HCJ 5304/15
HCJ 5441/15
HCJ 5994/15

Petitioner in HCJ 5304/15: Israel Medical Association

Petitioners in HCJ 5441/15:
1. Al Mezan Center for Human Rights
2. Yusuf Al-Siddiq Organization for Prisoner Support

Petitioners in HCJ 5994/15:
1. Physicians for Human Rights Israel
2. The Public Committee Against Torture in Israel
3. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
4. Yesh Din Volunteers for Human Rights

v.

Respondents in HCJ 5304/15 and HCJ 5441/15:
1. Israel Knesset
2. Minister of Public Security
3. Commissioner of the Israel Prison Service
4. Attorney General

5. General Security Service

Respondent 3 in HCJ 5441/15: General Security Service

Respondent in HCJ 5994/15: State of Israel

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The Supreme Court sitting as a High Court of Justice

Petitions for an order nisi

Before: Deputy President E. Rubinstein, Justice N. Sohlberg, Justice M. Mazuz

Abstract

Petitions to strike down the Prisons Ordinance (Amendment No. 48) Law, 5775-2015 (hereinafter: the Law), which addresses "preventing harm to the health of a prisoner on a hunger strike", and permits, in some instances, coercive medical treatment of hunger striking prisoners despite their refusal. The Petitions addressed, *inter alia*, the constitutionality of section 19N(e) of the Law, which instructs that in addressing a request for authorizing medical treatment, the court shall take into account "considerations of risk to human life or a real risk of serious harm to national security, to the extent that evidence to this effect is presented to the court". The Petitioners were the Israel Medical Association and human rights organizations.

The High Court of Justice (*per* Deputy President E. Rubinstein, and Justices M. Mazuz and N. Sohlberg) denied the Petitions for the following reasons:

The Law meets the constitutional tests. Ultimately the Law comprises an element of saving a life and prioritizing the principle of the sanctity of life. It is where it begins and where it ends. This is reinforced by the fact that the person concerned is in the custody of the State, which is duty-bound to provide him with proper medical treatment.

The Deputy President addressed the different components of the constitutionality tests and the Limitations Clause in detail, and reached the conclusion that the Law, including section 19N(e), passes the constitutionality tests by delicately balancing the sanctity of life, the State's responsibility toward prisoners in its custody, and national security, against the right of the individual to dignity, including autonomy and freedom of expression. This is the case given the graduated procedure established by the Law, which includes several medical, judicial and legal mechanisms of supervision.

Inter alia, it was held that the dominant purpose of the Law is protecting the life of a hunger striking prisoner, subject to the exceptions designed to ensure protecting the dignity of the prisoner, with close supervision and monitoring by medical and judicial bodies. This is an indisputably proper purpose. The secondary purpose is security based. Its concern is preventing risk to the lives of others aside from the hunger striking

prisoner, or preventing serious harm to national security. This purpose is expressed in section 19N(e) of the Law, under which the court may consider non-medical considerations in making its decision whether to permit involuntary medical treatment. Had the security purpose been an exclusive or primary purpose, there may have been doubt as to whether it would be proper for the purpose of permitting forcible feeding. However, this secondary purpose, too, is largely grounded upon the principle of the sanctity of the life of the innocent who may be harmed as a result of the consequences of a hunger strike by prisoners or detainees. Given that the former is the dominant purpose and that the latter is secondary to it, Justice Rubinstein held that both purposes are proper.

It was also noted, *inter alia*, that the arrangement in section 15 of the Patient Rights Law, addressing a situation of a patient who refuses to accept treatment, does not sufficiently and fully respond to situations of hunger strikes in general, and to such strikes by prisoners or detainees in particular, in terms of the State's responsibility for them, the complexities of autonomous will in cases of hunger strikes by prisoners who are willing to die, or in regard to such cases where the group circumstances of those on strike prevents them from ending the strike, as well as in terms of the consequences of the hunger strike for national security. Therefore, this is a specific, supplementary arrangement for the purpose of addressing situations where the arrangement established in the Patient Rights Law is to no avail.

In terms of the proportionality *stricto sensu* test, it was found that the amendment provides a graduated, balanced arrangement that seeks to minimally infringe the prisoner's autonomy while protecting his life through mechanisms of close supervision and monitoring – both medical and legal – of the proceedings and its employment as a last resort. This arrangement represents a proper relationship between the benefit which may derive from the Law and the potential harm to constitutional rights due to its implementation.

In this context, it was noted that the procedure commences with the medical opinion of the treating physician. The request is to be submitted by the Prisons Commissioner with

the approval of the Attorney General or an appointee on his behalf – as a last resort meant to prevent risk to the life of the of a prisoner on hunger strike, or the risk of severe, irreversible disability – and only after the procedural process has been exhausted. As a general rule, the ethics committee will provide its opinion on the matter, the President of the District Court or his Deputy will determine the request, and the decision is subject to appeal to the Supreme Court. The treatment provided shall be the minimal treatment required. The caregiver is not required to provide the treatment permitted by the court. The Law presents a structured, organized arrangement that involves – alongside doctors – very high levels of the legal and judicial system, and is constructed in strict stages, and as a last resort. It was also emphasized that before the court may be approached, the treating physician must make "significant efforts" to persuade the prisoner to give his consent to treatment. Thus, the doctor must explain the legal process and its possible implications to the prisoner. The court must hear the prisoner, and it is authorized to hold the hearing on the request at the hospital. Even when permission for involuntary treatment is granted, the caregiver must again attempt to persuade the prisoner to consent to treatment, and as noted, the treatment to be provided must be the minimal required, and must be provided in a manner that would ensure the greatest protection of the prisoner's dignity, while preventing, to the extent possible, causing pain or suffering.

Section 19N(e), which focuses on the security purpose, also meets constitutional requirements. Moreover, it must be employed extremely sparingly and in extreme cases, given the proper evidentiary foundation. The security consideration itself cannot justify commencing proceedings under the Law, and certainly cannot itself enable authorization for treating a prisoner against his will. The security considerations according to the Law can be considered only when the treating physician has determined that the prisoner's medical condition is extremely severe and that there is real risk to his life, or that he will suffer severe, irreversible disability, and for the purpose of saving his life, which is the main purpose of the Law. In any event, the treatment that is provided in practice, if and to the extent it is provided, in accordance with the physician's discretion, will be a result of medical considerations alone. Implementing section 19N(e) must be extremely sparing

and exceptional, where the State provides evidence pointing to a near certainty of serious harm to security, and all this following the medical journey, which is primary.

Justice M. Mazuz concurred in the result as to the constitutionality of the Law. He reiterated, *inter alia*, that the employment of the procedure was designed for extreme cases where other means were not successful, and it is restricted to the necessary minimum required in order to save the life of a prisoner at mortal risk due to a hunger strike, or to prevent severe, irreversible harm. Nevertheless, Justice Mazuz expressed concern that too great a weight might be given to considerations of security and public order at the expense of the medical considerations and the right to autonomy. Therefore, he proposed establishing guidelines and restrictions for the implementation of the provisions in section 19N(e), which would address the security consideration, in the form of a "procedural separation" between the examination of the medical and security considerations.

Pursuant to the opinion of Justice Mazuz, the Deputy President clarified that the best approach is one of first things first – first the medical issue, and a discussion of the security issue only thereafter. In order not to tie the hands of the trial court completely, the Deputy President suggested a formula whereby the court would begin by examining the medical issue as the basis of determining the matter, while the security issue – to the extent it may be necessary – would be left to be addressed last.

Justice Sohlberg concurred in the opinion of the Deputy President and added, *inter alia*, a few comments on the question of the proper place and role of the security considerations under section 19N(e) of the amendment.

Judgment

Deputy President A. Rubinstein:

1. Before us are Petitions to strike down the Prisons Ordinance (Amendment No. 48) Law, 5775-2015 (hereinafter: "the Law"), which concerns "preventing harm to the health of a hunger striking prisoner", and which, under certain circumstances, permits involuntary medical care for hunger striking prisoners despite their refusal. The Petitions address, *inter alia*, the constitutionality of sec. 19N(e) of the Law, which provides that in addressing a request to permit medical care, the court will take account of "considerations regarding concern for human life, or a real concern for serious harm to national security, to the extent that evidence to this effect is presented to the court."

Background

2. The right to informed consent for medical care was recognized over the years as one of a person's fundamental rights under the right to liberty. Therefore, as a general rule, one may refuse medical treatment, including feeding (CA 506/88 *Sheffer v. State of Israel*, IsrSC 48(1) 87 (1993) [English: http://versa.cardozo.yu.edu/opinions/yael-shefer-minor-her-mother-and-natural-guardian-talila-shefer-v-state-israel]).

3. The Patient Rights Law, 5756-1996 (hereinafter: the Patient Rights Law) was designed to "establish the rights of every person who requests medical care or who is in receipt of medical care, and to protect his dignity and privacy" (sec. 1 of the Law). According to sec. 13(a) of the Patient Rights Law: "No medical care shall be given unless and until the patient has given his informed consent to it, in accordance with the provisions of this chapter", and this subject to the exceptions listed in sec. 15 of the Patient Rights Law, which permit – under certain circumstances – forcible feeding. Ethics committees that were established under the Patient Rights Law operate within the hospitals (see sec. 24 of the Patient Rights Law, as well as the Patient Rights (Manner of Appointments, Terms of Office, and Operating Procedures of Ethics Committees) Regulations, 5757-1996). Their role is to permit a caregiver to provide treatment to a patient against the patient's will, under certain circumstances. The ethics committee is chaired by a jurist eligible to be appointed as a district court judge, and comprises two specialist physicians from different areas of medical specialization, a social worker or a

psychologist, and a public representative or a clergyman. Under the Patient Rights (Amendment No. 6) Law, 5774-2014, the composition of the ethics committee was expanded to include a certified nurse. It was determined that where the opinions of the committee are evenly split for purposes of a request under sec. 15(2) of the Patient Rights Law, the committee's decision should be viewed as a decision not to permit the caregiver to provide the patient with care against his will.

4. A hunger strike is a means of protest by which the hunger striker seeks to achieve a defined goal. Hunger strikes by prisoners occur from time to time in Israel. In recent years, this phenomenon has been recurrent among security prisoners and detainees who are members of terrorist organizations – be it as a group or as individuals. It occurs, albeit on a smaller scale, among non-security prisoners and detainees, as well. Although a hunger strike is not itself a medical problem or an illness, its continuation inevitably leads to severe, at times irreversible, medical problems for the hunger striker, and may even lead to death if medical care not be given. There is some scientific uncertainty in the medical community as to the medical aspects of a hunger strike, as well as to its treatment. There are no scientific tools or scientific experience that may serve as a foundation for medical opinions as to the life expectancy of a hunger striker. As the explanatory notes to the Bill reveal, a prisoner is at real risk of death after 55-75 days of absolute hunger strike. The Bill also notes that there is no evidence from around the world of a full, ongoing hunger strike of 75 days after which the hunger striker remained alive (see the Explanatory Notes to the Bill, Government Bills (5774-2014) 763, 870). By their nature, hunger strikes require medical monitoring and treatment.

5. Prior to the Law's enactment, the law did not include provisions regulating the possibility of the involuntary artificial feeding of hunger striking prisoners, and consequently, Israeli law did not define the terms "hunger strike" of "hunger striker". Until the Law was enacted, and in practice, even after its enactment, as we will see in the examples below, treatment for hunger striking prisoners or detainees was provided in accordance with the Patient Rights Law, similarly to medical treatment for patients who, being informed, refuse necessary treatment, including hunger strikers who are not

prisoners. However, in situations of extended hunger strikes, particularly when they are partial, there is medical difficulty in determining the point in time where the hunger striker enters a state of "severe danger," which is a prerequisite to convening the ethics committee under sec. 15(2) of the Patient Rights Law. In an attempt to confront the above challenge, in April 2012, in the midst of a wave of hunger strikes by prisoners and administrative detainees, Guidelines for the Medical Treatment of a Hunger Striker (Including Detainees and Prisoners) were published by the Ministry of Health. The Guidelines set a rule of thumb according to which after 26 to 30 days of hunger strike, full or partial, there may be risk to the life of the hunger striker, or a risk of severe, irreversible impairment.

6. The Patient Rights Law includes a possibility of coercive medical treatment of a person only after approval by the ethics committee. In recent years, ethics committees convened according to the Patient Rights Law have considered requests to treat hunger striking prisoners. In all these cases, the striking prisoners consented to medical care without coercion. Ultimately, not a single prisoner died due to a hunger strike. This was the result of a dialogue between the members of the ethics committee and the hunger strikers, which was based on the close trust relationship between the caregiver and the patient. On February 24, 2013, Dr. Michael Dor, then the head of the General Medicine Department in the Ministry of Health, published a directive to the administrators of general hospitals, according to which security prisoners who have been on a hunger strike for over 28 days were to be admitted even if they objected to receiving medical treatment, and that a prisoner on a hunger strike for less than 28 days was to be admitted if his medical condition posed a life-threatening risk. As will be explained, several cases were recently brought before this Court (HCJ 5580/15 *Alan v. General Security Service* (Aug. 15, 2015) (hereinafter: the *Alan* case); HCJ 452/16 *Al-Qiq v. IDF Commander in Judea and Samaria* (Feb. 2, 16) (hereinafter: the *Al-Qiq* case)). They all concluded, one way or another, with an agreed arrangement that ended the hunger strike (also see HCJ 3267/12 *Halahla v. Military Commander of Judea and Samaria*, para. 25 (2012)).

7. Before we address the details of the Law, and in order to clarify the issue, we will explain what forcible feeding is. It is a medical treatment wherein nutrition and fluids are artificially introduced into the patient's body against his will. Such feeding includes a range of possible medical procedures, beginning with intravenously providing fluids and supplements, performing blood tests for evaluation, and providing medications. In extreme cases, which we will address below, nutrition or fluids are introduced into the body of a hunger striker through a nasogastric tube inserted through the nose and throat into the stomach, or through a tube inserted through an opening in the abdomen and into the stomach.

The Course of the Law's Enactment

8. Following a mass hunger strike among security prisoners and administrative detainees in 2012, which lasted – in part – for an extended period of time, and to the point that it posed real risk to the health and life of strikers, an inter-ministerial taskforce – headed by the Deputy Attorney General (Criminal), and with the participation of representatives of the Minister of Justice, the Ministry of Public Security, the Ministry of Health, the Prisons Service and the Security Service – was convened in order to establish appropriate guidelines to address the phenomenon. The team also included the Deputy Attorney General (Special Projects), the Deputy Attorney General (Legislation) and the Director of the High Court of Justice Department of the State's Attorney's Office. The team held a series of meetings at the Deputy Attorney General's office, conducted in-depth research into the provisions of international law on the matter, and examined the challenges unique to addressing hunger strikes in Israeli prisons. On August 7, 2013, a draft memorandum of the Law was distributed to the Israel Medical Association (hereinafter: IMA), the National Council for Bioethics, and the Public Defender's Office (see below in regard to the differences between the Memorandum and the Bill). IMA strongly objected to the proposal in the Memorandum. On May 18, 2014, the Knesset Ministerial Committee for Legislation approved the Bill in resolution HK/869, and it was referred for a first reading by the 19th Knesset. The Bill was submitted to the Knesset for first reading on June 9, 2014. At the end of the debate, it was decided to refer the Bill to

the House Committee, which decided to pass the Bill on to the Knesset Internal Affairs and Environment Committee. This Committee convened nine times in order to discuss the Bill. During its discussions, a fruitful deliberation was held with diverse opinions and positions presented by different professional entities from government ministries, the Courts Administration, the Public Defender, IMA and other organizations. Following these discussions, the language of the Bill was revised on certain issues. The Bill was intended to come to a vote in second and third readings by the Knesset on June 30, 2014, but the Knesset hearings for that day were canceled and the Bill was not presented again by the time the Knesset dispersed on December 8, 2014. On July 6, 2015, the Government gave notice as to its desire to apply the continuity rule to the Bill. The Internal Affairs and Environment Committee of the 20th Knesset convened four times to discuss the Bill. Several entities from government ministries and representatives of organizations participated in the discussions. The Committee considered 90 objections that were submitted, and those brought about significant changes in the Bill. The Bill was submitted to the Knesset for second and third readings on July 29, 2015. After a lengthy debate, the Law was passed by a majority of 46 Knesset Members with 40 opposed (see below as to the differences between the Bill and the Law as enacted).

The Legal Framework

9. The Law was passed by the Knesset in second and third readings on July 30, 3014, and entered into force upon its publication in the Official Gazette on August 5, 2015. The Law amends the Prisons Ordinance [New Version], 5732-1971 (hereinafter: the Prisons Ordinance) by adding article B2: "Preventing Health Damage to a Hunger Striking Prisoner."

10. According to the Law, which is detailed and precise, the process for requesting permission to provide medical treatment to a hunger striking prisoner commences with the opinion of the prisoner's treating physician (or a physician who has recently treated the prisoner), whereby "there is a real possibility that within a short period of time there will be a risk to the prisoner's life or risk of a severe, irreversible disability, without

receiving medical treatment or treatments detailed in the medical opinion" (sec. 19M(a) of the Law). Along with submitting the medical opinion, the Prison Service Commissioner may, with the consent of the Attorney General or a person appointed for such purposes by the Attorney General, approach the President of the District Court or his deputy with a request to provide medical treatment to a prisoner. Such a request will be submitted only after he is persuaded that "a significant effort was made to secure the prisoner's consent to such treatment, *inter alia*, by a doctor's discussion with the prisoner, and after the prisoner received an explanation as to the request to the court and its potential consequences" (sec. 19M(d) of the Law.) A copy of the request for medical treatment shall be submitted by the Prisons Service to the ethics committee, which shall give its opinion on the relevant medical matters after hearing the prisoner (sec. 19M(c) of the Law). The ethics committee's opinion must be presented to the court, except for cases where "for urgent and exceptional medical reasons resulting from the prisoner's medical condition" it is not possible to wait for the opinion or to hear the prisoner or his attorney (section 19N(c)(2) of the Law).

11. Before rendering its decision, the court must be persuaded that "a significant effort was made in order to secure the prisoner's consent for treatment, and in the course of such effort he was informed about his medical condition and the consequences of continuing the hunger strike for his condition in detail, in a manner that is understandable to him under the circumstances, and that he was also given medical information as stated in section 13(b) of the Patient Rights Law, and that the prisoner continued to refuse medical treatment" (sec. 19N(b) of the Law). The Law mandates that the prisoner be represented by an attorney in the court proceedings, and if he is not represented, a public defender will be appointed (sec. 19O(d) of the Law). The court will hear the prisoner or his attorney, and may order that the hearing on the request for medical treatment be conducted in the hospital in which the prisoner is hospitalized (sec. 19O(a) of the Law. The court may conduct the hearing *in camera*, if it is of the opinion that a public hearing may deter the prisoner from freely expressing his position or expressing it at all, or for the purpose of protecting the prisoner's privacy (sec. 19O(d) of the Law). The court may admit evidence in the absence of the prisoner or his attorney if it is of the opinion that

disclosing the evidence may compromise national security, and that its concealment is preferable to its disclosure for the purposes of justice (sec. 19O(e)(1) of the Law).

12. On the merits, before making a decision, the President of the District Court or his Deputy must consider the prisoner's medical and psychological condition, the consequences of failing to provide treatment, the prospects and risks of the requested treatment and of alternative treatments, the level of the requested treatment's invasiveness and its impact on the prisoner's dignity, the prisoner's position and his reasons, including the reasons for which the prisoner chose to initiate a hunger strike, as well as the outcomes of previous coerced medical treatment, had there been any (sec. 19N(d) of the Law). The court must also take into account considerations of concern for human life or a real concern for serious harm to national security, when evidence is presented to that effect (sec. 19N(e) of the Law).

13. Should the court be persuaded that there is a "real possibility that there will be a risk to the prisoner's life, or risk of a severe, irreversible disability within a short period of time, and that the medical treatment is expected to benefit the prisoner" (sec. 19N(a)(1) of the Law), it may permit providing medical treatment to a hunger striking prisoner against his will. The medical treatment must be provided "in a way and a place that would ensure maximum protection for the prisoner's dignity, while avoiding as much as possible causing pain or suffering to the prisoner" (sec. 19P(c) of the Law).

14. In its opinion, the court must detail the type of treatment or treatments that it permits (sec. 19N(6) of the Law). The treatment must be provided to the prisoner by a caregiver in accordance with his area of practice, and in the presence of a physician (sec. 19P(a) of the Law). If the prisoner refuses the necessary treatment, a warden may – at the caregiver's request – "use reasonable force in order to allow the caregiver to provide the treatment, as long as the use of force is only to the degree necessary to provide the treatment" (sec. 19P(d) of the Law). The treatment is to be "the minimal medical treatment necessary, according to the professional discretion of the treating physician, in order to protect the prisoner's life or to prevent a serious, irreversible disability" (sec.

19P(a) of the Law). Section 19Q of the Law exempts the caregiver and the medical institution from liability in tort as a result of providing coerced medical treatment.

15. The decision of the court is subject to appeal to the Supreme Court (sec.19S(b) of the Law). The Supreme Court will hear the appeal within 48 hours of its submission (sec. 19S(b) of the Law). It is also possible to ask the court that made the decision to reconsider the request if new facts are discovered, or if the circumstances have changed in a way that could influence the decision (sec. 19R of the Law).

16. To complete the picture, it should be noted that the main points of the Memorandum circulated as described above were similar to the Bill with one notable exception. The Bill added a provision that a copy of the request for permission to provide treatment to the prisoner be delivered to the ethics committee where the prisoner is hospitalized, and that the court's decision on the request be given after it has received the opinion of the ethics committee (unless the court is of the opinion that, under the circumstances, the request should be denied *in limine*).

17. The language of the Law, as enacted, was ultimately similar to the Bill, with certain changes. The Law added the requirement, not included in the Bill, for the Attorney General's consent to submitting a request for permission to provide medical treatment (sec. 19M(a)), and submission of the request was made contingent upon making a significant effort to secure the prisoner's consent to treatment, and only after the procedure for submitting a request to the court and its consequences were explained to the patient (sec. 19M(d)). Another central difference, which we shall discuss below, is that the Bill placed the security considerations in the primary section that outlines the judicial discretion, and they were included among the factors the court must take into account, such as the Prisons Service's responsibility to safeguard the health and life of the prisoner, and the impact of the decision on the ability to maintain security and order in prisons. However, ultimately, the role of the security considerations was reduced in the Law, such that the court may consider factors of "concern for human life or a real

concern of serious harm to national security, to the extent it was presented with evidence to this effect".

