In the Supreme Court

Sitting as the High Court of Justice

HCJ 466/07

HCJ 544/07

HCJ 830/07

HCJ 5030/07

Before: Her Honor, President D. Beinisch

His Honor, Deputy President E. Rivlin

His Honor, Justice (ret.) E.E. Levy

His Honor, Justice A. Grunis

Her Honor, Justice M. Naor

Her Honor, Justice E. Arbel

His Honor, Justice E. Rubinstein

His Honor, Justice S. Joubran

Her Honor, Justice E. Hayut

His Honor, Justice H. Melcer

His Honor, Justice N. Hendel

Petitioner in HCJ 466/07: **M.K. Zehava Gal-On**

Petitioner in HCJ 544/07: **The Association for Civil Rights in Israel**

Petitioners in HCJ 830/07:

1. **Ranin Tawilla**
2. **Hattam Tawilla**
3. **Assalla Tawilla**
4. **Mahmoud S'bihat**
5. **Dima Tawilla**
6. **Ulla Tawilla**
7. **Ahmed S'bihat**
8. **Mahmad S'bihat**
9. **Adalah – Legal Center for Minority Arab Rights in Israel**

Petitioner in HJC 5030/07: **Hamoked – Center for the Defense of the Individual, Founded by Dr. Lotta Salzberger (A.R.)**

v.

Respondents in HCJ 466/07

1. **Attorney General**
2. **Minister of the Interior**

	3.	**Israel Knesset**
Respondents in HCJ 544/07	**1.**	**Minister of the Interior**
and HCJ 5030/07	**2.**	**Commander of the Military Forces in Judea and Samaria**
	3.	**Head of Southern Command**
Respondents in HCJ 830/07	**1.**	**Minister of the Interior**
	2.	**Attorney General**
Requesting to Join as Respondents	**1.**	**Fence of Life Movement: For the Construction of a Separation Fence**
	2.	**Shurat Hadin – Israel Law Center**
	3.	**Im Tirzu – Building the Zionist Dream**
	4.	**Movement for Renewed Zionism**

Petitions for an Order Nisi

Date of Sessions:	Nissan 2, 5767	(March 21, 2007)
	Heshvan 12, 5768	(October 24, 2007)
	Nissan 30, 5768	(May 5, 2008)
	Adar 19, 5769	(March 15, 2009)
	Adar 16, 5770	(March 2, 2010)

On behalf of the Petitioner in HCJ 466/07:	Adv. **D. Holz Lechner;** Adv. **Tali Aviv**
On behalf of the Petitioner in HCJ 544/07:	Adv. **D. Yakir;** Adv. **S. Abraham-Weiss;** Adv. **O. Feller**
On behalf of Petitioners in HCJ 830/07:	Adv. **H; Joubrin;** Adv. **S. Zohar**
On behalf of the Petitioner in HCJ 5030/07:	Adv. **Y. Ben-Hillel;** Adv. **Y. Wolfson;** Adv. **L. Bechor**
On behalf of Respondents 1 & 2 in HCJ 466/07, and Respondents in HCJ 544/07, HCJ 830/07, and HCJ 5030/07:	Adv. **Y. Genessin**; Adv. **A. Licht**; Adv. **N. Ben-Or**
On behalf of Respondent 3 in HCJ 466/07	Adv. **R. Sherman-Lamdan**
On behalf of Request to Join no. 1:	Adv. **I. Tsion**
On behalf of Request to Join no. 2:	Adv. **L. Azar;** Adv. **A. Chen**
On behalf of Request to Join no. 3:	Adv **. J. Reshef;** Adv **. A. Baruch**
On behalf of Request to Join no. 4:	Adv **. K. Neumark**

Israeli legislation cited:

Citizenship and Entry into Israel Law (Temporary Order), 5763-2003

Basic Law: Human Dignity and Liberty

Foreign legislation cited:

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act, 2001

Israeli Supreme Court cases cited:

[1] HCJ 7052/03 *Adalah – Legal Center for Minority Arab Rights in Israel v. Minister of the Interior* [2006] IsrSC 61(2) 202.

[2] CA 6821/93 *Bank Mizrahi Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[3] HCJ 6427/02 *Movement for the Quality Government in Israel v. Knesset* [*Nevo* – 11.05.2006].

[4] HCJ 2605/05 *Human Rights Division v. Minister of Finance* [*Nevo* – 19.11.2009].

[5] HCJ 6126/94 *Szenes v. Matar* [1999] IsrSC 53(3) 817.

[6] EA 2/84 *Nayman v. Chairman of the Central Elections Committee for the Eleventh Knesset* [1985] IsrSC 39(2) 225.

[7] CrA 6669/96 *Kahana v. State of Israel* [1998] IsrSC 52(1) 535.

[8] HCJ 8276/05 *Adalah, Legal Center for Minority Arab Rights in Israel v. Minister of Defense* [2006] IsrSC 62(1) 54.

United States cases cited:

[9] Hiabayashi v. United States, 320 U.D. 81 (1943)

[10] Terminiello v. City of Chicago, 337 U.S.I.

[11] Texas v. United States, 523 U.S. 296, 300 (1998).

[12] Baker v. Carr, 369 U.S. 186, 217 (1962).

[13] Clark v. Suarez Martinez, 543 U.S. 371, 386 (2005).

[14] Fiallo v. Bell, 430 U.S. 787, 792 (1972).

[15] Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[16] Zadvydas v. Davis, 522 U.S. 678 (2001).

[17] Lochner v. New York, 198 U.S. 45 (1905).

[18] United States v. Carolene Products Co., 304 U.S 144 (1938).

[19] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[20] Schenck v. United States, 249 U.S. 47 (1919).

Other foreign cases cited:

[21] Kiyutin v. Russia, no. 2700/10, ECHR (2011) – 111 (European Court of Human Rights).

[22] Pfizer Animal Health SA v. Council of the European Union, (Case T-13/99) [2002] ECR II-3305 (European Court of Human Rights).

[23] Libman v. Attorney General of Quebec [1997] 3 S.C.R. 569 (Canada).

Judgment (Abstract)

Justice (Ret.) E.E. Levy

> The State of Israel … will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex (…)
>
> We appeal - in the very midst of the onslaught launched against us now for months - to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship (from the Declaration of Independence, 14.5.1948).

The Background and Pleadings

1. Exactly 58 years after these words were written, on 14 May 2006, this Court expressed its position on the Citizenship and Entry into Israel Law (Temporary Order) that was enacted by the Knesset in 2003 (hereinafter: the Law). A majority of six of the eleven Justices found the Law to be unconstitutional, ruling that it unlawfully violated the right to equality of Israel's Arab citizens and the constitutional right to family life (HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [1] (hereinafter: *Adalah Case*). The Law was not declared void, and the Knesset was given time in which to amend it. That was five years ago. To this day the Law has not been amended as required.

2. We have before us four petitions to invalidate the Law. It is argued that the Law is unsuited to the democratic paradigm, and does not implement the conclusions of the case law regarding the illegitimacy of the blanket restriction of the aforementioned rights. The Law discriminates between persons on the basis of nationality and ethnic affiliation, and does not reflect a willingness to take the risks that are inherent in the strict maintenance of basic human rights in general, and of the rights of the minority in particular. The respondents, on the other hand, are convinced that the Law comports with the complex reality in which Israeli democracy has been rooted since its very inception, and especially during the past decade – years of terror that have been tantamount to outright war. In their view, prevention of immigration of enemy subjects into the territory of the State is imperative. The claim is that the security risk cannot be removed by means of individual checking. Instead, the Law which is under scrutiny at present has adopted a system of profiling – a system which is neither arbitrary nor sweeping, but which relies on the characteristics that are shared by terrorists, and which is capable of predicting risks and protecting the lives of Israelis.

Personally, it is unclear whether the line of argument taken by the State in its response – the security line – actually supports its position. Nevertheless, I too will limit this hearing to the parameters of the dispute as delineated in the respondents' pleadings. Questions not yet ripe for resolution, such as, for example, the question of the composition of the Israeli population or the appropriate nature of an arrangement for immigration to Israel, will be left until their time arrives. I will just say that the character of the Law is reflected in the statements made on behalf of the Government by the Deputy Attorney General in the Knesset Interior Committee: "This provision was accepted by the Government for security reasons

and *due to an accelerated process of settlement of ten thousands of Palestinians in the State of Israel*" **(**Knesset debate of 14 July 2003**,** emphasis added).

The Citizenship and Entry into Israel Law

3. The core provision of the Law places limitations on the granting of status in Israel or a permit to remain therein to Palestinians who are inhabitants of the Territories, and to those who come from enemy states.

Limitation of citizenship and residence in Israel	During the period in which this Law shall remain in force, notwithstanding any legal provision, including sec. 7 of the Citizenship Law, the Minister of the Interior and the military commander shall not grant [to a Palestinian inhabitant of the Area] or to a citizen or resident of a state specified in the Schedule [Iran, Iraq, Syria and Lebanon] citizenship, nor will they grant him a permit to reside in Israel.

This blanket prohibition, from which Israeli residents of the Territories were excluded (sec. 1 of the Law), included a number of exceptions: Palestinian males over the age of 35 and Palestinian females of at least 25 years of age; minors up till the age of 18; a person who remains in Israel for purposes of work or medical treatment; and a person who identifies with the State or who has contributed to the advancement of its goals. Most of those applying for family reunification are not included in those categories.

The exceptions were included in the Law before it underwent judicial review on the previous occasion, when it was found to be disproportional. In the wake of the judgment, the Law was amended, but the amendment did not resolve the difficulty and in certain respects even aggravated it. A committee was established to consider exceptional humanitarian cases, and it was authorized to make a recommendation to the Minister of the Interior to permit temporary residence or a stay in Israel for special reasons. The Minister was authorized to establish a maximum yearly quota of such permits. The Humanitarian Committee approved only 33 of the more than 600 applications submitted to it, about one percent of an average of 3,000 applications for permits filed in each of the years that preceded the commencement date of the Law. The amended Law further provided that a person was liable to constitute a security threat to the State of Israel not only when there was information about him or a member of his family presenting a specific risk, but even if activity posing a threat to security "was carried out in his state of residence or in the area in which he lives."

On Foundational Values and their Constitutional Expression

4. Constitutional review seeks out the fundamental values upon which the political and social framework of the Israel is premised. All of these come together to form a broad conception which provides a common basis for the members of the nation, strives for coherence in sketching out the national story and records its defining features. This conception provides legitimacy for the existence of the nation, conferring upon it unique significance that distinguishes it from other nations. From this conception is derived – for the

future as well – the image of the nation, the various developments of which are but a logical and ongoing sequence of chapters of the foundational narrative on which it is based. This idea was eloquently expressed by Dr. Sharon Weintal:

> Looking backwards, the "foundational narrative" presents [the] historical events that preceded the establishment of the nation in the framework of a state, and provides the background and the justification for this development, such that the entire development is perceived to be a natural, obvious and legitimate one. From the current perspective, the "foundational narrative" presents the identity of the nation, as it was shaped in the process of its establishment, an identity that reveals the preferred way of life, common values, aspirations and purposes of the members of the political community, which are intended to guide those charged with the administration of the political framework. Looking to the future, the "foundational narrative" invites future generations to write their own unique chapters in the common story, without detracting from the logical sequence of the story, to change without becoming detached from the sources of the communal tradition (Sharon Weintal, *"Eternal Clauses" in the Constitution: the Strict Normative Standard in Establishing a New Constitutional Order* (Ph.D. Thesis, The Hebrew University of Jerusalem, 2005).

Identification of the nation's foundational values is effected on the basis of the core conceptions of its people, its dominant and timeless values, foundational events, documents of special significance, its basic laws, its historical legacy and the consciousness that shapes its image. The foundational values express a broad cross-generational consensus. They reveal themselves from time to time in various scenarios occasioned by the life of the nation. They are written and updated from time to time. Each one of the governmental authorities is a partner, in accordance with its part and role, in their emergence, as well as in influencing their character.

5. A conception that is concerned with the existence of foundational values raises, almost automatically, a question regarding their constitutional function. Two possibilities come to mind. The *first* lies in the idea of a material constitution, in the framework of which the foundational values fulfill their function as though they were constitutional norms, even if they are not anchored thus in writing. It is enough to correctly identify those values in order to recognize their normative weight, which is likely to limit the power – even that held by the legislator – to harm them. In this manner the foundational story may serve as an independent source from which constitutional values may spout. The *second* possibility rejects recognition of the power of any foundational narrative as an independent basis for the creation of constitutional values, but acknowledges the possibility of invoking this narrative in the *interpretation* of values which are based in constitutional documents. At the same time, the basic values play an important role in demarcating the borders of protection of the constitutional value. According to this approach, the values which the constitution did not seek, either explicitly or by derivation, to include within the scope of its protection will not merit constitutional status even if they are among the constitutive values of the nation. However, the constitutional values will view the foundational narrative as a significant factor in determining the scope of their application and the determination of the extent of their protection.

These conflicting approaches found expression in CA 6821/93 *Bank Mizrahi Ltd v. Migdal Cooperative Village* [2] (hereinafter: *Bank Mizrahi Case*); in the decision concerning the enlistment into the Israeli Defense Forces of ultra-Orthodox Yeshiva students (HCJ 6427/02 *Movement for the Quality Government in Israel v. Knesset* [3] and especially in the case of the establishment of private prisons in Israel (HCJ 2605/05 *Human Rights Division v. Minister of Finance* [4]. In my own judgment in the last case, I remarked that "*It might have been argued that recognizing the existence of basic values of the legal system as an instrument of quasi-constitutional review is inconsistent with the positive constitutional arrangement, whereby what has not yet been included in the Basic Laws is equivalent to an expression of negation of constitutional protection for those missing values* (*ibid*). I would now like to further refine these comments, through the prism of the present case.

There is little dispute that the Israeli constitutional project has not yet been completed, and that the Knesset, as the constitutional authority, retains the power to develop it. One may wonder why this development is necessary if one adopts a conception that recognizes the power of "fundamental values of the system" to constitute, as though out of thin air, new constitutional values. The logical conclusion, which dovetails nicely with our constitutional tradition, is in fact that whereas the foundational values of Israel cannot engender independent protected values, their import lies in the *interpretation* of constitutional values in light of their purpose, and *in the determination of the extent of protection that they warrant.*

In these senses, the constitutional mechanism is an immensely important means for safeguarding the existence of the nation's foundational values. It confers upon the legal system the power to protect the nation against radical changes to its foundational narrative which threaten to disrupt the sequence of building blocks that make up its story. Constitutional discourse protects the members of the minority from changes of this kind that are adopted by majority decision. It may well protect the rights of the majority from themselves. This mechanism helps identify an infringement of those values following a change that rattles the nation. It may sound the alarm. It may try to help repair the infringement. It is able to protect the normative framework from changes that would make such a violation possible. However its power is not limitless. This point was made by the late Professor Gualtiero Procaccia:

> … there is a danger that an ideological regression of a society will be accompanied by an ideological regression of its fundamental legal values. The legal system has no defense against this danger. The legal system in its entirety is a simulacrum of society, and if society changes, then so does the legal system, for good or for bad. Basic [legal] values cannot prevent the deterioration of society – this was not the purpose of their creation. Only the internal powers of society can prevent its deterioration. It is only continuous, uncompromising adherence to the eternal moral values of humankind that can prevent the deterioration of the society. Freedom, equality, and justice are the preliminary fundamental concepts of the legal system and they exist above and beyond it. As long as these moral values reside in people's hearts, they will prevent the deterioration of the society, but if they do not exist, then it is not within the power of the constitution, the laws and the courts to save them (Gualtiero Procaccia, "Comments on the Changing Contents of Basic Values in Law" 15 *Tel Aviv Law Review* (5750) 377, 382).

The Israeli Narrative – "Jewish and Democratic State"

6. A distilled expression of the constitutive narrative of Israel is provided by the phrase "Jewish and democratic state", which constitutes the keystone of our constitutional law. The Declaration of Independence, from which I quoted at the beginning of my opinion, provides the outline for the character of the foundational infrastructure of the Israeli nation. The late Justice Haim Herman Cohn wrote of this declaration that it had been "raised to the level of the 'manifesto' of the state, in other words, a value unsurpassed by any other, values upon which the founding fathers promised to base the state" (Haim Cohn, "The Values of a Jewish and Democratic State", *Selected Writings* (2001) 45, 51-52. It was not by chance that two Basic Laws, which together constitute Israel's written Bill of Rights, provide as follows:

1. Basic Principles	Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.
1A. Purpose	The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

In the combination "Jewish and democratic state" lies the key to Israel's self-determination. It is central to its definition, even for the outside observer. It encapsulates the reason for the establishment of the state, and its special character. It is the source of its justified demand for international recognition. It underlies the feeling of Israelis that this is a state that ought to exist, and that being a citizen of this state is worthwhile. It provides the basis for the conclusion that this *can* be done, despite significant internal tensions.

