 7, 2020) [https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister]

[2] CA 6455/19 *Yeruhamovich v. Official Receiver*, (Jan. 28, 2020)

[3] HCJ 3267/97 *Rubinstein v. Minister of Defense*, IsrSC 52(5) 481 (1998) [https://versa.cardozo.yu.edu/opinions/rubinstein-v-minister-defense]

[4] HCJ 4491/13 *Academic Center of Law and Business v. Government of Israel*, (July 2, 2014)

[5] HCJ 4374/15 *Movement for Quality Government in Israel v. Prime Minister*, (March 27, 2016) [summary of judgment: https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-prime-minister]

[6] HCJ 5936/97 Oren Lam v. Ben Tzion Dal, Director-General Ministry of Education, Culture and Sport, IsrSC 53(4) 673 (1999) [https://versa.cardozo.yu.edu/opinions/lam-v-dal]

[7] HCJ 7510/19 *Orr-Hacohen v. Prime Minister*, (Jan. 9, 2020)

[8] CrimA 1302/92 *State of Israel v. Nahmias*, IsrSC 49(3) 309 (1995)

[9] CA 439/88 *Registrar of Databases v. Ventura*, IsrSC 48(3) 808 (1994)

[10] LCA 2558/16 *A. v. Claims Officer of the Ministry of Defense*, (Nov. 5, 2017)

[11] AAA 9341/05 *Movement for Freedom of Information v. Government Companies Authority*, (May 19, 2005)

[12] LCA 8954/11 *Doe v. Doe*, IsrSC 66(3) 691 (2014) [https://versa.cardozo.yu.edu/opinions/doe-v-doe]

[13] HCJ 8070/98 *Association for Civil Rights in Israel v. Minister of the Interior*, IsrSC 58(4) 842 (2004)

[14] HCJ 3809/08 *Association for Civil Rights in Israel v. Israel Police*, (May 28, 2012) [https://versa.cardozo.yu.edu/opinions/association-civil-rights-israel-v-israel-police]

[15] HCJ 6298/07 *Ressler v. Knesset*, (Feb. 21, 2012) [https://versa.cardozo.yu.edu/opinions/ressler-v-knesset]

[16] HCJ 10203/03 *Hamifkad Haleumi v. Attorney General*, (Aug. 20, 2008) [https://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general]

[17] HCJ 6051/08 *Rosh Pina Local Council v. Minister of Religious Services*, (May 8, 2012)

[18] HCJ 466/07 *MK Zahava Gal-On v. Attorney General*, (Jan. 11, 2012) [https://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]

[19] HCJ 7040/15 *Hamad v. Military Commander in the West Bank*, (Nov. 12, 2015)

[20] LCrimA 2841/17 *Haifa Chemicals Ltd. v. Haifa Municipality*, (July 27, 2017)

[21] *Nesher Israel Cement Enterprises v. Ministry of Environmental Protection*, (July 23, 2018)

[22] CrimApp 8823/07 *A. v. State of Israel*, IsrSC 63(3) 500 (2010) [https://versa.cardozo.yu.edu/opinions/v-state-israel-0]

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[24] *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972)

[25] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

The Supreme Court sitting as High Court of Justice

Before: President E. Hayut, Deputy President H. Melcer, Justice N. Sohlberg

Judgment

(April 26, 2020)

President E. Hayut:

The joined petitions before us challenge the Government's decision of March 31, 2020 to authorize the Israel Security Agency (hereinafter: ISA), by virtue of sec. 7(b)(6) of the Israel

Security Agency Law, 5762-2002 (hereinafter the ISA Law), with the consent of the Subcommittee for Intelligence and Secret Services of the Knesset Foreign Affairs and Defense Committee, to collect, process and use "technological information" regarding persons who have tested positive for the novel coronavirus (hereinafter: the virus), as well as persons who came into close contact with them (hereinafter: the Enabling Decision). The Journalists Union further asks that the journalists in the State of Israel be exempted from the application of the Enabling Decision, due to the fear of infringement of journalistic privilege and the exposure of sources.

I will already note at the outset that the petitions were also originally directed at an additional Government Decision of March 16, 2020 (which was amended pursuant to remarks by this Court on March 25, 2020), that authorized the Israel Police, by virtue of Emergency Regulations (Location Data), 5780-2020 (hereinafter: the Police Regulations), to supervise the isolation requirement and enforce it upon those required to remain in isolation. This was to be accomplished by authorizing the police to receive location-data samples from the telecommunication companies in order to check whether the address where a person was required to isolate matched the location of that person's cellphone. On March 23, 2020, the Governmental Respondents informed the Court that they intended to enshrine the police authorization in this regard in primary legislation, subsequent to which the Criminal Procedure (Enforcement Authorities – Telecommunication Data) (Temporary Order – Novel Coronavirus) (Receiving Location Data for the Purpose of Supervision of Isolation Orders) Bill, 5780-2020 (hereinafter: the Telecommunications Data Bill) was presented to the Knesset plenum. The Telecommunications Data Bill passed its first reading, but on April 23, 2020, the Respondent informed us that following several debates in the Foreign Affairs and Defense Committee, the Government decided not to present the Bill for second and third readings in the Knesset at this time. The Governmental Respondents further informed us that on April 22, 2020, the Police Regulations will expire, and that the authorities granted thereunder would not be exercised at this time.

Therefore, for the present, the hearing in regard to the Police Regulations, and the interim order requested in that regard by the Petitioners in HCJ 2141/20, has become moot. This judgment will, therefore, focus upon the Enabling Decision in regard to the activity of the ISA.

Factual Background

1. These are days of national and worldwide crisis of dimensions and scope the likes of which we have not known (see: HCJ 2435/20 *Loewenthal v. Prime Minister* [1], para. 1 (hereinafter: the *Loewenthal* case). The coronavirus epidemic that began to spread throughout the world several months ago, and that has cost so many lives in various countries, did not spare the State of Israel. Since the first infected person was discovered here, two months ago, there have been over 15,000 verified cases, and some 200 people have perished from the illness. For about a month, the majority of Israeli citizens have been sequestered in their homes, and the education system is closed. Many economic branches are at a standstill, while others are on the verge of collapse or their activity limited, and the resulting daily economic harm to the marketplace approaches more than a billion shekels. The data of the government agencies shows that there are more than a million unemployed in Israel. Entire cities and towns have been placed under quarantine, and movement between cities has been prohibited for days at a time. The activity of Ben Gurion Airport has been disrupted and almost brought to a standstill. This year, we celebrated Passover with only our nuclear family members who live with us, and the situation in some countries – including countries with advanced, developed health systems – is even worse.

2. In order to contend with the spread of the virus, the Israeli Government adopted a policy of "social distancing", and the isolation of verified patients and those who came into close contact with them. To that end, a number of very exceptional steps were adopted over time, among them, authorizing the ISA to aid in epidemiological investigations through the use of the technological means at its disposal, for the purpose of identifying, as quickly as possible, the route of the movement of anyone who tested positive for the virus during the 14 days prior to the diagnosis, and locating all the people who were in that person's close proximity for more than a quarter of an hour (hereinafter: contacts).

In this regard, we would note that the ISA was originally authorized to perform the said activity by promulgating emergency regulations (hereinafter: the ISA Regulations). The original petitions challenged that decision, focusing upon issues related to the authorities granted to the Government by virtue of a Declaration of a State of Emergency, and the possibility of promulgating emergency regulations for the purpose of contending with a civilian health crisis, like the spread of the coronavirus epidemic. Following the hearing of the original petitions, on

March 19, 2020, an interim order was granted that stated in regard to the ISA Regulations that "if by noon on Tuesday, March 24, 2020, the Knesset does not establish the relevant committees for parliamentary oversight of these regulations, no use may be made of the authorities granted thereunder from that date until the issuance of another decision," and the restricting of the ISA Regulations only to verified patients.

3. Following the swearing-in of the 23rd Knesset, the Arrangements Committee was established on March 24, 2020, along with several temporary Knesset committees, among them the Knesset Foreign Affairs and Defense Committee and the Subcommittee for Intelligence and Secret Services of the Knesset Foreign Affairs and Defense Committee (hereinafter: the Services Committee). That same day, the Government passed Decision no. 4916, according to which the ISA was authorized, by virtue of sec. 7(b)(6) of the ISA Law, to collect and process "technological information" regarding persons who have tested positive during the 14 days prior to their diagnosis, for the purpose of identifying that person's route of movement and identifying the people who were in that person's close proximity during that period, so that the Ministry of Health could instruct them to self-isolate at home.

4. Section 7(b)(6) of the ISA Law permits the Government to authorize the ISA to perform activities in an area that is not among the core areas of its authorized activity under the ISA Law, subject to meeting the conditions set forth under the section, which we will address below, and subject to the consent of the Service Committee. The Government's decision was therefore presented to the Service Committee, which held five debates on the issue, three of which were unprecedented public hearings. In the public hearing on March 26, 2020, conducted as a video-conference – with the participation of representatives of the Knesset and the relevant government agencies, and public representatives, including representatives of some of the Petitioners – questions were raised in regard to the period during which the use of the surveillance authorizations granted to the ISA would be required. The representatives of the Ministry of Health pointed out that the use of these authorizations would be necessary as long as the Government's policy is premised upon home-isolation of those who have come into close contact with people who have tested positive. They added that, in their opinion, in the event of a decision to relax the isolation policy, the use of the ISA for tracking would not become superfluous, but on the contrary – to the extent that restrictions would be eased, the need for the ISA's "contact tracing" would become all

the more necessary. In view of these circumstances, the Ministry of Health stated that it was unable to delimit the timeframe in which the ISA's assistance would be required.

5. On March 29, 2020, the Security Committee held a closed-door session, and the open session continued on March 30, 2020 – this time, only with the participation of members of the Knesset and the Government. The debate addressed four possible paths for authorization of the ISA's use of its technological resources for the purpose of epidemiological investigation: (1) amending the ISA Law in a regular legislative process, and adding the said authority to the law; (2) enacting a separate law designated for that purpose; (3) promulgating emergency regulations by the Government, by virtue of sec. 39 of Basic Law: The Government, similar to the approach adopted prior to the swearing-in of the 23rd Knesset that was the subject of the original petitions; (4) granting Government authorization to the ISA to conduct this activity by virtue of sec. 7(b)(6) of the ISA Law, by means of an enabling decision.

