CrimApp 8823/07

**A**

**v.**

**State of Israel**

The Supreme Court
[4 January 2009]
[24 March 2009]

*Before President D. Beinisch, Vice President E. Rivlin, and Justices A. Procaccia, E. Levy, E. Grunis, M. Naor, E. Arbel, E. Rubinstein, S. Joubran*

Appeal of a decision of the Jerusalem District Court dated 18 October 2007 in MApp 10116/07, issued by the Honorable Judge H. Ben Ami

Facts: The appellant was arrested on suspicion of membership in an illegal organization, and had been the subject of: a. a decision by the authority in charge to postpone the appellant's first meeting with an attorney by three days; and b. a decision, rendered two days after his arrest, to extend his detention by an additional ten days. The Jerusalem District Court rejected the state's request to have the appeal of the detention extension decision deliberated in the absence of the appellant; and the state successfully appealed that decision to the Supreme Court. The appeal against the extension of the detention was thus deliberated in a hearing conducted in the appellant's absence, in which the appeal was denied. The respondent next requested that the hearing regarding a second extension of the detention be conducted in the appellant's absence, and in response the appellant argued in the Magistrates Court against the constitutionality of the statutory provision allowing for such a hearing. The Magistrates Court rejected this argument, and the District Court upheld its decision. An appeal to the Supreme Court followed.

As an arrestee suspected of having committed a security offense, the appellant was subject to the possibility of having detention hearings and

appeals thereof held in his absence, pursuant to s. 5 of the Criminal Procedure (Arrest of a Security Offense Suspect) (Temporary Provision) Law, 5766-2006. The constitutionality of this section was attacked indirectly in the appeal originally heard by the Supreme Court, but not considered by the Court because it had not been raised in the earlier stages of litigation. The issue had become moot by the time the case reached the Supreme Court.

Held: (Vice President Rivlin) First, the Court could consider the constitutional issue despite its mootness, in light of the importance of the issue and the likelihood of its recurrence in other situations in which it would also become moot by the time its constitutionality could be determined by the Supreme Court. Next, regarding the substance of the appeal, the right to be present at a criminal proceeding (including at the detention hearing stage) is a core part of the constitutionally guaranteed right to due process, as currently established in the Basic Law: Human Dignity and Liberty. The right applies at all stages of a proceeding, including detention hearings. Because it is a constitutionally protected right, the denial of the right is permissible only if it meets the four conditions established in the limitations clause of that Basic Law. Here, compliance with the first two conditions (a legislative basis, and conformity with the values of the State of Israel) was not in question. The purpose of the section (the enabling of a continuous and effective interrogation of the suspect, without there being a need for an interruption for the purpose of bringing the suspect to court) is an appropriate one, and the third condition is thus met. The constitutional status of section 5 therefore depends on its compliance with the proportionality condition of the limitations clause, which it fails.

Compliance with the proportionality condition has been determined through the use of three sub-tests: a. whether there is a rational relationship between the measure that violates a right and the appropriate purpose it is intended to help achieve (a test which was met here); b. whether the measure involves the least possible violation of the right, in light of the purpose it is intended to achieve; and c. the "narrow sense" proportionality test which requires that the measure be one that creates a violation which is proportionate in terms of the appropriate purpose that is being achieved.

The measure here fails the last two sub-tests because of the depth of the violation involved — it is thus neither a measure that causes the least possible violation, nor is it one that represents a proportionate balancing between a violation of a right and the need to achieve a legitimate purpose. The depth of the violation involved is especially marked, given that the

measures described in s. 5 of the Temporary Provision can be combined with a measure established in s. 35 of the Criminal Procedure Law (Enforcement Powers — Arrests), 5756-1996, which establishes the possibility of delaying a meeting between a suspect and his attorney. The suspect can thus be prevented both from appearing in court at a hearing regarding his case, and from meeting with an attorney in order to assist in presenting his case — leading to his utter inability to enjoy due process during the proceedings held in his absence. The section is therefore an impermissible violation of a constitutionally protected right, and the Arrests Law is to be interpreted as if s. 5 had not been enacted.

*Justice Naor*, concurring in part, wrote that while s. 5 was invalid on constitutional grounds, the Knesset should be given a six month period in which to enact a more proportionate arrangement. Justice Naor considered the option of allowing the provision to stand in cases of a near certainty of frustration of the prevention of harm to human life, but ultimately decided that a full invalidation was necessary because there would always be the potential for disproportionate periods of detention. In Justice Naor's opinion, the decision that a statutory provision is unconstitutional as a result of its "cumulative effect" when combined with another statutory provision is a complex issue that should be left for further discussion. *President Beinisch* and *Justice Rubinstein* took a different view regarding the need for deferment and the utility of a new legislative arrangement, both finding that any alternative proportionate legislation would cover such a small number of cases that it would be pointless. *Justice Grunis* wrote that alternative legislation could be enacted, but that there was no need to defer the declaration of the section's invalidity for any period of time; to the contrary, an immediate invalidation would provide an incentive for the legislature to act promptly.

Appeal allowed.

**Legislation cited:**

Criminal Procedure (Arrest of a Security Offense Suspect) (Temporary Provision) Law, 5766-2006, s. 5.
Criminal Procedure Law [Consolidated Version], 5742-1982.
(Emergency) Defense Regulations — 1945, Reg. 85.

Evidence Ordinance [New Version], 5731-1971, ss. 44, 45.
Basic Law: Human Dignity and Liberty.
Criminal Procedure Law (Enforcement Powers — Arrests), 5756-1996, ss. 35, 38.
Criminal Procedure Regulations (Enforcement Powers — Arrests) (Deferral of a Security Offense Arrestee's Meeting With Attorney), 5757-1997.
Military Jurisdiction Law, 5715-1955.
Penal Code, 5737-1977, s. 34K.
Rabbinical Tribunals Regulations, 5733, Reg. 57.

**Israeli Supreme Court cases cited:**

[1] HCJ 6055/95 *Tzemach v. Minister of Defense* [1999] IsrSC 53(5) 241.
[2] HCJ 73/85 *Kach Faction v. Chairman of the Knesset* [1985] IsrSC 39(3) 141.
[3] HCJ 1581/91 *Salahat v. Government of Israel* [1993] IsrSC 47(4) 837.
[4] HCJFH 4110/92 *Hess v. Minister of Defense* [1994] IsrSC 48(2) 811.
[5] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* (2006) (not yet reported).
[6] CrimA 152/51 *Trifus v. Attorney General* [1952] IsrSC 6(1) 17.
[7] CrimA 353/88 *Wilner v. State of Israel* [1991] IsrSC 45(2) 444.
[8] HCJ 7457/95 *Barki Petra Humphries (Israel) v. State of Israel* [1996] IsrSC 50(2) 769.
[9] CrimA 1741/99 *A v. State of Israel* [1999] IsrSC 43(4) 750.
[10] FH 3032/99 *Baranes v. State of Israel* [2002] IsrSC 56(3) 354.
[11] CrimA 1632/95 *Meshulam v. State of Israel* [1996] IsrSC 49(5) 534.
[12] CrimA 951/80 *Kanir v. State of Israel* [1981] IsrSC 35(3) 505.
[13] CrimApp 4586/06 *Halido v. State of Israel* (2006) (unreported).
[14] CrimApp 1097/06 *Bineib v. State of Israel* (2006) (unreported).
[15] HCJ 5016/96 *Horev v. Minister of Transportation* [1997] IsrSC 51(4) 1.
[16] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.
[17] HCJ 6302/92 *Rumhiya v. Israel Police* [1993] IsrSC 47(1) 209.
[18] CrimApp 1144/06 *Ziyad v. State of Israel* (2006) (unreported).
[19] LCrimA 2060/97 *Valinchik v. Tel Aviv District Psychiatrist* (not yet reported).
[20] HCJ 5100/94 *Public Committee Against Torture in Israel et al. v. Government of Israel* [1999] IsrSC 53(4) 817.

[21] HCJ 3239/02 *Marab v. IDF Commander in Judea and Samaria* [2003] IsrSC 57(2) 349.
[22] HCJ 769/02 *Public Committee Against Torture in Israel et al. v. Government of Israel* (2006) (not yet reported).
[23] HCJ 3451/02 *Almandi v. Minister of Defense* [2002] IsrSC 56(3) 30.
[24] HCJ 7015/02 *Ajuri v. IDF Commander* [2002] IsrSC 56(6) 352.
[25] HCJ 1730/96 *Sabiah v. IDF Commander* [1996] IsrSC 50(1) 353.
[26] CrimApp 8473/07 *State of Israel v. A* (2007) (unreported).
[27] HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [1953] IsrSC 7(2) 871.
[28] HCJ 243/62 *Israeli Film Studios v. Gary* [1962] IsrSC 16 2407.
[29] CrimA 6696/96 *Kahane v. State of Israel* [1998] IsrSC 52(1) 535.
[30] HCJ 253/88 *Sejadia v. Minister of Defense* [1988] IsrSC 42(3) 801.
[31] HCJ 9098/01 *Ganis v. Ministry of Building and Housing* [2004] IsrSC 59(4) 241.
[32] HCJ 4562/92 *Zandberg v. Broadcasting Authority* [1996] IsrSC 50(2) 793.
[33] CrimA 6659/06 *A. v. State of Israel* (2008) (unreported).
[34] HCJ 10203/03 *"Hamifkad Haleumi" Ltd. v. Attorney General* [2008] (unreported).
[35] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* (2006) (unreported).
[36] HCJ 366/03 *Society for Commitment to Peace and Social Justice v. Minister of Finance* (2005) (unreported).
[37] HCJ 10578/08 *Legal Institute of Terrorism Studies v. Government of Israel* (2006) (unreported)
[38] HCJ 801/00 *Bassam Natshe and The Public Committee Against Torture in Israel v. Erez Military Court* (2000) (unreported).
[39] HCJ 320/80 *Kawasme v. Minister of Defense* [1980]. IsrSC 35(3) 113.
[40] HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior et al.* (2006) (unreported).
[41] HCJ 951/06 *Stein v. Police Commissioner* (2006) (unreported).
[42] HCJ 7957/04 *Mara'abe v. Prime Minister* (2005) (unreported).
[43] HCJ 7862/04 *Abu Daher v. IDF Commander in Judea and Samaria Area* [2005] IsrSC 59(5) 368.
[44] HCJ 9441/07 *Igbar v. IDF Commander in Judea and Samaria* (2007) (unreported).

[45] HCJ 1546/06 *Gazawi v. Commander of IDF Forces in Judea and Samaria* (2006) (unreported).
[46] CrimApp 10879/05 *Al-Abid v. State of Israel* (2005) (unreported).
[47] HCJ 7932/08 *Al-Harub v. Commander of the Military Forces in Judea and Samaria* (2009) (unreported).
[48] LCrimA 7284/09 *Rosenstein v. State of Israel* (2009) (unreported).
[49] CrimApp 4857/05 *Fahima v. State of Israel* (2005) (unreported).
[50] MApp 838/84 *Livni v. State of Israel* [1984] IsrSC 38(3) 729.
[51] CrimApp 9086/01 *Raviv v. State of Israel* [2002] IsrSC 56(3) 163.
[52] CrimApp 7200/08 *Sa'id v. State of Israel* (2008) (unreported).
[53] CrimApp 5114/97 *Salimani v. State of Israel* [2001] IsrSC 55(2) 721.

**U.S. Supreme Court cases cited**
[54] *Roe v. Wade* 410 U.S. 113 (1973).
[55] *United States v. W.T. Grant Co.* 345 U.S. 629 (1953).
[56] *Edgar v. MITE Corp.* 457 U.S. 624 (1982).
[57] *United States v. Munsingwear, Inc.* 340 U.S. 36 (1950).
[58] *U.S Bancorp Mortgage Co. v. Bonner Mall Partnership* 513 U.S. 18 (1994).
[59] *Kentucky v. Stincer* 482 U.S. 730 (1987).
[60] *Snyder v. Massachusetts* 291 U.S. 97 (1934).

For the appellant — R. Zoabi; D. Halevy.
For the respondent — M. Karshen.

JUDGMENT

**Vice President E. Rivlin**

1. The Jerusalem District Court (Judge H. Ben Ami) denied an appeal of two decisions issued by the Jerusalem Magistrates Court: the first was a decision by Judge R. Winograd, to hold a hearing regarding the extension of the appellant's detention, rendered in the appellant's absence; the second was a decision issued by Judge D. Pollock to extend the appellant's detention by an additional eight days. We first note that the issue arising in the appellant's own particular case — as is the case with deliberations of all cases of a similar nature within this context — became moot long ago due to the passage of time. But this does not bring the discussion to an end, as will be explained below. The appellant argues that the statutory provisions on which

the lower courts based their decisions to deliberate the extension of the detention in the arrestee's absence — s. 5 of the Criminal Procedure (Arrest of a Security Offense Suspect) (Temporary Provision) Law, 5766-2006 (hereinafter, "the Statute" or "the Temporary Provision") — is unconstitutional in that it violates the Basic Law: Human Dignity and Liberty (hereinafter also: "the Basic Law"). It is this constitutional issue that arose indirectly in the appeal that we face today; because of the nature of the matter, as will be explained below, we have seen fit to hear the case, despite its being a purely theoretical issue with respect to the appellant's case.

*Background and the parties' arguments*

2. The appellant was arrested on 5 October 2007 on suspicion of membership in an illegal organization (pursuant to Regulation 85(a) of the (Emergency) Defense Regulations — 1945). On 6 October 2007, the authority in charge decided to prevent the appellant's meeting with an attorney for three days (pursuant to authority established in s. 35 of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996 (hereinafter, "the Arrests Law") and in the Criminal Procedure Regulations (Powers— Arrests) (Delay of a Security Offense Arrestee's Meeting With Attorney), 5757-1997)). On 7 October 2007 the Jerusalem Magistrates Court decided to extend the appellant's detention until 17 October 2007. The appellant appealed this decision and the respondent, on its part, requested that the appeal be heard in his absence, pursuant to s. 5(2) of the Statute. That section is quoted here in full, as follows:

> 5. *Hearing held in the absence of an arrestee suspected of committing a security offense*
>
> The provisions of ss. 16(2) and 57 of the Arrests Law, with regard to the presence of an arrestee during deliberations as described in those sections, will apply with regard to the presence of a security offense arrestee during his detention, as stated in s. 4(1), with the following changes:
>
> (1) If the court orders, in the presence of the security offense arrestee, an extension of the detention for a period of less than 20 days, the court may, in the arrestee's absence,

> extend his detention for a period that does not exceed the balance of the days remaining until the end of 20 days from the date of the hearing that was held in the security offense arrestee's presence — if an application for such has been filed with the approval of the supervisor, and if the court has been persuaded that the suspension of the arrestee's interrogation is likely to prevent the thwarting of a commission of a security offense or hinder the ability to prevent harm to human life;
>
> (2) The court may order that a hearing concerning an application for a rehearing pursuant to s. 52 of the Arrests Law or of an appeal pursuant to s. 53 of the said statute be held in the arrestee's absence — if an application for such has been filed with the approval of the supervisor, and if the court has been persuaded that the suspension of the arrestee's interrogation is likely to cause material harm to the investigation;
>
> (3) The provisions of s. 15(c) through (h) of the Arrests Law will apply, *mutatis mutandi*, to a deliberation about whether to permit the presence of the arrestee in the proceedings described in this section;
>
> (4) A security offense arrestee will be made aware of a court decision reached in a deliberation that was held in his absence as soon as is possible, unless the court orders otherwise at the request of the State's representative, if the court is persuaded that disclosure to the arrestee is likely to prevent the thwarting of the commission of a security offense or the ability to prevent harm to human life;

The District Court rejected the request for the hearing to be held in the arrestee's absence, noting that after reviewing the classified report attached to the application, it was not persuaded that the suspension of the interrogation for the purpose of having the arrestee present at the deliberation of the appeal would likely cause material harm to the investigation. The state appealed this decision to the Supreme Court. The Supreme Court (*per* Justice Fogelman) granted the appeal. The Court reasoned that ss. 5(1) and 5(2) of the Statute do violate the suspect's right to be present at his detention hearing. The Court emphasized that the combination of these provisions with the possibility that

the suspect may be prevented from meeting with his attorney, "leads to a situation in which, as a practical matter, the respondent's ability to present his position at the hearing is very limited". This, the Court noted, constituted a material violation of the arrestee's right to be present at the deliberation of his case, to defend himself and to present his position. The Court emphasized the severity of this violation in light of the fact that the deliberation dealt with the restriction of a person's liberty in the form of his arrest —liberty being a basic right protected by the Basic Law: Human Dignity and Liberty.

3. Despite the constitutional context, the Supreme Court did not discuss the argument that the Statute is unconstitutional, because the arguments concerning that issue were first raised only in the context of the appeal, without a proper background having been presented and without the state having been given an opportunity to relate to the issue. The Court therefore discussed only the matter of implementation, and in this connection noted that in light of the violation of the arrestee's rights, it was necessary to determine that the violation was no greater than absolutely necessary. The Court further noted that the legislature had made a distinction between s. 5(1), dealing with the extension of detention, and s. 5(2), dealing with the deliberation of an application for a rehearing or an appeal. In the first case, the ability to hold the deliberation in the arrestee's absence is very limited — in fact, this can only be done in a case in which the court "is persuaded that the suspension of the arrestee's interrogation is likely to prevent the thwarting of the commission of a security offense or hinder the ability to prevent harm to human life"; in contrast, the requirement in s. 5(2) is that the suspension of the interrogation is likely to "cause material harm to the investigation". The Court also found that, in connection with the implementation of the provisions of the Statute, consideration must be given to the interest in preserving public welfare and security on the one hand, and on the other, to the need to protect the arrestee's rights. The court must determine, *inter alia*, the severity of the harm done to the investigation, the likelihood that such harm will occur, the gravity of the suspicions and the potential danger inherent in the matter under investigation. As Justice Fogelman wrote: "The more severe the suspicions attributed to the arrestee, and the greater the potential danger to public welfare and security that is involved in the matter under investigation, the greater the tendency is towards granting the said request. And the reverse is true as well."