Filling a fundamental principle with real content is no easy task. Without exhausting the subject I would say that the basis of the foundation of a *state* is the need to ensure the safety of its citizens. Many a state has been established as a result of the desire of a national group that founded it to realize its right to self-determination. The concept *Jewish* relates in a concrete sense to the right of the Jewish people to self-determination, as well as to its ability to defend itself from the outside. The basic concepts of Zionism, history, culture, Jewish tradition, and the Hebrew language, as well as a Jewish majority of the population of the state, are some of the components of the "Jewish" part (of the combination). As a *democratic* framework, the state is committed to a substantive conception of freedom and of equality, to upholding the basic rights of the individual, including those of minority groups, and to open and accessible mechanisms for dialogue and decision-making.

Each of the terms "state", "Jewish" and "democratic" is the receptacle of an entire complex of constituent values. Occasionally they contradict and compete with each other. The tasks of harmonizing them into a single coherent story occasionally appears as an attempt to square a triangle, the points of which are these three concepts. However, this is inevitable. The conflicts that arise, like the attempts to resolve them, are an integral part of the Israeli story. Even though each of these values *per se* can be described as integral, complete and absolute, this is not necessarily true with respect to the extent to which each is protected. This extremely complex formula, into which the values of the Jewish and democratic state are compacted, cannot allow any one of the values involved to occupy the entire space or to act as though it existed in a vacuum. Absolute protection for any one of the values threatens to destroy the entire equation. A suitable and appropriate balance increases the prospects for its success. This element of balance also serves as a constitutive value in our system. The story of the Jewish and democratic state is a delicate and complex story of balancing between its different components, and just as it cannot tolerate the absolute foregoing of any of these components, neither can it agree to a sweeping and absolute dominance of any one of them. As such, while there may be situations in which the extremities of aspects of a central value in our legal system may find themselves extending beyond the foundational Israeli tapestry, the essence of that value, the nucleus around which its most salient elements revolve, cannot be missing from our constituent story. Harm done to this core cannot but disrupt the delicate balance upon which the Israeli equation is based. Detracting from elements located in this nucleus of the foundational value cannot coexist with the fundamentals of our system. Abandonment of the fundamental, classical elements cannot be squared with the notion of a Jewish and democratic state.

7. The foundational values may assume different forms and appear in various ways. Jurisprudence has developed various mechanisms for choosing between competing values, according to their nature and the nature of the conflict between them. In balancing between a foundational value in the form of an important public interest and a constitutional right of the individual, the limitation clause of the Basic Laws comes into play. Competition between these values is settled in light of the principle that permits the breach of a right only for the purpose of realizing an important public principle, provided that the extent of the violation does not exceed that which is required. Deciding between competing values, which is contrary to the notion of the proper purpose and proportionality, is not consistent with the foundational narrative. The constitutional mechanism must fix this.

Constitutional Review

8. In its attempts to determine whether a violation of a protected constitutional norm is appropriate, the constitutional mechanism of the limitation clause establishes a hierarchy in the form of a funnel: "by a law, befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." This graduated structure is comprised of normative filters, which become progressively finer and denser. The test moves from the difficult to the easier. The more blatant the deviation from the constitutional order, the sooner will the norm in question be caught in the constitutional filter. Violations that involve more complex questions of constitutionality will need to continue further along the path of the limitation clause. The advantage of this structure is found in the signal it emits, both to the legislator and to the court, concerning the depth of the violation of the constitutional order, in the indication it provides with respect to the proper way of dealing with this violation. The establishment of the "geographical location" of the violation affords the *legislator* a better

understanding of the nature of the change that it must make to the law in order to render it constitutional. This structure helps the *court* to select the proper relief, for the graver the violation of the normative order, the more immediate and definitive will be the judicial relief for the protection of the right that was violated.

A law "befitting the values of the State of Israel"

9. A law that is inconsistent with the Israeli narrative cannot stand. Its violation of our first principles is severe, and it is like an alien element whose existence is intolerable. The impact of the violation is so severe that the constitutional order is designed to block it at a relatively early stage. Case law generally relates to the requirement regarding the values of the state as a test of purpose at a high level of abstraction, the question being whether the law promotes, in terms of its objective, the fundamental values of Israel as these are derived from the need to protect the constitutional right. Our concern here is with the objective in the broad sense, namely, with all of the components that grant the law its unique significance. These include not only the purpose of the law but also the means it adopts and its outcomes.

A law "enacted for a proper purpose"

10. The criterion of the proper purpose addresses the specific objective of the law. It examines the law's combined purpose – that which emerges against the backdrop of the totality of circumstances, the normative environment and the time in which the constitutional review is conducted, and that which expresses the "historical" intention of the legislator. In this context the law must overcome three hurdles in order for its concrete purpose to be regarded as befitting: [a] It must be intended for the achievement of social objectives, i.e., it must serve a concrete public interest. This requirement may be referred to as the *test of interest;* [b] The interest must be regarded as sufficiently important to justify the violation of a protected right, having regard to the essence of the right and the severity of the violation. This can be referred to as the *test of necessity*. In terms of its development in our case law, and unlike other systems of law, this test has a relatively open texture, involving value-based decisions; [c] The law must befit a democratic regime that protects human rights. This is the *test of sensitivity to the right*.

11. *The test of sensitivity to the right* has yet to be sufficiently expounded in our case law, and the main thing that has been said of it is that "[a] purpose is deemed proper if it constitutes a social goal in a society sensitive to human rights" (HCJ 6126/94 *Szenes v. Matar* [5]). According to this conception a law that seeks to further a security interest, i.e., that at base seeks to protect a person's right to life, is a law that is sensitive to human rights, and this is sufficient for purposes of determining that it is for a proper purpose. However, I am hard put to think of a law that seeks to promote a viable public interest which does not have some import for any of the human rights. Not only is it difficult to assume that had there been such a law, the legislature would have refrained from enacting it, but even had it been enacted, it would not have overcome the hurdle of befitting the values of a Jewish and democratic state. One may therefore wonder as to the utility of placing the hurdle of sensitivity to human rights at this stage of the constitutional examination, in that it is difficult to conceive of any law that would not overcome that hurdle. Therefore, the requirement of a befitting purpose must be understood to mean that a law cannot be befitting if it fails to demonstrate, according to its purpose, sensitivity to the *right that is actually violated*, as evinced in the circumstances under examination. As such, if in the previous sub-test – the *test of necessity* – the appropriateness of the concrete purpose is tested from the perspective of the public interest,

this will now be supplemented by the perspective of the right that was violated. In order to be regarded as befitting in terms of its purpose, the law causing the violation must demonstrate that it does not seek to deliver a mortal blow to protected human rights to such an extent that it becomes indifferent to the importance and significance of the violated right. A law that is totally indifferent to the importance of the violated basic rights is a law with an improper purpose. It cannot fit into the framework of a social order in which rights discourse is of the essence. In order to meet the test of *sensitivity to the right*, it must be shown that the law leaves, insofar as possible, real space for the existence of the right – even if only of its nucleus – whether broader or narrow, whether now or in the future, with various limitations, and provided that a reading of the law leads to the conclusion that it does not deny this right. This point was addressed by Dr. Yaacov Ben-Shemesh:

> A democratic state that is sensitive to human rights is not free to promote the realization of public objectives in an absolute manner, regardless of their cost, and regardless of the violation of human rights that may be involved. Total objectives lead to totalitarian practices. It is doubtful whether a law intended to realize its objective to the maximum degree is a law intended for a proper purpose even if its purpose, *per se*, is a proper purpose. It is conceivable that such a law will not overcome the hurdle of propriety of purpose not because the purpose is not proper but because it seeks to achieve it in a manner that is not proper, having regard to the importance of human rights (Ben Shemesh, *supra*, p. 59)

"*An extent no greater than is required*"

12. We have derived three tests of proportionality from the wisdom and experience of others (Moshe Cohen-Eliya & Iddo Porat, "American Balancing and German Proportionality: The Historical Origins", 8 *Int. J. of Con. L.* 263 (2010); R. Oakes [1986] S.C.R 103; L. 263 (2010). Proportionality addresses the means that the law seeks to invoke. This means may totally fail to realize the purpose of the law, in which case its violation of the right is in vain (rational relationship test), or it may realize the purpose but cause damage that was avoidable. The importance of this latter dimension, which attempts to identify the means which is the least intrusive, emerges specifically with the adoption of the notion that the proper purpose of the law must leave some space for the violated right. Once the notion of totality in realizing the public interest is rejected, the path is clear for an examination of whether the means adopted was the only one possible. Finally, it is conceivable that the norm under examination may indeed have realized the proper purpose effectively, but at the same time it harmed other principles and values, such that its damage exceeds its benefit ("narrow" proportionality test).

13. This last test must be distinguished from the requirement that the law befit the values of a Jewish and democratic state. The test of appropriateness addresses first principles, and the value judgments it involves will reflect a relatively wide consensus. In addition, the three components set boundaries for its implementation. The final test of proportionality, which is paradoxically referred to as "narrow" even though it is quite broad, and even though it is possible to structure the judicial discretion required in applying it, involves value judgments that may be controversial and are more dependent upon the world view of the observer. In my view one must be careful to avoid transforming the "narrow" test of proportionality into a dominant one, to the extent of exclusivity, eclipsing the other components of the constitutional examination. The earlier it is possible to conduct this examination, in a non-contrived manner, the better.

Today there is broad recognition of the similarity between the "narrow" test of proportionality and the ground of "reasonability" which for many years was dominant in our administrative law. The ground of reasonability provided a more powerful demonstration of the doctrinal and practical difficulties inherent in reliance on judicial discretion, in demarcating its borders and in identifying the proper relationship between it and the administrative act. These difficulties become more acute, *a fortiori*, when our concern is with review of legislative action, and they have been experienced by many of the legal systems that are confronted with defining the position of the various branches of government, particularly the relationship between an elected legislative branch, which operates by virtue of the majoritarian principle, and the judiciary. The transition from reasonability to proportionality is no magic potion. It does not eliminate the dispute between different views regarding the role of the court in a democratic society. As I already mentioned, certain aspects of proportionality may necessitate value judgments which are liable to further exacerbate this dispute. However, proportionality has advantages, the most important of which is that it involves detailed and structured tests, some of them objective, which provide a basis for in-depth argumentation.

The Citizenship Law and the Values of a Jewish and Democratic State

14. The State of Israel was born into a security situation which was infinitely more difficult than the reality that it has confronted in recent years. Real existential threat hung over its head in the first decades of its existence. Many were consumed by doubt as to whether it was capable of meeting the challenges lain on its doorstep. An insistent question mark floated at times above the notion that it was possible to establish and successfully maintain a true democratic entity in the heart of a hostile region from which democratic ways of thinking were absent. Leaders in the Arab community in Israel as well as outside of it refused to accept the existence of a sovereign Jewish state in any part of the territory of the Land. They embarked on a war to destroy it when it was still in its infancy. After a short while, many of members of that community, as if all at once, became citizens of the state that was established. In this complicated reality, the young State inscribed on its flag the principle, which found expression in the Declaration of Independence, that even when the security situation was dire, and even though the basis for the State was the rebirth of the Jewish people in its homeland, all its citizens would enjoy equality of social and political rights irrespective of their religion, their ethnic origin or the community to which they belong. The historical experience of the Jewish people over the centuries, and one of the foundations in the name of which the State of Israel sought recognition amongst the nations of the world, acted to instill in the emerging image of the State this core component of equality – absence of discrimination due to group affiliation. The views diverge on the extent and the manner in which this would be applied. Even today, there are many allegations – not entirely baseless – of discrimination against and oppression of Arabs in Israel. But efforts were and still are being made, particularly in recent decades, to change the situation. The chapter of equality between Jews and those who are not Jewish has grown broader and it ought to be widened even further, until it is woven with silken thread into the entire fabric of the Israeli story, as an indisputable fact.

The difficult, continuous struggle for the peaceful existence of the Jewish people, too, adds to and comprises the Israeli foundational narrative. We are very far indeed from achieving rest and respite. Even if, albeit for a very short time in historical terms, the specter of the existential threat has been removed from above us, it has been replaced quickly by murderous terror. It has been decreed that we must deal with this. The efforts of our security forces make this possible. The courageous spirit and the determination of the Jewish people are no less

important components. But our strength lies also in our existence as a democratic state, which aspires to allow individuals and communities to fulfill themselves, to express what is in their hearts, to move freely from one place to another, to think independently, to respect one another, to give a person the feeling that he is equal to the next person, to allow him to establish a home and a family of his choosing, and all this – without harming others.

15. The realization of these elements under a single roof is not an easy task. It requires mutual concessions. It requires the taking of risks. It is not amenable to a blanket application. And the principle is as if woven into these things, that each person is an individual, and every man and women – even if he or she belongs to a particular social community – has a separate, individual existence. This is the basis of the idea that every person is responsible for his actions.

16. The provisions of the Citizenship Law contradict all the above. They accord decisive weight to the element of security, while inflicting a mortal blow on basic rights of the first order. They create a reality, the clear outcome of which is constriction of the rights of Israelis merely because they are Arabs. They grant legitimacy to a notion that is alien to our basic conceptions – oppression of minorities only because they are minorities. By basing themselves on an arrangement of categorical classification, which contains everything except for an individual investigation of the danger presented by a person, they blur the image of the individual as an entire world in himself. They open the door to additional legislative acts which have no place in a democratic conception. They threaten to bring us a step closer to the conception that "preserves the outer skin of democracy, without leaving any traces of the contents" (Menachem Hofnung, *Israel – Security Needs vs. the Rule of Law – 1948-1991* (1991) 105). The continued existence of the Law casts a dark shadow over the chances for Israeli democracy to meet the challenges which it faced till now. Whoever thinks that over time, even the majority, by virtue of whose decision this Law came into being, can withstand the damage it does, is wrong. I fear that it will threaten to overtake every Israeli, whoever he be, since it harbors the power to destabilize the foundation upon which we are all standing, shoulder to shoulder. At the end of the day this harm, distant and slow-approaching though it be, state-sponsored as it appears, is no less damaging than the acts of terror against which we are trying to protect ourselves.

17. All this is wrought by the Citizenship Law at a time when it makes no real contribution to the Jewish aspect of Israel. On the contrary, because this Law has the potential to weaken the democratic foundations of the State, it also detracts from its ability to serve as the furnace in which the Jewish people is forged. This insight is particularly pertinent in view of the insistence of the State on its contention that the purpose of this Law is purely security-related, and nothing else. As declared, of the three arms of the foundational Israeli triangle, the Law purports to assist only in the realization of that relating to "state", i.e., to the framework of the state that promotes the security of its citizens. It seems to me that this purpose can and should be achieved at a lower cost. Only individual arrangements, which avoid labelling a person according to his ethnic origin, affiliation to an age group, gender, or area of residence – arrangements that are based on acknowledgement of his own actions, evince a willingness to take the risk that is involved in recognition of human rights, and which draws upon our historical experience and our tradition as a people and as a state.

The Detailed Purpose

18. The Citizenship Law serves a concrete public interest, the importance of which cannot be overstated. Protection of the security of the residents of Israel in view of terrorist threats justifies a certain erosion of the protection of the right to equality. It justifies a constriction of the protection of the right to family life. But the failure of the Law to propose a means of detailed examination – in view of the stance of the security forces that they are not able to achieve the same optimal degree of security to which the Law aspires in its present formulation – is such a gross violation of these rights, to the extent that it is no longer possible to say that the Law is sensitive to human rights. The Law does, indeed, prescribe exceptions to the limitation on acquiring a status in Israel. It expresses its position that in certain circumstances, Israelis can become reunited with their Palestinian spouses, as well as with their offspring. But these circumstances are so sparse, and their application so limited, that in practice they leave no room for the main principles of the specified rights. A comprehensive examination is not necessary in order to establish that the majority of Arab-Israeli partners wish to marry men and women belonging to the "prohibited age" under the Citizenship Law. This is the customary age of marriage, and this is attested to by the assessment of the respondents that some two-thirds of those who seek status by virtue of family reunification (an annual average of approx. 2000) are not included in the exceptions specified in the Law. Particularly noticeable are the weakness of the humanitarian exception and the idea, surprising in itself, of setting *quotas* for permits issued by virtue of it (sec. 13A1(6) of the Law).