18. The constitutionality of Article B2, including sec. 19N(e) of the Law in regard to the considerations for deciding upon the request, is now the subject that requires our decision.

The Petitioners' Arguments

The Israel Medical Association's Arguments

19. IMA, the Petitioner in HCJ 5304/15, is the representative union of physicians in the State of Israel. IMA argues that the Law is not proportionate, is not ethical, is not equal, and undermines the internationally accepted rules of medical ethics, which it has adopted and ratified. IMA claims that force-feeding persons on a hunger strike despite their refusal poses a real risk to their health, and is inconsistent with the overarching principles of preventing harm and protecting the patient's autonomy over his body, which are the basis for the medical code of ethics. Under international ethics codes, force-feeding is considered torture. Therefore, IMA is obligated to do all it can in order in order to repeal the Law.

20. According to IMA, the Bill was greeted by the absolute, across-the-board objection of the entire medical-scientific community, including the World Medical Association, the National Association of Nurses, the IMA's Hospital Managers' Association, as well as the National Council for Bioethics, which was created in accordance with Government Decision no. 1219 of January 31, 2002, in order to provide recommendations to decision makers within the executive, legislative and judiciary branches on ethical issues deriving from developments in research, and in order to form positions for ministers and the Government of Israel in regard to matters that have yet to be regulated in legislation, or whose legislative arrangement required re-examination.

21. IMA maintains that the Law makes an exception of the population of hunger striking prisoners in terms of the general arrangement established in the Patient Rights Law, while seriously infringing the principle of equality, although there is no relevant difference between a hunger striking prisoner and any other patient that would justify making them exceptions to the general arrangement. IMA argues that the difference between hunger striking prisoners and non-prisoners refusing medical treatment concerns non-medical purposes. In IMA's view, these purposes cannot constitute a relevant difference even if there is greater concern that a prisoner's hunger strike would lead to a violation of public order.

22. IMA refers to specific arrangements that are exceptions to the general rule established by the Patient Rights Law, such as sec. 68(b) of the Legal Competency and Guardianship Law, 5722-1962 (hereinafter: the Legal Competency Law), according to which a court may assume the role of guardian in extreme cases where medical treatment is necessary for the physical or emotional wellbeing of a ward. According to IMA, the Law in our matter concerns those who are competent to give informed consent but chose knowingly to withhold it. Additionally, the Legal Competency Law requires that the court obtain a medical opinion and weigh medical considerations in regard to protecting the physical or mental health of the minor, the incompetent or the ward, and the court may not consider non-medical considerations. Similarly, in the Treatment of the Mentally Ill Law, 5751-1991 (hereinafter: Treatment of the Mentally Ill Law) was designed to protect the right of the mentally ill to autonomy and to set limits upon the possibility of imposing treatment upon them. This is in contrast of the Law at hand, which reduces the weight given to the patient's autonomy under the Patient Rights Law. IMA also refers to the Terminally Ill Patient Law, 5766-2005 (hereinafter: the Terminally Ill Patient Law), which establishes a specific arrangement for treating patients whose impending death is certain and unpreventable. According to IMA, the arrangement in the Terminally Ill Patient Law explicitly prioritizes the rights of the patient and his autonomy. Under the Terminally Ill Patient Law, the exclusive considerations in determining medical treatment are the medical condition, the patient's will, and the level of his suffering. IMA notes that according to the case law, patients with anorexia are not subject to the Treatment of the

Mentally Ill Law, but rather to the general arrangement in the Patient Rights Law. Therefore, IMA claims that by extension, there is no justification for a specific arrangement for hunger striking prisoners who are competent, sane and have functional discretion and judgment.

23. According to IMA, the Law creates clear statutory disharmony because its purposes and provisions are inconsistent with, and sometimes stand in obvious opposition to, the purposes and provisions of the general and related arrangements that concern the right to autonomy, the right to refuse medical treatment, and forced medical treatment.

24. Additionally, the Law has two explicit purposes: the first – to protect the life of a hunger striking prisoner (hereinafter: the humanitarian purpose), and the second – to preserve public order and national security within and without the prison walls (hereinafter: the non-medical purpose). IMA argues that the humanitarian purpose was not the primary purpose for which the Law was enacted, but rather it was the non-medical purpose. It claims that the Law was designed to make it possible for the State of Israel to compel a hunger striking prisoner to receive medical treatment contrary to his will. IMA maintains that forcing treatment upon a hunger striking person through force-feeding is a violent and humiliating act that amounts to torture under international standards, and that may irreversibly harm health and even lead to death. As a result, the Law severely infringes the prisoners' constitutional right to dignity, as well as their right to life and to physical integrity, from which the right to autonomy and the right to refuse medical treatment derive. In IMA's opinion, the right to refuse force-feeding is part of the general right each person, as such, holds to refuse medical treatment. This right is not denied to those inside prison walls.

25. IMA reminds us that hunger striking has been recognized as a means of expression and protest. It argues that the Law seriously infringes the prisoners' freedom of expression by denying them, in effect, what is practically their sole legitimate means of protest.

26. IMA maintains that the Law is not befitting the values of the State of Israel as a Jewish and democratic state, and that, *inter alia*, coercive use of medical means in order to achieve goals that are not medical is inconsistent with the principles of democracy.

27. In IMA's opinion, the Law's purpose is improper: the dominant purpose of the Law is not a humanitarian purpose. Protecting the lives of prisoners is secondary and is but an intermediate goal that was meant to serve the non-medical purpose of the Law. The non-medical purpose does not meet the test of a real public interest, neither under the necessity test – the existing statutory arrangement in the Patient Rights Law allows treating hunger striking persons, including prisoners, without coercive and harmful medical intervention – nor under the test of sensitivity for the right. Therefore, the serious harm to human dignity and a person's autonomy over his body, while humiliating him and performing invasive medical procedures without consent, and the infringement of his right to equality and freedom of expression, cannot be justified by the need to achieve non-medical purposes, even due to a concern for compromising public order.

28. In IMA's opinion, the Law does not meet the proportionality tests either. *The rational connection test* – the arrangement established in the Law is not at all necessary, and may even undermine the chances for successful treatment of hunger strikers and irreversibly damage their health. Currently, the manner of treating hunger strikers is based on close monitoring by a doctor of the hunger striker's statements of his wishes to receive or refuse treatment, and attempts to persuade the hunger striker to receive full or partial feeding with consent, and with a commitment that he will not be fed against his will. According to IMA, the procedure described is the best way to address hunger strikes – building a relationship of trust between treating physicians and the hunger striking prisoner leads to a negotiation that facilitates arriving at agreements. The ethics committee is viewed as a neutral body that aims to benefit the hunger striking person and to seek his best interest, rather than acting on anyone's "behalf" or as a "threatening" institutional arm. In the IMA's view, the small number of cases in which the matter of hunger striking prisoners were brought before the ethics committee is worth noting, and is a result of the trust relationship formed between the doctor and the hunger striking

prisoner – a relationship that directly affects the scope of the cooperation between them, and the hunger striker's consent to undergo examinations and to receive vitamins and nutrition intravenously.

29. On the other hand, the arrangement established in the Law significantly alters the system of checks and balances established under sec. 15(2) of the Patient Rights Law. The Law shifts the decision to force medical treatment onto the President of the District Court or to his Deputy – who is not effectively involved in the medical procedure, is not familiar with the professional details and does not have the necessary tools to make an educated decision. In IMA's opinion, this change may cause irreparable harm to the delicate trust relationship between hunger striking prisoners and the medical system, and may increase resistance to medical care. Additionally, although the Law requires presenting the court with the opinion of the ethics committee, there is no obligation to consider its opinion in cases of urgency. The patient does not even have the right to submit an opposing medical opinion, and the court has no authority to appoint another expert on its behalf. Furthermore, the Law requires only that the benefits and risks of providing forced treatment be considered, whereas the Patient Rights Law requires an expectation that the treatment will significantly improve the patient's medical condition. And while the Law requires considering the position of the prisoner and his reasons among the considerations for coercing medical treatment, the Patient Rights Law requires a reasonable basis for assuming that the patient would retroactively consent. Moreover, the Law makes it possible to order coercive treatment in reliance upon privileged evidence, as opposed to the arrangement in the Patient Rights Law, which does not involve a judicial procedure. The Law even explicitly permits the use of force against a hunger striking prisoner in order to facilitate the coerced treatment, whereas the Patient Rights Law does not explicitly permit this.

30. IMA further maintains that it is doubtful whether forced-feeding can save the life of a hunger striking prisoner. Rather, force-feeding that may bring about precisely the result about which the State is concerned – disturbance of the peace, additional acts of

protest and significant national and international reactions, as well as health risks and even the death of the hunger striking prisoner.

31. IMA adds that there is a *less harmful means* for achieving the purpose of protecting the lives of prisoners, under sec. 15(2) of the Patient Rights Law and in accordance with the rules of medical ethics and the physician's independent discretion. As for the *proportionality stricto sensu test* – IMA believes that the very assumption that some benefit may be derived as a result of implementing the Law is in doubt. On the contrary, the Law may cause extremely severe harm to prisoners, as well as to doctors and medicine in Israel.

32. IMA maintains that the Law is inconsistent with the fundamental principles of medical ethics in Israel and around the world: autonomy, preventing harm to a patient, benefiting the patient, equality and distributive justice. According to IMA, the Law would compromise the doctor-patient relationship because a constant threat will hang over the heads of hunger striking prisoners that would lead to irreversible harm to the fragile trust prisoners place in prison doctors, as well as hospital doctors. IMA believes that it is not a hospital doctor's role to participate in implementing governmental decisions that serve non-medical purposes against the will of the patient, and to prefer non-medical considerations over medical considerations. IMA maintains that as a result of implementing the Law, a doctor may find himself in a conflict between his ethical duties and his duties as an employee required to provide a medical opinion to the Prisons Service Commissioner, or to administer forced treatment. In IMA's opinion, issuing a judicial order by the President of a District Court or by his Deputy compelling medical treatment would lead to a situation in which no doctor would agree to execute the order, or that a doctor who would execute it would be committing an ethical violation that would expose him to disciplinary action by the IMA's ethics board.

33. IMA presented an enlightening survey of how different countries around the world contend with hunger strikes by detainees, prisoners, or those seeking asylum within

their borders (Appendix P/38). The remaining Petitioners, as well as the Respondents, have also shed light on this issue. I will discuss their survey in depth, below.

The Petitioners Arguments in HCJ 5441/15: Al Mezan Center for Human Rights and the Yusuf Al-Siddiq Institute for Prisoner Support

34. The Petitioners in HCJ 5441/15 – organizations active in the field of human rights and social change, including protecting the rights of Palestinian prisoners – also contend that the Law is unconstitutional. It blatantly contradicts the fundamental right to dignity as it violates one's right to autonomy over one's body, as well freedom of expression and protest in a manner that negates a prisoner's effective ability to express his position in an attempt to influence prison and state authorities. According to the Petitioners, a hunger strike is a legitimate course of protest, it is non-violent, and its importance grows when prisoners, whose forms of protest are limited due to their incarceration, are concerned. According to the Petitioners, force-feeding, which is designed to end the prisoner's protest, gravely infringes his humanity. They argue that the Law was designed to provide the Prisons Service and the General Security Service with a tool to "break" a hunger strike, on the basis of considerations of public safety and breach of public order. The Petitioners believe that these considerations are irrelevant to the purpose of a decision regarding the compelling of medical treatment that is intended to save lives. Therefore, the purpose of the Law is improper because the hunger striking prisoner becomes an instrument in the hands of the authorities for the purpose of implementing policy, and the claim as to protecting the life of the prisoner is merely a fig leaf. In this context, the Petitioners refer to sec. 19O(e) of the Law, which permits the use of privileged evidence in the proceedings, while limiting the prisoner's ability to mount a defense. In the Petitioners' view, the extent of the benefit deriving from the Law is also limited because the publicity and public outcry following the forced feeding of a hunger striking person would create animosity and inspire an uprising which may be "life threatening" or compromise prison order. The Petitioners argue that the arrangement in sec. 15 of the Patient Rights Law balances the need to care for the individual's welfare, and his will and dignity.

35. The Petitioners are of the view that, considering past experience, the security system has a wide range of capabilities for controlling a hunger strikes by prisoners. They maintain that the number of prisoners on hunger strikes decreases from year to year. In this regard, they rely on the response of the Prisons Service, dated July 12, 2015 (Appendix H to their Petition. In their Petition, they note the hunger strike by administrative detainee Muhammad Alan, which was discussed in the *Alan* case that we mentioned above, and to which we will return.

The Petitioners' Arguments in HCJ 5994/15: Physicians for Human Rights, The Public Committee Against Torture in Israel, HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger, Yesh Din Volunteers for Human Rights

36. The Petitioners in HCJ 5994/15 are organizations whose mission is to promote and protect human rights in relation to health, to act against torture, and to protect the rights of residents of the West Bank – including Palestinians under arrest or investigation. They join the arguments by the Petitioners as presented above, including the argument whereby force-feeding constitutes torture that is prohibited under Israeli law and under international law. They, too, are of the opinion that the purpose of the Law is "breaking a hunger strike by prisoners, and silencing their protest". In their opinion, as well, a hunger strike is a last resort that is taken up in protest over arbitrary and harmful policy and conduct towards Palestinian prisoners and detainees in recent years; in protest against a policy of administrative detention and a policy of solitary confinement; and in order to secure basic human rights such as family visitations, medical care and proper living conditions. The Petitioners review hunger striking in Israel, including the mass hunger strike by Palestinian prisoners in 2012, following which the process of enacting the Law was accelerated. In 2014, there was another mass hunger strike by administrative detainees. According to the Petitioners, a hunger strike is considered a disciplinary offense under the Prisons Ordinance. A Special Commissioner Order (Commissioner Order 04.16.00) grants the Prisons Service tools to address hunger striking prisoners, including revoking of benefits. They maintain that the tools that existed before the Law

was passed succeeded in bringing an end to strikes by security prisoners without coercive treatment and without any instance of death as a result of a hunger strike. The Petitioners argue – without any documented substantiation – that it was precisely in cases in which coercive treatment was employed, before the enactment of the Patient Rights Law, that several cases of death occurred (para. 16 of their Petition).

37. These Petitioners, as well, believe that coercive treatment infringes the hard core of human dignity, autonomy, free will, equality and freedom of expression. The Petitioners argue that there is a real possibility for harming human life in cases of force-feeding. In their opinion, the blanket immunity granted by the Law to entities that would provide coercive medical treatment directly violates the right to property of whomever was force-fed, constitutes another form of humiliation, and is not intended for a proper purpose. The Petitioners argue that the cumulative violation of human rights, including the possibility of relying upon privileged evidence in the proceedings, should be considered. They believe that ending a hunger strike by using force will guarantees further protests.

38. In the Petitioners' view, the Law contradicts the ethics rules of the World Medical Association, as well as the provisions of international law – which we shall address below – contrary to the presumption of compatibility [the *Charming Betsy* canon – ed.], which presumes that the purpose of a law is, *inter alia*, to realize the principles of international law and not to violate them. The Petitioners emphasize the prohibition on medical professionals to perform force-feeding of prisoners, and refer, *inter alia*, to the position of the Red Cross, the United Nations' Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The Petitioners argue that the Law, which they claim effectively targets only the Palestinian population, is wrongfully discriminatory. In light of all this, the Petitioners believe that the Law must be struck down even before it is implemented, as it is a stain upon the law.,

The Response of the Knesset

39. The Knesset believes the Petitions should be denied. In its opinion, the Law creates a supplemental arrangement to the existing arrangement in the Patient Rights Law, which responds to the special complexity that arises when the patient refusing medical treatment is a prisoner in the charge of the State, and whose medical condition is a product of a deliberate decision to undertake a hunger strike. According to the Knesset, the Law strikes a delicate balance between the State's responsibility for the welfare of the prisoner and the sanctity of his life, and respecting the prisoner's autonomy and wishes not to receive medical treatment. The Law was designed to allow a treating physician to care for the welfare of a hunger striking prisoner, subject to the exceptions that are meant to protect the prisoner's dignity, under the strict supervision and monitoring of various judicial and medical entities.

40. The Knesset emphasizes that the President of the District Court or his Deputy may *permit* providing medical treatment to a hunger striking prisoner despite the prisoner's refusal, but they cannot *order* providing such treatment, and the matter remains in the discretion of the treatment provider (sec. 19P(a) of the Law). If the treatment provider chooses to treat the prisoner against his will, in accordance with the permission granted, he is required to provide "the minimum treatment necessary in the caregiver's professional discretion to maintain the prisoner's life or prevent severe, irreversible disability" (sec. 19P(a) of the Law). In light of this, the Knesset believes this is a balanced procedure that is meant to provide the most minimal treatment, in the most extreme cases, where treatment is required in order to save the life of the prisoner, or in order to prevent his severe, irreversible disability.

41. The Knesset argues that although the Law permits the infringement of certain constitutional rights of prisoners – the right to autonomy and dignity – this infringement is intended for proper purposes and passes the proportionality tests established in the Limitations Clause of Basic Law: Human Dignity and Liberty. The Knesset finds evidence for this in the thorough legislative process that brought about significant

changes in the Law's language, whereby balances and mitigating elements were added. According to the Knesset, the alleged infringements of certain constitutional rights enable protection of other constitutional rights, first and foremost the prisoners' right to life. The Knesset emphasizes that a prisoner has no constitutional right to hunger strike. A hunger strike in itself cannot be considered part of the freedom of political expression granted to a prisoner. In the Knesset's opinion, preventing a hunger strike does not itself infringe the prisoner's constitutional rights.

42. The Knesset maintains that the Law meets the requirements of the Limitations Clause, as it is intended for a proper purpose and its infringement of the constitutional rights of prisoners passes the proportionality tests. The Knesset argues that the purposes grounding the Law are most proper, and befit the values of the State of Israel as a Jewish and democratic State. The Law is founded upon two intertwined purposes: the first, and primary one, which derives from the central value of the sanctity of life, concerns saving the life of a hunger striking prisoner and protecting his health and welfare. The second is protecting national security and the lives of others who may be at risk as a result of the hunger strike. As noted, a *conditio sine qua non* for initiating the procedure under the Law is the prisoner's serious medical condition. The forced medical treatment that can be provided under the Law is "the minimal necessary medical treatment." Thus, it is clear that the central purpose of the arrangement is to protect the life and health of the prisoner. According to the Knesset, it cannot be disputed that persevering a person's life and health is a proper purpose.

43. According to the Knesset, even the secondary purpose – the security purpose – is a proper purpose. Security considerations would only be taken into account when a treating physician finds that the prisoner's medical condition is most serious and that there is real risk to his life, or that he would sustain severe, irreversible disability. In such circumstances, the court may consider "considerations of risk to human life or a real concern of serious harm to national security, to the extent that evidence to this effect is presented to the court" (sec. 19N(e) of the Law). In the Knesset's opinion, it is clear that a purpose that concerns preventing risk to "human life" or "serious harm to national

security" is a proper purpose. The Knesset argues that the combination of medical purposes and "non-medical" purposes is not unusual in Israeli legislation. It refers, for example, to the Treatment of the Mentally Ill Law. According to the Knesset, there is no contradiction between the security purpose and the humanitarian purpose: the death of a prisoner as a result of a hunger strike is a dire, undesirable outcome, both from the standpoint of the sanctity of life and in terms of the consequences for security that may follow his death. In effect, it is precisely the approach that argues for preventing medical treatment of a hunger striking prisoner who is in grave danger that gives priority to non-medical purposes over purely medical considerations. The Knesset also argues that even were there a distinction between the two said purposes, according to the case law of the Supreme Court, when the dominant purpose of a statutory arrangement is a proper and legitimate one, it may "cure" an additional purpose that cannot stand on its own.

44. In the Knesset's view, the two purposes befit the values of the State of Israel as a Jewish and democratic state, and the Law realizes the values of Israel both as a Jewish state and as a democratic state. It maintains that the Law also meets the proportionality tests: the Law inherently realizes the *rational connection test* because there is a sufficient likelihood that the procedure will reasonably contribute to achieving the purposes of the arrangement: the entities taking part in the procedure are required to examine the potential that the forced medical treatment would improve the prisoner's condition; the treatment provided would only be the minimum required to protect the prisoner's life or to prevent a serious disability. In the Knesset's opinion, the claim that in the past there were cases where forced medical treatment of prisoners led to irreversible harm and even death is insufficient to disprove the existence of a rational connection between providing treatment without consent and saving the life of a prisoner. The Knesset argues that the claim according to which the Law would compromise the trust relationship between the doctor and patient is unfounded. This is because even under the Law, the doctor must invest significant effort into securing the consent of the prisoner to receive medical treatment. The Law meets the *less harmful means test* because sec. 15(2) of the Patient Rights Law does not realize the purpose of saving the life (or preventing serious disability) of a hunger striking prisoner to a similar extent. The Law also meets the

proportionality stricto sensu test: the Law creates an arrangement that is proportionate and balanced, which seeks only to minimally infringe the prisoner's autonomy, while protecting his life and ensuring close supervision and monitoring of the entire process. The process begins with a medical opinion by the treating physician. Treatment may be provided only by a professional caregiver, in the presence of a physician, and it is the minimal treatment necessary in order to prevent death or a severe, irreversible disability. Even in such circumstances, the caregiver still has discretion not to provide the treatment that the court permitted. The Law includes different supervision mechanisms that are meant to ensure that permission will be granted only in instances where there is a real need for it. Emphasis has been placed on the prisoner's participation and on attempts to persuade him to receive the necessary treatment.

45. In the Knesset's opinion, the argument as to the legislative disharmony, as well as the ethics argument that IMA made, cannot be independent grounds for striking down primary legislation by the Knesset. Instead, constitutional grounds are necessary, that is, only if a statute is inconsistent with the Basic Laws, and as explained above, according to the Knesset this is not the case. As for the rules of medical ethics – without diminishing their importance – such rules cannot detract from primary legislation by the Knesset or override it. This is especially true when, even in other democratic states, arrangements exist which permit providing medical treatment without the consent of a hunger striking prisoner under certain circumstances. As to the argument of legislative disharmony, in the Knesset's opinion this argument must be rejected as the differences between the Law and the existing arrangement in the Patient Rights Law are not significant. The Law is a supplemental one that expands the arrangement established by the Patient Rights Law. The Law's unique elements are grounded upon the relevant difference between the issue of a hunger striking prisoner who is in State custody, and a different patient who is not a prisoner, and therefore there is no disharmony.

46. Finally, the Knesset reminds us that the Court must act with caution and restraint in exercising its power of judicial review over the Knesset's legislation, because setting social policy is within the authority of the legislature. In its view, under the circumstances

there are no grounds for the Court's intervention in the value-based determination of the legislature.