Moving from the general to the particular: the Supreme Court, in considering the standard to be applied in the petitioner's case — i.e., the possibility of "material harm to the investigation" — determined that the evidentiary and intelligence foundation that had been laid before it, which included additional information beyond that which had been presented to the District Court, indicated a high probability that the investigation would be substantively and materially impaired if it was suspended in order to allow the detainee to appear at the hearing of his appeal. The state's appeal was therefore allowed, and it was held that the hearing of the appellant's appeal regarding the extension of his detention could be held in his absence.

4. On 11 October 2007, the District Court heard the appellant's appeal regarding the extension of his detention, but without the appellant being present. The appeal was denied. In the meantime, it was also decided that the period during which he could not meet with his attorney would be extended for an additional six days (beginning on 16 October 2007).

In anticipation of the hearing regarding the extension of the appellant's detention on 17 October 2007, the respondent filed a request to have that hearing held in the appellant's absence, pursuant to s. 5(1) of the Statute. The appellant, on his part, raised the argument that the statutory provisions on which the respondent relied were unconstitutional and that they should therefore be declared invalid. The Magistrates Court, in its decision dated 17 October 2007, rejected the constitutional argument and held that the Statute satisfies the requirements of the limitations clause of the Basic Law (s. 8 of that Law). The Statute, it was noted, was designed to prevent harm to human life in circumstances in which the suspect is a "ticking bomb" or in which his interrogation could prevent the "explosion of a ticking bomb". This purpose, it was held, is a proper one. The Magistrates Court added that the violation of the arrestee's rights caused by s. 5 of the Statute is proportionate — in light of the fact that the first order for the suspect's detention had been issued in his presence, that the right had only been denied later on (at the point when the court was deciding whether to extend the remand and during the rehearing and appeal), and in light of the high level of proof that the respondent was required to meet in order to establish a ground for applying s. 5(1). Regarding the appellant, the Magistrates Court held that the material that had been presented in his case met the narrow test established in s. 5(1) of the Statute, and that the hearing regarding the request for an extension of the remand could be held in the appellant's absence. The same day, the

Magistrates Court issued another decision, to the effect that the appellant could be detained for an additional eight days (through 24 October 2007).

5. An appeal was filed with the District Court against all these decisions, and it was denied on 18 October 2007. The District Court also recognized that s. 5 of the Statute violates an arrestee's basic right — the same as that of an indicted defendant — to be present at his own trial. This violation, the District Court held, has a justifiable purpose, and it is also proportionate: "because, unfortunately, the State of Israel has officially declared a state of emergency and the right to life of the residents of the country hangs in the balance, and it is also beyond doubt that the reasonableness and proportionality requirements have been satisfied." The District Court also did not see fit to intervene in the specific holdings in the appellant's case.

An appeal against this decision — the appeal now pending before us— was filed on 21 October 2007. Several general questions were raised in the appeal relating to the constitutionality of s. 5 of the Statute, as were various specific questions regarding the implementation of the section in the appellant's particular case. Naturally, our case focuses on the constitutional claims. The appellant believes that ss. 5(1) and 5(2) of the Statute violate an arrestee's right to be present at his trial, as well as his rights to due process, dignity and liberty. This violation, it is argued, is inconsistent with the provisions of the limitations clause of the Basic Law: Human Dignity and Liberty, particularly when combined with other violations of the rights of a security offender, in particular, of the right to meet with an attorney. The appellant also believes that s. 5 of the Statute conflicts with the State of Israel's obligations pursuant to international humanitarian law.

When this case was brought to this Court, it was determined that a panel of three judges would deliberate it on the following day. The Court (Justices Arbel, Joubran and Fogelman) noted, in a decision dated 22 October 2007, that the grounds on the basis of which the arrestee was prevented from attending his hearing were no longer valid, and that given this fact, the deliberation of the issue of the appellant's detention would be returned to the Magistrates Court to be reheard in the presence of the appellant. Nevertheless, the Court held that this Court would deliberate the

constitutional matter separately, after the parties had submitted their written positions.

6. The respondent, in its written arguments, did not dispute the importance of the right of an arrestee to be present during deliberations regarding his detention. However, the respondent argued that even if the right is a constitutional one — and it raises certain questions regarding that point — its violation within the framework of s. 5 of the Statute is permissible pursuant to the provisions of the limitations clause. The respondent argued that the Statute was enacted in response to the needs of the time, as a means of coping with the security situation prevailing in Israel following, *inter alia*, the implementation of the disengagement plan and the establishment of the Hamas government in the Gaza Strip. The respondent also argues that s. 5 of the Statute does not conflict with the State of Israel's obligations pursuant to international humanitarian law and that even if such a conflict existed, it would not be sufficient to justify a nullification of the Statute.

7. The case was scheduled to be heard before a panel of three justices in the middle of 2008. Even before the date set for the hearing, a number of human rights organizations submitted a petition to this Court seeking to invalidate the Statute in its entirety on constitutional grounds (HCJ 2028/08 *Public Committee Against Torture in Israel v. Minister of Justice*). A decision was made to consolidate the two cases and on 27 July 2008, the Court ruled that the deliberation would proceed before an expanded panel. On 4 January 2009, a deliberation was held before the expanded panel, and oral arguments continued on 24 March 2009. In the course of the deliberation held on that date, a majority of the panel decided to review, *ex parte*, the classified material that the respondent wished to present. After the review, the parties returned to the courtroom and the Court informed them of the main points of the material that had been presented *ex parte*. Only then did the petitioners in HCJ 2028/08 state that they were withdrawing their petition in light of the decision to review the material *ex parte*. The petition was therefore withdrawn and only the appeal before us remained in place. As stated, this appeal raises, indirectly, the question of the constitutionality of s. 5 of the Statute.

*Theoretical appeal*

8. The appeal before us was filed by a person — the appellant — who believed that he had been harmed by the implementation of s. 5 of the Statute; the appeal attacked the section's constitutionality indirectly. The appellant raised various arguments regarding the constitutionality of the

section in the earlier stages of litigation as well. The earlier panels responded to these arguments by rejecting the contention that s. 5 is unconstitutional (regarding indirect attacks on statutes in trial courts, see A. Barak "Judicial Review of a Law's Constitutionality: Centralized or De-Centralized," 8 *Mishpat U'Mimshal (Law and Government)* 13 (2005)). When the question reached this Court in the context of the appeal of the first round of litigation, it was still relevant to the appellant's case. However, as indicated in this Court's ruling dated 22 October 2007, the grounds for the non-appearance of the appellant in court had lost their force before this Court had the opportunity to decide the constitutional issue. The significance of this is that the constitutional issue became moot with respect to the appellant's specific case. The Supreme Court therefore returned the appellant's case to the Magistrates Court to be deliberated there in the appellant's presence. Nevertheless, the Court decided to retain its focus on the constitutional issue.

9. It often happens that a discussion of a theoretical issue emerges in the framework of the process of an appeal to the High Court of Justice. The rule is that the Court does not customarily discuss a theoretical issue and it will prefer to wait until an appropriate specific case arises before it prescribes a particular rule. However, in certain cases, the Court is nevertheless required to deal with a petition that is only theoretical in nature. Justice Y. Zamir stressed this point in HCJ 6055/95 *Tzemach v. Minister of Defense* [1]:

> 'There have been instances in which the Court was prepared to discuss a theoretical question, of a general nature, even though it was not connected to a specific case. These were mostly cases in which the petition raised an important question and as a practical matter, the Court could not issue a ruling on it, except when it was presented as a general question that was not connected to a specific case. See, for example, HCJ 73/85 *Kach Faction v. Chairman of the Knesset* [2], at pp. 145-146; HCJ 1581/91 *Salahat v. Government of Israel* [3], at p. 841; HCJFH 4110/92 *Hess v. Minister of Defense* [4].'

In that case, the Court discussed the constitutionality of a provision of Military Jurisdiction Law, 5715-1955, which prescribes the period of time during which a soldier may be detained by a military policeman before being

brought before a military judge. The Court held that despite the theoretical aspect of the petitions, they should be deliberated in light of the importance of the question related to the basic principles of the rule of law, the frequency with which the question arises, and the "short life-span" of the issue as a practical question; "it arises when a soldier is arrested by a military policeman; it continues to be relevant for only a few days, until the soldier is released or brought before the military court for an extension of his arrest; and then it expires". The same point is true, in principle and with the necessary changes, with respect to the instant case.

In this case, there has been no petition to the High Court of Justice that attacks the Statute's constitutionality directly. As stated, the petition submitted by the human rights organizations has been withdrawn. What remains before us, therefore, is an individual appeal that raises the constitutional issue only indirectly. However, it seems to me that for the purpose of the question that we are to decide here, we need make no distinction between the two situations, and in appropriate cases it is proper to discuss a fundamental-constitutional question that has been raised indirectly in a specific case even if it has been rendered moot with respect to the specific appellant. Indeed, if the constitutional question had lost its relevancy with respect to the appellant during the earlier proceedings, the lower courts might not have considered it, and the appropriate way for the appellant — if he had wished to present a fundamental question regarding the Statute's constitutionality — would have been to petition this Court. I note in this context that in certain respects, the indirect attack is the most appropriate manner in which to test the constitutionality of a statute's provisions, and an appeal of the type presented here, even if it has become theoretical since the time it was originally brought, is an appropriate manner in which to present a constitutional question to the Supreme Court.

10. It should be noted that the federal courts in the United States follow a rule (known as the mootness doctrine) according to which a claim must be dismissed when a judicial decision will no longer have any effect on the rights of the parties to the proceeding and the only question remaining before the court is one that is purely hypothetical or academic. The courts have recognized a number of exceptions to this rule. The first applies when there is an expectation that the legal question under discussion will arise again in the future, with regard either to the parties to the specific proceeding or with regard to others, although — because of the question's temporary character — it will always become a purely theoretical question during the time

required for the question to be adjudicated. Thus, for example, in *Roe v. Wade* [54], which dealt with the right to an abortion, the United States Supreme Court held that although its decision would not impact on the specific appellant's rights — the appellant having given birth already as the proceedings in the case had continued — it would be inappropriate to deny the appeal on the basis of the mootness doctrine because the problem of potential mootness was inherent to the issue of the constitutionality of a prohibition against abortions, in the sense that legal proceedings would never be relevant with respect to the actual parties for more than the nine months of a pregnancy. A second exception to the doctrine arises when a defendant ceases to engage in a wrongful activity due to the initiation of the legal proceeding, but a need remains to deter the party from returning to such wrongful activity in the future. In such a case, the concern arises with respect to the possibility that the defendant has discontinued the questionable actions as a strategic measure only, in order to lead to the dismissal of the claim brought against it, and will afterward return to its earlier path (see, for example — *United States v. W.T. Grant Co.* [55]). An additional exception applies when a rejection of the complaint on the basis of the mootness doctrine is likely to expose one of the parties to criminal proceedings or to a civil claim (*Edgar v. MITE Corp.* [56]).

In some cases, it may still be important, even when a claim has become theoretical at the stage of an appeal, to overturn the trial court's ruling in order to deny precedential value to that ruling and remove any possible implications for future proceedings between the parties. In the American legal system, this remedy is known as vacatur, and its significance is that it nullifies the lower court's decision completely. One of the key considerations in determining whether this remedy should be used is whether the claim had become moot due to a voluntary waiver of claimed rights by the appellant at the appellate level (such as in the case of a settlement) or whether it had become moot because of changes in circumstances that are external to the parties or because of an independent move made by the respondent at the appellate level. (See *United States v. Munsingwear, Inc.* [57]; *U.S Bancorp Mortgage Co. v. Bonner Mall Partnership* [58]. See also the Israeli Supreme Court's decision (*per* President Beinisch) in CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [5]).

11. In the case before us, there is no need to establish a fixed rule regarding any of these matters. Given the development of the situation in our case, it is of no real consequence whether a distinction is drawn between a direct attack and an indirect one, since the case became theoretical after it was brought before the Supreme Court. And indeed, as stated, the Supreme Court held on 22 July 2007 that the constitutional question, which from the beginning had been raised only indirectly in the context of the specific matter, remained an open question in the case. It is clear that the constitutional question remains a valid issue vis-à-vis all potential parties because a decision regarding the matter will constitute a binding precedent..

We must now deal with the constitutional question on a substantive level.

*The temporary provision*

12. The government's draft law establishing special powers relating to the arrest of security offense suspects, was published toward the end of 2005 (Draft Criminal Procedure Law (Enforcement Powers — Arrests) (Non-Resident Arrestee Suspected of Security Offense — Temporary Provision) 5766-2005, Draft Laws 206). This Draft Law granted powers regarding arrestees who are not residents of Israel and who are suspected of having committed security offenses (according to a list of such offenses set out in s. 1 of the Draft Law). The explanatory material stated that the interrogation of a security offense arrestee, which is conducted for the purpose of bringing the arrestee to trial and thwarting terrorist activity, has special features that justify the grant of special powers to the enforcement authorities.

Among these special features, the explanatory material lists the following — *first*, regarding an arrestee who prior to his arrest was not a resident of the State of Israel, the investigating authority will have only a limited ability to collect evidence and establish a factual background, as compared to the ability to do so with respect to those who are residents of the State. *Second*, when the offense involved is a security offense, potential witnesses — when there are any — often do not cooperate for ideological or nationalistic reasons—; this is because of the sympathy such witnesses have for the suspects, or because they are hostile to the State of Israel. The nationalistic or ideological motive — it is further argued — generally means that those being interrogated are themselves uncooperative, and it is therefore necessary to conduct the interrogation for a more extended and uninterrupted period than is usually the case, so that the interrogators can arrive at the truth. *Third*, some of the interrogations must be held continuously and without

interruption, especially at an initial stage, so that the investigating authorities can thwart terrorist attacks before they are carried out.

The explanatory material indicated that the need to grant broader enforcement powers in connection with the interrogation of a security offense arrestee who is not a resident of Israel is also derived from the fact that since the end of the military administration in the Gaza Strip, the investigative authorities can no longer exercise the powers that they previously could pursuant to security legislation enacted by the commander of the IDF forces in the region.

The Draft Law therefore included provisions that expanded the powers of the enforcement authorities beyond the regular powers established in the Arrests Law. Thus, the Draft Law contained provisions that extended the period of time before an arrestee must be brought before a judge, the duration of a detention that can be ordered *ex parte*, the period of time allowed before an indictment must be brought, and the period of time during which the arrestee may be prevented from meeting with an attorney. The Draft Law also included — as is relevant to this case — a provision that allowed the court to hold a detention hearing without the arrestee being present. Regarding s. 6 of the Draft Law, which is now s. 5 of the Statute, the explanatory material included the following:

> 'The right of a person to be present in the court that hears his case is a very important right under the Israeli legal system, and certainly when the matter involves his detention. It is nevertheless the case that the removal of a security offense arrestee from the interrogation facility for the purpose of bringing him to court can, in certain cases, do serious damage to the interrogation and at times can even lead to the frustration of its purpose. Under these circumstances, it is necessary to balance the protection of the rights of the arrestee against the need to allow the enforcement authorities to carry out their investigative activities continuously, in a manner which leads to the thwarting of terrorist activity or otherwise prevents a danger to human life and the security of the public.'

The law that was eventually enacted is broader than the proposed Draft Law, in the sense that it applies to any person suspected of committing a

security offense — whether or not such person is a resident of the state of Israel. In other ways, the law is narrower in scope than the Draft Law — for example, with regard to the type of security offenses to which it applies. The Statute, as currently worded, includes a number of key components. *One component* deals with the extension of time during which it is permissible to delay the arraignment of a security offense arrestee before a judge — 96 hours instead of the 24 hours or 48 hours provided in the Arrests Law (s. 3). A *second component* grants the court the power to extend the detention of a security offense arrestee for a period of no more than 20 days, each time — instead of the 15 day period prescribed in the Arrests Law (s. 4(1)). A *third component* extends the period of time regarding which an application for an additional arrest will not require approval of the Attorney General — up to 35 days, instead of 30 days as established in the Arrests Law (s. 4(2)). The *fourth component* relates to the matter that arises in the instant case — the holding of detention hearings in the absence of the arrestee (s. 5). The Statute further provides (in s. 6) that the arrestee must be represented by defense counsel at a hearing pursuant to s. 5. The Statute also includes provisions that require reports concerning the implementation of the Statute (s. 8) from the Minister of Justice to the Knesset's Committee on the Constitution, Law and Justice.

13. The provisions of the Draft Law, which originally applied only to arrestees who were not residents of the state because of the special difficulties involved in interrogating such arrestees and in collecting information about them, were eventually consolidated into a piece of legislation that applied to all security offense suspects. This legislation established various powers that were mainly intended to enable a more continuous interrogation of such suspects, and to minimize "interruptions" and delays in the interrogation process. The legislation narrows the power of the Attorney General and the court to review an arrest in such cases, and limits the arrestee's ability to object to the arrest. The main objective of these measures is to improve the enforcement authorities' ability to carry out effective interrogations regarding security offenses, given the special characteristics of such offenses. The main difficulty in these cases arises in connection with the gathering of information and the need to take action in order to thwart acts of terrorism. The Draft Law and the Statute both reflect the fact that those involved in this work wished to establish a balance between these objectives and the rights of the suspects. In the words of the explanatory material:

> 'The provisions of the law reflect a consideration of the required balance between the guiding principles of the Israeli legal system regarding suspects' rights in criminal proceedings — on the one hand — and, on the other hand, he law enforcement authorities' special need for broader powers with respect to security offense arrestees, because of the danger they pose and the special characteristics of their interrogation.'

