[HCJ 7052/03, 8099/03 – Adala The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior et al.]

Summation on behalf of the Respondents

1. The petitions at hand address the constitutionality of the Nationality and Entry into Israel Law (Temporary Order) 2003 (hereinafter: The Temporary Order), which stipulates the following:

> 1. In this Law –
>
> "Region" – includes Judea and Samaria and the Gaza Strip;
>
> "Citizenship Law" – Citizenship Law, 5712 – 1952;
>
> "Entry into Israel Law" – Entry into Israel Law, 5712- 1952;
>
> "Commander of the Region" – the commander of forces of the Israel Defence Force in the Region;
>
> "Resident of the Region" – includes those who live in the Region but are not registered in the Region's Population Registry, and excludes those who are residents of Israeli communities in the Region.
>
> 2. During the period in which this Law shall be in effect, notwithstanding the provisions of any law, including Section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship to a Resident of the Region pursuant to the Citizenship Law and shall not give a Resident of the Region a permit to reside in Israeli pursuant to the Entry into Israel Law, and the Commander of the Region shall not give such Resident a permit to stay in Israel pursuant to the security legislation in the Region.
>
> 3. Notwithstanding the provisions of section 2 –
>
> (1) The Minister of the Interior or the Commander of the Region, as the case may be, may grant a Resident of the

Region a permit to reside in Israel or a permit to stay in Israel, for purposes of work or medical treatment or other temporary purposes, for a fixed period of time, and for a cumulative period that shall not exceed six months; and a permit to reside in Israel or a permit to stay in Israel, in order to prevent the separation of a child under twelve years of age from his parent who is lawfully staying in Israel.

(2) The Minister of the Interior may grant citizenship or give a permit to reside in Israel to a Resident of the Region if he is convinced that the said resident identifies with the State of Israel and its goals, and that the resident or his family members performed a meaningful act to advance the security, economy, or another matter important to the state, or that granting citizenship or giving the permit to reside in Israel are of special interest to the state; in this paragraph, "family members" means spouse, parent, child.

4. Notwithstanding the provisions of this Law –

(1) The Minister of the Interior or the Commander of the Region, as the case may be, may extend the validity of a permit to reside in Israel or of a permit to stay in Israel that was held by a Resident of the Region prior to the commencement of this Law;

(2) The Commander of the Region may give a permit allowing temporary stay in Israel to a Resident of the Region who submitted an application to become a citizen pursuant to the Citizenship Law, or an application for a permit to reside in Israel pursuant to the Entry into Israel Law, prior to 1 Sivan 5762 (12 May 2002) and who, on the day of the commencement of this law, has not yet been given a decision, provided that the said Resident shall not be given, pursuant to the provisions of this paragraph, citizenship pursuant to the Citizenship Law or a permit for temporary or permanent residence pursuant to the Entry into Israel Law.

5. This Law shall remain in effect for one year from the day of its publication; however, the government may, with the

approval of the Knesset, extend its validity by order, from time to time, for a period that shall not exceed one year each time.

It is the respondents' position, in a nutshell, that the Temporary Order restricts the immigration of a population that is currently in armed conflict with the State of Israel. The purpose of this restriction is to protect the Israeli public and uphold its safety and security. In view of the above, the Temporary Order is consistent with the provisions of Basic Law: Human Dignity and Liberty. Alternatively, even if the Temporary Order violates the rights protected by the Basic Law, this violation serves a proper purpose and the extent of the violation is no greater than required.

To support this legal argument, we shall first present the background for the Government's resolution and the enactment of the Temporary Order.

(A) Introduction

2. The petitions at hand address the constitutionality of the Temporary Order, which originated in a Government resolution dated 12 May 2002, regarding the treatment of illegal aliens and the policy of family reunification in the case of residents of the Palestinian Authority and other aliens of Palestinian descent (hereinafter: The Government Resolution). It is common knowledge that the character of the Israeli-Palestinian conflict changed as of September 2000, when it developed into a brutal terror attack orchestrated by Palestinian terror organizations that is broadly supported by the Palestinian population. This armed conflict is directed by the Palestinian leadership, following the failure of political negotiations regarding a permanent status agreement.

3. These terror attacks take place both in the West Bank and the Gaza Strip (hereinafter: The Territories, or The Region) and inside Israel itself. They are directed against civilians and soldiers, men and women, the elderly and children and ordinary people and public figures, and are carried out in all places, including public transportation, shopping centers and markets, coffee shops and restaurants, and so on. The terror organizations use various means to carry out these attacks, but the common denominator is that they are all deadly and cruel. The methods employed include shootings, suicide bombings, mortar shells, rockets, car bombs, etc. This armed conflict has so far taken the lives of more than 800 Israeli citizens and residents, and caused the injury of more than 5,100 others, including some extremely serious injuries.

Supreme Court President Aharon Barak referred to the unique attributes of this conflict in HCJ 7015/02, *Kifah Mohammad Ahmad Ajuri v. IDF Commander*, *Takdin Elyon* 2002(3) 1021:

> Since the end of September 2000, fierce fighting has been taking place in Judea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than six hundred citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. Moreover, in one month alone - March 2002 - 120 Israelis were killed in attacks and hundreds were wounded. Since March 2002, as of the time of writing this judgment, 318 Israelis have been killed and more than 1,500 have been wounded. Bereavement and pain overwhelm us.
>
> 2. Israel's fight is complex. The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place where Israelis are to be found (within the boundaries of the State of Israel and in the Jewish villages in Judea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. Indeed, the forces fighting against Israel are terrorists; they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including in holy sites; they are supported by part of the civilian population, and by their families and relatives. The State of Israel faces a new and difficult reality, as it fights for its security and the security of its citizens. This reality has found its way to this court on several occasions…

The terrorism carried out by the Palestinians, including by employees of the various Palestinian security agencies, has prompted a long line of security measures on the Israeli side, of varying degrees of severity. These developments are reflected in the Court ruling in HCJ 2461/01 *Kanan v. IDF Commander in the West Bank* (not published):

> For the past several months ***actual warfare*** has taken place: live fire is used against Israelis and IDF soldiers, bombs are planted on roadsides, Molotov cocktails and grenades are thrown, car bombs are smuggled into Israel, and Israelis who enter A zones are murdered or injured.
>
> (Emphases from this point on are added, unless otherwise stated – Y.G.)

This indicates that in reality, the current situation is that of **"actual warfare"** in the Territories, or in other words, that of an "armed conflict", as stipulated in the Ajuri ruling.

Having examined all the relevant aspects of the new situation, the State has determined that it comprises "an armed conflict that does not amount to a full-fledged war."

It should also be noted that the world has recognized the war on terror as equivalent to military war against aggressive countries; the war has recognized an attack by a terror organization as "an armed attack" that threatens international peace and security; the United States, which was targeted on September 11, has even officially declared an armed conflict with the responsible terror organization.

In the 20th century, a new term – "armed conflict" – was coined in international law to encompass all violent situations (declared or undeclared) in which at least one state is involved. Following this development, the term "armed conflict" is now used to describe various kinds of warfare. Today this term includes additional armed conflicts that do not amount to a full-fledged war.

4. It is the opinion of the defence establishment that as of now, security considerations require that none of the residents of the Region be allowed into Israel, since their entry into Israel with Israeli permits and their free movement inside the country is liable to substantially threaten the safety and wellbeing of Israel's citizens and residents. This opinion is one of the factors underlying the Government Resolution – on which we will elaborate below – and the Temporary Order addressed in this petition. The law provides for several exceptions, on which we will elaborate below.

5. Generally, the Respondents assert that granting a permit to stay in Israel to a resident of a state or political entity that is in conflict with Israel involves an inherent security risk, since that person's loyalties might be with the state or entity that is in conflict with Israel.

This general position was reinforced by the escalation of the armed conflict with the Palestinians in September 2000. The existence of an ongoing Israeli-Palestinian conflict is common knowledge, and no evidence is required to substantiate this fact. It is also true that the character of the conflict has changed since the end of September 2000. In this conflict, which has become an armed conflict, the Palestinian side uses all available means against Israel's citizens and residents. ***Unfortunately, in some cases the Palestinians also uses Arab citizens of the State of Israel, and especially people who were formerly residents of the Territories and have received legal status in Israel following family reunification processes***. Consequently, Israeli citizens and public security face serious dangers; these dangers have multiplied since the start of the armed conflict in September 2000. The comments made above are general and naturally do not apply to the entire Arab community in Israel.

(B) The purpose of the law: upholding the right to life, physical integrity and personal security

(B)(1) Identifying the objective purpose of the law: protecting the right to life

6. Section 8 of the Basic Law: Human Dignity and Liberty expressly states that rights protected under this law are not to be violated except by a law "designed for a proper purpose." It is therefore clear that the Basic Law itself aims at an objective test (purpose) rather than a subjective one (intention).

The "objective purpose" test is based on the concept that "once passed into law, the cord connecting the statute to the legislative process is severed. The statute then becomes independent and its interpretation and implementation can only be based on the language and content of the statute itself. Once the legislative process is completed, the drafters and voters become *functi officio* - their job is completely finished and their traces are historical only." (Justice Haim Cohen, *Preparatory materials*, Selected writings, Bursi Publishing, p. 360.)

Indeed, in HCJ 4769/95 *Ron Menahem et al. v. Minister of Transportation et al., Piskei Din* 57(1), 235, pp. 268-269, the Court held:

> As a rule, the examination of the compliance of the purpose of a statute with the limitations clause does not focus on the Legislature's rationale, even though ostensibly the purpose and the rationale somewhat overlap. Rather, the examination focuses on the objective purpose of the statute. Generally, the very fact

> that the Knesset adopted the policy of the Government does not mean that the statute is flawed, provided that the Government's intention was to accomplish a proper purpose, in line with its policy.

However, the Legislature's intention and the explanatory notes submitted with the bill can be used in identifying the objective purpose of the statute.

7. The identification of the purpose of legislation as the **protection of the collective right to security and the individual right to life and personal security** is based on the aggregate of the following factors:

Firstly, the increasing threat to the life of individuals in Israel due to the armed conflict and the pattern of settling in Israel by Residents of the Region prior to the Temporary Order. ***Secondly***, the legislative process that took place. ***Thirdly***, the fact that the Temporary Order is temporary indicates that it is tied to a purpose that is time and place dependent, that is, it is connected to the armed conflict and to its implications for the increasing threat. ***Fourthly***, the fact that the scope of the Temporary Order was reduced so that it does not apply to as many persons as originally intended in the Government's bill. ***Fifthly***, the explanatory notes attached to the bill.

We shall now elaborate on each of these factors.

(B)(1)(i) <u>The increasing threat resulting from the pattern of settling in Israel by Residents of the Region prior to the Temporary Order</u>

8. **The professional opinion of the security establishment is that a policy that would allow an almost uninterrupted immigration and flow of residents of the Region into Israel, through marriage, would increase the danger to public security in Israel and increase the risk of a violation of the right to life and physical integrity of Israeli citizens and residents**. This position is based exclusively on the unique attributes of the current armed conflict, which are:

9. **(a) Involvement of the civilian population in the violent conflict**:

The forces fighting against the State of Israel are not part of a regular army; they are civilians. In this context it should be noted that the age range of Palestinians taking an active part in the conflict with Israel and that of Palestinians seeking permits to stay in Israel and gain legal status in this country through marriage are almost identical. The age of Palestinians seeking family reunification in Israel is almost the same as that of the typical terrorist, ranging, in most cases, between 18 and 40.

Moreover, the civilian Palestinian population in the Region largely supports the violent struggle against Israel, including suicide bombings that target innocent Israeli civilians. This extensive support amplifies the danger presented by the civilian population in the Region for public security in Israel. (See the public opinion polls prepared by Dr. Khalil Shkaki's research institute, which indicate that 58%-72% of the Palestinian population supports the continuation of the armed conflict; www.pcpsr.org/survey/polls)

Regrettably, the involvement of the civilian Palestinian population in the armed conflict, whether by actively participating in the conflict or by supporting it, makes it necessary to impose certain restrictions on the civilian Palestinian population in general and on those Palestinians in the age range of most terrorists in particular.

10. **(b) Abuse of Israel immigration policy by means of family unification procedure for the purpose of the armed conflict**

Investigations conducted by the defence establishment, mainly in the last two years, produced increasing evidence that Residents of the Region who received legal status in Israel through marriage have been involved in terror attacks in Israel both as terrorists and as accessories who helped bring terrorists into Israel from the Territories. Operations in which Residents of the Region with legal status in Israel include:

- Personal involvement in terror attacks, including as suicide bombers;
- Bringing suicide bombers into Israel from the Territories or from Palestinian villages on the Palestinian side of the seam line and transporting them to their destination inside Israel;
- Collection of intelligence regarding attractive sites for terror attacks, designed to make the attack as deadly as possible;
- Performance of logistical missions for terror organizations, such as renting safe houses that serve as bases for launching terror attacks, smuggling the weapons, etc.;
- Recruitment of terrorists and accessories among Israeli Arabs with whom they establish connections.

The involvement of these residents in terror operations is a direct outcome of the interest that terror organizations in the Territories and abroad have in these individuals, which has dramatically grown since the start of the armed conflict.

11. This growing interest emanates primarily from the fact that people who have official Israeli certificates, including a driving license, can move freely inside Israel and have access to and are familiar with Israeli targets, including security targets. The attractiveness of such former Residents of the Territories to terror organizations grew in direct proportion to the difficulty of independently transporting terrorists across the Green Line, in part because of the progressing construction of the separation fence. Since the start of the armed conflict and in the last year and a half in particular, after the IDF entered the Territories in Operation Defensive Shield, terror organizations have faced increasing logistical problems, because of the closures and encirclements and because of IDF presence in the Territories. The defence establishment consequently found that Palestinians who acquired such certificates thanks to family reunification, as well as a few Israeli Arabs, were involved, mainly as accessories, in a large portion of the suicide bombings carried out inside the Green Line.

12. In addition, concurrently with integration into Israeli society, Residents of the Region who receive legal status in Israel maintain firm ties with their families in the Territories and with institutions and "organizations" there. The loyalty that some of these individuals maintain for the Palestinian cause and the Palestinian Authority is clear.

    There is no need to mention how easy it is to pressure persons whose family still resides in the Region to aid terrorists.

    Furthermore, some of them even continue to live in the Territories intermittently; their Israeli certificates enable them free passage between the Territories and Israel, as they please.

13. Moreover, their integration into Israeli society and familiarity with the Israeli way of life, while maintaining strong ties in the Territories, makes these individuals the perfect link. Thanks to this situation, they can gather intelligence about targets and transfer this information to the Territories, and can also personally transport terrorists from the Territories into Israel. For the terror organizations, Israeli IDs and yellow Israeli license plates are a "**power multiplier**" for terror.

14. **(c) The limitations of individual screening and the inability to rule out security risks as a result of the entrance of Residents of the Region in the current situation**

    Obviously, the main objective of the defence establishment is to thwart the violent operations of Palestinian terror organizations, or in plain language – to save lives. Naturally, most of the resources the State can allocate to the defence establishment

are dedicated to fighting this murderous terror; the scant resources available to the defence establishment are stretched to the brink.

Ever since the establishment and transfer of authorities to the Palestinian Authority, and even more so since the start of the armed conflict, the ability of Israel's defence forces to individually analyze the risk posed by each Resident of the Region seeking legal status in Israel and wishing to enter it has declined.

Starting in 1994, when the steady increase in the number of applications for family reunification between Israeli residents and citizens and Residents of the Region began, until the Government Resolution, the percentage of applications denied based on **specific security information** about a foreign spouse who is a Resident of the Region, was only 8% on average.

15. However, the involvement of holders of Israeli certificates in terror organizations and deadly attacks inside Israel since the start of the armed conflict, in the various forms detailed above, indicates that many of those to whom Israel has agreed, in the absence of specific security information about them, to confer legal status in Israel in the process of family reunification, have at one stage or another after their entry into Israel reunited themselves with the Palestinian cause and aided and carried out deadly terror attacks.

16. The factors making **individual screening** impossible for the defence establishment:

    (1) Information gaps – Under the circumstances, the defence forces obviously have information gaps regarding the activity of Residents of the Region, particularly those residing in zones A and B. Therefore, the fact that no negative security intelligence exists regarding a particular individual does not necessarily mean that this person is not involved in prohibited security activities, and cannot rule out the possibility that the absence of such intelligence is only due to these information gaps.

    (2) The risk to Israel's security can materialize at any time without prior warning, since those for whom family reunification is sought reside where terror organizations operate freely, as do their family and friends. Terror organizations can thus easily and at any time make contact with the person seeking legal status in Israel and/or with their family or friends, and convince them – whether amicably or through threats – to cooperate. Therefore, even if a periodic evaluation of each applicant were practicable, such a screening process could not rule out the risk inherent to granting entry permits to Israel.

(3) The risk is posed by individuals who can legally enter and move inside Israel – since the general closure was tightened and it became harder to enter Israel, terror organizations have sought ways to carry out terror attacks inside Israel. These organizations perceive holders of Israeli certificates, especially those who have strong ties with the Palestinian Authority, as an important and attractive asset in their armed struggle, due to these people's continuing links with their immediate family and childhood friends in the Region; their solidarity with the Palestinian cause; their access to both the Region and Israeli areas; and the organizations' ability to pressure the family of former Residents to convince these individuals to collaborate. In this context it should be noted that the security forces estimate that the establishment of the "buffer zone" or "seam line zone" and of the separation fence around Jerusalem might have further adverse implications, since as it becomes harder to transport terrorists and explosives from the Territories into Israel, holders of Israeli certificates will become even more attractive to terror organizations.

(4) The past is not indicative of the future – The fact that a certain person was in the past permitted entry into Israel and/or that at present there is no concrete intelligence about him does not, in and of itself, mean that **in the future** this person will not be a threat to Israel's security, whether because of his solidarity with and active participation in the armed conflict currently waged by the Palestinian side, or because he will not be able to ward off threats made by the terror organizations against his close relatives in the Region. Examples from the last several months can be provided of accessories to terrorist activity who were not considered to be potential threats of this kind. These examples include the 38-year-old mother of seven who took part in smuggling a terrorist and an explosive belt into Israel. There are numerous other cases in which unsuspected prior Residents of the Region became actively involved in the armed conflict, without any prior signs or any reason to expect that they might. Naturally, the favorite candidates for terror organizations are individuals about whom Israel has no prior intelligence.

17. We shall now offer several examples, according to the categories provided above, of individuals who, following family reunification, received Israeli certificates and then aided and carried out terror attacks.

One such case is that of **I. I.**, who gained legal status in Israel following his marriage in 1991. Idris has two brothers – one is a Hamas activist and another a Tanzim activist. His brothers convinced him to transport a terrorist with a bomb into Israel

and to recruit two Israeli Arabs from Umm al Fahm to help him transport the cargo. (March 2001)

M. A. H., originally from Nuseirat Camp in Gaza, married a resident of Ramla and received Israeli papers. He was arrested in September 2002 when it was discovered that he belonged to a cell of Israeli Arabs from Ramla and Lod that was run by senior Hamas operatives in the Gaza Strip. Abu Hubeiza was recruited in March 2002, and in turn recruited two other residents of Ramla and Lod, including his brother-in-law, for the purpose of carrying out terror attacks in Israel. The members of the cell were instructed to kidnap and murder a soldier. They gathered intelligence about the home of an IDF officer in the Modi'in area who was targeted for assassination, and transferred this information to their handlers in the Gaza Strip.

N. H., originally from Kafr Ra'i in the West Bank, received Israeli papers following an application for family reunification with an Israeli citizen from Elut. He was recruited by an Islamic Jihad cell in Jenin. He personally, together with an operative from Jenin, went on a mission of planting a bomb in the Haifa area. (August 2001)

M. M., originally from Tulkarm, received Israeli papers after he married a resident of Jisser al Zarqa. He was recruited by Hamas in the West Bank in order to transport a suicide bomber into a busy site in Israel. (February 2002)

A. B., originally from Qalqiliya, received Israeli papers after he married a resident of Jaljulia. He was recruited by Fatah-Tanzim in the West Bank in order to carry out a suicide bombing in a busy site in Israel. (February 2002)

M. A. J., born in Rafah, lived in Israel for two years after he married a resident of Rahat. He received Israeli papers after he applied for family reunification. Abu Jasar was recruited by Hamas operatives in the West Bank in order to transport two suicide bombers from the West Bank into Israel; their target was the central bus station in Beer Sheva. The attempt to enter Israel was thwarted in April 2002, and Abu Jasar was arrested in May 2002.