The Response of the State Respondents: The Government of Israel, the Minister of Public Security, the Attorney General, the Prisons Service and the Prisons Service Commissioner

47. The position of the State Respondents (hereinafter: the Respondents) is also that the Petitions must be denied in the absence of grounds for judicial intervention in primary legislation. According to them, the Law was enacted in a comprehensive, thorough, professional legislative process that was exceptional in its scope. This is a constitutional statute that serves important, proper purposes, and appropriately balances the State's duty to protect the sanctity of life, in general, and the life of a prisoner who is in its charge, in particular, and the value of the prisoner's autonomy to make decisions over his body and use it as a tool for expressing protest. According to the Respondents, sec. 15(2) of the Patient Rights Law does not provide a satisfactory response for the State to handle the recurring phenomenon of extended hunger strikes by prisoners in all its aspects. The Law is a supplementary arrangement to the Patient Rights Law that will be implemented only after all attempts at negotiation with the hunger striking prisoner have been exhausted.

48. The Respondents claim that past experience shows that the ethics committee has difficulty in "predicting" the future will of a hunger striking person and determining the chance that he would give his consent to treatment retroactively, along with its understandable inclination to consider the autonomy and will of the patient as much as possible. This has led to the outcome that in recent years, medical treatment has rarely been provided to a hunger striking prisoner against his will, even when there was serious risk to his life. Medical intervention mostly occurred only when the hunger striker reached a state of medical emergency. In addition, the ethics committee is not authorized to consider other factors inherent to the very fact that the hunger striking person is a prisoner who is in the custody of the State.

49. In the Respondents' opinion, a hunger striking prisoner does not wish to die, and he does not see death as a desirable result of his struggle, but rather – at most – a price that he is willing to pay in the name of the struggle. In their opinion, the struggle of a hunger striking prisoner does not always reflect an autonomous decision by the prisoner. At times, his decision is influenced by external pressures, in accordance with an organizational decision by the terrorist organization to which he belongs, for the purpose of improving the image or status of the prisoner within the organization or a different population. In addition, when the basis for the hunger strike is an issue that has political aspects, the hunger strike becomes a tool in a struggle that is essentially political, which involves those who support the hunger striker and influence him, on one hand, while influencing those who oppose his political demands or who consider themselves harmed by them, on the other. This political struggle may escalate as the hunger striker's condition progresses to a risk of death. Therefore, the hunger strike may cause a real risk to national security.

50. The Respondents argue that there is no dispute that the Law infringes the autonomy of a hunger striking prisoner and his freedom of expression, but they believe that the Law serves a proper purpose, befits the values of the State of Israel as a Jewish and democratic State, and meets the proportionality tests established in the Limitations Clause. The Respondents explain that the treatment given to a hunger striker may include a wide range of treatments and tests, which may change according to the condition of each patient, and that are provided based on medical need. The Law permits a range of discretion in the selection of the treatment that would most improve the condition of the hunger striker. The Respondents deny that the Law violates equality. In their view, there is a relevant difference between patients who are hunger striking prisoners and other patients, which justifies special treatment for them.

51. According to the Respondents, the purpose grounding the Law is that of expanding the means at the State's disposal for the purpose of protecting the life, physical integrity, and health of a hunger striking prisoner who is under the direct charge of the State, while minimizing the harm that may be caused to his quality of life as a result of

the medical harm that may suffer. Another purpose is to protect the security of the public and of the State from the consequences of the hunger strike itself, and from its possible consequences for the entire public – consequences that may very likely harm public safety and the rule of law.

52. According to the Respondents, the purpose of preserving the life, health and physical integrity of the prisoner is consistent with the Commissioner's Order "Preventing Losses – Treatment and Monitoring" (Order no. 04.54.01 dated October 13, 2004), and is also consistent with the provisions of sec. 15(2) of the Patient Rights Law. In the Respondents' opinion, the fact that the obligation to protect the life of the prisoner, his physical integrity and his health is not solely an independent purpose, but one that also serves the goals of protecting the security of the state and its residents does not detract from the legitimacy of this obligation. At the basis of the Law is the purpose of protecting the life of a hunger striking prisoner. We are concerned with a proper purpose – protecting the right to life and its sanctity, which justifies infringing the autonomy of the prisoner. According to the Respondents, the right to autonomy is not absolute even in the fields of medicine and ethics. Thus, for example, the Terminally Ill Patient Law establishes the sanctity of life as a fundamental principle, and the Patient Rights Law permits violating the autonomy of a patient in medical emergencies. Another purpose of the Law is to protect the safety and wellbeing of the public from the consequences of a hunger strike, which is used as a tool to bring about the release of hunger striking prisoners despite the danger they pose to the public and to national security.

53. In the Respondents' opinion, the Law does not infringe the constitutional right to an extent beyond what is necessary. There is a rational connection between the purpose and the arrangements established in the Law. Addressing the issue solely through the Patient Rights Law posed significant difficulties, and even resulted in medical treatment being provided to hunger striking prisoners only after loss of consciousness and in a state of medical emergency, in accordance with sec. 15(3) of the Patient Rights Law. The balanced arrangement established in the Law responds to the unique aspects of the issue, and makes it possible to extend the life of a hunger striking prisoner and protect his

health, as much as possible. According to the Respondents, in any case, if no caregiver would agree to act upon the permission granted under the Law, the Law would not be implemented and, in any event, no harm would be caused. The Law also meets the condition of the *less harmful means*, as it establishes a number of restrictions that limit the infringement of rights by establishing strict tests for implementing the Law's arrangement, as well as by the demand for exhausting the possible ways to secure the prisoner's consent, and by the decision procedure – the considerations that the President of the District Court is instructed to take into account, and the authority to grant a proportionate permit that is tailored to the type of treatment necessary.

54. According to the Respondents, the State of Israel respects and complies with its obligations under international law, including the prohibition on torture and cruel, inhumane and humiliating treatment under the U.N. Convention against Torture and other conventions. However, according to them, international law does not comprise any specific rule prohibiting the providing of treatment in general, or artificially feeding a hunger striking prisoner against this will, as a matter of principle. According to the jurisprudence of the various international tribunals, forcible feeding does not necessarily amount to torture or cruel treatment prohibited under international law, which we will address further, below.

55. The Respondents note that the IMA's position has opponents even in the medical community. They refer to a position paper they have attached, dated August 23, 2015, whose signatories include leading Israeli doctors, jurists, ethics and bioethics experts and philosophers (Appendix R/3), according to which, in extreme circumstances, the value of protecting human life and the ethical professional obligation of the doctor to save his life outweighs the infringement of a hunger striker's autonomous will.

56. In light of all this, the Respondents argue that given the clear public interest in protecting the prisoner's life, on one hand, and protecting public safety, on the other hand, as well as considering that the infringement is limited and proportionate, the Law is constitutional and does not raise legal grounds for intervention.

The Hearings before the Court

57. We held two hearings on the Petitions. During the hearing on September 17, 2015, we raised the question of whether the fact that a hunger striking *prisoner* is concerned may influence the balance between the considerations. Advocate Orna Lin, representing IMA, reiterated the position of the professional bodies that the preferable practice in treating a hunger striker is the procedural process, which has proven itself, inasmuch as no hunger striking prisoner has ever died in Israel. She claimed that the number of hunger strikers decreases continually. Advocate Durgam Saif, representing the Petitioners in HCJ 5441/15, reiterated his argument that the true purpose of the Law is to protect national security and the concern for disruptions, which constitutes an irrelevant consideration, and the Law therefore lacks a proper purpose. According to him, the European Court and other countries that have permitted force-feeding have considered only medical factors and not security considerations. Advocate Saif noted that according to the Law it is also possible to permit forced treatment following presenting the judge privileged evidence. This, too, he argues, renders the procedure unconstitutional. Advocate Tamir Blank argued on behalf of the Petitioners in HCJ 5994/15 that this is a statute that permits carrying out torture in the State of Israel. He also challenged the impossibility for a prisoner harmed as a result of forced treatment to recover damages.

58. We also permitted Dr. Leonid Eidelman, the Chairman of IMA, whose affidavit was attached to IMA's Petition, to express his objection to the Law. According to Dr. Eidelman, the Law would compromise the ability of doctors to treat patients.

59. As opposed to this, Advocate Dr. Gur Bligh, representing the Knesset's Legal Adviser, argued that the Petitioners' approach respects the prisoner's autonomy to the point of death – an approach that the legislature did not choose. According to him, there are two purposes to the Law: the dominant purpose is that of the sanctity of life, while the secondary purpose is that of security. In the opinion of the Knesset, the Patient Rights Law does not sufficiently respond to the problem because the presumption is that an

unconscious hunger striking prisoner would not wish to be fed. Advocate Areen Sfadi-Attila, on behalf of the Respondents, also argued that the Patient Rights Law does not provide tools for addressing a hunger striking prisoner. She explained that the relevant law serves as a last resort, designed to prevent irreversible harm to the hunger striking prisoner, and to permit intervention at the point where risk to life or serious disability may be prevented. This is, *inter alia*, due of the state's duty to save the prisoner's life, as well as to protect the lives of others who may be harmed as a result of the hunger strike. According to her, the purposes of protecting the prisoner's safety and state security coexist harmoniously with the purpose of protecting human life, and she is of the opinion that the Law adopted the jurisprudence of the European Court on this issue.

60. On December 10, 2015, the following decision was handed down:

> A follow-up hearing is to be scheduled before the Panel on one issue alone: the question of the constitutionality of section 19N(e) of the Prisons Ordinance (Amendment No. 48) Law, 2015, which states: "The court shall take into account considerations of risk to human life or real concern for serious harm to national security, to the extent that evidence to such effect has been presented to the court". The hearing shall be held in three months. The Respondents shall submit a supplementary position on this issue up to two weeks prior to the hearing, and the Petitioners may respond up to five days prior to the hearing.

Accordingly, the parties submitted their supplementary positions as follows:

The Knesset's Supplementary Position

61. The Knesset argues that sec. 19N(e) is constitutional and there are no grounds for judicial intervention. According to the Knesset, in the course of the legislative process a significant change was made in the Law to the effect that security considerations were removed from the primary section that guides the discretion of the court (sec. 19N(d) of

the Law). They were included in a separate section and significantly reduced, so that only if the court is presented with evidence in this regard, the court shall consider security factors. According to the Knesset, including sec. 19N(e) of the Law was designed to achieve the second, and secondary purpose of the Law. In the Knesset's view, this is a proper purpose. The Knesset emphasizes that security considerations may not, in and of themselves, lead to providing coercive treatment to a prisoner on a hunger strike. Such factors would be considered only where a treating physician found that the prisoner's medical condition was extremely serious, and that there was a real risk to his life, or that he would suffer a severe, irreversible disability. Only then would the court take into account "considerations of risk to human life or real concern for serious harm to national security, to the extent that evidence to such effect has been presented to the court". According to the Knesset, the integration of these purposes is not unusual in Israeli legislation. In its view, there is no contradiction between the security purpose and the humanitarian purpose, which is founded upon the sanctity of life, to the extent that it is possible to say that in the typical situation, the security purpose is "subsumed" by the humanitarian purpose. The Knesset is of the opinion that, in practice, it is precisely the approach that advocates preventing medical treatment to a hunger striking prisoner in grave danger that prioritizes the non-medical purposes over the pure medical considerations. The Knesset reiterates its argument that even were there a distinction between the two purposes, and even were it argued that the security purpose cannot stand independently, this Court has ruled in the past that when the dominant purpose of a legislative arrangement is proper and legitimate, this may "cure" an additional purpose that cannot stand on its own.

62. In the Knesset's opinion, sec. 19N(e) of the Law is proportionate. The section meets the *rational connection* test – allowing the court the possibility to factor in security considerations once evidence in this regard has been presented, would best contribute to realizing the security purpose of the arrangement, and certainly establishes the potential for realizing it. The section meets the *less restrictive means* test – it is hard to see how it would be possible to realize the security purpose without permitting, when appropriate, that the court take security considerations into account once evidence to this effect has

been brought before it. The alternative means proposed by the Petitioners – the arrangement established by sec. 15(2) of the Patient Rights Law, cannot be deemed capable of achieving the purposes of the Law to the same extent, while limiting infringement of the prisoner's rights. The section also meets the test of *proportionality in the "narrow" sense*: it is proportional and balanced, and ensures that the infringement of the prisoner's autonomy is minimal. The security factors listed in the section could never, in and of themselves, lead to initiating a procedure according to the Law. Once the case has been brought before the court on pure medical grounds, and to the extent that such evidence to this effect has been presented, the court may also take into account the security considerations alongside the entirety of other considerations and the opinion of the ethics committee. Additionally, according to the language of the Law as enacted, there must be concrete evidence that substantiates a "concern for human life" or a "real concern for serious harm to national security." This is a relatively high threshold, which requires substantial evidence. Furthermore, even where the court permits coercive treatment of a prisoner, that does not require the caregiver to provide such treatment (sec. 19P(e) of the Law.) In any case, the treatment actually provided would be the product of only medical considerations (end of sec. 19P(a) of the Law).

63. In effect, the Knesset argues that the court's authority to factor in security considerations was not meant to outweigh the medical considerations, but to balance other non-medical considerations that may lead the prisoner to put his health, and as a result the entire public, at risk.

The State Respondents' Supplementary Position

64. According to the Respondents, as well, sec. 19N(e) of the Law is constitutional. It was argued that it is impossible to commence a proceeding on a request to permit medical treatment, and such permission cannot be granted, based solely upon security considerations, but only in order to realize the objective of protecting the life of a prisoner, which is the original purpose for recourse to the Law. The position of the Respondents is that in instances where there is real possibility that the prisoner would be

at risk of death or of a severe, irreversible disability within a short period of time, and that the medical treatment is expected to improve his condition, the sanctity of life outweighs the prisoner's autonomy, and the District Court will have no need to address security considerations. However, if, and to the extent that it is found that there is a range of judicial discretion for determining the issue of the relation between the sanctity of life and the prisoner's autonomy, the legislature instructs that in the scope of that discretion, weight should also be given to the real concern for serious harm to state security, to the extent that evidence to such effect has been presented to it. The Law does not establish the relative weight of the various considerations, and the determination in this regard is given to the discretion of the court.

65. The Respondents argue that once the conditions for submitting a request under the Law have been met, maximum weight should properly be attributed to the value of the sanctity of life, and in such a case there should be no need for recourse to sec. 19N(e) of the Law. Even if their position is rejected, there is no constitutional flaw in taking the security considerations into account when balancing other considerations under the Law. According to the Respondents, a hunger strike may become a tool in what is essentially a political struggle, which involves the group of those supporting the hunger striking person, on one hand, and the group of those who oppose his political demands, or who see themselves as harmed by them, on the other hand, and influences them. Such a political struggle may escalate the condition of the hunger striker. Therefore, the need arose for a supplementary legal arrangement to be implemented only once the Patient Rights Law is no longer effective. According to the Respondents, the change that was made to the language of the Law led to limiting the security consideration, for the purpose of reducing the infringement of the prisoner's right to autonomy. The Respondents say that there is no dispute that granting permission to treat a hunger striking prisoner against his will involves infringing the prisoner's right to autonomy, including the prisoner's right to free expression. However, preventing harm to the prisoner's life is a purpose worthy of protection, just as protecting other human life is a protected fundamental right and one of the duties of the state. Additionally, protecting national security constitutes a real, and even essential, public need in an ongoing security

situation that has the potential of harming innocent citizens and residents. Thus, the security purpose of the Law may justify, in appropriate cases, infringing the right to autonomy. The Respondents emphasize that the severe medical condition of a hunger striking prisoner is always the basic premise for adjudicating the request. In their opinion, in terms of the outcome, as well, the security consideration will not stand on its own (sec. 19N(a)(1) of the Law.)

66. The Respondents also believe that the Law is proportionate. Following the procedure in accordance with the requirements of the Law can ensure the realization of the purpose of protecting the lives of others and protecting national security, alongside protecting the life of a prisoner on a hunger strike. The decision of the court is a suitable means for preventing the security risk caused by failing to provide medical treatment to a hunger striking prisoner and the deterioration of his condition as a result of the hunger strike. In their opinion, the balanced arrangement established by the Law meets the second proportionality test, and there is also a reasonable relationship between the right to autonomy and the public benefit deriving from it for the purpose of realizing the legislative purpose. In their opinion, the components of the Law create a proportional and balanced arrangement that minimally infringes the prisoner's right to autonomy, while protecting his life and ensuring measured, supervised use of the entire process, and the implementation of sec. 19N(e) of the Law in particular. Recourse to the Law would serve as a last resort, after exhausting all efforts under the Patient Rights Law. We are concerned with a strict supervision procedure, and permission for treatment cannot be granted on the basis of the security consideration alone. Therefore, as argued, the Law passes the tests for constitutionality, and does not provide legal grounds for intervention.

IMA's Response to the Supplemental Responses

67. IMA maintains that a constitutional discussion in terms of sec. 19N(e) of the Law as disconnected from the Law as a whole would be incomplete. IMA disputes that the humanitarian purpose is the primary purpose of the Law, whereas the security purpose is secondary to it. According to IMA, refraining from discussing the ethical issue brought

before it is tantamount to the Court's approval of future judicial orders to violate ethical duties, with all this may imply. IMA referred us to the case of the administrative detainee Muhammad al-Qiq, mentioned above and to which we shall return to below. According to IMA, in that case the hospital doctors refrained from treating Al-Qiq despite the decision of the ethics committee. According to IMA, had the Law implemented in the *Al-Qiq* case, clearly its goal would have been to put pressure on the doctors to treat Al-Qiq solely for security considerations, in violation of professional ethics. IMA argues that moving the security considerations from the scope of the general section to a separate section in the Law is a technical revision rather than a substantive one. This is because the Law mandates that the security considerations will be considered whenever the state may present the court with such evidence. According to IMA, under the circumstances, a serious concern arises that the state would use the security considerations to lead the court to a wrong determination on a medical matter that is not within its expertise. It argues that the security considerations are not secondary but a primary, central and inseparable part of the considerations that the court must take into account in deciding upon the request under the Law (it refers to the words of Advocate Yoel Hadar, the Legal Adviser of the Ministry of Public Safety, minutes of meeting no. 312 of the Internal Affairs and Environment Committee, the 19th Knesset, p. 23 (June 17, 2014)). According to IMA, the state's custody over the prisoner and the existence of a security purpose cannot justify violating the fundamental rights of a prisoner. Therefore, the argument that the state is absolutely responsible for the welfare of a hunger striking prisoner such that it may severely infringe his autonomy and personal will must be rejected. According to IMA, violating human rights in order to protect against an abstract danger or "collateral consequences" for public safety that are not connected to the specific prisoner, does not meet the requirements of reasonableness and proportionality and is unconstitutional. The IMA argues that the security purpose is not "subsumed" by the proper medical purpose – the proper dominant purpose cannot cure an improper secondary purpose. In its opinion, the humanitarian purpose is designed to serve the primary purpose – the possibility of imposing medical treatment upon the prisoner. Even were the primary purpose humanitarian, this purpose exists in the Patient Rights Law, and it is doubtful that it is present at all in the Law at hand. Its realization in our case is in doubt. The considerations

that led a prisoner to undertake a hunger strike, and the state's attempt to prevent protest of this type in the future, cannot and should not be part of the judicial decision in regard to his medical condition, and certainly not in regard to forcing medical treatment of questionable medical benefit for the hunger striking prisoner. Non-medical considerations that led the prisoner to go on a hunger strike do not justify considering non-medical factors in order to end it. According to IMA, even if the Law may be viewed as a supplementary arrangement, the concern arises whether its entire purpose is putting additional pressure on physicians through the granting or judicial orders.

The Response of the Petitioners in HCJ 5441/15 to the Supplementary Responses

68. According to these Petitioners, as well, the Law as a whole violates individual rights, and sec. 19N(e) cannot be disconnected from the entirety of the Law. In any event, considerations of public safety are irrelevant to the purpose of saving the life of a prisoner on a hunger strike, because they were designed to prevent the possible outcomes resulting from the death of the prisoner rather than the death itself. This removes the section from the scope of the Law's purported goal: protecting human life. According to the Petitioners, most hunger strikes are by administrative detainees. They argue that distinguishing between detainees or prisoners on hunger strikes according to the impact their death may have upon the public violates equality. Moreover, according to the position of the Respondents, a severe infringement of individual rights is justified in order to prevent the administrative detainee from achieving a "public-opinion victory" over the State of Israel. The Petitioners find support for this in the words of the Deputy Attorney General, Advocate Raz Nizri, in the debate of the Internal Affairs and Environment Committee: "The Law is intended to provide an additional tool in exceptional situations in order to prevent resolving it by releasing that person about whom there is information that he is involved in terrorism" (minutes of meeting no. 26 of the Internal Affairs and Environment Committee, the 20th Knesset, p. 12 (July 14, 2015)). In the opinion of the Respondents, there is no necessary rational connection between saving the prisoner's life and the security consideration that is intended to advance other goals. Furthermore, not even one alternative to forced feeding was

considered. The Petitioners again challenge the possibility of using privileged evidence during the proceedings under sec. 19O(e) of the Law. They maintain that there is no choice but to discuss this section as well. They argue that they have met their burden to prove infringement of constitutional rights, and thus the burden shifts to the State to show the justification for the infringement, but that the State has not met this burden.

The Response of Petitioners in HCJ 5994/15 to the Supplementary Responses

69. In the Petitioners' opinion, the responses reveal that the purpose of the Law is ending the hunger strike of Palestinian prisoners and silencing their protest. In their opinion, physicians would find themselves in an impossible situation in which they may become torturers against their will. According to the Petitioners, the position of the Respondents means that in any case where the matter of a hunger striking prisoner would reach the court, the conditions listed in sec. 19N(3) of the Law would effectively be met, and security considerations are supposed to, or may be considered. In the Petitioners' opinion, because of the language chosen -- "a real concern for serious harm to national security" – it is likely that security considerations would be attributed greater weight, and the chance that the court would reject the request to permit forced medical treatment is negligible. In their view, considering non-medical factors in the course of a request to permit forced medical treatment constitutes sanctioning torture through legislation, despite the absolute prohibition on torture. The Petitioners reiterate that the purpose of the legislation is political, and it is not preventing risk to the life of a prisoner on a hunger strike. They believe that even if according to the Respondents it were possible to strike a balance between life and autonomous will, it is not at all clear why it is necessary to insert a non-medical security consideration, and how such a consideration would serve the balance between the two values. The Petitioners argue that it cannot be claimed that, on one hand, sec. 19N(e) of the Law is unnecessary, while on the other hand holding on to it for dear life. In the Petitioners' opinion, there is no link between protecting the prisoner's life and his autonomy, and considerations of public safety – these are contradictory factors. The Respondents also fail to explain why forced feeding would not bring about the severe outcome of harming security and human life. According to

Petitioners, the Respondent's argument that implementing the Patient Rights Law alone may cause a prisoner on a hunger strike serious and irreversible harm – and may even lead to death – is an empty claim inasmuch as over decades of implementing that law, not one person on a hunger strike had died. The Petitioners argue that the Respondents do not explain how taking national security considerations into account would reduce the potential for medical harm to a hunger striking prisoner. According to the Petitioners, when "a concern for human life and a real concern for serious harm to national security" hang in the balance, the individual becomes a means to an end, and the road to torture, and to violent and humiliating procedures is short and inevitable.