14. Eighteen months before the Temporary Provision was set to expire, the Knesset decided (on 18 December 2007) to extend it for an additional three years, while introducing certain minor changes to the Knesset reporting mechanism. The explanatory material to the Draft Criminal Procedure (Arrestee Suspected of a Security Offense) (Temporary Provision) (Amendment) Law 5765-2005, SH 340, includes the following:

> 'During the period in which the law has been in force, it has been found that the provisions established in it were most essential to the law enforcement authorities involved in the investigation and thwarting of terrorist offenses, and that the use of the powers established therein were often helpful in thwarting terrorist attacks, finding offenders, and bringing them to trial. It should be noted that the security forces have used the special provisions established in the law proportionately and cautiously — using them only in cases in which they were needed in order to achieve the said purposes.
>
> It should also be noted that the need for the Statute became even more essential after the Hamas organization came to power in the Gaza Strip.'

The significance of this is that the Temporary Provision will remain in effect until at least 29 October 2010.

*The constitutional right to be present at one's criminal trial and detention proceedings*

15. The appellant argues, correctly, that the Temporary Provision violates fundamental rights that are protected by the Basic Law: Human Dignity and Liberty. It is a basic rule of criminal law that no person may be judged other than in his presence. This rule is anchored in the Criminal Procedure Law

[Consolidated Version], 5742-1982, which provides that "[e]xcept as otherwise provided in this law, no person will be criminally tried in his absence". This rule expresses the right of any defendant to be present at his criminal trial — a presence which is "essential", as was noted in CrimA 152/51 *Trifus v. Attorney General* [6], at p. 23. This Court has reiterated the importance of the defendant's right to be present at his trial. A court's obligation to respect that right, it has held, "is one of the most basic obligations in terms of maintaining the appearance of justice and regarding the holding of proper proceedings" (CrimA 353/88 *Wilner v. State of Israel* [7], *per* Justice Mazza at p. 450). The right of a defendant to be present at his own trial, it was held, ensures that "a defendant will not be tried 'behind his back' and that he will be given the opportunity to face the prosecution's evidence and to put forth his defense" (HCJ 7457/95 *Barki Petra Humphries (Israel) v. State of Israel* [8], *per* Justice Dorner at p. 775).

16. Is the right of a defendant to be present at his trial — which all agree is an important fundamental right — also a constitutional and supra-constitutional right? It is. The Supreme Court has recognized the right to due process as being a protected constitutional right, at least with regard to some of the components thereof. "The Basic Law," it has been held, "has fortified the defendant's right to a fair trial. This is done in s. 5 of the Basic Law, which anchors the right of each person to liberty, through the constitutional recognition of human dignity, of which the defendant's right to a fair trial is a part" (CrimA 1741/99 *A v. State of Israel* [9], *per* Justice Turkel at para. 3). Indeed, the right to the core elements of due process is an essential element of the defense of liberty. The right to liberty is a fundamental constitutional right:

> 'Personal liberty is a first tier constitutional right, and it is, as a practical matter, a necessary condition for the exercise of all other basic rights. The violation of personal liberty, like a stone thrown into a body of water, creates a ripple effect, widening the circle of violations of additional basic rights: violations of not only the right to freedom of movement, but also of the right to freedom of expression, and of the rights of individual privacy and of property and of additional rights as well. . . . Only a person who is free can fully and properly exercise his basic rights. And personal liberty, more than any other right, is what makes a person free. For that reason, the denial of personal

> liberty is an especially severe violation' (*Tzemach v. Minister of Defense* [1], *per* Justice Zamir at para. 17).

Moreover, the right to due process is closely tied to the right to dignity, since the denial of due process "may also harm the accused's self-image and give him a feeling of degradation and helplessness, as if he is a plaything in the hands of others, to the extent that there is a violation of his constitutional right to dignity under ss. 2 and 4 of the Basic Law" *Yissacharov v. Chief Military Prosecutor* [5], *per* President Beinisch at para. 67). Thus, "the Basic Law: Human Dignity and Liberty, enacted in 1992, recognized the right to due process in the criminal law context as having the status of a protected constitutional right. This recognition is accomplished primarily through s. 5 of the Basic Law, which establishes the right to liberty, and through ss. 2 and 4 of the Basic Law, which establish the right to human dignity. In s. 11, the Basic Law obligates all the branches of government — legislative, executive and judicial — to honor the rights established in the Basic Law" (RT 3032/99 *Baranes v. State of Israel* [10], at p. 375).

17. The above discussion demonstrates that the right to those core elements of due process that relate to the protection of liberty and dignity is a protected constitutional right. The defendant's right to be present at his trial is a core element of the right to due process, and it is therefore a protected constitutional right pursuant to the Basic Law. Justice Dorner has noted the connection between the right to due process and the right to be present at one's own criminal trial:

> 'As a rule, there is an overlap between the right to be present and the public interest in the holding of a fair trial. Indeed, the defendant's presence upholds the image of justice and ensures an effective defense against incriminating evidence, and thus enables proper clarification of the facts' (CrimA 1632/95 *Meshulam v. State of Israel* [11], at p. 547).

Indeed, the right to criminal due process is a broad right that includes various derivative rights. Among these rights is the right of a defendant to be present at his trial. President Beinisch noted this, as follows:

> '[T]he right to a fair criminal trial is a multifaceted right, which may serve as a basis for deriving many of the procedural rights

> of the person under interrogation, the suspect and the accused in criminal proceedings. Without exhausting the issue, we should point out that in foreign legal systems that are similar to our own and even in international conventions, the right to a fair criminal trial includes the right of the accused to know why he was arrested and what are the charges against him, the right to be represented by a lawyer, *the right to be present at the trial*, the right to an open trial by an unbiased and neutral tribunal and the right to defend himself at the trial and to present relevant evidence. The aforesaid right also includes the presumption of innocence, the principle of legality and the prohibition of placing the accused in double jeopardy of a conviction for the same act' (*Yissacharov v. Chief Military Prosecutor* [5], *per* President Beinisch at para. 66, emphasis added).

The right of a defendant to be present at his trial is an important condition for "ensur[ing] a fair procedure and proper procedural safeguards for the fairness of the criminal trial vis-à-vis the accused" (*ibid*. [5], at para. 66). This right is not only the right of the individual — it is also an expression of a general public interest in maintaining a criminal justice system that determines a person's fate only in accordance with due process, in a proceeding in which a defendant is given a full opportunity to present a defense (see CrimApp 2043/05 *State of Israel v. Zeevi* [12], *per* Justice Procaccia at para. 12). Indeed, the exercise of a defendant's right to be present at legal proceedings helps to ensure the accuracy and effectiveness of a proceeding whose purpose is to determine the truth. Although it is frequently the case that a criminal proceeding is carried out through agents and representation by attorneys, and the voice of the individual on trial is not heard in the courtroom (or is at least heard only as a whisper) — this does not minimize the importance of the defendant's presence at his trial, and particularly the importance of the defendant at his criminal trial. A person has an interest in protecting his own position, and desires to be present at the proceeding in which his fate will be determined. If he is prevented from being present, there may be a diminution of justice, because of the possible impact on the defendant's ability to defend himself. The legal proceeding does not deal with elements that are absent — it deals with elements that are present. Generally, it is appropriate that a defendant should experience, with his own senses, the criminal proceeding. It is fitting that the judge should see,

with his or her own eyes, the individual who is on trial. All these are built-in components of the legal process and important conditions for maintaining the defendant's faith and that of the public in the criminal process. In light of all these factors, it is not surprising that President Barak has directed that the defendant's right to be present at his own trial is a "constitutional right" (*Humphries (Israel) v. State of Israel* [8], at p. 780).

18. It should be noted that the right of every individual to be present at his own criminal trial is also recognized in other legal systems. In the United States it is understood to be an inseparable part of criminal due process (see J. Boeving, "The Right to be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information," 30 *Harv. J.L. & Publ. Pol'y* 463 (2007). There, the right is anchored in the Confrontation Clause of the Sixth Amendment to the Constitution, pursuant to both the due process clauses of the Fifth and Fourteenth Amendments and pursuant to s. 43(A)(2) of the Federal Rules of Criminal Procedure, which provides that a defendant must be present at all stages of his trial. Within this normative framework, the right to be present at trial has been analyzed as both part of the ability to hold an effective cross-examination, and, more broadly, as part of due process. The obligation to maintain this right, it has been held, remains in place, for so long as the defendant's presence can contribute to a just proceeding. The courts have, however, recognized that it may be permissible to hold a hearing when the defendant is not present, if his presence at the proceeding serves no purpose and will do nothing to assist in his own defense (see *Kentucky v. Stincer* [59]; *Snyder v. Massachusetts* [60]).

19. Does a suspect or arrestee also have a constitutional right to be present at his detention hearings, as part of the right to due process? I believe that he does. As a rule, the right to criminal due process applies to all stages of the criminal proceeding — "both at the interrogation and at the trial stage" (CrimA 951/80 *Kanir v. State of Israel* [12], *per* Justice Barak at p. 516; *Yissacharov v. Chief Military Prosecutor* [5], *per* President Beinisch at para. 66). These words apply especially with regard to a hearing regarding detention, which is "the most difficult form of violation of personal liberty" (*Tzemach v. Minister of Defense* [1], *per* Justice Zamir at para. 17). The detention hearing itself is a proceeding that involves a serious violation of the

rights of the suspect or defendant. Effective judicial review is an inseparable part of a detention hearing that complies with constitutional requirements. Thus, the need to maintain due process in the context of a detention hearing is a fundamental constitutional right which is necessitated by the need to protect the right to liberty and dignity. The presence of the suspect or defendant at a detention hearing is part of due process; this right to be present at the detention hearing is anchored in ss. 16(2) and 57 of the Arrests Law and also constitutes — in light of the reasons listed above — a constitutional right which is protected by the Basic Law (see also CrimApp 4586/06 *Halido v. State of Israel* [13], opinion of Justice Hayut; regarding the care to be taken in implementing s. 57 of the Arrests Law, see CrimApp 1097/06 *Bineib v. State of Israel* [14], opinion of Justice Rubinstein).

20. The importance and longevity of the principle regarding the arrestee's physical presence in court is indicated by the doctrine whose name indicates its logic — *habeas corpus* ("bring the body"). This common law doctrine allows the court to be petitioned to issue an order by which the authorities are directed to bring before the court a person who has been imprisoned by those authorities, so that he can be released if it discovered that the arrest was illegal. This power, which in Israel is conferred on the High Court of Justice, reflects the fundamental perception that the court that is deciding the matter of a person's liberty will generally be required to see the person and hear his arguments regarding the legality of his detention.

21. The respondent does not deny that the arrestee's right to be present at the proceedings for an extension of his detention is an important fundamental right, as defined, and that this right's importance is derived from reasons that are similar to those that form the basis of the defendant's right to be present at his own trial. Nevertheless, the respondent argues, the former right is not the same as the latter one — because there is a built-in violation of important rights at the interrogation stage, due to the need to determine the actual truth. Thus, for example, a person's liberty may be denied initially on the basis of a lower evidentiary standard; the suspect is also not exposed to the main elements of the evidence that is being brought against him. In light of this, the state argues that it is not possible to have an "ideal exercise of the right to due process" at the interrogation stage. It further argues that because at that stage, main elements of the evidence are not disclosed to the suspect, his absence at the detention hearing will not cause any great violation of his rights; this is especially so with respect to a security offense suspect,

regarding whom it is often the case that the evidence will be presented to the court *ex parte*.

I have difficulty accepting this argument. The respondent seems to suggest that it is easier to add another violation, to a situation in which there is already a violation of other rights. But this is not correct. The balance between human rights and other rights and interests is delicate and sensitive. As the respondent correctly notes, the criteria that are applied at the interrogation stage and at the stage of the initial detention are different in certain respects from those that apply at other stages of the criminal proceedings. At these earlier stages, there are also — alongside the possible restriction of the suspect's or arrestee's ability to defend himself — various protective mechanisms (for example, the periods of time during which the suspect may be detained during the interrogation stage are shorter, and there is close judicial supervision of the proceedings). However, each additional violation of the suspect's/arrestee's rights, particularly when it is expressed by a limitation of the ability to maintain judicial supervision, can undo the balance and undermine the fairness of the process. To the contrary, it is particularly in a proceeding in which there are increased restrictions on the suspect's/arrestee's ability to defend himself and to respond to the charges levelled against him that it is necessary to take an especially protective stance against the addition of further difficulties, and against the suspect's further exclusion from the process. I will return below to the specific argument relating to the existing legal restrictions that apply to security offense suspects, and their implications for the determination of the constitutionality of s. 5 of the Temporary Provision.

In summation, s. 5 of the Temporary Provision violates the right of a security offense suspect to be present at his own detention hearing.

22. Indeed, the right to due process, including the arrestee's right to be present at his detention hearing, is not an absolute right. It should be noted that s. 16(2) of the Arrests Law makes it possible for a detention hearing to be held in the arrestee's absence if the arrestee cannot attend the hearing because of the state of his health (see also s. 57 of the Arrests Law, regarding the deliberation of a petition for a rehearing and appeal). The Supreme Court has recognized the possibility that the arrestee himself, may, in certain cases, waive his right to be present at trial (*Humphries (Israel) v. State of Israel*

[8]). In terms of the *constitutional* aspect, person's right to be present at the proceedings involved in his own case may be restricted pursuant to a law that complies with the tests established in the limitations clause — s. 8 of the Basic Law. The limitations clause allows for a violation of the right to due process if all the following four conditions are met: the violation is prescribed by a law or pursuant to a law, by virtue of an authorization that is expressly established in the law; the law that creates the violation conforms with the values of the State of Israel; the objective of the law that creates the violation is an appropriate objective; and the violation is not greater than is necessary. In our case, the main question relates to the last condition — the proportionality condition — and we will therefore focus on that requirement. However, before we reach that point, we must examine and describe the statute's objective, in light of the close connection between a legislative objective and the means that are designed to be used for achieving that objective.

*The objective of the Temporary Provision*

23. The key objective of the Statute, as stated, is to improve the ability of the enforcement authorities to carry out an effective interrogation in connection with security offenses, taking into consideration the special characteristics of these offenses, including the difficulty involved in gathering information and the need to take action to thwart terrorist attacks. This is also the objective of s. 5, the constitutionality of which we are examining in the instant case. As stated, the Draft Law originally focused on arrestees who had not been residents of the State of Israel prior to their arrests, and the reason given for this focus was that the investigative authorities have a relatively limited ability to gather evidence and information with regard to this class of arrestees. By the time the Temporary Provision was enacted in its final form, the above-mentioned distinction had been removed, and the Statute was written so as to apply to all security offense suspects — regardless of whether or not they are residents of Israel. It has been argued before us that as a practical matter the Statute is used only against Palestinian suspects and that this reflects a violation of the right to equal treatment, but this issue was not sufficiently discussed in the framework of the proceeding here, and in light of the conclusion that we have reached, we see no need to expand on this particular issue.

24. The main emphasis of the Temporary Provision and of s. 5 in particular, is the need to carry out a quick, continuous and effective interrogation. The respondent explains that the General Security Service's

main and central purposes in carrying out interrogations in connection with security offenses are to discover terrorist organizations and to thwart future terrorist attacks. An interrogation of this type, which looks to the future, must be carried out quickly so as to — among other things — prevent planned terrorist acts in time, or to locate and catch additional terrorists, weapons and explosive materials, all before they can be transferred to a new hiding place. The respondent also informed us, *ex parte*, of the operational elements, which, according to the respondent, necessitate a proper, continuous and quick interrogation — one that is carried out without delay or interruptions. The respondent also described, primarily in the arguments that were made *ex parte*, the special methods that characterize this type of interrogation; these methods require time and an uninterrupted interrogation.

Section 5 meets this objective, the respondent explained, as it is often the case that the need to bring a security offense suspect to court will hamper the interrogation of the suspect and may even hinder its purpose completely. The extension of a security offense suspect's detention in his absence makes it possible, in appropriate cases, to carry out the interrogation continuously and quickly, using special interrogation methods.

25. In light of these explanations, we can state that s. 5 was enacted in order to achieve an appropriate purpose. Nevertheless, we must note the restrictions to which this appropriate purpose is subject. The instant case deals with the interrogation of those suspected of *criminal* offenses. The framework in which the suspect's detention is being sought is a *criminal framework*. Although this is a special context which presents unique challenges, such uniqueness does not justify an avoidance of the fact that in all these cases the suspect is being questioned regarding *his own involvement* in security offenses. During the interrogation, a suspect may be asked questions relating to future terrorist activity — but this does not mean that these are "preventative arrests" only, since the interrogation and the detention must rest on grounds relating to the suspect's involvement in security offenses. With respect to this issue, an arrestee falls within the category of a suspect, and his rights as a criminal suspect must therefore be protected.

In light of this, and in light of our holding that the Statute does have a proper purpose, we can now turn to the question of its proportionality.