These are only a few examples. According to information gathered by the defence agencies, since 2001 twenty-one residents of the Region who received legal status in Israel in the process of family reunification contributed substantially to acts of hostility against Israel's security. Terror attacks abetted by Residents of the Region, as mentioned above, have taken the lives of 45 Israelis and injured 124. These statistics concerning the involvement in terror attacks of Residents of the Region who received legal status in Israel indicate a dangerous trend that has developed over the last few years among the population discussed in this petition.

18. To conclude, **Israel, like many other Western countries**, is forced today to handle immigration-related problems, including problems that originate from marriage-induced immigration. One way to deal with these problems is to stipulate more stringent criteria and additional preconditions for legal status. However, the most important point in our context is that **Israel is also forced to deal with unique issues due its geopolitical situation and the conflict between Israel and the Arabs and Palestinians – issues that are unparalleled anywhere else in the world.**

An application for legal status in Israel for an individual from the Region who is the spouse of an Israeli cannot in any way be compared to an application by a foreign spouse from another country (that is not high-risk or in conflict with Israel), since Israel and the Palestinian Authority are in an armed conflict that revolves around ***national and political issues***.

These unique problems, as explained above, have given rise to a special threat to the safety and wellbeing of the Israeli public. Large-scale immigration of the Palestinian population into Israel, concurrent to a bloody conflict between Israel and the Palestinian Authority, has given rise to a special threat to the safety and wellbeing of the Israeli public. It is this threat that the Knesset has sought to reduce, in the given period, through the Temporary Order addressed in this petition.

(B)(1)(ii) <u>The legislative process</u>

19. The Temporary Order was submitted to the Knesset for a first reading in June. On 14, 29 and 30 July 2003, the Internal Affairs and Environment Committee [hereinafter: The Committee] held lengthy discussions, and heard the Deputy Attorney General, Mr. Menahem Mazuz, the Population Administration Director, Mr. Hertzl Gadj, a representative of the Interior Ministry's legal department, Mr. Daniel Solomon, and representatives of nongovernmental organizations. The Committee's second meeting was attended by the Minister of the Interior himself.

In this meeting, the head of the Shin Bet explained – to the Committee members only – the professional position according to which granting entry permits to Residents of the Region increases the risk to public security in Israel. He also presented the statistics supporting this position.

The fact that the head of the Shin Bet appeared before the committee and made a presentation to it proves that the purpose of this statute was to minimize the threat posed to Israel's citizens and residents by the combination of the armed conflict and [Palestinian] immigration, and especially marriage-related immigration of the kind

prevalent prior to the Temporary Order, and that this explanation is not a "cover" for hidden agendas.

(B)(1)(iii) <u>The temporary nature of the law indicates that its purpose is connected to the armed conflict and its implications for security</u>

20. The application of the law over time depends on the purpose of the law. When the Legislature seeks to accomplish a general purpose that is independent of specific circumstances, it does so with laws unlimited in duration. When the purpose that the Legislature seeks to accomplish derives from specific circumstances that are only relevant at a given time, the mechanism employed is that of statutes that expire within a stipulated timeframe.

In view of this correlation between the purpose of any given statute and its period of applicability, it must be concluded that when the Legislature chooses the instrument of a Temporary Order, it is because the Legislature seeks to accomplish a purpose that is connected to specific circumstances and that the purpose of the statute is not general and permanent.

Indeed, in our case the Legislature chose to enact a Temporary Order that is applicable for one year with an optional extension. This indicates that the law passed by the Knesset was motivated by the current unique circumstances faced by Israel, which is in an armed, ongoing conflict with the Palestinian side. The purpose of the Temporary Order is to handle the increasing threat to the lives of Israeli civilians caused by the combination of the armed conflict and Palestinian immigration patterns prior to the statute.

(B)(1)(iv) <u>The reduced scope of the Temporary Order compared to the Government Resolution</u>

21. The Temporary Order only applies in cases where an Israeli marries a Resident of the Region. For the purposes of this statute, a Resident of the Region includes "persons who are not registered in the Population Registry but reside in the Region, except residents of Israeli settlements in the Region." The Region is defined as "Judea, Samaria or the Gaza Strip".

The Government Resolution, which preceded the Temporary Order, was broader, as it applied to all aliens of Palestinian descent. The Government Resolution provided that no new applications submitted by residents of the Palestinian Authority would be handled and that in processing applications made by any other persons, special attention would be given to the applicant's descent.

The fact that the scope of the statute was narrowed in comparison to the Government Resolution, and that this was done even prior to the Committee hearings in which the security needs emanating from the armed conflict were addressed, indicates security concerns were at the core of the Temporary Order.

(B)(1)(v) <u>The explanatory notes attached to the bill</u>

22. The explanatory notes attached to bills in the legislative process constitute a tool that can be used to identify the purpose of the statute (see: HCJ 5503/94 *Lili Segal v. Knesset Speaker*, *Piskei Din* 51(4) 529, 562). The rationales detailed above regarding the purpose of the Temporary Order, namely, the intention and duty to protect State security and the lives of Israeli citizens, are expressed in the Government Resolution that preceded the legislation of the Temporary Order:

> Faced with the security situation, and because of the implications of the immigration and settling of aliens of Palestinian descent in Israel, including through family reunification, the Ministry of the Interior, together with the other relevant ministries, will define a new policy for family reunification. In the relevant cases, until such a policy is defined and until the necessary new procedures and legislation are in place, the following rules will prevail.

The explanations for the language of the Temporary Order state:

> Since the outbreak of armed conflict between Israel and the Palestinians, which among other things has led to dozens of suicide attacks on Israeli territory, there has been increased involvement in this conflict of Palestinians who are originally residents of the Region and carry Israeli identity cards following family unification with Israeli citizens or residents, and who took advantage of their status in Israel, which enables them to move freely between Palestinian Authority territory and Israel.
>
> Therefore, and in accordance with Government Decision 1813, of 12 May 2002 (hereinafter – the government decision), it is proposed to limit the granting to residents of the Region citizenship pursuant to the Citizenship Law, including through family unification, and to limit the giving of permits to such residents to reside in Israel pursuant to the Entry into Israel Law or of permits to stay in Israel pursuant to the security legislation in the Region.

It is thus clear that underlying the Government Resolution and Knesset legislation are the unique circumstances that Israel is facing: an ongoing conflict with the Palestinians that has now turned into an armed conflict. **From the Legislature's perspective, in view of the duty of the State to protect the lives and physical integrity of its citizens and residents, the state is entitled to establish special suitable arrangements that guarantee that marriage with an Israeli citizen will not at any point undermine Israel's national security and the wellbeing of its citizens and residents.**

23. **To conclude**, **the escalation of the armed conflict has increased the threat to public security**, including to the right to life and physical integrity of every individual. **The increased threat to the right to life and the change in the nature of this threat call for an adaptation of the existing legal tools to the new circumstances**. The enactment of the Temporary Order at hand constitutes such adaptation of the legal infrastructure to the needs created by the nature of the current armed conflict. In other words, the purpose of the legislation – both the objective and the subjective purpose – is to protect the right of the public to life, personal safety and physical integrity. **This law must therefore be seen as putting into practice the legal obligation of the authorities to protect the most basic of all rights, which is anchored in the Basic Law – the right to life and physical integrity.**

(B)(2) The supremacy of the purpose of protecting life

24. The right to life is a constitutional and inalienable right of any person in Israel. The constitutional status of this right and of the principle of the sanctity of life is anchored in the Basic Law: Human Dignity and Liberty (hereinafter: The Basic Law).

(a) Section 1 of the Basic Law, entitled *Basic Principles*, reads:

> Fundamental human rights in Israel are founded upon recognition of **the value of the human being, the sanctity of human life**, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Israel's Independence declaration. (Emphasis added)

(b) Section 2 provides:

> There shall be no violation of the **life, body** or dignity of any person as such. (Emphasis added)

(c) Section 4 of the Basic Law translates this basic principle into the basic right of all individuals to the protection of their lives:

> All persons are entitled to protection of their **life, body**, and dignity. (Emphasis added)

See also Leave to CA 5587/97 *Attorney General v. Ben Akar (minor), represented by parents and guardians*, *Piskei Din* 51(4) 830, p. 848; CA 506/88 *Yael Shaefer, minor, v. the State of Israel*, *Piskei Din* 48(1), 87, p. 104.

25. It should be noted that prior to the enactment of Basic Law: Human Dignity and Liberty, the value of the sanctity of life constituted an integral part of the Israeli legal system, which absorbed this value from the basic values of Judaism. On page 1333 of CA 461/62 *Zim Israel Navigation Company et al v. Maziar*, *Piskei Din* 17 1319, Justice Zilberg explained:

> Judaism has always glorified the value of human life. The Torah is not a philosophic theory comprising opinions and beliefs; it is a way of life and for life …
>
> … Within the organized framework of social life and subject to the priorities set by the Torah, life is the holiest of assets …

Similarly, Deputy President of the Supreme Court, Justice Elon, said in CA 506/88 *Yael Shaefer, minor, v. the State of Israel* (*ibid*, p. 117):

> 'God created man in his own image' – this is the theoretical, philosophical foundation of the special attitude of Jewish law toward the supreme value of the sanctity of human life – the sanctity of the image of God …

26. The right to life of every individual in society coexists with the recognized right of the State to defend itself. The State is responsible for the protection of the life and wellbeing of its residents, and may take action against those who seek to harm them, in order to prevent any attack upon their lives.

27. The right to life is thus a basic right held by all individuals in Israel. As mentioned, the sanctity of life is a basic principle underlying our perception of the upholding of human rights in the State of Israel. The right to life is the most basic right, without which no other right can exist. All persons in Israel are entitled to protection of their **lives** (Section 4 of the Basic Law), and it is the State that is responsible to protect the life and wellbeing of its residents.

28. Before we address the petitioners' allegation that rights protected by the Basic Law: Human Dignity and Liberty have been infringed, we would first like to briefly discuss the implications of the Basic Law on persons wishing to immigrate to Israel. We will

argue that **the Basic Law directly defines the rights of individuals who are at the gates of the country and wish to enter or leave it** (Section 6 of the Basic Law), and that the Law deliberately avoids granting a constitutional right to aliens wishing to immigrate to Israel. We maintain that such a right, which the legislature did not mean to create, must not be created indirectly, through interpretation, as a right appended to another constitutional right.

(C) Aliens have no constitutional right to immigrate

(C)(1) International law

(C)(1)(i) Customary international law

29. It is an accepted principle of customary international law that states have the right to refuse entry to aliens:

> In customary international law a state is free to refuse the admission of aliens to its territory, or to annex whatever conditions it pleases to their entry. (*Halsbury's Laws of England (4th Ed., 1977), Vol. 18, paragraph 1726*)

Prof. Brownlie similarly asserts:

> A state may choose not to admit aliens or may impose conditions on their admission. (I. Brownlie*, Principles of Public International Law (6th Ed. 2003), p. 519*)

This is an established principle of customary international law. As noted by Nafziger in his book, this principle is perceived as an axiom that requires no justification. The right of a state not to admit aliens is derived primarily from the national sovereignty doctrine.

> J. Nafziger, "The General Admission of Aliens Under International Law", *(1983) 77 AJIL 804, 816.*

30. (a) The right of a state not to admit aliens is supported by several judgments of the Supreme Court of the United States, such as Nishimura *Ekiu v. U.S.*, in which the Court held:

> **It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions**, or to admit them only in such

> cases and upon such conditions as it may see fit to prescribe. (142 u.s. 651).

(b) British courts have also acknowledged this state prerogative, as in the case of *R. v. Governor of the Pentonville Prison*, where the Court held that:

> **No alien has any right to enter this country** except by leave of the Crown and the Crown can refuse leave without giving any reason. ([1973] 2 All E.R. 741, 747)

(c) The Irish Supreme Court upheld a similar policy in the matter of Fajujonu, where the Court quoted the principles embraced in Osheku (1987):

> The control of aliens which is the purpose of the Aliens Act 1935 is an aspect of the common good related to the definition, recognition and the protection of the boundaries of the state. **That it is in the interests of the common good of the State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State has been recognized universally and from earliest times**. ([1987] IEHC 2; [1990] 2 IR 151)

31. The prerogative of the state to refuse the admission of aliens into its territory, which is derived from the principle of state sovereignty, allows the sovereign very broad discretion. The prevailing customary international law is that this discretion is limited only by international legal obligations that the state has undertaken.

(C)(1)(ii) <u>International treaty law</u>

32. International treaty law, as reflected in various international treaties and conventions, distinguishes between the right of a citizen of the state to enter and exit the state freely, and the right of any person within the state to move freely – rights that impose a duty on the state to enable such freedoms, and the right of an alien who is not inside the borders of the state, and who does not have the right to enter it.

33. (a) This distinction between the freedom of movement within the boundaries of the state on the one hand and the right to immigrate to the state on the other is present even in the Universal Declaration of Human Rights of 1948. Article 13 provides:

> Everyone has the right to freedom of movement and residence **within** the borders of each state. Everyone has the right to leave any country, including his own, and to return to **his** country.

(b) Article 12 of the International Covenant on Civil and Political Rights (ICCPR) makes a similar distinction between citizens and aliens:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right **to enter** *his own country*.

(c) This distinction is also evident in Articles 2-3 of Protocol No. 4 of the European Convention on Human Rights.

Article 2 establishes the right of any person who is legally present in the territory of a state to move in it and leave it freely:

1. Everyone **lawfully within the territory** of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to eave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of '*ordre public'*, for the prevention of crime, for the protection of rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subjected, in particular areas, to restrictions imposes n accordance with law and justified by the public interest in a democratic society.

Article 3 reserves the right to enter the state for citizens only:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State **of which is a *national*.**
2. No one shall be deprived of the right **to enter the territory of the State which he is a *national*.**

(d) Let it be stated that Article 29 of the Declaration of Human Rights, Article 12(3) of the ICCPR and Articles 2(3) and 2(4) of the European Convention on Human Rights allow these rights to be limited in favor of national security, public security, public order, etc.

It is thus apparent that while international law protects the right of any person who is lawfully within a given state to move freely within it and leave it at will, the right to enter a state is reserved for nationals only.

34. The Petitioners maintain that the alleged right to family life, which they attempt to derive from the right to dignity, imposes a duty on the State to admit aliens into its territory.

Our response – on which we will elaborate in the section concerning the right to family life – is that customary law does not guarantee any such duty, and that even treaty law, as reflected in various international conventions, does not derive a state duty to permit the immigration of a foreign spouse from the right to family life.

The protection provided by international treaty law to family life was not interpreted as an obligation by the State to admit the foreign spouse into its territory so that he or she could settle there. Therefore, the principle of customary international law concerning state sovereignty in all outward-looking matters remains in tact.

35. In fact, international law and state laws both include provisions that allow the State – subject to international humanitarian law – to impose restrictions on nationals of enemy countries, as an act of self defence, as explained below.

(C)(2) <u>The rules of International law in reference to enemy nationals</u>

36. In any state of war, a delicate balance must be struck between the right of the state to defend itself and its duty to protect enemy nationals **in its territory** (in this context, see Article 44 of the Fourth Geneva Convention).

In the case of enemy nationals who are outside the territory of the state, the value of self-defence overrides. The state may implement general measures or decide on a case-to-case basis. The restrictions that can be imposed on enemy nationals include

prohibition from entering the state, prohibition from trade, etc. Many scholars have explained this concept:

> When the head of a state or sovereign declares war against another sovereign, it implies that the whole nation declares a war against the other, as the sovereign represents the nation, and acts for the whole society. Thus these two nations are enemies ri [sic] all the subjects of the other.
>
> Because the declaration of war between sovereigns immediately transforms every individual subject and citizen of those sovereign nations into enemies, the traditional law of nations naturally required that enemy aliens be accorded different legal status than alien subjects hailing from friendly powers. In particular, the treatise writers found that the law of nations imposed severe restrictions on the nature of the contacts between subjects of sovereigns at war with each other. (J.G. Ku, "Customary International Law in State Courts", 42 **Va. J. Int'l L.** 265)

Israel is in armed conflict with the Palestinian Authority, and a large portion of the civilian Palestinian population supports and actively participates in this conflict. This rationale therefore applies in our case. In other words, as of now, the Palestinian Authority is a state entity that supports terror, in which security agencies that support terror operate. Furthermore, terror infrastructure in the Palestinian Authority is unhindered, including various organizations that operate against Israel, its citizens and its residents, with the support of the Authority, as part of the armed conflict against Israel. In this context, see the recent judgment in HCJ 10467/03 *Sharbati v. Home Front Commander*, not published:

> The phenomenon of Jewish terrorists, as serious as it may be, is a rarity, and the overwhelming majority of the Jewish public in Israel condemns these individuals and disapproves of their ways. Therefore, sanctions of the aforementioned kind are unnecessary in order to deter this public. **Unfortunately, the situation in the Palestinian public is different.** Let it suffice to mention the large number of terror attacks that have been carried out and the many others that were thwarted, as well as the expressions of merriment at the slaying of Jews and the festivities declared by

> the families of those termed "shahid" when they learn of the death of their son or daughter. In my mind, **these facts demonstrate the extent to which the population in the Territories occupied by Israel encourages the acts of the suicide bombers**, which also explains the increasing number of those who are ready to serve as "living bombs". Under these circumstances, finding deterrents in order to reduce the number of deaths is an existential need of the highest degree. Clearly, no discrimination is involved, but rather a measured and balanced use of Regulation 119.

Let it further be noted that the restrictions stipulated in the Temporary Order are less stringent than those that a state is entitled to enact in times of war, and are only meant to prevent the entry of residents of the Palestinian Authority for the purpose of settling in Israel.

37. Finally, it should be noted that many treaties include a qualification for emergency times, including in the context of the right to family life, on which we expand below.

(C)(3) <u>The absence of any "direct" constitutional right to immigrate to Israel under any circumstances</u>

38. The Basic Law provides a direct definition of the rights of individuals who are at the gates of the country, seeking to enter or leave it. Section 6 provides:

> Leaving and entering Israel
>
> (a) **All <u>persons</u> are free to leave** Israel.
> (b) **Every <u>Israeli national</u> has the right of entry** into Israel from abroad. (Emphases added)

The Basic Law does not grant an alien seeking to immigrate to Israel the right to enter the country. In the context of emigration/immigration, the Law ***only*** confers upon aliens the right to leave the country. Only citizens, not even residents, have a constitutional right to enter Israel – and this does not constitute immigration but returning to one's homeland. In other words, the Basic Law distinguishes between the right to leave the country, which all persons have, and the right to enter it – which is reserved for Israeli citizens only.

It is thus clear that the Basic Law, which defines the constitutional rights of individuals who are at the gates of the State and the State's constitutional duties toward them, never granted any constitutional right to immigrate to Israel and

never imposed on the State any constitutional obligation to honor the alien's intention to immigrate.

39. In fact, in the context of immigration to Israel, the Basic Law: Human Dignity and Liberty ***did not*** change the legal situation that existed before, which gave priority to the principle of state sovereignty, from which the power of each state to determine whom to admit into its borders is derived.

This legal situation is consistent with international law and with the law actually practiced by countries throughout the world. Each country reserves the absolute right to decide which aliens may enter its boundaries; as a rule, a state has no duty to explain to foreigners why it refuses to allow someone in.

40. The Court has often stated that in the context of immigration policy, the authorities have extremely broad discretion. This position was repeated in both older and more recent Court rulings (see for example: HCJ 482/71 *Clark v. Minister of Interior*, *Piskei Din* 27(1), 113, and the recent Special High Court Hearing 8916/02 *Mario Dimitrov v. Ministry of Interior* (not published)):

> The respondent is right to argue that the decision of the Court is consistent with rulings on the subject of granting [legal] status in Israel to foreign nationals. The basic assumption noted in these rulings is that the Minister of the Interior has broad discretion in the question of whether to grant an alien the status of a permanent resident in Israel, which is decided, *inter alia*, based on the state's immigration policy; the Court's interference in the decisions of the Minister of the Interior in this subject is by definition minimal.