Most of the applications for marriage or for reunification with children do not succeed in overcoming the sweeping restriction in the Law. But even those which fall within the bounds of one of the exceptions are not assured a detailed examination. They pass on to the next station – to a test under sec. 3D of the Law; this section, too, entrenches a blanket arrangement. Applications which made it over the various hurdles placed by the Law and have reached this stage are liable to find themselves exposed to a blanket disqualification, which has absolutely nothing to do with detailed information about the individual. This may happen, for example, only because the Palestinian partner resides *in an area in which activity is taking place that is liable to endanger the security of the State of Israel or its citizens.* Is there no room for allowing him, this foreign partner – and even if the State met its preliminary burden of showing that he presents a security risk – to prove on his part that despite the involvement in terror of his relatives or his neighbors in the area in which he resides, he himself has nothing to do with activity of this type? Examination of a person's match to a profile of risk of one sort or another, I would stress, *is not a detailed examination.* And not only do *two-thirds* of the cases of family reunification not cross the threshold of the Law, but the vast majority of the cases that succeeded in accessing the foyer and crossing it successfully gained for their subjects only a permit to remain in Israel, which does not grant the rights enjoyed by Israelis. After all the exceptions, the Law implements an extremely sweeping arrangement, which does not take into account the rights of a sizeable majority of the Israeli partners, most of whom are Arab-Israeli citizens. In this can be seen the severe erosion of the right to family life. In this can be seen the mortal blow to the heart of the right to equality – the prevention of discrimination against a background of group affiliation.

A possible salve might have been found had the temporary order been of limited duration. A true and sincere time limitation may blunt the effect even of a blanket arrangement, and it is possible that this would provide the necessary minimal living space for the violated rights. But what can I do – once again I cannot escape the conclusion that the Citizenship Law is in

no way temporary; rather, it was intended to be with us for many years, despite its promising title: "*Temporary Order*".

On temporary orders:-

> There is no greater eternity
> Than a door sign stating: Closed for the day.
> Forever it shall be closed.
> No one will open. No one will emerge.
> Not a cloud in the sky.
> Embrace the verdict. Sign.
> They will not open. Go home. Dream.
> (Yehuda Amichai, *Poems 1948-1962*, at p. 352 (2002))

19. Prior to the Knesset passing the Law in the summer of 2003, the Government presented its clear position that the lifetime of the Law would be limited. But since then, the force of the Citizenship Law has been extended *thirteen* times – twice by the Knesset and another eleven times in governmental decisions that were approved by the Knesset. Even were we to ignore the question which is complex in itself – whether it is appropriate that the force of laws of the Knesset, and particularly a law which has such a significant impact, is extended by a governmental order which the legislature approves in a rapid process, a single vote, which may well not be based on a full picture of the information – I am afraid that again, we cannot be satisfied with the title "Temporary Order". What was intended to be a temporary order has proved to be, unfortunately, an "Order Enduring Many Years". Once it became clear that not only from the point of view of its contents but also from the perspective of the duration of its application, the Citizenship Law leaves inadequate room for the violated rights, it could no longer be said to be sensitive to human rights. It cannot be said of its purpose, even its concrete purpose, that it is proper.

20. This lack of sensitivity to the violated rights becomes more acute in view of the conclusion that the Law has additional purposes, apart from that of security. It permits the entry of Palestinian workers into Israel, and allows for the granting of status to Palestinians who have helped Israel. I find it difficult to accept the State's argument that the risk presented by temporary Palestinian workers – tens of thousands per year – is less than and substantially different from that presented by inhabitants of the Territories who acquired citizenship in Israel. The principle-based argument is not at all convincing, in my opinion, for access to Israel is possible for "day-trippers" too, just like workers. There is no escaping the conclusion that whenever the State has an interest in the presence of workers who fulfil employment requirements that the economy has trouble supplying, the security consideration is laid aside for the moment, or at least loses its status as a main consideration. This is not only liable to render the security purpose suspicious to some, but in my view, it poses an additional question mark as to the degree of seriousness with which the State relates to the violation of the protected rights of its Arab citizens.

Proportionality

Even an assumption that the Law is not inconsistent with the values of the Jewish and democratic state, and that its particular purpose is proper, will not help it to pass the constitutional test at its final station, that of proportionality. First, I believe that intensifying the violation of equality between Jewish and Arab citizens of Israel will not be of benefit even from the security point of view. The outcome is likely to be a reduction of the security risk

from one aspect, but its increase in another aspect, for the feelings of frustration and oppression are liable to be directed into negative channels.

If this leads to the conclusion that the Law lacks a rational connection between its purpose and the means of achieving it, then this conclusion is even more valid from an additional perspective. Even if I assume that the Law seeks, according to its purpose, to leave adequate room for the violated rights, the sweeping means it prescribes are inconsistent with this purpose. The illegitimate blanket application of the Law finds expression in the assessment of the tools it adopted. Arrangements that are not sensitive, in a specific manner, to every application that is submitted to the security forces are not consistent with the intention to recognize the central place of the right to family life and the right to equality. Even on the assumption, which as stated is not at all obvious, that a law under which decisions are made according to sketches of profiles will be more effective in increasing security, there is a serious question mark about its ability to also promote the other part of "proper purpose", which is showing sensitivity to human rights.

22. But even if the Law managed to reach the threshold of the second test, that which seeks the means that is less intrusive, blocking it with this fine filter would be justified. At the point of departure, which claims that the Law is not directed at the achievement of absolute security, but it does what it can to limit the security risk presented by inhabitants of the Territories and hostile states, there is no escaping the conclusion that there exists a means which is less intrusive, i.e., the detailed check, the scope and a character of which will be determined in consultation with the experts on the matter, including the security elements, in advance, throughout the process, and if necessary, even thereafter.

23. The words of the respondents best show that individual security checks are very effective. According to their data, of more than 600 applications that were lodged since September 2005 by virtue of one of the exceptions provided by the Law, and that were rejected for the reason that the applicant had been found to be connected to terrorist activity, more than 270 were from people who had already begun the process of acquiring status or acquiring a temporary permit to remain in Israel and had received temporary Israeli documentation; follow-up checks that had been made revealed that negative security information existed about them. In 66 other cases, this was the situation regarding those who received a permit to remain in Israel not by virtue of family reunification but for other reasons. It seems to me that even disregarding the fact that these were in any case not disqualified on the basis of the risk profiles in the Law, these statistics indicate the efficacy of the accompanying security check.

24. Not infrequently, in dealing with the second test of proportionality, the argument arises about the financial cost of the means that have been selected, and about the economic burden that these alternative means are likely to impose on the State. A significant difference in cost is liable to exclude the alternative means from the bounds of the means whose adoption is possible. In my view, it cannot be denied that cost is significant, but this significance decreases as the extent of the violation increases, and particularly when the violation is not in the category of damage to property, nor one that can be remedied by means of financial compensation. The violation of the rights that are the subject of these petitions, the protection of which justifies the investment of public resources, even in substantial amounts, is of this type. *Secondly*, my mind was put at rest in this matter, too, by the explicit words of counsel for the respondents, whereby the problem did not lie in the cost of the individual checks, but in the "inherent difficulty", as she said, of adopting these detailed checks, whatever their cost may be.

Ultimately, my opinion is that the Citizenship Law does not overcome the hurdle of the constitutional mechanism; this inevitably calls for granting the appropriate judicial relief. With this I will conclude my words.

The Constitutional Relief

25. Voidness is a major remedy for a misdeed in relation to the acts of a governmental authority. Its purpose is two-fold: repair of the wrong that is caused to the individual as a result of the act of the authorized body and restoring the authority to the path of constitutionality. In the course of the years, the discourse has moved from an absolute model of voidness, which means voiding the governmental act immediately and in full, to a classification of the relief according to the circumstances, including in light of the nature of the process and the identity of the parties to it. The main thrust of the doctrine of *relative voidness* is its granting of judicial discretion as to the breadth and depth of the voidness. *Deferred voidness* means that the court has the power to withhold its constitutional approval from the governmental action, but it postpones the date on which this receives practical expression. The two doctrines are liable to be invoked in examining the constitutionality of a Knesset law. Judicial discretion in selecting the relief resorts to a complex system of balances and various considerations. An appropriate solution for one set of circumstances may prove to be unsatisfactory for another. Sometimes, declaring immediate voidness of a statutory norm will be an appropriate response to the violation it involves, particularly when this is serious and more marked. On the other hand, there are situations in which despite recognition of the flaw, the benefit of deferring the voidness will exceed the harm caused by the constitutional violation.

Deferral has advantages and disadvantages. On the one hand, it allows the governmental authority the necessary time to rethink and to make the preparations for fixing the existing arrangement. The advantage of this is that it does not exhaust the legal process before the fate of the governmental action is decided, in a way that is certain to lead – even if only after some time – to the removal of the flaw. It allows the governmental authority time for consideration and for the necessary public and political discourse – vital elements in the legislative and administrative enterprise. The advantage lies also in the fact that it reduces the risk of a normative lacuna which is liable to accompany immediate voidness. On the other hand, it has two weaknesses. First, it extends that lifetime of an illegitimate norm; and second, in detracting from the power of the authority under review it is liable to turn the opponents of judicial review against the courts, and in a case in which no alternative arrangement has been proposed, when the time arrives for the voidness to take effect, it may even erode the status of the courts of law.

26. But the main virtue of deferred voidness is its contribution to constitutional dialogue, that is, to the understanding that protection of the values embodied in the constitution is an endeavor that is common to the *three branches of government.* This understanding does not undermine the democratic fundamental principles of the separation of powers and checks and balances; rather, it is concerned with furthering the dialogue between the branches of government and the mutual sensitivity between them. It acknowledges that the constitutional enterprise is not the exclusive domain of one authority. The responsibility for it – which is heavy indeed – does not fall upon the shoulders of the court alone, nor on those of the Knesset nor on those of the government only. Protection of constitutional basic values – one of the most important elements of the democratic system – is effected by the three branches together. It is best, therefore, that engagement with constitutional questions should be the outcome of an honest, constant and continuous dialogue between the authorities

This will likely be beneficial for the conduct of government in general. It may well be good for human rights. It is able to dispel antagonism, which is frequently connected to the notion of a right and protection of this right. It has the ability to aid in the development of additional constitutional rights. It allows basic rights to share the spotlight with other values, the promotion of which is important to the public. On the positive characteristic of constitutional dialogue, Hogg and Bushell wrote as follows in their well-known article:

> [T]he judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded… The legislative body would have been forced to give greater weight to the *Charter* values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are constraints on the democratic process, no doubt, but the final decision is the democratic one… Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole (P.W. Hogg and A.A. Bushell, "The Charter Dialogue between Courts and Legislatures — Or Perhaps the Charter of Rights isn't such a Bad Thing After All", 35 *Osgoode Hall L. J.* 75, 79; 80; 105 (1997)).

But constitutional dialogue cannot be fruitless. It cannot serve as a cover for an ongoing violation of human rights It cannot camouflage an approach that does not acknowledge the importance of protecting these rights. It cannot provide a platform on which to make light of their gravity. It cannot obviate the process of judicial review. In the absence of constitutional dialogue, the Law in question cannot be allowed to remain in place until the Knesset deigns to amend it.

Decision and Conclusion

27. The loss of the democratic image of the State of Israel and the abandonment of basic concepts that it has held from its inception is something the Israeli public cannot accept. Our legal system cannot reconcile itself to this. The Citizenship Law threatens to create more than a crack in the wall, the strength of which has held till now, and which is called "a Jewish and democratic state". The violation caused by the Law is serious. Its harms resounds. Its enactment is a foundational even in the democratic history of Israel. Even if there are those who would see this as a watershed in the relationship between the branches of government, the court can no longer observe this even from the sidelines. There is no option but to exercise our judicial authority. The severity of the violation and the concern about its additional ramifications make this necessary.

This does not detract from recognition of the gravity of the terror that has struck in our midst. The scenes of the attacks which we have experienced and their horrible results constantly pierce our hearts. Comfort over the worlds that have been destroyed in an instant – young boys and girls, parents, the elderly, entire families with all their children, soldiers, men and women – is hard to find. Outright war must be declared on the murderers, those who send them out, those to do their bidding – even amongst Israeli Arabs. It is the duty of the State to protect its residents, insofar as possible within the framework of the democratic regime. Its

role is to aspire to ensure personal security. In times of security threats, the State is permitted to act differently than in times of peace and quiet. Nevertheless, we must not cross lines that must not be crossed. This has happened, even in foreign fields (and see: Hiabayashi v. United States [9]). This is not the way of the Israeli legislator. "Israel is the only state in the twentieth century that has succeeded in maintaining the existence of democratic institutions and a reasonable level of human rights for its citizens, despite the constant external threat" (Hofnung, *ibid.*, at p. 346). I am sure that just as the Knesset succeeded, over the years, in dealing with complex, difficult challenges, this time too it will find a way to fix that which requires fixing.

28. Based on this position, I propose to my colleagues that we issue an absolute order stating that the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003, is void on grounds of unconstitutionality. The voidness of the Law will come into effect nine months from today.

Justice S. Joubran

I concur in the ruling of my colleague Justice E.E. Levy according to which the Law should be struck down, even in its present formulation. However, my reasoning is different.

In HCJ 7052/03 *Adalah – Legal Center for Minority Arab Rights in Israel v. Minister of the Interior* [1] (hereinafter: *Adalah Case*), I ruled that the right to establish family life is a constitutional right which is protected in its entirety by Basic Law: Human Dignity and Liberty. I also ruled that the harm caused to this right by the arrangement specified in the Law touched upon the very essence of a person as a free citizen.

The Law and the amendment thereto prevent (almost totally) the possibility of realizing the right to family life with a partner who is an inhabitant or a citizen of the Area. This limitation is relevant only to the group comprised of Arab citizens of the State – it is they who in practice marry spouses from the Area. Accordingly, the provisions of this Law must be viewed as substantially violating the constitutional right to equality.

I will add that the amendment to the Law includes both inhabitants of the Area and inhabitants of states listed in Addendum B, including Syria, Lebanon and Iran. In my view, this generalization is not justified. *First*, the political situation that exists between Israel and the Palestinian Authority is different from that existing between Israel and the states appearing in the second addendum. *Secondly*, it is unjustified in view of the social, cultural and special historical situation between the Arab citizens of the State of Israel and the inhabitants of the Area.

3. The respondents argue that the provisions do not violate the right to equality, and that they are based on a permitted distinction due to the security threat that is posed by partners from the states specified in the Law. However, the total negation in the Law of the possibility of acquiring a status for a partner who is an inhabitant of the Area, with no indication of danger posed by him, attests in my view to a distinction which is not permitted, one which has ramifications for a defined, specific population group (Arab citizens) and which is not based upon concrete characteristics of those who are seeking the status (inhabitants of the Area).

The State supports its argument with data according to which, of the total number of inhabitants of the Area who acquired status in Israel by virtue of family reunification, several dozen have been involved in terrorist activity. It contends that there is a statistical potential

risk posed by every one of the members of the group which justifies the distinction. In my view, attribution to an individual in a group of the negative characteristics that are attributed to the group, in the absence of any specific indication in respect of that particular individual, is illegitimate, and it violates the autonomy of the individual and his dignity. It would have been appropriate for the State to act to obtain maximum information, in order to create a distinction between the different persons seeking status and the degree of risk that they pose.

4. This, of course, does not decrease the importance of the security need which is behind the enactment of the Law. Every state is obligated to preserve its existence and to protect the security of its citizens. However, it must be recalled that the state exists not only for the purpose of preserving the physical existence of its citizens, but also in order to allow them to realize their humanity and their liberty, through the creation of the rule of law.

5. The violations of protected constitutional rights perpetrated by the Law are extremely severe, but that is not enough to strike it down. In accordance with the limitation clause in the Basic Laws, a law may violate constitutional rights, since they are not protected in their entirety. My colleague Justice E.E. Levy rules that the Law already fails to meet the second criterion of the limitation clause (the criterion of befitting the values of the State). In my view, my colleague's approach extends the scope of judicial review within the parameters of the criterion of "befitting the values of the States of Israel" in the limitation clause; this is at a time when the constitutional tools of review – central to which is proportionality – that were broadly developed in international and Israeli law are more suited to the constitutional examination of this Law, in accordance with what my colleague President Barak wrote in the *Adalah Case*. In my view, in the area of judicial review of the constitutionality of a law, we must proceed cautiously and with restraint. As long as the second criterion of the limitation clause has not been sufficiently developed, it should continue to be invoked as a threshold criterion at a high level of abstraction, and its development should be left pending for the future.

Moreover, recourse to the criterion of "befitting the values of the State" for the purpose of voiding this Law departs from our analysis in the *Adalah Case*. Despite the amendments to the Law as described, and the worsening violations, I am not convinced that there is justification for departing from President Barak's analysis, with which I concurred (see the *Adalah Case*, p. 485). Care must be taken that similar cases received similar legal treatment, and even if in this case it seems, *prima facie*, that the path trodden by my colleague Justice E.E. Levy is correct and just, we must maintain strict consistency, unless there is significant reason to deviate from our path.

6. In the *Adalah Case* it was ruled that the Law was designed for a proper purpose (pp. 318, 340). On this matter, I will once again stress that an examination of the Law and the arrangements it establishes, even in its present formulation, engenders the concern that security is not the only consideration behind the enactment of the Law, and it raises questions about the policy that the Law seeks to realize. It appears that demographic policy also figures amongst the considerations underlying the Law (see the *Adalah Case*, pp. 486-487). At the same time, having concurred in President Barak's ruling in our previous judgment, whereby even the security consideration does not justify such a severe violation of family life and of the right to equality, I see no need to discuss this issue in the present petition as well.