The Committee's legal advisor, Advocate Miri Frenkel-Shor, presented the advantages and disadvantages of each of the alternatives, and recommended adopting the last approach, i.e., that of an enabling decision, which was actually implemented following the swearing-in of the 23rd Knesset.

6. The Service Committee held another meeting, on March 31, 2020, in which it approved Government Decision No. 4950 – i.e., the Enabling Decision – following several changes and amendments made pursuant to comments by the Service Committee. This decision grants the ISA the authority "to receive, collect, and process technological information for the purpose of aiding the Ministry of Health in carrying out an examination in regard to the 14 day period prior to the diagnosis of the patient, for the purpose of identifying location data and routes of movement of the patient and identifying persons who came in close contact with that person, in order to locate those who might have become infected by that person" (sec. 2(a) of the Enabling Decision). At present, the Enabling Decision will remain in force until April 30, 2020, and its definition of "patient" was restricted in accordance with the decision of this Court in the interim order. The term "close contact with a patient" was defined as – contact that is likely to lead to infection in accordance, to the extent possible, with the clinical directives presented by the Ministry of Health in regard, inter alia, to the distance from the patient and the period of exposure, as shall be established in instructions that will be published on the Ministry of Health's website, which will be updated from time to

time, and brough to the attention of the Service Committee. General directives were established in regard to the protection of the information and its processing by the ISA. A provision was added that establishes that while the Enabling Decision is in force, the Minister of Health will periodically examine the need for the continued assistance of the ISA, in view of the restrictions upon activity imposed upon the public, or the availability of alternatives for achieving the purpose of the decision. In addition, a duty to notify the Service Committee was established, requiring that details in regard to the number of patients for whom the Ministry of Health requested the collection of data, the number of persons located by the ISA due to their proximity to a patient, and the steps taken by the Ministry of Health on the basis of the requested data, be presented to the Committee every six days, and to the Attorney General every three days.

7. The mechanism established in the Enabling Decision for permitting assistance from the ISA and for employing its technological means for tracking contacts is as follows: after diagnosing a patient with a positive laboratory test for the virus, the Ministry of Health requests that the ISA track the patient's movement over the course of the 14 days prior to the diagnosis, and identify the people who were in the patient's proximity for more than a quarter of an hour during that period. To that end, the Ministry of Health gives the ISA the patient's name, identification number, cellphone number, and the date of the diagnosis. At that point, the patient is sent a text message informing him that his particulars have been given to the ISA. After processing the necessary information, the ISA informs the Health Ministry of the route of the patient's movement over the 14 days prior to the diagnosis, and details of the relevant contacts. These details include the name of anyone in close contact with the patient, as defined in the Enabling Decision, their identification number, telephone number, date of birth, and the date and place of exposure. At this point, a text message is sent to each of the people whose particulars were transferred to the Ministry of Health as persons who had come into close contact with the diagnosed patient, and they are asked to begin self-isolation at home for 14 days, and to report that on the Ministry of Health's website.

8. In view of this development, we permitted the Petitioners in all the petitions to amend their petitions accordingly. The amended petitions were submitted on April 5, 2020, the responses to them were submitted by April 12, 2020, and the hearing, which was held on April 16, 2020, was broadcasted to the public by livestream. With the consent of the Petitioners, a closed-door, ex parte

hearing was also held in the course of the hearing, and the Respondents agreed that the petitions would be deemed as if an order nisi had been granted.

Arguments of the Parties

9. The Petitioner in HCJ 2109/20, Advocate Shachar Ben Meir, the Petitioner in HCJ 2135/20, The Association for Civil Rights in Israel, the Petitioners in HCJ 2141/20, The Adalah – Legal Center for Arab Minority Rights in Israel and the Joint List Knesset faction (hereinafter: Adalah and the Joint List), and the Petitioner in HCJ 2187/20, The Union of Journalists in Israel (hereinafter: the Journalists Union) (hereinafter jointly: the Petitioners) all argue that authorizing the ISA to address a civilian public-health issue is contrary to the ISA Law, and that the Government's Enabling Decision in this regard was *ultra vires*. According to the Petitioners, the ISA, as the preventive security agency of the State of Israel, is only authorized to conduct security-related tasks, and therefore sec. 7(b)(6) of the ISA Law – which allows the Government, with the consent of the Service Committee, to authorize the ISA to carry out tasks in another area for the purpose of protecting and advancing "other essential national security interests" – should be narrowly construed. According to the Petitioners, this section should be understood as permitting such activity only in regard to security threats in the "narrow" sense. Alternatively, the Petitioners argue that even if sec. 7(b)(6) of the ISA Law be given a broader interpretation, permitting the ISA to act in extra-security areas, that authority should be exercised only in extreme cases, which the current matter is not. Adalah and the Joint List further argue that the Enabling Decision violates fundamental individual rights, and therefore, in substance, it constitutes a primary arrangement. In their view, sec. 7(b)(6) is merely a "basket clause", and therefore such a decision cannot be made in reliance upon it.

10. The Petitioners further argue that the powers granted to the ISA by the Enabling Decision violate individual rights and fundamental principles of the system. Primarily, they argue that the constitutional right to privacy is violated, and Adalah and the Joint List are of the opinion that there is also a no-lesser violation of the constitutional right to dignity. The Petitioners do not dispute that the Enabling Decision was made for a proper purpose that befits the values of the State of Israel as a Jewish and democratic state, nor that there is a rational connection between that purpose the chosen means, but they are of the opinion that there are less harmful means than those

chosen, and that the harm caused by those means exceeds its benefit. In this regard, the Petitioners argue that choosing the ISA to carry out a civilian public-health task fundamentally alters the checks and balances of a democratic society, in which mass surveillance of citizens by the security services should be reserved for specific needs of protecting state security. Therefore, they argue, the task should have been assigned to civilian agencies, like private companies, the Ministry of Health, or at least the Israel Police. The Petitioners further insist that the mechanism established by the Enabling Decision is inconsistent with the applicable norms for the protection of the privacy of databases, particularly in view of the compulsory character of the mechanism and the associated lack of transparency.

11. On its part, the Journalists Union raises arguments concerning the implications of the Enabling Decision for journalists in the State of Israel. According to the Journalists Union, the Enabling Decision infringes freedom of the press and the confidentiality of journalists' sources, as it may create a chilling effect upon sources, who may fear exposure to "location tracing" performed by the government authorities. The Journalists Union stresses the importance of protecting journalistic sources, particularly in these unusual times, and emphasizes that the number of persons holding press credentials in Israel is not great – totaling some 5,000 persons. Therefore, in its view, the danger of excepting that group from the established arrangement is defined and limited. The Journalists Union therefore petitions for excepting journalists from the application of the Enabling Decision, or at least, that special conditions be established for exercising the authorities therein in regard to journalists.

12. As opposed to this, Respondents 1-7 in HCJ 2109/20, which are the relevant governmental organs (hereinafter: the Government Respondents), and Respondents 8-9 in HCJ 2109/20 and HCJ 2135/20 – the Knesset and the Chair of the Service Committee, Knesset Member Gabi Ashkenazi (hereinafter: the Knesset Respondents) (jointly: the Respondents), argue that the phrase "other national interests vital to the national security of the state" in sec. 7(b)(6) of the ISA Law encompasses broader areas than security in the narrow sense, in view of the language and purpose of the section. It is further argued that the epidemic caused by the coronavirus, and the need to confront it and stop its spread, fall within the scope of cases in which the ISA can be empowered by virtue of sec. 7(b)(6) of the ISA Law. The Government Respondents do not deny that that the Enabling Decision infringes the constitutional right to privacy, but they are of the opinion that the

violation is proportionate. The Government Respondents further note that, at the outset, the Ministry of Health conducted individual epidemiological investigations in which each confirmed patient was interviewed, and his movements over the two weeks prior to his isolation were published on the website of the Ministry of Health and the broadcast media. But as the number of confirmed cases in Israel rose, individual interviews became impractical, and the professionals in the Ministry of Health concluded that the use of technological means was required in order to identify the movement of those positively diagnosed as quickly as possible, and in order to locate all the people who were in close proximity of such persons for more than a quarter of an hour during the 14 days prior to the positive diagnosis. To that end, the Ministry first considered employing technologies offered by private companies, but those alternatives were found to be inadequate, and attempts to obtain the assistance of large international companies that have technological means that might be of use did not receive positive replies. Assigning the task to the Israel Police, which would receive the telecommunications data from the telecommunications companies, was also considered, but the relevant professionals found that there was a clear gap between the ability of the Police and that of the ISA in this regard. The Respondents further emphasize that the undeniable infringement of the right to privacy must be viewed against the right to life of the citizens and residents of the State of Israel, and the stability of the Israeli marketplace. According to the Respondents, under these circumstances, the weight of the latter rights and interests exceeds that of the violation of the right to privacy.

13. As for the arguments of the Journalists Union, the Respondents argue that the powers granted under the Enabling Decision do not infringe freedom of the press, as claimed. This is so, inasmuch as if a journalist is positively diagnosed, his personal details will only be provided to the ISA and the Ministry of Health (and only to those granted access to the data in those bodies). The Respondents emphasize that the process of locating and processing the technological information in regard to the patient's contacts is largely automatic. They further point out in this regard that the possibility of excepting journalists and others entitled to privilege was considered, but the importance of saving lives and stopping the chain of transmission is greater than the need to protect privileges.

Examination and Decision

14. The central question before the Court concerns the legality and constitutionality of authorizing the ISA to employ the means at its disposal to assist the Ministry of health in conducting epidemiological investigations by collecting and processing "technological information". Examining this question requires addressing it on three levels: First, in terms of authority – we must examine whether sec. 7(b)(6) of the ISA Law grants the Government the authority to employ the ISA in a purely civilian area that concerns a danger to public health. For that purpose, we must construe the meaning of the phrase "other essential national security interests" in sec. 7 of the ISA Law. Second, if the answer to the first question is positive, then we must further enquire as to the whether it was proper, under the circumstances, to use a Government Decision under sec. 7(b)(6) of the ISA Law for the purpose of empowering the ISA, or whether it would have been preferable to enshrine that authority in primary legislation. Lastly, if the answer to the second question is that it was not necessary to enshrine the authority in primary legislation, then we must consider whether the Enabling Decision is proportionate. That, given the undeniable infringement of human rights resulting from authorizing the ISA to act as stated.