The Follow-up Hearing

70. On February 21, 2016, we held a follow-up hearing on the question of the constitutionality of sec. 19N(e) of the Law. Advocate Lin repeated the position of IMA, whereby even where the conditions of sec. 19N(d) of the Law are not met, the Law authorizes the court to permit providing medical treatment in a manner that may put the life of a hunger striking prisoner at risk. In IMA's opinion, once security considerations are put in the mix, a "danger to life" is created. Advocate Saif addressed the issue of the privileged evidence in sec. 19O(e)(1). In his view, this further supports the Law's unconstitutionality. According to him, the security consideration, which serves as a "back door" to facilitate the forced feeding of a prisoner on a hunger strike, must be struck down. Advocate Blank believed that once a partial medical opinion is submitted, the security considerations would "initiate themselves". In his view, including security considerations in regard to a medical procedure may lead to painful, invasive and severe treatment that would amount to torture or humiliation. On the other hand, Advocate Dr. Bligh commented on behalf of the Knesset that inasmuch as the prisoner's public and political considerations are at the basis of his hunger strike, the State, too, should be permitted to take security considerations into account in certain circumstances, however only when necessary to protect the welfare of others. Advocate Sfadi-Attila explained on behalf of the State Respondents that the purpose of the section comprising the security considerations is to equip the District Court with additional balancing considerations. This section instructs the court to weigh the prisoner's right to autonomy against the

consequences that a risk to his life, or his death, may pose for other people, on the basis of evidence presented to it. Advocate Sfadi-Attila further explained that under the amendment, should the court conclude that it is concerned with a prisoner who is at mortal risk and that the treatment may save his life, that would be sufficient for permitting forced medical treatment. However, the court can consider the security issue only if the court is undecided. That is, the security factor always accompanies the consideration of the sanctity of life and does not stand on its own as an independent consideration.

71. Advocate Sfadi-Attila submitted to us a secret opinion prepared by the research unit of the General Security Service. We would note that the Petitioners in HCJ 5994/15 asked to review the opinion. On March 21, 2016, we ruled that "under the circumstances, the Petitioners will only be provided with the paraphrase at the end of the Respondents' response" whereby "the opinion points to a potential risk of a deterioration of security in and outside the prison as a result of the death of a security prisoner on a hunger strike, and as a result, to a loss of human life."

Decision

72. We are confronted with an issue that is legally, ethically, publicly, and humanly complex. These Petitions were submitted before the Law had been tested in practice and implemented. We are, therefore, concerned with a principled debate of an issue that is not – or in any event, is not yet – actual. Although, as a rule, the Court does not address theoretical issues, it has been held that there are cases in which petitions must be considered because of the importance of a question that concerns the fundamental principles of the rule of law, *inter alia*, in light of its "short lifespan" in the circumstances of its implementation. The issue before us is among those due to the real possibility that within a short period of time there may be a threat to the life of a prisoner on a hunger strike, or a possibility of severe, irreversible disability. Naturally, in this state of affairs, the decision on the matter must be handed down within several hours or days, given the prisoner's severe medical condition (compare: HCJ 6055/95 *Tzemach v. Minister of Defense*, IsrSC 53 (5) 241, 250 (1999) [English:

http://versa.cardozo.yu.edu/opinions/tzemach-v-minister-defense] (hereinafter: the *Tzemach* case,)) and therefore we must address the theoretical interpretive question at the outset.

73. It is, therefore, appropriate that we examine the constitutionality of the Law now – and not under the strict time frame established in the Law itself, when the severe medical condition of a hunger striking prisoner would complicate the performing of a thorough judicial examination. I state at the outset that after considering the arguments of the parties, I have reached the conclusion that there are no grounds for granting the Petitions, and that the Law passes the tests of constitutionality. Ultimately, the Law comprises an element of saving lives, and privileging the principle of the sanctity of life is first and last. This is reinforced by the fact that the person concerned is in the custody of the state, which is obligated to provide him with proper medical treatment. I shall explain.

74. It is decided law, anchored in the democratic structure, in respect for the separation of powers, and in common sense that the Court must act with restraint when reviewing statutes enacted by the Knesset, which express the will of the people (see for example: HCJ 8665/14 *Desete v. Knesset*, para. 22 of the opinion of President M. Naor (August 11, 2015) (hereinafter: the *Desete* case); HCJ 1213/10 *Nir v. Speaker of the Knesset*, para. 27 of the opinion of President D. Beinisch (February 23, 2012) (hereinafter: the *Nir* case)). Special caution is warranted when examining the constitutionality of a law (HCJ 7385/13 *Eitan – Israeli Immigration Policy v. Government of Israel*, para. 23 (September 22, 2014) (hereinafter: the *Eitan* case); HCJ 1548/07 *Israel Bar Association v. Minister of Public Security*, para. 17 (July 14, 2008)). The point of departure for examining the constitutionality of a law is, therefore, that it is a statute of the Knesset that expresses the will of the public's representatives, and as such, the Court must respect it. Thus, the Court will not easily determine that a particular law is unconstitutional (HCJ 3434/96 *Hoffnung v. Speaker of the Knesset*, IsrSC 50 (3) 57, 67 (1996) (hereinafter: the *Hoffnung* case); HCJ 4769/95 *Menachem v. Minister of Transportation*, IsrSC 57(1) 235, 263-64 (2002) (hereinafter: the *Menachem* case)). It

must be born in mind that a statute enacted by the Knesset enjoys a presumption of constitutionality which places upon those who challenge that constitutionality the burden to show, at least *prima facie*, that the statute is unconstitutional, before the burden may be shifted to the State and the Knesset to justify its constitutionality. The presumption of constitutionality also requires the Court to assume that the law was not intended to undermine constitutional principles (the *Hoffnung* case, p. 68), and in any event, places upon it a special responsibility.

75. Nevertheless, this does not mean that the law is immune to judicial review. The Court must fulfil its duty under our constitutional regime, certainly since the Basic Laws concerning rights were enacted, and even prior to this (CA 6821/93 *United Mizrachi Bank Ltd. v. Migdal Cooperative Village*, IsrSC 49(4) 221 (1993) [http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village]; A. BARAK, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION (2005) (pp. 105-118) (Hebrew); HCJ 98/69 *Bergman v. Minister of Finance and State Comptroller*, IsrSC 23(1) 693 (1969) [http://versa.cardozo.yu.edu/opinions/bergman-v-minister-finance]). The Court must then examine the constitutionality of the legislation enacted by the legislature in order to ascertain whether it is flawed, for example, by violating different types of rights. This examination must be carried out with strict care for the delicate balance between the principles of majority rule and separation of powers, and the protection of human rights and the fundamental principles that ground the Israeli political system. At times, immediate political needs may overly tip the scale in one direction in legislation, and the Court must balance, with institutional respect for the Knesset. Therefore, the constitutional review will, indeed, be carried out, but with proper caution and while avoiding reformulating the policy chosen by the legislature (CrimA 6659/06 *Anonymous v. State of Israel*, IsrSC 62(4) 329, 372-73 (2008) [http://versa.cardozo.yu.edu/opinions/v-state-israel-1]). As has been stated:

> … this Court cannot ignore a violation of fundamental rights that does not meet the requirements of the Limitations Clause as explicitly established in the Basic Laws. The Court is charged with the duty to ensure that the

legislative work of the Knesset does not infringe human rights established under the Basic Laws to a greater extent than is necessary, and it may not abdicate this duty. This examination should be made by striking a delicate balance between the principles of majority rule and the separation of powers, on the one hand, and the protection of human rights and the basic values underlying the system of government in Israel, on the other (HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, para. 14 of President Beinisch's opinion (November 19, 2009) [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance] (hereinafter: *The Human Rights Division* case); CrimA 6659/06 *Anonymous v. State of Israel*, IsrSC 62(4) 329, para. 29 (2008) (hereinafter: the *Anonymous* case)); (HCJ 7146/12 *Adam v. Knesset*, para. 67 (September 16, 2013) (hereinafter: the *Adam* case)).

76. We are, therefore faced with a sensitive, delicate pendulum, and certainly this is the case in the State of Israel in light of the mosaic of its reality and the complexity of its life. As is well known, judicial review is not performed in a vacuum – it is done against the background of the reality with which the law was designed to contend. As described above in detail, the provisions of the Law that are challenged by the Petitions include means that the State selected as part of an attempt to address the phenomenon of hunger strikes by prisoners and detainees, including administrative detainees. The scope of this phenomenon, according to the data we have, is on the decline (Appendix H to Petition 5441/15.) We pray that this Law will never be utilized, and turns out to be unnecessary, and as is known – "it is not for us to judge the wisdom of the legislature and the need for some particular legislation or another, whatever our position as citizens may be. Before us is a legislative product whose constitutional status we must evaluate according to its content – first and foremost – and according to its history, and we will not lock the door to legal developments following its implementation" (from my opinion in HCJ 2311/11 *Sabah v. Knesset*, para. 3 (2014)). But for the time being, the need to address the challenges arising from the hunger strike phenomenon still stand, and none of us can predict what tomorrow may bring. Against this background, I shall turn to examining the

constitutionality of the Law. In my view, the sanctity of life is overarching, as a fundamental tenet of Judaism as well as of every proper human society.

The Constitutionality of the Law

77. As we know, constitutional review is carried out in stages. First, we must examine whether the Law infringes a protected human right. If the answer to this is in the negative – this ends the constitutional review. If the answer is in the affirmative, we must examine if the infringement is lawful, according to the conditions of the Limitations Clause (see for example: HCJ 2605/05 *Academic Center for Law and Business v. Minister of Finance*, IsrSC 63(2) 545, 595 (2009) (hereinafter: the *Prisons Privatization* case)). These rules are based on the constitutional approach whereby constitutional rights are relative rights, and they must be balanced against other rights and interests.

78. The Limitations Clause in Basic Law: Human Dignity and Liberty (sec. 8) establishes four cumulative requirements that the offending Law must meet in order for the infringement to come within the scope of legality. First, constitutional rights cannot be infringed except by a law that befits that values of the State of Israel as a Jewish and democratic state. Additionally, the law must be for a proper purpose. The purpose is proper if it was designed to realize important public interests (see for example HJC 6893/05 *Levi v. Government of Israel*, IsrSC 59(2) 876, 889 (2005); HJC 6784/06 *Shlitner v. Director of Payment of Pensions*, para. 78 of Justice A. Procaccia's opinion (January 12, 2011); AHARON BARAK, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION, 525 (1994)). Finally, the infringement of the right must be proportionate. The proportionality of the statute is tested through three subtests.

79. The first subtest is the rational connection test, whereby we must examine whether the statute realizes the purpose for which it was enacted. The means selected must lead to achieving the purpose of the statute in a likelihood that is not remote or merely theoretical (see the *Nir* case, para. 23 of President D. Beinisch's opinion; HCJ 7052/03 *Adalah – the Legal Center for Arab Minority Rights in Israel v. Minister of Interior*, IsrSC 61(2) 202, 323 (2006) [http://versa.cardozo.yu.edu/opinions/adalah-legal-

center-arab-minority-rights-israel-v-minister-interior] (hereinafter: the Adalah case); HCJ 6133/14 *Abu Baker v. Knesset of Israel*, para 54 of my opinion (March 26, 2015); AHARON BARAK PROPORTIONALITY IN LAW – THE INFRINGEMENT OF THE CONSTITUTIONAL RIGHT AND THEIR LIMITATIONS, 377, 382 (2010) (Hebrew) (hereinafter: BARAK – PROPORTIONALITY).

80. The second subtest – the less restrictive means test – considers whether among the means that may achieve the purpose of the statute, the legislature has chosen the means that least infringe human rights. And note: the legislature is not required to select alternative means that do not achieve the purpose to the same extent or to a similar extent as the means selected (the *Adam* case, para 192; HCJ 3752/10 *Rubinstein v. Knesset*, para. 74 of Justice E. Arbel's opinion (September 17, 2014); the *Tzemach* case, p. 269-70.)

81. The third subtest is the proportionality *stricto sensu* test. In the framework of this test, we must examine whether there is a proper relationship between the benefit deriving from realizing the purposes of the statute and the attendant infringement of constitutional rights. This is a value-based test that is based on a balance between rights and interests. It calculates the social importance of the infringed right, and the type of the infringement and its extent, against the benefit of the statute (see HCJ 6304/09 *Lahav - Israel Organization of the Self-Employed v. Attorney General*, para. 116 of Justice A. Procaccia's opinion (September 2, 2010)).

82. If the Court concludes that the reviewed statute does not meet the conditions of the Limitations Clause, then the statute is unconstitutional. In such a case, the Court must determine the consequences of the unconstitutionality in terms of a remedy (see for example: HCJ 2334/02 *Stanger v. Speaker of the Knesset*, IsrSC 58(1) 786, 792 (2003)); HCJ 2254/12 *Samuel v. Minister of Finance*, para. 8 of Justice N. Hendel's opinion (May 15, 2014)).

A Prisoner's Human Rights

83. As stated above, the Petitioners argue that the Law does not comply with Basic Law: Human Dignity and Liberty because forcible feeding violates the right to dignity, the right to physical integrity, and the right to personal autonomy. It was further argued that a prisoner's freedom of expression and his ability to protest as he wishes are also violated.

84. Needless to say, the right to dignity achieved supra-legal status with the enactment of Basic Law: Human Dignity and Liberty, and that "human dignity relies on the recognition of a person's physical and spiritual integrity, his humanity and his dignity as a person" (the *Eitan* case, para. 14, *per* Justice Vogelman). Much has been written on the scope of this right, but there is no dispute that the right to autonomy derives from the right to dignity and constitutes part of the "hard core" of this right. At the base of the right to autonomy stands the recognition of one's right to self-fulfillment and of one's right to act according to his will and his choices (the *Eitan* case, para. 17):

> A person's right to shape his or her life and fate encompasses all the central aspects of his or her life: place of residence, occupation, the people with whom he or she lives, and the content of his or her beliefs. It is a central existential component of the life of every individual in society. It expresses recognition of the value of every individual as a world unto himself or herself. It is essential for the self-determination of every individual, in the sense that the entirety of an individual's choices constitutes his or her personality and life. ...The individual's right to autonomy is not expressed only in the narrow sense of the ability to choose. It also includes another – physical – dimension of the right to autonomy, relating to a person's right to be left alone ... The import of the right is, *inter alia*, that every person has freedom from unsolicited non-consensual interference with his or her body … The recognition of a person's right to autonomy is a basic component of our legal system, as a legal system in a democratic state. … It constitutes one of the central expressions of the constitutional right of every

person in Israel to dignity, a right anchored in Basic Law: Human Dignity and Liberty.

(CA 2781/93 *Ali Daaka v. Carmel Hospital, Haifa*, IsrSC 53(4) 526, 570-71 (1999) [http://versa.cardozo.yu.edu/opinions/daaka-v-carmel-hospital] paras. 15-17 of the opinion of Justice Orr)).

85. We hold it as fundamental that every right granted to a person as such, is granted to a person even when incarcerated or detained, and that the fact of incarceration or detention alone cannot revoke any of his rights, unless it is required as a result of the denial of his freedom of movement, or where there is an explicit statutory provision to such effect (HCJ 337/84 *Hukma v. Minister of Interior*, IsrSC 38(2) 826, 832 (1984)). This Court has been called upon repeatedly to consider the rights of prisoners, and has held that a prisoner does not lose the human rights and liberties granted to any person, unless it is necessary for the purposes of the incarceration:

> …the loss of personal liberty and freedom of movement of an inmate, which is inherent in the actual imprisonment, does not justify an additional violation of the other human rights of the inmate to an extent that is not required by the imprisonment itself or in order to realize an essential public interest recognized by law (the *Prisons Privatization* case, p. 595 [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance, para. 17 of the opinion of President D. Beinisch]).

And it should be emphasized:

> The necessary violation of a prisoner's human rights is rooted primarily in the restriction of his personal liberty, which stems from the incarceration. Restricting a prisoner's movement in prison necessarily leads to a violation of those incidental human rights whose realization is contingent upon the existence of human liberty, such as the right to an occupation, the right to privacy, and to some extent, even the right to freedom expression. Additional violation of a prisoner's human right may be required in order

> to achieve the purpose of maintaining order, safety and discipline in prison for purposes of protecting the security of its inmates. Limitations may also derive from other needs grounded in important public interests, such as general considerations of national security (the *Dobrin* case, para. 14). However, the purpose of violating the prisoner's human rights is never to add to the penalty imposed upon him by the court. Its legitimacy relies on the fact that it is a necessary result of the denial of liberty due to incarceration, or that it is required in order to achieve an essential, legally recognized public interest (APA 4463/94 *Golan v. Prisons Service*, IsrSC 50(4) 136, 154-56; HCJ 221/80 *Darwish v. Prisons Service*, IsrSC 35(1) 536, 546; HCJ 540/04 *Yousef v. Director of the Judea and Samaria Central Prison*, IsrSC 40(1) 567, 572-73). (HCJ 4634/04 *Physicians for Human Rights v. Minister of Public Security*, IsrSC 62(1) 762, 773, *per* Justice Procaccia (2007) (hereinafter: the *Physicians for Human Rights* case)).

And indeed:

> It is established law in Israel that basic human rights "survive" even inside the prison and are conferred on a prisoner (as well as a person under arrest) even inside his prison cell (APA4463/94 *Golan v. Prisons Service*, IsrSC 50(4) 136, *per* Justice Mazza (1996) [http://versa.cardozo.yu.edu/opinions/golan-v-prisons-service, para. 12]).

This is also the case in regard to the constitutional rights of a prisoner who is in the custody of the state:

> A prison sentence imposed upon a person does not itself revoke the constitutional human rights he is granted by virtue of the principles of the Israeli constitutional system. Such rights are denied to the prisoner only when their restriction is necessarily required due to the fact that his liberty was revoked because of incarceration, and to an extent that the violation of

> a protected right is in accordance with the principles of the Limitations Clause in the Basic Law (the *Physicians for Human Rights* case, p. 773).

In practice, it was held that the right to freedom of expression is not denied to a person upon incarceration, however it is substantially reduced:

> It is the decided law of this Court that when entering prison one loses one's liberty but one does not lose one's dignity (APA 4463/94 *Golan v. Prisons Service*, IsrSC 50(4) 136, 152-53; HCJ 355/79 *Katalan v. Prisons Service*, IsrSC 34(3) 294, 298). Although the prisoner's right to freedom of movement is denied, he still holds fundamental rights "whose infringement violates a person's minimal, fundamental needs" (HCJ 114/86 *Weil v. State of Israel*, IsrSC 41(3) 477, 492). Freedom of expression is among the fundamental rights granted to a prisoner even when he is incarcerated. It is not denied to a person upon his incarceration and is granted to the prisoner even within his cell (APA 4463/94 above, p. 157). Nevertheless, "incarceration severely limits the prisoner's ability to realize his freedom of expression, and his freedom of expression is, in practice, much more limited than the freedom of expression of a free citizen" (*loc..cit.*). Thus, restrictions are imposed upon the right of freedom of expression within the prison walls, the purpose of which is, *inter alia*, to promote unique interests "… which are required for the orderly administration and function of prisons: realizing the goals of incarceration, maintaining security, order and discipline in prison, protecting the welfare of prisoners, protecting the welfare of staff and wardens, and so forth" (*loc.cit.*). (HCJ 7837/04 *Borgal v. Prisons Service*, IsrSC 59(3) 97, 101 *per* Justice Y. Adiel (September 14, 2004) (hereinafter: the *Borgal* case).

Restrictions are imposed upon the right of a prisoner to freedom of expression, *inter alia*, in order to serve the unique interests related to the orderly operation of prisons. *In the*

Borgal case, it was held that a hunger strike is not included among the rights granted to a prisoner:

> *Against this background, even if we were to assume that a hunger strike may be considered a legitimate means to express opinions and to realize the right to freedom of expression, taking part in such a strike is not among the rights granted to a person while incarcerated in a prison*. A hunger strike, in both its elements, the hunger and the strike, undermine the orderly operation of the prison. As for its first element, the refusal to eat itself is a prison offence under sec. 56(8) of the Prisons Ordinance. In our case this is not a "plain" refusal to eat, but a refusal which expresses organized protest in the form of a strike. An organized strike is also inconsistent with maintaining order and discipline in a prison. In this regard it has already been held: "Taking matters to the extreme, we can say that an everyday demonstration — in a town or village — is not like a demonstration of prisoners inside a prison. Is there anyone who would conceive it possible to allow a demonstration of prisoners in a prison?" (PPA 4463/94 above, p. 180 [http://versa.cardozo.yu.edu/opinions/golan-v-prisons-service], para. 11 of the opinion of M. Cheshin, J.). Therefore, we cannot accept the Petitioners' argument as to a violation of their right to freedom of expression (emphasis added – E.R) (the *Borgal* case, p. 101).

86. I shall now turn from general principles to the constitutional analysis of the Law. I will first note that examining the section and its legislative history reveals that the State wished to formulate a unique model, a comprehensive arrangement by primary legislation, in order to address the phenomenon of hunger strikes by prisoners and detainees, which is recurrent in the Israeli reality (see the Explanatory Notes to the Bill – Government Bills, 5774-2014, 762, 870). Those proposing the bill were not unaware of the fact that providing involuntary treatment to a person on a hunger strike raises significant ethical questions for the treating physician (*ibid.*, p. 764). They considered the

current arrangement in section 15(2) of the Patient Rights Law, and in their view, as noted in the Explanatory Notes, the existing arrangement in the Patient Rights Law does not "express the unique aspects that characterize the medical condition of the person on a hunger strike, generally – and those of a prisoner on a hunger strike, in particular; the complexity of the question of autonomy of will in circumstances of a prisoner hunger strike, and the broader range of the considerations and circumstances relevant to such a situation that must be weighed in making a decision on providing necessary medical treatment" (*ibid.*, p. 772). Indeed, there can be no dispute that when the person on a hunger strike is a prisoner or a detainee, there is a different set of considerations and balances, and the weight given to the autonomous will of a prisoner or detainee on a hunger strike is not the same as in regard to a person on a hunger strike who is not a prisoner or a detainee. This is because he is in the custody of the state, with all that this may imply.