7. In light of this assumption, let us proceed to the criteria of proportionality. Regarding the first sub-criterion – the rational connection between the means and the end – in my opinion it should be ruled that there is a rational connection between the security purpose

of the Law and the means that it prescribes. In the framework of the criterion of the rational connection, a clear question must be asked: do the means that were selected further the aims of the Law? Even if the purpose of the Law is only partially realized, the rational connection exists.

In accordance with the interpretation accorded to this criterion, one is hard-put say that the Citizenship Law fails to meet it. The very fact that the Law is of help in realizing the purpose, i.e., reduction of the security risk (as my colleague Justice E.E. Levy also determines in para. 36 of his opinion) shows that it establishes a rational connection between the end and the means. Other considerations should not be introduced into this criterion – ones which should find expression in the balance in the framework of the third sub-criterion of proportionality.

8. The criterion of the "least intrusive means" has been interpreted in the case law as an instruction to examine whether the legislator selected, from amongst those means *that realize the proper purpose* of the law causing the harm *with the same degree of intensity*, the means that entail the least violation. The only difference there should be if we were to exchange the harmful means with an alternative is a lesser violation of the constitutional rights, with no difference in the other details surrounding the Law and in the extent of realization of the proper purpose (Barak, *Proportionality in Law*, p. 399). In my view, the question of the extent to which the alternative means must realize the purpose of the Law is likely to arise here: must the realization be full and identical, or can we be satisfied with a high, although not identical, degree of realization? I do not think that this question must be decided, since in my view the Law must be struck down as it does not meet the third sub-criterion, as will be elucidated below.

9. The third sub-criterion is the very heart of the principle of proportionality, which erects a "moral barrier" and prescribes that there must be an appropriate relationship between the benefit engendered by realization of the purpose of the law and between its violation of constitutional human rights. In relation to this sub-criterion, no amorphous, generalized balance is sought between the benefit and the harm. We must define what the harmful means has added to the purpose that the law sought to promote, and to examine this as against the additional violation of the constitutional right as a result of that same violating means prescribed in the law, and to compare their weights. Moreover, a situation is possible in which the balance can be reduced even beyond this. The starting point of the balancing of what has been added was the assumption that we are comparing the situation prior to the enactment of the harmful means with the situation following its enactment. As will be recalled, a less harmful means may possibly be found, one which does not wholly realize the aims of the Law, and which is not necessarily relevant to the second sub-criterion, but which is relevant in the context of the third sub-criterion. If such a means exists, then it will be the means figuring in the balance.

10. Thus, the Law in the present case is not the only means to ensure the security of the residents of the State; it is only one of the many means of maintaining security alongside many other laws, the activity of the security forces etc.. On the other hand, the means adopted by this Law cause a severe violation of the right to family life and the right to equality. In view of the complexity of the said rights and the many violations of them, the realistic path is to examine what the Law *adds* to security, and what it *adds* to violation of the right. This is based on the assumption that security is also realized through many other means, and that the constitutional rights are violated by many other arrangements as well.

11. The question in the framework of this sub-criterion in the present case is this: "Is the additional security that is obtained in the transition from the strictest detailed check possible according to the law of the foreign partner to a sweeping prohibition on entry into Israel properly proportionate to the additional violation of human dignity of the Israeli spouse that is caused by this transition?" (*ibid.,* at p. 345). The answer to this question is that there is no proper proportion between the added contribution to the purpose of the Law as opposed to the additional violation of constitutional rights. Indeed, assuming that we are talking about a proper security purpose, then the means prescribed by the Law, and principally, the blanket prohibition, contribute to security. But this purpose is obtained at too heavy a price. A democratic state cannot allow itself to pay such a price, even if the purpose is apparently a proper one.

12. Therefore, I concur in the decision of my colleague E.E. Levy that the order should be made absolute, and that the Citizenship Law should be declared void due to its non-constitutionality. I would add that alongside the legal difficulties that are raised by this Law, and due to which it should be struck down, this Law, like every law, was created in a particular social atmosphere and it affects this atmosphere. I can but rue the existence of this Law, which has the power to continue to make difficulties for the maintenance of the integrity of the delicate fabric of Israeli society, in all its sectors and varieties.

Justice E. Rubinstein

Justice E. Arbel

Justice Arbel joined in the deliberation of the petition in its second incarnation, following in the paths that were paved in the first judgment on the matter of the Citizenship Law; she elucidated her position and her reasoning, stressing the difficulty involved in making a decision.

In the view of Justice Arbel, and as the majority of the bench in the first judgment on the Citizenship Law held, the starting point of the deliberation must be that the purpose of the Law is security-related. At its heart is the concern about involvement in activity against the security of the State of Israel on the part of foreigners who arrive from states or areas whose hostility to Israel is clear and known, and who wish to settle in Israel in the framework of family reunification with an Israeli partner.

The right to family life is a constitutional right that is derived from the constitutional value of human dignity. The right of a person to connect to a person and to establish a family with that person is intricately woven into the value of human dignity, and lies at its heart. It is one of the fundamental components that define a person's identity and his ability to achieve self-realization. A person's right to choose with whom to bind up his life is the ultimate expression of autonomy of the individual will. It expresses a person's most basic needs for love, for belonging, for partnership and for propagation. As such, it stems from the very basis of human existence. However, the right to family life does not means that the foreign spouse of an Israeli citizen has a right to immigrate to Israel by virtue of the marital bond. As has been mentioned, a state, by virtue of its sovereignty, has the power to limit the entry of foreigners into its territory, and a foreigner has no vested right to enter the country. In principle, the State, due to its security requirements, may decide to prohibit entry into its territory of nationals of a hostile state or of those who arrive from places which are very

hostile towards Israel and in which activity against Israel and its security is conducted. This is even more the case when Israel and the state of the foreigner for whom family reunification is sought are engaged in armed struggle, and it is certainly true in relation to a state that is subject to such varied, incessant significant security threats such as Israel. However, even in this situation, the Law must meet the constitutional criteria of legislative review.

In proceeding to examine whether the right to family life is violated by the Law, Justice Arbel was of the opinion, after difficult deliberation, that there is no escaping the conclusion that the right to family life comprises two aspects – the substantive right to marry a foreigner and the right to realize family life in Israel. The separation between the substantive right and the right to realize it is artificial, for without realization of the right, there is no right. The almost blanket limitation imposed by the Law on the possibility of establishing family life together with a foreign partner who is an inhabitant of the Area, or the subject of a state that poses a risk constitutes a violation of a constitutional right not only by its very nature, but also, and mainly, because the implementation of the said limitation is not egalitarian.

Indeed, the Law does not distinguish between the Jewish citizens and the Arab citizens of Israel. It does not distinguish between any citizens. The same rule applies to all. The distinction adopted by the Law is based on a relevant difference between foreign partners who originate from the Area and hostile states – places in which activity against Israel and its security is conducted – and foreign partners from other places which do not, apparently, invoke a presumption of danger of this sort. However, even in these circumstances, the focus of the examination is on the Israeli citizen. For the Arab citizens of Israel, the inhabitants of the Area, who are members of their nation, constitute a potential group with whom to establish family connections. As such, on the basis of the outcome, they are the main victims of the limitation according to the Law. When, according to the outcome, the Arab citizens of Israel are much more severely harmed as a result of the statutory limitation than are other citizens of Israel, such a broad assumption of dangerousness as prescribed by the Law cannot legitimize the violation of the right to family life, to equality, nor can it legitimize the violation of dignity. In practice, the violation of the right to family life occurs in a way that is unequal and discriminatory. Accordingly, it was ruled that the Law violates the right to family life, in its broad sense, and the right to equality.

According to Justice Arbel, the main difficulty posed by the Law in its current formulation focusses on the stage of examining proportionality in its narrow sense, which is a component of the criteria of the limitation clause in sec. 8 of Basic Law: Human Dignity and Liberty.

Justice Arbel believes that it is very doubtful whether from a practical point of view, the detailed security check alone is capable, as the petitioners contend, of achieving the purpose of the Law. Relying on the assessment of the professionals, Justice Arbel concluded that despite the fact that individual scrutiny of partners who wished to enter would cause the least violation, from the point of view of severity, scope and depth, of the right to family life and of equality, it is not capable of realizing the purpose of the Law to the same degree as the broad prohibition under the Citizenship Law. Therefore, it was ruled that the Law stands up to the second sub-criterion of proportionality – the criterion of the means which is least intrusive, for no other less harmful means exists which will realize the purpose of the Law to the same extent as the means that was selected.

On the question of the proper ratio of the security purpose of the Law to the harm it causes to the basic right to family life, Justice Arbel's opinion was that an examination of the "added value" that the Law provides as opposed to the "added harm" caused by its violation of the right of Israeli citizens to family life reveals that the Law is not proportional. This position is based on two elements. The first is the non-proportionality of the harm from the perspective of time, for recourse has been had to a temporary order whose validity has twice been extended by the Knesset and ten times by governmental decisions. The fact that the violation of basic rights was effected by a temporary order, due to the exigencies of the time, can indeed serve as an indication of the proportionality of the violation. The temporary nature of the violation, stemming from the fact that the legislation appears in the framework of a temporary order, has implications for assessing the magnitude, the depth and the breadth of the violation of the human right. However, since the Law was enacted as a temporary provision, its validity has been extended twelve times. There has been no significant change in the Law. A survey of the changes that were introduced into the Law in the years that elapsed since its enactment raises, at very least, a concern that more than being designed to moderate the severe harm that the Law represents, these changes were designed to provide a basis for it. A temporary order is naturally suited to a temporary arrangement. Invoking it for purposes that touch on the core of the constitutional rights, such as in our case, gives rise to difficulties, particularly insofar as it entrenches a severe violation of human rights. Hence, the matter ought to have been regulated by statute.

The second base on which the position of Justice Arbel rests is the nature of the violation of basic rights. According to her, the potential added security provided by the restriction under the Law does not equal the additional certain damage in the wake of a real, concrete, profound and severe violation of the right to establish family life, of the right to equality and dignity, as well as a violation of their right to realize these rights in a state in which they are citizens with equal rights. To these is added the severe harm done to the feeling of belonging of the Arab citizens of Israel, which may intensify the feeling of alienation and rejection that is common amongst at least some of this public.

Justice Arbel arrives at this conclusion in light of the existence of a more proportional, even if not optimal, alternative – the detailed examination – which can be improved by combining it with additional means of checking and oversight. Together with this, Justice Arbel mentioned the conditions which could be added to the detailed examinations in order to demonstrate that the voiding of the Law need not necessarily leave the legislator empty-handed. A suitable arrangement could be basically similar to the outline proposed by Justice Levy in the first incarnation of the judgment in the matter of the Citizenship Law, which included three main components: as thorough and detailed an examination as possible in the circumstances; conditioning consideration of the application upon the foreign partner not being in Israel illegally and not being in Israel as long as permission to enter has not been given; similarly, a requirement of declaration of loyalty to the State of Israel and its laws, renouncing loyalty to any other state or political entity. It would also be possible to require longer minimum period of residence in Israel as a threshold condition for acquisition of Israeli citizenship, when the spouse is an inhabitant of the Area or a national of a hostile state. Commission of serious criminal offences will be cause for immediate termination of the process of family reunification. The State is authorized to attach certain conditions to a person's entry into Israel, the purpose of which is to reduce the security danger he represents, such as a prohibition on visiting his original place of residence or a prohibition on making

contact with certain elements if they are involved in activity against the security of the State. Justice Arbel does not rule out the possibility that the arrangement that will be introduced will distinguish between territories in Judea and Samaria and between the Gaza Strip and hostile nations, if the experts on behalf of the respondent think that there is a difference between them with respect to the ability to gather information for the purpose of conducting an individual examination .

Justice Arbel proposed to defer the declaration of voidness for a year from the time of publication of the judgment, mainly because this is a complex subject which is of great public importance. The legislator must weigh the subject in all its aspects, and formulate a proper, balanced arrangement, or alternatively, prepare itself for the reality that will exist once the Law is no longer in force. The legislative arrangement will be shaped and set in place by the legislature, if it sees fit to do so, for that is its role and its expertise.

Justice H. Melcer

Introduction

1. Let me begin by saying that in my opinion, the order nisi that was issued in this case should be cancelled. This is because the arrangements that were prescribed in the Law that is being challenged are, at this time, the lesser evil, and "better safe than sorry". In the area with which we are dealing, the principle that reflects the above saying is the precautionary principle. This principle has established itself in recent years in relation to various subjects, and it seems to be applicable to the present matter as well.

The Present Petitions and the Normative Basis

2. The petitions before us once again raise the question of the constitutionality of the current provisions of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003 (hereinafter: the Law, and together with the amendments made to it: the amended Law). The previous formulation of the Law was examined in the framework of HCJ 7052/03 *Adalah – Legal Center for Minority Arab Rights in Israel v. Minister of the Interior* [1] (hereinafter: *Adalah Case*), and the petitions in that matter were ultimately denied.

After the judgment was handed down in the *Adalah Case*, the Law was amended, and changes were introduced to it. Against the amended Law the present petitions were lodged, and in the period during which the petition has been pending, the validity of the amended Law has been extended several times by the Government with the approval of the Knesset.

3. The amended Law provides that the Minister of the Interior will not grant Israeli citizenship or a permit to remain in Israel to a person who is an inhabitant of Judaea and Samaria or of the Gaza Strip (hereinafter: the Area), or a person who is a citizen or resident of Iran, Lebanon, Syria or Iraq. The amended Law also provides that the commanders in the Area will not provide the inhabitants of the Area with a permit to remain in Israel.

Several exceptions were made to this provision, by virtue of which the governing bodies mentioned in the Law were authorized to provide a permit to remain in Israel, or a status in Israel in particular cases.

In the amendment of 2007, several innovations were introduced into the amended Law: the establishment of a committee charged with examining the provision of a permit to remain in

Israel for humanitarian reasons; a broadening of the geographical scope of the Law as mentioned above; and an extension of the definition of the security risk to a situation in which activity was taking place in the area of residence of the person that was liable to endanger state security.

Current Data concerning the Amended Law in Light of the Security Situation (according to the Respondents)

4. The point of departure of the amended Law is that at this time, it is not possible to conduct a detailed diagnosis for the purpose of predicting whether a person is dangerous with respect to the entire body of requests to settle in Israel by virtue of the process of family reunification. Therefore, the amended Law prescribes a model based on risk profiling.

Thus, *inter alia*, special arrangements were fixed for obtaining a status in Israel, and women and men who were not included in the clear risk groups were excluded. Authority was also given to deviate from these arrangements for special humanitarian reasons.

5. The respondents declare that from August 2005 until April 2010, the Ministry of the Interior approved the granting of status in Israel to 4118 subjects of the Palestinian Authority on the basis of applications for family reunification. To this data must be added the activity of the Professional-Humanitarian Committee. Up to April 2010, in excess of 600 applications were submitted to the Committee. More than 282 applications were considered by the Committee. 33 applications were handed on with positive recommendations to the Minister of the Interior and approved by him, and the applicants were granted permits to remain in Israel.

From the above it emerges that despite the security risk, in recent years more than 4,000 Palestinians were granted a status in Israel by virtue of the exceptions prescribed in the amended Law.

The Present Security Situation

6. From the statistics of the Security Forces, the following facts emerge:

From 2006 until April 2010, some 200 suicide attacks were averted. In addition, in the course of the years 2009-2010, the General Security Services averted dozens of intended suicide and kidnapping attacks at earlier stages of their preparation, We were further informed that the terrorist organizations continue to attempt, constantly, to carry out attacks in Israel, and to recruit activists and arms for perpetrating attacks.

7. The assessment of the security forces is that radicalization amongst the Palestinian population is on the rise. This applies to the Gaza Strip, and to Judea and Samaria and the Jerusalem area.

8. From the above we learn that contrary to the impression of relative quiet, attempts are being made to carry out attacks in the heart of the State of Israel. In order to carry out attacks, cooperation with those who are originally "inhabitants of the Area", who have settled in Israel, is necessary. *In almost every such attack to date within the territory of Israel, a person bearing Israeli documentation was involved at some stage or other of the planning, abetting or perpetration of the attack.*

The amended Law is one of the ways of preventing this.

Statistics about the Involvement in Hostile Terrorist Activity of Palestinians who were Originally Inhabitants of the Area, who Reside in Israel After having been Granted Status in the Wake of the Process of Family Reunification

9. From 2001 until 2010, 54 Palestinian subjects, who acquired or sought to acquire status in Israel in the framework of the process of family reunification, or elements connected to them directly, were involved in terrorist activities that were actually carried out, or that were prevented at the last minute.