*Proportionality*

26. Pursuant to the provisions of the limitation clause, a law that violates the right to due process — and such is the Statute that we are examining here — will be constitutionally valid only if the violation it entails is no greater than is necessary. The question raised here is whether the means chosen by the legislature is proportionate in relation to the Statute's proper purpose. The case law in Israel, as well as in other legal systems, has examined proportionality on the basis of three sub-tests, which serve to concretize the general standard (see HCJ 5016/96 *Horev v. Minister of Transportation* [15]). The three sub-tests are the following: the rational relationship test, referring to the relationship between the means chosen and the violation of the right which is involved and the statute's purpose; the minimal violation test; and lastly — the proportionate means test, within the narrow meaning thereof (Professor E. Bendor has called this the relativity test). President Barak discussed these tests in HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [16], at p. 385:

> 'The first sub-test is that of a rational correlation or connection. A legislative measure that violates a constitutional human right —in our case, one that violates the right to freedom of employment — is permissible if there is a correlation between it and the achievement of the purpose. A correlative relationship is required between the purpose and the means. The legislative means must lead, in a rational manner, to the achievement of the statutory purpose . . . ; the second sub-test is the test of whether the means involve a minimal infringement. A legislative measure that violates a constitutional human right — in our case, one that violates the right to freedom of employment — is permissible only if the statutory purpose cannot be achieved through some other measure that leads to a lesser violation of the human right . . . the legislative measure can be compared to a ladder, which the legislature climbs in order to achieve the legislative purpose. The legislature must stop on the rung at which the legislative purpose is achieved, and on which the violation of the human right is the least. "The legislature must begin at the 'rung' that causes the least infringement and move up the rungs slowly, until it reaches the rung at which the proper purpose is achieved without infringing more than necessary on the human right" . . . "If under the circumstances of the case the moderate measure, the measure that causes the least damage, is not sufficient to achieve the purpose, the authority may prescribe a more severe provision, to

> the extent necessary to achieve the purpose" . . . . The third sub-test is the proportionate measure test (in the narrow sense thereof). Even if the measure that has been chosen is appropriate (rational) for the achievement of the purpose, and even if there is no more moderate measure, there must be a proper relationship between the benefit achieved from the use of the measure to the scope of the violation of the constitutional human right . . . this test examines the result of the legislation, and the effect it has on the constitutional human right. If the use of the legislative measure causes a severe violation of a human right, and the expected public benefit to be achieved from such violation is minimal, it is possible that the legislation is disproportionate (in the narrow sense)'.

In our case, we have been persuaded by the material presented to us that there is a correlative relationship between the achievement of the Statute's purposes and the use of the measure that consists of preventing an arrestee from being present at his detention hearing. Section 5 itself provides that the arrest may be extended without the arrestee being present only when the court "has been persuaded that the suspension of the arrestee's interrogation is likely to prevent the thwarting of a commission of a security offense or hinder the ability to prevent harm to human life" (sub-section (1)); and that the hearing of a petition for a further hearing or for an appeal can be held in the arrestee's absence only when the court is "persuaded that the suspension of the arrestee's interrogation is likely to cause material harm to the investigation" (sub-section (2)). Thus, s. 5 itself creates a connection between the violation of the right and the realization of the objective of carrying out an effective interrogation for the purpose of thwarting the commission of security offenses and preventing harm to human life. Indeed, the interruption of an interrogation for the purpose of having the arrestee appear in court is likely to cause difficulty for the interrogators. As we have been told, it can disrupt the implementation of a particular interrogation method. It can therefore be said that there is a rational relationship between the need to prevent the interruption of an interrogation (for a specific period of time) and the achievement of the objectives of the interrogation.

27. Nevertheless, we have not been persuaded that the means prescribed in s. 5 will cause only a minimal violation, or that the section presents a proper balance between the violation of the right to due process — in the sense that this right is embodied in the arrestee's presence at detention hearings — and the achievement of the objectives of the interrogation. Viewed cumulatively the following elements form the basis of our position regarding this matter.

28. The *first element* relates to the scope of the violation of the right to due process and of effective judicial supervision. The violation of the right to due process which the operation of s. 5 of the Statute can cause is severe. The arrestee's presence at his detention proceedings is, as stated, a key element of the realization of his right to due process. When he is absent from the proceeding, a concern arises that his ability to defend himself against the claims that establish the ground for his arrest will be impaired, along with his ability to argue before the court about the terms of his detention and the manner in which the interrogation is being carried out. This absence also denies the court the ability to look the arrestee in the eye and to take note of his condition. The severity of this concern increases greatly when the suspect is detained in connection with a security offense — since, in such cases, the suspect's ability to defend himself at the detention hearings is restricted by various additional measures that can be used against him.

The provisions of s. 38 of the Arrests Law should be noted in particular. This section provides that an arrestee who is suspected of having committed a security offense may be prevented from meeting with a lawyer when such meeting is likely to disrupt the arrest of other suspects, interfere with the discovery or seizure of evidence, or disrupt an interrogation — or when the prevention of such a meeting is necessary in order to thwart the commission of a crime or in order to preserve human life. "The prevention of a meeting between an arrestee and his attorney" — it has been held — "is a serious violation of the arrestee's right. This violation is tolerated only when it is essential from a security perspective and necessary in terms of the conduct of a successful interrogation" (HCJ 6302/92 *Rumhiya v. Israel Police* [16], at p. 13). The combination of the provisions regarding the prevention of a meeting with an attorney with the provisions that are the subject of the constitutional examination here is likely to deny an arrestee any possibility of presenting a position to counter the government's stand regarding his detention. At the same time, it eliminates the court's ability to exercise any effective control

over the interrogation or the detention for the purpose of interrogation. Justice Fogelman noted this in the judgment rendered in the appellant's case:

> 'A hearing which is not held in the presence of the arrestee is not an *ex parte* hearing, since the arrestee may, it would seem, argue his case through his counsel. At the same time, in the case before us (and as may be presumed, in other cases in which the powers granted pursuant to the Temporary Provision are exercised), the respondent has been prevented from meeting with his attorney. This combination leads to a situation where, as a practical matter, the respondent's ability to present his case at the hearing is extremely limited. This is a material violation of the arrestee's rights. His right to be present at his hearing is violated, as is his right to defend himself and to present his position, and in effect, his right to present his arguments to the court has been materially violated . . . The said violation becomes more serious, since within the framework of the proceeding that is being conducted, it is necessary to restrict the person's freedom through the use of detention — and as is known, freedom from detention is a basic right which is contained in the Basic Law: Human Dignity and Liberty.'

In CrimApp 1144/06 *Ziyad v. State of Israel* [17], at para. H, my colleague Justice Rubinstein wrote as follows: " . . . It is axiomatic, in any event, that the defense of a party who cannot consult with his attorney is likely to be impaired to a certain degree, and not only temporarily. The suspect is not always aware of his procedural and substantive rights, and an effective legal defense often depends on a combination of the suspect's factual knowledge and of his lawyer's legal knowledge." The provisions of the Statute under discussion here further restrict the arrestee's ability to conduct a defense in terms of reducing the ability to present to the court the arrestee's factual knowledge — and this is a restriction that is in addition the violation that results from the prevention of a meeting with an attorney. Thus, both the legal and factual aspects of the defense are weakened.

29. Indeed, the harm done to a person who cannot protest his detention either through his own presence or through an "intelligent representative presence" is a very severe human rights violation. It is likely to invalidate the

legal proceeding and strip it of any content. This is, in effect, an *ex parte* proceeding. The European Court of Human Rights, in a decision dealing with art. 5(4) of the European Convention of Human Rights, held as follows: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." In that case, an arrestee claimed that she had not been permitted to be present at the proceedings in which the court deliberated regarding objections to her detention — proceedings at which she wished to present arguments with respect to the conditions of her detention. The court ruled as follows:

> 'The Court recalls that by virtue of Article 5(4), an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5(1), of his or her deprivation of liberty… The proceedings must be adversarial and must always ensure equality of arms between the parties… The possibility for an arrestee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty . . . '

The Court was aware that the arrestee had been represented by counsel at the proceeding, but that such representation was not a sufficient alternative for her own presence, because of the attorney's ignorance of facts known only to the arrestee:

> 'The Court notes at the outset the applicant sought leave to appear before the appeal court in order to plead her release on the grounds intimately linked to her personal situation. She planned, firstly, to describe the appalling conditions of her detention, *of which her counsel did not have first-hand knowledge. Only the applicant herself could describe the conditions and answer the judges' questions, if any*. . . '

The court therefore held that the refusal to allow the arrestee to appear in court denied her effective control of the legality of her detention, as required pursuant to art. 5(4) of the Convention.

30. All of the above leads to the conclusion that s. 5 of the Statute can only be examined upon consideration of the overall normative framework

dealing with the interrogation and detention of security offense suspects. When the arrestee has not met with an attorney, and the court is unable to direct questions to the arrestee in order to clarify matters that require clarification, the court's ability to conduct fair and effective review of the matter is substantially restrained. The court, in effect, relies on the position and statements of only one of the parties. This is a harsh result in light of what is necessary for legal proceedings to be proper and in light of the subject under discussion here — the curtailment of a person's liberty.

Similarly, we cannot ignore the fact that according to the law in its current state, it is frequently the case that during detention hearings, courts will be presented with material on an *ex parte* basis. Needless to say, this fact alone causes some form of a violation of the arrestee's ability to defend himself. By itself, this is a practice which, although necessary in certain cases, creates difficulty for the arrestee who seeks to conduct a defense and for the court that wishes to rule in accordance with the normal rules that guide us. The courts use various methods to minimize the violation of the arrestee's rights — such as, *inter alia*, providing either the arrestee's lawyer or his counsel with any information that has been presented to the court *ex parte* and which may be disclosed. It is clear that the ability to minimize the violation of the arrestee's rights, in terms of allowing the arrestee the opportunity to respond to such information, is weakened when the arrestee is not present and his counsel — as is frequently the case — has not yet met with him.

As noted above, the respondent's argument that in light of the various restrictions imposed by other laws on the suspect's ability to defend himself — such as the restricted exposure to the main points of the evidence presented against him — the additional violation caused by his absence from the legal proceeding "is not great". The reasoning seems to be that an already existing violation of a suspect's rights and of the propriety of the legal proceeding weakens the argument against a further violation of the suspect's ability to defend himself, and against a further limitation of the court's ability to clarify the true facts and information. If the respondent did intend to make that argument, it must be utterly rejected. Even in a proceeding involving the detention of security offense suspects, substantive judicial supervision remains necessary. The arrestee's presence is especially important in a proceeding such as this one — i.e., the detention hearing — which anyhow

involves various restrictions. In any event, when a basic right is violated from a number of perspectives, or gradually, it is certainly possible that the cumulative effect will be that the various violations will cross the threshold of constitutionality, such that the last "marginal violation" will not be permissible.

31. All of the above indicates that s. 5, especially in combination with other provisions contained in the law, can lead, *de facto*, to the arrestee being isolated from the legal proceeding being conducted in his case — a proceeding that revolves around a basic impairment of the right to be free of detention. The various provisions relating to the preliminary stages of the interrogation of security offense suspects is likely to mean the loss of any ability to maintain minimally effective control over the protection of an arrestee's rights in the framework of the detention hearings and interrogation proceedings. In effect, these provisions leave the court, as a reviewing entity, with only a partial view of what it needs to see, and thus impairs an integral and essential aspect of the constitutionality of an investigative detention. As President Barak has stated in another context:

> 'The degree of a society's sensitivity to the need to protect the liberty of the individual is expressed in the scope recognized by the government authority of the judicial review that can be exercised over a decision by the said authority that violates one of a person's freedoms. Indeed, the protection of the individual's freedom is too precious to us for it to be left in the hands of the government authorities. I am aware that judicial supervision does not always ensure that human rights will be protected. However, I am persuaded that the absence of judicial supervision will end in the violation of human liberty. When there is no judge, there is no law' (LCrimA 2060/97 *Valinchik v. Tel Aviv District Psychiatrist* [18].

The provision contained in s. 5 is therefore likely to cause severe damage to the legal proceeding itself, and to its effectiveness and its fairness. The provision violates the arrestee's right to due process, which is derived from his right to freedom and dignity. I note that the violation is reduced somewhat by the provision in s. 5 of the Statute that allows the arrestee to be kept from attending his detention hearings only after the first detention hearing has been held in his presence — but the provision does no more than that. *The ongoing supervision of the proceedings relating to an investigative detention is important for the protection of human rights — at least as*

*important as the ongoing investigation is for the realization of the goals of the interrogation.*

32. The *second element* relates to the disruption of the interrogation that s. 5 is intended to prevent. There is no doubt that a continuous interrogation — conducted without any impedance, delay or interruption — is likely to be useful in terms of the realization of its objectives. The expansion of the interrogator's powers is likely to make it easier to discover the truth. The fast and efficient discovery of the truth is especially important when the security of the state and its citizens is at stake. I note that the power to order the holding of a hearing without the arrestee being present is limited to those situations in which the court is "persuaded that the suspension of the arrestee's interrogation is likely to prevent the thwarting of the commission of a security offense or hinder the ability to prevent harm to human life" (for the continuation of a detention) or when the court "is persuaded that the suspension of the arrestee's interrogation is likely to cause material harm to the interrogation" (rehearing or appeal). The provision is therefore intended to be used in situations in which, from the perspective of the objectives of the interrogation, it is of great importance to allow the interrogation to be carried out without interruption.

Nevertheless, "a democratic society — one that supports freedom — does not allow interrogators to use any and all methods to disclose the truth . . . sometimes the price of the truth is so high that a democratic society cannot pay it" (HCJ 5100/94 *Public Committee Against Torture in Israel v. Government of Israel* [20], *per* President Barak at para. 22). Thus, an effective interrogation, carried out while the person being questioned is being detained, must be combined with substantive judicial supervision. The conduct of a proper legal proceeding is essential, so as to ensure that the investigative detention is proportionate and constitutional. As a matter of principle, the suspect's appearance before a judge should not be viewed as an obstacle, but rather as a basic element of an effective and constitutional investigative detention. "The accepted approach is that judicial review is an integral part of the detention process . . . at the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty" (HCJ 3239/02 *Marab v. IDF Commander in Judea and Samaria* [21]). The significance is

that the interrogation methods must be adjusted so that they can be halted in order to allow an effective and fair judicial proceeding to be conducted. An interrogation that takes place over time, while the interrogated party is held in custody and prevented from being brought before a court and to state his case before that court, is likely to reach the level of constituting a violation of human dignity and liberty.

To the extent that the objective is to reduce the harm done to the interrogation due to its interruption for the purpose of holding a judicial proceeding, it is necessary to examine the possibility of minimizing that harm through means that cause a lesser violation of the arrestee's rights. If it is difficult to interrupt the interrogation in order to bring the arrestee to court, it is also necessary to find ways to reduce this difficulty — ways that are more proportionate than preventing the arrestee's presence at the hearing. Regarding the proportionality sub-test, we note that the respondent was unable to persuade us that no other methods are available that cause a lesser violation of the arrestee's rights and which can, at the same time, achieve the objective that the legislation was enacted to achieve; such methods, which involve a lesser violation of a right, would be added to the special methods that are already established in the legislation — those measures that are already available to the authorities conducting the interrogation as well as to the enforcement authorities, pursuant to the existing Arrests Law, and pursuant to the other sections of the Temporary Provision (other than s. 5, which is the subject of discussion here).

33. An examination of both the degree of the violation of the interrogated party's fundamental rights — on the one hand — and of the interrogation advantage derived from the provision of s. 5 on the other, leads to the conclusion that this measure is not proportionate. An additional piece of information supports this conclusion — *the frequency with which the measure established in s. 5 is used*. The respondents argued that s. 5 of the Temporary Provision is used relatively rarely, and presented data to support this claim. According to them, the data prove that the implementation of s. 5, as a practical matter, is limited to only a few cases each year. However, this argument, which points to the rarity of the need to hold hearings at which the arrestee is not present, only strengthens the constitutional difficulty resulting from the enactment of s. 5. The remarks made by Justice Zamir in the above-mentioned *Tzemach v. Minister of Defense* [1] are pertinent here as well:

> 'Even if we had been shown data indicating that only a relatively few soldiers are held in custody until the end of the maximum

> time period, this is not a sufficient response to the argument that the maximum detention period is longer than necessary . . . The test of the detention period's proportionality also relates to the maximum period of detention — the period established by law, and not only to the actual period during which a particular person has been detained. If the maximum period causes a violation of personal liberty which is greater than is required, the fact that it violates the liberty of only a few of them makes no difference. The liberty of a single person is as deserving of protection as is the liberty of the entire world' (*ibid,* at para. 33).

The same is true in our case.

In light of this, we believe that the Temporary Provision does not satisfy the proportionality test — either from the perspective of the second sub-test (the minimum violation test) or from the perspective of the third test (the relativity test, or as it is also called, the narrow proportionality test).

*Conclusion*

34. The Supreme Court has emphasized more than once the need to act with maximum restraint in exercising the power to invalidate laws on the ground that they violate the provisions of the Basic Laws dealing with human rights. "The declaration that a law or a part thereof is invalid is a serious matter. A judge may not do this lightly . . . when he invalidates a piece of primary legislation, the judge frustrates the will of the legislature. This is justified only by the fact that the legislature is subject to constitutional/supra-constitutional provisions that the legislature has itself established . . . At the same time, the courts must exercise significant judicial caution" (HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [16], *per* President Barak at para. 19). This is how we have acted in this case as well.

We have also taken into consideration the special constitutional challenge faced by a democratic state which is fighting against terrorism. A situation involving hostilities in general, and of hostilities in a struggle against terrorism in particular, disturbs the balance between human rights and the security of the state and of the public. Human rights are intended to be basic principles that can withstand such disturbances, but the struggle against

terrorism requires — in Israel as in other countries — an adjustment of the implementation of the constitutional criteria for the purpose of dealing with the threat of terrorism. The main principle of Israel's legal system is to maintain the constitutional requirements even in the face of the terrorist threat. Indeed, "[t]his is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back" (*Public Committee Against Torture in Israel v. State of Israel* [23], per Justice Barak at para. 39). This is the secret of the strength of a democratic regime, which maintains its unyielding support of its fundamental principles and values even when it is engaged in a conflict against a party lacking those same values (see also HCJ 769/02 *Public Committee Against Torture in Israel et al. v. Government of Israel* [22]).