Furthermore, the authority of the Minister of the Interior to grant licenses under the Law of Entry into Israel, or any other status, was interpreted by this Court as an extremely broad authority, as stated in HCJ 431/89 *Kendal Richard et al v. Minister of Interior*, *Piskei Din* 46(4) 505, p. 520:

> Under Section 1(b) of the Law of Entry into Israel, "the presence in Israel of persons who are not Israeli citizens and who do not have an immigrant certificates shall be subject to a permit to reside in Israel granted under this law." It is the respondent, the Minister of the Interior, who has the authority to grant such permits and the discretion as to whether to grant them. The law and the regulations enacted under it … do not define the criteria

> for granting such permits. The respondent has broad discretion in the matter, and is not obligated to provide any explanation for his decision.

Regarding the imposition of restrictions on the entry of aliens into Israel, the Court said in HCJ 1031/93 *Elian (Hava) Passero (Goldstein)*, *Piskei Din* 49(4) 661, p. 705:

> Because of these public ramifications, all countries have imposed restrictions on the entry of aliens and further restrictions on those seeking to become residents or citizens. **The restrictions are meant to preserve the unique culture, identity and common denominator of the residents, to protect their economic interests and uphold public order and ethics.** There are two types of restriction: restrictions on entry into Israel and restrictions on naturalization and residency. **Regarding restrictions on entry, each country reserves the absolute power to control the flow of aliens that enter it.**

41. *These rulings referred to the implementation of the immigration policy by the Minister of the Interior as an administrative decision. The logic underpinning them is reinforced when the immigration policy, which is tailored to the needs of the hour, is not implemented by force of an administrative decision but rather by that of a Knesset law.*

(C)(4) <u>The law and marriage-induced immigration prior to the Temporary Order</u>

42. The status in Israel of an alien who marries an Israeli national or resident is regulated by law and by administrative orders.

The naturalization application of the **spouse of an Israeli national** is governed by Section 7 of the Citizenship Law. This section was interpreted, both before and after the Basic Law was passed, as granting the Minister of the Interior the discretion as to whether to approve the application, without giving the alien the any automatic entitlement to naturalization by virtue of his or her marriage. This binding precedent regarding the discretionary nature of this authority and the importance of naturalization was first stated by Justice Barak (now the President of the Supreme Court) in HCJ 754/83 *Renkin v. Minister of Interior*, *Piskei Din* 48(4) 113:

> Naturalization is an important step. Citizenship creates an ongoing legal relationship between a person and his country (see

> A. Rubinstein, Israeli Constitutional Law (Schocken, 3rd edition, 1981) 401). This relationship has implications in many legal fields, including both international law and domestic law. Citizenship imposes duties on the State in terms of foreign relations. From the perspective of the individual, citizenship confers upon him rights, gives him powers, imposed on him duties and recognizes his immunity in various matters. Citizenship has to do with the right to vote for the Knesset, the capacity to serve in various public offices, the jurisdiction of the courts, extradition and many other matters. **Citizenship implies loyalty.** (*ibid*, p. 117, emphases added)

In the *Renkin* case it was therefore stated, regarding the right of a foreign spouse of an Israeli citizen to become naturalized, that:

> ... This provision does not dismiss the need for the Interior Minister to exercise discretion under Section 5(b) of the Law of Naturalization. Indeed, the Naturalization Bill of 1951 proposed that marriage would [automatically] make the spouse a citizen as of the date of the marriage [Section 6]. The Knesset did not accept this proposal and instead set forth a mechanism by which marriage makes the requirements more lenient, but does not make the discretion of the Minister of the Interior redundant. (see Knesset Proceedings 11 (1952) 1688-1700, and 82 (M.D. Gouldman, Israel Nationality Law, Jerusalem 1970). Israel has thus joined many other countries that do not accept the premise that marriage (or the dissolution thereof) in and of itself automatically changes the citizenship of the spouse; Israel recognizes the principle of the independence of citizenship, according to which a spouse can become naturalized on an individual basis, with the marriage granting him preferential treatment in certain respects ... ***The Minister of the Interior is thus given the discretion ("if he sees fit") to confer Israeli citizenship upon the spouse of an Israeli citizen***. (*ibid*, p. 116, emphasis added)

The Court again held in HCJ 3648/97 *Stamka et al v. Minister of the Interior et al.*, *Piskei Din* 53(2), 728:

> ***An alien who marries an Israeli citizen does not acquire, by marriage alone, the right to become an Israeli citizen himself. The Minister of the Interior has the authority to grant or refuse an application submitted by such spouse.*** (*ibid*, pp. 767-768, emphasis added)

In HCJ 2208/02 *Maha Salama et al. v. Minister of the Interior* (not published), the Court held:

> It is common knowledge that the Minister of the Interior has broad discretion whether to grant Israeli citizenship to a man who marries an Israeli woman (see HCJ 758/88 *Kendal v. Minister of Interior*, *Piskei Din* 46(4) 505, 520). Granted, Section 7 of the Citizenship Law makes it easier for the spouse to become a citizen, but it does not altogether abolish the discretion of the Minister of the Interior. (See HCJ 754/83 *Renkin v. Minister of Interior*, *Piskei Din* 48(4) 113; the *Stamka Affair* 165; HCJ 4156/01 *Dimitrov v. Ministry of Interior* (not published).)

The arguments regarding discretion in the conferral of legal status upon a foreign spouse are reinforced when the local spouse is not an Israeli citizen but only a permanent resident. This is due not only to the difference in the legal status of the local spouse, but also in the different legal infrastructure underlying the conferral of legal status upon the foreign spouse. The criteria for granting a permit to stay or reside in Israel to an alien are not stipulated in law or regulations. This absence is not an oversight – rather, it stems from the basic understanding that the discretion as to whether to permit an alien to reside in Israel must be very broad.

43. For the prevention of entry of any specific alien into Israel, it is not necessary to prove the existence of a verisimilar fear for public safety, nor even a substantial one: it is enough to have concerns that are not unfounded in order to bar a person from entering Israel. **This was the ruling at times of relative calm, and it therefore holds with even greater force at times of armed conflict.**

(C)(5) <u>The law and marriage-induced immigration after to the Temporary Order</u>

44. The Temporary Order limits the discretion of the Minister of the Interior (and that of the IDF Commander in the Region), subject to the exceptions listed below, in

granting citizenship to Residents of the Region under Section 7 of the Citizenship Law and in granting a permit to reside in Israel under the Law of Entry into Israel.

The Temporary Order temporarily and partially restricts the discretion that the minister had before this Order was enacted, in view of the increased threat to the right to life of Israeli citizens and residents as a result of marriage-related settlement in Israel by Residents of the Region in the course of the armed conflict. This restriction is temporary because it is a Temporary Order (that can be extended), and it is partial because the Order only applies to Residents of the Region; in the case of all other aliens, the minister's discretion remains unchanged.

The Temporary Order was thus expressly intended – subject to the exceptions provided in the Order – to limit the discretion of the Minister of the Interior and the IDF Commander in connection with Residents of the Region. This express intention is reflected in the language of the Temporary Order ("Notwithstanding the provisions of any other law, including Section 7 of the Citizenship Law").

45. In conclusion, neither before nor after the legislation of the Temporary Order did aliens have a constitutional right to immigrate to Israel under any circumstances, including marriage. Entry permits and legal status were subject to the discretion of the Minister of the Interior. Prior to the Temporary Order, the Legislature structured the discretion of the Minister of the Interior in a way that implies an instruction to facilitate the naturalization of spouses of Israeli nationals. In the Temporary Order, the Legislature revised its instruction with regard to Residents of the Region, because of the threat to State security and the increased threat to the right to life of Israeli citizens and residents due to the pattern of marriage-related settlement of Residents of the Region in Israel in the course of the armed conflict. A new statute thus (partially and specifically) revised the procedure stipulated in an older one.

46. The Respondents hold that it is constitutionally permissible to revise a procedure through legislation. The Basic Law, which defines the constitutional rights of individuals who are at the gates of the country, does not recognize any constitutional right of an alien to immigrate to Israel, regardless of the reason for immigrating.

(C)(6) <u>The silence of the law is deliberate: no constitutional right to immigrate should be given indirectly</u>

47. As part of the definition of the constitutional rights of individuals who are at the gates of the country, the Basic Law refrains from granting aliens the right to immigrate to Israel and from imposing a constitutional duty on the State to admit such aliens into

its borders. This silence is deliberate; as explained at length above, it is based on the supremacy of the value of state sovereignty in Israeli and international law. This silence means that no such right is granted.

48. The Respondents maintain that a constitutional duty to enable immigration must not be imposed on the State indirectly if the constitutive branch chose not to grant this right to aliens directly. The Respondents therefore maintain that the Basic Law must not be interpreted in a way that would create a new constitutional obligation – the obligation to admit an alien into Israel, with the aim of implementing an ostensibly constitutional right of the Israeli spouse. This interpretation would not only violate the unity of the Constitution, but might also undermine the delicate relationship between the constitutive branch and the judiciary on the one hand and between the legislative branch and the judiciary on the other.

Before addressing the question of the ***internal*** scope of the right to dignity and other particular rights, we would like to assert that the ***external*** scope of these rights must be demarcated by the silence of the Basic Law regarding any constitutional right of aliens to enter the country. This demarcation means that not granting an entry permit to an alien can never violate any protected constitutional right of that alien or of any other person. Supreme Court President Barak explains the external demarcation of the right to dignity in his book, **Interpretation in Law – Constitutional Interpretation** (vol. 3, 1995) (hereinafter: Barak):

> The fact that particular rights exist indicates that in principle the framework right does not apply if the particular right can be derived from it. **For example, Israeli nationals have the right to enter Israel. Non-nationals cannot assert a constitutional right to enter Israel by force of the general principle of human dignity**. Aliens cannot assert a constitutional freedom of occupation derived from human dignity, above and beyond the protection of regular laws. Indeed, the internal system of rights leads to the conclusion that a distinction must be drawn between different rights and between the values and interests that they protect. Interpretation that renders particular rights superfluous and pools all rights under the framework rights must be avoided. (Emphasis added)

Naturally, this observation concerning the external demarcation of the general right to dignity holds even more in the external demarcation of other particular rights.

The unavoidable conclusion concerning the external demarcation of the rights by Section 6 of the Basic Law is that the Petitioners have failed to establish that any general or particular right have been violated, since the scope of these rights in no way includes a constitutional right to admit aliens into Israel.

49. We shall now address the arguments made by the Petitioners regarding an alleged violation of rights protected by the Basic Law: Human Dignity and Liberty.

(D) Alleged violation of protected rights

(D)(1) No violation is possible since the statute, which protects a constitutional human right, is internally balanced

50. The argument regarding violation of a constitutional right for the sake of protecting another constitutional right can be analyzed from three viewpoints, depending on the identity of the petitioners or those who challenge the law.

One viewpoint is that adopted by the Petitioners. Their point of departure is the limitation imposed on the rights of the Petitioners; they therefore require the State to justify this violation in compliance with the limitations clause [Section 8 of the Basic Law]. This approach presents the law as suspect and makes it a candidate for rescission from the outset, as it requires the Respondents to justify the statute.

However, another viewpoint is possible, that of the interest protected by the statute – the right to life. As explained, this is a supreme constitutional right in Israeli law, which in some cases overrides other constitutional rights. Therefore, if the reverse petition were to be filed, challenging the statute – namely, were an Israeli citizen to petition against the fact that the Order is only temporary and against the exceptions it allows, then the constitutional approach and the weight given to each argument would be entirely different. The Respondents would then have to justify the extensiveness of the exceptions and the fact that the statute is only temporary.

There is also a third viewpoint, which focuses on the reach of human rights that are anchored exclusively in the basic laws. According to this analysis, if the restrictive statute reflects a worthy internal balance between the various constitutional rights, then there is no "violation" whose purpose and proportionality need to be screened under Section 8 of the Basic Law. In the words of Supreme Court President Barak:

> When the 'ordinary' law balances between human rights in compliance with the 'internal balance' formula as emerging from the basic law itself, there is no room to talk about violation of

> any protected right in the first place. In such cases, the 'ordinary' statute upholds the constitutional human rights. The constitutionality of the statute is determined in the very first stage of the constitutional review, and as a matter of principle **there is no room even to move to the second stage of constitutional review, namely, to the limitations clause.** (**Barak**, p. 520)

The Respondents maintain that since the right to life is the supreme right without which no other right can exist, and in view of the exceptions provided in the statute and its temporary nature, the required internal balance is adequately struck in the Temporary Order. It can therefore be said that the statute does not violate any protected right at all.

51. Even if the alleged violation is analyzed with the mechanism established in the Basic Law, we must bear in mind that this petition can be seen from an entirely different viewpoint, which the rigid framework of constitutional analysis does not allow to properly underscore.

52. The Petitioners in the various petitions maintain that the Temporary Order violates two particular rights – the right to liberty and the right to privacy, as well as the general right to dignity, from which they seek to derive the right to family life and the right to equality.

The argument made above is that the external demarcation of the rights is done*, inter alia*, through Section 6 of the Basic Law and that this demarcation means that the general right to dignity, let alone the particular rights, must not be interpreted as imposing a constitutional obligation on the State to admit aliens in. According to our argument, not admitting aliens into the country does not constitute violation of the right to dignity or any other particular right, since these rights – due to their external demarcation – do not include any constitutional right that requires admitting aliens.

We shall now present the argument that the internal scope of the right to dignity and the other particular rights imposes no obligation on the State to admit aliens.

(D)(2) <u>The internal scope of particular rights: the right to liberty and the right to privacy</u>

53. (a) Section 5 of the Basic Law protects personal liberty:

> There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.

(b) Section 7 of the Basic Law protects the right to privacy:

> (a) All persons have the right to privacy and to intimacy.
>
> (b) There shall be no entry into the private premises of a person who has not consented thereto.
>
> (c) No search shall be conducted on the private premises of a person, nor in the body or personal effects.
>
> (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person.

54. The Respondents maintain that liberty and privacy are both liberties, which implies the existence of a negative obligation that complements them: the obligation not to violate these liberties.

This conclusion is called for primarily by the definition of the protection provided for these rights by the Basic Law. This protection is negative: "There shall be no deprivation or restriction" (as regards the right to liberty) and "There shall be no entry" and "There shall be no violation" (as regards the right to privacy). The negative language of the protection granted clearly indicates that it does not impose any positive duty on the State to allow the immigration of aliens.

55. This conclusion also emerges from the nature of these rights. The right to privacy is the right of the individual to a private space to which the access of all others is limited. This space can be physical (a home) or abstract (information). See for example HCJ 2481/93 *Dayan v. Maj. Gen. Yehuda Wilk et al.*, *Piskei Din* 48(2) 456, pp. 469-470:

> Without any attempt to cover all aspects of this right, it can be said, based on this approach, that the constitutional right to privacy extends to the right of a person to conduct in his home the lifestyle he pleases, without any outside interference. A man's home is his castle, and in his home he is entitled to be left alone and develop his own free will (see *United States Post Office v. Rowan*, 397, U.S. 728, 736 (1970)). In this respect, the right to privacy constitutes, among other things, in the words of Prof.

> Gavison, "a restriction on the access of others to the individual.
> (See Gavison, *ibid*, p. 428.)

56. The Petitioners base their case on Section 7(a) of the Basic Law, which states that all persons have the right to privacy, but does not define the term "privacy". In our opinion, the other clauses in this section define the prohibited violations of this general right; the common denominator is that the prohibited violations are the outcome of active behavior ("There shall be no entry", "No search shall be conducted" and "There shall be no violation"). These clauses illustrate that Section 7(a) provides a negative protection to the right to privacy.

Moreover, even though the Basic Law offers no definition of the term "privacy", the one provided in the Privacy Protection Act of 1981 can be used for this purpose. We are of course conscious of the fact that due to the higher normative hierarchy of basic laws, they are not subject to the definitions provided in ordinary laws. However, the definition provided in the Privacy Protection Act can be referred to, as it is assumed that it reflects "a legal culture that the legal community in Israel shares" (see HCJ 1384/98 *Gilad Avni v. The Prime Minister*, *Piskei Din* 52(5) 206, pp. 210-211). Section 2 of the Privacy Protection Act reinforces the argument that the protection granted to the right to privacy is negative by nature, and designed to prevent, among other things: surveillance, prohibited wiretapping, publications of various kinds, photographing people in their own homes, photocopies, using a person's name, violation of confidentiality duties, etc.

57. Everything that was said regarding the negative duty holds even stronger in the case of the right to liberty. As Supreme Court President Barak said in his book **Interpretation in Law – Constitutional Interpretation** (vol. 3, 1995), pp. 361-362:

> Several constitutional human rights are rights to non-violation. These rights belong to the category of *libertatis siva*; the flipside of these rights is the prohibition on others to violate them. These rights guarantee a person's freedom of operation in a given field, without imposing restrictions on him to act in any particular way. **These rights are therefore liberties. They do not impose any obligation on anyone else, except for the requirement to avoid violating this freedom (or liberty)**. The classic human rights – dignity, liberty, freedom of expression, conscience, religion and movement – belong to this category.
>
> …

> The two basic laws that protect human rights are founded on the classic liberties. This is evident in the negative linguistic formulas used in these laws: 'There shall be no deprivation or restriction', 'There shall be no entry', 'No search shall be conducted' and 'There shall be no violation'.

In addition, Section 5 is designed to protect physical liberty from violation by way of imprisonment, arrest, extradition and the like. This section, which is intended for the protection of physical liberty, is not the right tool for the protection of individual autonomy as regards choosing a spouse and bringing him or her to Israel. Therefore, the arguments made by the Petitioners in this context are, in our mind, baseless.

58. The Petitioners quote several foreign precedents upon which they base their case regarding the scope of the right to privacy and the right to liberty. These judgments address the constitutionality of a law that prohibits interracial (the Loving case) or same-sex (Goodridge) marriages, sex between persons of the same gender (Lawrence) and women's freedom to choose abortions (Casey).

The way we see it, these precedents are irrelevant to the main question addressed in this petition. As detailed below, these precedents reflect the understanding that the meaning of the right to privacy and the right to liberty is that the state must not actively interfere with the implementation of these liberties by the individual. These precedents therefore do not provide any foundation for imposing a duty on the State to grant entry permits to aliens in general and in times of armed conflict in particular.

59. The Respondents' legal argument is that wherever the freedom of the individual to select his or her spouse is not violated, and the State merely refrains from granting that spouse marriage-related preferential treatment in immigration, no violation of the right to privacy or the right to liberty has occurred.

(D)(3) The internal scope of the general right to dignity: the right to equality and family life

(D)(3)(i) General

The language of the Basic Law – "human dignity" as a multifaceted term

60. The Petitioners seek to derive from the general right to dignity two particular rights that were not expressly recognized in the Basic Law: the right of aliens to receive entry permits in order to implement family life and the right to equality.

The term "dignity" appears four times in the Basic Law: in the title; in Section 1(a), which defines the purpose of the law - "to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state"; in Section 2, which establishes that "There shall be no violation of the life, body or dignity of any person as such"; and in Section 4, which establishes that "All persons are entitled to protection of their life, body and dignity."

61. The linguistic vagueness of this term in the constitutional context creates difficulty in interpretation. This vagueness stems first of all primarily from the religious and philosophical content underlying the concept "human dignity", and the challenge in translating these terms into constitutional terms in Israel.

See A. Barak, **Interpretation in Law – Constitutional Interpretation** (vol. 3, 1995), pp. 404-406.

Regarding the many meanings attached to this concept in Judaism, see H. Cohen, ***"Gadol kevod ha-beriyyot* : Human Dignity as a Supreme Value**" *Hapraklit* Jubilee Issue (1993) 9, 31 and on; N. Rakover, (1999).

62. The essence of human dignity in the constitutional context – as both a specific right and an umbrella principle that serves as a foundation for all the other human rights stemming from it – is another reason for the interpretive difficulty of this concept.

This difficulty is evident in the language of the Law itself. The title and the purpose clause stress that human dignity is an umbrella principle from which specific human rights specified in the Law itself are derived. One of these specific rights is, in fact, the right to dignity. It is thus clear that **a distinction is drawn between human dignity as an umbrella principle and human dignity as a specific right**.

63. Broad interpretation of the specific right to dignity in a way that leans toward interpreting the specific right as an umbrella principle gives rise to the question of why the constitutive branch even bothered to mention other specific rights in the

Basic Law, if it were sufficient to merely specify the right to dignity, thus making the entire charter of human rights redundant. Furthermore, this broad interpretation in fact contradicts the intention of the constitutive branch, as we demonstrate below. At the same time, an interpretation that is too narrow might sterilize the uniqueness, symbolic value and significance of the right to dignity.