In this context it should be explained that according to the approach of the security forces, the *very entry* of a Palestinian subject into Israel in the framework of the "graduated test" adopted by the Israeli authorities is what makes it "attractive". Naturally, insofar as the person bears an Israeli identity card or driving license, his "potential contribution" to the causes of terror also grows.

Failures of Individual Screening and the Age Groups in the Profile of Dangerousness for Perpetrating Hostile Terrorist Acts Against the State of Israel in Accordance with the Amended Law

10. According to the statistics of the Security forces, since September 2005 632 applications to acquire a status in Israel by virtue of family reunification were rejected on grounds of involvement in terrorist activity.

It should be understood that of the 632 applications that were rejected as stated, in 273 cases the obstacle arose after the status was granted or preliminary approval was given in the framework of the "graduated process". It will be stressed that in relation to these applicants, the information from which it emerged that they were perpetrators, terrorists or helpers was discovered after the individual screening had not produced any suspicious information in relation to them.

Hence one can discern the inherent difficulty in relying on detailed screening, while ignoring the age-risk profile of the inhabitants of the Palestinian Authority.

The activity of terrorist organizations is based on the recruitment and identification of activists who are not known to the security forces in Israel from the outset as terror activists, in the format of penetration into Israel by means of marriage. For these seekers of status individual screening is in any case not effective, for at the time of submission of the application these people are not involved in terror and therefore there is no information arousing suspicion about them.

Moreover, the failures of individual screening are aggravated with the routinization of the phenomenon known as the "lone attacker", who acts without affiliation to any terrorist organization.

Reactions of the Petitioners to the Above Statistics

11. The response of the petitioners in HCJ 830/07 to the above information was a general denial. Furthermore, they and the other petitioners repeated the legal arguments that they raised in the *Adalah Case* and in the petitions before us.

12. The petitioners in HCJ 5030/07 asked to discuss the violation of the rights of minors in the provisions of the amended Law, and commented that the respondents had not supplied separate data concerning the involvement of the children of inhabitants who acquired a status or a permit in attacks. Moreover, and according to them, the status of the children who live in East Jerusalem was not accorded separate treatment, as was required according to their approach. They also added that the credibility of the security argument is undermined by the application of the amended Law to children, as well as the willingness to furnish them with

CCA (Coordination and Communications Administration) permits alongside the refusal to grant them permanent status and social rights.

Deliberation and Decision

13. The basis for the allegations of the petitioners is in the fact that the amended Law violates the basic constitutional right to family life.

In my opinion, even though the right to family life is a basic right, the possibility of realizing it in the state of citizenship of the Israeli partner *does not have constitutional status*, as I shall elucidate below.

Rejection of the Argument that the Right of the Israeli Partner to Bring the Foreign Partner into Israel is a Constitutional Right that is Protected by virtue of Basic Law: Human Dignity and Liberty

Under the provisions of Basic Law: Human Dignity and Liberty, the right to enter Israel is granted *only to Israeli citizens* (sec. 6(b)). The right to leave the country, on the other hand, is granted *to every person* (sec. 6(a)). My opinion is that the right to enter Israel is the constitutional right of a citizen, and not one conferred upon every person, as I will explain forthwith.

According to the opinion of the majority of the justices in the *Adalah Case*, the basic constitutional right to family life is a *derived right* from the "mother right" to human dignity, or a type of right derived from a derived right (a "grandchild right") to the right of equality that is included in the "framework right" of human dignity. The question here, therefore, is how far the "rights without a particular name" can be stretched. It would seem that when the *extent* of the derived right is not consistent with the reach of the particular constitutional "mother right", the latter must prevail as being *lex specialis.* That is to say, in the said case the particular "mother right" – the right of entry to Israel, as defined in the Basic Law – prevails over the derived right – the right to family life in Israel of the Israeli citizen, and its ramifications for the possibilities of the foreign partner and children to enter the State and remain there.

Contrary to the petitioners' argument, comparative law has *not* recognized a constitutional right of the right of a spouse who is a citizen to cause his/her partner to acquire citizenship or another status for remaining in the country of citizenship (of the former). Only recently, this rule was again approved in the European Court of Human Rights, in the case of Kiyutin v. Russia [21].

14. This leads to the conclusion that the petitions should be denied, even if only on the basis of the fact that in my view, the alleged right on which the petitions are based does not pass the "first stage" of the constitutional examination. At the same time, out of respect for the opposing – reasoned and detailed – views of the majority justices in the *Adalah Case*, and of some of my colleagues here, I will continue with my analysis and I will discuss the applicability of the terms of the limitation clause to the entire matter.

15. There would seem to be universal agreement that the requirement of the limitation clause that the violation be "by law or according to law", i.e., by virtue of explicit authorization, is met here.

16. It would appear that the majority of the justices on the bench, too, are of the view that it *cannot* be said that the amended Law, in its present format and its temporary nature, is

not in keeping, in the circumstances in which we find ourselves, with the values of the State of Israel.

17. The next test that the amended Law must pass is that of the "proper purpose". In the *Adalah Case*, most of the justices agreed in fact with the view that the Law was designed to ensure Israel's security. And I, too, think so.

18. What remains to be examined, therefore, is the proportionality of the Law according to three sub-tests:

(a) *The test of the rational connection.*

(b) *The test of the least intrusive means.*

(c) *The test of the proportional means* senso strictu.

The main dispute in this case turns on the third of the above sub-tests.

At this point I wish to show that the amended Law satisfies the above criterion, in that it represents the precautionary principle, which has been developed in comparative law for situations of predictable uncertainty and catastrophic risks.

The precautionary principle is a relatively new principle in public law, but within a few years it has justifiably become – with the support of liberal jurists and the case law – one of the important principles in a number of areas, such as the environment, the use of nuclear energy and nuclear waste, use of medications, genetic engineering, oversight of food, sources of water and more.

In implementing this principle in the areas in which it was already recognized, the precautionary principle was designed to deal with the difficulty of the gap between the existing knowledge at a given time and the enormous and uncertain potential harm that was liable to be caused by an activity, if appropriate precautionary measures were not adopted in relation to that activity. From the outset, the principle allows the authority (the legislature or the executive) to adopt measures designed to prevent the catastrophe when a significant threat of irreversible, wide-spread damage exists, even if the probability is low and even when there is no proven scientific certainty that the damage will indeed eventuate.

Many fine scholars have studied the origin of the precautionary principle. Some have held that this principle is simply a matter of pure logic. According to others, it is typical of the modern approach of citizens and governments who are attempting to reduce risks, or to change the emphases of various disciplines and values (science, economics, ethics, philosophy politics and active law – for the protection of the public) that prevail in society. My present analysis follows the path of the research of Professor Funk (Björn M. Funk, "The Precautionary Principle", in *The Earth Charter: Framework for Global Governance* 191, 196 (Klaus Bosselmann and J. Ronald Engel eds., 2010), although I believe that it is possible to find echoes of this principle already in the words of Proverbs 28:14: "Happy is the man that feareth always…". In all events, in modern law the development of this principle is attributed to German jurisprudence, in which it also came to be known as the *Vorsorgeprinzip*.

The principle first received a universal legal formulation in 1992 in the Rio Declaration on Environment and Development. Since then, the principle has been modified many times in form and content, and it has had some twenty formulations.

The commonly accepted approach today with respect to its definition is formulated as follows:

> Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically In this context the proponent of an activity, rather than the public bears the burden of proof. (Wingspread Statement on the Precautionary Principle (1998), http://www.gdrc.org/u-gov/precaution-3.html).

This approach is more simply and memorably formulated in the English expression, "Better safe than sorry."

(a) Dr. Liav Orgad in his article ("Immigration, Terror and Human Rights: Israel's Immigration Policy in Times of Emergency (Following HCJ 7052/03*Adalah v. Minister of the Interior*)", 25(2) *Mehkarei Mishpat* (2009), 485) offers a number of reasons why, in the circumstances, the basic constitutional right to family reunification in Israel may be violated, even if the percentage of terrorists among the "family migrants" is small. They are as follows:

(1) The relevant question, in his opinion, is not how many "marriage migrants" were *involved in acts of terror or how many acts of terror occurred due to their immigration, but rather, how many victims there were and how much damage was caused.*

(2) It must be borne in mind that the success of a "quality" terror attack exacts a cost that is far greater than the number of victims: it has far-reaching strategic, political and psychological ramifications. A successful terror attack has ramifications for the state economy, for tourism, for international relations, for the deterrent ability of the state, for its ability to stand up to threats and similar variables that are part, or should be part, of every mathematical equation or formula.

(3) The question is not only how many acts of terror were committed by "family migrants", but what percentage do these constitute of total terrorist acts that were committed by Israeli citizens.

(4) Even if we accept that the state must take risks in order to realize basic constitutional rights of its citizens, we cannot ignore the fact that the risk that the state is required to take in the case of marriage migration of enemy subjects stems not from citizens of the state, but from foreign partners.

(5) The present version of the Law contains five exceptions, which in any case obligate the state to take risks; these exceptions allow for detailed screening of about thirty percent of the applications.

(6) From an institutional point of view, value-based decisions of this type ought to be made by the parliament and not by the court, unless there was a flaw in the decision-making process or it was based on alien considerations or it is irrational.

20. It now remains for us, therefore, to examine the compatibility of the precautionary principle with the test of proportionality. The leading European decision on this subject is Pfizer Animal Health SA v. Council of the European Union [22] of the European Court of Justice, which in effect combined the precautionary principle with the criterion of proportionality and ruled, in our terms, that in cases in which the conditions for the application of the precautionary principle are met, one cannot say that the acts of the authority did not fulfill the requirements of proportionality, for in such situations, preference is

accorded to the considerations of the regulatory authority, since *it bears the responsibility* if the catastrophe eventuates, and it *will be required to justify its actions, or its omissions*.

Let us now move on to discuss in greater detail the third sub-criterion of proportionality i.e., the "test of relativity".

21.The criterion of "proportionality *senso strictu*" requires, as is known, that in order to justify the violation of a constitutional right, there must be a proper and positive relationship between the added benefit ensuing from realization of the legislative purpose and between the added harm that is liable to be caused thereby to the constitutional right. In my humble opinion, when the added benefit that the Law under scrutiny wishes to provide is the *prevention of anticipated damage,* and particularly in situations in which the precautionary principle is apt, the relevant legislation will successfully pass this sub-test.

Thus, in the present case, the alleged additional violation of the right to family life, which is of high probability in the wake of the provisions of the amended Law, carries less weight than the anticipated harm.

22. Moreover, and on the contrary. As is known, the legislator is afforded "legislative room for maneuver". Within this room, the question with which we are confronted is not whether we would succeed in devising a better arrangement, but whether the arrangement that was selected is *constitutional*, i.e., whether it falls within the "legislative room for maneuver" within which the legislator is permitted to operate. Indeed, as Dr. Orgad demonstrates in his above article, the legislator not infrequently fixes provisions and prohibitions on the basis of statistical generalizations that are considered reliable, even if most of the individuals who belong to a particular risk group are not dangerous on an individual level, but the level of danger presented by this group as a whole is higher than that presented by other groups. Thus, for example, the generalization whereby young people have dangerous driving habits, and therefore restrictions and special statutory provisions will apply with respect to their driving, does not mean that all youngsters, or even a majority of them, drive in a dangerous manner, and it does not require a cancelling of the restrictions in the law that are applied to the driving of youngsters per se. This is particularly the case in relation to the precautionary principle.

23. Application of the precautionary principle in the present case is justified, for this is a situation in which the uncertainty is great and even if the alleged anticipated danger is relatively very low, the tragedy that could be caused is absolutely terrible, and there is in fact no alternative for preventing it other than by means of a blanket restriction (with exceptions, as in relation to the amended Law). Moreover, the parameters for comparison between the potential damage and the violation of the right *set up different values, which are difficult to present and assess in juxtaposition.*

24. The precautionary principle has another quality that is relevant to our matter, viz., the fact that it requires a permanent, ongoing examination with respect to the parameters defining it. This is consistent with legislation of temporary orders, for *limitation of time, per se, contains an element of proportionality.*

25. We learn from comparative law that recourse to temporary legislation is appropriate in four alternative situations (see: Jacob Garsen, "Temporary Legislation", 74 U. *Chi. L. Rev.* 247, 273-279 (2007)):

(a) Constraints due to urgency or emergency;

(b) A controlled trial of a new system, or a new policy or as a means of receiving information;

(c) A response to defects in existing normative situations;

(d) An attempt to overcome cognitive biases.

Simply put, it appears to me that most of the above situations *exist* with respect to the reality that gave rise the amended Law and its extensions, *and it can only be hoped that the reasons that justify adopting these steps will disappear in future*. In the last update submitted to us by the respondents on 21.12.11, they said that an administrative study project is being conducted by the Government with the objective of formulating a comprehensive legal arrangement regarding the policy for entry into and settlement in Israel, as part of the State's handling of the issue presented by legal and illegal immigration to Israel.

In view of the above – in the framework of the abovementioned administrative study which is at present being carried out, or parallel to it, in deliberations towards extending the validity of the amended Law – emphasis should be placed at least on two subjects:

(a) A thorough reexamination of the severity of the present risks, while attempting to neutralize the cognitive biases that exist in these fields.

(b) The provision of appropriate solutions for the problems and the status of minors, the children of the families to which the Law refers. On this matter I concur, fully, in the opinion of my colleague Justice M. Naor.

This last matter brings us to the issue of relief.

Relief

26. In my view, as stated, the petitions should be denied. However, even those of my colleagues who hold that the Law should be declared void are of the opinion that the decision of voidness should be deferred for a significant period (up to nine months), in order to allow for another statutory arrangement to be devised. In my humble opinion, there are two fallacies in this approach:

(a) At the time of writing this opinion, the said Law is scheduled to lapse on 31.1.2012, and one cannot know if it will be extended and how. Hence, whoever advocates striking it down is in fact giving the amended Law life, or is suggesting to the authority to extend its force even beyond the period allocated to it. This is problematic in view of the substance and the special nature of such a Temporary Order Law.

(b) The relief that my colleagues propose proves that even according to them, the amended Law at this stage *is essential* (even if not necessarily in its present format) *and proportional* and that it in fact meets the requirements of the limitation clause, for apparently, the deferral provision, too, must conform to constitutional criteria.

Justice M. Naor

Justice Naor restated her position in HCJ 7052/03 *Adalah – Legal Center for Minority Arab Rights in Israel v. Minister of the Interior* [1] (hereinafter: the *Adalah Case*), according to which the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003 (hereinafter: the Law) should not be voided. Justice Naor noted that with the passage of time, the number of families who married *prior* to the decision of the Government and the Law and

who are not able to realize family reunification has decreased; in her opinion, this alleviates somewhat the harsh consequences of the Law. Justice Naor added that without making light of the hardship caused to families that were established *subsequent* to the government decision or the Law, the Israeli spouses who chose to establish families after the rules of the game had been changed, with persons whose entry into Israel was *prohibited*, did so in the knowledge of the legal situation in Israel.

Justice Naor reiterated her position concerning the scope of the constitutional right to family life. She discussed the fact that the right to family life, which is a whole world, has many derivatives, and that the constitutional protection of the right to family life does not provide universal coverage on the constitutional level. Similarly, in her view, no general duty should be imposed on the state to permit family reunification within the territory of the State of Israel. Against this backdrop, Justice Naor determined that the constitutional protection does not apply to the possibility of realizing family life with a foreign spouse in Israel in particular, which is only one of the derivatives of the right to family life. Justice Naor emphasized that in other democratic states as well, the constitutional right of a citizen or a resident to bring a foreign spouse into his country and to choose the country in which family life will be realized has not been recognized.

Justice Naor noted that even on the assumption that the right in question is a constitutional one, it was agreed that there is no obligation to permit the right to be realized at all times under all conditions. Justice Naor cited several examples from the case law of the Supreme Court, which permitted postponement or deferment of the realization of the constitutional right, out of consideration for the public interest. Justice Naor pointed out that in a similar fashion, in the present case, realization of the right to bring a foreign spouse into Israel was deferred for a fixed, known time (as opposed to some unclear, undefined time): until a woman reached the age of 25 years old, and a man – 35 years old. Justice Naor ruled that having regard to this and in view of the special, serious public interest underlying the Law, the Law meets the criteria of proportionality.

Justice Naor added that the provisions of the Law applying to minors allow minors *not* to be separated from a parent with custody who is entitled to reside in Israel. Justice Naor added that the State explained that minors who received a resident license or permit to remain in Israel, as relevant in accordance with the provisions of the Law, *would continue* to benefit from the same status even after they reached the age of 14 or 18, as relevant, on condition that they continued to reside permanently in Israel, and in the absence of any criminal or security-related obstacle. In light of the above, Justice Naor ruled that there is no cause for concern that minors, or minors who have reached majority, will be separated from their families; hence, in her opinion, intervention of the Court is not warranted, even in relation to the provisions of the Law that involve minors.