87. We should already explain that in addressing hunger strikes we must consider another factor, which is also an important part of examining the right to human dignity. A hunger strike, if prolonged, may lead to a loss of life. In the absence of life – where is the person and what is the source of human dignity? The State of Israel is a Jewish and democratic state, and thus we must consider the Jewish ethos of the sanctity of life – any human life – as well. In addition, the jewel in the crown of Basic Law: Human Dignity and Liberty is the statement (in sec. 1):"Fundamental human rights in Israel are founded upon the recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free …" This must not be taken lightly. These are not merely words. They are constitutional norms. This raises the question whether a prisoner, who is in the custody of the public, may decide as he wishes upon ending his life, or whether the sanctity of his life while in custody outweighs his will, also given that realizing his will carries serious potential consequences that go beyond him alone (and see, for example, on this issue the Commissioner's Order "Preventing Losses – Treatment and Monitoring" (Order no. 04.54.01 of October 13, 2004)), which states that "the Prisons Service sees guarding human life and physical integrity as a value of paramount importance, and is committed to protect the life of a prisoner to the best of its ability"). Perhaps we have

here – in the words of our Sages – a case of "he is subjected to pressure until he says I am willing" (TB Yevamot 106a). That is, at the end of the day, he will be reconciled (and compare section 15(2)(c) of the Patient Rights Law).

88. Before we move on to a thorough examination of the concrete arrangement that is the subject at hand, we will examine the relevant provisions of international law and of the domestic law of other countries.

Comparative Law and International Law

89. A review of the relevant legislative provisions and case law from abroad reveals that countries of the western world, as well as international tribunals, are divided on the question of the legitimacy of artificially feeding a prisoner on a hunger strike. Despite the position of the World Medical Association on the matter, it seems that a significant number of western countries permit the artificial feeding of a prisoner in extreme circumstances that present a real danger to his life.

90. We shall start with those who prohibit it. It seems the strongest prohibition on coercive feeding exists in England. There, legislation and case law mandate that life extending treatment – including artificial feeding – should not be provided to a prisoner, regardless of the medical harm, when the person is competent to make decisions regarding his medical condition. See: the Mental Health Act 1983 (hereinafter: MHA) and the Mental Capacity Act 2005 (hereinafter: the MCA), which were amended in 2007 by the Mental Health Act 2007, and see the 2002 guidelines of the English Department of Health to those tasked with prison medical treatment: "Seeking Consent: Working with People in Prison", as well as the rulings of British courts in the *Robb* case (*R. v. Home Secretary, ex parte Robb* [1995] 1 All ER 677); and the *Collins* case (*R. v Collins, ex parte Brady* [2000] Lloyd's Rep Med 355 58) that are consistent with the aforesaid approach. Also see on this issue P. JACOBS, FORCE FEEDING OF PRISONERS AND DETAINEES ON HUNGER STRIKE, 303, 306 (2012) (hereinafter: JACOBS.)

91. It would appear that Canadian law, too, prohibits the artificial feeding of prisoners, in principle. This is because sec. 89 of the Corrections and Conditional Release Act of 1992 stipulates that a medical team is prohibited from force-feeding an inmate by any method, as long as the prisoner has the capacity to understand the consequences of the fast he has undertaken. *However*, it should be noted that on April 27, 2015, the Canadian Prisons Commissioner published a *concrete* instruction as to handling prisoners on hunger strikes ("Hunger Strike: Managing an Inmate's Health"). Under section 2 of this instruction, in light of the risk posed by an extended hunger strike which may cause medical harm or even death, the medical team must intervene for the purposes of saving a prisoner's life at the stage where the prisoner is unconscious or lacks the ability to make an informed decision as to wanting medical treatment.

92. On the other hand, in France, the United States, Australia, Germany, and Austria, the law permits artificial feeding of a prisoner against his will in extreme cases, which change from state to state.

93. In France, as the Petitioners note, regulation D.364 of the Criminal Procedure Regulations establishes a specific arrangement for treating prisoners on a hunger strike, which permits treating a hunger striking prisoner against his will, but only when the prisoner is in immediate, serious danger. In 2012, the French ministries of justice and health issued instructions for treating prisoners. The instructions state that once it becomes known that a prisoner is on a hunger strike or refuses to drink, the medical unit must be updated as soon as possible, and that the health of the prisoner must be monitored according to the Public Health Law. It is also stipulated that, under section R4127-36, medical treatment will not be given to a prisoner without his consent except in cases of an extended hunger strike leading to immediate and serious risk to his life, and only upon medical request.

In the United States and Australia, the situation is somewhat more complex, *inter alia*, because of the differences between the federal and state laws on the matter. However, there, too, there are arrangements that permit coercive feeding of a hunger

striking prisoner under certain circumstances (and see for example: Mara Silver, *Note: Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN L. REV. 631 (2005);, Barry K. Tagawa, *Prisoner Hunger Strikes: Constitutional Protection for a Fundamental Right*, 20 AM. CRIM. L. REV. 569 (1982-83); M. Kenny, and L. Fiske, *Regulation 5.35: Coerced Treatment of Detained Asylum Seekers on Hunger Strike. Legal, Ethical and Human Rights Implications*, in THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW THEORY AND POLICY, (S. Juss, ed.) (Ashgate, 2013).

94. In Germany, section 101 of the Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty (1976), which concerns "Coercive Measures in the Field of Medical Care", states as follows:

> (1) Medical examinations and treatment under coercion, as well as forced feeding, shall be permissible only in case of danger to life, in case of serious danger to the prisoner's health, or in case of danger to other persons' health; such measures must be reasonable for the persons concerned and may not entail a serious danger to the prisoner's life or health. The prison authority shall not be obliged to execute such measures as long as it can be assumed that the prisoner acts upon his own free will.
> (2) For the purposes of health protection and hygiene, a coercive physical examination shall be permissible in addition to that in subsection (1) if it does not involve an operation.
> (3) The measures shall be carried out only upon orders from, and under the supervision of a medical officer, except where first aid is rendered in case a medical officer cannot be reached in time and any delay would mean danger to the prisoner's life.

Thus, under German law, involuntary medical treatment of a prisoner, including forced feeding, is possible when there is a significant risk to the health or life of the prisoner or the life of another. Such treatment is permitted only at the instruction of a medical officer and under his supervision, unless urgent intervention is necessary, the

medical officer is unavailable and any delay may cause harm to the prisoners' life. Still, it should be noted that German law empowers the authorities to provide such treatment, but does not require doing so as long as it may be assumed that the prisoner is acting of his own free will.

95. In Austria, section 69(1) of the Prisons Law of 1969 – *Strafvollzugsgesetz* (StVG) – mandates that in a case where a prisoner refuses to cooperate with a medical examination or with medical treatment, force may be employed in order to compel treatment, provided that the treatment is reasonable and does not pose a risk to life. It also states that the advance approval of the Minister of Justice must be secured, except in urgent cases. Section 69(2) of the statute states that a prisoner on a hunger strike shall be under medical supervision, and should it become necessary, it is permitted to force-feed the prisoner in accordance with the instructions and under the supervision of a doctor.

96. As for international law, according to the Petitioners, artificial feeding against the patient's will amounts to torture or cruel and inhumane treatment in a manner that violates the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dated December 10, 1984, which was ratified by Israel on August 4, 1991 (hereinafter: the Convention against Torture), and is inconsistent with article 7 of the International Covenant on Civil and Political Rights of December 16, 1966, which was ratified by Israel on January 3, 1992, and which establishes a similar prohibition. However, the standards established by the Committee for the Prevention of Torture state as follows in regard to contending with hunger strikes by the various states:

> Every patient capable of discernment is free to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances which are applicable to the population as a whole.

> A classically difficult situation arises when the patient's decision conflicts with the general duty of care incumbent on the doctor. This might happen when the patient is influenced by personal beliefs (eg. refusal of a blood transfusion) or when he is intent on using his body, or even mutilating himself, in order to press his demands, protest against an authority or demonstrate his support for a cause.
>
> In the event of a hunger strike, public authorities or professional organizations in some countries will require the doctor to intervene to prevent death as soon as the patient's consciousness becomes seriously impaired. In other countries, the rule is to leave clinical decisions to the doctor in charge, after he has sought advice and weighed up all the relevant facts" (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) CPT Standards p. 42 (2002-2015)).

Thus, it is clear that the Committee did not *a priori* rule out forced feeding, but rather leaves a degree of discretion to states in handling hunger strikes between prison walls, while noting that to the extent that a state may elect to employ this measure, it must be established by law, and be limited to extreme and exceptional circumstances (see also: P. Jacobs, *Food for Thought: the CPT and Force-Feeding of Prisoners on Hunger Strike,* in FERVET OPUS: LIBER AMICORUM – ANTON VAN KALMTHOUT, 103, 106-07 (M.S. Groenhuijsen, T. de Roos & T. Kooijmans, eds.) (2010) (hereinafter: *Food for Thought*).

97. The jurisprudence of the European Court for Human Rights on the issue is also of interest. Article 3 of the European Convention on Human Rights prohibits torture and humiliating penalties and treatment, similar to the prohibition established under article 7 of the International Covenant on Civil and Political Rights, and the Convention against Torture. The question raised before the European Court was whether forced feeding is inconsistent with the above prohibition. In a number of decisions, the European Court acknowledged that the issue creates a conflict between two paramount rights: the first, the

individual right to autonomy; the second, the individual right to life. In the matter of *Nevmerzhitsky v. Ukraine*, the Court established the following balancing formula:

> The Court reiterates that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 26, § 83). Furthermore, the Court must ascertain that the procedural guarantees for the decisions to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention (*Nevmerzhitsky v. Ukraine*, application number 54825/00, §94 (2005)).

In that case, the Court adopted a test comprising three cumulative conditions under which forced feeding would not be considered a violation of the European Convention. First, there must be medical necessity for the forced feeding. Second, the decision must be made in a proper procedure and according to the procedural framework established in state law. Third, the method of forced feeding must not exceed the minimal extent of severity permitted by the Convention, that is – does not amount to humiliating or degrading treatment or penalty. That case involved a prisoner who was force-fed through a tube, while restrained to a chair, with a mouth widener attached to his mouth. The Court held that using such means, while the patient resists and through the use of force, may amount to a violation of the Article when it is not medically justified. Further on, the court found that the said treatment was provided without medical justification and without due process, and therefore constituted a violation of Article 3 of the Convention.

98. On the basis of those tests, the Court similarly found in *Ciorap v. Moldova* that forced feeding in that case amounted to a violation of Article 3. First, it found that there was no medical justification for the treatment. Second, it found that the procedure by which forced feeding was decided upon was improper because the physician who performed the forced feeding did not explain why he did so. It was held that the one purpose of the forced feeding in that case was to limit the prisoner's right to protest through a hunger strike. Because the treatment caused him great physical pain and humiliation, it was held that this was prohibited torture under the Convention (*Ciorap v. Moldova*, Application no. 12066/02, §89 (2007)).

99. Similarly, in *Rappaz v. Switzerland*, the Court dismissed the complaint *in limine*, once it was found that the decision to force-feed the prisoner against his explicit will – that ultimately was not implemented as he ended the hunger strike – was made according to the above three-pronged test: the decision was made out of medical necessity; it was made through a proper process – in accordance with the limits established in law, by a judge, and only after it was found that the complainant's condition was serious and it was determined that the treatment would be provided by a professional medical team; and there was no reason to assume that even were the decision implemented, the manner of its implementation would have amounted to humiliating treatment or penalty. Therefore the complaint was dismissed.

100. The conclusion from the above jurisprudence is that the European Court does not prohibit forced feeding as long as it meets the three standards described above: necessity, due process, and that the concrete method of forced feeding does not exceed the minimal severity possible (see also *Food for Thought*, p. 106). And as noted, even the Committee for the Prevention of Torture is not categorically opposed to employing such means.

Now that we have reviewed the comparative law and the provisions of international law, we will return to our own legal system, and examine whether the arrangement established in the amendment to the Law that is the subject of this Petition passes the Israeli tests of constitutionality.

Violation of Constitutional Rights

101. Providing forced medical treatment against the will of a hunger striking prisoner or detainee *prima facie* violates his constitutional rights, primarily his right to autonomy, and to a certain extent, his freedom of expression as well, even if the latter is generally limited, by its nature, behind prison walls (see the *Borgal* case, p. 101). I shall reserve the matter of whether the right to life itself can be compelled for another time, and I will assume that there is an infringement of the aforementioned constitutional rights. Thus, we must examine if this infringement is lawful. This examination will proceed in accordance with sec. 8 of Basic Law: Human Dignity and Liberty, whereby:

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

102. Assuming that the first condition – that the violation is by virtue of law – is met, I shall proceed to consider whether the provisions of the Law are consistent with the values of the State of Israel, whether the provisions of the infringing Law are intended for a proper purpose, and whether the infringement is not greater than necessary.

Does the Law befit the Values of the State of Israel

103. The second condition of the Limitation Clause demands that the Law befits the values of the State of Israel. This Clause refers to the values of the State of Israel as a Jewish and democratic state, and reflects the tension between the values presented by this case.

104. There is no denying that "giving concrete expression to the idea of a 'Jewish and democratic state' is no simple task, as is testified by the extensive legal and other literature that has attempted to do so, as well as most of the important verbiage dedicated

to this phrase. Each of the terms – 'state', 'Jewish' and 'democratic' – encompasses a long line of constitutive values that are of its foundations. 'Each is a fathomless ocean'" (Haim Cohn *The Values of a Jewish and Democratic State*, SELECTED WRITINGS 45, 47 (2001) (Hebrew)). "Occasionally they contradict and compete with each other." (HCJ 466/07 *Galon v. Minister of Interior* (2012), para. 14, *per* Justice E. E. Levy). The term "Jewish" primarily refers to "the right of the Jewish people to self-determination, as well as to its ability to defend itself against external threats" (*ibid.*), and in the framework of democratic existence, the state is committed to the individual rights of those coming within its borders, including the values of liberty, equality, dignity and autonomy (see Asher Maoz, *The Values of a Jewish and Democratic State*, 19 *IYUNEY MISHPAT* 547 (1995) (Hebrew)).

105. As described above, the Law came into being against the background of hunger strikes among security prisoners and administrative detainees, undertaken as a means of protest, and to the point of posing a real risk to their health and lives. As was explained, the Law seeks to realize two interrelated purposes. The primary purpose is saving the life and protecting the health of a hunger striking prisoner. The secondary purpose is protecting State security and the lives of others who may be at risk as a result of the hunger strike.

106. In seeking to realize these purposes, the Law permits the infringement of the hunger striking prisoner's right to dignity, as well as autonomy over his body, and to make decisions in regard to his life. As opposed to this stands the full force of the value of the sanctity of life – first and foremost of all values, because in the absence of life there can also be no human dignity or sanctity of life – and the need and duty of the State to protect itself and others who may be harmed. These values is not merely those of a Jewish state or of a democracy, but rather they are intertwined – like Siamese twins – in a Jewish and democratic state that seeks to find a proper, sensitive balance of these values. Sanctity of life is not a value exclusive to a Jewish state alone, it is at the heart of a democratic state. A state that values life must, first and foremost, protect the lives of its residents, and certainly the lives of those in its direct charge, such as prisoners and

detainees, and this is not only its right but also its duty (HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza*, IsrSC 58(5) 385, 406 (2004) [http://versa.cardozo.yu.edu/opinions/physicians-human-rights-v-idf-commander-gaza]; HCJ 7957/04 *Mara'abe v. Prime Minister of Israel*, IsrSC 60(2) 477, 500 (2005) [http://versa.cardozo.yu.edu/opinions/mara%E2%80%99abe-v-prime-minister-israel]).

The State is required to protect itself and meet the security needs of its residents. On the other hand, not only are an individual's right to autonomy, freedom of expression, and dignity not foreign to the values of Judaism, they are among its core values (see: NAHUM RAKOVER, HUMAN DIGNITY IN JEWISH LAW, pp. 13-32 (1998) (Hebrew)). Does the Law before us befit the purpose of the State of Israel as Jewish and democratic state? It would seem that the answer to this is in the affirmative. The sanctity of life and the protection of the security of the State and of others are the values underlying the Law, which recognizes the infringement of the autonomy, and possibly the dignity of a person on a hunger strike, and attempts to ensure that this harm be proportionate, as described below. The Law seeks a proper balance between these values, and in this sense, it would therefore appear that our primary task in the next step of the constitutional review is to examine the proper purpose.

The Purpose of the Law

107. Constitutional review of the proper purpose seeks to answer the question whether the purpose of the legislation provides sufficient justification for the infringement of the human right. This examination considers, *inter alia*, two subsidiary questions: the first relates to the characteristics of the purpose; the second relates to the need for its realization, and whether that sufficiently justifies the infringement of the human right (HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset*, IsrSC 61(1) 619, para. 50 of the opinion of President A. Barak (November 5, 2006)). According to Professor Barak's general approach, "if the purpose of the infringing law is improper, the infringement is unconstitutional, regardless of whether it is proportionate" (BARAK, PROPORTIONALITY, p. 297). And also: "in examining the threshold question of whether the purpose of the infringing norm is proper, a proper content of the norm is insufficient. Some or other level of necessity or essentialness for realizing that purpose is also

required" (*ibid.*, p. 344-45). In other words, the appropriateness of the purpose must be examined separately and independently of the extent of the infringement of the constitutional right, as there is no reason to delay such discussion until the later balancing stage (*loc. cit.*). According to B. Medina, examining the proper purpose must be strict, and must establish that the purpose of the law is proper only when the expected benefit is relevant to the concrete means taken, considering the infringed right. In his opinion, this is crucial primarily concerning laws that seek to protect national security, which is itself a proper purpose at a high level of abstraction, but not necessarily in light of the concrete means adopted by a particular statute in order to realize it (B. Medina, *On "Infringements" of Human Rights and the "Proper Purpose" Requirement (following Aharon Barak, Proportionality—Constitutional Rights and their Limitations)*, 15 IDC LAW REVIEW 281, 311 (2012) (Hebrew)). I will already state that in my opinion, subject to what follows below, the Law at hand meets the tests of both approaches because it stands under the canopy of the sanctity of life, and as noted above, in the absence of life, all the rest – both autonomy and freedom of expression -- is irrelevant..

The Dominant Purpose versus the Secondary Purpose

108. In their responses, and in the hearings before us, the Respondents stated that the Law has two interrelated purposes. The primary purpose of the Law, which derives from the central value of the sanctity of life, concerns protecting the life, health and wellbeing of the prisoner on a hunger strike. This is expressed in sec. 11(1) of the Prisons Ordinance, which mandates that a "prisoner incarcerated in a prison shall be deemed subject to the lawful custody of the prison director" (see, for example, the statement of the Minister for Public Security Gilad Erdan, minutes of meeting no. 26 of the Internal Affairs and Environment Committee, 20th Knesset, pp. 3-4 (July 14, 2015) as well as that of Deputy Attorney General, Advocate Raz Nizri, *ibid*., pp. 4-5).

109. The Law also has a security purpose, which is preserving the security of the State and protecting the lives of others who may be at risk as a result of the hunger strike. The Respondents maintain that this purpose is secondary to the primary purpose of protecting human life, whereas the Petitioners contend that this is the primary and real purpose for

which the Law was intended. Thus, according to the Explanatory Notes to the Bill: "First and foremost, the court must consider the prisoner's medical condition and the danger posed to his health should he not receive the desired treatment… *this is in order to ensure that no decision as to providing forced medical treatment shall be made unless in very serious circumstances, and not as a tool for forcing an end to the hunger strike when only at its outset*" (Government Bills, 5774- 2014, 771, 870, emphasis added – E.R.; see also the statement of Knesset Member David Amsalem, Chair of the Internal Affairs and Environment Committee, in presenting the Bill to the Knesset plenum for second and third readings, pp. 641-43 (July 29, 2015)).

110. It should be noted that ascertaining the dominant purpose is not exhausted by reviewing the legislative history of the Law, which was presented above. The question whether a particular purpose is the dominant purpose of the statute is also examined in light of the specific arrangements it establishes. I shall now turn to this.

111. As noted at the outset, the procedure for requesting permission to provide forced medical treatment to a hunger striking prisoner comprises several steps, as well as the supervision of different bodies, and this should not be taken lightly in the constitutional review, as the legislature went to great lengths to create mechanisms of persuasion and supervision for informed consent. First, a medical opinion by the treating physician is submitted, the Attorney General is approached, and upon obtaining his consent, a request may be submitted to the President of the District Court or his Deputy, and this only after efforts have been made to secure the consent of the prisoner (or the detainee). A copy of the request is forwarded to the ethics committee, as well, which shall give its opinion after hearing the prisoner. The District Court is also required to ensure that efforts have been made to secure the consent of the prisoner. The court hears arguments by the prisoner and examines the range of possible treatments, the benefits and risks of the proposed treatment, the level of its invasiveness, and other considerations. This, in my opinion, supports a conclusion that the dominant purpose of the Law is indeed protecting the life of a prisoner on a hunger strike, subject to exceptions designed to ensure

protecting his dignity, along with the close supervision and monitoring of different medical and judicial entities.

112. The secondary purpose of the Law, the security one, is expressed in sec. 19N(e) of the Law, under which the court may consider non-medical factors in making its decision to permit forced medical treatment. We shall address the details of this below.

The Purposes of the Law – Proper Purposes?

113. In my view, it is hard to dispute that saving lives – the said dominant purpose of the Law – is a proper purpose. The right to life is a constitutional right enshrined in Basic Law: Human Dignity and Liberty. Section 1 of Basic Law: Human Dignity and Liberty states, as we recall, that: "Fundamental human rights in Israel are founded upon recognition of the value of the human being, *the sanctity of human life*…" and sec. 2 states that: "There shall be no violation of the *life*, body or dignity of any person as such" (emphases added – E.R.; see also, in another context, my opinion in CA 1326/07 *Hammer v. Amit* (2012) para. 12 [http://versa.cardozo.yu.edu/opinions/hammer-v-amit]). The sanctity of life constitutes a paramount value in Judaism: "For your own sake, therefore, be most careful" (Deuteronomy 4:15), and only in extreme case will the value of life yield to other values (Yisrael Katz, *Force-feeding Hunger Strikers in Jewish Law*, in 6 MEDICAL LAW AND BIOETHICS 227 (2015) (Hebrew) (hereinafter: Katz), as whoever destroys a soul (of Israel), it is considered as if he destroyed an entire world. And whoever saves a life (of Israel), it is considered as if he saved an entire world. (MAIMONIDES, *MISHNEH TORAH*, *Hilchot Sanhedrin* 12:3); and as Professor E.E.. Orbach showed in his article *Whoever Sustains a Single Life…Textual Vicissitudes, the Impact of Censors, and the Matter of Printing*, 40 TARBITZ 208*ff.* (5731) (Hebrew), the correct version does not include the words "of Israel" but refers to the loss of any life and the saving of any life. One is required to be careful and to protect one's life. A person is prohibited from harming himself, and certainly is not permitted to end his own life (MAIMONIDES, *MISHNEH TORAH*, *Hilchot Avel* 1:11).