64. In order to understand the correct scope of the right to dignity, we must first refer to the language of legislative norm and to the basic principles of the Israeli legal system. In this interpretive system, special weight must be given to the intention of the constitutive branch, as reflected in the process that led to the creation of this constitutive norm.

Interpretive principle: The scope of social consensus

65. As a constitutive basis of the society to which it refers, a constitutional text must be based on a broad consensus. This means that great weight must be given to compromises between the various sectors in society, so as to accomplish a unifying constitutional text.

It is thanks to this broad consensus on basic principles that extra-political entities such as the Court can intervene in the political process and disqualify statutes. When disqualifying non-constitutional statutes, the Court reflects the consensus reached by the members of society about the principles that unite them and serve as society's guiding light. Therefore, disqualification of a statute does not constitute interference in the democratic process, but rather protection thereof.

In the words of Prof. Barak:

> Constitutional law must and in practice is based on national consensus. It reflects the original social consensus that underlies the constitutional law, and an ongoing consensus that underlies the continued legitimacy and existence of this law. This consensus enables society to unite around its common denominators. Naturally, such national consensus is reached by way of compromise. (**Barak**, pp. 67-68)

In this respect, the following has also been noted:

> Generally it can only be said that the ability of a constitution to fulfill its political functions depends to a great extent on the fact that it is founded on broad consensus. This is especially true in rigid, supreme constitutions that hand over the power to decide

> key issues to extra-political authorities that are not directly accountable to the voter. The legitimacy of the operation of such entities depends on the existence of a broad consensus surrounding both the values based on which they operate and the fact that they have the power to decide these matters. (R. Gavison, "*The constitutional revolution – a description of reality or a self-fulfilling prophecy*," *Mishpatim* 28 (1997) 21, 71)

66. The legislative process in which constitutions are adopted is therefore in most cases different than the regular legislative process, in terms of the entity that adopts the constitution, the time when the constitution is adopted and the celebrations and formalities surrounding the process. In some cases the process also includes an external mechanism, such as a referendum, and the constitution is adopted by an extraordinary majority or supermajority within the constitutive branch. It should be noted that these elements were almost entirely absent from the process in which Israel's basic laws were adopted.

See the judgment handed down by Justice M. Cheshin in CA 6821/93 *United Mizrahi Bank v. Migdal*, *Piskei Din* 49(4) 221, 471 and on, and p. 521 in particular.

67. One of the manifestations of this national consensus is that it is used as a tool in interpreting the Constitution. Because of the element of broad consensus and compromise, the intention of the constitutive branch must be given special weight, since this intention is the main expression of the aforementioned compromise and consensus. This premise holds with even more force in Israel's constitutional law, because of the unique process in which it was adopted.

As Prof. A. Rosen-Zvi said:

> Heeding the compromise means, first and foremost, that it must be taken into account in interpretation. But it also involves constitutional wisdom, both in terms of strategy and in terms of tactics. (A. Rosen-Zvi, "*A Jewish and Democratic State – Spiritual Paternity, Alienation and Symbiosis – Can a Circle be Made into a Square?*" *Iyunei Mishpat* 19 (1995) 479, 508)

And Justice Dorner said:

> The question of whether the expression 'dignity' in the Basic Law can be seen as including human rights that are not expressly stated therein, thus allowing for judicial review of statutes that violate these rights, is controversial.

> **Regarding human rights about which there is as yet no national consensus, as is necessary in order to anchor them in a basic law, and which were not expressly mentioned in the Basic Law because of this lack of consensus, I personally doubt that an expansionary interpretation that would include them under the term "dignity" in the Basic Law is permissible.** In any case, it is not the right way to go about it… (HCJ 4513/97 *Abu Arar v. Knesset Speaker***,** *Piskei Din* 52(4) 26, 46)

See also:

HCJ 453/94 *Israel Women's Network v. Israeli Government et al***.**, *Piskei Din* 48(5) 501, 534-536.

Supreme Court CA 4463/94 *Golan v. Prison Service*, *Piskei Din* 50(4) 136, 190-191.

See also Y. Zamir and M. Sobel, "Equal *Treatment under the Law*", *Mishpat Umimshal* 5 (2000) 165, 211-212.

68. Consequently, social consensus is a key factor in interpreting the suitable scope of a given basic right, including the right to dignity. One of the main instruments for identifying the scope of social consensus is the legislative history, which we describe below.

Interpretive principle: Legislative history

69. Israel's Declaration of Independence reflects the clear intention of the founding fathers that a constitution would be adopted within a short period of time. The first Knesset, which was to be the constitutive entity, did not adopt a constitution because of opposition to the very concept of one and because of disagreements about its content.

On 13 June 1950, the Knesset adopted the Harari Resolution, which stipulated that a constitution would comprise different chapters, in the form of separate basic laws. This mechanism was meant to circumvent the political hurdle and the lack of consensus about the principles the constitution would incorporate.

70. However, the Harari Resolution did not resolve the differences surrounding the constitutional affirmation of human rights; it only deferred the debate.

Israel’s legislative history is studded with attempts, with every newly elected Knesset, to constitute a complete human rights charter in the spirit of the Harari Resolution.

But all these attempts failed because there was no consensus in the Knesset as to the nature of this charter and as to which rights it was to include.

71. The breakthrough happened in 1989, in a private bill sponsored by MK A. Rubinstein. This bill was identical to the one drafted by the Ministry of Justice and submitted to the Government shortly before.

72. On 15 November 1989, the bill passed the first reading. However, it was held up in the Constitution, Law and Justice Committee. MK Rubinstein then conceived the idea of atomizing the bill. The bill was therefore broken down into several bills that deal with specific human rights. The rights that were outside the consensus were set aside, and bills addressing rights that were unlikely to raise controversy were promoted.

One of these bills was for Basic Law: Human Dignity and Liberty.

73. **None of these bills included the right to equality, which – as noted – was covered by the originally proposed constitution; nor did they include the right to family life, which was not even mentioned in the originally proposed constitution. These omissions were not inadvertent, and were due to the parliamentary circumstances at the time.**

74. Granted, it is hard to tell with certainty what the intention was of the constitutive branch or that of any individual Knesset member that supported the Law. It is nevertheless clear what the constitutive branch did not intend. Clearly, there was no intention to protect the right to equality, in the broad sense, with a basic law. This is why the social consensus that led to the legislation of the Basic Law never included the right to equality.

75. In our opinion, the legislative history gives rise to the unequivocal conclusion that in the matter of protecting rights that are not enumerated in the basic laws through the right to dignity, the legislation of the basic laws reflects a compromise that goes to the essence, rather than a tactical compromise or acquiescence.

One of the main outcomes of this social compromise is that the right to equality, in the broad sense of the concept, and the right to family life were not granted the protection of the basic laws.

76. **The analysis of the legislative history shows that the social consensus surrounding the right to dignity was to protect the core of this right, as emerging from the standard linguistic meaning of the term, namely, protection against clear-cut violations of human dignity – physical and mental violation, humiliation, degradation and so on**. As stated by the sponsor of the bill:

> During the Knesset session preceding the first reading of the bill, the drafter who submitted the bill noted that the Basic Law pertains to "human dignity and liberty" in the narrow sense only:
>
> This is a compromise which pertains to only one human right … perhaps the most important one: a man's right to his life, liberty and dignity – the right without which there can be no civilized society; the right without which there can be no democracy; the right that was in fact created by Judaism, namely, that God created man in his own image and that man is not a piece of property and cannot be enslaved. Every human being, as such, has inalienable rights with which he is born.
>
> This was what the Knesset members had in mind. The bill entitled "Basic Law: Human Rights" was broken down into parts, and Basic Law: Human Dignity and Liberty only included a portion – albeit the most important one – of the list of rights that were to be protected under the original bill. Therefore, the right to dignity protects man from "violation, humiliation, embarrassment and shame that debases the image of man". This right protects individuals from cruel punishment and injury to reputation, and upholds the individual's right to basic subsistence with dignity. (A. Rubinstein, **Israeli Constitutional Law** (vol. II, 5th edition, 1996), pp. 948-949)

77. Therefore, the interpretation of the right to dignity, as that of any other constitutional right, especially in Israel, must give special weight to social consensus and the intention of the constitutive branch. The fact that only a relatively short time has passed since the enactment of the Basic Law must also be taken into account.

Interpretive principle: The structure of the Basic Law

78. The Basic Law comprises the framework right, namely, the general right to dignity and liberty, as well as various particular rights. Because of this structure, the scope and applicability of any given right must be determined in consideration of all other rights. Interpreting the general right to dignity too broadly would lead to the inclusion of particular rights in its scope, and in fact render them redundant. In addition, an interpretation that expands the framework right might lead to recognition of constitutional rights that the constitutive branch expressly avoided including in the basic laws.

Regarding the scope of the right to dignity, Supreme Court President Barak said in his book **Interpretation in Law – Constitutional Interpretation** (vol. 3, 1995), p. 390:

> The fact that particular rights exist indicates that in principle the framework right does not apply if the particular right can be derived from it. **For example, Israeli nationals have the right to enter Israel. Non-nationals cannot assert a constitutional right to enter Israel by force of the general principle of human dignity**. Aliens cannot assert a constitutional freedom of occupation derived from human dignity, above and beyond the protection of regular laws. Indeed, the internal system of rights leads to the conclusion that a distinction must be drawn between different rights and between the values and interests that they protect. **Interpretation that renders particular rights superfluous and pools all rights under the framework rights must be avoided**.

79. Since the right to dignity is a framework right, the interpretation of this right must give weight to the relationship between the scope and applicability of the general right to dignity and the scope and applicability of the particular rights, so that they can all coexist.

<u>Interpretive principle: The location of constitutional analysis – under which part of the Basic Law should an alleged violation be screened</u>

80. The location of constitutional analysis is one of the factors that influence the scope of the defined right, and consequently the definition of violations. It is our position that the constitutional right should be defined such that only a substantive and serious violation of this right would be subject to analysis under the limitations clause. This is all the more important in the case of rights that are not specified in the Basic Law and receive partial protection through the right to dignity.

This approach reflects a principled position that the main constitutional debate should fall under the definition of the right, not under the limitations clause. This approach is motivated by the concern that overexpansion of the protected right would erode constitutional protection. The constitutional arrangement gives normative supremacy to a series of human rights. In order to maintain this supremacy, the uniqueness of these rights must be upheld. If any protected interest instantly becomes "a protected constitutional right" and any administrative intervention is immediately seen as "a

violation of a protected constitutional right", the normative supremacy of these rights will be eroded.

81. This position also prevents a situation in which every violation is immediately screened under the criteria of Section 8, so that the Court is forced to inspect the logic of every piece of legislation that influences human rights. In the case of the right to equality – on which we elaborate below – this would include almost any statute that does not apply to all Israeli citizens and residents.

82. Regarding the appropriate location of constitutional analysis, see the comments of Justice Strasberg-Cohen in CrimA 4779, 4713, 4424/98 *Pedro Selgado v. the State of Israel*, *Piskei Din* 56(5) 529, pp. 554-555:

> 5. According to the rules we follow, the constitutionality of a statute is examined in two main stages: In the first, the interpreter checks whether the human right protected by the basic law was indeed violated by the statute under review. Only if he decides that it was does he move on to the second stage, in which he asks whether the violating statute complies with the requirements of Section 8. (See A. Barak, Interpretation in Law – Constitutional Interpretation (1994), 473-474.) …
>
> 6. I share the position that substantive criminal law that pertains to the incarceration of a man is subject to the constitutional review. **However, I do not believe that the first stage of the review can be omitted and that the review can start with the second stage. Not every definition of a form of behavior as criminal and as calling for incarceration necessarily violates a right protected by the Basic Law. This question is determined in *a thorough examination as part of the first stage* of the constitutional review.** In this stage, it is asked whether the criminal norm and the incarceration penalty attached to it indeed violate a human right protected by the Basic Law; is the liberty protected in Section 5 of the Basic Law that of the criminal lawfully convicted of a crime that violated the liberty, physical integrity or life of another individual; whether the violation of the liberty of such a criminal is so self-evident that the interpreter can omit the first stage of the examination and move directly to the second stage? **My opinion is that the norm**

> **and the possibility to impose incarceration through it should be reviewed under *the tests of the first part* of the constitutional review…** (Emphasis added – Y.G.)

Conclusions can also be drawn from the approach of Justice Y. Zamir to the interpretation of the right to property, which is also anchored in Basic Law: Human Dignity and Liberty. According to this approach, the scope of the protected right should be limited so that the Court is not forced to review every piece of economic legislation that violates private property. Thus, only substantive violation of property shall be considered violation of the constitutional right:

> The focus of the great rule provided in Section 3 is not in the definition of 'property', but rather in the connection between the object of the legislation with the act pertaining to it. In other words, Section 3 refers to the violation of property. **In the case at hand, violation of property was explained by reference to statutes of substantial personal ramifications**, such as statutes that expropriate an individual's property without due compensation, arbitrarily or through some other material breach of his rights. (Emphasis added)

Bank Hamizrahi, *ibid*, p. 332, see also p. 578 (opinion of former Supreme Court President M. Shamgar).

83. South Africa has also rejected the broad approach according to which the analysis moves on to the limitations clause whenever differentiation is proven. The South African court realized that such a broad approach would force the courts to examine almost every piece of legislation and administrative act:

> If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. . . . The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the

> border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense. (*Prinsloo v. Van Der Linden* 1997 (6)BCLR 759 Para 17)

The judgment refers to Section 33 (the limitations clause) of the interim constitution, which is now Section 36 of the new constitution adopted in 1996.

84. In our mind, this interpretive principle should also apply in the case at hand, to wit, regarding the scope of the right to dignity, and especially regarding the scope of the right to equality and the right to family life, which are protected via the right to dignity.

Implementing the interpretive principles: Interpretive models

85. The language of the Basic Law, the constitutional history that is built on the social foundations of the State of Israel, the subjective and objective intention of the constitutive branch, the structure of the Basic Law and the fitting location of constitutional interpretation all lead to the same conclusion, that the principle of equality in the comprehensive sense and the full scope of the right to family life cannot be protected through a broad interpretation of the concept of "human dignity".

86. Under the existing legal circumstances, it is difficult to adopt the broad interpretation of the term "human dignity" in connection with Basic Law: Human Dignity and Liberty, according to which:

> Human dignity is free will and freedom of choice. Human dignity is the value of man, the sanctity of human life and the fact that man is free. Human liberty considers man an aim unto itself rather than a means for achieving anyone else's aims. This perception of human dignity and liberty, which joins them with free will, leads to the conclusion that human dignity means the individual's (physical and legal) freedom to do as he pleases. Human dignity therefore means the freedom of contract of any individual. **From this principled understanding of human dignity and liberty flows the principle of equality, freedom of expression, movement, religious belief and other rights that are closely related to the personality of a human being and**

> **the uniqueness of each individual …** (Emphasis added)
> (**Barak**, p. 421)

For this approach see also:

HCJ 5394/95 *Hupert v. Yad Vashem*, *Piskei Din* 48(3) 353, 360-363.

HCJ 721/94 *El Al Airlines v. Danilovich*, *Piskei Din* 48(5) 749, 760.

HCJ 453/94 *Israel Women's Network v. Israeli Government et al.*, *Piskei Din* 48(5) 501, 521-522.

LCA 105/92 *REM Engineers and Contractors v. Upper Nazareth et al.*, *Piskei Din* 47(5) 189, 201-203.

Supreme Court CA 4463/94 *Golan v. Prison Service*, *Piskei Din* 50(4) 136, 156-157.

HCJ 1133/99 *Adalah v. Minister of Religious Affairs et al.*, *Piskei Din* 54(2) 164, 186.

87. This expansive approach represents an ethical approach that is easy to identify with, but does not necessarily give the right weight to social consensus and constitutive intention. According to the legislative history, the basic rationale (because of which Israel has only a partial charter of human rights) was to achieve social consensus, even at the price of not affording constitutional protection to certain rights, important as they may be.

This expansive approach would, through interpretation, include in the right to dignity the very human rights that thwarted the endorsement of a human rights charter and were therefore **deliberately** omitted from the final version of the basic laws. These rights are freedom of religion, expression and movement, the right to equality in the comprehensive sense and the right to family life – which was not incorporated in the various bills to begin with.

A broad interpretation ostensibly renders all the debates about a charter of human rights redundant. If all the central rights can be generated from the right to dignity, why did we undergo decades of constitutional debate?

Supreme Court Justice A. Barak summarized this critique in his book:

> It is unfitting to accomplish through the judiciary what could not be accomplished through the constitutive branch. Problematic elements, such as equality, freedom of religion and faith and freedom of movement inside Israel, which the constitutive

> branch sought to set aside for the time being, should not be injected into the law against the intention of the Knesset, through the judiciary. These issues, which are outside of the national consensus, should be decided by the people, through its representatives in the constitutive branch, and not by the court. Judicial determination of these issues would compromise the legitimacy of the judiciary: it would keep these issues as an open wound that would stir up recurring debates as to the legitimacy of the judicial act. It would forever undermine the status of the judiciary, which would be accused of bringing human rights in through the back door and of 'judicial guerrilla'. (**Barak**, p. 414)

See also, H. Somer, "*The Unlisted Rights – The Scope of the Constitutional Revolution*," *Mishpatim* 28 (1997) 257, p. 314 and on.

88. Another difficulty in the expansive approach stems from the broad scope of the protected rights. The constitutional arrangement puts several human rights at the top of the normative hierarchy. In order to maintain this supremacy, the uniqueness of these protected rights must be observed. If any protected interest instantly becomes a "protected constitutional right" and any administrative intervention is immediately seen as a "violation of a protected constitutional right", the normative supremacy of these rights will be eroded.

As Justice Y. Zamir explained in the similar context of the scope of the right to property, which is also protected by the Basic Law: Human Dignity and Liberty:

> If any violation of value of a person's property, including violation of various monetary charges, violates his property, then the laws that violate the right to property are countless; the Court might be forced to devote most of its time to examining the constitutionality of every such law, checking whether it violates the right to property more than necessary; and the Legislature would have difficulty in performing its duties. The broader the scope of property as a constitutional right, the lesser the power of the protection that can be granted to this right. Over-expanding the scope of the constitutional right is biting off more than we can chew. (*United Mizrahi Bank* p. 471 (opinion of Justice Y. Zamir). For more about this

perspective see also A. Rubinstein, **Israeli constitutional Law**, (vol. II, 5th edition, 1996) p. 940)

89. It should further be noted that a large part of the modern legislative process is based on differentiation and prioritization. In other words, adopting the expansive approach would place almost every piece of legislation under the sophisticated microscope of the limitations clause.

As shown below, courts in other places in the world were troubled by this issue, and defined criteria to prevent this unwelcome result, based on the interpretive experience of constitutional courts.

We would like to stress that this difficulty with the expansive approach would have existed even if the right to equality and the right to family life were expressly protected by the Basic Law. It therefore certainly exists since no such express protection is afforded.

90. At the same time we agree that a narrow interpretation of the term "human dignity", which would completely rule out any reference to human rights that are not enumerated in the Basic Law, is unfit. Obviously, there are cases in which a violation of a human right that is not specified in the Law can amount to a violation of human dignity.

By this we do not mean that the right to dignity incorporates other specific rights. Rather, we mean that an act or norm that violates a certain right can also violate the right to dignity, so that the relevant violation is that of the right to dignity, as explained below.

91. The approach offered by the Respondents is a middle path, according to which the interpretation of the term "human dignity" does not require a decision as to whether certain categories of human rights are incorporated in it. ***According to this approach, the question that must be asked in every case is not whether any particular right has been violated but whether the alleged violation constitutes a violation of human dignity.***

92. This also holds in the cases of the right to equality and the right to family life. According to the expansive approach, the rights to equality and family life in the comprehensive sense are part of human dignity. According to the narrow approach, violation of equality or family life would never constitute violation of human dignity.

According to the Respondents' approach, violation of equality or family life can constitute violation of human dignity, but not all violations of equality or family life

would amount to a violation of the right to human dignity that is protected by the Basic Law. ***The dispute, therefore, surrounds the definition of a violation of equality or family life that would constitute a violation of human dignity.***

93. Let us now examine the alleged violation of the right to equality and the right to family life that the Petitioners seek to derive from the general right to human dignity.