35. In conclusion, and in light of all this, we believe that the provision of s. 5 of the Temporary Provision on which the lower courts relied when deciding the appellant's case cannot be allowed to stand, because it violates the fundamental constitutional principles established in the Basic Law: Human Dignity and Liberty. The significance therefore is that the appellant's detention hearing should have been held in his presence. From a constitutional perspective, the significance of our holding is that the Arrests Law must from this point forward be interpreted in accordance with its formulation prior to the enactment of s. 5 of the Temporary Provision.

**Justice E. E. Levy**

I concur.

**President D. Beinisch**

I concur in the opinion of my colleague, Vice President Rivlin, and in his conclusion that s. 5 of the Temporary Provision Law violates, to a greater extent than is necessary, the constitutional right of an arrestee to be present at his detention hearings — which is a core component of the right to due process.

After concurring in this opinion, I received the opinions of my colleagues, Justices Naor and Grunis, who believe that legislation can be used to regulate the issue, which can be a proportionate measure in certain circumstances. Indeed, there may be some exceptional and rare situations in which it may be necessary, in order to prevent an immediate and concrete danger, to refrain from bringing an arrestee before a judge for a detention hearing— but this will be the case only rarely, when the very fact that an interrogation is halted

for the purpose of bringing the arrestee to court is likely to lead to immediate harm to human life, and the risk is at the level of great certainty, as in the case of a "ticking bomb". I myself believe that such rare cases can be resolved through what is at least a partial legal solution that can be found in other existing arrangements. Regarding this matter, I join in the position taken by my colleague Justice Rubenstein in para. 26 of his opinion, in which he expresses doubt that such legislation is worthwhile for the purpose of providing a solution for such rare cases. Indeed, I wonder whether there is any justification for providing a response to these rare cases through a unique piece of legislation such as the Temporary Provision which is the subject of the appeal before us, and whether such legislation will not present a "slippery slope" of constitutional difficulties. These questions are not before us here, and I see no reason to take any position regarding them.

**Justice E. Arbel**

I agree with the opinion of my colleague, Vice President Rivlin.

Section 5 of the Temporary Provision, as well as the entire Temporary Provision, is the result of the complex security situation that prevails in our region — a situation in which, unfortunately, terrorism has become a permanent fixture. The security forces stand at the frontline of the struggle against terrorism; their task is to deal with the challenges and threats presented by terrorism on a daily basis, and the state provides them with appropriate tools for this purpose. The Temporary Provision is one of those tools, given to the security forces in order to allow them to carry out their function. The purpose of the Temporary Provision is to provide the security forces with the appropriate tools for carrying out their function, based on an understanding that the interrogation of those suspected of having committed security offenses differs from an ordinary police interrogation of a criminal suspect. Indeed, the interrogation of a security offense suspect is unique in that its main purpose is usually to prevent activity that is directed against the security of the state. These are offenses that are generally committed against an ideological background, and this frequently means that the suspects or other relevant individuals who are being interrogated refuse to cooperate with those conducting the interrogation. Furthermore, when the parties being interrogated are not residents of the State of Israel, there is in any event an added difficulty in obtaining additional evidence, questioning relevant

witnesses, information-gathering, etc. Each one of these factors alone leads to a situation in which the interrogations of those suspected of committing security offenses are very complex, frequently requiring both time and continuity — and this is even more so when the various factors are combined. Such interrogations are also often carried out under time pressure (see also the Draft Law).

At the same time, as my colleague has explained, even in these circumstances, Israel is required to conduct the struggle for its security and for the security of its citizens in a manner that maintains its character as a democratic and Jewish state. In other words, the battle against terrorism and against all the security threats faced by Israel must be fought within the boundaries outlined in the law (HCJ 3451/02 *Almandi v. Minister of Defense* [23], at pp. 34-35; HCJ 7015/02 *Ajuri v. IDF Commander* [24]; HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [25]). The objective does not validate all possible means. Indeed, the explanatory material to the Draft Law, as well as the explanatory material to the Draft Criminal Procedure Law (Enforcement Powers — Arrests) (Security Offense Suspect) (Temporary Provision) (Amendment), 5768-2007) (Draft Laws 340), pursuant to which the Temporary Provision's force was extended, indicate that the drafters sought to take into consideration the guiding principles of our system regarding the rights of criminal suspects, while regulating the powers given to the investigative authorities with regard to the investigation of security offenses. Thus, the legislature was also aware that because of Israel's character as a state that upholds the law, the limitations on permissible government action remain in place — and that special care must be taken regarding the rights of a suspect who is held by the state and is in its custody, whenever a measure is considered which contains within it a violation of a suspect's rights.

For these reasons, I find it difficult to accept the state's argument that because a suspect whose liberty has already been restricted in order to serve the public interest of clarifying the truth will already have lost significant rights during the interrogation stage, the temporary loss of his right to be present at a detention hearing will not constitute a significant additional violation. The guideline in this matter should be the opposite: although there are indeed situations in which it is not possible to avoid certain violations of the rights of a security offense suspect — in that the main evidence against him is not disclosed to him and in that he is sometimes prevented from meeting with an attorney for a set period of time etc. — these violations

should be viewed as exceptional, as measures that are to be used cautiously and with restraint. We therefore cannot argue that an additional violation of the suspect's rights is permissible and justified, due to its mildness in light of the other violations that take place in any event.

In conclusion, I also believe that s. 5 of the Temporary Provision lacks proportionality, for the reasons that the Vice President noted. The legislature's intent, which was to create a reasonable and appropriate balance between the need to create tools that would be suitable for the interrogation of a security offense suspect and our fundamental principles regarding the rights of a suspect and of an arrestee, has not been realized in practice.

**Justice M. Naor**

1. I agree with my colleague, Vice President Rivlin, that s. 5 of the Criminal Procedure Law (Arrest of a Security Offense Suspect) (Temporary Provision), 5766-2006 (hereinafter: the Statute) impinges upon the right to a fair criminal proceeding — a right which is closely connected to the constitutional right to human dignity established in the Basic Law: Human Dignity and Liberty. In order to pass the constitutionality test, this infringement must satisfy the tests set out in the limitations clause. I agree that s. 5 of the Law, as currently formulated, does not satisfy the tests of the limitations clause. Nevertheless, my position is that the declaration that the statute is void should be postponed for six months. This will allow the legislature to determine, if it chooses to do so, narrower and more proportionate limits on the conduct of a detention extension hearing, an appeal or a review in the absence of the arrestee — all in the spirit of my remarks below. In my view, the possibilities for allowing a hearing to take place without the detainee being present must be limited to a narrow range of possibilities, which I will define below. In short, according to my view, in rare cases, the right to due process must retreat for a short time in the face of the need to prevent — at the level of near certainty — harm to human life. As my view is the minority view, I will state my position in brief.

2. I will first clarify the demarcation of time during which it is permissible, pursuant to the Statute that we are examining here, to hold a hearing without the detainee being present. The first judicial determination regarding the detention of a security offense suspect takes place in the presence of that suspect, and the constitutionality of that first proceeding

(hereinafter, "the first detention decision") has not been challenged by any argument raised before us. The first detention decision may include an order that the suspect be held for up to twenty days (hereinafter: "the maximum period"). Where the court has ordered, in the framework of the first detention decision, a detention period of less than 20 days, section 5 "kicks in" 'and allows a judge to extend the detention up to the maximum period, in a proceeding conducted in the detainee's absence (hereinafter, "the detention extension decision"). The infringement of the constitutional right therefore occurs within the period in which s. 5 of the Statute grants the court jurisdiction to decide the matter of the extension of the detention, under certain conditions, without the detainee being present; in other words, the number of days that completes the maximum period of 20 days, and no more. As I have suggested, even this period might be too long, and I will discuss this below.

3. The rule under the Statute is that a hearing must be held in the presence of the detainee, and the hearing in the absence of the detainee is the exception to that rule. As my colleague the Vice President noted, the purpose of the exception — improving the enforcement agencies' ability to carry out effective investigations of security offenses — is an appropriate purpose (see paras. 23 and 25 of my colleague's opinion). The key to its constitutionality is the requirement of proportionality. The state's argument that the *practical* implementation of the Statute, is "limited and proportionate" (para. 41 of the written pleadings) is not sufficient. The statute that creates the power that infringes upon a constitutional right must itself be "limited and proportionate". Sections 5(1) and 5(2) of the Statute define different "balancing formulas" for the application of the exception, and I will describe them, moving from the most stringent to the most lenient: the frustration of prevention of harm to human life (regarding an extension of detention); the thwarting of a security offense (regarding an extension of detention); or material harm to the interrogation (regarding a review or an appeal). The most stringent test is the *frustration of the prevention of harm to human life*. It is stringent in comparison with the test involving the prevention of a security offense, given that the definition of a "security offense" in s. 1 of the Statute does not necessarily require proof of a concern regarding harm to human life, and instead refers to a concern regarding harm to the security of the state (see s. 3 of the state's written pleadings). It is also more stringent in comparison to the test regarding substantial harm to the investigation (see CrimApp 8473/07 *State of Israel v. A* [26], *per* Justice Vogelman at para. 5). Regarding the last two balancing formulas, the least stringent ones, I accept

the conclusion reached by my colleague the Vice President — that they do not satisfy the proportionality requirement, because they allow for too broad a range of possible infringements of a constitutional right. Section 5(2) of the Statute should therefore be declared invalid. The possibility of holding a hearing in the detainee's absence in order to thwart a security offense, as described in s. 5(1), must also, in my opinion and in the opinion of my colleague the Vice President, be eliminated.

4. I take a different position, as a matter of principle, regarding the more stringent balancing formula appearing in s. 5(1), which requires that the court be persuaded that the interruption of the interrogation is likely to hinder the prevention of harm to human life. Such a requirement may indeed be proportionate if additional limitations are imposed. One limitation could be achieved by way of interpretation: the expression "likely to" could be interpreted as a test requiring near certainty that the presence of the detainee at the hearing in court will lead to the frustration of the prevention of harm to human life (regarding the near certainty test, see HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [27]; A. Barak, *A Judge in a Democratic Society*, at pp. 273-274 (2004)). A "near certainty" requirement expresses a formula that "has been established on a broad conceptual basis" (HCJ 243/62 *Israeli Film Studios v. Gary* [28], *per* Justice Landau, at 2418G). The case law has accepted near certainty as a balancing formula regarding prior restraint on a right, as opposed to its restriction after the fact (see CrimA 6696/96 *Kahane v. State of Israel* [29], *per* President Barak at paras. 10 and 11). The near certainty requirement makes clear that the exception can only be used if there are critical, necessary and "decisive" reasons for its use, in order to prevent the frustration of the prevention of harm to human life (see and compare President Shamgar's remarks in HCJ 253/88 *Sejadia v. Minister of Defense* [30], at p. 821, at the B-C margin marks). The typical case in which such reasons are present, but not necessarily the only one, is when there is a "ticking bomb", when "there exists a concrete level of imminent danger of the explosion's occurrence" (see and compare: *Public Committee Against Torture in Israel v. Government of Israel* [20], at p. 841).

5. In general, a possible interpretation can be used to conform a statute to the constitutional requirements (see: HCJ 9098/01 *Ganis v. Ministry of Building and Housing* [31]; HCJ 4562/92 *Zandberg v. Broadcasting*

*Authority* [32]; CrimA 6559/06 *A. v. State of Israel* [33], *per* President Beinisch at paras. 7-8). There is a connection between the interpretative balancing formulas, such as the near certainty test, that were formulated in the case law prior to the "constitutional era", and the proportionality principle established in the constitutional limitations clause. In my view, the case law balancing formulas can be properly placed, *mutatis mutandi*, within the framework of the third sub-test of proportionality, which is based on a balancing of values (see HCJ 10203/03 *"Hamifkad Haleumi" Ltd v. Attorney General* [34], at par. 55 of my opinion). This is the position taken by Professor Barak, as he recently described it (A. Barak, "Principled Constitutional Balancing and Proportionality: the Doctrinal Perspective," *Barak Volume - Studies in the Judicial Work of Aaron Barak* 39 (E. Zamir, B. Medina and C. Fassberg, eds., 2009), at pp. 94-96). If the only difficulty I found in s. 5(1) of the Statute regarding the more stringent test was that it does not expressly refer to the near certainty test, that test could be prescribed by way of interpretation (while eliminating the test relating to the thwarting of a security offense).

However, in our case, the said interpretation technique is not sufficient to allow the Statute to satisfy the constitutional requirement, even regarding the stringent test. Even if a stringent interpretative criterion were to be adopted regarding s. 5 of the Statute, requiring near certainty that the interruption of the interrogation would frustrate the prevention of harm to human life (while eliminating the other less stringent tests), the section would still be tainted by a constitutional defect that cannot be remedied other than through the legislature's intervention, should the legislature decide to so intervene: the Statute still grants the power to establish, in the context of a detention extension decision, a duration for the detention which is liable to be disproportionate — even one that is as long as the maximum period. An extension of detention until completion of the full continuous maximum period, in the absence of the detainee, is liable to infringe upon the constitutional right beyond the extent that is necessary — particularly if the initial detention period was a short one. I have therefore concluded that there is no choice but to declare the invalidity of s. 5(1), as my colleague has proposed.

6. The invalidation of a statute is a measure of last resort. The constitutional aspiration is to strike a balance between conflicting values, rather than to decide between them. "A balance must be struck between security needs and the rights of the individual. This balance imposes a heavy

burden on those involved in the defense of the state. Not every effective measure is also a legal one. The end does not justify the means . . . This balance imposes a heavy burden on the judges, who must determine, on the basis of existing law, what is permitted and what is prohibited" (*Public Committee Against Torture in Israel v. Government of Israel* [22], *per* President Barak, at para. 63).

Against this background, I considered the possibility of finding the Statute constitutional with respect to the more stringent balancing formula only, as per the interpretation requiring near certainty, in reliance on the assumption that in all cases, a judge deliberating a case in the absence of the arrestee will reach a proportionate result concerning the duration of the detention (see and compare *A. v. State of Israel* [33], *per* President Beinisch at para. 46). However, I concluded, ultimately, that such an attempt cannot succeed. If, as per my view, s. 5(2) needs to be invalidated in its entirety, there is no point, in any event, in allowing a detention hearing to be held without the detainee being present: an appeal will be submitted immediately, requiring the detainee's presence by virtue of the general law regarding appeals as established in s. 53 of the Criminal Procedure Law (Enforcement Powers – Arrests), 5756-1996 — and the detainee's interrogation will be halted for that purpose. Furthermore, the determination of the duration of the maximum period is primarily the job of the legislature, and it should be allowed a reasonable amount of time to establish an arrangement that will satisfy the constitutionality threshold (compare *Tzemach v. Minister of Defense* [1], at p. 284; *Marab v. IDF Commander in Judea and Samaria* [18]; Y. Mersel, "Suspension of a Declaration of Invalidity," 9 *Mishpat U'Mimshal (Law and Government)* 39 (2006).

7. I therefore agree with the bottom line expressed in the decision of my colleague the Vice President. I nevertheless believe that we can leave for further discussion the Vice President's view that in this case the "cumulative effect" of the provisions regarding the denial of attorney-client meetings, together with s. 5 of the Statute, crosses the constitutionality threshold (paras. 28 and 30 of his opinion). I emphasize that in this proceeding the appellant did not attack the constitutionality of s. 35 of the Arrests Law — the section dealing with the prevention of meetings with an attorney (and see also s. 35(g) of the Arrests Law which allows for hearings to be held in the

presence of the detainee and of his attorney, separately). I believe that the bottom line can be reached through a direct analysis of s. 5 of the Statute in and of itself.

In light of the novelty of my colleague's approach, I wish to note regarding this matter that the argument concerning the "cumulative effect" of two legislative measures is a consequential argument (see, in the context of a discrimination claim, HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [35]). As a consequential argument it cannot be examined abstractly, and instead it is always applied in the context of a concrete case (see and compare HCJ 366/03 *Society for Commitment to Peace and Social Justice v. Minister of Finance* [36], *per* President Barak, at par. 19). The use of the "effect" argument in the context of this case means that a claim is being made that the *manner* in which the measures are employed, when combined together, amounts to an unnecessarily excessive infringement of a constitutional right. The argument is not made against the *very existence* of each of these powers, in and of itself and separately. The rule is that the burden of proof in the first stage of a constitutional review is imposed on the party arguing against constitutionality, and it is that party that must prove that a constitutional right has been infringed upon. The rationale at the basis of this requirement is the presumption of constitutionality (A. Barak, "The Burden of Proof and the Infringement of Constitutional Rights," *Trends in the Evidentiary Rules and in the Criminal Procedure Law — Collection of Articles in Honor of Professor Eliahu Harnon* 53 (A. Horowitz and M. Kremnitzer, eds., 2009), at p. 71). This is also true with regard to the "effect" argument. Moreover, the acceptance of an "effect" argument" as a ground for invalidating the particular legislative measure that the party making the argument has chosen to attack, would involve, necessarily, a degree of arbitrariness. Such acceptance relies on the preliminary choice made by that party to attack a specific measure and reflects indifference regarding the other measure, even though it is the combination of the two both measures together that provides the basis for the "effect" argument. It is thus possible that the dominant cause of the "effect" — the cause that forms the source of the unconstitutionality — is not even brought before the court for review, and the court is presented with a deficient factual and legal picture. Therefore, in my opinion, the invalidation of a particular legislative measure which has been established through primary legislation, on the basis of an "effect" argument, requires an overall examination of all the legislative measures that give rise to the claimed "effect". It is clarified that the party making the argument must do so in a reasoned and focused way, and not as a

general claim. (The burden of proof requirement mentioned above necessitates this as well.) In my view, we have not been presented here with arguments that justify the acceptance of such an "effect" argument.