The Issue of Authority – The Normative Framework

15. The ISA Law was enacted in 2002, reflecting the view that the activity of the preventive security service of the State of Israel should be addressed in appropriate primary legislation that would define its authority, establish its subordination to the civil authorities, and the oversight of its activity. For the matter before us, the provisions concerning the purpose of the ISA, detailed in sec. 7(a) of the Law, and its functions, as detailed in sec. 7(b) are of relevance. These sections state as follows:

> 7. (a) The Service is responsible for protecting state security, the democratic regime and its institutions against terrorist threats, terrorism, subversion, espionage, and revealing state secrets, and the Service will also act to protect and advance other essential national security interests of the State, as the Government shall decide, and subject to any law.
>
> (b) For the purpose of subsection (a), the Service shall perform the following tasks:

(1) Frustration and prevention of illegal activity intended to harm state security, the democratic regime or its institutions;

(2) Protecting people, information and places as decided by the Government;

(3) Establish directives in regard to security classification for roles and positions in the civil service and other bodies, as shall be decided by the Government, with the exception of elected officials and judges, and establishing the security compatibility of a person for a classified role or position, including by means of polygraph examination, as shall be established in rules. For the purpose of this section: "Judges" – a person holding judicial authority under Basic Law: The Judiciary, with the exception of candidates for judgeships and a military judge under the Military Justice Law, 5715-1955;

(4) Establishing security procedures for bodies as decided by the Government;

(5) Conducting intelligence research and providing advice and situation evaluations to the Government and other bodies as decided by the Government;

(6) Activity in another area decided upon by the Government, with the consent of the Knesset Secret Services Committee, intended to protect and advance essential national security interests of the State;

(7) Collection and acquisition of information for the protection and advancement of the matters detailed in this section.

The parties to the petitions are divided as to the meaning of the phrase "essential national security interests of the State" that appears twice in sec. 7 of the ISA Law. According to the Petitioners, the ISA Law expresses a sensitive balance between granting very broad powers to the

ISA, on the one hand, and restricting the use of those powers solely for security purposes, on the other hand. The Petitioners argue that coronavirus epidemic – as complex and difficult as it may be – is not among the situations that would justify "crossing the Rubicon" and authorizing the ISA to employ its abilities – that are rooted in preventive security – in order to assist in performing epidemiological research in the framework of a health crisis that does not present a threat to the very existence of the state. As opposed to this, the Respondents are of the opinion that the use of the term "national security" rather than "state security" in sec. 7 of the ISA Law indicates that it is possible to authorize the ISA to carry out missions that are not "security related" in the narrow sense. However, the Respondents agree that expanding the ISA's activity beyond the narrow area of security for which it is responsible is problematic, and must be resorted to only in exceptional cases.

In order to resolve the dispute between the parties as to the proper interpretation of the provisions of sec. 7(b)(6), we must make recourse to our system's accepted rules of interpretation.

Section 7(b)(6) of the ISA Law – The Interpretive Process

16. The interpretive journey begins with the language of the provision we seek to interpret (CA 6455/19 *Yeruhamovich v. Official Receiver* [2], para. 9 (hereinafter: the *Yeruhamovich* case)). Section 7(b)(6) of the ISA Law speaks of "Activity in another area […] intended to protect and advance essential national security interests", and it would appear that the words "national security" are the key words requiring interpretation.

The term "national security", and the aspects comprises, does not have a universally accepted definition (Greg Carne, *Thawing the Big Chill: Reform, Rhetoric and Regression in the Security Intelligence Mandate*, 22 MONASH U. L. REV. 379 (1996) (hereinafter: Carne)). The conceptions of security differ from country to country. They derive from their different characteristic security challenges, and from the differences between the bodies and institutions responsible for security in each state. Even in Israel, the concept of "national security" does not have a comprehensive statutory or case-law definition, and therefore, it is possible that its scope may differ in regard to different matters, in accordance with the context in which it appears.

In the present matter, it may be possible to argue that the language of sec. 7(b)(6) of the ISA Law does not allow for authorizing the Israel Security Agency to engage in matters that are not in the field of security. As opposed to this, the legislature chose to employ two different terms is sec.7 – "national security" and "state security" – and we presume that the legislature did not do so for esthetic purposes, as a mere "linguistic adornment". For interpretive inspiration, the Government Respondents went to great lengths in comparing other laws that employ the term "national security", noting that this term has been broadly construed in various contexts, including aspects of national resilience in the socio-economic sphere. The Government Respondents further pointed to decisions in the field of international law in which the term "national security" was construed as comprising, inter alia, economic crises. Therefore, from a linguistic perspective, we cannot rule out the interpretation suggested by the Respondents, according to which the use of the term "national security", as opposed to "state security", granted the Government – by virtue of the section and the consent of the Security Committee – the authority to extend the activity of the ISA to another area that is not at the core of security activity, to the extent required for the purpose of protecting and advancing "essential national security interests" related to security in the broad sense. We would emphasize that in their arguments, all of the Respondents stress that we are not speaking of any "national interest" in any sphere, but rather the authorization applies only to exceptional cases in which there is an essential need to do so.

17. In terms of the interpretive possibilities that the language "tolerates", we must choose the interpretation that best realizes the normative purpose under examination (see: the *Yeruhamovich* case, para. 9). The subjective purpose of the law can be learned from its legislative history. In this regard, the fact that the Knesset Respondents went to the trouble of presenting the transcripts of the deliberations of the Knesset committees that addressed the enactment of the relevant section of the ISA Law is worthy of note and praise. These transcripts, which were classified until now under sec. 6(b) of the ISA Law and restrictions imposed by the Knesset Rules of Procedure, were appended, with the consent of the parties, as appendices to the Knesset's response thanks to its efforts to permit their release. Although parts of the transcripts were blackened out for reasons of national security, they can serve to show the purpose of sec. 7(b)(6) of the ISA Law, and the serious reflection in its enactment.

18. The Israel Security Agency Bill, 5758-1998 (hereinafter: the Bill) was submitted by the Government in 1998. In that framework, the original language of sec. 7(b)(6) established that one of the tasks of the Service was "activity in another area decided by the Government, with the consent of the Knesset Secret Service Committee, intended to protect and advance *essential interests of the state*". In the course of the deliberations on the Bill, several members of the Subcommittee for the ISA Law expressed the fear of the possibility that the Government might improperly exploit the authority established under sec. 7(b)(6) of the Bill, and significantly expand the powers of the ISA to areas that deviate from the security matters for which it is expressly responsible. Thus, Knesset Member Ze'ev Binyamin Begin noted that the phrase "essential interests of the state" is understood as referring to "market, economic, and perhaps social" interests, and warned that the use of this power for such purposes might violate individual rights in matters that have nothing to do with security (transcript of the meeting of the Subcommittee for the ISA Law of Aug. 24, 1998, pp. 23, 31). Knesset Member Ran Cohen joined in expressing those fears, emphasizing that "the ISA should deal with security matters, and the police should focus on purely civilian matters" (transcript of the meeting of the Subcommittee for the ISA Law of Aug. 26, 1998, p. 10). Professor Mordechai Kremnitzer, who attended one of the sessions, was of the opinion that the ambiguous description of the ISA's tasks, particularly the possibility for significantly expanding them by virtue of sec. 7(b)(6) of the Bill, might lead to the Government employing the ISA for purposes for which it was not created.

19. In view of these comments, the end of sec. 7(b)(6) of the Bill was changed to "essential *national security* interests of the State". Then Deputy Attorney General Meni Mazuz explained that this change was meant to limit the scope of the provision in the original Bill, explaining as follows:

> The term "national security" is somewhat broader than the term "security" in its narrow sense. For example, if an enemy state intends to flood the State of Israel with counterfeit money, that is something that could harm national security, in the sense that the state could collapse. These are matters that are not security in the sense we are used to, of armed security, terror, army (transcript of the meeting of the Subcommittee for the ISA Law of Dec. 30, 2001, p. 33).

The Deputy Attorney General went on to present a number of examples from areas that might be considered "essential national security interests of the State". In this framework, he noted such economic issues as industrial espionage and transnational crime, as well as serious international crimes, and "things that are done around the world in which an organization like the ISA or parallel organizations have a certain professional advantage over the regular police" (*ibid*., p. 40). The ISA Legal Advisor at the time, Advocate Arie Rotter, later explained that the term "essential national security interests", as such, allows for granting authority to the ISA "in a broad manner, beyond security matters" (ARIE ROTTER, THE ISRAEL SECURITY AGENCY LAW – ANATOMY OF A LAW, 75, fn. 202 (2010) (hereinafter: ROTTER) (Hebrew)). Ultimately, on Feb. 11, 2002, the ISA Law was approved by the Knesset plenum, and the language of sec. 7(b)(6) of the Law is the amended language of the Bill that we have just examined.

20. As we see from the legislative history described above, due to reservations expressed by Knesset Members in regard to the significant expansion of ISA authority, the possibility of the Government employing the ISA was restricted only to areas directly related to the national security of the State. In this regard, it would appear that sec. 7(b)(6) of the ISA Law was not intended, as a rule, to expand the role of the ISA to civilian areas. However, from the discussions of the Bill, we learn that it was the legislative intent to include matters that deviate from the narrow meaning of "national security".