(D)(3)(ii) <u>The right to equality</u>

<u>General</u>

94. The Petitioners seek to derive the right to equality from the right to human dignity. The Respondents maintain that according to the method of analysis that they propose, according to which complete categories of rights (in our case, the right to equality) must not be imported into the right to human dignity, the question to be addressed is whether the concrete violation – that is, the violation stemming from the refusal of the State to grant entry permits to alien spouses who belong to an authority that is in armed conflict with Israel – violates equality in a way that constitutes a violation of human dignity.

The Respondents hold that this method of analysis is fitting, considering that the right to equality was not incorporated as a particular right in the Basic Law. This absence is not an oversight. In the years preceding the legislation of the basic laws, "the most concrete front where the fiercest battles were fought was that of the formula of equality." (J. Karp, "*Basic Law: Human Dignity and Liberty – a biography of power struggles*," *Mishpat Umimshal* 1 (1993) 323, p. 336)

Therefore, in order to promote the protection of the rights that were not controversial, the right to equality was omitted. As Somer explained in his paper:

> The sponsors of Basic Law: Human Dignity and Liberty were thus forced to leave 'equality' out, in order to enable the swift approval of the other parts of the bill. Even in the first reading of the bill, several MKs argued against the fact that it does not address equality. The sponsor, MK Amnon Rubinstein, even said:
>
> 'Yes, this bill does not include a general equality clause, because this clause was the stumbling block, the hurdle that made it impossible to pass the comprehensive bill.' (H. Somer, "*The Unlisted Rights – The Scope of the Constitutional Revolution*," *Mishpatim* 28 (1997) 257, p. 276)

At the same time, note MK Rubinstein's comment in the first hearing that "obviously this bill incorporates the concept of general equality [in all] matters pertaining to human dignity and liberty" (Knesset Proceedings 1992, p. 1532).

95. In this context it has also been said:

> Equality is not part of the Basic Law, and as explained above, this is no oversight. The concept of composing a constitution in chapters was meant to circumvent the equality clause, which was the bone of contention at the heart of the debate about the Jewish nature of the State. The political consensus was to pass a law that would not incorporate an equality clause … It thus seems that the political tendency was not to discuss the equality principle as part of the Basic Law: Human Dignity and Liberty, and therefore also not to give it the normative force given to other rights under that Law. (J. Karp, "*Basic Law: Human Dignity and Liberty – A Biography of Power Struggles*," *Mishpat Umimshal* 1 (1993) 323, p. 348)

The Respondents maintain that some cases in which equality is violated constitute an infringement of the constitutional right to human dignity. Since the right to equality is not expressly protected by the Basic Law, the protected aspect of this right must be distilled through the right to dignity. Constitutional arrangements in other countries can help in this process. In the case at hand we must look at three aspects of this right: the extent to which it applies to aliens; the scope of the right as reached through an internal balance which is part of the definition of the right; and the extent of the violation of the right to equality. We elaborate on each of these aspects below.

<u>The extent to which the right to equality applies to aliens</u>

96. (a) In some constitutions that protect the right to equality as a separate, particular right, this right is reserved for nationals and/or residents only. For example, section 10(2) of the Belgian constitution provides:

> (2) ***Belgians*** are equal before the law; they are the only ones eligible for civil and military service, but for the exceptions that could be made by law for special cases.

Section 3(1) of the Italian constitution provides:

> ***All citizens*** have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.

The Greek constitution provides:

> 1. ***All Greeks*** are equal before the law.

Section 40(1) of the Irish constitution provides:

> ***All citizens*** shall, as human persons, be held equal before the law.

(b) Provisions of this kind, which reserve constitutional protection for nationals only, can also be found in the constitutions of Luxemburg, Bulgaria, Algeria, Albania, Armenia, Cambodia and Macedonia.

(c) Regarding the differentiation between nationals and aliens in Israeli law see: Leave for Elections Appeal 3969/97 *the State of Israel v. Abu Rabia Khaled*, *Piskei Din* 51(5) 470, pp. 479-480.

97. The Respondents maintain that the constitutional protection addressed in this petition is granted to Israeli nationals and residents, not to aliens seeking to enter the country. There are two reasons for this:

The first is the nature of the right on which the right to equality is superimposed; in our case, the right to enter Israel in order to implement family life. In light of the state sovereignty principle toward the outside and in light of the consequent broad discretion granted to the Minister of the Interior, and in light of the purpose of the humanitarian qualification regarding family unification, which is intended to benefit the Israeli spouse (as an exception to the rule under which no one but nationals or residents has a vested right to enter the country), clearly an alien seeking admittance into Israel has no standing to argue unlawful discrimination that justifies repealing a Knesset law.

The second emanates from the scope of the right to equality, regardless of the right on which it is superimposed. As demonstrated, in many countries in the West and otherwise, this protection is reserved for nationals and residents. For this reason too, an argument regarding unlawful discrimination that justifies repealing a Knesset law cannot be made by an alien seeking admittance into Israel.

98. Unlawful discrimination exists when Israeli spouses receive different treatment due to different personal characteristics that are irrelevant to the differentiation made. In the

case at hand, **the differentiation implemented by the statue is not based on the characteristics of the local spouse but on those of the alien**. Furthermore, the Temporary Order applies to all Israeli spouses, regardless of their personal characteristics. This fact undermines the foundation of the argument concerning unlawful discrimination of the local spouse.

The Petitioners, who also agree that if there is any discrimination the only injury that can be caused is to the local spouse, argue consequential discrimination against the local spouse. The Respondents' answer to this argument is threefold: ***Firstly***, objective justification – as explained later in connection with the European model – nullifies the alleged injury from the outset, even if consequentially a group differentiation results. In the case at hand, such objective justification is provided in the form of the professional assessment of the defence establishment (based on experience and professional analysis) concerning the threat to Israeli citizens and residents due to marriage-related settlement patterns of Residents of the Region in the course of the active armed conflict. ***Secondly***, in this case the purpose of the statute is not to discriminate against the Arab citizens of Israel, but to protect the life of all nationals and residents. Let it be noted that in the U.S., in order to overturn acts of Congress, it must first be proven that the purpose of the norm is discriminating. A discriminating result alone is not sufficient. ***Thirdly***, an argument of indirect collective discrimination must be supported by substantial evidence; the burden of proof lies with the Petitioners. The Petitioners failed to provide such evidence, which is necessary considering that on the face of it, marriages between Arabs who are Israeli nationals/residents and Residents of the Region account for only a small fraction of the marriages of Israeli Arabs.

<u>Identifying the violation by finding an "internal balance"</u>

99. Conceptually, the analysis of the right to equality is different than that of other rights, since the internal demarcation of this right involves ethical reasoning. For example, the definition of the relevance of a difference, which can nullify the very existence of discrimination because of such differentiation, is the outcome of ethical decisions that vary from time to time and place to place. As Prof. Thomas Wartenberg wrote:

> The important point of reference in the application of the general principle of equality is the idea of justice. Whatever justice requires as equal or unequal treatment in a particular case, depends on the prevailing moral and cultural order, and is also developed, in terms of legal psychology, from the generally

> prevailing ideas of justice. The generally prevalent moral and cultural values as well as ideas of justice find on the one hand their point of reference in the basic values of the constitution, but on the other hand can also change from time to time. The interpretation of the principle of equality depends not only on social and cultural changes, rather also on changes of legal consciousness. (*The Constitution of the Federal Republic of Germany* (U. Karpen, ed), p. 73)

The power of ethical values is not absolute in the sense that an internal balance must be struck between the extent of the difference and the extent of the objective justification.

100. Indeed, some constitutions demarcate the scope of a protected constitutional right with an ethical definition. This definition can nullify any possible violation altogether (Finland) or disqualify it (South Africa). Section 6(2) of the Finnish constitution provides:

> No one shall, ***without an acceptable reason***, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concern his or her person.

The South African constitution only affords protection to victims of unfair discrimination, as seen by South African society:

> 9. Equality
>
> …
>
> (3) The state may not ***unfairly*** discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

It should be noted that Section 36 of the South African constitution refers to the limitation of rights (the limitations clause), which underscores the fact that the justification of the differentiation is evaluated in the stage in which the definition of the right is examined, and not according to compliance with the requirements of this section.

101. This construction means, as we shall see shortly, that when there is an objective justification for the violation – and relevant differences constitute such justification – the violation is nullified. This ethical foundation creates an "internal balance" in the definition of the right to equality and the scope of violation of this right. It is within this balance that the legitimacy of the differentiation is evaluated.

The objective justification test to determine whether equality was violated was developed in the European Community in connection with indirect discrimination (that is, a situation in which the differentiation is based on a neutral criterion, but is de facto a specific group that is discriminated against). However, objective justification can also be used in the context of direct, deliberate discrimination:

> The concept of objective justification is in the European context often linked with the concept of indirect discrimination … However, as Drijver and Prechal point out, the application of objective justification is not necessarily limited to instances of indirect discrimination. (Irene P. Asscher-Vonk, "Towards One Concept of Objective Justification", *Non-Discrimination Law: Comparative Perspective* (Loenen & Rodrigues Eds.), 1999, p. 42)

102. (a) Thus, for example, in the precedent set by the European Court of Justice (ECJ) in the matter of Bilka-Kaufhaus, the Court addressed the question whether a wage practice that differentiates between part- and full-time workers, which de facto applies to many more women than men (since most part-time workers at the time were women) constitutes unlawful discrimination. The Court held that this differentiation would not constitute a violation of the principle of equality, provided that the employer explains it with objective reasons:

> Objectively justified factors unrelated to any discrimination on the grounds of sex.

In the same case the Court further held that the objective justification test requires the employer to demonstrate that the measure chosen accomplishes his goal:

> Corresponds to a real need on the part of the undertaking, and appropriate with a view to achieving the objective in question and are necessary to that end. (Bilka-Kaufhaus, case 180/84, ECR 1986, 1607)

(b) The ECJ implemented this approach in additional judgments pertaining to indirect discrimination, such as:

> Rinner-Kuhn, case 149/77, ECR 1989, 2743.
>
> Teuling-Worms, case 30/85, ECR 1987, 2497
>
> Kowalska, case C33/89, ECR 1990, 2591

ECJ case law indicates that justification for the differentiation should be considered in the stage in which the violation is defined. If an objective justification is identified (such as relevant differences), the alleged violation is nullified in this stage, even if the result is a class differentiation, and even if the differentiation applies to a specific group.

103. (a) As emerging from the paper of Asscher-Vonk mentioned above, the test of objective justification is also applied in state courts in Europe in the cases of alleged discrimination (especially in the context of indirect discrimination). The existence or absence of objective justification determines whether the differential treatment addressed is permissible or not:

> The concept of objective justification in these instances draws the line between allowed and forbidden indirect discrimination. (Asscher-Vonk, p. 42)

(b) See for example the explanatory remarks for the comprehensive amendments recently implemented in Section 14 of the Aliens (Consolidated) Act of 2002, which deals with unlawful discrimination:

> The fundamental criterion for the application of Article 14 is that the situations must be comparable ("in relevantly similar situations"). However, if differential treatment in comparable situations is **objectively and reasonably motivated, *there is no discrimination***. This implies that **differential treatment must pursue a legitimate aim and be proportionate** in order not to fall within the prohibition of discrimination. (http://www.finfo.dk/www.finfo/HTML/engelsk/Finfo_Danmark/NY_i_Danmark/Love_og_regler/side3.html)

104. It is our understanding that the definition of the right to equality must contain the "internal balance" construct, not only because of the nature of this right but also because of the fitting location of constitutional analysis in general and that of the right to equality in particular.

As noted, we maintain that over-expanding a protected right would erode the constitutional protection afforded to it. If any protected interest instantly becomes a "protected constitutional right" and any administrative intervention is immediately seen as a "violation of a protected constitutional right", the normative supremacy of these rights will be eroded. In addition, screening the violations in the first stage of the analysis would prevent shifting the focus of constitutional analysis to the purpose and proportionality of the violation, and would thus maintain the delicate balance between the legislative branch and the judiciary.

This concept is reinforced in the case of the right to equality, which was not expressly recognized in the Basic Law, because of the potentially broad scope of this right. In fact, if violations are not screened in the first stage of analysis, the Court would be forced to examine every piece of legislation that does not apply to all citizens and residents under the microscope of Section 8.

105. The question that needs to be considered in order to determine whether the right to equality was violated is **whether there is a relevant and objective justification for the differential treatment**. As detailed below, in the case at hand such justification exists, and the violation of equality is therefore nullified. Therefore, the constitutionality of the violation need not be examined under Section 8 at all.

The Respondents hold that in the case at hand an objective justification exists for differential treatment based on **the personal characteristics of the alien spouse – Residents of an authority (state-like entity) that is in armed conflict with Israel**. This differentiation is based on relevant considerations that, according to the professional assessment of the defence establishment, must be weighed under the circumstances. These circumstances are that granting legal status in Israel to spouses who are Residents of the Region increases the threat to public security, because of the current armed conflict between the Palestinian Authority and the State of Israel. Relevant considerations of protecting the right to life and public security **constitute legitimate objective justification** for limiting rights, as part of the internal balancing between competing rights.

106. It is therefore our position that due to this objective justification, the violation of the right to equality is nullified. However, in view of the importance of this issue, we would like to elaborate on the theoretical and comparative basis for the assertion that not all violations of equality amount to violations of the constitutional right to dignity.

Violations of equality that are not objectively justifiable and which constitute a violation of dignity

107. It is our understanding that a violation of equality that is not objectively justifiable can constitute a violation of human dignity (certainly in the ethical and symbolic meaning), but that not every violation of equality constitutes a violation of human dignity as protected by the Basic Law. The correct way to phrase the question would be: which kind of violation of equality constitutes a violation of human dignity.

108. Based on this principle, we assert that **only serious and substantive violations of equality can amount to violations of human dignity.** As seen in comparative law, the criteria according to which the seriousness and nature of the violation should be reviewed must include the identity of the injured group, the purpose of the statute, the extent of the violation, the nature of the violation, and so on.

109. **The constitutional analysis of the violation should focus mainly on the violation of the right, not on Section 8**, so that only serious violations that go to the heart of the right to equality and constitute violations of dignity are examined according to the criteria set forth in Section 8. This approach, which is respectful of the legislative process, is practiced in countries that have similar constitutions and protects against over-examination of statutes by the judiciary.

For this purpose we shall now provide a comparative review of the extent of constitutional protection granted to the right to equality and the relationship between this right and the right to dignity in the U.S., Canada and South Africa.

(a) The Untied States

110. The American Bill of Rights was enacted through amendments to the Constitution. This Constitution, which served as a basis for other Western constitutions, does no more than list protected rights. It does not follow the modern structure, which incorporates both a list of protected rights and a clause defining the conditions under which rights can be limited or violated.

The Constitution does not address the issue of human dignity, although there are schools of thought in the U.S. that consider this principle to be the guideline underlying constitutional protection of human rights. See **Barak**, p. 408 and on.

111. The principle of equality is anchored by the American Constitution in two separate provisions. The duty imposed on the states is established in the 14th Amendment, which states: "No State shall … deny to any person within its jurisdiction the equal

protection of the laws." The duty imposed on the Federal Government is derived from the 5th Amendment – the Due Process clause.

112. Since the constitutional directive is vague, in the many years since the Amendments were passed, the courts have developed judicial tests under which the statute or executive act are examined. As of now, there are three tiers of judicial scrutiny:

The first tier is that of strict scrutiny. It is applied in cases of suspect classification. In this tier, **the government must show that the challenged classification is necessary to serve a compelling state interest**. Suspect classification includes classification on the basis of race and national origin, and in some cases also distinguishes between residents and foreigners. Strict scrutiny is applied even if the suspect classification is designed to benefit the weaker segments of society. The strict scrutiny test is also used in the case of violation of fundamental rights as recognized by the courts: the right to vote, access to the courts and interstate migration.

See for example:

Hernandez v. Texas, 347 U.S 475 (1954)

City of Richmond v. Croson, 488 U.S 469 (1989)

The Government must also prove that the **Legislature** or the Executive, as relevant, **intended** to discriminate against that class. Thus, a discriminating outcome alone is not sufficient to overturn the statute, although it does serve as an indication of the purpose of the law. See *Washington v. Davis* 426 U.S 229 (1976).

113. The Supreme Court refused to categorize any further classifications as "suspect", even if they had the same attributes. However, a new tier was formed: intermediate scrutiny, of quasi-suspect classifications. In this case the government must show **that the challenged classification and the violation that it creates substantially serve an important state interest**. This category includes mainly gender-related classification, but also classification of illegitimate children. In the case of such classifications as well, **a discriminating outcome alone is not sufficient, and it must be shown that the purpose of the statute was to discriminate**.

See:

Craig v. Boren, 429 U.S 190 (1976)

U.S v. Virginia, 116 S.Ct 2264 (1996).

114. The lowest tier of judicial scrutiny includes all other classifications that do not belong to the two tiers described above. In these cases the Government need only show that

the challenged classification is rationally related to serving a legitimate state interest.

Classifications that have similar attributes to those for which the stricter tests are applied, such as sexual preference, mental conditions, disability and the like, fall under this category.

However, it is commonly accepted that classifications resembling those categorized as "suspect" would be scrutinized by the court with special care. Therefore, if it is discovered that there was an intention to injure an "unpopular" group that is not politically represented, the Government will find it very difficult to justify the violation, even under the ostensibly lenient test of "rational basis". See:

Romer v. Evans, 116 S.Ct 1620 (1996)

Massachusetts Bd. Of Retirement v. Murgia, 427 U.S 307 (1976)

City of Cleburne v. Cleburne Living Center, 473 U.S 432 (1985)

115. To conclude, U.S. law does not protect human dignity as a separately listed right. Some consider this a supreme right that influences the rights enumerated in the Constitution. The right to equality is expressly recognized. Although it does not ostensibly include any categories, over the years the Supreme Court has created categories of judicial scrutiny that afford different weight to different classifications made by the Legislature and the Executive. Case law has accordingly stipulated strict tests for suspect classification.

As seen above, not all classifications are strictly scrutinized. Some classifications are seen as more suspect, and therefore undergo stricter scrutiny. Although the right to equality is expressly protected, not every violation of equality receives the same constitutional review.

Another substantive criterion in the U.S. requires demonstrating that the purpose of the challenged norm is to discriminate. Therefore, a discriminating outcome alone cannot serve as sufficient grounds for overturning a statute.

(b) Canada

116. The Canadian Charter is a modern constitution that is similar in essence to Israel's basic laws. It contains a list of relative rights, which can be violated if the violation meets the requirements set forth in Section 1 (the limitations clause).

The impact of the Canadian Charter is evident in the language of the bill drafted by the Israeli Justice Ministry, which was the precursor of the basic laws. The

interpretation of the Canadian Charter is therefore most relevant to the questions with which we are grappling.

117. The Charter does not include any reference to the right to dignity, but it expressly protects the equality principle. Section 15 provides the following:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) permits violations on the basis of affirmative action. We will not be addressing this subject.

118. The equality principle can be violated if the violation complies with the terms set forth in Section 1 of the Charter, as interpreted by the Canadian Court. This section resembles the sections in Israel's basic laws that set forth the conditions for permissible violations.

119. Section 15 prohibits class discrimination, and expressly lists groups that must not be discriminated against. Discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability is impermissible. Although the language of the law makes no such restriction, the section was interpreted as referring **exclusively** to discrimination of the enumerated classes or to discrimination on analogous grounds.

This interpretation narrowed the reach of the equality section from the very beginning of constitutional interpretation in Canada.

See:

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143.

P.W Hogg, *Constitutional Law of Canada* (4th. Ed)(loose-leaf)(2002) 52-15, 52-35.

120. When constitutional analysis first began in Canada, as seen in **Andrews**, the prevalent perspective was that the scope of the protected right was relatively wide. The justification for the violation, and therefore the bulk of the constitutional analysis, was to be performed under Section 1. As explained above, this approach is also the one held today by the proponents of expansive interpretation in Israel.

However, the Court was divided on the question of whether the regular tests stipulated in Section 1 should be applied, or whether, because of the uniqueness of the

right to equality and the difficulty of implementing the regular tests of Section 1 in violations of this right, the tests used in such cases should be less strict. See **Hogg**, pp. 35-40 and on.