114. Jewish law recognized the importance of this value to the extent that it established that saving a life suspends all the prohibitions of the Torah, except for the three heinous offenses of idolatry, bloodshed, and incest (TB Sanhedrin, 74a). Jewish law also establishes that, aside from these three offenses, one must not sacrifice his life even if he so desires, and some have deemed a person who does so as having shed blood (NOVELLAE RITVA [Rabbi Yom Tov Ibn Asevilli (ca. 1260-1320)], Pesachim. 25a (Hebrew)). Maimonides ruled: "… should a gentile attempt to force a Jew to violate one of the Torah's commandments at the pain of death, he should violate the commandment rather than be killed, because [the Torah] states concerning the mitzvot [Lev. 18:5]: 'by the pursuit of which man shall live', and not that he should die by them. And if he died rather than transgress, he is held accountable for his life" (*MISHNEH TORAH, Hilchot Yesodei HaTorah* 5:1. The three exceptions are enumerated in 5:3).

115. According to Basic Law: Human Dignity and Liberty, the State is obligated to protect the right to life in an effective manner (sec. 4 of the Basic Law). Even under the strict scrutiny of the proper purpose that we addressed above, I believe that the benefit of saving a life is relevant to the means adopted, that is, artificial feeding, and certainly when the prisoner or the detainee is in the custody of the State, and under the circumstances, does not enjoy the same autonomy as a person who is free, as we have shown above.

116. In this context, we should more carefully examine the position of Jewish law. It would seem that Jewish law prohibits one from hunger striking as part of the general prohibition against self-harm (see Michael Wigoda, *Forced Feeding of a Hunger Striker*, The Jewish Law Department of the Ministry of Justice (2013) (Hebrew); the following is based in part upon his opinion). Some halakhic decisors derive this prohibition from the verse: "Only take heed, and keep your soul diligently" (Deut. 4:9), whereas others refer to the prohibition "*bal tashhit*" ["do not destroy/waste"] which prohibits the destruction of things that produce benefit, and derives from the verse "When you besiege a city for a long time, making war against it in order to take it, you shall not destroy its trees by wielding an axe against them; for you may eat of them, but you shall not cut them down."

(Deut. 20:19). The Babylonian Talmud notes that "he who harms himself, although not permitted – is exempt" from punishment by a court (MISHNA, *Bava Kama* 8:6). Over the years, halakhic decisors have ruled that the sources mentioned prohibit a hunger strike (see RESPONSA YAD EPHRAIM (Rabbi Ephraim Fischel Weinberger, 19th century, Poland and Israel,) chap. 14; and Rabbi Yehuda Zoldan, *Hunger Strike*, 15 TEHUMIN 273 (5766) (Hebrew); but *cf*. Menachem Felix, *And Nevertheless: A Hunger Strike*, 15 TEHUMIN 291 (5766) (Hebrew)). We would also briefly note the words of Rabbi Abraham Isaac HaKohen Kook (19th-20th centuries, Latvia and Palestine), in his letter to Zeev Jabotinsky who went on a hunger strike while held under arrest by forces of the British Mandate: "I am obligated to declare to you, my beloved sons, that this is absolutely and strictly prohibited by our holy, pure religion, the philosophy of life and the light of the world" (*HAZON HAGEULA*, p. 273 (Hebrew)). The prohibition upon an individual's hunger strike constitutes a source for the State's authority to act toward ending the strike. Additionally, Maimonides (Rabbi Moses ben Maimon, 12th century, Spain and Egypt) notes that "Our Sages forbade many matters because they involve a threat to life. Whenever a person transgresses these guidelines, saying: 'I will risk my life, what does this matter to others,' or 'I am not careful about these things,' he should be punished by stripes for rebelliousness." (*Hilkhot Rotzeach uShmirat HaNefesh* 11:5).

117. Indeed, the fact that there are those who are willing to end their lives for an idea is no simple matter, and it may be a part of the question of when "death shall be chosen rather than life" (Jeremiah 8:3); see M. Greenberg, *The Worth of Life in the Bible*, in SANCTITY OF LIFE AND MARTYRDOM: STUDIES IN MEMORY OF AMIR YEKUTIEL, I. Gafni and A. Ravitzki, eds. (1992) 35 (Hebrew); in the Bible, God calls for us to "choose life" (Deut. 30:19). In regard to suicide, Professor Greenberg writes (*ibid*., p. 51) "Choosing death over a life of degradation is heroism worthy of note and respect. This appreciation is not a legal ruling, but the Bible is not only a source of law but also a reflection of Israelite values that were not concretized in law." He further writes (p. 53):

> Life as depicted by the Bible is, therefore, multicolored and reflects a spectrum of value judgments. For the most part, these judgments are positive: choosing life

> and hope prevail over despondence and despair. The positive approach is based on a conception of life as the beneficent gift of a Creator who desires life, who shows humans the path that brings life, and maintains the world that sustains them.

These words speak for themselves.

118. Another source considers the general duty to rescue, which is established in the verse: "Do not stand upon the blood of your fellow" (Lev. 19:16). This duty to rescue is anchored in the Talmud: "Where do we learn that he who sees his fellow drowning in a river, or dragged by a beast… that he must save him – the verse states 'do not stand upon the blood of your fellow" (TB Sanhedrin 73a) Thus, Maimonides, in his *Sefer HaMitzvot*, ruled that the general duty of rescue is a biblical commandment: "The 297th [negative] commandment is that we are warned in regard to not saving a Jew's life in a case where we see that his life is in danger and we have the ability to save him. For example, when someone is drowning in the sea and we can swim and able to save him" (MAIMONIDES, *SEFER HAMITZVOT*, Negative Commandments, 297). The rulings of Jewish law over the years have established that the duty to rescue applies even when the person at risk asks not to be saved. See, for example, RESPONSA MELAMED LEHOIL (Rabbi David Zvi Hoffmann, 19th-20th centuries, Germany) *Yoreh Deah* 104, where it was held that in a case where parents object to performing surgery upon a sick baby, "the doctor is under a duty to heal, and if he refrains, it is as if he shed blood, and we have not found in the entire Torah that a father and a mother are permitted to risk the lives of their children and prevent the doctor from healing them". To complete the picture, see also the Do Not Stand on Your Neighbor's Blood Law, 5758-1998, whose explanatory notes state that "this Bill is intended to give statutory expression in Israeli law to the moral and social value rooted in the Torah (Leviticus 19:16) whereby a person is obligated to assist in saving the life of another person" (Penal Law (Amendment no. 47) (Do Not Stand on Your Neighbor's Blood) Bill, 5755-1995 (Bills 5755, 456) which was ultimately enacted as an independent law) (Nahum Rakover, *"Do Not Stand on Your Neighbor's Blood Law" – Indeed?* 17 *MEKHKAREI MISHPAT* (2002) (Hebrew)). See also the opinion of

Justice Bejski in CrimA 480/85 *Kurtam v. State of Israel*, IsrSC 40(4) 673, 696-698 (1986), in regard to a drug offender who was operated on against his will in order to save his life after he swallowed bags of heroin, which Dr. Wigoda also cites:

> As for me, I do not believe that we must necessarily adopt the principles developed in the United States and in England in regard to this difficult, complex issue -- neither the general principle that prohibits physical treatment by a physician in the absence of the patient's consent, nor the few exceptions to this principle. I do not underestimate the value of the sources in this regard to which my colleague refers, but I am not persuaded that this approach is consistent with the approach of Jewish philosophy to the sanctity of life as a paramount value, or with the Jewish tradition as to rescue wherever possible. In this regard, the learned trial judge cited Rabbi Jacob Emden's *Mor uKetziah* as follows:
>
> "In cases of visible sickness and injury of which a doctor has certain, clear knowledge and understanding, and applies a tested, certain cure, a refusing patient at risk is certainly compelled in any way and form that permits the doctor to heal him, such as cutting the flesh of the injury, or widening an opening, or draining an abscess, or binding a broken bone, and even amputation (in order to save him from death…). In all such cases, he must surely be treated and compelled against his will for the purpose of saving his life, and he must not be listened to if he does not wish for pain and prefers death over life, but instead even a whole limb must be amputated if this is necessary to save him from death, and all that that is required to save the life of the patient must be done even against his will. And each person must be warned of this due to 'you shall not stand upon the blood of your fellow', and this is not dependent upon the consent of the patient, as he is not permitted to commit suicide."
>
> I believe that the principle of the sanctity of life and saving it, as a paramount value, justifies not following those rules that support, almost

> rigidly but for particular exceptions, the prohibition against intervening in a person's body without his consent, without regard for the consequences.
>
> I believe that the approach deriving from CA 322/63 and CA 461/62, above, represents and complies with the proper approach in Israel, as it is the closest to the Jewish tradition that supports the sanctity of life. Thus, when one is at immediate, certain risk of death, or foreseeable, certain, severe harm to his health, it is indeed permitted to perform surgery or any other intervention in his body even without his consent. This is all the more permitted and even required when such intervention itself does not pose special risks beyond the common risks of surgery or intervention of that kind, and where there is no risk of significant disability.

119. Finally, forced feeding may be justified – from the perspective of Jewish Law -- where a hunger strike poses a threat to others. We learn the primary rule in this regard from the verse: "You shall keep My laws and My rules, by the pursuit of which man shall live: I am the Lord" (Lev. 18:5). And the Talmud states: "Nothing shall stand in the way of saving a life other than idolatry, forbidden sexual relations and bloodshed" (TB Yoma, 82a); and see also MAIMONIDES, *Hilkhot Yesodei HaTorah* 5:6. The priority that is given to the value of life permits infringing other values to some extent. Thus, the position of Jewish law is that a woman may be compelled to nurse a child – for pay – where that child is at risk (*SHULHAN ARUCH, Even HaEzer*, *Hilkhot Ketubot* 82:5; see also Michael Wigoda, *GSS Interrogation in light of the Sources of Jewish Law*, The Jewish Law Department of the Ministry of Justice (2000)).

120. This is all consistent with the principles at the foundation of the Terminally Ill Patient Law, 5766-2005. This statute seeks to "regulate the medical treatment provided to a terminally ill patient while properly balancing the value of the sanctity of life and the value of one's autonomous will and the importance of quality of life" (sec. 1(a)), and it is "based on the values of the State of Israel as a Jewish and democratic state and the fundamental principles of morality, ethics and religion" (sec. 1(b)). According to this

statute, the terminally ill patient, as defined there, has the right to ask not to be provided medical treatment for the purposes of extending his life, *however*, no action designed to cause the death of the patient may be taken, assistance will not be provided for committing suicide, nor shall continuous medical treatment be terminated when its termination may cause the death of the patient, regardless of his will.

121. As for the secondary security purpose, which is concerned with preventing harm to human life other than the hunger striking person, or preventing serious harm to national security, it seems the issue here is somewhat more complex. In the Bill, this purpose is explained as follows:

> A hunger strike by prisoners is not generally a private act for the purpose of achieving personal gains. Rather, it is part of a public struggle of a political character. Therefore, when deciding how to handle a hunger strike, this aspect, too, must not be ignored. Therefore, for example, at times the increased severity of the hunger strike and the deterioration in the condition of the person on the hunger strike may lead to heated emotions in communities outside of the prison, and in some situations may even result in harm to public safety due to widespread disturbances or the eruption of violent conduct as a sign of solidarity with the hunger striking person and his struggle (*ibid*., p. 772).

122. As said above, at a high level of abstraction, it cannot be disputed that national security amounts to a proper purpose, even at the cost of some – proportional, as will be discussed below – infringement of human rights. As President Barak simply put it at the time "just as without rights there is no security, so too without security there are no rights." (the *Adalah* case, para. 82), and more need not be said. When security is of no concern, life is of no concern, and where shall that lead us? However, in my view, assuming there is a *prima facie* infringement of the prisoner's basic right to autonomy, and the manner in which this harm is caused – and as noted, according to the positions of both the learned Barak and the learned Medina, when examining the proper purpose, one

must consider the necessity of the harm in accordance with the importance of the infringed right and the extent of that infringement – we must ask whether the security purpose is *relevant* to this means of artificial feeding, subject to the limitations established by the Law. My view is that the answer is in the affirmative, here as well, in the broader context of the sanctity of life. However, the matter must be examined with caution, as we do not live in an ideal world or in a vacuum, and there may be countries that would abuse forced feeding for purposes of oppression. Nevertheless, I believe that we may assume that in the Israeli legal system this risk is not high, and in any event the adjudicating panel of judges will be vigilant in this regard. As for the status of the security consideration, I have noted in the past as follows:

> The security challenges the State has faced – and sadly, still faces – present the Court with legal questions that our forebears had not imagined, but times are changing. Israeli society today is not like that of the founding generation, and this change can also be seen in the area reserved for security considerations… this change has also left its mark in regard to the scope of judicial review over security policy. Thus, Justice Strasberg-Cohen wrote that "national security is not a magic word; it does not have preference in every case and in all circumstances, nor is it equal for every level of security and for every harm thereto (HCJ 4541/94 *Alice Miller v. Minister of Defense*, IsrSC 49(4) 94, 124 (1995) [http://versa.cardozo.yu.edu/opinions/miller-v-minister-defence]; see also ADA 10/94 *Anonymous v. Minister of Defense*, IsrSC 53(1) 97, 106 (1997)). Thus, President Barak noted that "human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State" (HCJ 7015/02 *Ajuri v. IDF Commander in the West Bank*, IsrSC 56(6) 356, 383 (2002) [http://versa.cardozo.yu.edu/opinions/ajuri-v-idf-commander-west-bank].
>
> Therefore, the current approach as to security considerations can be

summed up as cautious respect. The caution results from historical situations and different affairs that have cast a shadow over security considerations in the past (the surprise of the Yom Kippur War, the Bus 300 affair, and others.) Respect is warranted since no sensible person does not see that Israel has complex security problems from different directions. (HCJ 4374/15 *Movement for Quality Government in Israel v. Prime Minister*, paras. 39-40 of my opinion (March 27, 2016); see also my article *Security and Law: Trends*, 44 *HAPRAKLIT* 409, 410 (5758-60) (Hebrew); my book *PATHS OF GOVERNMENT AND LAW* 265 (5763-2003) (Hebrew); *Israel, Security and Law: A Personal Perspective*, MAZZA VOLUME (5775) 99).

123. Indeed, in my opinion, were the security purpose the only or primary purpose, it would have been possible to doubt whether it could properly justify forced feeding. As noted, whatever the means of treatment may be – and I will address this below, when considering proportionality – the mere fact that the medical treatment is given against the will of the prisoner means an infringement of autonomy, and although that is necessarily limited behind prison walls, as noted, it still has the power to prevent its violation for a purpose that is external to its core.

124. This infringement of rights that are at the core of human dignity must be offset by the protection of very important rights (such as the right to life, as noted). As important as national security and public safety may be, and they are very important indeed, they would not alone or primarily be sufficient under the circumstances of this matter to justify an infringement of a prisoner's right such as forced feeding. The element of caution noted above sets off a red light. Reviewing comparative law supports this conclusion, because as described above, it seems that explicitly employing the security consideration to justify coercive medical treatment of a prisoner is quite unique for the statutory framework chosen by the Israeli legislature, and foreign legal systems, as well as international law, mainly grant exclusivity to medical considerations and the health of

the prisoner they wish to feed coercively. In our case, in the Jewish ethos as well, this consideration cannot be seen as exclusive.

125. However, I believe that this is not sufficient to show that the inclusion of security consideration as *secondary* to the dominant consideration of saving a life amounts to an improper purpose, also bearing in mind that this consideration itself comprises a significant possibility of saving lives – the life of the prisoner, as will be explained – and also the lives of many others. As noted above, despite changes and transformations of different types in the security situation of the State of Israel over the years, the security consideration still exists, clearly and in great force. This requires no evidence. The State of Israel daily faces complex, continually changing security threats that require an appropriate response. Obviously, as noted, even the security consideration concerns protecting human life, and just as protecting a prisoner's life is, as noted, a proper purpose in itself, the attendant public interest in protecting the safety and the life of others is proper as well (see and compare HCJ 6288/03 *Saadeh v. General of the Homefront Command*, para. 3 of the opinion of Justice Turkel (2003); HCJ 8567/15 *Halabi v. IDF Commander in the West Bank*, para. 13 (Dec. 28, 2015)). In light of this, I believe we cannot wholly rule out addressing security considerations to some extent within the Law under review, even if – as we shall address below – this response be limited and, as noted, absolutely secondary to the primary purpose of the Law, which is saving the life of the prisoner for whom treatment is sought, and the response is implemented by the legal and medical mechanisms with strict regard for preventing a "slippery slope".

126. The combination of purposes is not exceptional in our legislation. Thus, for example, the *Eitan* case considered the constitutionality of Chapter A of the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014. The State argued that the primary purpose of the law was identification and removal. That was found to be a proper purpose. As for the additional purpose – general deterrence – it was held that "general deterrence *in-and-of-itself* is not a proper purpose" (the *Eitan* case, para. 2 of (then) Deputy President M. Naor's opinion). Still, it was held that there is nothing wrong with a purpose of

deterrence when it accompanies another legitimate purpose (*ibid*., para. 52 of the opinion of Justice U. Vogleman; see and compare HCJ 7015/02 *Ajuri v. IDF Commander in the West Bank*, IsrSC 56(6) 352, 374 (2002)). Moreover, this Court has already held that where a statute combines several interrelated purposes, greatest weight will be attributed to the *dominant* purpose, which will be the focus of the constitutional review. However, it was held that the statute's secondary purposes must not be overlooked, as their implications for human rights must also be examined (the *Menachem* case, p. 264 and references there.) In my view, it seems that in the present case, both the humanitarian and the security purposes – the latter also based to great extent upon the principle of the sanctity of the life of the innocent who may be harmed because of the consequences of hunger strikes by prisoners or detainees, and despite the change occurring in Israeli society as to the place reserved for security considerations in terms of transparency – are proper. This, given that the first purpose is, as noted, the dominant purpose and the other is secondary to it.

The Proportionality Tests

127. In my humble opinion, under the interpretation I propose, the Law – including sec. 19N(e) – meets the requirements of the proportionality tests under the Limitations Clause of Basic Law: Human Dignity and Liberty. The Law meets the rational connection test – correspondence between the legislative means that infringe the constitutional right and the purpose that the statute was designed to achieve. According to President A. Barak in the *Movement for Quality Government* case (para. 58), it is sufficient that there be a suitable likelihood that the action that infringes the protected right or interest will reasonably contribute to achieving the purpose (see also the *Nir* case, para. 23). Thus, a proceeding under the Law may be commenced only if the physician treating the prisoner, or whoever had recently treated him, is of the view that without the specified medical treatment "there is real possibility that within a short period of time the life of the prisoner will be at risk or he may suffer severe, irreversible disability" (sec. 19N(a)(1) of the Law). The list of considerations the court must take into account emphasizes medical aspects, including the condition of the prisoner, the benefits and risks

posed by the requested medical treatment and by alternative medical treatments, the level of invasiveness of the requested treatment and its implications for the prisoner's dignity, as well as the results of the requested treatment (sec. 19N(d)(1)-(3) of the Law). In addition, the coercive medical treatment that may be provided under the Law must be "the minimally necessary medical treatment, according to the professional discretion of the caregiver, in order to protect the life of the prisoner or to prevent serious, irreversible disability" (section 19P(a) of the Law). Moreover, the physician must make a significant effort to secure the prisoner's consent to medical treatment (section 19N and section 19P(b) of the Law). Additionally, providing coercive medical care is always subject to the discretion of the caregiver (sec. 19O(e) of the Law). In other words, under the Law, the District Court must evaluate the potential of the coercive medical treatment to improve the medical condition of the hunger striking prisoner, and ensure that if such treatment be permitted, it will be the minimal required. The court must go to the heart of the matter, demand clarifying medical documentation, and hear physicians and caregivers. See, in regard to hunger strikes, the *Alan* case and the *Al-Qiq* case. Therefore, we can conclude that the means selected by the Law, and the Law's primary purpose – protecting the life of the hunger striking prisoner or detainee – correspond.

128. The Law also passes the second proportionality test – the less harmful means test. This test, as we know, does not necessarily require choosing the means that is least harmful. It is sufficient to demonstrate that, in terms of the right and the extent of its violation, the means chosen from among the relevant options presents a lesser infringement (see, for example, the *Nir* case, para. 24). In the matter before us, while it might appear that there is a possible alternative for handling a prisoner on hunger strike – sec. 15(2) of the Patient Rights Law – given the purposes of the statute and the complexity of the situation, it seems this alternative does not achieve the purpose of the Law with comparable efficacy (compare the *Eitan* case, paras. 60-66). Section 15(2) of the Patient Rights Law instructs:

> 15(2) Should the patient be deemed to be in grave danger but reject medical treatment, which in the circumstances must be given soon, the

clinician may perform the treatment against the patient's will, if an Ethics Committee has confirmed that all the following conditions obtain:

(a) The patient has received information as required to make an informed choice;

(b) The treatment is anticipated to significantly improve the patient's medical condition;

(c) There are reasonable grounds to suppose that, after receiving treatment, the patient will give his retroactive consent.

129. The arrangement established in sec. 15(2)(c) of the Patient Rights Law permits providing medical treatment without the consent of the prisoner only when "there are reasonable grounds to suppose that, after receiving treatment, the patient will give his retroactive consent." However, in most cases, a prisoner on a hunger strike who clearly and consistently expresses his ideological objection to receiving medical treatment cannot be provided with medical treatment within the confines of section 15(2)(c) of the Patient Rights Law, even if there is a real risk to his life. This is because the Patient Rights Law requires reasonable grounds to assume that the patient would give his consent retroactively, whereas in our case, often the hunger striking prisoner has no interest in being fed should he lose consciousness, nor as long as he or she is conscious. On an ethical level, the doctor would not always assume that retroactive consent would ultimately be given. Under these circumstances, a hunger strike may end with the death of the prisoner – with all of its consequences. The arrangement established in section 15(2) of the Patient Rights Law is limited to the relationship between the caregiver and the patient, and places maximum weight upon the patient's autonomy to the very end. This arrangement does not take into account the unique aspects of a hunger strike in general, and a hunger strike by a prisoner or detainee in particular, in terms of the State's responsibility for him, the complexity of autonomous will in cases of hunger strikes by prisoners who are willing to die, and where, in any event, the group context may, in some cases, prevent them from ending the hunger strike -- and after all, the purpose is saving their lives – and in terms of the consequences of the hunger strike for national security.