21. As for the objective purpose of sec. 7(b)(6) of the ISA Law and its ramifications for the interpretation of the term "national security", an overly broad, ambiguous definition of the expression "national security" in this context might loosen the reins and permit employing the ISA's abilities for missions that have absolutely nothing to do with the purpose of a preventive security organization. As noted, the ISA Law limits the purpose of the ISA, and grants it defined tasks that are meant to enable the State of Israel to contend with the security threats that are part of our daily reality, primarily by means of collecting preventive intelligence, providing personal protection for personages, and other security activities (see: ELI BACHAR, LEGAL ADVICE IN A SECURITY SERVICE, 52 (2013) (Hebrew); ISSER HAREL, SECURITY AND DEMOCRACY, 162 (1989) (Hebrew); for a comparative survey, see Ariel Zimmerman, *The General Security Services Bill – A Comparative Study*, (Israel Democracy Institute, 1997) (Hebrew)). To that end, it was provided with broader tools and means than those given the police, which contends with civilian threats and

maintaining public order (and compare, for example, the powers of the ISA under sec. 11 of the ISA Law with those granted to the police in this regard in the Criminal Procedure (Enforcement Authorities – Telecommunications Data), 5768-20017). This established the balance between the security needs of the State and the foundations of our democratic regime, primary among them, respect for the rights and freedoms of the individual and the principle of the rule of law. Employing the abilities of the ISA in regard to the State's citizens and residents who intend it no harm comprises a threat to the existence of a democratic society that, as a rule, is willing to abide a certain, limited and defined infringement of human rights, and occasionally even of the rule of law, in regard to threats to its continued existence. Expanding the situations in which recourse can be made to the preventive security service thus raises serious fears.

22. For the sake of comparison, in strategic papers published by the United States government over the last few years, the term "national security" comprised such aspects as cyber threats, natural disasters, drug trafficking, shortages of natural resources, and even epidemics (see: Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1577, 1722 (2011) (hereinafter: Donohue)). In regard to the latter, it would appear that the original intention was to epidemics resulting from biological warfare, but the federal government of the United States expanded the definition to epidemics not deriving from warfare (see, in this regard, the government's response to the SARS epidemic in 2003, and to swine flu in 2009: Donohue, p. 1734). However, in view of the inherent ambiguity of the term "national security", the American courts warned against exploiting its use, and expanding it in a manner that would infringe fundamental rights (see, e.g., *United States v. United States Dist. Ct*. [24], 314: "Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent"; and see how the United States Supreme Court addressed the broad and "malleable" use of national security considerations in the framework of the war on terror: *Hamdi v. Rumsfeld* [25], 520). This fear of the expansion of the meanings given to the term "national security" has been expressed over the years, inter alia, in Europe, Australia, and Canada (for an expanded discussion, see: Frank Foley, *The Expansion of Intelligence Agency Mandates: British Counter-terrorism in Comparative Perspective*, 35 REV. INT. STUD. 983, 984-989 (2009); Carne, 381-385, 390-391).

Therefore, there were those who were of the opinion that adding to the tasks of the ISA required the strictest test of protecting and advancing essential national interests for the prevention of an existential threat (see and compare: ROTTER, pp. 17-18). As opposed to this, given the complexity of a changing reality, it is possible to accept the view that in certain, defined circumstances, the term "national security" may encompass a broader range of threats than those that are actually existential.

23. In my opinion, sec. 7(b)(6) of the ISA Law should be construed as a provision that permits the Government to delegate authority to the ISA even in areas that do not concern security in the narrow sense, but the test that should be adopted for the term "national security" in this regard is that of *a severe, imminent danger to the citizens and residents of the State or its regime*". In other words, as we move further from the core of security activity, the Government bears the burden of demonstrating that the situation is indeed one that presents a severe, imminent danger to the citizens of the State of Israel or to the national regime to an extent that requires mobilizing all its forces, among them its security services, in order to meet the challenge. This construction is necessary in view of the linguistic difficulty in interpreting the section, the limitation of its scope of incidence that can be discerned from its legislative history, and the emphasis – in Israel and abroad – upon preventing unchecked expansion of the powers of preventive security agencies.

And note: the severe, imminent danger test that I believe should be adopted in this matter comprises two dimensions – a substantive dimension and a time dimension. The substantive dimension imposes a particularly high threshold of danger to the citizens and residents of the state. This does not necessarily mean an existential threat or a man-made subversive threat, but it is clear that the intention is not to the usual threats to public order that the police and civilian enforcement authorities contend with on a daily basis. As for the time dimension, the immediacy requirement requires that the danger must be such that there is no real, available possibility for developing more appropriate alternatives for confronting it before it is realized. In other words, the expansion of the powers of the ISA by virtue of sec. 7(b)(6) of the ISA Law beyond security matters in the narrow sense is not for an unlimited time period, and it is possible only as long as the immediacy requirement remains, and no other means are available for similarly addressing the severe threat. These strict requirements are necessary in view of the aforementioned fear of authorizing a preventive security service and employing its resources – which are neither transparent nor known,

for understandable reasons – such that they be employed in an area that is not of a security nature in the narrow sense, and against citizens and residents of the state who intend it no harm.

24. In summary, sec. 7(b)(6) of the ISA Law was intended to permit the Government – with the consent of the Security Committee – a certain measure of flexibility in regard to authorizing the ISA to act in circumstances that were unforeseen when the law was enacted. However, the section's language, legislative history, and objective purpose show that the term "national security" in sec. 7(b)(6) is only slightly broader than the term "state security", and in appropriate circumstance it can also comprise severe, imminent threats that do not derive from active subversion against the State and its institutions by some hostile entity. However, in expanding the ISA's activity beyond the core areas of its security mandate in the narrow sense, we are concerned with the very limited expansion applicable to those rare, exceptional cases in which there is a severe, imminent threat to the citizens and residents of the state or its regime, carried out under strict restraint and supervision, and only temporarily.

From the General to the Specific: Is the Coronavirus Epidemic comprised by the Term "National Security"?

25. As we have already noted in various recent decisions, like most countries, we are currently in an emergency situation unlike any we have previously experienced. As Justice I. Amit wrote in regard to another petition addressing the coronavirus epidemic, this situation leads us "from a legal standpoint … through a land not sown [Jeremiah 2:2], to legal and constitutional places and paths not imagined by our predecessors, nor even predicted by prophets of doom" (the *Loewenthal* case [1], para. 1). In the course of his statement to the Knesset Secret Service Committee, the Director General of the Ministry of Health, Mr. Moshe Bar Siman-Tov, referred to the current situation as "an unparalleled situation in modern times" (transcript of the meeting of the Service Committee of March 26, 2020, pp. 4-5). The National Security Council holds overall responsibility for the crisis, and its span of control for that purpose encompasses most government agencies, the Bank of Israel, the Airports Authority, the National Parks Authority, the IDF, the Israel Police, and other security and civilian entities mobilized in support.

26. Under these exceptional, unprecedented circumstances, it would appear that even if we are not concerned with security needs in the narrow sense, the outbreak of the coronavirus crisis meets the conditions of the test for a severe, immediate threat to national security, as construed above. These unique circumstances, regarding which the Ministry of Health explained that "every passing hour is important" (statement of Deputy Attorney General Raz Nizri in the transcript of the meeting of the Service Committee of March 26, 2020, p. 24), required mobilizing the ISA in order to provide a quick, effective response to the significant challenge of preventing the spread of the coronavirus, and permitted authorizing it for that purpose by virtue of sec. 7(b)(6) of the ISA Law.

27. We should emphasize that not every threat to public health can be deemed a severe, imminent danger to the citizens of the state. However, the country's situation following the outbreak of the coronavirus – which presents an exceptional challenge to the health system, and comprises devastating consequences in other areas, first and foremost, the economic security of far too many of the country's families – justifies the finding that the current crisis passes through that narrow gate that permits the rare, exceptional expansion of the ISA's authority by virtue of sec. 7(b)(6) of the Law. The Legal Advisor of the Service Committee aptly summarized this in stating: "It cannot be said that the ISA cannot be assigned this task in the framework of its purpose as established by law, when we are concerned with a serious, exceptional and unprecedented event, and the situation in which the state now finds itself. But this must be done with restraint, with sharp clarification that we are concerned with an exceptionally extreme situation, while emphasizing the fact that this authority is not at the core of the classic role of the Service, and that it cannot serve as a precedent for the future" (transcript of the Service Committee session of March 30, 2020, p. 3).

Authorizing the ISA by means of a Government Decision for contending with the Coronavirus Epidemic

28. The next issue that must be addressed concerns the question whether the path chosen for the purpose of activating the ISA, and employing it for confronting the coronavirus is the appropriate path, or whether that authorization should be given by means of primary legislation. In this regard, Adalah and the Joint List argued that authorizing the ISA to conduct widespread tracking of citizens for civilian purposes contradicts the principle established in the *Rubinstein*

case (HCJ 3267/97 *Rubinstein v. Minister of Defense* [3]) according to which there is an interpretive presumption that the legislature did not intend to authorize the executive branch to establish primary arrangements – i.e., arrangements that enshrine general policy and fundamental criteria in matters that violate basic individual rights or other matters of primary importance (HCJ 4491/13 *Academic Center of Law and Business v. Government of Israel* [4], para. 26, *per* President Grunis (hereinafter: the *Academic Center* case); Yoav Dotan, *Non-Delegation and the Revised Principle of Legality*, 42 MISHPATIM 379, 414 (2012) (Hebrew)) – in the absence of express authorization by the legislature permitting the executive branch to establish a primary arrangement in a particular matter (the *Academic Center* case, para. 26, *per* President Grunis).

29. The Enabling Decision does, indeed, establish a primary arrangement in substance, that permits the ISA to carry out widespread "contact tracing" of the state's citizens and residents in order to protect public health and prevent the spread of the epidemic. This decision infringes basic rights, primary among them the right to privacy – a violation cannot be denied, as will be explained below – and it also expands the involvement of a preventive security service to matters that are civilian in nature. Therefore, the question is whether sec. 7(b)(6) of the ISA Law expressly permits expanding the authorities of the ISA as established in Government Decision No. 4950.

It has been held that the urgency of the arrangement can have implications for the level of explicitness sufficient for delegating authority to the executive to establish primary arrangements (see: HCJ 4374/15 *Movement for Quality Government v. Prime Minister* [5], para. 61, *per* Justice N. Sohlberg). Having found that the outbreak of the crisis met the narrow test for the existence of a severe and *imminent* threat to the state's citizens and residents, and particularly in view of the urgency inherent in activating the arrangement as pointed out by the professional entities in the Ministry of Health, I am of the opinion that at the time the Government decision was made, the authorization granted under sec. 7(b)(6) of the ISA Law was sufficiently explicit, and therefore, the decision is not repugnant to the primary arrangements principle. As noted, as it presently stands, the decision will remain in force until April 30, 2020. Can it be held that the force of the Enabling Decision can be extended again, rather than address the role of the ISA in the coronavirus crisis in primary legislation?