121. In the ten years after Andrews, a gradual change occurred. In the matter of the equality principle, this timeframe is one of uncertainty in Canadian case law. It is studded with judgments in which the Canadian Court generated many different opinions, from which it was difficult to draw a clear, single guideline as to the scope of the protected right to equality.

122. In 1999, the Court handed down a decision on the issue of equality, which – extraordinarily – was endorsed unanimously by all the Supreme Court justices. The decision, the language used and even express statements made in it indicate that the Court was trying to reach an agreed formula for the constitutional analysis of the right to equality, in order to give the other courts in Canada a clear guideline. This was the case of *Nancy Law v. Minister of Human Resources Development* [1999]1 S.C.R. 497.

123. The Court held that the main constitutional review would not be done under the terms of Section 1, but under the analysis of the violation of the constitutional right to equality. Therefore, compliance with the justifications provided in Section 1 need not be analyzed in every case of class discrimination.

The Supreme Court of Canada reached the understanding that, because of the vagueness of the right to equality and because of the nature of modern legislation, which is based on differentiation between various populations and individuals, there is no room to pass every piece of legislation through the strict sieve of Section 1. This is only necessary if the protected right is substantively violated.

According to the new guideline, the claimant must prove **not only that class discrimination exists, but also that this discrimination is substantive and unlawful, that it contradicts the purpose of the Charter and that it is based on a known classification.** Only in such serious cases of discrimination does the claim pass the threshold of violation and move on to an analysis under Section 1. This mechanism was summarized in the following passage:

> 39..., a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the

> claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? **And third, does the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1)**.

124. Constitutional analysis now depends on understanding the purpose of the protection afforded to equality. **The Supreme Court of Canada has held that the purpose of protecting equality is to protect human dignity.**

Based on this understanding, a new requirement was added to the constitutional analysis of equality: proving that the violation of equality is so great that it constitutes a violation of human dignity.

Thus, only a violation of equality that amounts to a violation of human dignity can constitute a violation of a protected right, and only violations of this kind are to undergo the scrutiny of Section 1.

125. The point of departure for any examination of an alleged violation of human dignity is the "reasonable person" standard: the perspective of a reasonable person in the same social and historic situation as that of the claimant. See paragraphs 59-61 of the decision. The Court defined four guidelines with which to determine whether the dignity of the appellant was demeaned, although this is not a closed list.

Firstly, whether the classification injured a weak, vulnerable group that even before the challenged norm suffered pre-existing disadvantage because of stereotypes and prejudice. However, this is not a mandatory condition. Moreover, **the fact that such a class was injured does not, in and of itself, necessarily lead to the conclusion that human dignity was demeaned. All the circumstances of the case must be analyzed as part of the analysis of the violation of the right**. As the Court explained:

> 67…I also do not wish to suggest that the claimant's association with a group which has historically been more disadvantaged will be conclusive of a violation under s. 15(1), where differential treatment has been established. **This *may* be the result, but whether or not it is the result will depend upon the circumstances of the case and, in particular, upon whether or not the distinction truly affects the dignity of the claimant**. There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory.

Secondly, whether the challenged classification is relevant and takes into account the unique characteristics of the claimant. For example, there are cases in which age- or gender-based discrimination is relevant because of the nature of the statute and the interests at stake, and therefore does not violate the claimant's dignity (Sections 69-71 of the decision).

Thirdly, whether the legislation has an ameliorative purpose or effect upon a more disadvantaged social group. This information is relevant if the claimant belongs to a socially strong group. However, even laws designed to promote the rights of a certain group with the aim of improving its inferior social status can constitute violation of the dignity of other social groups (Sections 72-73 of the decision).

Fourthly, the **nature** of the affected interest, and the **scope** and **type** of violation (Section 74 of the decision).

126. As mentioned, this is not a closed list, and other tests can also be offered. The purpose of these guidelines is to determine whether human dignity was violated, from the perspective of a reasonable person in the shoes of the potentially injured party, taking into account the overall social context. As held by the Court:

> 75… The general theme, though, may be simply stated. An infringement of s. 15(1) of the *Charter* exists if it can be demonstrated that, **from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity**.

127. Section 88 of the decision summarizes the new guidelines. The Court is to scrutinize the violation in the following order: is there a classification, is it based on one of the

grounds enumerated in the Charter or on analogous grounds, and does this classification constitute impermissible discrimination to the extent that it violates human dignity. The summary of the guidelines, on which we elaborated above, is provided below.

The Court held that not all injuries to groups protected by the Charter amount to constitutional violations of the principle of equality. Each case must be examined separately, so that only substantive violations qualify as violating the protected right.

The Court offers new guidelines for uncovering special violations that amount to a violation of human dignity: the identity of the injured group, the relevance of the classification, the **purpose** of the legislation and the type of injury. However, the Court notes that in certain cases of class discrimination, evidence will not have to be provided in order to prove an infringement, since it will be evident on the basis of judicial notice.

It is important to reiterate in this context that the right to equality is expressly protected by the Canadian Charter.

It should further be noted that this is just the beginning of the analysis, since any alleged violation of rights must still be scrutinized under Section 1.

128. To conclude, the Law guidelines reflect a new approach in Canadian law, according to which only a substantive infringement of equality resulting in a violation of human dignity shall be considered unlawful discrimination. **The main constitutional review takes place in the stage in which the violation of the right is analyzed, not in the stage in which the violation is checked for compliance with the criteria of Section 1.**

For new decisions implementing these guidelines see also:

Granovsky v. Canada [2000] 1 S.C.R 703

Gosselin v. Quebeq [2002]

For a critique of this approach see:

P.W. Hogg, **Constitutional Law of Canada** (4th Ed., 2002), pp. 26-52.

(c) South Africa

129. The South African Constitution is the newest of the three, adopted in 1996 as part of the democratization process.

130. Unlike the two constitutions reviewed above, the South African Constitution also includes a provision expressly protecting the right to dignity. Furthermore, the right to

dignity has a special status in this constitution, and it appears in other contexts as well – as a principle that affects the entire Constitution and in the section pertaining to limitation of rights, as another factor indicative of a violation of a protected right (Sections 1, 10, 36 and 39(1)).

131. The Constitutional Court of South Africa has given the term "human dignity" broad interpretation and views it as a principle that influences the interpretation of the entire Constitution. The specific provision protecting human dignity was also interpreted relatively broadly, so as to incorporate human rights that were not expressly enumerated in the Constitution.

132. It has been held that in view of South Africa's history and the treatment given to its black nationals, the right to dignity is a central right of the Constitution. This right influences the interpretation of all other rights and can even give rise to other human rights that are not expressly protected by law.

133. As in the case of the U.S. and Canada, the South African Constitution also expressly protects the right to equality:

> **Section 9 – Equality**
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not **unfairly discriminate** directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

134. Under the South African Constitution, as interpreted by the Constitutional Court, only **unfair discrimination**, as compared to simple differentiation or discrimination, constitutes violation of the equality principle protected by the Constitution. The Constitution enumerates many classifications that may serve as a basis for violation of the protected constitutional right. Classifications of these kinds create a refutable presumption of unfair discrimination. An infringement of equality that is not based on one of the enumerated rights will be considered to violate **the constitutional right only if it violates the dignity of the claimant**. The South African guideline as to the appropriate constitutional analysis of the right to equality was summarized as follows:

> [53] At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:
>
> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon **whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.**
>
> (b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have

been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution). (*Harksen v. Lane* no 1997 (111) BCLR 1489 Para 53)

135. According to this approach, the first step is to prove a connection between the legislation and a legitimate government purpose. If no such connection is proven, then unlawful discrimination has been established. But even if such a connection is proven, the statute must still undergo further scrutiny.

In the case of discrimination on grounds specified in the Constitution, a refutable presumption exists that this is unfair discrimination. If the discrimination is based on unspecified grounds, it must first be proven that discrimination even exists, that is, that different treatment is given based on irrelevant characteristics and that this different treatment violates human dignity. The next stage is to prove that this discrimination is unfair.

Let it be noted that this analysis was based on Section 8 of the Interim Constitution, which is identical to Section 9 of the final Constitution. The above quote is from the majority opinion delivered by Justice Goldstone.

136. One of the most interesting stages in the constitutional review pertains to the definition of unfair discrimination, since discrimination ostensibly, by definition, involves unfairness. **The Constitutional Court interpreted the element of unfairness as meaning that only serious discrimination that violates human dignity constitutes unfair discrimination**. As held in the Harksen case:

> [50]…In para 41 dignity was referred to as an underlying consideration in the determination of unfairness. **The prohibition of unfair discrimination in the Constitution**

provides a bulwark against invasions *which impair human dignity* or which affect people adversely in a comparably serious manner…

137. Because of the vagueness of the concept of "human dignity," in South Africa, as in Canada, guidelines have been determined in order to define which violations of human dignity in fact generate unfairness. But the South African Court stressed that this is not a closed list and that the flexibility of constitutional analysis must be maintained.

The guidelines provided resemble those stipulated in Canada, and take into account the social situation of the claimant and the treatment he or she had received in the past.

The guidelines also take into account the purpose of the challenged piece of legislation. A legitimate purpose reduces the chances that the discrimination will be declared unfair. Another factor weighed is the force of the alleged violation.

The following tests were defined:

> [51]…(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) **the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question**…
>
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

138. These tests were implemented by the Constitutional Court that same year, in a case addressing racial discrimination in the collection of water bills. The administrative authority was unable to fully rebut the presumption of unfair discrimination.

The Court held that the element of discrimination should be analyzed according to the outcome, so that even discrimination that is not racially based can qualify for the constitutional definition. However, as explained above, **the nature and purpose of the challenged provision** are also weighed in the analysis of the element of unfairness, since a legitimate purpose is a relevant factor that weighs against declaring the provision unfair. It was held that:

> [44] **This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits "*unfair*" discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness.** This is made clear in the passage cited above from the judgment of Goldstone J in *Harksen*'s case. It is also made clear in that case that an objective test has to be applied in deciding whether or not discrimination has been unfair. (*The City Council of Pretoria v. Walker* 1998 (3) BCLR 257)

139. To conclude, in South Africa the right to dignity and the right to equality are expressly protected by the Constitution and are closely linked. Human dignity is a key concept of the South African Constitution, and it serves as a basis for the analysis of all other constitutional rights and as a channel for protecting rights that are not enumerated therein. South African case law indicates that it is the history of this country that led to the heavy weight given in the Constitution to the principle of human dignity.

In analyzing the right to equality, the Constitutional Court does not rush to declare a violation of a protected right. The main constitutional review therefore focuses on the analysis of the violation. Only unfair discrimination, that is , serious discrimination that violates human dignity, is considered to violate the constitutional right to equality.

In analyzing the element of unfairness, weight is given to **the status of the claimant, the purpose of the statute and the extent of the violation**.

(d) Comparative review – summary

140. A cursory review of the constitutions of the U.S., Canada and South Africa reveals a substantive difference between them and Israel's Basic Law. All these constitutions expressly protect the equality principle, while the Basic Law does not. In these three countries the focus when analyzing the right to equality is on the discrimination of particular classes or based on specific personal characteristics.

Because of the difficulty in demarcating the scope of the right and because discrimination can be argued with respect to many prioritizing administrative and legislative acts, the scope of the constitutional right was limited to include only serious and substantive violations.

The courts thus **refrained** from quickly moving on to an analysis under the limitations clause, wherever one exists, since such a move transfers the burden of proof to the government.

141. The scope of the protected constitutional right is limited with different techniques of judicial review; the most interesting one is that used in Canada and South Africa, according to which only a violation of equality to the extent that human dignity is also violated constitutes a violation of the constitutional right.

142. Because of the vagueness of the concept of "human dignity", the courts have defined various guidelines with which to detect such serious violations of the equality principle.

As opposed to the rigid formula developed in the U.S., the Canadian and South African courts have refrained from creating a closed list of protected rights or defining rigid tests. Case law in these countries reiterates the need to maintain the flexibility of interpretation and examine each case individually.

Guidelines offered by the courts also give weight to the status of the injured group, the overall treatment that this group has received, the purpose of the challenged legislation, and the extent of the violation of the protected right.

It should be stressed that in the U.S. **no act can be overturned unless it is proven that its purpose was to discriminate**. In Canada and South Africa a discriminating outcome is sufficient to declare that the constitutionally protected equality principle has been violated. However, a **legitimate purpose** is a factor that could protect the challenged piece of legislation from being seen as violating a constitutionally protected right, despite the discriminating outcome.

(e) From the general rule to the case at hand

143. In Israel, the right to equality is not expressly protected by the basic laws, and as the legislative history shows, this is no oversight. The interpretive process in Israel is therefore unique and in fact opposite to that seen in the countries reviewed above.

While Canada and South Africa move from the principle of equality to the principle of human dignity as a way of reducing the scope of the protected right, in order to reserve constitutional protection for the core elements of the right to equality, the trend in Israel is reversed: from the right to human dignity to the right to equality, with the aim of expanding the rights protected by the basic laws.

144. As noted, a final decision has not yet been reached in Israel about several issues: the scope of the right to dignity; the relationship between the right to dignity and the right to equality; and whether the right to equality is protected by the Basic Law. It is our understanding that the most suitable approach is the one stressing that not all violations of equality necessarily violate human dignity.

See:

HCJ 4541/94 *Alice Miller v. Defence Minister et al.*, *Piskei Din* 49(4) 94, paragraphs 4 and 7 of the opinion of Justice D. Dorner

HCJ 7111/95 *Union of Local Authorities v. Knesset*, *Piskei Din* 50(3) 485, p. 497

HCJ 453/94 *Israel Women's Network v. Israeli Government et al.*, *Piskei Din* 48(5) 501, 534-536

Y. Zamir and M. Sobel, "*Equal Treatment under the Law*", *Mishpat Umimshal* 5 (2000) 165, 211-212

A. Rubinstein, **Israeli constitutional Law**, (vol. II, 5th edition, 1996), pp. 952-953

D. Kretzmer, "*From Bergman and Kol Ha'am to Bank Hamizrahi*", *Mishpatim* 28 (1997) 359, 385 (footnote 49)

D. Statman, "*Two Concepts of Dignity*", *Iyunei Mishpat* 24 (2001) 541, 579

145. In certain cases, class discrimination can indeed amount to a violation of human dignity. These are cases in which the discrimination occurs ***because of affiliation with a certain group***, in which the differentiation ***is based on irrelevant factors*** related to prejudice and stereotypes of the inferiority of this group. This also holds true for discrimination based on congenital or irreversible traits.

Because constitutional analysis is unique in the sense that it can lead to the striking down of a Knesset law, another conclusion must be drawn: differentiation that

amounts to discrimination, which can lead to the revocation of an administrative act, need not necessarily amount to a violation of human dignity to the extent that laws may be overturned (on the matter of administrative equality see HCJ 528/88 *Eliezer Avitan v. Israel Lands Administration et al*., *Piskei Din* 43(4), 297; HCJ 720/82 *Elitzur Religious Sports Association v. City of Naharia*, *Piskei Din* 47(3), 17).

146. We are arguing, in short, that the Temporary Order does not constitute unlawful discrimination against the Arab citizens of Israel, since it was not meant to discriminate against them. Even if the outcome of the law discriminates against them – which is not the case – this outcome does not constitute a violation of equality to the extent that human dignity is violated.

147. The Temporary Order applies to all Israeli spouses, regardless of their personal characteristics or group affiliation. It should be stressed that Jewish citizens who marry Residents of the Region will not receive an entry permit for the spouse either. The distinction drawn by the statute is not based on the personal characteristics of the local spouse but on those of the alien and on the relevant security factors. This fact nullifies the basis of the argument of unlawful discrimination against Israeli Arabs.

148. The Petitioners hold that the relevant criterion set forth by the Order, namely, the affiliation of the alien seeking to be admitted into Israel with an entity that is in active armed conflict with the State of Israel, leads to consequential discrimination.

Let it first be noted that the Petitioners have failed to provide sufficient evidence to substantiate the argument of consequential discrimination. But even if such evidence is provided – which is not the case – the existence of **objective justification for the different treatment nullifies the basis of the argument of alleged violation and the unlawfulness of such differentiation**. In the case at hand objective justification exists in the form of the professional opinion (based on professional experience and historical records) of the defence establishment regarding the threat to Israeli citizens and residents due to marriage-related settlement patterns of Residents of the Region in the course of the active armed conflict. Regarding protection of the right to life and public security as objective and legitimate justification for limiting rights, see the provisions in international treaties, as detailed above.

149. Finally, it should be stated that even if a violation of equality is assumed, this violation is not such that it constitutes a violation of the constitutional right to dignity that justifies overturning the statute.

As mentioned, it is our position that only substantive discrimination constitutes a violation of dignity. We believe that in proving the substantiveness of any case of

discrimination, **the purpose of the statute must be considered**. An argument of unlawful discrimination that amounts to constitutional violation is supported if the purpose of the statute is to injure individuals that belong to a certain class, because of irrelevant reasons.

In the case at hand, whether we implement the test of **intention to discriminate** (the American model), the test of **objective justification** (the European model) or **purpose of the legislation** (one of the guidelines used in Canada and South Africa for asserting the substantiveness of the violation) – **clearly the Order was not designed to discriminate against the Arab citizens of Israel, and this is not the objective purpose of this statute**. The Order was designed to prevent the entry and settlement of the residents of a state-like entity that is in active armed conflict with Israel. ***The purpose of this statute is legitimate and fitting*** – protecting the right to life at a time of armed conflict – and this is a weighty argument against deeming the Order a violation of the right to dignity.

(D)(3)(iii) <u>The right to family life</u>

<u>General</u>

150. The Petitioners seek to derive the right to family life from the right to dignity. It is our opinion, according to the method of analysis we propose, that entire categories of rights (in our case, the right to family life) must not be imported into the right to dignity. Although there may be cases in which violation of the right to family life amounts to violation of the constitutional right to dignity, in the case at hand the question that should be asked is whether this specific violation, namely that stemming from the refusal of the State to permit alien spouses from an authority that is in armed conflict with Israel into the country, violates the right to family life to a degree that also constitutes violation of the right to dignity.

The Respondents maintain that this method of analysis is fitting, considering that the right to family life, in its entirety, was not incorporated in the Basic Law as a particular right. This absence is not an oversight, as indicated by legislative history, which shows that this right was never incorporated in any draft of the bill sponsored by Prof. Rubinstein or in other social bills. Legislative history indicates that social consensus, which is the key element in defining constitutional rights, and is required for full, broad recognition of this right as constitutional, never existed.

151. This right was not incorporated as a particular right in the Basic Law because of the incredible potential for violations of this right in the State of Israel, in which religious

law governs the most basic aspects of this right, namely – the ability to marry, the form of marriage, etc.

It should be noted that the scope of the right to family life is potentially very broad, and can also include existing family units. Because of this potential, the Respondents would like to stress that Section 10 of the Basic Law (which preserves preexisting legislation) does not adequately answer these concerns. If the right to family life is recognized as part of human dignity, the Court might be forced to deal with constitutional dilemmas pertaining to personal status in general and to alternative family units in particular.

In Israel, there is as yet no consensus that the limitations on this right due to religious family law should be uprooted; the legitimacy of these limitations is a cause for serious societal rifts. Because of these rifts, this right was not included in the first place as a basic particular right, and it cannot be said that the social consensus has taken shape, as is necessary in order to recognize this right as constitutionally protected.

152. It should also be noted that the literature that deals with the demarcation of the right to dignity – and this does not mean that we agree with the proposed demarcation – proposed to incorporate under this right: minimum subsistence; equality; the freedom of individual will; reputation; freedom of expression; freedom of movement; freedom of religion, religious practice, conscience and faith; freedom of association; in criminal procedure. The important point is that this literature **never proposed incorporating the right to family life into the right to dignity**. (**Barak**, pp. 420-435)

153. This begs the conclusion that against the backdrop of no social consensus, as also seen in the legislative history, with regard to the full scope of the right to family life as a constitutional right, the method of analysis proposed by the Respondents is even more appropriate. According to this method, the right to dignity should not be used as a vessel for importing the full scope of the right to family life into the realm of constitutional protection; rather, **it should be checked, on a case-to-case basis, whether a given violation in fact violates human dignity as well.**

Let us reiterate that the Temporary Order does not prevent family ties from materializing, nor does it bar people from independently choosing their spouse or nullify the right to family life altogether. The Temporary Order limits the ability of couples in which one of the spouses is a Resident of the Region from basing their family unit in Israel of all places, while armed conflict is underway between Israel,

the country of which one of them is a national, and the Palestinian Authority, the state-like entity with which the other is affiliated. This is consistent with the purpose of the Temporary Order, as detailed at length above.