President D. Beinisch

1. The question of the constitutionality of the provisions of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003 (hereinafter: the Citizenship Law or the Law) has come before us once again for adjudication. The Citizenship Law raises several basic issues that Israeli society must confront; first and foremost amongst these is the constant need to find the correct balance between security requirements and protection of human rights. The sweeping arrangements established in the Law give rise to difficult, complex questions which

are both legal and social in nature. These arrangements demonstrate the almost impossible reality with which the State of Israel is confronted both internally and externally. Israel is not the only state dealing with questions regarding immigration policy but it seems that the situation here is different from everywhere else. Israel is in a constant state of war or "quasi-war", and those who seek family reunification in Israel come from areas that are in a state of bitter conflict with Israel. But together with this bitter conflict, there are Arab citizens living in Israel who maintain ties with these people. Some of the ties are family ties. Those Israeli Arab residents and citizens seek to realize their rights, including their right to family life. Because the Arab minority constitutes the absolute majority of those seeking family reunification, any violation of their right to realize their family life is also a violation of equality. However, a certain number of spouses of Israeli citizens, who were permitted to live in Israel for the sake of family reunification, have abused their status and joined terrorist organizations; and ultimately, it was murderous terrorist attacks that spawned the need to legislate the Law and to adopt additional security measures.

In this complex reality, Israel must find an arrangement which, on the one hand, will allow for the maintenance of the security and protection of the State, but on the other hand, will not violate basic rights beyond what is necessary. Finding this balance is not a simple task. Every arrangement must be based on Israel's social, cultural, ethical and legal background. The security situation with which Israel has been dealing since the day of its establishment must be its backdrop, but it cannot ignore the fact that the problems of security are a permanent fixture, and unfortunately, it is difficult to regard this situation as a temporary one.

2. It is extremely doubtful whether the changes made to the Citizenship Law since the first judgment limit its application. The point of departure according to President Barak, in whose position I concurred in the first judgment, was a person's basic right to choose a spouse and to establish a family unit with that partner in his country. This right, so we ruled there, is severely breached by the provision of the Citizenship Law in its establishment of a blanket prohibition against the entry of residents of Israeli-occupied territories, irrespective of whether that spouse poses a security risk. In our judgment we recognized the importance of the security requirements, and even of the need to establish presumptions of risk. At the same time, we pointed out that there cannot be an all-inclusive negation of basic rights, without any concrete investigation of the particular person and situation.

3. In the framework of the amendments that were introduced after the first judgment, the "presumption" of security risk was not changed, and it was even extended. Under the Law at present, not only is no concrete investigation of the risk posed by the spouse or his/her family members or immediate surroundings required, but a general profile of dangerous activity that is taking place at the spouse's place of residence is deemed sufficient. The list of the countries from which entry into Israel is prohibited was extended to all the states that are in a state of belligerence with Israel. The Law, in its former version and as formulated at present, does not allow for a concrete check of those seeking family reunification, and it does not have recourse to other means which involve a lesser violation of rights.

4. We will also mention that not only the changes – the few changes – that were introduced into the Law are the focus of the petitions before us. They are accompanied by the fact that the Citizenship Law, which was enacted as a temporary order, has acquired permanent status on our law books. The Law has been extended twelve times since its enactment in 2003. The significance of this for a constitutional analysis of the Law is huge. The fact that the arrangement established in the Citizenship Law was enacted by way of a

temporary order was the factor underlying the opinions of a significant number of judges in the first judgment, who held that in view of its set duration, the temporary arrangement obviates the need for a determination concerning a constitutional infringement and its proportionality. Reality, as we now know, has proved otherwise. The temporary order was extended many times, and even if it is possible that the same security need drove the extension, the question still arises as to whether, by means of the narrow chink through which temporary orders gain entry, the legislator was not attempting to introduce matters that would better have been given serious consideration, and in relation to which their introduction through the front door should have been examined.

5. In this situation, I can only repeat the position I expressed at length in the first judgment. The amendments that were introduced into the Law do not ameliorate the violation of the right to family life and the right to equality. I already pointed out in the previous judgment that absolute security does not exist in Israel, nor in any other state. Taking a risk is a necessary element of life in society and in the state, and the question, ultimately, is the degree of calculated risk that Israeli society is able to assume.

6. In this context I will point out that I do not agree with recourse to the "precautionary principle" proposed by my colleague Justice Melcer. The precautionary principle is designed to deal with catastrophes when there is no scientific basis for their eventuation or for assessing the damage that they will cause. This principle allows for reduction, to the point of absolute obliteration, of the margins of risk that society is prepared to assume. By virtue of this principle it is possible to take far-reaching preventive action even in the absence of sufficient proof that the catastrophe will occur. My approach is that the conception of "preventive precaution" which gives priority to adopting the safe line – even where there is no direct causal connection between the act that is averted and its possible consequences – is an extremely wide one. It poses a significant risk not only of infringement of constitutional rights, but also of infringement of the processes of decision-making. This is because, if it is preferable to be safe in every case, there is no need to investigate the alternatives that reduce the violation. This approach has real potential for creating a slippery slope that is likely to lead to recourse to expansive regulatory means in order to prevent risk. It is not only the danger that was averted following recourse to the precautionary principle that must be considered, but also the risk that this itself creates.

7. I do not concur in the position taken by some of my colleagues whereby the risk posed from permitting family reunification, subject to detailed checks or adoption of other means of testing is such that it justifies so broad a violation of basic constitutional rights. I am not arguing with the security needs. However, we must ensure that recourse to principles such as the precautionary principle – the goal of which is to impose very broad arrangements in order to prevent potential danger – do not themselves cause real harm. The Citizenship Law in its present formulation entails very significant harm. It impacts our most basic democratic conceptions. It involves a serious violation of the constitutional rights of the Arab citizens of Israel.

8. My approach, as stated, is that even in its present formulation, the Law cannot be upheld due to its non-proportional violation of the right to family life and the right to equality. I believe that the proper balance was not achieved when the Law was analyzed in the first judgment, and the amendments that were introduced did not bring it to the point at which we could say that the Law is constitutional despite its violation of basic rights. The violation must – and also can – be ameliorated by changing the arrangement, be it by conducting detailed

checks of those who seek family reunification; be it by allowing the refutation of the presumption of risk; or be it by broadening the possibility of acquiring status in Israel for humanitarian reasons. All these must find expression in legislation.

9. Therefore, if my view is accepted, I would propose to my colleagues to order the Law to be invalidated, but to rule that it may be extended in its present format, if necessary, for an additional period not to exceed nine months. I am aware of the fact that in doing so, we will be allowing a law to remain in force despite its non-constitutionality. Nevertheless, in the present case immediate repeal of the Law would change the legal situation that pertained in the last eight years without a transitional period. An immediately-effective change in the reality will lead to a lack of preparedness on the part of the authorities responsible for implementation of the Law, and will increase the danger to which the public is exposed. Secondly – and particularly – this amount of time is required in order to allow the legislator to formulate a statutory arrangement.

Justice A. Grunis

The words of President A Barak (EA 2/84 *Nayman v. Chairman of the Central Elections Committee for the Eleventh Knesset* [6], at 310; CrA 6669/96 *Kahana v. State of Israel* [7], at 580) are based on the statement of Justice Robert Jackson of the United States Supreme Court in 1949 (Terminiello v. City of Chicago [10]). Justice Jackson, who was in the minority, warned his colleagues, the majority justices, in the following words:

> There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact (ibid., at p. 337; my emphasis – A.G.).

These words of warning are what guided me when I expressed my opinion in the earlier process (*Adalah Case*), in which we were asked to examine the constitutionality of the Citizenship Law. I believed then, and this is still my opinion today, that the Law meets the criterion of constitutionality.

2. I am prepared to assume that the Law infringes the constitutional right of the Israeli couple to family life. I stress that this is only an assumption. This emphasis is intended to clarify that in principle, I am not one of those who accord the explicit constitutional rights in Basic Law: Human Dignity and Liberty extremely wide, comprehensive significance. As I said in my opinion in the previous process:

> The very broad definition of the constitutional right … leads to a situation in which quite a few laws will be considered as violating constitutional rights … the outcome is liable to be a devaluation of constitutional rights (*Adalah Case*, at p. 513); and see my opinion in HCJ 8276/05 *Adalah, Legal Center for Minority Arab Rights in Israel v. Minister of Defense* [8]).

Nevertheless, in view of the abovementioned assumption, I considered the question of whether the Law met the criteria of the limitation clause. I focused on the third criterion of proportionality, known as proportionality *sensu stricto.* According to this criterion, we must look at the relationship between the social benefit of the law that is under scrutiny and the damage caused by the constitutional violation. On this matter, I can only mention once again the certain harm that will be caused as a result of the entry into Israel of thousands of Palestinians, who have received the status of permanent residents or citizens as a result of

marriage to Israeli citizens. On the basis of past data, there is no doubt that a certain percentage of them will be involved in terrorist acts. Indeed, the percentage of those involved in terror is expected to be very low, even negligible. However, even if the extent of the damage that will be caused cannot be assessed, it is clear that it will occur. There is no need to describe the consequences of terrorist acts.

3. The relationship between social benefit and harm must be examined also on the assumption of a mistake on the part of the person who would negate the Law, as opposed to a mistake on the part of one who holds the view that the Law meets the constitutional criterion. Disqualification of the Law will lead to the entry of thousands of Palestinians into the State following their marriages to Israeli citizens. If it should emerge in the future that those who would disqualify the Law were mistaken in their low estimate of the risk, it will not be possible to turn back the clock. In other words, if – Heaven forbid – it emerges that there is involvement in terrorist acts, it will definitely not be possible to correct the mistake. It may be possible to revoke the status in Israel of those who turn out to be involved in terrorist activity, but this solution will be available only after the damage – harm to human lives – has already been done. On the other hand, if the Law does meet the constitutional criterion, this will lead to harm to Israeli citizens, who are not able to establish families with Palestinians, or to a familial separation between the Israeli spouse and the Palestinian spouse. I am certainly not belittling this harm, and what is more, from a numerical point of view quite a number of Israeli citizens are effected. Nevertheless, this violation of the right to family life of Israeli citizens has to be weighed up against the certain harm, on the basis of past experience, to the *lives and persons* of Israeli citizens. We must consider another point – one which I mentioned in my opinion in the previous process. None of the judges who are of the opinion that the Law cannot stand, whether in the previous process or in the present one, provided any example or precedent from any other country for a similar situation of a law being struck down. Israel has been in a constant battle for decades against states and organizations that wish it ill. Even if the status of residents of the Palestinian Authority is not identical to that of nationals of an enemy state, it is more similar to that latter status than to the status of nationals of a friendly state. To the best of my knowledge, there has not been even a single case in which a state permitted entry into its territory of thousands of nationals of an enemy, whether for the purpose of marriage or any other, at a time of war or of armed struggle. There is no reason for Israel to be a pioneer in this field.

4. In the framework of her opinion, my colleague Justice M. Naor discussed the arguments on the subject of minors. I concur in her opinion on that issue.

5. In summary, I stand firmly by the opinion I expressed in the past: the Law passes the test of constitutionality, and therefore, the petitions should be denied.

Justice E. Hayut

In the *Adalah Case*, I concurred in the opinions of those justices who held that although the Citizenship Law is consistent with the values of the State of Israel and was enacted for a proper purpose, the arrangements it provides are not proportionate, and for this reason they do not pass the constitutional test. Following this judgment the Law was amended on 28.3.2007 (hereinafter: the second amendment), and three central changes were introduced: *first*, sec. 3A1 was added to the Law, whereby the Minister of Interior is permitted, "for special humanitarian reasons" and on the recommendation of a professional committee that he

appointed for that purpose, to grant a license for temporary residence in Israel or to approve an application for a permit for an inhabitant of the area whose relative is in Israel lawfully to remain in the State; *second*, the Law was applied, in addition to inhabitants of the Area, also to residents of Iran, Lebanon, Syria and Iraq (see the Addendum to the Law); *third*, the definition of prevention for security reasons appearing in sec. 3D of the Law was broadened. The last two amendments in effect extended the scope of the prohibitions established in the Law, and therefore they cannot provide a response to the lack of proportionality which afflicted the arrangements in the Law in its previous format. As opposed to these, the amending arrangement appearing in sec. 3A1 of the Law allows for a license for temporary residence or a permit to stay in the country to be granted "for special humanitarian reasons", but this is an exception designed for exceptional circumstances and rare cases only, and it therefore cannot repair the defect of lack of proportionality from which the Citizenship Law suffers.

2. In the *Adalah Case* I expressed my position that the enactment of laws that provide a response to security needs is one of the means available to us as a state in order to deal with the security risks to which the Israeli public is exposed. I further pointed out that imposing restrictions on family reunification for security reasons is a necessity, and should not be condemned. This is still my opinion. Nevertheless, it seems that the problem of lack of proportionality that taints the Law has not been resolved. I discussed the core of the problem in this context in the *Adalah Case* in saying that the Law "does not include any individual criteria for examining the security risk of an inhabitant of the Area", and I added that given the special, complex security situation of the State of Israel, a presumption of risk in the matter of family reunification is warranted, but this presumption should be rebuttable in the framework of an individual, detailed examination which should be permitted in each and every case.

3. The Citizenship Law, even in its format after the second amendment, continues to preserve the blanket prohibition prescribed in sec. 2 of the Law concerning the granting of status to an inhabitant of the Area (except for a general criterion of age), and largely blocks the path even of those who meet the age criterion or who comply with the requirement concerning the "special humanitarian reasons". This is in view of the broadened criteria that were added in relation to the existence of "security-related prevention"; they now also cover a concern about a security risk that stems, *inter alia*, from the fact that in the place of residence of an applicant who is an inhabitant of the Area, activity is being conducted that is liable to pose a threat to the security of the State of Israel or its citizens. The second amendment to the Citizenship Law does not, therefore, offer any response to the problems emanating from the collective arrangements that it prescribes, and apart from really exceptional cases, no detailed check is carried out by virtue of this Law in relation to those who seek to reunification with their families, and they are not given any practical opportunity to refute in a positive manner the presumption of presenting a danger that is attributed to them. This constitutes a severe violation of the constitutional right to family life of each of the individuals in the group, and it is exacerbated by the fact that this is not a short-term, targeted violation but a violation with long-term consequences. Moreover, the Law was indeed intended to provide a solution to the security needs of the State of Israel, given the armed struggle that the Palestinian terrorist organizations wage against Israel's citizens. At the same time, the collective nature of the policy anchored in the Citizenship Law – which in fact has the capacity to negate the particular identity of the individuals who belong to that collective – and the disproportionate violation of equality due the arrangements prescribed in the Law, are liable to create a

semblance of illegitimate racial profiling which ought to be avoided. When the collective prevention prescribed by the Law remains in place; when the second amendment broadened the collective criteria blocking family reunification between Israeli Arabs and spouses who are inhabitants of the area; and when the people concerned are not given the chance to prove, on the individual level, that they do not pose a security threat, the constitutional defect of lack of proportionality that impaired the Law remains.

4. My colleague Justice H. Melcer believes that in this case, the "precautionary principle" ought to be applied. On this matter I prefer the stance of my colleague President D. Beinisch. The clear disadvantage of this principle, or at least in the way that my colleague Justice Melcer wishes to implement it, lies in the fact that it ignores the fact that the all-encompassing means adopted in the face of the danger whose prevention is sought, in itself creates dangers and harms that are liable to be significant for society or at least for certain groups therein. Therefore, the conclusion is unavoidable that application of the precautionary principle in the said manner displays great sensitivity to the dangers of only one certain type, and it is not sensitive to other harms that are liable to be caused by the very fact of its implementation. The totality that its application involves does not leave room for a correct balancing between the interests – however important they be – that we are required to protect, and the harms and the violations that may well occur as a result of the implementation of the means in this manner. Implementation of the precautionary principle has, to a great extent, the capacity to divest the third sub-criterion of the requirement of proportionality – which is one of the foundational components of the rules of constitutional review in the Israeli legal system – of all content.

5. For all the above reasons, I concur in the conclusion reached by my colleague President D. Beinisch and my colleagues Justices E. Levy, E. Arbel and S. Joubran, whereby the Law should be declared void.

Justice N. Hendel

Difficult constitutional decisions bring out the best in the work of the judge, and at the same time they expose the weakness of the judicial task. The reasoning in various opinions is rich and even personal in a positive sense. But decision-making is far from an exact science, and far from a world in which there is one correct, clear answer which has the power to persuade all those dealing with the case. Against this backdrop my position will be presented.

Violation of a Constitutional Right

1. The preliminary question is whether the Citizenship Law, with its amendments (hereinafter: the amended Law) violates a right under Basic Law: Human Dignity and Liberty. In my opinion, the answer is affirmative due to the combination of infringements of two rights: the right to realization of married life in Israel, and the right to equality.

First, I will comment that there is no constitutional right vested in each citizen to bring a foreigner into the borders of his state, even if he is married to that person. A state is entitled to set immigration law, and the hearts' desire of its citizens cannot dictate policy in this area. This is so in general, and it is particularly so if the partner is a citizen or inhabitant of an enemy state or entity.