In my opinion, the answer is no.

30. When we are concerned with an arrangement of a temporary character, that was defined as limited in time when it was established, the need to reexamine the process for enshrining that arrangement, and the question of the sufficiency of the authorization upon which it was based, arise every time an extension of its force is sought. In the present matter, the weight that attaches to the urgency of the executive's need to arrange the matter in a Government decision attenuates over time. This is particularly the case inasmuch as several weeks have passed since Decision No. 4950 was made, during which the Knesset could have conducted a substantial debate, and could have properly enshrined the authorization of the ISA in primary legislation. This fact tips the scales toward the conclusion that the authorization by virtue of sec. 7(b)(6) of the ISA Law, which relies upon the ambiguous term "essential national security interests of the State", cannot provide a sufficient basis for so significant an expansion of the ISA's activity over time without the legislature addressing the issue in the framework of primary legislation (see and compare the *Rubinstein* case [3], which held that sec. 36 of the Defense Service [Consolidated Version] Law, 5746-1986, which grants the Minister of Defense authority to exempt a person from military service "for reasons related to the requirements of education, security settlement or the national economy or for family or *other reasons*", could not serve as sufficient authority for granting comprehensive exemptions to yeshiva students "for whom Torah is their calling"). This conclusion is brought into sharper view in the present case in light of the Government's notice in these petitions that it is currently considering the possibility of relying upon sec. 7(b)(6) of the ISA Law for the purpose of a further expansion of the ISA's activities in the framework of confronting the coronavirus epidemic.

31. We would emphasize that the question of the "proper path" for addressing the authorization of the ISA is not a technical matter that can be taken lightly. In a representative democracy, in which the people are the sovereign, "decisions fundamental to citizens' lives must be adopted by the legislative body which the people elected to make these decisions" (the *Rubinstein* case [3], p. 108 [para. 22, *per* President A. Barak]). This basic principle is of particular importance in Israel, where there is an ongoing process of strengthening the executive branch at the expense of the legislative branch (DAPHNE BARAK-EREZ, CITIZEN-SUBJECT-CONSUMER: LAW AND GOVERNMENT IN A CHANGING STATE, pp. 42-43 (2012) (Hebrew)). An additional advantage to conducting a legislative process was well expressed by Justice D. Dorner in HCJ 5936/97 *Lam v. Dal* [6], 864 [para. 9]):

> … generally speaking, the legislative process in the Knesset is more complex, protracted and expensive than the administrative process. Nonetheless, efficiency is not necessarily an advantage where there is a question involving infringement of the freedom of occupation. It is precisely the "cumbersome" nature of primary legislation and the requirement of a majority of the people's representatives in order to pass a statute which provide a kind of institutional guarantee that basic rights will not be violated except where necessary.

An up-to-date example of this can be seen in the developments described at the beginning of this opinion in regard to the legislative steps taken in order to enshrine the authorities that had been granted to the police in emergency regulations promulgated by the Government, which authorized the police to obtain location data from the telecommunications companies of persons required to remain in isolation. The Bill passed a first reading, but pursuant to the opinion of the Knesset Legal Advisor, the Arrangements Committee did not permit holding all three readings that day. In the course of preparing the Bill for a second and third reading, four in-depth meetings were convened by the Foreign Affairs and Defense Committee, which invited experts in the field of privacy protection, public health experts, and civil society organizations. In view of the reservations expressed in the meetings, the Government requested that the Bill not proceed at this time, the Police Regulations elapsed, and the police location-tracing of those required to be in isolation ceased. These developments illustrate the clear advantage of conducting a full legislative process in the Knesset, even at times of emergency, and particularly when a violation of individual rights is concerned.

32. All of the Respondents insisted that primary legislation presents difficulties under the circumstances, primarily because it can permanently enshrine an exceptional authority and thus create a problematic precedent for the future. However, we should bear in mind that primary legislation can also be enacted as a temporary order that is limited in time and suitable for the moment. Thus, in appropriate circumstances, a temporary order – which constitutes primary legislation that is temporary by definition – can provide a proper, appropriate solution, in general, for legislation in a situation characterized by a lack of information and frequent change (see: Ittai Bar-Siman-Tov & Gaya Harari-Heit, *The Proper Time for Temporary Legislation? The Rise of Temporary Legislation in Israel*, 41 IYUNEI MISHPAT 539 (2109) (Hebrew)).

To this we should add the fact that the current Government – the 34th Government – serves as a caretaker government whose powers, in general, are more limited than those of a regular government (HCJ 7510/19 *Orr-Hacohen v. Prime Minister* [7], para. 10). Indeed, the Service Committee of the newly sworn-in Knesset is conducting close, continuous parliamentary oversight – which has even led to the introduction of changes to the ISA's authorities under the Enabling Decision. However, the temporary Service Committee, composed of a small number of Knesset Members, cannot serve as a substitute for 120 elected Knesset members. Moreover, it should be borne in mind that, as a rule, the meetings of the Service Committee are classified. In the present matter, the Services Committee did, in fact, decide that three of five of its meetings on the Enabling Decision would be open to the public, and representatives of the public, academia, and civilian and security bodies were heard. That is praiseworthy, but it is an exception that is not characteristic of the regular work procedures of the Committee.

33. Under the unique, exceptional circumstances that developed, and especially given the timeframe imposed by the rapid spread of the coronavirus, which did not allow for initiating primary legislation in order to address the role of the ISA in the crisis, I am of the opinion that the decision to act under sec. 7(b)(6) of the ISA Law was lawful. However, due to the time dimension, which, as noted, constitutes a significant factor in regard to the possibility of expanding the ISA's activities by virtue of the said sec. 7(b)(6), and in view of the fact that the arrangement established by the Enabling Decision constitutes a primary arrangement in substance, we cannot but conclude that if the ISA's continued involvement is required in order to stop the epidemic even after the force of the Enabling Decision lapses on April 39, 2020, then the Government must take steps to establish the basis for such involvement in primary legislation in order to allow for the participation of Knesset Members from all the factions in the decisions related to this important issue. Such legislation should be provisional in nature, and should be enacted as a temporary order.

34. However, as the attorney for the Knesset Respondents emphasized in the hearing, exhausting the legislative process demands time. Under these circumstances, if the Government continues to be of the opinion that authorizing the ISA for the tasks imposed upon it is still required, the Knesset should be allowed to proceed with the legislation in expedited, but not hasty proceedings that will allow for public comments and appropriate deliberations. Nonetheless, and given the fact that the Enabling Decision will expire on April 30, 2020, I am of the opinion that if

the legislative process will move forward, it will be possible to extend the force of the Enabling Decision for a short additional period, not exceeding a few weeks, for the purpose of completing that process.

Before concluding – On Violating the Right to Privacy

35. Having found that the Enabling Decision can no longer be relied upon for the purpose of providing for the ISA's involvement in the coronavirus crisis after the decision expires, there is no need to examine whether the Enabling Decision meets the proportionality requirement. Nonetheless, inasmuch as the parties argued this point at length, I think it proper to make a few observations in regard to the proportionality of the infringement of the right to privacy caused by the Enabling Decision.

36. Undeniably – and the Respondents all concede this – the Enabling Decision leads to a serious violation of the right to privacy and intimacy. This right, which achieved constitutional status upon the enactment of Basic Law: Human Dignity and Liberty (sec. 7 of the Basic Law), and was enshrined in other legislation even prior to that, most prominently in the Protection of Privacy Law, 5741-1981, and was recognized in case law as one of the most important human rights (see: CrimA 1302/92 *State of Israel v. Nahmias* [8], 353; CA 439/88 *Registrar of Databases v. Ventura* [9] 835). Moreover, on more than one occasion, the case law has stated that the right to privacy "is one of the freedoms that shape the character of the Israeli regime as democratic" (LCA 2558/16 *A. v. Claims Officer of the Ministry of Defense* [10], para 39, *per* Justice D. Barak-Erez; and see: AAA 9341/05 *Movement for Freedom of Information v. Government Companies Authority* [11], para. 41, *per* Jusitce E. Arbel). Similarly, my colleague Justice N. Sohlberg wrote in LCA 8954/11 *Doe v. Doe* [12], 740 [para. 84]:

> The democratic regime also requires the existence of the right to privacy. The existence of a private living space that is not under the watchful eye of the state is vital to the existence of a pluralistic society which gives freedom to the variety of voices amongst it. Political criticism will not emerge where human lives are monitored by various means. The existence of a private space is essential for the development of unique positions which can later gain political expression … And note, the right to privacy does not merely serve the person as a person. It has a broad social significance, over and

> above the right of the individual. Its value is great and important for the mere existence of human society.

37. In the present matter, the Chair of the Service Committee, Knesset Member Gabi Ashkenazi, addressed this issue in the course of the deliberations on the Enabling Decision. He observed that authorizing the ISA to employ its technological resources for "contact tracing" grants "the State authority to invade the private areas and spaces of the citizens of the State of Israel" (transcript of the meeting of the Service Committee of March 30, 2020, pp. 39-40). President Grunis once noted, as well, that such cases present "concern about the excess power of the State, which may gather extensive information about citizens and residents and may abuse such information" (HCJ 8070/98 *Association for Civil Rights v. Minister of the Interior* [13], 856). "This concern increases as the government acquires more sophisticated means, making more extensive infringement of privacy possible" (HCJ 3809/08 *Association for Civil Rights v. Israel Police* [14], para. 5, *per* President Beinisch).

38. The violation of privacy in the present case is particularly severe for two primary reasons: The *first* concerns the identity of the entity that is exercising the means under discussion, that is, the fact that it is the ISA – the State's preventive security service – that is tracking the State's citizens and residents, and the *second* concerns the nature of the means chosen, *viz*., the fact that we are speaking of a coercive mechanism that is not entirely transparent.