The question at hand is therefore whether the Temporary Order, which, against the backdrop of armed conflict, suspends the authority to admit into Israel persons affiliated with the Authority, which is in armed conflict with Israel, violates the right to family life, and whether this violation is so great that it also violates human dignity. In other words, **does the constitutional right to dignity also impose a constitutional duty on the State to admit aliens into its borders in general, and the subjects of an enemy entity that is engaged in armed conflict with it in particular, so as to enable the exercise of family life?** ***The Respondents answer this question in the negative***.

154. In their response, the Petitioners refer to HCJ 3648/97 *Stamka et al. v. Minister of the Interior*, *Piskei Din* 53(2), 728. They make this reference to prove that Israeli case law has recognized the right of an Israeli national to reside with his or her spouse in Israel as a **derivative right** of the right to family life. It is the Respondents' position that the Stamka case has no bearing on the one at hand, for three reasons:

Firstly, in Stamka the Court did not recognize any constitutional right to family life in the sense that it did not recognize the right of an alien to immigrate to his spouse's country of nationality. In the Stamka case, it was the policy of the Ministry of the Interior that was being challenged, **not Knesset laws as is the case here**; the Court was therefore not forced to address the constitutionality of the right to family life in general and that of the duty of the State to give aliens entry permits in particular. In other words, comments made in Stamka about recognizing a basic right to family life in case law do not mean that this right is also constitutional.

Secondly, the Stamka case concerned the policy regarding marriage-related immigration from any given country in times of calm. The circumstances of that ruling are therefore different from ours, which, as mentioned, revolves around the restriction of marriage-related settlement in Israel by Residents of the Palestinian Authority in the course of armed conflict, in view of the professional assessment of the defence establishment, which is based on the operational patterns of terror organizations and on past experience as to the threat to Israeli citizens and residents caused by this armed conflict.

Thirdly, even the paragraph to which the Petitioners refer only recognizes that the State has a duty to protect the family unit – "**subject to limitations as required for State security and public safety and wellbeing**."

155. Moreover, an analysis of the principles of international law reveals that the right to family life granted to residents and nationals does not impose any duty on the state to admit the alien spouse into the country. The state – both in customary international law and in treaty law – has absolute sovereignty toward the outside world. In fact, from the state sovereignty principle, international law concludes that no such duty exists.

We will now review the various international treaties and prove that although they recognize the right to family life, they do not impose a duty on the State to admit aliens into its borders.

The International Covenant on Civil and Political Rights

156. As noted, this Covenant reserves the right to be admitted into the country to nationals only (Article 12 of the Covenant, quoted in Section 33(b) above). In Articles 17 and 23, the Covenant refers to the family institution, but contains no provision compelling contracting states to grant legal status to alien partners.

Article 17 provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23(1) provides:

> The family is the natural and fundamental group unit of society and **is entitled to protection by society and the State.**

As noted, in the absence of an express commitment by and duty of the State, the protection granted to the family institution cannot give rise to an exception to the discretion given to the State in limiting the entry of aliens – a discretion that Article 12 of the Convention reserves for the State, as seen above.

157. The right to family life and to State protection of the family unit is interpreted as a **relative right whose implementation is also contingent upon other parameters and interests**.

In this context it is important to mention Article 4 of the Covenant, which provides that in *an officially declared state of emergency that endangers the life of the nation, a contracting state may take measures that violate their undertakings under the Covenant, as required under the circumstances*.

Article 4(1) provides:

> In a time of public emergency that threatens the life of the nation, and the existence of which is officially proclaimed, the States party to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

It should be stressed that Subsection 2 of Article 4 prohibits any derogation from certain specific articles to be made under this provision – Article 6 (the right to life), Article 7 (torture), Article 8 (slavery), Article 11 (imprisonment due to inability to fulfill contractual obligation), Article 15 (conviction without a declared criminal offense), Article 16 (recognition as a legal person). However, **Articles 17 and 23, which protect the right to family life, are not enumerated in Article 4(2); that is, in times of emergency, the obligations set forth in these articles can be derogated**.

The Convention on the Nationality of Married Women

158. This Convention stipulates that special arrangements must be made to facilitate the naturalization of an alien woman who is married to a national of a contracting state. As explained in the preamble, the Convention sets out to prevent situations in which after their marriage women have no nationality at all, because of a conflict of laws. However, Article 3 of the Convention expressly provides that the woman's right to the new nationality "may be subject to such limitations as may be imposed in the interests of national security or public policy."

As explained below, Israel's general immigration policy makes it relatively easy for aliens who marry nationals or residents to naturalize. However, as part of the discretion reserved for the sovereign, as also seen in Article 3 of this Convention, the application of this policy was temporarily limited as regards spouses who are

residents of the Palestinian Authority. This was done because of the threat to the security of Israeli citizens and residents caused by marriage-related immigration of residents of the Palestinian Authority to Israel against the backdrop of the active armed conflict between terror organizations, which are supported by the Palestinian Authority, and the State of Israel.

Finally, it should be noted that many countries have refrained from ratifying this Convention, including the U.S., France, Italy and Britain, which ratified the Convention but then withdrew its ratification.

The European Convention on Human Rights

159. As noted, Protocol No. 4 of this Convention protects the right of any person who is legally present in the territory of a contracting state to move within it and leave it freely (Article 2), and reserves the right to enter the state to nationals only (Article 3).

This Convention, which is not binding to Israel since Israel is not a contracting party to it, provides in Article 8:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 provides:

> Men and women of marriageable age have the right to marry and to found a family, **according to the national laws governing the exercise of this right**.

As seen above, Article 12 contains a qualification according which the right can only be exercised subject to state laws.

Let it further be stressed that along with the duties imposed on contracting states as regards the right to family life, Article 8(2) of the Convention also stipulates a **primary exception** that allows contracting states to limit the right in accordance with

state laws and as necessary in a democratic society **in the interests of national security, public safety** or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or **for the protection of the rights and freedoms of others.**

Let it further be stressed that Article 15 of the Convention provides that **in time of war or other public emergency threatening the life of the nation any contracting state may take measures derogating from its obligations under this Convention (except for specific Articles, which do not include Article 8).**

Let us proceed to discuss the rulings of the European Court of Human Rights regarding Article 8 of the European Convention on Human Rights.

160. (a) There were several cases in which the European Court of Human Rights interpreted Article 8 in the context of **an alien's right to continue living in a country in which he has resided for several years** by force of the legal status granted to him through marriage. For example, in the case of *Abdulaziz v. United Kingdom*, the Court held (paragraph 68), in connection with Article 8 of the European Convention on Human Rights, quoted above:

> **The duty imposed by article 8 (art. 8) cannot be considered as extending to a general obligation on the part of Contracting State to respect the choice of married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.** (http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1030120724&Notice=0&Noticemode=&RelatedMode=0)

(b) In the Abdulaziz case the Court further commented about the circumstances of the case (paragraph 67), which are also relevant in the case at hand:

> Moreover, the Court cannot ignore that **the present case is concerned not only with family life but also with immigration** and that, as a matter of well-established international law and subject to its treaty obligations**, a State has the right to control the entry of non-nationals into its territory.**

(c) The Court made similar observations in the case of *Jakupovic v. Austria*, handed down in February 2003:

> **The court recalls that *no right of an alien* to enter or to reside in a particular country is as such guaranteed by the convention.**

To be fair, it should noted that in this case the Court eventually decided that Austria's decision indeed violated a right protected by Article 8 of the Convention. However, the reason for this decision – which is not relevant to the case at hand – was the extremely unusual circumstances of the case, which led the Court to conclude that the decision of the Austrian authorities was disproportionate; the authorities in this case issued a 10-year residence prohibition against the applicant, **a youth of Bosnian descent who had been living in Austria since the age of 11**, because of criminal acts for which he had been convicted and sentenced to several months in prison.

(d) In the case of *Ahmut v. Netherlands*, the Court held that the right granted under Article 8 does not establish a right to select the most convenient place to develop family life.

> **Article 8 (art. 8) does not guarantee a right to choose the most suitable place to develop family life.**
> (http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/588.txt)

Similarly, in its ruling in the case of *Boultif v. Switzerland*, handed down in August 2001, the Court implemented the proportionality test derived from Article 8(2) of the Convention and examined the constitutionality of the decision to deport an Algerian man convicted for criminal offenses, who resided in Switzerland by force of his marriage. In its decision, the Court gave much weight to the question of whether the man and his wife, a Swiss resident, could develop their family life somewhere else – be it in the applicant's homeland (Algeria) or in any other country (paragraphs 52-53 of the decision).

One of the factors weighed by the Court was that the wife of the applicant never lived in Algeria, had no ties with this country and spoke no Arabic, and that the couple had no possibility of gaining legal status in any other country except the applicant's homeland.

Eventually the Court decided that considering the serious injury the couple would suffer and the fact that they had no viable options for living outside of Switzerland, and considering the relatively limited threat that the applicant represented for public order, not extending his permit to reside in Switzerland was disproportionate and thus violated Article 8(2) of the Convention.

(e) These principles have been integrated into state laws in Europe. For example, the explanatory notes for the Danish Aliens (Consolidated) Act of 2002 state the following:

> Article 8 does not involve a general and unconditional right to family reunification…
>
> **The European convention on human rights thus does not ensure a right to choose the country in which to start a family life**. As a rule, a duty for the country to grant family reunification will only exist if the parties are otherwise relegated to living as a family in a country which the resident person has no possibility of entering and in which he cannot take up residence together with his applicant…
>
> As an example of this can be mentioned a resident person holding a residence permit as a refugee or with protection of status.

(f) All of the above indicates that international law, which recognizes the right to family life, **does not consider this right to give rise to a derivative right to legal status in the country of the spouse, and in any case qualifies this right for various reasons, including national security and public safety**.

161. The Petitioners focus their arguments as related to **Ahmut** and **Abdulaziz** on the fact that these rulings stress the obligation of the state to consider the particular circumstances of each case. The response to this argument is threefold:

Firstly, these rulings were referred to in order to show that **the right to family life does not in principle incorporate the duty to permit the immigration of aliens into the country**, and even if the particular circumstances of the case must be examined, this does not give rise to a general duty of this kind.

Secondly, The Respondents do not dispute the principle that **when it is possible** to examine the particulars of each case, this should be done. The statute addressed in this Petition was born against the backdrop of the professional opinion of the defence establishment regarding the limitations of individual screening, **because of the unique attributes of the current armed conflict**.

Thirdly, these rulings were handed down at times of calm, and no inference can be drawn from them as to the conclusion that the European Court would have drawn regarding Residents of the Region under circumstances of the kind that the State of Israel is forced to deal with, namely, active armed conflict between Israel and the Palestinian side.

162. In their response, the Petitioners make reference to several rulings from which they seek to conclude the existence of a constitutional State duty to admit aliens into its territory for the development of a family unit (Ciliz, Mehemi, Berrehab).

The Respondents maintain that these rulings indicate no such constitutional duty, ***and certainly do not indicate the existence of any constitutional duty to grant permits despite a threat to public safety and to the right to life of citizens and residents, all the more so in a state of emergency***. We would also like to stress that the factual foundation underlying these rulings differs from that of the case at hand in several respects:

Firstly, these three rulings address **temporary residents** who are already in the State and have settled in it and lived in it after marrying locals. The rulings consider the question of *maintaining their existing status* after a change of circumstance (criminal conviction, dissolution of the family unit). In this respect, these rulings are substantively different from the petition at hand, since the Temporary Order refers to persons who have not yet acquired any legal status in Israel, have not yet made their home and family in Israel and have not yet developed any expectation as to their residence here. Furthermore, it can be said that not only does the statute addressed here not deviate from this case law, but that it is even in complete harmony with them since the Transitional Order guarantees that in the case of persons who already have permits to stay in Israel, the law shall not bar the extension of such permit.

Secondly, these rulings do not address the extent to which a state is obligated to grant a permit to an alien who belongs to a community that is engaged in armed conflict with the state to which the alien seeks to immigrate because of his or her marriage. They only address general immigration policy.

Thirdly, the Petitioners attempt to equate these rulings, which deal with general immigration policy, with the petition at hand, which deals with a specific aspect of limiting marriage-related settlement in Israel by residents of the Palestinian Authority, which is in armed conflict with Israel. It is our position that because of the unique attributes of the current armed conflict and in view of the professional assessments of the defence establishment that as of now it is impossible to conduct individual screening on a case-to-case basis and that under the circumstances it is impossible to tell whether the threat represented by a particular Resident of the Region will materialize, as explained above, such parallelism cannot be drawn.

Fourthly, One of the elements that differentiate between the case law to which the Petitioners refer and the case at hand is the security situation in Israel, which has led

to restrictions on the entry of persons who belong to an authority that is currently in armed conflict with Israel. As mentioned above, this exception is recognized by international treaty law.

163. Finally we would like to note that even in new constitutions, like that adopted by Bosnia in 1995, the constitutional right to family life does not apply to persons who are outside the territory of the state. Section 3(2) of the Bosnian constitution provides:

> All persons **within the territory of Bosnia and Herzegovina** shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:
>
> …
>
> (f) The right to private and family life, home, and correspondence
>
> …
>
> (j) The right to marry and to found a family.

164. All of the above indicates that **even under the international treaties to which Israel is a party, Israel was entitled to pass the Temporary Order at this time, in view of the state of emergency in which its citizens and residents are placed due to the threat represented by the residents of the Palestinian Authority. Under these circumstances, international law recognizes the state's right not to admit into its territory an alien who belongs to a state-like authority that is engaged in armed conflict with Israel.** A statute of this kind does not violate the right to family life, and even if it did, under the circumstances, to wit, in wartime, this violation was not of a kind that violates human dignity.

(E) The limitations clause

(E)(1) The limitations clause and provisional statutes

165. We maintain that even if a protected right has been violated, this violation complies with the requirements of the limitations clause in the Basic Law. Before reviewing the conditions set forth in this clause, let it be stressed that **the Temporary Order is temporary and only in force for one year**, as provided in Section 5 therewith:

> This law shall be effective for one day as of publication; however, the Government, subject to Knesset approval, may extend its force from time to time, for a maximum of one year at a time.

The Respondents maintain that in evaluating the constitutionality of an alleged violation of a protected right in compliance with the limitations clause, the Court must take into account the fact that this is a Temporary Order and as such is temporary. It was thus held in HCJ 24/01 *Ressler v. The Knesset*, *Piskei Din* 56(2) 699, p. 713 and on:

> There may be cases in which the Court decides, based on judicial policy, to accept the temporary nature of a provisional law as supporting a proportional violation of rights, and based on that to assume – *without making any ruling* – that the law complies with all other standards of constitutional review … (Emphasis in original)

Justice Goldberg said in HCJ 7111/95 *Union of Local Authorities v. Knesset*, *Piskei Din* 50(3) 485, p. 494:

> It must be noted that this is merely a transitional order that does not perpetuate inequality. Problems that emerge in the transition period of a law can be resolved in various ways and through various balances that can be struck, and it is up to the Legislature to select one of these alternatives. **The temporary character of the norm has bearing on the intervention of the Court in the Legislature's rationale and on the implementation of the section of the Basic Law – Human Dignity and Liberty in this case – that defines the scope of permissible violations**.

See also HCJ 726/94 *Clal Insurance Ltd. v. Finance Minister*, *Piskei Din* 48(5) 441, p. 486, in which Justice Strasberg-Cohen attributed exceptional weight to the provisional nature of the statute under review:

> The new policy is consistent with public interest. In this conclusion I gave special weight to the temporary nature of the legislation. The normative status of laws enacted by the Knesset reflects on the seriousness of the intention of designing a new policy that will resolve problems stemming from the existing situation. The transition period must naturally be short. While on one side of the scales we have an important social cause, on the other we have the violation of the petitioners' freedom of occupation, which under the circumstances must temporarily step back and make way for the social cause…

In light of these references and of the fact that the Temporary Order is limited in time, the Respondents ask the Court not to intervene in the acts of the Legislature.

(E)(2) The limitations clause tests

166. The limitations clause, namely, Section 8 of the Basic Law, provides:

> 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, to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.

According to the conditions set forth in the Basic Law, a violation of a protected right can only be constitutional if it is sanctioned by a regulation enacted by virtue of express authorization in a law befitting the values of the State of Israel and enacted for a proper purpose, and if the extent of the violation is not greater than required. It is the position of the Respondents that even if some right to which the Petitioners are entitled has been violated, this violation is constitutional, since it passes the tests of the limitations clause, as detailed below.

(E)(2)(i) A purpose befitting the values of the State of Israel as a Jewish and democratic state

167. The purpose of the Temporary Order is to minimize the daily threat to the public collectively and the threat to violation of the most fundamental basic right of every individual in Israel – **the right to life**.

As noted, this purpose can be extracted from the factual situation at the time when the Temporary Order was passed. These were circumstances in which the threat to the life of individuals in Israel was increased by the marriage-related settlement patterns in Israel prior to the Temporary Order, due to the armed conflict. This purpose can also be extracted from the legislative process in which the Temporary Order was passed into law; from the fact that the statute is temporary, which reflects that its purpose is closely related to current circumstances, namely, the armed conflict and the increased threat it created; from the fact that the reach of the Temporary Order was reduced as compared to the Government Resolution; and from the explanatory notes.

There can be no doubt that this purpose, ***protecting the right to life, is a worthy one that befits the values of the State of Israel as a Jewish and democratic state***.

168. Based on the reasons enumerated above, the Respondents hereby rebut the attempt made by the Petitioners, who argue that the security factor is a fig leaf covering for demographics, which they hold is the real motivation for this statute.

In the case of *Ron Menahem* the Court held that when there are several objective purposes for a given statute, the one under review shall be considered dominant:

> **That considered, if protecting the economic interest of the holders of 'green numbers' [license to operate a taxi cab] were the exclusive or even dominant purpose of Section 14E of the order, this purpose may not have been considered fitting. However, a thorough review of this Section reveals that this is not the case**. Firstly, as explained above, this Section has a traffic-related purpose – to provide the public with a bus service at reasonable costs, and to assure the flow of traffic in main traffic routes. As noted, these traffic-related purposes are fitting, and constitute a dominant purpose of Section 14E. **Secondly, the legislative history of Section 14E of the Transportation Ordinance reveals that the interest of holders of 'green numbers' to maintain the economic value of their licenses served as a serious factor in the final arrangement that was reached, but it was not a decisive or exclusive one**.

Even if one of the things that the statute appears to set out to accomplish is a demographic purpose, this was certainly not the dominant purpose. This can be deduced from the timing of this statute, which was only one year and nine months into the armed conflict and after a wave of suicide bombings.

169. Finally, even if the dominant purpose of the statute was demographic – which does not seem to be the case – then this purpose can coincide with the values of the State of Israel as a Jewish and democratic state. Let us refer to the words of Prof. Gavison, in her paper: "*The Jewish State – Implications on Immigration Policy*", *Memad* 27 (November 2003), 4:

> In fact, for those who seek self determination for both nations and promulgate the existence of a Palestinian state alongside Israel, the purpose of the statute – barring unlimited Palestinian immigration to Israel that does not allow the State any discretion– *is fitting and even called for* under the prevailing geopolitical situation … An immigration policy that is

> 'nationality blind', which does not give preference to Jews and does not restrict the immigration of all others, mainly Palestinians, is tantamount to ignoring Israel's reality and the history of its establishment.
>
> …
>
> The question of Palestinian immigration to Israel, whether by force of family reunification or by any other means, is not just a humanitarian question or one that is relevant [only] to the naturalizing individuals. This is a fundamental question that goes to the relationship between these two groups. Under such circumstances, Israel may and might even be obligated to enable Palestinians to obtain legal status in Israel, if this is made necessary by supreme humanitarian reasons. **However, as a matter of course it would be naïve and foolish on the part of Israel to grant general immigration rights, without a limit, to members of a group that has competing claims to those of the Jewish nation for self-determination in this land.**
>
> As noted, the State of Israel is not allowed to preserve its Jewish majority through means that violate human rights, but it certainly may decide not to voluntarily adopt any [facilitative] immigration policy for the Palestinian minority that lives in its territory and which has civil and political rights.