And note, even if the appellant had carried the burden of proof described above, I would still be of the opinion that there is no obvious answer to the question of whether the combination of two measures — which are *each* constitutional *on their own* — is likely to cause an unconstitutional "effect" on a *cumulative basis*. The answer to the question depends, *inter alia*, on the manner in which the measures are actually implemented in practice; on the purpose constituting the basis for each measure; and on the ability to identify the measure which is dominant in causing the said effect. Thus, for example, when the purposes of the measures are connected, the invalidation of one of the measures is likely to eliminate the justification for the use of the other measure (see and compare HCJ 801/00 *Bassam Natshe and The Public Committee Against Torture in Israel v. Erez Military Court* [38]). Of course, this examination of the legislative measures will also impact upon the proper constitutional remedy. These issues are complex and require in-depth examination. I prefer to leave them for further review at the appropriate time, having reached the conclusion that the legislative measure prescribed in s. 5 of the Statute, in and of itself, is unconstitutional.

8. To sum up, if my view is accepted, s. 5(1) and s. 5(2) will be found to be invalid. This leads to the invalidation of the entire s. 5 of the Statute, since s. 5(3) and s. 5(4) do not stand alone. My position is that the legislature should be given six months during which, if it wishes to do so, it may establish a different arrangement that restricts the ability to hold detention extension hearings, reviews and appeals in the absence of the detainee. In my view, such an arrangement may be based on the presence of a danger – at the level of near certainty – that the prevention of harm to human life will be frustrated; the arrangement will relate to a limited period which will meet the criteria for constitutionality. I therefore propose to my colleagues to delay the declaration of the Statute's invalidation that is contained in our judgment, for a period of six months from the date on which the judgment is rendered.

**Justice S. Joubran**

I concur in the decision of my colleague, Vice President E. Rivlin. We cannot ignore the needs of the hour and the need to allow the security forces to use effective means for protecting public welfare and security. However, as my colleague the Vice President notes, the normative framework that we are discussing here is a criminal proceeding. Even in times of emergency, we must not forget the primary principle, that the purpose of a criminal proceeding — the purpose without which there may not be a proceeding — is the punishment of a person for offenses that he has committed and regarding which his guilt has been established. It is often necessary, in the context of such a proceeding, to use secondary measures, the primary example of which would be an arrest and an interrogation, but these are required only for the purpose of realizing the final purpose of the proceeding. The defendant who has been prosecuted is the center of the criminal proceeding, and the questions that are asked of him will all relate to his own acts and liability for that which is attributed to him. Alongside this is the state's duty to make use of its powers for the purpose of punishing him. It is therefore not for nothing that one of the key requirements, one to be found at the core of the criminal proceeding, is the presence of the defendant in the court where he is being brought to trial. When a defendant is prevented from exercising this right — to be present at the place where he is being judged — his right to human dignity has been severely violated. It would seem that the best description of this situation would be that of Josef K's experience, and of his extreme despair after having been tried in secret, until his bitter end:

> Were there objections that had been forgotten? Of course there were. Logic is no doubt unshakable but it can't withstand a person who wants to live. Where was the judge he'd never seen? Where was the high court he'd never reached? He raised his hands and spread out all his fingers. But the hands of one man were right at K's throat while the other thrust the knife into his heart and turned it there twice. With failing sight K. saw how the men drew near his face, leaning cheek-to-cheek to observe the verdict. "Like a dog!" he said; it seemed as though the shame was to outlive him.

[*Translator's note — excerpt from "The Trial, published by Tribeca Books, April 2012, translation copyright by David Wyllie*]

Unlike the Kafkaesque legal world, it is unimaginable in the modern liberal world of law that a person would be tried for his actions without being given the opportunity to be present at the time that his guilt is being determined, and this is not disputed in the case before us either.

The state's position on this is incorrect: these matters are just as relevant at the stage of a pre-trial arrest. In contrast to the state's position, it is when a person is in custody in anticipation of his trial, at a time when the presumption of his innocence remains in full force, that it is especially necessary that he himself be brought before the court in order to refute what has been attributed to him and to seek his freedom. Despite all the significance of an intensive and effective interrogation of security offense arrestees — arrestees whose interrogation can often prevent harm to the lives of innocent people — the purpose of an interrogation in the context of a criminal proceeding is the clarification of those acts that the person being interrogated committed in the past, in anticipation of the person being brought to trial for the commission of such acts. The limitations imposed on the person's freedom are derived from this purpose — such limitations being a consequence of the acts the person is suspected of having committed. The denial of the rights of these arrestees to come before court and argue against their detention — at a time that the evidence against them is only at the *prima facie* level and has not yet been formed into the basis for an indictment — constitutes a direct contravention of the most basic principles of criminal law, and we cannot accept it.

I therefore agree with the view that the Temporary Provision must be invalidated, as it does not satisfy the requirements of the Basic Law: Human Dignity and Liberty.

**Justice E. Rubinstein**

*Introduction*

1. I join in the comprehensive opinion of my colleague the Vice President, subject to my following comments. I first wish to express my surprise regarding the petitioners' decision to withdraw their petition in HCJ 2028/08 because of the hearing held partially *in camera* (albeit by majority decision), at which the representatives of the defense establishment presented their positions. Section 15 of the Arrests Law does allow for the presentation

of confidential information regarding particular individuals on an individual basis, as counsel for the petitioners argued, but I do not believe that this option is unavailable when the case is a "general" and constitutional case being deliberated by the High Court of Justice. Indeed, this is not a routine matter; it is instead a non-routine decision regarding the unconstitutionality of a statutory provision which relies on, *inter alia*, "the ? hindrance of the prevention of harm to human life" (s. 5(1) and s. 5(4) of the Temporary Provision, with which we are dealing), and requires precise and sophisticated consideration. The court must be presented with the complete picture, particularly when the argument being made involves the proportionality of the legislation. The Knesset sub-committees also view confidential information. As some of my colleagues have noted during the deliberations in this Court, this viewing of confidential information was necessary in order for our decision to be responsible and concrete, rather than abstract.

2. My colleague the Vice President considered the question of whether the issue should be dealt with as a theoretical one, and I will add, as a further reason for dealing with this case (beyond his reasons, with which I agree) that given the Israeli reality, and especially the reality relating to Judea, Samaria and the Gaza Strip and the Palestinian population, it is frequently the case that an immediate decision is required. This immediacy does not allow for an organized and in-depth response to a particular case, so that the discussion of the principles of the subject must be conducted after the operative matter has come to an end; see the matter of the release of the Palestinian prisoners in the context of negotiations, in HCJ 10578/08 *Legal Institute of Terrorism Studies v. Government of Israel* [37], decision dated 15 December 2009, and the unreported opinion of Justice Arbel, dated 3 November 2009).

*Section 5 and interrogation methods*

3. Regarding the decision itself, it is not a simple one. The subject was discussed at length in the Knesset (as will be partially described below) and the legislature was persuaded by the needs of the security establishment. Our approach here is not based on self-righteousness; we are aware of the burdensome tasks faced by the security establishment in terms of the interrogations that are carried out for the purpose of thwarting acts of terrorism; we do not live in an ivory tower or in a bubble, as we are citizens, whose people and whose country are exposed to security dangers. We believe that the explanatory material accompanying the Draft Law (Draft Laws 206, *supra*, at p. 1) reflected, per the government, a necessity; we have learned

from experience that even if some of the measures that the legislature has made available to the authorities who conduct the security interrogations – such as the prevention of meetings with attorneys (see s. 35 of the Arrests Law) – intrude on the array of rights of those who are subject to such measures, there are good reasons for these measures to be used, reflecting legitimate interrogation needs. As my colleague the Vice President noted, the purpose for the enactment of s. 5 is appropriate, on a *prima facie* basis. However — and I say this now and I will repeat it below — the measure which is prescribed in s. 5 (i.e., the holding of a hearing in the arrestee's absence) is rarely used. Its rarity, which none dispute, indicates that the interrogation authorities — and this is a fact to be appreciated — generally do their work by relying on other measures that are available to them. The concern that a judicial decision will prevent the security forces from doing their job well also arose after the decision in *Public Committee Against Torture in Israel v. Government of Israel* [20] — that case being one which prohibited the use of a substantial portion of the measures that the parties conducting security investigations had used until that time. This concern eventually dissipated because of the professional wisdom that the authorities displayed following the issuance of that decision (a matter to which I will return). The need for a decision in our case arises from the fact that the State of Israel is a country in which human dignity is a constitutional value — and it is a value which contains within it the right to due process.

4. I agree with the Vice President that we should not distinguish between the presence of the defendant at his trial and his presence at the detention hearings. As the sage Hillel said: "What is hateful to you, you must not do to your friend" (Babylonian Talmud, *Shabbat* 31a). It is true that those who are interrogated under the circumstances under discussion here are generally not our "friends" and they are often in fact our enemies; but we must recall the classic comments of the then Vice President Haim Cohen:

> 'What is the difference between the way the state fights and the way its enemies fight — that the state fights while observing the law and the enemies fight while violating it. The moral strength and substantive justice of the fighting engaged in by the authorities is entirely dependent on the observance of the law of

> the land' (HCJ 320/80 *Kawasme v. Minister of Defense* [38], at p. 132).

These remarks are true, *a fortiori*, with respect to hostilities that are conducted while complying with the Basic Laws and with the constitutional rights — meaning also the right to due process. When we speak of those being detained in connection with security offenses — who are subject, by law, to several unique restrictions (see, as stated, s. 35 and s. 36 of the Arrests Law) — any addition to the existing restrictions must be considered properly in terms of its proportionality, so that the result will not be like that of the mythological beast of burden who was given such a heavy load that any addition to it would cause the beast to collapse.

*On security and rights*

5. The decision to be reached in this case is one part of this Court's effort to deal with security matters, as set against various types of rights of Palestinians and Israelis. As President Barak wrote in *Public Committee Against Torture in Israel v. Government of Israel* [20] at p. 895, "[a] democracy must sometimes fight with one hand tied behind its back" (see also CrimA 6659/06 *A v. State of Israel* [33], at para. 30; HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior et al*. [40]; HCJ 951/06 *Stein v. Police Commissioner* [41]; HCJ 7957/04 *Mara'abe v. Prime Minister* [42], at para. 29; HCJ 7862/04 *Abu Daher v. IDF Commander in Judea and Samaria* [43], at paras. 7-8).

6. More than twelve years ago, I wrote the following:

> 'The relationship between human rights issues and the security challenge and security needs will remain on the agenda of Israeli society and of the Israeli courts for many years. Israel is at the height of peace negotiations, but even the most optimistic do not expect that Israel will come to enjoy full peace and security during the foreseeable future. The tension between security and rights will remain, and its key legal expression will be the Basic Law: Human Dignity and Liberty; the discussion will continue regarding questions such as when do security concerns prevail over rights, and what is the proper balance between protecting existence and protecting the human essence — a formulation which reaches the core of the dilemma. We will continue to deliberate the question of what is the range between the commandment "take therefore good heed unto

> yourselves" (Deuteronomy 4, verse 15) in a group sense, and "man was created in the image of God" (Genesis 9, verse 6) and "the honor of human beings is great in that it annuls even a negative commandment of biblical origin" (Babylonian Talmud, *Brachot* 19b). The court seeks to find the balance between security and rights, such that the word security is not used in vain, but security is also not forgotten' (E. Rubinstein, "The Basic Law: Human Dignity and Liberty and the Security Establishment," 21 *Tel Aviv Univ. L. Rev. (Iyyunei Mishpat)* 21 (1998), at p. 22; E. Rubinstein, *Paths of Government and Law* (2003), at p. 226).

This matter is especially obvious when we speak of the General Security Service. (See my remarks in my above-mentioned book, at pp. 268, 270-271, originally published in E. Rubinstein, "Security and Law: Trends," 44 *Hapraklit* 409 (October 1999); see also E. Rubinstein, "On Security and Human Rights During the Struggle Against Terrorism," 16D *Law and the Military* 765 (2003). As N. Alterman wrote, as quoted in *Paths of Government and Law*, *supra*, at p. 271, in his poem "Security Needs, Following One of the Searches, 1950" (*Seventh Column* 1, at p. 3279): "A state is not built with white gloves and the work is not always clean and pure-hearted — this is true! It seems that to some degree, we allow ourselves a small luxury of dirt." Long before the "age of human rights", the poet warned us against sliding into the commission of improper acts. And I would bring a "general" parallel from another piece of his poetry, which refers to the concealment of information from the public regarding a security trial (see, as background, M. Finkelstein, "The 'Seventh Column' and 'Purity of Arms' — Nathan Alterman on Security, Morality and Law" ?20(a) *Law and the Military* 177 (2009)). The poet wrote the following words (*Seventh Column* 2, at p. 358):

> 'Thus, it is not only that these matters should not be kept confidential, not only that the doors of the courtroom may not be locked . . . the deliberation must go beyond its framework, all must be dealt with under the light of day.'

And the words of the American Supreme Court Justice, Louis Brandeis, are often recalled and cited "sunlight is said to be the best of disinfectants . . .".

7. Indeed, the struggle to arrive at a balance between security and rights, using a sensitive scale and fine-tuned tools, runs like a shining light through this Court's case law. Because Israel is a Jewish and democratic state, its approach to the matter of the ethics of the struggle against terror must draw inspiration from Jewish law as well. In HCJ 9441/07 *Igbar v. IDF Commander in Judea and Samaria* [44], Rabbi Aaron Lichtenstein's remarks (from "The Patriarch Abraham's Ethics of War," *Parshat Lech Lecha, 5766*, websitehanas of Yeshivat Har Etzion) are cited:

> 'We must continue to walk in the path outlined for us by our father Abraham (regarding the way he conducted his war — E.R.) and be sensitive to morality and justice even in the middle of a just war and struggle, which are themselves correct.'

See also J. Ungar, "Fear Not Abraham — on Jewish Military Ethics," *Portion of the Week* (A. Hacohen and M. Wigoda, eds.), at p. 30; A. HaCohen, "'I am for Peace; But When I Speak, They Are For War': Law and Morality at a Time of War," *Portion of the Week*, at p. 260.

8. In HCJ 1546/06, *Gazawi v. Commander of IDF Forces in Judea and Samaria* [45], the Court, referring to the need for a substantial interrogation of every detainee, held as follows:

> 'Within the basic boundaries of human dignity — and the rules relating to this apply to all, even to those who are suspected of having committed the most serious and even despicable and depraved crimes, acts committed by those who are as far from human dignity as east is from west — there is an obligation to interrogate a person shortly after his arrest, while presenting to him the information that can be shown to him, the information which is not classified and which may therefore be disclosed. The purpose of allowing this, beyond the provision of the opportunity to raise arguments concerning mistaken identity, etc., is that a person may not be detained without having been given every opportunity, even if he does not make use of it, to present a version that refutes the justification for his arrest, and to attempt to persuade . . .'

As Professor A. Rosen-Tzvi wrote (*Hapraklit, Jubilee Volume* -1993, ed. in chief, A. Gabrieli, ed., M. Deutsch), 77, at p. 78:

> ‘ . . . The reality of security dangers does not negate the law, just as the enormity of crime does not cancel the need to grant basic rights to the person being interrogated, or to a defendant. The law is not silenced by security needs. Security must also adapt itself to law, but at the same time, a particular security situation requires the law to adjust itself within the framework of the proper balancing between law and life’.

See also CrimPet 10879/05 *Al-Abid v. State of Israel* [46]:

> ‘The security reality of the state involves real security needs, and the enemies of the state and those who help them or those involved in terrorism . . . often act in a sophisticated manner while presenting new challenges to the security and enforcement authorities . . . the security challenges weigh in on one side, and the need to guard the rights of the defendant, including his constitutional rights, weighs in on the other side; each case requires a careful balancing’.

We are faced, in examining the proportionality of the Temporary Provision in this proceeding, with the duty to act fairly, on the one hand, and the need to find a balance, on the other hand.

*Legislative proceedings and parliamentary supervision*

9. It is now necessary to note, in brief, that the Knesset deliberations regarding the legislation that is the subject of this case — deliberations that were held in the plenum and in the Committee on the Constitution, Law and Justice — involved a great deal of discussion of s. 5 (s. 6 of the Draft Law). The Draft Law was submitted along with a great emphasis on the necessity of continuous interrogations (Protocol of the Committee on the Constitution, Law and Justice hearing, 16.3.2006, at p. 2) and the change that had taken place when the military administration of Gaza ended in the summer of 2005. During the Committee’s hearing on 16 March 2006, the Committee’s chairman, MK Michael Eitan, stressed the challenge presented by the need to strike a proper balance (*ibid*., at p. 3). At the same session Dr. Yuval Shani of the Hebrew University noted (*ibid*., at p. 14) the difficulty presented by the

combination of a hearing held in the defendant's absence — something which can, by itself, be justified by special security needs — and a situation in which the defendant has been prevented from meeting with an attorney. The representative of the Association for Civil Rights in Israel, Attorney Lila Margalit, asked whether it was legitimate for a democratic state not to allow a suspect to appear in court because of the need for a continuous interrogation since "judicial supervision has an additional function [beyond the extension of the detention — E.R.], which is the viewing of the suspect. The fact that the suspect is removed from the interrogation unit and physically reaches the court has great significance with respect to his ability to present complaints . . . " (*ibid*., at p. 23). Chairman Michael Eitan responded (*ibid*., at p. 24) that the matter should be the subject of judicial discretion, since the court has the tools to determine when it needs to see the individual. The legal adviser to the General Security Service noted (*ibid*., at p. 32) that after the disengagement from the Gaza Strip, the physical disconnection had caused great difficulty with respect to interrogations. The Deputy State Prosecutor, Attorney Shai Nitzan, noted (*ibid*., at p. 44) that it would be necessary to attempt to *persuade a judge*, who wishes to be made aware of all, to allow the arrestee not to be present so as not to hamper the interrogation.