As for the identity of the entity employing the said means – employing tools that were developed for the purpose of fighting against hostile elements, and aiming them at the State's citizens and residents who do intend it no harm is a step that might cause any lover of democracy to lose sleep. To this we may add that according to documents published by the Israel Democracy Institute (hereinafter: the Institute), the apparatus employed in Israel that will be used to locate contacts with validated patients is carried out with the aid of the preventive security organ, is exceptional on the international landscape (see: Tehilla Schwartz Altshuler & Rachel Aridor-Hershkovitz, *Surveillance During a Pandemic - International Comparison*, (Israel Democracy Institute, March 25, 2020); Rachel Aridor-Hershkovitz, *A Comparative Survey of Europe and the United States – Contact Tracing as a Means for Fighting the Coronavirus*, (Israel Democracy Institute, March 31, 2020) (Hebrew)). This fact was not lost upon the Service Committee, which noted in this regard that the Government respondents must make a real effort to show the Service

Committee "alternative tools like those available in other countries" (transcript of the meeting of the Service Committee on March 30, 2020, p. 40).

As for the nature of the chosen means – in order to examine the level of conformity of the mechanism established in the Enabling Decision to the prevailing norms for protecting privacy in databases, we can turn to the legislation that treats of these subjects, and draw inspiration from comparative law in regard to accepted norms in the field of protection of privacy in the administering of sensitive databases (Michael Birnhack, *Public Privacy by Design: The Case of Data Transfer to Political Parties*, 12 HAIFA LAW REV. 15, 25 (Hebrew) [English abstract]. An examination of the mechanism established in the Enabling Decision shows that there was a real effort to circumscribe and confine the infringement of privacy by adopting some of the primary norms prevailing in the field of protection of privacy of databases (see, e.g: secs. 5,7,9,10,15 and 16 of the Enabling Decision). However, the consent of the individual to collecting the information is a "central pillar" of the protection of the right to privacy (MICHAEL BIRNHACK, PRIVATE SPACE: THE RIGHT TO PRIVACY, LAW AND TECHNOLOGY 252 (2010) (Hebrew)). This is so because when an authority collects information in regard to an individual without obtaining his consent, his autonomous ability to control the flow of information about himself is effectively expropriated (Michael Birnhack, *Control and Consent: The Theoretical Basis of the Right to Privacy*, 11 MISHPAT UMIMSHAL 9, 13 (2008) (Hebrew); and see the *Joint European Roadmap towards lifting COVID-19 Containment Measures* of April 15, 2020, which explains that the use of cellphone applications for "contact tracing" must be carried out with full respect for the principles of protection of privacy, including that their use be voluntary).

In addition, when we are concerned with information collected by the security agencies, transparency should be very strictly observed. In this regard, we would emphasize that the shroud of secrecy surrounding the use of the mechanism in its current format – which derives from the desire to preserve secrecy in regard to the ISA's abilities – is understandable. The same is true for the need to protect the privacy of people who test positive, and of those who came into contact with them (Amir Cahane, *The Chilling Effect: Online Surveillance in the Days of Corona*, CSRCL Blog (March 16, 2020)). However, there is some justification for the view that it is "desirable to remove much of the cloak of secrecy surrounding the 'digital means' […]. Even if these means in themselves must remain confidential (in order to maintain special intelligence collection

capabilities)" (*ibid*.). Therefore, it would appear that in the present matter, the possibility of providing more information on the manner by which the information is collected should be considered, and the oversight mechanisms over its use should be expanded.

39. It cannot be denied that despite the infringement caused by employing the ISA's tracking mechanism, that mechanism has significant advantages. Its use makes it possible to locate persons who came into close contact with a Corona patient quickly, and that makes a real contribution to saving lives and protecting public health by severing the chain of transmission. This situation requires striking a balance between the severe infringement of individual rights – primarily, the right to privacy – that the mechanism inflicts, and the significant benefit it provides.

40. Striking the necessary balance is significantly influenced by the point in time when it is made. At the beginning of the outbreak of the virus in Israel, the choice to use the means available to the ISA derived from the "need to provide an effective means at record speed, and that was provided by the Service a short time after the Ministry of Health requested its help" (para. 163 of the Government's Response of April 12, 2020). However, with the passage of time, it could be expected that in view of the Respondents' own position that we are concerned with a highly effective means whose harm is undeniable, a serious effort would be made to find alternatives like those adopted elsewhere in the world, among them, use of the "HaMagen" application developed by the Ministry of Health, which are all based upon obtaining the consent of the person being tracked. This was also made clear in the meetings of the Service Committee, in which it was stated that "the State is obligated, together with its use of this exceptional means, this unprecedented means by the Israel Security Agency whose role is different and that was established for another purpose, to examine other, different alternatives" (transcript of the meeting of the Service Committee of March 30, 2020, p. 40). The Service Committee even suggested that seeking an alternative to the said means should be carried out by a competent professional entity that would conduct an organized study with the cooperation of experts in the field (*ibid*.).

41. Indeed, the efforts to locate an effective alternative must continue uninterrupted. This conclusion can also be learned from the Enabling Decision itself. Section 13 states that "over the course of the period when this decision is in force, the minister of Health will consider the need for continued recourse to the Service, bearing in mind the restrictions upon the public's activity imposed by the Government, or the existence of alternative possibilities for achieving the objective

of the decision". This provision reflects the understanding that in view of the extraordinary nature of the means currently in use, the government authorities must always consider whether the immediate needs still justify the severe means that it is employing. The Service Committee addressed this in stating:

> Over the course of all the deliberations, the Committee stated that it was not comfortable with the use of the tool, and that it views it as something temporary. I find the need to state that again. The entire situation is exceptional – so we are permitting it with constraints and balances. But if it goes on, we will not be able to continue with this situation. We are not hiding this. We are saying this to everyone concerned. This is not the primary purpose of the ISA. It was not created for this purpose. The State will have to find alternative solutions, significantly reduce the use, or stop it as soon as possible (transcript of the meeting of the Service Committee of March 31, 2020, p. 34).

42. In seeking such an alternative, consideration must be given to the substantive flaws in the current mechanism, and must particularly consider whether it is possible to achieve the necessary, important advantages by means of a transparent, voluntary mechanism.

The Journalists Union Petition

43. The Journalists Union's petition argues that the powers granted to the ISA in the Enabling Decision violate freedom of the press and the confidentiality of journalistic sources. It further explains that the problem does not end with the question of whether there is actually a technical fear of exposing of sources, but that the very use of a mechanism that affords a preventive security organization a possibility of tracking the "technological information" in all that regards journalists creates a chilling effect that could deter their sources.

44. In the course of the hearing before us on April 16, 2020, we suggested that the Government Respondents consider a path agreed to by the journalists, by which a list of journalists holding press credentials would be given to the Ministry of Health, and that the Ministry would ask a journalist who tests positive for the virus to consent to providing his details to the ISA. If such consent be given, the mechanism would operate in the usual way. If the journalist would refuse, he will be granted 24 hours to petition the court for an order preventing the transfer of his data to

the ISA. At the same time, he will undergo an individual epidemiological investigation, and will be asked to sign a declaration that he undertakes to inform any journalistic sources with whom he was in contact over the 14 days prior to his diagnosis. The Government Respondents considered the suggestion, and informed us, on April 20, 2020, that they could not agree to it. Instead, they offered a different path to which the Journalists Union did not agree.

45. One cannot overstate the importance of freedom of the press in a democratic state, and preserving this principle is of particular importance during a national crisis of the type we are currently experiencing. In the hearing, the Journalist Union's attorney pointed out that at this time of "social distancing", most contacts with sources are conducted by telephone, and do not involve physical meeting. In the ex parte hearing, it was clarified that physical meeting is necessary for "contact tracing" by means of the mechanism employed by the ISA. Therefore, adopting the path that we have now suggested is, in any event, of limited scope, and is not expected to raise and particular difficulty. That being so, I am of the opinion that it should be applied as of the date of this judgment, and that we can expect that an arrangement in this spirit will be included in future legislation.

Conclusion

46. These are unusual times. The outbreak of the coronavirus, and its spread throughout the world, have changed how we live. Under these unique, exceptional circumstances, the Government made a decision to employ technological means at the disposal of the ISA in order to perform epidemiological investigations, with the purpose of locating those who came into close contact with persons who had tested positive for the virus, and to inform them that they had to isolate themselves at home. The ISA was granted authorization by virtue of sec. 7(b)(6) of the ISA Law, which permits the Government, with the consent of the Services Committee, to authorize the ISA to perform additional tasks to those set out in the ISA Law for the purpose of protecting and advancing "essential national security interests of the State". In my view, the term "national security" permits authorizing the ISA to perform tasks in areas that are not at the core of security activity in the narrow sense, but such authorization requires that there be a severe, imminent danger to the citizens and residents of the state or its regime. This test sets a high bar that requires periodic examination of the situation. At the point in time when the Enabling Decision was made, the need

to contend with the outbreak of the coronavirus epidemic did, indeed, meet the said test. However, for the reasons stated above, if the ISA's involvement is to continue after the date set in the Enabling Decision – i.e., April 30, 2020 – its authority to do so must me grounded in appropriate, primary legislation, such as a provisional temporary order. This is so given the fact that the means chosen by the State in the framework of the Enabling Decision is invasive and cannot be taken lightly. The choice to employ the preventive security organization of the state for tracking persons who intend it no harm, without the consent of those being tracked, raises particular difficulty. These extraordinary means were adopted in regard to a rare, extraordinary crisis by any metric. We must take every precaution that the unusual events with which we are currently contending will not lead to a slippery slope of using extraordinary, invasive means without justification.

47. Therefore, if my opinion be accepted, I would recommend to my colleagues that we grant the petitions in the sense that, subject to what is stated in para. 34, above, as of April 30, 2020 it will not be possible to authorize the ISA to aid in confronting the coronavirus outbreak by means of the mechanism established under sec. 7(b)(6) of the ISA Law, and that should the State seek to continue to employ the means at the disposal of the ISA, it must take steps to establish that authorization in primary legislation. I would further recommend to my colleagues that in regard to journalists, the outline set out in para. 44, above, will be employed.

Justice N. Sohlberg:

1. I concur in the considered opinion of my colleague the President, as well as with the opinion of my colleague the Deputy President in regard to the precautionary principle. On the margins of the matter, I will note an addition and register a reservation.