As for equality: when the court examines a violation of equality, it must also examine the practical aspects of the outcome, and whether there is clear, unjustified consequential

discrimination. It will be stressed that consequential discrimination is not derived from the intention to discriminate. Take, for example, the present case. I do not believe that the purpose of the amended Law is to discriminate. The purpose is security-related. However, the consequence of the amended Law discriminates between the Jewish and the Arab citizens of the State. This consequence constitutes a constitutional violation. This is the cumulative power of the violation of the right to equality and the right to immigration of a partner for the purpose of marriage. To this is added the fact that the prohibition in the amended Law is sweeping, and it is not conditional upon an individual examination of the foreign partner.

In the overall assessment of the violation of the right of the Israeli partner to bring the foreign partner from the Area and of the lack of practical equality, I found that there is a constitutional violation that necessitates an examination of the amended Law according to the limitation clause.

Limitation Clause – Section 8 of the Basic Law

2. The permit to violate a constitutional right includes several conditions: (a) by law; (b) befitting the values of the State of Israel; (c) enacted for a proper purpose; (d) and to an extent no greater than is required. The last test, that of proportionality, comprises three sub-tests: (1) the test of the rational connection; (2) the test of the means involving the least violation; (3) the test of proportionality in the strict sense. In my view and that of most of my colleagues, it is not difficult to determine that the first three conditions are met, and also the first two sub-tests of proportionality. The disagreement mainly boils down to the third sub-test.

The Test of Proportionality sensu stricto

In the framework of this test, the harm caused to the constitutional right must be weighed against the benefit to the public interest as a result of the violation. In my view, the constitutional right that is violated must first be positioned on the scale of constitutional rights, and the relevant public interest must be juxtaposed to other interests. Such "prioritization" of the rights and interests can assist the court in carrying out the task of constitutional balancing. This is similar to the approach in the United States, where it is customary to rank the constitutional rights on three levels for the purpose of determining the level of judicial scrutiny.

As I mentioned, the prohibition on bringing in a foreign partner who is an inhabitant of the Area, and establishing a family with this partner in Israel, together with the consequential discrimination against Israeli Arab citizens, entails a violation of a constitutional right. But this right, and its violation, is not ranked high on the scale of rights. As opposed to this, the public interest is state security. This interest is highly placed. It is interesting to note that the right to family life does not appear explicitly in the Basic Law, whereas the Law states expressly that "There shall be no violation of the *life*, *body* or dignity of any person as such." From this one can learn that the protected public interest occupies a very high rank on the scale of values of the State of Israel.

4. The outcome whereby an Israeli citizen who belongs to a particular national group will be prevented from bringing a foreign spouse into the State, without any detailed check of whether that person is dangerous, is harsh. This is one side of the coin. The other side is that concern about injuries to persons relates to a matter of certainty, or at least one of high probability. From the factual data that was submitted it emerges that the benefit deriving from the Law regarding reduction of the probability of future attacks is very considerable. It will be

recalled that a "successful" attack is liable to cost the lives of dozens of Israeli citizens, and also those who are "only" badly or moderately injured pay an unbearable price. To this must be added the moral consideration that is cited in the *Mishna* in Tractate Sanhedrin (4:5), whereby "if any man has caused a single soul to perish ….[it is] as though he had caused a whole world to perish; and if any man saves alive a single soul … [it is] as though he had saved alive a whole world."

As for violation of a constitutional right, and the consideration of proportionality, regard must be had to the exceptions in the amending Law. I will mention two of these. *One* is the exception relating to age: the sweeping prohibition is not applicable to a male inhabitant of the Area over the age of 35 years, and a female inhabitant over the age of 25 years. From the data that was presented in this case, it emerges that the age exception reduces the affected group by some 30%. The *second* is connected to the Humanitarian Committee (sec. 3A1 of the amended Law). As I see it, the powers of the Committee and the discretion granted to it should be interpreted more widely than is done today. The two exceptions that I have mentioned – age and the Humanitarian Committee – do not cancel out the constitutional violation, but they blunt its intensity.

5. Decisions on the narrow proportionality test are not all made of the same stuff. There are cases – and such is the case before us – in which the decision is difficult. The two competitors – the right that is violated and the public interest – tug mightily at each end of the decision rope. In these situations, there is a constitutional domain in which more than one answer is possible (similar to the margin of appreciation in the law of the European Union). Any law falling within this domain will be considered constitutional.

We are faced with a difficult case. The decision is a matter of degree. It is not surprising that this issue has twice been brought to court, and that each time, the outcome was determined by a majority of one justice in a bench of eleven justices. Of course, the existence of disagreements does not dictate a particular outcome. But here, ultimately, the difference in the opinions lies, in my opinion, in preferring to prevent the harm caused by the amended Law as opposed to preferring the marginal benefit of the amended Law. These disagreements, too, lead to the conclusion that this case falls within the parameters of constitutionality.

6. Through this prism I considered the position of the interest of the defending Israel's security in the ranking of public interests, and the position on the scale of constitutional rights of the constitutional violation with regard to the Israeli partner. I also examined the magnitude of security risk and its extent, as opposed to the damage caused to the basic rights, bearing in mind the exceptions in the amended Law. All this was executed against the backdrop of the factual web that was presented, with an awareness of the possible constitutional domain in this case. In short, my view is that declaring to law to be void is not warranted.

Summary

The amended Law was enacted as a temporary order, which was extended a dozen times. The passage of time, and the many extensions of the amended Law, do not, in my view, help the position of the State. The harsh climate accompanies us all year long, and has done so for a great many years. When we sit as the High Court of Justice, we are bound, in our judicial review, to watch the clock as well. My view is, as stated, that the Law should not be declared void. At the same time, the State would do well to formulate a law that deals with the subject of immigration in the present context and in general. According to the updated notice of the State counsel, this is being pursued energetically. In the event that no such new law is

enacted, from the point of view of constitutional review it is to be expected, at the very least, that discussion of any extension of the amended Law will be comprehensive, thorough and substantive. Similarly, it is to be expected that the legislature will be attentive to the changing reality, in order to examine whether the violation of constitutional rights is still justified.

8. In the final analysis, my view is that the petitions must be denied.

Deputy President E. Rivlin

The Issue in Dispute and the Role of the Court

1. The petitions raise a question about the protection of human rights. The question concerns the imposition of statutory limitations on the right of non-resident foreigners to acquire citizenship by virtue of their marriage to citizens of a particular state, when such foreigners reside in an area hostile to that state. This question lies at the heart of a public dispute. The issue is complex, and the way in which it has been handled illustrates the way in which the Israeli legal system handles questions that spill over into the public and political debate.

2. In practice, every legal system deals in its own way with the dilemma posed by a question of the type that was raised here. The way it approaches the question is a function of the political system, or the constitutional and social structure, and of the governmental culture. The core role of the constitutional court is to protect human rights, particularly minority rights or rights of other weak groups. This is not an easy task. In its formal sense, democracy is the rule of the majority. In its substantive sense, it is a regime in which minority rights, too, are protected. In order to fulfill its core function in a free society, i.e., the protection of basic rights, in all legal systems the court must conserve its limited resources.

The resources available to the court are limited. Over two hundred years ago, Alexander Hamilton noted that the judiciary has no control over the "purse" and over the "sword", hence its weakness. He attributed the weakness of the judiciary also to the fact that "it has no will of its own" – for it decides only those disputes that others bring before it, and it does not initiate decisions that are not based on a genuine conflict:

> The Judiciary … has no influence over either the sword of the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will (The Federalist no. 78).

Because the judiciary has neither purse nor sword, nor a will of its own, the principal resource available to it is public trust. Descending into the public battlefield, when unnecessary, is liable to dissipate this precious resource. In the past, I have said that refraining from entering the arena of political dispute and showing deference to the political authorities in the appropriate cases is not intended to increase the power of those authorities, but to conserve the resources of the judiciary. This is the dilemma facing every constitutional court and every court of administrative affairs. On the one hand there is a need for judicial and constitutional and administrative review – review that stands at the center of the work of the court – and on the other hand, there is a desire to refrain from entering the arena of public controversy, an entrance which is liable to use up resources available to the court. We will illustrate this in one other constitutional system as well as in our system.

The United States: Doctrine of Non-Justiciability

4. The Third Chapter of the United States Constitution limits federal jurisdiction to cases and controversies. This limitation, when accompanied by the rules of judicial prudence, has shaped the parameters of the standing of a person who brings a case before an American court; in other words, there must exist a personal interest that is likely to be resolved through litigation. The need for the existence of a personal interest is the outcome of the requirement that there be a harm that is not abstract or hypothetical – harm to the litigant who comes to court, and not someone else. To this are added other filters that together come under the aegis of the doctrine of non-justiciability. Justiciability is absent in cases which are not yet ripe for adjudication, or if the subject-matter is theoretical, and in all those cases that are termed "political questions". Non-justiciability in some of these cases lies, at base, in the principle of separation of powers. Under the rule of lack of ripeness, the United States court will refrain from adjudicating an argument whose validity depends on a future development, which itself might well not eventuate as expected, or not happen at all (see e.g.: Texas v. United States [11]). A potential violation of a right does not entitle one to relief. Another barrier is found in the doctrine of the theoretical subject, i.e., mootness, that directs the court not to adjudicate a hypothetical or academic dispute, where the judicial decision will not affect the rights of the parties to the process. There is also a lack of justiciability where the question is essentially a "political question". Non-justiciability in "political questions" reflects a conception according to which questions which the judiciary has neither the tools nor the criteria to resolve. The United States Supreme Court has drawn up guidelines for examining whether a question is a political one with which the Court should not deal: where there is written constitutional provision assigning the matter to the political authority; where there are no obvious judicial criteria than can be applied in order to resolve the question; where the question in dispute cannot be resolved without deciding in advance on policy that is not within the discretion of the Court; where there is a clear and special need to abide by a political decision that has already been made; and where there is a potential for a multiplicity of conflicting decisions on the part of the various authorities on the very same question (Baker v. Carr [12]). Apart from the "political questions", the United States Supreme Court defers to the political authorities in other matters that fall within their area of expertise: they do so out of recognition that not all matters were intended to pass beneath the rod of judicial discretion, and that there are matters which are better left to be decided by the elected authorities.

5. One of these matters is that of immigration and entry into the United States; here, the doctrine of deference in the United states reached the peak of its application. It was decided that as a rule, deference in these matters is absolute, and the political powers are vested with plenary power (Jon Feere, "Plenary Power: Should Judges Control U.S. Immigration Policy", *Center for Immigration Studies*, Feb. 2009). Thus, for example, the U.S. Supreme Court noted, in 2005 (Clark v. Suarez Martinez [13]) that Congress had the power to introduce legislation that protected the security of the State borders, in addition to the legislation enacted in 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001).

This conception of matters of immigration was, *inter alia*, the outcome of the doctrine of the "political question", namely, the refusal to adjudicate cases that involved determining policy that ought to be determined by the body that represents the public interest and which is accountable to the public. The connection between immigration and foreign relations, between immigration and national security, and between immigration and other subjects that involve the determination of policy, has formed the basis of non-intervention on the part of the courts. In addition, the U.S. Supreme Court's approach was served by considerations of

institutional inability to make political decisions in the framework of immigration laws which by their nature are created by the political authorities. "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens" said the US Supreme Court (Fiallo v. Bell [14]). When security considerations formed the basis for the decision to expel an alien from the United States, the American court refused to intervene, even though the person involved was married to an American citizen who had served in the United States Army. This was stated emphatically: an alien who wishes to enter this country cannot claim a right of entry. Permitting the entry of aliens into the territory of the United States is a privilege conferred by the sovereign on the United States government. This privilege is granted to an alien only in accordance with the conditions that the United States determines. It must be implemented in accordance with and by virtue of the process that is to be set by the United States (Knauff v. Shaughnessy [15]).

There in the United States too, however, and even on matters of immigration, the court does not entirely refuse to regulate the rules, and one can find cases in which the court abandoned the doctrine of plenary power vested in the authorities in those matters (see, e.g., Zadvydas v. Davis [16]).

6. Our older sister – the American constitutional law system – experienced historical shifts that rocked the boat of case law this way and that, until it stabilized. American history presents us with a clear picture of the dilemma facing constitutional courts in every free legal system: the need to fulfill the core function – protection of human rights – and the need to recruit the necessary resources in order to overcome the difficulties presented by every political culture to the court that fulfills its core function. American history reflects the harsh consequences of Lochnerism – a case that became a concept in the wake of the decision in Lochner v. New York [17], in which the Supreme Court ruled that a New York State law that set an upper ceiling on the number of working hours of bakers was void in that it was unconstitutional. This was a protective labor law, and the judgment aroused widespread, almost universal, criticism as a symbol of excessive intervention in value-based matters, and in matters concerning the regulation of economic policy – in relation to which the court ought to have deferred to the statutory regulation.

7. The effects of the Great Depression at the end of the 1920s and the beginning of the 1930s cast a dark shadow over the intervention of the courts in economic regulation of Congress, which sought, on its part, to heal the economy in the framework of the laws of the New Deal. During his second term of office, President Franklin Roosevelt, riding the wave of public criticism of the court, proposed the court packing plan, which was designed to cripple the court. The Lochner era came to an end: the new legislation, beginning in 1937, once again respected the choices of the legislature in the economic field, as long as they were supported by some sort of rational basis. Recognition was once again accorded to the broad power of both the various states and the Federal government to regulate economic matters.

8. The end of the era of Lochnerist intervention was clearly manifest in the foundational decision in United States v. Carolene Products Co. [18]. However, at the very time that intervention in economic policy was terminated, and in the very same decision, the first signs of the renewed flowering of protection of basic human rights appeared. In a historical footnote included in that judgment (footnote 4), the US Court pointed out, albeit with the caution that was a product of its clipped power, that "it is possible that there would be a greater proclivity on its part" for constitutional judicial review, when at stake was a law that violated human rights, or a law that limited the ability of the political process to block

unwanted legislation, or a law that discriminated against a discrete and insular minority. The Court formulated the two sides of the coin that was minted in that tempestuous period – respect for the authorities where this was due, and validating laws as long as they were reasonable and logical on the one hand, and on the other hand, simultaneously, a clear and courageous statement that deference would not apply to laws that violate basic rights or laws that discriminate against vulnerable minorities. The way in which the US court dealt with the dilemma of justiciability was to take one step back followed by a courageous step forward. In the foundational footnote that symbolized the beginning of the revival of the US court, the strong protection of freedom of expression, of liberty and equality, of privacy and of personal autonomy, was fashioned. The US court became a beacon from which the light of liberty shone forth.

Israel: On Governance and Accountability

9. The various legal systems, we said, struggle with the need to fulfill the core function of the court in the framework of the realities in which they operate – each in its own way. The Israeli legal system adopted a path that was different from that chosen by the United States. The American system adopted a rigid approach with respect to the intervention of the courts in matters that were the subject of public controversy; our system chose a different approach due to the reality in which the Israeli courts operate. This reality is affected by legislative failures and by a lack of governance on the part of the executive authority, resulting in an absence of statutory regulation of essential subjects, or acceptance of partial or temporary legislative regulation – as attested to by the Law with which we are dealing, with all its flaws.

In a parliamentary system of government of the Israeli type, the government (the executive) governs by way of application of the normative rules that are fashioned by the parliament. Normally, it is within the power of the executive authority to initiate legislative processes, and even to influence them by means of the support of the majority it enjoys in the legislature. This is governance. But governance has a price. He who exercises power bears responsibility for his actions. He who has sovereignty in the exercise of his powers by virtue of the law assumes accountability vis-à-vis the public. Refraining from making executive and legislative decisions on substantive questions detracts from governance, and it represents a certain denial of accountability. Moreover, transferring the onus of regulating matters that are the responsibility of the executive and the legislative branches to the judiciary imposes upon the latter the consequences of the weakness of the first two. Contrary to what many think, such a choice in fact weakens the judicial authority.

10. Civilized countries have a clear, comprehensive policy of immigration and of nationalization. In many states, the establishment of norms that regulate the entry of foreigners was intended to ensure that such entry would not impose an economic and security burden upon the citizens and inhabitants, that it would not be detrimental to their health nor to the welfare of the public and its way of life. This is when times are normal.

In times of war or of armed struggle, the nations of the world limit the entry of enemy nationals into the state. These limitations also apply to immigration for the purpose of marriage, and they are recognized by law. Even where there are no security considerations, states limit immigration for the purpose of marriage. European states are constantly tightening conditions for immigration into their territory for demographic reasons. The European Court of Human Rights gave support to the rights of these states to limit matrimonial immigration into their territory. The rules of International law do not recognize a right of immigration for

the purpose of matrimony, and they do not impose an obligation upon states to guarantee family reunification in their territory.