10. The discussion of this subject was not concluded during the sixteenth Knesset's term, and it was deliberated again by the seventeenth Knesset on 20 June 2006. The deputy legal adviser to the Knesset, Attorney Sigal Kogut, presented (Protocol of the Committee on the Constitution, Law and Justice hearing, 20.6.2006, at pp. 2-3) the Draft Law as it was at that time (the proposal had been changed in the meantime), including the framework for the exercise of judicial discretion through which the court would determine whether it was persuaded that the interruption of the interrogation would be likely to prevent the thwarting of the commission of a security offense, or the ability to prevent injury to human life (*ibid*., at p. 5). Several Knesset members discussed the question of the arrestee's presence at a trial, as did Attorney A. Avram, from the Public Committee Against Torture (*ibid*., at p. 11-12) and the Deputy State Prosecutor, Attorney Nitzan (*ibid*., at pp. 27-28). Attorney Nitzan agreed (*ibid*., at p. 28) that s. 5 was problematic, but described the many difficulties involved in conducting a reasonable interrogation if the arrestee is required to be brought every day or two to court — "we therefore sought a solution for the matter . . . that it will be necessary to persuade the court to allow the hearing to be held in the arrestee's absence. If we wish to enable the conduct of reasonable

interrogations, we must provide a tool . . . I ask that you rely on Israel's judges that if they are being sold a story . . . they will know not to buy it". At the Committee vote on the section (on 20 June 2006), the Meretz, Chadash and Ra'am-Ta'al factions expressed reservations, seeking to delete s. 5, but these were not accepted. Reservations regarding this subject were expressed in the Knesset plenum (on 27 June 2006), when the Temporary Provision was approved.

11. During the deliberation preceding the first reading of the matter of the extension of the Temporary Provision (on 12 November 2007), Justice Minister Daniel Friedman stated as follows: "It has become clear that the provisions prescribed in the Temporary Provision have been most essential for the enforcement authorities who are engaged in the investigation of terrorism crimes and in thwarting them." At the discussion held by the Committee on the Constitution, Law and Justice (on 3 December 2007), the head of the interrogations department of the General Security Services stated, regarding s. 5, that it had been used on seven occasions through that time. Attorney Avram of the Public Committee Against Torture again noted (Protocol of the Committee on the Constitution, Law and Justice hearing, 3.12.2007, at pp. 8-9) that "the hearing of the two sides is the moral basis for an adjudication . . . we are tying the judge's hands. The arrestee finds himself in a position of inferiority and remains in a truly inhumane situation. He cannot go to court and state his position, and he cannot tell anyone of the manner in which he is being interrogated, he cannot tell anyone of any mistake that he has found . . . nor can he speak of any other matter . . ." On the other hand, the head of the interrogations department of the General Security Service stated that "without this, it is impossible" (*ibid*., at p. 123). At a different Committee hearing (on 12 December 2007) the issue of s. 5 arose again (in particular, s. 5(4), dealing with the possibility of concealing from the arrestee the decision in his case if the court is persuaded that "disclosure to the arrestee is likely to prevent the thwarting of the commission of a security offense or hinder an ability to prevent harm to human life"). It was again proposed that s. 5 should be omitted, but the reservation was not accepted. When the extension of the Temporary Provision came up for second and third readings (on 18 December 2007), MK Y. Levy stated, in the name of the Committee on the Constitution, Law and Justice, that "the Committee . . . had received a detailed report from the

Ministry of Justice and from security forces involved in the matter, and we had the impression that the security forces were using this law in a proportionate manner. The security forces had used these sections only in what appeared to be exceptional cases, which were few in number."

12. To complete the picture, it is noted that the semi-annual report to the Committee on the Constitution, Law and Justice regarding the exercise of the powers that had been granted, dated 9 September 2008, stated that s. 5 had been used twice (including the use of more than one sub-section). The Committee's legal adviser noted that there has been "a substantial decline, primarily in the use of s. 5, which is at the center of the petition."

13. We see that the legislative branch considered the issue of s. 5 at length. However, I suspect that the transcripts of the Knesset proceedings indicate that the state's representatives did not provide any information regarding the way in which the interest in saving *human lives that are at risk* is truly weakened if the security establishment does not have available to it the ability (even if it is dependent on the court's approval) to conduct a legal proceeding in the absence of the arrestee, as described in s. 5. The Temporary Provision designed by the legislature *is not limited to cases of "ticking bombs"* and the protected value which is under discussion here is not limited to human life. The issue thus does not reach the level of *near certainty and substantial and immediate concern for human life*, and I do not consider here the question of whether, in certain circumstances, the necessity defense established in s. 34K of the Penal Code, 5737-1977 would be available. Thus, when considering the section in terms of the constitutional balancing, it would seem that the scales have tipped, disproportionately, in favour of one side — with harm being done, from the suspect's perspective, to the significant value which is his right to due process — and this does not, heaven forbid, reflect on the court's decency or that of the authorities conducting the interrogation and the prosecution. Instead, it relates to the condition of the suspect. We understand the difficulties noted by the security establishment in connection with the need to conduct continuous interrogations, and we cannot say that these are not significant in certain cases, but there are not many such cases, and in any event the duration of the first detention will have been determined by a judge who has examined the interrogation needs in the specific case, in view of the specifics of the party being interrogated. I would emphasize the following: *the need to bring the arrestee before a judge is a fundamental principle in any proper legal system* and is a part of the judicial genetic code without which there is no due

process. Thus, this legislation lacks proportionality, as my colleague the Vice President described. Moreover, we note, simply, the principle of human dignity has shown us that an issue which can be resolved through other measures does not comply with the limitations clause, even if the particular matter has been enacted through legislation, even in only a Temporary Provision — when the constitutional right to due process has been violated.

*Dealing with terror and legal limitations*

14. Here I wish to placate the respondents, to a certain degree, by adding that after the decision in *Committee Against Torture in Israel v. Government of Israel* [20] in 1999 — only a little more than ten years ago — the security establishment was very concerned (to put it mildly). I served, at the time, as the Attorney General, and many discussions were held in various forums regarding the implementation of the decision and the new situation that had been created, and various legislative initiatives were considered that were intended to make it possible "to survive the harsh decree". And fortunately, the establishment has, over time, found solutions to the difficulties, through various forms of creativity. One year after the decision was issued, the difficult period entitled the "second intifada" began, and the tasks with which the security establishment was charged were very difficult; but it dealt with them, within the limitations established in that decision, with considerable success. The immediate aftermath of the decision in *Committee Against Torture in Israel v. Government of Israel* [20] was described as follows (Rubinstein, *Paths of Government and Law*, *supra*, at pp. 273-274):

> 'After the decision, the establishment faced a dilemma; on the one hand, the General Security Service believed that the decision had dealt a harsh blow to the effectiveness of its interrogations during a period in which, in any event, in light of the agreements with the Palestinians and the withdrawals that were taking place, its ability to interrogate had become limited; it therefore believed that regulatory legislation was necessary. This position is worthy of examination. Many believed otherwise, and that there was no chance that any effective legislation would comply with the limitations clause. One of the dilemmas that we also face is the matter of the protection of the interrogator who carries out his job honestly, as the decision

> prohibits the use of the necessity defense as a sword, and allows it to be applied only as an "after the fact" shield. I myself believe that it will be of the utmost importance that there be as broad a consensus as possible for any solution that is found, since I believe that in terms of values, there are none who are more concerned about security than are others, and none who are more concerned with rights than are others.
>
> After the decision was rendered, a committee headed by the Deputy State Prosecutor, Rachel Sucar, and the Deputy Attorney General, Meni Mazuz, discussed the question of whether there was a need for legislation, and if there was, what kind of legislation was needed. The questions are difficult to ask, and they are questions of the "squaring the circle" type . . . . In the end, after all this, the events of Tishrei 5761 (October 2000) occurred, with the ensuing eruption of violence, which significantly sharpened all these questions concerning the relationship between security and rights, as well as other questions.'

In the end, the decision was made not to pursue legislation, and the security establishment found methods and channels of interrogation that fell within the boundaries of the existing law.

15. We are aware that some of the interrogation methods that are currently used were developed as a consequence of the decision in *Committee Against Torture in Israel v. Government of Israel* [20] and that our current decision will necessitate another round of creative thinking. It can be presumed that the security establishment will buckle down following the issuance of this judgment, and will find ways that comply with the law's requirements to improve the interrogations and to achieve its objectives. We note, nevertheless, that the situation here, and that which followed the 1999 decision, are not at all the same. In *Committee Against Torture in Israel v. Government of Israel* [20], this Court disallowed various interrogation methods that had been used for years — but in this case we are dealing with interrogations that had been conducted for years *without* the additional tools provided in the Temporary Provision. It is true that after the disengagement from the Gaza Strip, there were more individuals whose interrogations were subject to Israeli law (and not to the region's [military administration] law, which had applied in the past), but there is no reason not to apply to them the rules that applied prior to the Temporary Provision.

16. In this context, I would add, that if the text of s. 5(1) had been such that its application was limited to cases involving *the hindrance of the prevention of nearly certain injury to human life in the soon or near future*, (which is not the case given the actual text of the section) — meaning that it would cover a "ticking bomb" situation (see also *Committee Against Torture in Israel v. Government of Israel* [20], at p. 845; Rubinstein, *Paths of Government and Law*, *supra*, at pp. 275-277) — it may very well have been able to pass muster from a constitutional perspective. This would be so even if in situations like this, the processes are generally urgent and rushed, with tight schedules that are likely to create problems of a different kind (see also paragraphs 22 through 27 below). However, constitutional judicial review can deal with a specific legislative arrangement, by approving or disapproving it, but such review cannot — either legally or practically — propose a more proportionate arrangement.

17. We must take the bull by the horns. On a *prima facie* level, the authority granted in s. 5 is given to the court dealing with the detention, and the court can exercise discretion; the court, carrying out its function as a filter, will consider the circumstances and will ask the right questions before making a decision about whether to be satisfied with a proceeding at which the suspect is represented, but not present. And we must not forget that representation has its own value, and is also a basic right of a constitutional nature. Judicial intervention in such a case is not a simple matter (see, as a comparative parallel situation, HCJ 7932/08 *Al-Harub v. Commander of the Military Forces in Judea and Samaria* [47]). Nevertheless, I believe that the value of due process for one who is likely to be a serious offender, but who still enjoys a presumption of innocence and against whom no indictment has yet been issued, should tip the scales in the framework of proportionality. This section allows for detention to be extended without the suspect being present even when the interrogation involves a security offense that *does not* include a near certainty of danger to human life. Furthermore, the judge who determines the length of the first detention period will not necessarily be the one who will waive the need for the presence of the suspect later on, for the maximum of 21 days (which is a long period) — and this is a built-in difficulty. A situation can arise in which a second judge, sitting in the same court, can change the decision reached by his predecessor who had ruled that the court must see the suspect. In substance — and this is the heart of the

matter — it may be that the first judge, at the time that he determines the length of the initial detention, will receive a particular impression regarding the suspect's situation, but the second judge will not receive this impression when the suspect is absent. I am also aware that this is a Temporary Provision, and that the level of the violation is therefore likely to be less. However, since this a constitutional right, the measure still impairs the concept of proportionality; the degree of harm to a right here is greater than is necessary.

*The position of Jewish law regarding the presence of a litigant at his trial*

18. My colleague the Vice President has examined, from the perspectives of Israeli law and of comparative law, the issue of an arrestee's presence at detention proceedings — both in terms of legislation and case law. I wish to look at the living sources of Jewish law regarding the matter. Although Jewish law does not deal directly with detention hearings, its clear position regarding the presence of a litigant at his trial, either civil or criminal, can be a source of inspiration in our case.

19. Generally, this is an issue involving equality and fairness, and together with these two values — of justice. Its basis is biblical, coming from the language in Deuteronomy 1, verses 16-17:

> 'I further charged your magistrates as follows, "*Hear out your fellow man, and decide justly between any man and his fellow or a stranger* ['ger']." You shall not be partial in judgment, hear out low and high alike. Fear no man, for judgment is God's' (emphasis added).

Note that the verse recalls not only the man and his fellow, but also the stranger; and although Rashi [an eleventh century major Biblical and Talmudic commentator – E.R.] explained the term "the ger", according to the Babylonian Talmud (*Sanhedrin* 7b) as meaning a litigant who "collects much material against him", the term "stranger" was translated by Onkelos [the Aramaic translator – E.R.] according to its plain meaning [namely, a convert – E.R.], and Rabbi Saadiah Gaon [a tenth century scholar] interpreted the term as meaning a "resident stranger". And this is relevant to our matter, in which most of the arrestees involved — if not all of them — are Palestinians. Maimonides (the important twelfth century codifier and philosopher) ruled similarly (*Laws of the Sanhedrin*, 21, 7): "A judge may not hear the words of one of the litigants before his co-litigant arrives, or before the co-litigant was told 'hear out your fellow man'." In the same spirit, the Shulkhan Aruch

(*Hoshen Mishpat* 16, 5) provides that "a judge may not hear the remarks of one litigant other than in the presence of the other litigant, and that litigant too has been cautioned regarding this."

20. It should be noted here that in Jewish criminal law, with respect to capital cases (*dinei nefashot*) (in which the punishment is capital punishment ordered by a court, and I stress this, because the phrase *dinei nefashot* is currently normally used to refer to criminal law in general) — it is required that the defendant be present. (See Babylonian Talmud, *Sanhedrin* 79B: "a person's judgment may not be concluded other than in his presence" — and this applies as well to an animal who is, under certain circumstances, brought to trial — "the animal's execution is [treated] like its owners"; see also, Babylonian Talmud, *Baba Metzia* 45A). Maimonides (in *Laws of Murder and the Preservation of Life*, 4, 7) ruled — for example — as follows: "If a murderer who was sentenced to execution becomes intermingled with other people, they are all absolved. Similarly, when a murderer who was not convicted becomes intermingled with other murderers who were sentenced to execution, none should be executed. The rationale is that *judgment can be passed on a person only in his presence*. All the killers should, however, be imprisoned" (emphasis added — E.R.); see also Maimonides, *Laws of the Sanhedrin*, 14, 7 ". . . we complete the judgment of a person only when he is present." Note that, according to Jewish law, a trial in capital cases is *ended* on the day of the judgment in the event of an acquittal, and on the day afterwards if there is a conviction (Mishnah, *Sanhedrin* 4, 1; Maimonides, *Laws of the Sanhedrin*, 11, 1). This indicates that even a murderer will actually be exempt from execution if the judge was not able to see him at the time judgment was completed. The Bible states as follows (Numbers 35, 12) "the manslayer may not die unless he has stood trial before the assembly"; and the law is as Maimonides wrote: "How are cases involving capital punishment judged? When the witnesses come to the court and say: 'We saw this person commit such-and-such a transgression', the judges ask them: 'Do you recognize him? Did you give him a warning?' (*Laws of the Sanhedrin*, 12, 1), which is based on the language of the Mishnah, *Sanhedrin* 5, 1, which includes (per Rabbi Yossi) the following language among the questions that are asked of witnesses: "Do you know him? Did you warn him?" It is clear that this involves the presence of the defendant. See also Maimonides, *Laws of Murder and the Preservation of Life*, 1, 5; *Sefer Hachinuch*, 409. Indeed, it

is not for nothing that in the context of the "capital laws" of our time, s. 126 of the Criminal Procedure Law (Integrated Version), 5742-1982, provides that "[i]n the absence of another provision in this Law, a person may not be judged in a criminal proceeding other than in his presence."

21. As Professor E. Shochetman wrote ("'Hear Out Your Fellow Man' — Rules of Natural Justice and the Principle of Equality in Arguments Brought by Litigants," *Portion of the Week* 36), we are dealing with the principle of equality before the court. As he stated, "the reason for this rule is that in the absence of the opposing party, the litigant who is making his arguments can formulate lies as if they were the truth . . . after the judge has heard the words of this litigant, and has already leaned towards ruling in his favor, it will be difficult for the judge to change so as to rule in favor of the opposing party after he hears the arguments put forth by that party". I do not say that the government authorities would not tell the court the truth, but I do wish to note the dilemmas involved when only one side is heard. Regulation 57 of the Rabbinical Tribunals Regulations, 5733, provides that "the litigants are to be present throughout the entire trial, even if they have representatives, unless the tribunal decides that their presence is not necessary . . ." Professor Shochetman also noted that the "denial of a litigant's right to be present at the time that the claims and evidence of the other side are presented is a violation of the right to a fair hearing . . . this is one of the principles of natural justice". And he concludes by stating that "the commandment of 'hear out your fellow man' involves many rules, and the purpose of all of them is 'and you shall judge with justice'". He cites Maimonides, as follows (from *Laws of the Sanhedrin*, 21, 1):

> 'It is a positive commandment for a judge to adjudicate righteously, as it is written: "Judge your fellow people with righteousness." What is meant by a righteous judgment? It is when the two litigants are made equal with regard to all matters.'

See also Shochetman, *Litigation Procedure* (1988), at p. 220, citing the responsum of Rabbi Moshe Isserles (the Rama), who lived in Poland during the sixteenth century:

> 'Obviously, a matter may not be judged without the defendant's claims being heard, because the Torah commands "hear out your fellow man", and although the matter is simple, we can learn it from God's behavior, because all He does is justice and His ways are pleasant and His directions are of peace; He began

> with Adam (the first man) by asking him "Who told you that you are naked" and He asked Cain "where is your brother Abel," so that He could hear his arguments. *A fortiori*, [the rule applies] to a regular person. And our rabbis learned from the verse "I will go down and see" — that He taught the judges that they should not judge until they hear and understand, and it is learned [from here]. And even if it is clear to the judge that the defendant is guilty, he must in any event hear his claims first.'