2. Authorizing the ISA to collect, process and use "technological information" in regard to persons testing positive for the coronavirus, and persons with whom they were in close contact, falls – by the language of the law and its legislative purpose – within the compass of sec. 7(b)(6) of the ISA Law, inasmuch as it is intended "to protect and advance other essential national security interests of the State", but that, only when there is an imminent, severe danger to the state's citizens and residents. The Corona epidemic indeed presented such a danger. Just as IDF soldiers are working to offer help in the city streets and in the homes of citizens, so the members of the ISA

were mobilized to confront the harm of the coronavirus. The pressing needs of the hour required that such action be taken. The involvement of the ISA, and its attendant the shroud of secrecy, are "not pleasant but not terrible" (in the lenient view), and in any case not intolerable (in the strict view) due to the exigencies of the situation. In any case, the weeks that have passed, and the danger that is no longer what it was, require that we return to the "high road", i.e., primary legislation, preferably as a temporary order, to allow for the participation of all of the Knesset members in the required decisions. The Government's Enabling Decision will lapse in the coming days, and if the legislative process begins before that, it will be possible to extend the Government's decision for the period required for a proper process by a legislature that proceeds quickly.

3. Without detracting from my colleague's correct statements on the right to privacy and intimacy, I would like to this: At the present time, when privacy and intimacy are notoriously trampled and "location data" are transmitted in every direction, it would seem to me that the violation of the "marginal utility" of privacy caused by the involvement of the ISA, in the manner that it is carried out, can be tolerated. Indeed, in these difficult times, all are required to show general civic responsibility and solidarity. It is reasonable to assume, and recent opinion polls indeed show a humane readiness to relinquish some measure of privacy in order to aid in the early detection of those infected. There is a clear willingness to stand strictly upon individual rights, due to a sense of responsibility for others and for society.

4. A person with the coronavirus who has infected those around him – family, congregation, friends – suffers greatly. The Government Respondents correctly state that "*the dignity of every person, as such, is expressed in his willingness to defend his family and himself, to act altruistically, and to aid in the defense of others*" (para. 219 of the Government's Response). Indeed, more than the violation of privacy, we have here protection of human dignity and liberty, the saving of one's own life and that of his neighbor. And note: there is more work to be done to protect and ensure privacy and intimacy, and we must do it, but not necessarily in the given crisis that pits the right of privacy against the right to life and health of people and of the entire public – a life-threatening danger in the plain sense – and a real fear for Israel's economy.

5. As for the Journalists Union's petition, my colleague the President and my colleague the Deputy President are of the opinion that there should be a special approach that would include a 24 hour hiatus during which a journalist who tests positive for the coronavirus can petition the

court for an order that would prevent transferring his particulars to the ISA (paras. 44-45 of the opinion of the President; para. 7 of the opinion of the Deputy President). I hold a different view in this regard. It would seem to me that with all due respect for the importance of freedom of the press and journalistic confidentiality, inasmuch as the *principle* of journalistic privilege (which is, as we know, a relative privilege) is rooted in case law, it would appear to me to be problematic to enshrine the *exception* to the principle in legislation. Moreover, the path that my colleagues require means denying the right of those exposed to the ailing journalist to be notified as soon as possible that they were exposed to the danger. Such a violation of the right to health – theirs and of those close to them – is unjustified. The right to life outweighs a fear of a violation of freedom of the press. I am not an expert on leaks, but it would appear reasonable – and so the Journalists Union's attorney affirmed – that most of a journalist's contact with sources is conducted by telephone. There is no fear of exposure in regard to such sources. The only fear, and it is very remote, is of the exposure of a source who physically meets with the journalist. And why is that a remote fear? Because the data processing mechanism operates automatically, and as a rule, the files produced are not opened except when a person who receives a text message from the Ministry of health (informing him that he must self-isolate due to exposure to a person who tested positive for Covid-19) questions the accuracy of the information, or in the course of an examination of random samples. Even then, there is only a miniscule chance that such a random examination might specifically hit upon the file of a journalist of such fame that his name will be recognized by the person performing the examination. When the fear of exposing sources is so remote when we are concerned with some 5,000 journalists, and when the danger of a chain of transmission is real, it seems to me that the Government Respondents fulfilled their duty with the path they suggested (paras. 6 and 7 of the Response of April 20, 2020), of a human epidemiological investigation that can be performed in regard to a journalist who tested positive for the coronavirus, in addition to the examination by the ISA's mechanism whose results will not be exposed to anyone. I will suffice with that.

6. As stated, I concur in the opinion of my colleague the President, subject to the above.

Deputy President H. Melcer:

1. I concur in the comprehensive opinion of my colleague President E. Hayut.

However, in view of the importance of the matters under discussion, I will allow myself to add several insights and emphases.

The Question of Authority

2. The question presented to us was whether the Israel Security Agency (hereinafter: ISA or the Service) could be authorized to receive, collect, and process "technological information" concerning persons who tested positive for Covid-19 and those who were in close contact with them, and transfer that information to the Ministry of Health.

The Respondents argued that the matter fell within the compass of sec. 7(b)(6) of the Israel Security Agency Law, 5762-2002 (hereinafter: the ISA Law), which states as follows:

> For the purpose of subsection (a) [which establishes the purpose of the ISA and its role – H.M.], the Service shall perform the following tasks:
>
> […]
>
> (6) Activity in another area decided upon by the Government, with the consent of the Knesset Secret Services Committee, intended to protect and advance essential national security interests of the State.

My colleague the President ruled that if the above conditions were met (a Government decision with the consent of the Knesset Secret Services Committee), and in view of the current extraordinary, special situation resulting from the coronavirus epidemic, then while there was a severe, immediate danger to the state's citizens and residents due to the spread of the virus, it was possible to make limited (in time and substance) use of that subsection, and to make the Enabling Decision and its accompanying arrangement (hereinafter, together: the Enabling Decision).

Under the circumstances, I concur with this limited ruling, as well as with the reasoning of my colleague the President and what derives therefrom, i.e., that for the purpose of fulfilling this role, the ISA (by means of its staff) is authorized to receive, collect and process "technological information", and transfer it to those duly authorized in the Ministry of Health, in accordance with

secs. 8(a)(1) and (2) and (3) of the ISA Law, and all bearing in mind that the said special activity is intended – under the time, event, substance and place conditions – to protect and advance essential national security interests of the State (that deviate from national security in the narrow sense).

My colleague Justice N. Sohlberg notes in this regard – by way of comparison – the activity of IDF soldiers in the city streets and in citizen's homes at this time, and I would like to point out that in order to permit such activity – when necessary – at the time, in 1995, legislative amendments were made (in sec. 18 of the Law and Administration Ordinance, 5708-1948, and sec. 26A of the Defence Service (Consolidated Version) Law, 5746-1986 (hereinafter: Defense Service Law)). See: Defence Service (Amendment No. 7 and Temporary Order) (Service in the Police and Recognized Service) Law, 5755-1995 (hereinafter: Amendment 7).

In accordance with Amendment 7, sec. 18 of the Law and Administration Ordinance states that the armed forces of the State "shall have authority to do all lawful and necessary acts for the defence of the State *and for attaining its national-security objectives*" (the emphasized words were added by Amendment 7 in 1995). Pursuant to that, the said Amendment also added sec. 26A to the Defence Service Law, which provided for the possibility of recognized service, that the Minister of Defense would establish by order, with the consent of the Government and the Knesset Foreign Affairs and Defense Committee, in one of the following:

> (2) Service in military units in the framework of a government ministry or organizational framework of a public body and under the supervision of a government ministry, designated for the attainment of a military- national objective in one of the following areas: immigration and absorption, education, health, protection of the home-front or voluntary activities for I.D.F. soldiers, all provided that the Minister of Defense is persuaded, having consideration for the circumstances at that time, and in consultation, as the case may be, with the Minister of Immigrant Absorption, the Minister of Education, Culture and Sport, or the Minister of Health, and with the Minister of Justice, that if such activity is not performed by those designated for military service in regular service, the objective will not be attained as required.

For a detailed discussion of Amendment 7 and the possibilities it presents, see: my opinion in HCJ 6298/07 *Ressler v. Knesset* [15]; my article: *The IDF as the Army of a Jewish and Democratic State*, in VOLUME IN HONOR OF PROF. AMNON RUBINSTEIN – LAW AND MAN, 14 MISHPAT V'ASAKIM 347, 358-364 (Sept. 2012) (Hebrew).

We thus find that in special, exceptional circumstances, and in a defined situation, it is possible to authorize the IDF and the ISA to act for the purpose of attaining national-security objectives that go beyond the defense and security of the State (in the narrow sense).

3. Moreover, sec. 7(b)(6) of the ISA Law, together with the provisions of the ISA Law that I noted in para. 2, above, provides express authority to perform the activities under discussion in the petitions (under the conditions we established) – in the sense of the first condition of the Limitations Clause in sec. 8 of Basic Law: Human Dignity and Liberty (that is, that the violation be *by a law*, or by virtue of *express authorization in such law*). See the majority opinion in HCJ 10203/03 *Hamifkad Haleumi v. Attorney General* [16] (hereinafter: the *Mifkad Haleumi* case).

That case also provides an answer to the argument that the matter should have been arranged (if at all) in a primary arrangement (by primary legislation). Also see: my opinion in HCJ 6051/08 *Rosh Pina Local Council v. Minister of Religious Services* [17]. However, in view of the significant dissent of President D. Beinisch and Justice E. Hayut in the *Mifkad Haleumi* case, it would seem to me that when the stage of pressing need for acting by virtue of sec. 7(b)(6) of the ISA ends (on April 30, 2020), it would be proper to arrange the matter – to the extent that it may still be relevant – in primary legislation by way of a temporary order, as recommended by my colleague the President and my colleague Justice N. Sohlberg, as long as such legislation meets all the other conditions of the Limitation Clause.

I will now briefly turn to the matter of the proportionality of the path chosen and the arrangement set forth.

Examination of the Path Chosen and the Proportionality of the Arrangement

4. The path chosen (authorizing the ISA by virtue of sec. 7(b)(6) of the ISA Law) was one of four alternatives examined, and that, after the Government had previously promulgated emergency regulations by virtue of sec. 39 of Basic Law: The Government.

It seems to me that until the date set (April 30, 2020), that was, indeed, the preferable course under the circumstances. There are several reasons for this:

(a) Emergency regulations do not require any "approval" (other than their promulgation by the Government, and submitting them to the Knesset Foreign Affairs and Defense Committee at the earliest possible date after their enactment – see: sec. 38(a) of Basic Law: The Government).