11. And in Israel: instead of a normative, principled and comprehensive regulation of immigration policy, to this day we have bits of arrangements. Temporary orders, made up of assorted scraps, are not an alternative to a comprehensive normative arrangement. The Temporary Order in the present case, too, changes from one moment to the next. Over the years, exceptions and reservations have been inserted into the preliminary prohibition on granting the right of entry and status to an inhabitant of the Area, or to a citizen or inhabitant of an enemy state specified in the Law, most of which were designed to mitigate the prohibition. The absence of a comprehensive legislative arrangement on matters of immigration has led to a situation in which the questions that required comprehensive resolution have once again been laid piecemeal at our door, and we are required to decide once more the question of whether a "temporary order" will remain in force.

The statutory vacuum in the Israel reality forced the Court to depart from the core judicial function and to touch upon questions that are the subject of a heated public controversy. This distancing, which is the result of constraints placed on the courts in Israel, made it necessary to replace doctrinal non-justiciability, which is familiar to us from other legal systems, with discretionary non-justiciability. The doctrine of justiciability in its classic formulation became more moderate, but the logic on which the doctrine was based did not disappear, and it has always formed the basis of the judgments of the Supreme Court. We do not dismiss out of hand questions that are at a remove from the core judicial function – constitutional or administrative – but we do not ignore the need of the Court to choose, from amongst all the issues that are laid at its doorstep, those issues which call for discussion in the existing social and political reality. The further we draw away from the constitutional core, the more we are liable to be asked to pull the chestnuts out of the fire for the political branches. The Court itself determines the parameters of justiciability, as well as the parameters of intervention in the actions of the political authorities. Where the Court is confronted with the question of whether to delve deeply into political, social and economic questions, it is expected to act in accordance with the best rules of deference. Considerations of non-justiciability, which in Israel, as we have said, are differentiated from an independent doctrine of non-justiciability, due to the constitutional structure and the problem of governance, find expression in the arena of deference. Thus, for example, the arena of reasonability outlines the arena in which the administrative authority is authorized to make decisions, according to its discretion. The arena of reasonability is influenced, on its part, by the arena of deference.

Between Deference and Judicial Review: Conservation of Resources for the Sake of Protection of Human Rights

12. As stated, the resources available to the court, and primarily, public trust, are precious and limited. The court must store as much of them as it can, and refrain from "wasting them", where possible and appropriate. There will be a day when it will have need of them, when it is called upon to protect the human rights of Israel's citizens, and primarily, the citizens who belong to the weaker sectors. It needs them in order to protect unpopular views and the right to express them; it needs them in order to ensure liberty; it needs them to ensure the right to equality. It needs them when it is required to protect the minority, the weak and the poor. It must use its strength and power in order to afford unreserved protection of liberty. Deference towards those subjects that are at the heart of political endeavor is in no way intended to detract from judicial review of the court. "Deference" cannot detract from

constitutional review: it is designed to secure the resources necessary for its existence. "Deference" does not mean denial of responsibility; deference is not the withholding of an opinion. On the contrary: it is a condition of strong constitutional review. Indeed, the Court's abstention from entertaining and deciding on certain subjects is liable to be perceived as a handicap and a weakness. In reality, in this way the courts defend themselves by means of filtering mechanisms. Through these mechanisms, the courts can refrain from dealing with matters which they ought not to be deciding. This is a privilege accorded to the courts, and it is this that conserves their strength and their resources. Thus their accountability retains its position: in the court of the political authorities.

13. In its protection of human rights, judicial review must be, in the words of Justice Brennan in another context, "fearless, vigorous and uninhibited" (New York Times Co. v. Sullivan [19]. The arena of deference that we designate for the activities of the other authorities will take into account our fundamental constitutional principles and our conception of the balance between the relevant considerations regarding the exercise of judicial review. The special importance of judicial review in those cases in which fundamental human rights are at issue should be recognized. Here it is important for judicial review to utilize the full extent of its power and ability. It will have this ability if it succeeds in refraining from dispersing its legal and social resources that are nurtured by public trust where the area of deference widens.

The Question in Dispute

14. The issue to be decided here today is of the kind that lies at the core of the judicial function due to the fact that it gives rise to questions of protection of human rights, but at the same time, due to the legislative omission, it touches upon a sharp public controversy and political debate. Our decision will be made on the basis of the rules of constitutional review, while having regard to the principles of deference.

In the petitions before us the question of protection of human rights arises. The quest for equality provides a backdrop to the petitions. Another basic right also underlies the petitions, i.e., the right to family life. There is no doubt that imposing restrictions on immigration in some way violates these basic rights. True, this violation is not in itself directed at Israeli citizens. It violates the basic rights of Israeli citizens only where the realization of their right is conditional upon granting a right to foreigners who reside in radical enemy states, such as Iran or Syria, or to foreigners who live in areas in which intense terrorist activity, targeted at Israeli citizens, occurs and is based. However, even a violation that is not directed, from the outset, at the basic rights of Israeli citizens, justifies constitutional review as long as it exists. The protection of constitutional basic rights is the very heart and the purpose of the authority to exercise judicial review. That is its function. It is the violation of human rights that justifies the examination of the constitutionality of the contents of the Citizenship Law**.**

The Constitutional Right

15. I have already expressed my opinion that the constitutional question cannot be divested of the reality in which it is cloaked. It cannot be placed in a world that does not exist – on another planet. The constitutional question is adjudicated here and now – in a state that is hurting, struggling to maintain its existence on a strip of land that is ablaze, a state which tries to avoid becoming "another planet".[1] The reality is a comprehensive one, for which it is

[1] This is what the author Ka-Tsetnik called the Auschwitz death camp.

difficult to set analytical boundaries, just as there is no place to draw an analytical, artificial distinction between the case of an Israeli partner who wishes to marry and that of the foreigner whom s/he wishes to marry. The right of the Israeli partner affects a particular segment of the right – a segment in which the foreign spouse is a partner; we cannot close our eyes to the identity of the foreigner, to the political entity to which he or she belongs, to the identity of the elected leaders of that entity and to the circumstances in which the matter is being adjudicated. Since the hearing in the previous petition, the Hamas Organization has taken control of some of the Territories. This reality is a true one, and it must be taken into consideration when, in the framework of the constitutional balance, we are called upon to decide on the constitutionality of the restrictions that are placed on basic rights.

16. There is no doubt that the Citizenship Law affects the possibility of full realization of the constitutional right to family life and the constitutional right to equality. It does not negate these rights. It detracts from their full scope. The Law does not prevent the Israeli spouse from marrying a partner from the Area; neither does it prevent the Israeli spouse from realizing the right to family life in the Area, or in any other place outside of Israel. However, it detracts from the right of the Israeli spouse to establish the family unit within the borders of Israel in those cases in which the foreign spouse is an inhabitant of the Area specified in the Law before us, and belongs to one of those groups whose entry from the Area into Israel the Minister of the Interior was empowered to prevent. The result of this is also a violation of equality, in that most of the Israeli spouses who marry inhabitants of this Area are Arab Israelis.

17. Moreover, the defined range of human rights should not be contracted in times of emergency. Neither should different balancing criteria be adopted in difficult periods. The Basic Laws do not recognize two systems of laws, one of which applies in times of calm and the other, in times of emergency. Israeli constitutional law has a uniform approach to human dignity and liberty both in times of peace and in times of danger. The statement of Justice Holmes in the case of Schenck v. United States([20]), according to which things that are said in times of peace may sometimes not be said in times of war, is not understood as a call to deviate from the constitutional criteria themselves in times of emergency. This applies to freedom of expression, and to other basic rights. The criteria on the basis of which we examine restrictions on human rights are uniform at all times. The criteria are identical. But we should recall that their implementation is affected by the factual situation.

The question which has returned to our doorstep today is, therefore, whether the conditions that permit a violation of the basic rights that we have discussed have been met.

The Conditions for Detracting from a Constitutional Right

18. The limitation clause of Basic Law: Human Dignity and Liberty sets four conditions for violating a constitutional right: the violation of the basic right must be by law or according to a law; the law must befit the values of the State of Israel; it must be enacted for a proper purpose; and its violation of the right must be to an extent no greater than required. Most agree that the first and second conditions are met here. The dispute turns on the question of whether the third and fourth conditions are met, i.e., if the Law was enacted for a proper purpose and if its violation of constitutional rights is greater than necessary. The first of these conditions deals with the purpose, and the other – with the appropriate means of realizing this purpose.

It seems to me that there can also be no dispute that the Law was enacted for a proper purpose. The purpose of the Law in this case is security-related, and it is to reduce, insofar as possible, the security risk posed by the foreign spouses who enter Israel. At the basis of the legislation lay the security concern about involvement in terrorist activity on the part of the Palestinian spouses, who hold Israeli identity cards by virtue of their marriage to Israeli partners. The concern is about abuse of this status in Israel – a status which allows for free movement between the area of the Palestinian Authority and Israel. History shows that this is not a baseless concern. This purpose is a proper one.

The fourth condition listed in the limitation clause requires that the violation of the right be no greater than is necessary. It is not enough that the purpose is proper: the means that are adopted for its realization must also be proper, i.e., proportional. The words "to an extent no greater than is necessary" have been interpreted in Israeli case law, following foreign case law, as implying three sub-criteria: that of suitability (the rational connection); that of necessity (the means which involves the least violation); and that of proportionality. The first sub-criterion requires the existence of a rational connection between the (proper) purpose and the means selected for its realization. This is the criterion of common sense and of life experience. From amongst the means that create the rational connection between the proper purpose and the means, the means which involves the least violation should be chosen – that is the second sub-criterion. The third sub-criterion is that of overall balance. It looks at whether the relationship between the benefit derived from achieving the (proper) purpose – prevention of risk – and the damage caused (as a result of the violation of the constitutional rights achieves a proper balance between the needs of the general population and the harm to the individual.

The third sub-criterion (of the three sub-conditions of the fourth condition – the requirement of proportionality) i.e., the criterion of relativity, imposes the task of striking the balance on the court. This balance is not detached from the examination conducted by the court in the framework of the first two sub-criteria. Moreover, in many cases, once it has been proven that there is a rational connection between the purpose of the law and the means it selected (the first sub-criteria), and once the Court is convinced that the purpose of the law cannot be achieved, as it stands, by recourse to less harmful means (the second sub-criterion), it is a short road to the conclusion that the proper overall balance is achieved as well (the third sub-criterion). However, a positive decision in relation to the first two criteria often led to a rapid decision on the question of the third sub-criterion (see, e.g., R. v. Keegstra [1990] 3 S.C.R. 69; McKinney v. University of Guelph [1990 3 S.C.R. 229). This natural channel led some to the conclusion that the third sub-criterion is in fact a superfluous stage in the constitutional examination.

I believe that there is no room for a sweeping conclusion that if the first two sub-criteria are satisfied, the question of the existence of the condition of proportionality will necessarily be answered affirmatively. Indeed, the third sub-criterion should not be isolated from the other two; the response to each of these has an understandable effect on the others. However, the importance of the last criterion should not be underestimated, just as the importance of each of the sub-criteria in itself should not be inflated. These sub-criteria should be implemented, with sensitivity being shown to the circumstances of each case (Libman v. Attorney General of Quebec [23]). This is not a matter of guidelines alone. The sub-criteria, as adopted, outline the way in which judicial review should be exercised with respect to the condition of proportionality, and in certain senses, they also set the parameters of the court's

competence. They allow for a uniform, sophisticated examination of the question of whether the condition of proportionality has been met. The Court will, therefore, refrain from applying the proportionality criteria in a mechanical or literal manner when it wishes to declare the law invalid.

The criteria of proportionality come together to examine the relationship between the cost of the harm to the protected right and the expected utility embodied in the proper purpose of the law – prevention of a security risk, or if you will, in the logical formulation coined by Learned Hand: an examination of the relationship between the cost of the legislation (C) and the probability (P) of injury (L) without it. In the present case, even if the probability of damage is low, its magnitude – both physical and spiritual harm – is almost insurmountable.

19. In the present case, the first two sub-criteria of the fourth condition were met with respect to the condition of proportionality. First, there is a rational connection between the purpose of the Law and the means it selected. The prohibition on the entry of foreign spouses to Israel prevents the risk that they present. The fact that it was allegedly possible to realize the purpose of the Law by using other means that were not adopted does not necessarily indicate that the means that was selected is not rational.

With respect to the second sub-criterion, too, it would seem to be generally agreed that the individual examination causes less harm. However, it is also clear that the individual examination of those who seek to settle in Israel does not realize the purpose of the Law to the same extent as a blanket prohibition on their entry. "In light of the central value of human life that the Law seeks to protect, it is clear that a sweeping prohibition will always be more effective – from the point of view of realization of the purpose of reducing the security risk as much as possible – than the individual examination (President Barak in the first petition).

Still to be decided, therefore, is the question concerning the third sub-criterion of the condition of proportionality – that of relativity, i.e., the question of *sensu stricto* proportionality: is the relationship between the benefit derived from achieving the proper purpose of the Law and the harm caused by it proportional? This examination should be carried out against the background of the accepted distinction between interest and right.

Interest as opposed to Right

20. The criterion of balance between the means adopted and the purpose underlying the law is derived from the question of the definition of the value for the sake of which the constitutional right is violated: is it a private right or a public right? The case law, even that which preceded the Basic Law, created a distinction between the criterion of vertical balance (between a right and a public interest) and the criterion of horizontal balance (between rights of equal weight). However this distinction sometimes presents a difficulty, stemming from the artificiality that often lies in the definition of the public interest as distinct from the right of the individual. [The] public, which has an interest, is comprised of individuals. And when the public interest is dissected into its components, aggregate individual rights are exposed. Thus, for example, when we are dealing with the security of the public – a public interest in our language – we are talking about nothing other than the right to life and to bodily integrity of each member of the public. This categorization is likely, however, in this case, to have implications for the balance on which the requirement of proportionality is based.

21. The value of public security normally assumes an abstract form; the tendency is to view it as a non-specific public interest. Often, the nature of the anticipated harm to public security is not tangible. A person's right to life, on the other hand, is a concrete, tangible

right. It is almost an ultimate right; it is the right of people to life – and every one of these people is a world in himself. It is designed to protect people as individuals. As we have said, the distinction between the two – the interest and the right – is sometimes difficult, as we see from the present case. Apparently, we are dealing with a value in the category of interest – public interest – but in this case, the image of the public become sharper and the danger becomes focused. We are not looking at an abstract public, but at the faces of those who are liable to be hurt in the next terror attack. We can envision the horror of the harm. This is not the abstract concern for public welfare that we have encountered in previous cases. Public security here means the actual right to life, and this is what the Law seeks to protect. The attack that the Law seeks to prevent is directed at certain people, individuals, Moslems, Jews, Christians and Buddhists, who live with us. These people – each and every one of them – have a vested right to life. They have not appeared physically before us today because no one knows what the future holds for him. But their right stands before us here and now.

The Overall Balance

22. In the framework of the previous petition, there was no dispute concerning the benefit of the disputed legislation, and it was agreed by the majority of my colleagues that "detailed examination of those who belong to those population groups that have a proven potential for posing risks to security and to life, is indeed likely to reduce the harm to the ability to establish family life in Israel, but as opposed to this it will not ensure in an appropriate manner the security of the public." It has been proven in the past that terrorist organizations will recruit a spouse who is an inhabitant of the Area to their ranks only after that spouse has acquired a permit allowing him/her to enter Israel and to move about freely. In the task of balancing between reducing the carnage and ensuring life on the one hand, and the harm caused to some Israeli citizens who wish to live with foreign spouses in Israel – the benefit [of the Law] exceeds the damage.

The limitation imposed in the Temporary Order does not apply, *ab initio*, to marriage to Palestinians who live in states which are no longer enemy states – Egypt and Jordan. It applies to those who live in the Area, from which enemy action emerges, or nationals of states that advocate incessantly for the destruction of Israel. In the meantime, additional concessions have been introduced into the Law for those who seek to immigrate to Israel for the purpose of marriage. On our recommendation, a provision was also added to the Law to allow for approving an entry permit in specific cases in which weighty humanitarian reasons justify so doing. The benefit therefore prevails, in the overall balance, over the damage in the legislation. Damage of another type is not that which is found in the existing legislation, but which lies in the lack of a responsible, serious and complete regulation of the matter of immigration to Israel. In the absence of an arrangement, the Temporary Order was returned to us for resolution. In an overall and responsible balance, we cannot void it and leave, in its place, a dangerous legislative vacuum which no-one knows when it will be filled.

My opinion, therefore, is that the petitions must be denied.

Decided as per the majority opinions of Deputy President E. Rivlin and Justices A. Grunis, M. Naor, E. Rubinstein, H. Melcer and N. Hendel; as against the dissenting opinions of President D. Beinisch and Justices: E.E. Levy, E. Arbel, S. Joubran and E. Hayut, to cancel the order nisi issued by the Court and to deny the petitions, with no order for costs.

16 Tevet 5772

January 11, 2012