This quote was offered in order to stress that even if the demographic purpose was the one underlying the statute, which is not the case, this purpose is nevertheless in keeping with the values of the State of Israel as a Jewish and democratic state.

As noted, the objective purpose of the statue, or at least the dominant objective purpose, is to protect the right to life of all citizens and residents during armed conflict.

(E)(2)(ii) <u>General factors governing the application of the proportionality tests</u>

170. Before applying the proportionality tests, we would like to mention two general factors that have bearing on the way in which these tests are applied.

The first factor is the supremacy of the right that the Temporary Order seeks to promote, the right to life. This supremacy pushes the balance point closer to the right to life.

The second factor is that the Temporary Order is based on the position and professional expertise of the defence establishment. Therefore, the question of whether alternative measures exist, or rather, whether any effective alternative measures exist, with which the purpose of the statute – reducing the threat to the right to life – can be accomplished, is a professional question that leaves the Legislature relatively little leeway in selecting such alternative measures.

We shall now expand on these two factors.

171. ***Regarding the first factor***, namely, the influence of the purpose of the law on the implementation of the proportionality tests, let us state that in his book **Interpretation of the Law – Constitutional Interpretation** (vol. 3, 1995), pp. 518-522, Prof. Barak distinguishes between three main categories of purpose. The first includes laws designed to promote human rights. The second includes laws designed to promote social goals, and the third includes laws whose purpose is to violate human rights – a purpose that is not proper and therefore fails the constitutional test.

The relevant category in our case is the first, which includes laws designed to protect human rights, including **the right to life and physical integrity**, which in Israeli constitutional law is, as mentioned above, a basic right. Legislation that falls into this category is characterized by a clash between competing rights.

The tests provided in the limitations clause are the instruments with which the extent of protection extended to the violated right is balanced with the extent of protection granted to the violating right. Theoretically, the point of balance is influenced by the nature of the competing rights; therefore, in order to implement the limitations clause, the relative weight of these rights must be defined. In other words, means are by definition related to the aims that they set out to accomplish; therefore, the proportionality test and its three sub-tests are directly influenced by the strength of the fitting purpose in whose name the other basic rights are violated. In this vein, Justice Dorner held in HCJ 6268/00 *Kibbutz Hahotrim v. Israel Lands Administration*, *Piskei Din* 55(5) 639, p. 668:

> The precision with which the various requirements should be implemented depends on the weight of the protected rights and interests on the one hand ***and of the purpose of the violating act on the other***. (Emphasis added)

See also: D. Dorner, "Proportionality" Bernson Book (A. Barak, H. Bernson eds., vol. II, 2000, 281), which holds that the constituent parts of the proportionality test should be adapted as relevant to the various rights and interests protected by this principle,

and that ***the constituent parts of the test should be interpreted as relative rather than absolute***. (p. 289)

Similarly, in HCJ 4769/95 *Ron Menahem et al. v. Minister of Transportation et al.*, *Piskei Din* 57(1), 235, pp. 261-262, Justice Beinisch held:

> It is my approach that **the scope of protection granted to the freedom of occupation should not be based on the nature of this right in isolation. Rather, the protection granted to this constitutional right should be based on the aggregate of several parameters, including: the field that the violating statute addresses (economic, social, security related, etc.), the rationale for protecting the right and its relative social significance, the type of violation of the right and the force of violation in the specific case, the circumstances and context of the violation, and the nature of the competing rights or interests**. It is reasonable to assume that as time goes by, these standards will be applied by the courts on a case-to-case basis, which will help demarcate the constitutional protection granted to freedom of occupation in this legal system.

It should be noted that the South African Constitution expressly requires that weight be given, as part of the proportionality test, to the importance and purpose of the limitation, as provided in Section 36 of the South African Bill of Rights, which is part the South African Constitution:

> **Limitation of rights**
>
> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, **taking into account all relevant factors, including**
>
> 1. the nature of the right;
> 2. **the importance of the purpose of the limitation**;
> 3. the nature and extent of the limitation;
> 4. the relation between the limitation and its purpose; and
> 5. less restrictive means to achieve the purpose.

> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Respondents therefore argue that before applying the proportionality tests, the Court should first evaluate the relative weight of the violating and violated rights.

172. To conclude the first factor let us state that in the internal balance between the relevant human rights, the right to life has the upper hand, **since without this right no other right can exist, as it receives double protection under the Basic Law and as the sanctity of life is a fundamental principle in Israeli society**. Therefore, any statute that protects the right to life meets the requirement of a suitable purpose, and this supremacy should be weighted in the application of the proportionality tests.

173. ***Regarding the second factor***, namely, the fact that the Temporary Order is based on the professional assessment of the defence establishment, let us note that binding precedents have recognized that the realm of reasonableness for decisions of professional authorities that are based on relevant expert opinions is wide (HCJ 678/88 *Kfar Vradim v. Finance Minister*, *Piskei Din* 53(2) 501, 507). This binding precedent holds even stronger when it is not an executive act that is challenged but an act of the Knesset, which enjoys the presumption of constitutionality. (As an aside, let us note that the head of the Shin Bet made a personal appearance in front of the Committee and presented his professional position based on the professional experience accumulated by the Shin Bet since the escalation of the armed conflict.)

In this context let us refer to the opinion of Justice Strasberg-Cohen in HCJ 6406/00 *Bezeq v. Minister of Communication* (not published) regarding regulations:

> Is the decision of the Respondents regarding the rates charged by the Petitioner tainted with the legal defect of unreasonableness to the extent that this decision must be rescinded? … Although we studied the detailed oral and written arguments made by the Petitioner, we could only see in them a dispute, apparently a legitimate one, between the experts on the two sides. The Court is not supposed or fit to decide this dispute. The Court is supposed and fit to decide the question of whether the Respondents' decision to favor the opinion of their own experts over that of the experts employed by the Petitioner is unreasonable. The answer to this question is no: we did not

> consider the decision of the Respondents to be unreasonable in a way that requires the decision to be rescinded.
>
> If this is the case in an ordinary executive act, the same logic holds with even more force in the case of the Respondents' decision, which is not an ordinary executive act. The Respondents' decision was expressed in regulations that were approved by the Knesset's Finance Committee. It is these regulations that the Petitioner now challenges. It is well known that the Court exercises special restraint in the judicial review of regulations that have been approved by a Knesset committee. This is especially true in disputes that in essence revolve around economics, accounting or technology, as in the case at hand. In cases of this kind the Knesset's Finance Committee has a broader realm of reasonableness when approving the regulations; and the broader the realm of reasonableness, the less room is there for Court intervention.

In HCJ 240/98 *Adalah et al. v. Minister of Religious Affairs et al.*, *Piskei Din* 52(5), 167, the Petitioners challenged the constitutionality of the Budget Law. The Court, which rejected the petition, held that "the Petitioners did not give us the appropriate tools to work with; furthermore, they did not compare their cause with competing interests and did not examine the discretion exercised by the Knesset in passing the Budget Law – a discretion that is as wide as can be."

In that case Justice Cheshin referred to Aharon Barak's book, **Judicial Discretion** (1987), p. 255, regarding court intervention in matters "that the judge has no tools to deal with":

> In comparison [with factors of legal policy that the Court may weight in matters such as the rights of individuals, including freedom of expression, freedom of demonstration and freedom of occupation, etc. – M.C.], judges should be wary of weighing complex factors of economic or social policy, which are often controversial, require expertise and information and might require hypotheses upon hypotheses to be made. The safest, most reasonable course of action would in most cases be to leave such issues to the Legislature, which can obtain comprehensive

information from experts and formulate a legal policy that suits the issue from all angles.

174. To conclude the second factor, the fact that the Temporary Order is based on the professional position of the defence establishment regarding the necessity to use the selected measures should be weighed in the implementation of the proportionality tests.

175. Having addressed these two general factors, which bear on the application of the proportionality test in this case, let us now apply the tests themselves.

(E)(2)(iii) The proportionality tests

176. The requirement that the extent of the violation be "no greater than is required" determines the constitutionality of the selected measure. The proportionality test incorporates three requirements that must all be met: suitability – the violating act must be suitable to accomplish the purpose; minimal violation – the measure that is chosen must be the one that violates the right or interest at stake to the least extent possible; proportionality – any action that violates a protected right or interest will only be permitted if the violation caused is not disproportionate to the benefit accomplished by it (HCJ 1715/97 *Association of Investment Managers in Israel v. Finance Minister*, *Piskei Din* 51(4) 367, pp. 384-385).

177. (a) Suitability: This test requires a rational connection between the aim and the means. In the case at hand, this requirement is satisfied. It is the professional opinion of the defence establishment that in these difficult times, when large portions of the civilian Palestinian population are mobilized to the deadly armed conflict with Israel, and when a substantial majority in Palestinian society supports the continuation of terror against Israel, and terror is supported not only by terror organizations and terror activists but also by the security agencies of the Palestinian Authority and by residents of the Authority who in terms of their age and marital profile are not necessarily considered potential terrorists, restricting the entry and **settlement** of Residents of the Region in Israel is the most suitable instrument and measure for reducing the threat to public security and to the right to life of every Israeli citizen and resident.

178. (b) Minimal violation: This test requires assessment of the extent of the violation caused by two different measures. **In other words, the Petitioners must point to at least one other measure that is just as effective but that violates the right to a lesser degree.** The Petitioners do not seem to have applied this test properly, since instead of referring to it as a relative test that compares two different measures, they

make do with an unequivocal declaration that the violation resulting from this measure is not sufficiently low.

This test requires that the efficacy of the means employed be measured in light of the purpose that the violating law sets out to accomplish. The reason for this is that the nature and relative weight of this purpose impacts on the acceptability of error in the estimated efficacy of such means. **In the case at hand, the purpose of the law is to protect the right to life; a mistake in evaluating alternative means by which this purpose could be accomplished could mean the loss of lives. The certainty of the efficacy of any proposed alternative means of action must therefore be exceptionally high**.

It is the professional estimate of the defence forces, which is unfortunately based on experience, that under the current circumstances, as described above, individual risk assessment is inefficient and does not provide satisfactory prediction of the potential threat. Therefore, **under the circumstances, no other alternative can be considered an effective means of action that would violate the ostensibly protected right to a lesser degree**.

Let us further note that the Provisional Act was not the first measure implemented upon the eruption of the armed conflict in September 2000; it was only adopted after the suicide bombing **at Matza Restaurant in Passover 2002.** ***In these two years the defence establishment gradually realized that the unique attributes of the current armed conflict have rendered individual screening ineffective.***

As mentioned, the Petitioners have failed to point to an alternative measure that violates the protected right to a lesser degree. Even if they were to argue that such a measure exists, they would have had to offer supporting professional opinions from defence experts who have expertise with the attributes of this armed conflict and its implications.

179. (c) The extent of violation compared to its benefits:

(a) This test weighs the damage (the alleged violation to the right to family life) against the benefit (protection of the right to life). The supremacy and sanctity of the right to life leads to the conclusion that in the overall balance, the benefit justifies the alleged violation to the right to family life; all the more so since the violation does not nullify the right to marriage but merely rules out the possibility of exercising this right in Israel of all places (see HCJ 4769/95 *Ron Menahem et al. v. Minister of Transportation* et al (not published), and since the violation to the basic right is **temporary rather than permanent**, as explained above in detail.

Let it be noted that as part of the leeway given to the Legislature in choosing the modus operandi that least violates basic rights, and as part of the attempt to balance the severity of the danger to state and public security and the right to life on the one hand and the other rights on the other hand, the Legislature imposed the restricting Temporary Order temporarily, for one year only; the Order can only be extended subject to the **approval of the Knesset plenary**, which must first discuss the need for such extension.

Of course, in weighing the damages and benefits, the qualifications section (Section 3 of the Temporary Order) and the transitional order (Section 4) must be taken into account.

(b) Section 3 of the Temporary Order includes several qualifications that limit the restrictions imposed in Section 2 therein. Thus, the Minister of the Interior and the Commander of the Region are authorized to grant a Resident of the Region a temporary permit to stay in Israel for the purpose of work, medical treatment **or any other temporary purpose**. The maximum aggregate term that an individual may be allowed to stay in Israel was set at six months. Also, the Committee that reviewed the Order before the Knesset approved it added another qualification that prevents children under the age of 12 from being separated from a parent in Israel (Section 3(1)). Another qualification pertains to persons who made a substantial contribution to Israel's defence, economy or other important State matters (Section 3(2)), since it is reasonable to assume that such a person represents no potential security threat.

(c) Section 4 stipulates a transitional order, which – as is the nature of transitional orders – stipulates the arrangement to govern applications that were submitted **before the Temporary Order was created**. The two transitional mechanisms provided in the statute reduce the application of the Temporary Order with regard to applications that were made or approved before the Temporary Order was created.

The first mechanism in the transitional order authorizes the Minister of the Interior or the Commander of the Region to extend a permit to stay or reside in Israel that predated the Temporary Order. This partially qualifies the Temporary Order in the case of applications that had already been approved, and provides the means to maintain the situation preceding the Temporary Order without change. This qualification increases the proportionality of the Temporary Order, since it rules out a change in the position of persons holding a permit to stay in Israel.

The second mechanism in the transitional order authorizes the Commander of the Region to grant temporary permits to stay in Israel to persons who applied under the

Citizenship Law or Law of Entry into Israel prior to 12 May 2002 – the date of the Government Resolution. The transitional order is designed to protect the reliance interest of persons who are already in the process, and the expectation interest of persons who had already applied prior to the Government Resolution. In fact, the transitional order significantly reduces the number of individuals who are actually injured by the decision; this now includes mainly family units created after the Temporary Order was endorsed, as the policy restricting the marriage-related entrance of Residents of the Region has been in the public domain at least since the Government Resolution, that is, for the past 19 months.

(d) The Respondents maintain that the qualifications and transitional order reduce the extent of the violation caused by the Temporary Order, so that in the overall balance of benefit and injury, the scales tip even more toward the conclusion that the benefit outweighs the damage.

180. The Petitioners base their argument that the Temporary Order is incoherent on the qualifications and transitional order, which in fact are intended to guarantee the proportionality of the Order. Let us answer the main arguments raised by the Petitioners in this context and explain why these arrangements do not contradict the internal logic of the Temporary Order.

(a) Work permits: The Temporary Order authorizes the Commander of the Region to grant temporary work permits for a maximum cumulative period of six months. This provision does not indicate that the Temporary Order is incoherent, for two reasons:

Firstly, because of the restrictions imposed on work-related entrance into Israel, the threat represented by workers is not the same as that created by persons who seek to immigrate and settle in Israel after marrying a local. People who enter Israel for work are only allowed to do so at times of calm; when general closure is imposed, that is, when the threat to public security is heightened, they are not allowed in and their permits are automatically suspended.

In addition, even in times of calm, their entrance is restricted in the sense that workers do not spend their nights in Israel; are not permitted to enter with equipment, including cars; undergo daily physical searches at the gates; and the total duration of the permit is limited to six months. Furthermore, as of now, only 20,000 workers are allowed to enter Israel; this quota changes continually, according to circumstances.

Furthermore, unmarried men are not granted such permits, which are only given to people with families and over a certain age. In this respect, this is an entirely different population than that seeking family reunification. Since the entrance of workers is

subject to many restrictions and daily supervision, and especially since most permit holders are from Gaza and undergo stringent security checks at the Erez Crossing, they are not as attractive to the terror organizations. Therefore, the threat represented by the entrance of a worker into Israel cannot be compared with that created by entrance and settlement in the case of marriage.

Secondly, with day workers there is an effective measure with which to minimize the threat represented by their entrance to Israel – the daily physical search conducted at the gates, before entering Israel. This measure is only relevant in the case of persons who do not spend their nights in Israel, which is the case with workers; this is why they make their entry daily and undergo a daily check. This measure is inapplicable for persons who seek to immigrate to Israel after marrying a local. They spend their nights in Israel, receive Israeli papers within a relatively short time period, and once their permit is fully processed, they are free to move in and out of Israel, and can use cars with Israeli license plates in doing so.

For these reasons, permitting a certain number of workers to enter Israel under numerous restrictions is not equivalent – in terms of the threat and the tools for minimizing it – to permitting marriage-related settlement. Indeed, up to now only one Palestinian who entered Israel with a work permit has been involved in a terrorist attack.

(b) *The transitional order*: Without a transitional order, a law might be overturned because the reliance and expectation interests of individuals are not protected (see HCJ 1715/97 *Association of Investment Managers in Israel v. Finance Minister*, *Piskei Din* 51(4) 367). It is therefore hard to understand how the existence of the transitional order can contradict the internal logic of the Temporary Order.

The Respondents believe there is no need to explain why there is no basis for comparison between persons who have made a substantial contribution to State security and persons seeking to immigrate to Israel after marrying a local; the acts of the prior attest to the fact that he or she is not dangerous, so that permitting such a person entry does not nullify the internal logic of the Temporary Order. Also, the readiness to let people into Israel for clear humanitarian reasons such as medical care, for a limited time and in some cases a limited place, without allowing them free movement inside Israel, does not nullify the internal logic of the Temporary Order. Rather, it reflects sensitivity to humanitarian needs.

181. Let us add that as opposed to the allegations made in paragraph 78 of the Petition, the Temporary Order does not provide a sweeping prohibition on the military commander

from granting temporary permits to stay in Israel to Residents of the Region. This authority is given to the Commander of the Region in Section 3(1) of the Temporary Order, which provides that "the Commander of the Region … may nevertheless give a Resident of the Region a permit to stay or reside in Israel … or [for] another temporary purpose, for a period that will not exceed six months in total."

182. In light of the above, the Respondents ask that the Court hold that even if the rights protected by Basic Law: Human Dignity and Liberty have been violated, this violation passes the tests of the limitations clause in the sense that it is designed for a fitting purpose, namely, protection of the right to life, and that the extent of the violation is no greater than required in order to accomplish this supreme purpose.

(F) The scope of judicial review

183. The point of departure is that "legislation is the job of the Legislature. The Legislature is the faithful representative of the sovereign – the people. In keeping with the principle of separation of powers, the overall responsibility for enacting laws that accomplish proper purposes with proportional measures is imposed on the Legislature. It is the Legislature that has the tools with which to identify the proper purpose and select the proportional measures. The Court is not meant to replace the Legislature's rationale and priorities with its own. The Court does not step into the shoes of the Legislature. The Court does not ask itself which measures it would have selected were the Court a member of the Legislature. Rather, the Court implements judicial review. The Court examines the constitutionality of the law, not the wisdom of it. The question is not whether the law is good, effective, or just. The question is whether it is constitutional." (HCJ 1715/97 *Association of Investment Managers in Israel v. Finance Minister*, *Piskei Din* 51(4) 367)

With reference to the restraint that the Court must practice when exercising judicial review and judging the legality [sic] of laws, the Court held in CA 6281/93 *Bank Hamizrahi v. Migdal Cooperative Village*, *Piskei Din* 49(4) 221:

> The harmony between the branches of government calls for … drawing a "red line" between judicial review, which the Court is authorized to exercise, and involvement in the legislative process. The Court must beware of losing sight of this boundary and exercising an authority that it does not have. The Court must bear in mind that it only has the authority to carry out judicial review – to check whether a law is constitutional, and that in exercising this authority it does not replace the Legislature. The

> Court does not substitute the Legislature's rationale and priorities for its own. It is the Legislature, and not the Court, that has the freedom to choose between alternative measures that strike a balance between the proper purpose and the violation of a protected right. The Legislature has the discretion to select the measures most suited to accomplishing the proper purpose of the law.

In HCJ 7111/95 *Union of Local Authorities v. Knesset*, *Piskei Din* 50(3) 485, p. 496, Justice Zamir also elaborated on the caution and restraint with which the constitutionality of a law must be reviewed:

> The main point is, in my opinion, that Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation are not meant to make laws passed by the Knesset easy prey for anyone not pleased with these laws. Such laws still have full force: they still reflect the wishes of the sovereign, namely, the people. It is therefore the law that leads the way, including that of the Court … Human dignity and the dignity of the law are not necessarily mutually exclusive.

184. **Based on all of the above, it is the Respondents' position that in the case at hand intervention by the Court and striking down a Knesset law would not be justified. The Respondents therefore believe that the petitions should be rejected.**

Todat: 21 Kislev 5764

16 December 2003

Yochi Genesin

Head, High Court of Justice Matters

State Attorney's Office