(b) Emergency regulations, by virtue of sec. 39(c) of Basic Law: The Government, may alter any law, temporarily suspend its effect or introduce conditions, unless there be another provision by law (see, in this regard: sec. 12 of Basic Law: Human Dignity and Liberty). Here we should note, however, that after presenting the emergency regulations to the Knesset Foreign Affairs and Defense Committee, the Knesset may – by law or a decision of a majority of the members of the Knesset – *revoke* the emergency regulations (see: sec. 39(f) of Basic Law: The Government).

Thus, until the enactment of primary legislation in the form of a temporary order (if at all), there was an advantage to the Enabling Decision, due to the pressing need, inasmuch as it is within the *framework* of the ISA Law (without need for alter or suspend it), and it is subject to the review and oversight of the Subcommittee for Intelligence and Secret Services of the Knesset (hereinafter: the Service Committee), which acts by virtue of sec. 6 of the ISA Law.

At this point we should note that the Service Committee (chaired by MK Gabi Ashkenazi) admirably fulfilled its role in this regard, and conducted in-depth deliberations (some of which were open to the public) on the Enabling Decision that is the subject of the petitions, and added restrictions, changes, and various duties of notification (it also instigated the process that led to halting the advancement of the law to amend the Telecommunications Data Law – see para. 1 of the opinion of my colleague the President).

5. Without detracting from what is stated in para. 4, above, concerning the choice to follow the course of an enabling decision *until now* – the proper course at present, to the extent that it may be needed, is that of a temporary order enacted as primary legislation that must meet the requirements of the Limitations Clause (inasmuch as we are concerned with a serious violation of the right to privacy, which is constitutionally guaranteed in sec. 7(a) and (d) of Basic Law: Human

Dignity and Liberty, as well as other constitutional rights). This entire matter must be considered by all the members of the Knesset in their legislative capacity (compare: ITTAI BAR-SIMAN-TOV, PARLIAMENTARY ACTIVITY AND LEGISLATIVE OVERSIGHT DURING THE CORONAVIRUS PANDEMIC – A COMPARATIVE OVERVIEW (2020); Ittai Bar-Siman-Tov & Gaya Harari-Heit, *The Proper Time for Temporary Legislation? The Rise of Temporary Legislation in Israel*, 41 IYUNEI MISHPAT 539 (2109) (Hebrew)).

This is the place to make a few observations on the path established – which is the subject of these proceedings – without deciding upon the matter for the future, inasmuch as Prof. Sigal Sadetzky, Head of Health Services in the Ministry of Health, who appeared before us, informed us that the possibility of continuing, and even expanding the arrangement is being considered.

6. The arrangement adopted in the Enabling Decision (after the changes introduced by the Service Committee), and the date established for its termination (April 30, 2020) met the criteria for proportionality under the Limitations Clause.

In the framework of the third component of the proportionality requirement, I previously recommended the Precautionary Principle, which under certain circumstances is the lesser evil, inasmuch as *better safe than sorry* (see my opinion in HCJ 466/07 *Gal-on v. Attorney General* [18] (hereinafter: the *Galon* case); and see the opinion of my colleague Justice N. Sohlberg in HCJ 7040/15 *Hamad v. Military Commander* [19]; LCrimA 2841/17 *Haifa Chemicals Ltd. v. Haifa Municipality* [20], para. 37 and the references there; HCJ 5263/16 *Nesher Israel Cement Enterprises v. Ministry of Environmental Protection* [21], *per* Justice M. Mazuz writing for the Court).

In the current emergency situation due to the Corona epidemic (as opposed to the disagreements that arose on the *Gal-On* case in this regard), it would seem that here and throughout the world, all agree that the authorities may act in accordance with the *Precautionary Principle*, and they are, indeed, doing so. This principle takes the view that in order to contend with a problem created by a gap between existing knowledge at a given time and the tremendous potential and uncertain harm that may be caused by some activity if no adequate precautions are adopted, the authorities (the legislature or the executive) should be permitted to adopt measures intended to prevent the catastrophe. This is the case when there is a perceived significant threat of wide-spread, irreversible harm, even if it is only of low probability, and when there is no proven scientific

certainty that the harm will be realized (the *Gal-On* case, paras. 34-42 of my opinion [paras. 17-24 of the English summary].

Nevertheless, even the said principle requires setting limits, or as my colleague Justice E. Rubinstein expressed it in the *Gal-On* case, cautions must be adopted even in regard to the *Precautionary Principle*. In order to pass the proportionality test *stricto sensu* (or "the *relativity* test", as my colleague Deputy President E. Rivlin called it in CrimApp 8823/07 *A. v. State of Israel* [22], and Prof. A. Bendor in his article *Trends in Israeli Public Law: Between Law and Judging*, 14 MISHPAT UMIMSHAL 377 (2012)) that caution requires, in my view, not to continue with the Enabling Decision (other than for a short period after April 30, 2020, as recommended by my colleague the President in para. 34 of her opinion), and to replace it (if at all) by a temporary order in primary legislation.

There are a number of reasons for this:

(a) Over and above the need for immediacy, use of the Precautionary Principle requires – beyond immediacy – parliamentary oversight even in emergency situations (this is so even in the opinion of critics of the principle, like Prof. Cass R. Sunstein, in his book Laws of FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE, p. 214 (2005)).

(b) The existence of alternative, more proportionate means for achieving the same or similar purpose must be examined (both in terms of the second subtest for proportionality under the Limitations Clause, and under the third subtest of proportionality *stricto sensu*).

(c) We must beware of sliding down the "slippery slope" in the use of the means that will be permitted or their continuation (see: Elyakim Rubinstein, *On the Danger of the Slippery Slope*, PARASHAT HASHAVUA, no. 65 (Ministry of Justice) (Hebrew); Dr. Menachem Finkelstein, *The Slippery Slope*, JUDGE BARUCH JUDGES BULLETIN, no. 4, p. 1 (Feb. 2011) (Hebrew), and see: AAA 4011/05 *Dagesh Foreign Trade (Shipping) Ltd. v. Ports Authority* [23], para. 7(1) of the opinion of my colleague Justice E. Rubinstein, who stated:

> Open for Me an opening like the eye of a needle and I will open for you an opening that wagons and carts can pass through (SHIR HASHIRIM RABBA 5).

In the hearing in the present matter, Prof. Saditzky explained that *serological tests* will be approved in the next few days, and that they may be able to replace – by mass testing (with immediate results) – the need to locate those who were in contact with persons who tested positive (in this regard we would emphasize that until now, due to the lack of sufficient test kits, and at the instruction of the Ministry of Health, not everyone who was located by the ISA as having been in contact with a person who tested positive was necessarily tested).

Thus, given that until now there was no available alternative for achieving the objective of locating those who had come into contact with persons who had tested positive for the coronavirus, or to identify those who had contracted the virus, those who had not, and those who had developed antibodies, and the ISA had the ability to use its resources to help in this area (and thus, the situation differs in regard to what the ISA stated in the *Gal-On* case), it was possible to utilize the mechanism at the ISA's disposal for this purpose, since it met all three criteria of proportionality, including the third subtest of *relativity*, inasmuch as: One who saves a single life "is considered as if he has saved an entire world" (MISHNA SANHEDRIN 4:5; Maimonides, MISHNE TORAH, Laws of the Sanhedrin 12:3).

However, it would be appropriate to reexamine the entire complex (which was also the recommendation of the Service Committee), and this should be done by the entire *Knesset* in the timeframe set by my colleague the President in para. 34 of her opinion, while considering the alternatives that have been created in the meantime. In any case, any arrangement that may be made in the future (if at all) should comprise, inter alia, a provision that no material obtained as a result of the ISA's activity for the purpose of identifying persons with the coronavirus will be used for any criminal investigation and will not serve as evidence in any trial.

This framework should also address the matter of journalistic privilege, which was raised in the Journalists Union's petition, which I will address in the following subsection.

The Issue of Journalistic Privilege

7. Journalistic privilege raises a special problem, inasmuch as the arrangement deriving from the Enabling Decision may infringe the confidentiality of sources that is fundamental to

investigative journalism in general, and at present, in particular, as well as freedom of the press (DR. YISGAV NAKDIMON, JOURNALIST'S PRIVILEGE (2013) (Hebrew)).

In the present matter, I believe that the approach we have recommended, as set out in paras. 44 and 45 of the opinion of my colleague the President, is appropriate, and it would be appropriate to adopt it in any additional arrangement that may be made (if at all), and should be followed from now. This is required by the rule established in HCJ 3809/08 *Association for Civil Rights v. Israel Police* [14], *mutatis mutandis* to the present matter, (in that case, I was of the minority opinion that the rule should be extended to all case of privilege, and in the course of the hearing, it became clear that this is indeed the practice in regard to members of Knesset). My colleague Justice N. Sohlberg's fear for the health of the source will, in any case, be resolved, inasmuch as the approach requires that the journalist himself warn his source.

Conclusion

8. This case raised new issues that the world, the medical profession, and the legal field had not yet encountered. In this judgment, we tried – with the help of the authorities who addressed the entire issue and the accepted legal principles – to treat of a situation and provide solutions that, on the one hand, would save lives, while on the other hand, would protect the accepted constitutional rights by means of appropriate balancing and proportionality. We may hope that we will no longer have need for all of these in the foreseeable future, and that we will see better days. Let us hope.

Therefore, it is unanimously decided to grant the petitions in HCJ 2109/20, HCJ 2135/20, HCJ 2141/20 in the sense that as of April 30, 2020, it will not be possible to authorize the ISA to aid in contending with the outbreak of the coronavirus by means of the mechanism established in sec. 7(b)(6) of the ISA Law, and that if the State seeks to continue to employ the means at the ISA's disposal, it must act to establish such authority in primary legislation. To the extent that such legislation will progress, it will be possible to extend the force of the Enabling Decision for a short, additional period that shall not exceed a few weeks, in order to enable the completion of that process.

It is further decided my majority decision (President E. Hayut and Deputy President H. Melcer concurring, and Justice N, Sohlberg dissenting) to grant the petition in HCJ 2187/20 in the sense that, in regard to journalists holding press credentials, the arrangement set out in para. 44 of the opinion of the President will be followed.

Given this day, 2 Iyyar 5780 (April 26, 2020).