Therefore, the arrangement in section 15(2) of the Patient Rights Law does not achieve the purposes of the Law to the same extent, both factually and ethically.

130. And note, as clarified in the Bill's explanatory notes, it cannot be inferred that one may "skip" attempting to gain the patient's trust and consent and move straight to forced feeding. Similar to the procedure in the Patient Rights Law, the emphasis is on the attempt to achieve the cooperation of the person on a hunger strike, even for minimal treatment that would only slightly improve his condition. This attempt is based on building a trust relationship between the hunger striking person and the treating doctor. As noted in the Bill:

> Achieving such cooperation is, of course, the most desirable practice in terms of respecting the prisoner's autonomy and preserving his liberty, and it is also the most appropriate method of operation from the perspectives of medical ethics (*ibid*., p. 767).

131. In other words, aside from the general examination of the Law's provisions, *the less harmful means will be examined in the implementation of each case*, and to the extent that there is a less harmful means than artificial feeding, and such means may save the life of the hunger striker, the court will refrain from granting an order to provide coercive medical treatment to the prisoner. In addition, even among the options for artificial feeding, the court must explore alternatives according to the level of intrusiveness of the requested procedure and the extent of harm to the dignity of the prisoner (sec. 19N(d)(2) of the Law). Therefore, for example, it is clear that the court will not order intubation when there is a more proportional means for saving that person's life. As a general rule, as noted in the State's response, intubation is most exceptional, and the primary means of treating a hunger striker would be providing fluids and nutrients intravenously, as well as providing medication as needed (para. 82 of the response dated Sep. 9, 2015). I would add in this regard that the State notes that in the course of debating and drafting the Bill, the possibility of excluding force-feeding by intubation from the possible medical procedures was considered, but due to the position

of the Ministry of Health, which found the exclusion of a medical procedure in primary legislation to be problematic, it was decided not to do so.

132. In this context, we should address the two cases mentioned above concerning two administrative detainees – Alan and Al-Qiq –which were recently decided by this Court. In those cases, recourse was not made to the Law, although it had already come into force, and the authorities acted in accordance with the Patient Rights Law, with the supervision of this Court, under the circumstances surrounding those cases, regarding which the Court held several hearings (also see and compare HCJ 5464/13 *Al-Aziz v. IDF Commander* (2013)).

Alan, an operative of the Islamic Jihad terror organization, was placed in administrative detention based on reliable intelligence that linked him to other operatives whose goal was to promote terror in the framework of widespread activity against the security in the area. Alan commenced a hunger strike, due to which he was under medical supervision, first in the Soroka Medical Center in Be'er Sheva, and afterward in the Barzilai Medical Center in Ashkelon. In his petition, he argued that administrative detention is a preventative tool rather than a punitive one and that it was intended to prevent activity against national security. His medical condition due to the hunger strike, albeit self-inflicted, is such that it renders him unable to compromise security, and thus he must be released. We held two hearings on that petition, both in order to evaluate Alan's medical condition and in order to facilitate negotiations with his attorneys. Prior to the second hearing, we were informed that Alan was experiencing cognitive deterioration. The State's attorneys declared before us that if Alan's condition was irreversible, the administrative detention order would be rescinded. The decision handed down on August 19, 2015 stated, *inter alia*: "It is clear that the petitioner brought his condition upon himself, but this does not preclude making every effort to save his life." Inasmuch as it was clear that, due to his medical condition, Alan no longer presented a security risk, we suspended the administrative detention order that had been issued against him (it later turned out that Alan had not suffered permanent brain damage, thank God) and the hunger strike came to an end.

134. Al-Qiq, a categorical Hamas operative involved in military terrorism, was also placed under an administrative detention order. Shortly thereafter, Al-Qiq went on a hunger strike and refused any treatment. He also petitioned this Court to reverse the administrative detention order issued against him, due to his condition. We held several hearings on this petition, while receiving daily medical briefings as to Al-Qiq's condition, including the decision of the ethics committee at the HaEmek Medical Center where he was hospitalized, which stated that "due to deterioration in the condition of the petitioner, the medical team should be permitted to provide the patient with treatment without his consent, in order to improve his condition". On February 4, 2016, we addressed the petition as if an order nisi had been granted, and we ordered the suspension of the administrative detention order, as we found that the petitioner no longer posed a risk that required administrative detention.

135. Thus, in both cases a solution was found that did not require recourse to the Law under review, but remained within the framework of the Patient Rights Law. There is no guarantee, and no one can provide such assurances, that this would be the case in every instance, and we must take into consideration instances of mass strikes as well. In any event, it is presumed that in considering requests submitted under the relevant Law, the courts will bear in mind the possibility for achieving, as far as possible, a balanced, proportional solution that will respond both to the prisoner's autonomy and to the sanctity of life, and also – as was the case in the matters of Alan and Al-Qiq – to the need to preserve national security. Implementing the Law is, of course, a last resort -- a "doom's day weapon" of sorts.

136. As for the third test -- the proportionality test *stricto sensu* -- as noted and as is generally known, this is a value-based test that examines whether there is a proper relationship between the public benefit deriving from the law under review, and the infringement of the constitutional right that will be caused by its implementation (see the *Prisons Privatization* case, p. 626). It seems that the Law passes this test as well. The Law creates a proportional, balanced arrangement that seeks to minimally infringe the

prisoner's autonomy while protecting his life, through close supervision and monitoring of the process and employing it as a last resort. Let us again recall that the procedure commences with a medical opinion by the treating doctor. The request is then submitted by the Prisons Commissioner, with the approval of the Attorney General or whomever he has appointed on his behalf – as a last resort designed to prevent a risk to the life of a hunger striking prisoner, or the risk that he may suffer severe, irreversible disability – and only after the procedural route is exhausted. Generally, the ethics committee will render its opinion on the matter, the President of the District Court or his Deputy will decide upon the request, and that decision is subject to appeal to this Court. The treatment to be provided would be the minimum required, and the caregiver is not obliged to provide the treatment permitted by the court. As we see – and this should be emphasized – we are concerned with a structured arrangement that involves, alongside the doctors of course, very senior levels of the legal system and judiciary, built in careful stages, and as noted, as a last resort. Based on my great familiarity with these systems, I can confidently say that the determinations in this area will be appropriately thorough. It should also be emphasized that before approaching the court, the treating physician must make a "significant effort" to attempt to persuade the prisoner to grant his consent to treatment. Thus, the physician must explain the legal process and its potential consequences to the prisoner. The court must hear the prisoner, and it is permitted to hold the hearing at the hospital in order to do so. Even when permission is granted for coercive treatment, the caregiver must again attempt to persuade the prisoner to consent to the treatment, and as noted, the treatment provided must be kept to the absolute minimum, and must be done in a manner that will ensure the greatest protection of the prisoner's dignity, while avoiding, as much as possible, causing pain or suffering. It seems, then, that the gradual, balanced procedure, which is accompanied by medical and legal monitoring and supervision, achieves a proper relationship between the benefit that may derive from the Law, and the potential infringement of the constitutional right due to its implementation.

137. As for the security consideration (sec. 19N(e)), there is no denying that it raises apparent discomfort in regard to the relationship between individual autonomy and broader considerations as specified above. However, as we have explained and again

emphasize, since the dominant purpose is saving a life and preserving its sanctity, as part of that universal and especially Jewish ethos in a Jewish and democratic state, we are satisfied that everything possible has been done in order to reduce infringement, and that the presiding judge will ensure this under the concrete circumstances. In the past, I had the opportunity to address the tension between the security needs and human rights:

> The relationship between questions of human rights and the needs and challenges of security will remain on the agenda of Israeli society and Israeli courts for years to come. The peace negotiations that Israel is conducting are ongoing, but even the greatest optimists do not expect that the country will arrive at its safe haven in the foreseeable future. The inherent tension between security and issues of rights will therefore continue, and will find its central legal expression in the interpretation of Basic Law: Human Dignity and Liberty. The discussion of questions such as when rights give way to security, and of the proper balance between protecting existence and preserving humaneness – a sharp contrast that fully reflects the dilemma – will go on. We will continue to deliberate the question of the relationship between the command "For your own sake, therefore, be most careful" (Deut. 4:15) in its collective sense, and "For in His image did God make man' (Gen. 9:6) and "Great is human dignity, since it overrides a negative precept of the Torah" (Berachot, 19b). The Court will seek the balance between security and rights so that the name "security" shall not be taken in vain, but neither will security be abandoned (from my article *On Basic Law: Human Dignity and Liberty and the Security System*, 21 *IYUNEI MISHPAT* 21, 22 (5758) (Hebrew) 21, 22; my book PATHS OF GOVERNANCE AND LAW (2003) 226).

These words seem as apt today as when they were written eighteen years ago..

138. As noted by the State, the security consideration itself cannot justify commencing a procedure under the Law, and certainly cannot, in and of itself, ground permission to

treat a prisoner against his will. The security considerations under the Law can be taken into account only when a treating physician has found that the medical condition of the prisoner is extremely serious and that there is a real risk to his life, or that he may suffer serious, irreversible disability, and that it is for the purposes of saving his life – which is the main purpose of the Law. In any event, the treatment that will actually be provided – if and to the extent provided, according to the caregiver's discretion (sec. 19P(e) of the Law) – shall be determined according to medical considerations alone (the end of sec. 19P(a) of the Law). I would add, not insignificantly, that the security considerations were originally included in the main provision of the Law, which addresses judicial discretion and the considerations that the court must address (sec. 19N(e) of the Law), as has also been noted. However, ultimately, the role of these considerations was limited such that the court may weigh considerations of national security only when evidence to that effect has been presented, and when there is real concern for serious harm to national security, but all this only after the medical journey, which is primary.

139. We would emphasize that sec. 19N(e) is exceptional, and will be implemented only *very sparingly*, in extreme cases in which the State presents evidence indicating a *near certainty of serious harm* to its security (see and compare other cases where individual rights were weighed against security considerations, HCJ 9349/10 *Anonymous v. Minister of Defense* (2011); HCJ 1514/01 *Yaakov Gur Aryeh et al. v. Second Television and Radio Authority* (2001) [http://versa.cardozo.yu.edu/opinions/gur-aryeh-v-second-television-and-radio-authority]). Even in such cases, as noted, this consideration will be an attendant, secondary consideration to the primary purpose of the Law – saving the life of the prisoner for whom treatment is sought, even if against his will.

140. It should further be noted in this context that while raised in our case explicitly, it cannot be ignored that in many instances in which the question of treating a hunger striking prisoner arises, it is in regard to an administrative detainee. These cases raise additional challenges, that, by nature, involve different legal aspects than those arising in the case of a prisoner on hunger strike after conviction and sentencing, because being targeted at prevention, they inherently involve the question of the security risk posed by

the detainee, to the extent that he is physically and mentally competent. Under such circumstances, the security considerations may tip the scale toward a solution that obviates the need to force-feed the hunger striking prisoner, which will, as noted, remain a last resort (and see the above cases of *Alan* and *Al-Qiq*).

141. Before concluding, I would emphasize that we do not, God forbid, seek to minimize the value and importance of IMA and the moral position it wishes to express in this matter. IMA's moral objection to the Law that is the subject of these proceedings relies primarily upon the Tokyo Declaration of the World Medical Association (hereinafter: WMA) of 1975, updated in 2006, which provides physicians with guidelines prohibiting their involvement in torture or other cruel, inhuman or degrading punishment in relation to detention and imprisonment. Section 6 of the Tokyo Declaration prohibits the forcible feeding of prisoners on a hunger strike. In December 2007, IMA adopted the Tokyo Declaration and endorsed its latest version in a position paper. IMA also refers to the WMA's Declaration of Malta of 1991, also updated in 2006, which comprehensively focuses on voluntary hunger strikes, not only by prisoners, and defines principles and guidelines designed to assist physicians in handling the dilemmas that arise when treating those on hunger strikes. The Declaration establishes that forcible nutrition despite informed refusal is unethical, unjustifiable and constitutes degrading, inhuman treatment. The Declaration includes detailed instructions as to how to treat those on hunger strike. The principal parts of the Declaration were endorsed by IMA in 2005, while defining the rules for treating those on hunger strike, including: "a physician will not take part in the forcible feeding of a person on a hunger strike." The IMA rules were ratified several times, most recently in a hearing of the ethics board in September 2013.

142. However, and without taking these positions lightly -- even if I asked myself where the sanctity of life is in these – they do not represent the current legal state, in Israel or abroad, but rather particular ethical positions. They may derive form cruel practices of countries among which, thank God, we are not counted. Moreover, as the State presented, there are doctors and ethics experts who hold a different position. Thus,

the position paper that was presented to this Court (Appendix 9 to the Knesset response of Sept. 9, 2015) states as follows:

> In extreme situations – when *all else has failed*, and after every possible effort has been made to secure the consent of the person on hunger strike to end his strike, and when there is *real, tangible risk to his life* should he continue his hunger strike – the moral value of protecting human life and the ethical-professional duty of the doctor to save his life outweigh the infringement of his autonomous will (*ibid*., para. 3, emphasis original.)

The Law that is the subject of these proceedings is aware of the ethical dispute, and thus explicitly states that it does not "require the caregiver to provide medical treatment to the prisoner on hunger strike" (sec. 19N(e)). As the discussions of the Internal Affairs and Environment Committee on this issue reveal, this subsection was inserted into the final draft, although it was not included in the Government Bill, due to the desire to emphasize that no doctor is obligated to provide treatment, and this despite the fact that the original language of the Law – in sec. 19N(a) – stated that upon the decision of the District Court, "the physician *may* provide the prisoner with the above medical treatment…" (minutes of meeting no. 312 of the Internal Affairs and Environment Committee, the 19th Knesset, p. 47-51 (June 17, 2014)). Clearly, the additional emphasis in sec. 19N(e) was designed to give real expression to the above position of some doctors, and to the ethical complexity of the issue.

143. Nevertheless, given our constitutional legal system, and given the state of the law in various countries, as noted, I believe that the position of the World Medical Association, or the position of the Israeli Medical Association, cannot, itself, lead to the striking down of the Law that is the subject of these proceedings, which was enacted by the Israeli Knesset. As then Deputy President Sussman wrote:

> The Petitioner's argument that he is subject to a moral or medical-ethical obligation under his physician's oath, or according to the ethics rules of

> the medical profession, or his medical conscience is irrelevant, with all due respect to those ethical duties – and one who strives to go beyond the letter of the law is praiseworthy. However, we are not concerned here with ethical duties, but rather with legal ones (HCJ 447/72 *Dr. Bernardo Yismachovitz v. Aharon Baruch, Income Tax Assessor for Investigations, Tel-Aviv and Center*, IsrSC 27(2) 253, 266-67 (1973)).

These words are also apt to the matter before us, *mutatis mutandis*. Of course, each doctor may look to his conscience and to the physician's oath and decide as he may.

Conclusion

144. Ultimately, the Law passes the constitutionality tests in striking a delicate balance among the different values we have discussed. This is said given the graduated procedure that the Law sets out, which includes several mechanisms for medical, legal and judicial checks. Section 19N(e), whose primary concern is the security purpose, meets the constitutional tests as well, however recourse to it must be very sparing and limited to extreme circumstances, and proper evidentiary foundation. By nature of the issue, this Law is not a source of comfort. There are those who might say that it is possible to "live without it", assuming other solutions may be found within the existing statutory framework. In any event, having been enacted, we have examined its constitutionality and have reached the above conclusion, being convinced that there may be instances where saving lives demands this, and that the sanctity of life is our highest priority as human beings and as a court.

145. Following the above, I had the opportunity to read the opinion of my colleague Justice Mazuz. His proposal in paragraph 20, in the substantive sense – that is, that the security issue be considered after the medical deliberation – is not far different from what was stated in my opinion (for example, in para. 138, and particularly at the end). This is also consistent with the order set out in section 19N of the Law, in that subsection (d), which appears first and is dedicated to the medical condition, while and subsection

(e), which follows, concerns the security consideration. The best practice is, therefore, discussion of the main issue – the medical one – and only afterward the security issue, as I have written. However, I would clarify that in order not to completely tie the hands of the trial court, I would propose that we establish that the court should begin its deliberation with the medical issue as a basis for determining the case, and that the security issue be addressed last. The court has discretion whether to make an interim decision on the medical issues, which may be appropriate as a general rule, or whether to combine all aspects of the decision together, according to the circumstances of the case, as long as the order detailed above, and the dominance of the medical issue are observed.

We therefore do not grant the Petition. There is no order as to costs.

Justice M. Mazuz:

1. I concur with the outcome reached by my colleague Deputy President E. Rubinstein as to the constitutionality of the Amendment to the Prisons Ordinance (Amendment No. 48) Law, 5775-2015, whereby sections 19L-19S were added to the Prisons Ordinance [New Version], 5731-1971 (hereinafter: the "Ordinance Amendment" and "Ordinance"). Still, I am not at ease in regard to section 19N(e) of the Ordinance, which concerns considerations of public peace and safety (hereinafter: the security consideration), and in my opinion it requires clarification and the establishment of boundaries. My colleague discussed the facts, the parties' arguments, the reasoning and the constitutional argument in detail, and therefore I can present my position briefly.

2. I accept the position of the Knesset and the State authorities that the Patient Rights Law, 5756-1996 (hereinafter: the "Patient Rights Law" or the "Law") does not fully respond to the complex situations of prisoners on hunger strike who reach a stage where their lives or health are at risk, and that the balance of values and interests established by the Law for the purposes of "*providing medical treatment without*

consent" (sec. 15 of the Law) in regard to an "ordinary" patient" does not exhaust the range of complexities in the circumstances of prisoners on a hunger strike.

3. Section 13 of the Patient Rights Law establishes the general principle, which reflects the right of the individual to personal autonomy, whereby "*no medical care shall be given unless and until the patient has given his informed consent to it*".

Naturally, a sick person seeks to be cured, and in any event, as a general rule, he is presumed to give consent to medical treatment that may cure him or improve his condition. Cases where the patient refuses treatment are unusual, such as instances where a patient is dying, is experiencing unbearable pain and suffering, and refuses to accept medical treatment that could prolong his life (an issue that is primarily regulated in the Terminally Ill Patient Law, 5766-2005), or other instances where, due to religious or other beliefs, a sick person or patient refuses *particular* medical treatments (such as amputation of limbs or receiving vaccinations). Therefore, in such circumstances, the Patient Rights Law strikes a delicate balance between the individual's right to autonomy and the value of the sanctity of life, when the assumption is, as noted, that as a general rule, these two values are not in conflict (this is also the root of the presumption established in sec. 15(2)(c) in regard to retroactive consent, which I will address below).

This is not the case for a prisoner on a hunger strike. The hunger striker is not "sick" in the ordinary sense. He is a person who voluntarily and knowingly puts himself in a position where his health is compromised in order to express protest or to exert pressure in order to advance a personal goal or public cause. The hunger striker is not interested, of course, in endangering his health or dying, but he is willing to put his health, and at times even his life, at risk in order to advance his goals. In this sense, he is substantially different from an ordinary patient. The refusal of a hunger striker to receive medical treatment is at the core of his activity, and it is not an unusual or rare situation. In addition, in a case of a hunger strike that is part of a group hunger strike, primarily by prisoners or detainees, it is not always clear whether it indeed reflects the autonomous personal choice of each person on strike, or whether it is a result of group pressure, or

possibly, even coercion. Furthermore, a hunger strike by prisoners and its outcomes have consequences that go beyond the personal matter of the person on a hunger strike.

In light of all the above, the complex of considerations and balances in regard to a person on a hunger strike is substantially and substantively different from that which concerns an "ordinary" patient as addressed by the Patient Rights Law.

4. Section 15 of the Patient Rights Law focuses on the exceptions to the general principle that medical care requires informed consent. In this section, the Law permits providing medical treatment in the absence of consent, under particular conditions, in two basic situations: the *first* concerns cases where it is *impossible* to secure the patient's consent because of his medical condition (physical or mental), or because of a medical emergency (paras. (1) and (3)), and the *second*, which is more relevant to our case, addresses situations where the patient is at serious risk but still "*refuses* medical treatment". In cases of refusal of treatment, sec. 15(2) stipulates that a caregiver may provide the medical treatment even against the patient's will, where the ethics committee – after hearing the patient – authorizes providing the treatment, once it is persuaded that *all* the following conditions have been met"

> (a) The patient has received information as required to make an informed choice;
> (b) The treatment is anticipated to significantly improve the patient'smedical condition;
> (c) There are reasonable grounds to suppose that, after receiving treatment, the patient will give his retroactive consent.

The condition in paragraph (c) is not simple or obvious. It is an attempt to bridge between the right to personal autonomy and the value of the sanctity of life. Arguably, it is a somewhat artificial bridge, but it is still based, as noted, upon the natural presumption that a sick person wishes to be healed.

The provision of sec. 15(2) may then provide a solution in cases where there is no objective, rational reason for the patient's refusal to accept life-saving treatment, or treatment that may significantly improve his condition, and therefore it may be assumed that, in retrospect, he may come around and give his consent. However, there would appear to be some difficulty in meeting the requirement of paragraph (c) in the case of a hunger striker, whose clear, manifest refusal to accept treatment is at the core of the act of hunger striking, and is designed to prevent frustration of the hunger strike and its purposes.

5. In addition, when a *prisoner* (including detainee) in State custody is concerned, the State has direct responsibility for protecting his life and health (beginning of sec. 19N(4) of the Ordinance, and see further, section 11 of the Ordinance and section 322 of the Penal Law, 5737-1977). Thus, *inter alia*, the State provides food and health services to prisoners, and is even obligated to take *active* steps to prevent suicidal acts by prisoners, or prevent harm to them *even against their will* (see, for example, Article B.1 of Chapter B of the Ordinance in regard to holding a prisoner in segregation). As we know, Basic Law: Human Dignity and Liberty not only establishes the sanctity of life as one of the basic principles of the Basic Law (sec. 1), but also imposes an *active* duty upon State authorities to protect the life and body of each person (sect.4). This active duty is of particular weight when a prisoner in State custody is concerned, and the State is directly responsible for his life and his health. Moreover, the State also has a responsibility to protect the security of the prison and to protect the wellbeing of other inmates in the prison, and of course, also has the duty and responsibility to protect the safety and security of the general public, which may be affected by events involving hunger strikes by one group of prisoners or another. The State's general obligation to preserve public welfare and safety is, of course, heightened when the source of the risk are those who are held in State custody, and are in the State's charge. As we know, strikes by political prisoners in general, and security prisoners in particular, may also lead to events outside of the prison gates – which are often the purpose of the strike – that could pose a threat to public welfare and safety.