This is natural justice in its essence — see also LCrimA 7284/09 *Rosenstein v. State of Israel* [48], at para. 9; H. Shain, *Justice in Jewish Law* (2004), at pp. 98-99.

22. The matter is summed up in Vol. 4 of the Talmudic Encyclopedia, "Litigant" (Column 105): "A litigant may not present his arguments to the judge until the other litigant has arrived, as it is said 'keep away from lies' (Exodus 22, verse 7). When a litigant argues in the absence of the other litigant, he is not ashamed of telling a lie. Rabbi Hanina said this, based on the verse 'hear out your fellow man' (Deuteronomy 1, verse 16), and this includes the following as well: the word hear means to make it be heard, between the parties, when both are present together" (in accordance with the Babylonian Talmud, *Sanhedrin* 7b, and Rashi's commentary there).

23. We see that Jewish law is very concerned with the rules of natural justice; it is true that the rabbinical judges had not been dealing, over the years, with the struggle against terrorism; but the litigation framework is clear and covers all. This Court cannot support a disproportionate weakening of the rules of natural justice.

*Further comments on proportionality*

24. I also note that Professor Aaron Barak has examined the third sub-test as being among those suitable to be used in testing for constitutionality; he termed this test — following Vice President Cheshin (in *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior et al*. [40], at para. 109) — "the test of proportionality in the value sense" (see A. Barak, "The Test of Proportionality in the Value Sense," *Mishael Cheshin Volume*, (2009) A. Barak, Y. Zamir, Y. Marzel (eds.), at pp. 201, 206). He terms this test "the absolute core of proportionality" (*ibid.*, at p. 209), which,

according to his view, "brings an aspect of reasonableness into the concept of proportionality" (*ibid.,* at p. 211). Furthermore, in his article "A Principled and Proportionate Constitutional Balancing: A Doctrinal Perspective," *Barak Volume - Studies in the Judicial Work of Aaron Barak, supra,* Professor Barak examines balancing — the metaphorical rule which is at the basis of the normative approach (see *ibid*., at pp. 53, 55), which is the "balancing between the importance that the single principle is given (beyond the proportionate alternative) and the importance of the prevention of harm to a constitutional right resulting from it" (*ibid*., at p. 63). The concept of the function of the balancing act, in his view, "is not to establish the scope of the right, but rather the justification for its protection or for its violation" (*ibid*., at p. 98). These comments are particularly apt in our case, and there is no need to expand.

25. Jewish law also requires that a balancing be carried out. The basic rule, established by Rabbi Judah Hanasi [the President - E.R.] in *Ethics of the Fathers* 2, 1, provides as follows: "What is the straight path that a person should choose . . . calculate the loss generated by a commandment against its reward and the reward generated by a sin against its loss". We can see this as being, in brief, a balancing, since here as well we are dealing with a matter that is given over to discretion, where there are more than a few unknown factors; see also Rashi's commentary to the verse in Proverbs 4, verse 1, which reads as follows: "Survey the course you take, and all your ways will prosper"; see also Rashi's commentary to Babylonian Talmud, *Moed Katan* 8A, to the phrase beginning "and he who chooses the way. . .". See also Dr. A. Hacohen, "The Principle of Proportionality in Jewish Law," *Portion of the Week* 342, and the examples brought there regarding the need to minimize the harm done to human dignity; Rabbi S. Dichovsky "Proportionality and Coercion Regarding the Granting of a Divorce," 27 *T'humin* 300.

*Justice Naor's position*

26. Before concluding, I will address the thorough opinion written by my colleague Justice Naor, which arrived after I had written my remarks. As noted, I also wrote (in paragraph 16 above) that it is very likely that a narrower version of s. 5(a) — dealing only with "ticking bomb" situations — could be found to be constitutional. My colleague also stresses that this type of restriction would involve a situation of a near certainty of harm. Even if such a legislative process is possible, I doubt whether, on a practical level, it would serve much purpose except in rare cases, and the question is whether it would be worthwhile to enact such legislation specifically for those cases.

27. In any event, even if legislation regarding this matter is considered, it is doubtful whether the factual information that we have been shown here, with respect to the degree to which s. 5 is used as described above, necessitates the delay proposed by my colleague Justice Naor. Furthermore, my colleague discussed, persuasively, the matter of the "cumulative effect", i.e., the question of why we are invalidating specifically this measure — the absence of the arrestee in court — and not, for example, the process for not allowing a suspect to meet with his attorney. She also discussed the question of whether the "combination of two measures — which are *each* constitutional *on their own* — is likely to cause an unconstitutional 'effect' on a *cumulative basis*" (emphasis in the original); this question is indeed a valid one, although the accumulation of several factors often determine the balancing result in administrative law; but it is possible that the matter can be left as requiring further discussion, in light of the specific constitutional flaw we identified with regard to s. 5.

*Conclusion*

28. Based on all of the above, I agree with the opinion of my colleague the Vice President, and I repeat my hope and belief that the security establishment can find appropriate solutions for the difficulty that it has noted, even though it appears that the practical scope of this difficulty is limited.

**Justice E. Procaccia**

I have given much consideration to the question of whether the constitutional difficulty regarding s. 5 of the Temporary Provision should bring about the complete invalidation of its provisions, or whether, in the spirit of the comments of my colleague, Justice Naor, the proper balance between the conflicting values justifies a decision to leave open a narrow possibility of permitting a deliberation in a criminal proceeding in the arrestee's absence, under circumstances in which the needs of the interrogation involve the prevention of a danger of harm to human life, at the level of near certainty.

The ethical balancing required under the circumstances in this case is difficult and complex. It sets against each other the values of due process in criminal proceedings — which involves, at its core, the presence and

involvement of the arrestee — and the needs of a criminal investigation, and in particular the he security aspects involved in the protection of human life which can often present substantial difficulties in terms of bringing the arrestee to the hearing of his case.

The decision to be made regarding these balancing questions is one of the most difficult of the decision-making processes. Nevertheless, it is unavoidable in a country in which there is a constant clash between the struggle for existence on the one hand, and a continuous striving to preserve human rights, on the other — and in which, each day, this conflict sharpens the proportions that must be maintained between protecting life and protecting life values.

The conduct of a fair trial for every person is part of the foundation of a constitutional regime. This is especially the case when the legal proceeding can lead to the restriction of a person's liberty. The violation of this value of a fair trial touches on the deepest core of the human right to liberty — a right which is ranked highest among all human rights.

A fair trial requires due process. The value of due process in a criminal proceeding is a complex concept, comprised of more than one element. It contains many layers of procedural and substantive rights that are given to a person who is subject of the proceeding, and not all of these are of identical weight and status. Within the rich texture of the procedural rights and super-rights that are involved in a criminal proceeding, which together guarantee at a basic level that the proceeding will be based on due process, the presence and involvement of the arrestee or the defendant at the hearing of his case is one of the most important — if not the most important. The ability to realize these rights stands at the heart of due process. Without these rights, the person being judged is not involved in the determination of his fate; he is unable to make arguments in his defense; and the court is denied the opportunity to receive an impression regarding the conditions under which the person is being held, and of his physical and mental condition. Without these rights, there is a violation of a basic human right, which involves the possibility of a person's liberty being denied. Without these rights, the judicial process loses an essential tool on its road to discovering the truth, and it loses all ability to examine and to supervise, as it moves towards a correct decision of the matter. The conduct of a criminal proceeding in the absence of the arrestee or of the defendant speaks of judicial proceedings held in the shadows; the horrors of such a phenomenon are an aspect of those dark regimes in which nothing is known of human rights or of judicial due

process. The presence of a person at a hearing in his own criminal case is, indeed, one of the main aspects of due process, and without it, an important guarantee of the conduct of a fair trial is removed.

It is undisputed that an improvement of the means given to law enforcement authorities for the purpose of increasing the effectiveness of the interrogations they carry out in the area of security offenses is a most important goal — especially when those authorities are dealing with matters involved in the thwarting of possible dangers to human life. Under certain circumstances, the interrogation can become substantially difficult if it must be interrupted in order to bring the interrogated person to court for a hearing. The difficulty is material when the interrogation involves the thwarting of the commission of security offenses, and the prevention of danger to human lives.

The balancing of the right of the arrestee to be present at a hearing in his criminal case, as part of his basic right to criminal due process, on the one hand, and the needs of a security interrogation, given its objectives and its importance — on the other hand — is complex and difficult.

Despite the special complexity involved in the balancing of values that is required in this matter, the violation of the arrestee's right to due process caused by his absence from the judicial hearing being conducted in his case is so deep and so basic that it cannot be left to stand, even if it creates substantial difficulty for the security forces in conducting their law enforcement activities and their activity involving the security of the state. Justice for the individual — which is dependent on, *inter alia*, the individual's presence at his hearing, and on his ability to exercise his right to defend himself properly against the suspicions and accusations brought against him — is one of the signs that identifies a constitutional system of law, and without it the value of due process is dealt a mortal blow. The value of needing to do justice, which cannot be realized in full due to the arrestee's absence at his hearing, will have, in this context, greater importance than even enforcement and general security considerations — no matter how important and substantive they are. The weight of the value of doing justice and of maintaining criminal due process is so great that it outweighs even the public interest involved in a criminal-security interrogation. Israeli law has expressed this value preference — for protecting the rights of an individual

within law enforcement proceedings, as being above considerations related to the public-general security interest — in other contexts as well. Among other matters, the use of harmful interrogation methods even in security cases has been restricted, with the courts giving clear preference to the protection of the rights of the interrogated individual over the security considerations (*Public Committee Against Torture in Israel et al. v. Government of Israel* [20]); the legislature also determined that evidence which is confidential because of security reasons must be disclosed if it is material to the defendant's defense, even if its disclosure can do harm to a general public interest, including a security interest (ss. 44 and 45 of the Evidence Ordinance [New Version], 5731-1971; CrimApp. 4857/05 *Fahima v. State of Israel* [49]; MApp 838/84 *Livni v. State of Israel* [50], at pp. 737-738; CrimApp 9086/01, *Raviv v. State of Israel* [51]; CrimApp 7200/08 *Sa'id v. State of Israel* [52]; CrimApp 5114/97 *Salimani v. State of Israel* [53], at p. 725.

In the context of the dilemma that arises concerning this issue, the value of doing justice and of maintaining due process in an individual's case will outweigh even the public interest considerations involved in the use of the most efficient interrogation and enforcement methods, even in extreme situations involving danger to life, when the appearance of the arrestee in court can cause significant difficulty for the activity of the authority carrying out the interrogation. We can hope that these authorities will be able to adjust their operation system intelligently to the framework of rules that are intended to protect the arrestee's rights in criminal proceedings, in a manner that will best coordinate between the needed protection of human rights in the context of a judicial proceeding and the need to deal with criminal-security interrogation needs, and to maintain the level and efficiency of such interrogations.

I therefore concur in the opinion of my colleague Vice President Rivlin, according to which s. 5 of the Temporary Provision must be completely invalidated, without leaving any margin that would allow for the conduct of a judicial hearing in a criminal proceeding in the arrestee's absence, subject to the general provisions of the Arrests Law.

**Justice A. Grunis**

1. I agree with the conclusion of my colleague, Vice President E. Rivlin, to the effect that s. 5 of the Temporary Provision should be invalidated. This is because of the conflict between the section and the provisions of the Basic Law: Human Dignity and Liberty. More specifically, I note that in my view, the provisions of s. 5 of the Temporary Provision are

inconsistent with the principle of human liberty as it pertains to freedom from detention, as described in s. 5 of the Basic Law. I do not see any need to state my position regarding the question of whether the section in the Temporary Provision is also in conflict with other provisions of the Basic Law, especially regarding human dignity.

2. Section 5 of the Temporary Provision effectively suspends the right of a suspect to be present at the detention proceedings being conducted against him. In my view, the suspect's right to be present in court is derived from the right to liberty, either directly, or pursuant to the right to due process. What makes the case before us unique is that along with the denial of the said right, the law also allows for the possibility that another right will also be denied — the right of a criminal suspect to be in contact with his attorney (s. 35 of the Arrests Law). This right is a critical element of the right of any suspect to be represented by an attorney that he has chosen. In my view, this last right is also derived from the right to personal liberty, and it makes no difference whether the derivation is direct or pursuant to the right to due process.

3. Theoretically, the authority to deny the two mentioned rights — the right to be present at the detention hearings and to be in contact with an attorney — can be exercised separately, rather than simultaneously. There is certainly the possibility of communication between the suspect and his attorney being prohibited, while the suspect is nevertheless permitted to be present in court. Section 35(g) of the Arrests Law expressly provides that when it has been decided to refuse to allow a suspect to meet with his attorney, the hearing regarding a request for detention or release or regarding an appeal, will be conducted *separately* for the arrestee and for his attorney "in a manner that prevents contact between them", unless the court decides otherwise. In such a case, the judge must also serve as a type of go-between for the suspect and his attorney. What is clear is that in such cases the suspect may be present in court and can present his arguments before the judge, even if he is not permitted to communicate with his attorney. It is theoretically possible for a suspect's right to be present in court to be denied, without his right to meet with his attorney having been suspended — but this does not occur in reality, for various reasons. It appears that in every instance in which the right to be present in court during a detention hearing has been denied,

the suspect's right to meet with his attorney has also been denied. The significance of this simultaneous denial of the two rights (or, as my colleague Justice Naor calls it, the "cumulative effect") is clear. In a formal sense, the lawyer may represent the suspect during the detention proceedings, but it is understood that the ability to provide proper representation under such circumstances is extremely difficult. This difficulty is added to the fact that the suspect is himself unable to be present in court. The judge therefore rules on the matter, in such a case, even though he is unable to hear the suspect's statements. Although it cannot be said that the proceeding becomes an *ex parte* proceeding, since the suspect's attorney is present, it does become a proceeding in which that attorney is acting with one hand tied behind his back and the court is provided with only a partial picture (as my colleague the Vice President wrote in para. 31 of his opinion). It should be noted that in the instant case, the two rights were suspended simultaneously. Nevertheless, we have not been provided with information regarding the duration of the period in which there was an overlap between the denial of both rights.

4. There is no need to explain that under such circumstances, in which the two mentioned rights are both denied, there is a built-in danger that the process will not fulfill the due process requirement. However, even if there has been a violation of a fundamental right to personal liberty, this is not all that is be said of the matter — instead, it is necessary to examine whether the violation satisfies the tests prescribed in the limitations clause in s. 8 of the Basic Law. This examination must, in my view, relate to the period of time in which the mentioned rights are both denied simultaneously. It cannot be that a suspension of a right for a period of forty-eight hours is to be equated with its suspension for a period of twenty days. More concretely, it can be said that the proportionality requirement of the limitations clause requires an investigation of the degree of the possible violation of the right due to the simultaneous suspension of the right to meet with an attorney and the right to be present at detention hearings, arising from the length of time involved.

5. The maximum period in which it is permissible to deny a meeting between a suspect and his attorney is twenty days (s. 35(d) of the Arrests Law). Regarding the prevention of a suspect's presence in court, the maximum period is nineteen days (s. 5(1) of the Temporary Provision, which states that the period of detention that a court can order may be for less than twenty days; on the assumption that the day of the hearing is not included, we thus arrive at a maximum period of nineteen days). Thus, there is authority to prevent a suspect from meeting with his attorney, and to prevent his presence

at the detention hearings, for a period of eighteen days. In my view, a period of such length does not comply with the proportionality requirements of the limitations clause — either with respect to the least violative measure test or the narrow proportionality test.

6. Because the defect in the provisions of s. 5 of the Temporary Provision arises from the above-mentioned lack of proportionality (in its broader sense), I do not believe that as a matter of principle, there is any impediment preventing the legislature from adopting a different arrangement regarding the prohibition of the suspect's presence at the detention hearings. Of course, any new arrangement of this matter must take into consideration the existing arrangement regarding the prevention of the suspect's meeting with his attorney. In other words, in order for the new arrangement to comply with the proportionality principle of the limitations clause, care must be taken regarding the simultaneous application (or the cumulative effect) of the provisions regarding the prohibition against the suspect's meeting with an attorney and the ability to conduct hearings in the suspect's absence. A new and proportionate arrangement may take various forms. We note, *inter alia*, the possibility of shortening the period of time during which the two restrictions — the denial of the suspect's ability to appear in court and the prohibition against his meeting with an attorney — would apply simultaneously. In my opinion, it is doubtful that the shortening of the period in which both applied would be sufficient. An additional possibility would be a significant limitation of the grounds that could be used to justify the prohibition of the suspect's presence at his detention proceedings (see also Justice Naor's opinion). It is important to find a solution that combines the two possibilities noted here.

7. I do not agree with the view expressed by my colleague, Justice Naor — to the effect that our holding regarding the invalidity of s. 5 of the Statute should take effect six months from now, in order to allow the legislature time in which to respond. As we have been told, the authority to prohibit a suspect's presence during detention hearings is exercised only rarely. For any particular suspect being discussed, it makes no difference at all that his case is unusual or even unique. What is important for the particular suspect is that there has been a disproportionate violation of his right to personal liberty. Thus, the rarity of such cases — those involving the use of the said — is not

sufficient to qualify a defective arrangement. To the contrary, the fact that there are only few such cases justifies the immediate implementation of the decision to invalidate the arrangement. Furthermore, such immediate implementation will provide an incentive for the parties involved to act quickly and energetically so as to find an alternative arrangement which will be proportionate, and which will pass constitutional muster.

Decided as stated in the opinion of Vice President E. Rivlin, to allow the appeal as described in para. 35 of his opinion, holding that s. 5 of the Criminal Procedure (Arrest of a Security Offense Suspect) (Temporary Provision) Law, 5766-2006 is invalid.

27 Shvat, 5770.

11 February 2010.