All of these considerations distinguish the issue of coercive treatment of a prisoner on hunger strike from the issue of treatment provided to an "ordinary" patient in the absence of consent, and they may justify limiting the prisoner's right to autonomy in this regard.

6. In light of the above, the arrangement established in sec. 15 of the Patient Rights Law for handling a situation of a patient who refuses treatment, clearly does not adequately address the circumstances of a hunger strike, nor exhaust the complexity of the situation of a hunger strike by prisoners. The *constitutional balance* underlying the arrangement established by the Patient Rights Law, which attributes dominant weight to individual autonomy, is not necessarily appropriate to the balance required in addressing prisoners in general, or the situation of prisoners on a hunger strike in particular. When we are concerned with a prisoner held in State custody, the element of personal autonomy is weakened (although not negated). On the other side of the equation, alongside the value of the sanctity of life, stand elements of the State's responsibility for the life and health of the prisoner, as noted, as well as its responsibility for the consequences of the hunger strike for the immediate environment of the prisoners on hunger strike, and beyond.

7. Moreover, even from the perspective of the infringement on autonomy, when a prisoner on hunger strike is concerned, this is effectively a *different type* of infringement than in regard to a patient refusing treatment, as the person on hunger strike is not interested, as noted, in dying (even if he may be prepared for this), and in any event the infringement of his autonomy is not in the denial of his ability to exercise his will over his body, but rather is actually focused upon denying him the possibility to go on hunger strike. That is an infringement of his freedom of expression and right to protest, which in any event are limited in regard to prisoners. This Court has already held that a hunger strike:

> … is not among the rights granted to a person while he is incarcerated in prison. Both elements of a hunger strike – the hunger and the strike –

> compromise the proper administration of the prison. As for the first element, the refusal to eat in itself constitutes a prison offense under section 56(8) of the Prisons Ordinance [New Version]. In our case, this is not any ”ordinary” refusal to eat, but rather a refusal that expresses organized protest in the form of a strike. An organized strike is also inconsistent with maintaining order discipline in prison (HCJ 7837/04 *Borgal v. Prison Service*, IsrSC 59(3) 97, 102.)

I would parenthetically note, that I believe that there is a measure of exaggeration in the general statements (to which my colleague referred to in para. 85 of his opinion) that a prisoner retains all human rights but for the right to freedom of movement and those that derive from it. This is not the place to elaborate, but it seems to me that this is inaccurate both on the abstract level, and certainly on the practical level. The deprivation of freedom of movement is not the *purpose* of imprisonment, but rather a *means* for punishing the prisoner. Imprisonment is a *penalty* imposed upon those convicted, which is generally intended to reflect the principle of retribution (the proportionality principle) for their criminal conduct. Infringing the freedom of movement of a prisoner is, indeed, a result of his sentence and a central characteristic of it, but limiting his freedom of movement *does not exhaust* the range of penal elements inherent to incarceration, as if it were, house arrest could suffice. A prisoner is subject to no small number of additional restrictions that are not necessarily required by the restriction of his freedom of movement. Indeed, a prison sentence does not itself automatically void the constitutional human rights granted to each person, and certainly not the right to human dignity, with its derivative rights, and the above statements should be seen to some extent as a methodological rule that establishes the *point of departure* for review (in the absence of explicit legal provisions), whereby a prisoner retains human and civil rights except to the extent that their limitation is a result and necessary consequence of the *nature of the prison sentence* imposed upon him, and of his status as an inmate in a prison facility run according to necessary disciplinary rules.

8. Under these circumstances, it is easy to understand why the State wishes not to be dependent in realizing its said responsibility – to the life and health of the prisoner, as well as the welfare of the public and its safety – only upon the mechanism of sec. 15(2) of the Patient Rights Law, which was not intended, as noted, to respond to the complex dilemma of treating prisoners on a hunger strike, and cannot always provide a suitable solution. Therefore, there is need for a specific, *supplementary* arrangement in order to cope with situations for which the mechanism established in the Patient Rights Law falls short. I cannot accept, as noted above, the Petitioners' argument that the Patient Rights Law fully responds to the relevant situations, nor can I accept their argument that considerations of public safety and welfare are irrelevant to the matter at hand. A central role of the governing authorities, as such, is to protect public safety and welfare, and in this regard we should bear in mind that we are concerned with prisoners whose incarceration is premised upon the purpose of protecting public safety and welfare from them.

9. This, in short, is the general theoretical basis that justifies establishing the supplementary arrangement in the Ordinance Amendment. Moving forward, an examination of the *details* of the arrangement, and whether and to what extent they meet the constitutionality tests (the Limitations Clause) is required. My colleague the Deputy President discussed the different components of the constitutionality tests and the Limitations Clause in detail, and in general, I concur and see no need for repetition. It should be emphasized that the statutory arrangement that was established was achieved after a long, thorough legislative effort, and it includes a long list of supervisory mechanisms and strict safeguards as prerequisites to granting permission to provide medical treatment (including nutrition) without the consent of the prisoner, and these are their main aspects:

> a. As a condition for commencing proceedings, *a medical opinion* as to an immediate risk to the life of the prisoner, or severe, irreversible disability is required, as well as an opinion as to the necessary treatments for preventing such risk.

b. A decision by the Prison Commissioner, *with the approval of the Attorney General*, as to the need to approach the President of the District Court for permission to provide medical treatment without the prisoner's consent, is required.

c. A copy of the request to the court, along with the medical opinion, must be submitted to the *ethics committee*, which is to give its opinion as to the medical issues concerning the prisoner after hearing the prisoner.

d. The court's authority to grant permission for providing medical treatment without consent is limited to circumstances where the court finds that without the treatment "*there is real possibility that within a short time the prisoner's life would be at risk, or that he would suffer severe, irreversible disability, and that the medical treatment is expected to improve his condition*".

e. The provisions of the Patient Rights Law continue to apply to the prisoner as long as a decision has not been handed down by the court.

f. The court may grant permission for such treatment only when it is satisfied that significant efforts have been made to secure the prisoner's consent for treatment, after being given a detailed explanation of his medical condition and consequences of a continued hunger strike for his condition, as well as all the relevant medical information, and the prisoner continued to refuse treatment. And in addition, after receiving the opinion of the ethics committee in the matter, and hearing the prisoner, to the extent it is possible considering his medical condition, or his attorney.

g. The court's authority is to "*permit*" medical treatment without the consent of the prisoner, but not to *order* such treatment.

h. The medical treatment to be provided to the prisoner without his consent must be limited to the *necessary minimum* for protecting the life of the prisoner or for preventing severe, irreversible disability.

i. Treatment shall be provided "*in the manner and location that would ensure maximum protection of the prisoner's dignity, while avoiding, as much as possible, causing pain or suffering to the prisoner*."

> j. The decision of the court is subject to appeal to the Supreme Court, which will consider the appeal within 48 hours of its submission.

To these we should add – as noted by my colleague the Deputy President, and as was also made clear by the representatives of the State authorities and the Knesset, in writing and orally – that the arrangement established in the Ordinance Amendment does not replace the Patient Rights Law, but it is a *residual, supplementary arrangement*, that is, an arrangement that may be implemented only after procedures under the Patient Rights Law have been exhausted, and only where such procedures cannot prevent the risk to a prisoner's life or health.

10. We thus find that this is a complex procedure, full of strict medical and legal monitoring mechanisms, alongside strict substantive tests. Implementing the established procedure is reserved for extreme cases where other tools have failed, and it is limited to the minimum necessary to save the life of a prisoner at risk due to a hunger strike, or to prevent a severe, irreversible disability.

The Security Consideration

11. As noted, I concur, in general, with the conclusions of my colleague the Deputy President as to the issue of the constitutional analysis of the Ordinance Amendment. As for the *security consideration* established in section 19N(e), I see some difficulties that must be addressed and clarified, as explained below.

12. The Ordinance Amendment details, *inter alia*, the considerations that the court must take into account in granting permission for medical treatment without the consent of the prisoner, all of which concern the *medical-health* aspect (sec. 19N(d)). Section 19N(e) of the Ordinance adds an additional, *optional* consideration, as follows:

> (e) The court shall take into account considerations of risk to human life or real concern for serious harm to national security, to the extent that evidence to such effect has been presented to the court.

13. The legislative history of the Amendment clearly shows – and this is not in dispute – that the consideration in regard to the consequences of a prisoners' hunger strike, primarily security prisoners, for public welfare and safety (the security consideration) was one of the primary considerations that led to initiating the Ordinance Amendment. As I noted above, I accept that the arrangement established in sec. 15 of the Patient Rights Law does not always fully respond to the need for providing treatment without consent in the circumstances of a hunger strike by prisoners, with all its implications, first and foremost in regard to the responsibility and duty to protect the life and physical integrity of a prisoner. Thus, I do not find any flaw in the fact that the security consideration was of the factors that *motivated* the legislative process of the Ordinance Amendment (and as such I see no reason to refrain from expressing this even in the "purpose clause").

14. However, once the purpose of creating a legal means for preventing the death or severe, irreversible disability of a prisoner on a hunger strike has been accomplished, there might seem to be no further need for establishing the security consideration as an additional factor for the discretionary stage of the court's decision as to whether to permit coercive treatment, since the "security" purpose is already achieved as an *inevitable secondary result* of preventing harm to the health of the prisoner. The purposes of protecting the sanctity of life and guarding public welfare and safety are not contradictory, but rather complimentary in the area with which we are concerned. Since the potential harm to public welfare is a *product* of the harm to the life of a prisoner on strike, saving the life of the hunger striking prisoner by providing proper care (even coercively) itself responds to the interest of protecting public welfare and safety. Therefore, it might appear that we have no need whatsoever for this consideration as a separate consideration at the stage of the court's decision as to whether to grant permission for treating a prisoner without his consent.

15. While a "redundant provision" is not constitutional grounds for striking down a statute, it seems that in our case this is not merely a matter of "esthetics". Including sec.

19N(e) in the manner in which it was included in the statute's final version, at the stage of the court's discretion and decision in deciding a request to grant permission to provide medical treatment without consent, may cause the confusion of different issues. It raises questions as to the *place and role* of this consideration in the court's decision, and raises concerns as to deviating the decision-making process from the necessary focus on health and medicine to considerations of national security and public order.

It should also be noted that although comparative and international law provide support for the approach that permits medical treatment without consent, including forced feeding of prisoners on hunger strike for medical considerations, as detailed by my colleague the Deputy President, there is no precedent, to the best of our knowledge, for including considerations of security and public order as component factor in the discretion for such a decision.

16. According to the early versions of the Bill, as published in the memorandum that was submitted to the Knesset, the security consideration was one among various factors of medicine and of public safety and welfare that the court must take into account before making its decision. Removing the security consideration, in the final version approved by the Knesset, from the general discretion provision (sec. 19N(d)), and placing it in a separate, optional provision (sec. 19N(e)), emphasizes that the court's decision must be rooted in the medical considerations, whereas the security consideration is but an additional, optional consideration, that should be taken into account only where all the medical-health factors have been met.

And indeed, the Respondents accept that under the statute as ultimately enacted by the Knesset, *commencing* a proceeding of approaching the court in order to obtain permission for treatment without consent must be based *solely on medical factors*, and that the security factor may never, itself, justify commencing a proceeding. The Respondents also accept that a *conditio sine qua non* for the court to grant permission is meeting *all* the health-medical conditions. Thus, the question arises – what, therefore, is

the need for the security consideration, and primarily, what role may it fill in the court's decision?

17. The Petitioners' attorneys argued that the security consideration is, in effect, the "*end all, be all*", and that in practice this consideration is that which tilts the scales, and will come at the expense of the medical considerations, and that the security consideration "*will always satisfy the doubt*" in the court's discretion.

As opposed to this, the Respondents' attorneys argued that the security consideration was never designed to outweigh the medical considerations or replace them, and that it may come to the fore "*only when all the medical conditions have been met*". But once the court finds that the medical conditions have been met, it may, if evidence to this effect be presented to it, give weight to the security consideration, as a balancing factor to the non-medical considerations grounding the hunger strike, in order to determine the request to grant permission for coercive treatment.

18. It is easy to see that the concern raised by the Petitioners is not enirely unfounded. Establishing the security considerations as a separate consideration that the court *must* address ("the court shall consider…"), to the extent that relevant evidence has been produced, indeed raises a concern as to the attribution of weight, and perhaps even determinative weight, to considerations of security and public order at the expense of the medical considerations and the right to autonomy, at least in cases where there is doubt or deficiency as to the existence of the medical-health conditions such that they *alone* do not justify granting permission for coercive treatment.

Indeed, the test that was established for taking security considerations into account, according to which it is limited only to cases where evidence was brought before the court as to a "*concern from human life or a real concern for serious harm to national security*" is a strict test. Yet, there is still the concern that the security consideration may fill the gap where there is *doubt or deficiency* as to the fulfillment of the medical-health considerations as noted.

19. Under these circumstances, the question arises as to whether these difficulties may compromise the constitutionality of sec. 19N(e) of the Ordinance.

After examining the issues, I do not believe that these concerns are sufficient to justify striking down the provision itself. However, such difficulties do, in my opinion, warrant establishing guidelines and restrictions as to the *manner of implementation* of the provision in regard to the security consideration. This, considering, *inter alia*, the restraint and caution necessary in judicial review, and in light of the rule that when a statute has several intermingled purposes, judicial review shall focus upon the dominant purpose of the statute, without disregarding the secondary purpose (CA 6821/93 *United Mizrachi Bank Ltd. v. Migdal Cooperative Village*, IsrSC 49(4) 221, 342 (1995) [http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village]; HCJ 4769/95 *Menachem v. Minister of Transportation*, IsrSC 57(1) 235, 264 (2002)). This is especially so when in our case the security purpose, with its different aspects, is also a legitimate purpose, and when this purpose *in itself* is not sufficient for commencing proceedings and cannot satisfy granting permission.

20. As noted above, the Respondents also accept that the security consideration, *in and of itself*, does not justify commencing proceedings for permission, and is certainly not sufficient for granting permission for coercive treatment. This holding – along with the holding, which is also acceptable to the Respondents – that the court may not permit coercive treatment unless the medical and health conditions have been fully met, requires preventing circumstances of conflation and confusion that might color a decision made on the basis of the security consideration, without the medical and health conditions having fully been met.

21. This difficulty, and the concerns that accompany it, which as noted, are not entirely without foundation, may be resolved by a *procedural separation* between the examination and decision phases as to the fulfillment of the medical and health requirement, and the phase of examining the security consideration, to the extent it may

be raised. Accordingly, *at the first stage*, the court should conduct a hearing on the medical and health conditions – the substantive conditions – that are a *conditio sine qua non*, and decide whether these are indeed *fully* met in the case before it. Only having so found, will the court proceed to the *second stage*, and address the security consideration, to the extent that evidence to this effect has been presented in accordance with the provisions of sec. 19N(e) of the Ordinance. After exhausting both stages, the court will make its final, *comprehensive* determination upon the request for granting permission for treatment in the absence of consent. In this framework, and on the basis of the above finding that all the medical and health conditions have been met, the court must strike a balance among all of the relevant considerations: on the one hand – the position of the prisoner as to the relevant medical treatment, and as to the purpose of the hunger strike, that is, the right to personal autonomy and to freedom of expression (sec. 19D(d) of the Ordinance); and on the other hand – considerations of protecting the life and health of the prisoner (sec. 19D(d)), as well as the public interest reflected in the security consideration, to the extent evidence to this effect was presented (sec. 19D(e)).

At this point, is appropriate that we emphasize that a broad view of the arrangement established in the Ordinance Amendment clearly reveals that the legislature intended to give primary weight to considerations relating to the prisoner – balancing protecting his life and health against his right to personal autonomy and self-expression. Most of the provisions in the arrangement concern these, both in its substantive and procedural aspects, while the security consideration is included solely as a supplementary, optional consideration, strictly limited to cases, backed by evidence, of "*concern for human life or a real concern for serious harm to national security*". This approach by the legislature should guide the court in determining a request to grant permission under the Ordinance Amendment.

The said a procedural separation, which is designed to ensure the full meeting of the medical and health conditions, and to prevent conflation and confusion between the medical and health conditions and the security condition, is important for purposes of the *appeal* process as well. Section 19R of the Ordinance establishes that the decision of the

court on the request to grant permission is subject to appeal to the Supreme Court, and that this Court "*shall hold a hearing in the appeal within 48 hours from the time of its submission*". The need for swift determination is clear, and is required by the nature of the matter. The *transparency* of the proceedings and the decision that would be achieved by the above procedural separation would also facilitate an expedited decision by the Supreme Court on the appeal.

22. Indeed, it is still possible to wonder if "a trifle is worthy of the King's trouble" [Esther 7:4], and whether the harm posed by the security section is greater than the benefit derived from it, when the purposes grounding the Ordinance Amendment can seemingly be achieved without it, whereas its existence raises concerns and arguments. However, we are not concerned with review of the wisdom of the legislature, and in light of and subject to the above, it cannot be said that we are concerned with unconstitutionality. However, I believe the relevant State organs would do well to revisit and consider the repeal of sec. 19N(e).

23. In conclusion, subject to my above comments, particularly as stated in para. 21 above, I concur with the conclusion of my colleague the Deputy President that we must deny the Petitions.

Justice N. Sohlberg:

1. I concur with my colleague Deputy President, E. Rubinstein's comprehensive opinion, and my conclusion as to the constitutionality of the Prisons Ordinance (Amendment No. 48) Law, 5775-2015 (hereinafter: the Amendment) is as his.

A complex – human, moral and legal – issue was brought before us: the sanctity of life, national security, the right to autonomy, the right to equality, freedom of

expression, the State's responsibility for prisoners in its custody – these are all combined in our issue. As usual, the Deputy President addressed the issue with knowledge, wisdom and reason – considering the importance of each of these considerations for our matter, as well as the delicate balance among them, in accordance with the stages of constitutional review, in a logical, orderly manner. Most of this is academic rather than practical. In light of our experience with the petitions of hunger striking prisoners and detainees so far, and in view of the monitoring mechanisms, the stages of the procedure and the strict conditions established in the framework of the Amendment, it is both my hope and expectation that we will not reach the stage of forcible feeding in its extreme form, and even the need to address coercive medical treatment of hunger striking prisoners will be rare, if at all. The primary effect of the Amendment is its clear expression of a value judgment of intrinsic practical benefit.

3. I shall very briefly add a few words as to the proper place and role of the *security* considerations in sec. 19N(e) of the Amendment. As noted by my colleague Justice M. Mazuz (para. 13 of his opinion), the security consideration was among the primary motives for the enactment of the Amendment. Review of the Bill's explanatory notes and the minutes of the various discussions along the legislative process leaves no room for doubt in this regard. However, and most importantly, the constitutionality of the Amendment must be reviewed, first and foremost, in light of the specific arrangements it establishes, as they were written into the law books, and these – as the Deputy President demonstrated – give priority to the *medical* considerations. These considerations "overtook" the *security* considerations along the legislative "journey" and outweighed them. As emphasized by the Respondents, while the *medical* considerations may justify providing medical treatment to a hunger striking prisoner against his will, even without *security* considerations, the *security* considerations, in and of themselves, can never justify granting permission for such medical treatment (para. 138 of the opinion of the Deputy President). This position may lead one to wonder: if the *security* purpose is indeed secondary to the *medical* purpose, and is but another layer placed upon it, what then is the benefit that derives from the provision of section 19N(e) of the Amendment?

Is “a trifle worthy of the King’s trouble”, as my colleague Justice Mazuz wonders (para. 22 of his opinion)?

4. It is true that, in many instances, protecting a prisoner’s life and realizing the medical purpose would entirely achieve the security purpose, as well. In the matter at hand, the *medical* purpose and the *security* purpose are not at odds – indeed, they are sisters and they complement one another (see para. 14 of the opinion of Justice Mazuz). However, there are still situations where the *security* considerations may be of some significance for the determination of the court. As we may recall, under sec. 19N of the Amendment, the court may *permit* providing medical treatment. May – but is not obliged. This means that in certain circumstances, in striking the balance between the sanctity of life on one hand, and the right to autonomy on the other, the scales may remain balanced. In other words – even if the State succeeds in showing that without receiving medical treatment there is a real possibility that within a short period of time the prisoner’s life would be at risk, or that he may suffer a severe, irreversible disability, the court still holds a certain margin of discretion in balancing the sanctity of life and the right to autonomy, and determining as its wisdom dictates. Within that margin of discretion, there is also room for considerations of concern for human lives, or a real concern for serious harm to national security, to the extent such evidence has been presented. And note: this does not in any way detract from the State’s duty to withstand the “trials” of the “medical journey” (as the Deputy President described it in para. 138 of his opinion). Only if the state has met its burden to show that the *medical* considerations have been satisfied, and if the court is still in doubt whether there is justification to permit medical treatment, is there room to consider the *security* considerations as well.

5. My colleague Justice Mazuz, following the reasoning of the Petitioners, is concerned about attributing excessive weight to the considerations of security and public order at the expense of the medical considerations and the right to autonomy (para. 18 of his opinion). Therefore, he proposes to set restrictions upon the implementation of sec. 19N(e), in the form of a “procedural separation” between the examination of the *medical* considerations and the examination of the *security* considerations. I do not share his

opinion in this regard, and I concur with the view of the Deputy President that we must take care not to tie the hands of the trail court. Aside from the question of our authority to do this in the framework of these proceedings, I believe that there is no substantive justification for doing so. Once this judgment has made it absolutely clear that the *medical* considerations are a *sine qua non* threshold condition without which coercive medical treatment cannot be provided, and that the *security* consideration is merely an additional layer that may be given expression in a limited spectrum of cases, I see no further need for concern about attributing excessive weight to the *security* considerations to an extent that would require creating a "procedural separation". Therefore, I agree with the formula proposed by the Deputy President, whereby the court will begin by examining the medical issue as a basis for its determination, while the security issue will be reserved – if required – as a last issue for examination.

Therefore, I concur in the conclusion of the Deputy President that the Petitions must be denied, and with the formula he proposed in paragraph 146 of his opinion.

Decided in accordance with the opinion of Deputy President E. Rubinstein.

Given this 8th day of Elul 5776 (Sept. 11, 2016).