At the Supreme Court in Jerusalem **HCJ 1437/02**
Sitting as the High Court of Justice **HCJ 3168/02**

Before The Honorable Justice E. Rivlin
The Honorable Justice M. Naor
The Honorable Justice E. Hayut

The Petitioner in HCJ 1437/02:
1. **The Association for Civil Rights in Israel**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger (Reg. Assoc.)**
3. **The Public Committee against Torture in Israel**

The Petitioner in HCJ 3168/02: **Israel Bar Association**

v.

The Respondents in HCJ 1437/02 and HCJ 3168/02:
1. **Minister of Public Security**
2. **Prisons Service**

Opposition to Order Nisi

Date of session: 22 July 2003

On behalf of the Petitioners in HCJ 1437/02: Attorney Dan Yakir

On behalf of the Petitioners in HCJ 3168/02: Attorneys Gil Orion, Oded Ravivo, Tamar Turjeman

On behalf of the Respondents in HCJ 1437/02 and 3168/02: Attorney Yochi Gensin

Judgment

Justice M. Naor

The regulation under discussion

1. Before the court are two petitions that have been joined, in which the petitioners contend that Section 29(b) of the Prisons Regulations, 5738 – 1978, is void. Section 29

underwent various changes, to which we shall relate below. The last version, which was enacted while the petitions were pending states:

> **Meeting of prisoner with attorney outside of hearing range**
>
> 29 (a) A meeting between a prisoner and attorney that has a substantive relationship to the professional services provided by the attorney to the prisoner shall be held at a distance that is not within the hearing of another person.
>
> (b) Where a substantial suspicion exists that the said meeting of a prisoner with an attorney as set forth in Subsection (a) will enable the commission of an offense that endangers the welfare or safety of a person, or public safety, or state security, the Commissioner or the prison warden may prevent the meeting or terminate it.

Transformation of the Regulation

2. Section 29 underwent, as stated, a number of transformations. In its original formulation, of 1978 (hereinafter the first version), stated:

> **Meeting not in presence of jailer**
>
> 29. Meetings of a prisoner with his attorney and visits by a person with whom the prisoner requested to communicate regarding the matter of his detention or legal proceedings shall not be held in the presence of another person in the event that security conditions and state security so enable.

The first version contained, in one breath, a meeting between a prisoner and his attorney and a meeting between a prisoner and a person who is not an attorney with whom the prisoner wished to communicate on a legal matter. The rule was that the conversation would not take place in the presence of another person, subject to the reservation set forth in the regulation. The regulation did not state who decides that a meeting shall not be allowed unless another person is present.

On 19 December 2001, the regulation was amended by the Minister of Public Security. The second version of the regulation stated:

> A meeting between a prisoner and attorney that has a substantive relationship to the professional services provided by the attorney to the prisoner shall be held at a distance that is not within the hearing of another person, unless there is a substantial suspicion that provision of the services in the said manner will enable the commission of an offense that endangers the welfare or security of a person or public safety or state security.

3. Pursuant to this regulation, an internal procedure was published. I do not think it necessary to delineate its particulars because it was replaced by another procedure.

4. Petitions were filed with us following the second version of the regulation. On 11 September 2002, an *order nisi* was issued directing that the respondents explain, as regards the second version of the regulation:

> "1. Why it should not be held that the end of Section 29 of the Prisons Regulations, 5728 – 1978, beginning with the words, "therefore" is void; or why it should not be nullified.
>
> 2. Why it should not be held that the "procedure for attorney-client meeting" that the Ministry of Public Security published pursuant to the said Section 29 is void, or why it should not be nullified.
>
> 3. Why restrictions on the right of a prisoner to meet with his attorney are not made in the framework of primary legislation, through the exercise of judicial discretion, in accordance with the fundamental principles of Israeli law."

5. On 19 December 2002, another amendment to the said regulation, representing the third version, which was quoted at the beginning of the judgment, was published in *Reshumot*. Following the making of the amendment, counsel for the parties filed a "Consent Application on Setting a Hearing Arrangement." The application mentioned that, following the Court's observations during the hearing, the Minister of Public Security enacted a new regulation to replace the regulation that was being litigated. The wording of the regulation was provided to petitioners' counsel, who maintain that the matter had not become moot. The parties agreed that amended petitions would be filed, a responding affidavit to the amended petitions would be submitted, and the hearing on the petitions would be held as if an *order nisi* had been issued on the amended petitions. The Court was requested to adopt the consent arrangement. Justice Heshin decided to adopt the said arrangement.

6. On 2 April 2003, after the filing of the consent arrangement, the legal advisor of the Prisons Service issued a new detailed procedure regarding implementation of the new regulation. I shall relate to the essential elements of the procedure, but I do not consider it part of the hearing arrangement. The new procedure did not exist at the time the hearing arrangement was in effect and no application was made to amend the petitions following the issuance of the procedure. Also, the summary arguments filed by the parties concentrated on the new Section 29(b), and not on the procedure. Thus, I shall focus only on the essential points.

The procedure mentions that it comes to provide new rules that will guarantee a privileged meeting between prisoner and counsel. Where the meeting involves the provision of professional services, no prison guard or other person will be within hearing range, but a prison guard will be placed within viewing range. The procedure also states that information that raises a substantial suspicion that the prisoner's meeting with his counsel is intended to further the commission of an offense as set forth in the regulation, the prison's warden shall be so notified. A "substantial suspicion" is defined in the procedure as a "well-founded suspicion such as specific information regarding intention and exploitation of the meeting as stated or transfer of a forbidden object that is liable to be used in the commission of offenses as stated."

The procedure further states that a decision will be reached following consultation with the head of prison intelligence and the prison's legal advisor, and after the prison's warden gives the attorney an opportunity to be heard. The warden must inform the attorney and the prisoner of his decision, and must tell the prisoner that he has a right to appeal. The warden's decision remains in effect for up to 14 days, or until the Commissioner makes a decision in the matter. The procedure also provides that if the warden is precluded from deciding, certain officers may decide to delay the meeting for a period of four hours, or until the warden reaches a decision, whichever comes first. The Commissioner must given his decision within 14 days from the day of the warden's decision. The Commissioner, too, must give the attorney an opportunity to be heard. If, after hearing the attorney's arguments, the Commissioner decides to prevent the meeting, he must inform the attorney of his decision and his reasons therefore, and indicate the length of time that the prohibition will remain in effect.

The grounds for the decision shall be provided to the attorney and the prisoner, unless their disclosure is liable to harm state security or a matter of public import. In such case, the attorney will be provided a summary of the information or of the reason relating to state security or other important public interest and that it is not possible to state the reasons in detail.

The amended petitions

7. In their amended petitions, the petitioners contend that the regulation as presently worded improperly and disproportionately infringes the right of a prisoner to consult with his attorney, which is a fundamental right; Subsection (b) violates the Basic Law: Human Dignity and Liberty, and the minister did not have the authority to enact it, that the Prisons Ordinance does not include either the explicit authority or implicit authority to violate by way of regulation the basic rights of

a prisoner to meet with counsel, and the regulation is thus unlawful; the prisons contain detainees being held until the end of the criminal proceedings against them, convicted prisoners, administrative detainees and illegal combatants. According to various provisions of primary legislation (that will be described in greater detail below), all of the above groups are given the right to meet alone with counsel, at times subject to restrictions, such as the demand that permits be obtained. The petitioners made the further argument that the regulation is vague and unreasonable, and that the test of "substantial suspicion" is not the proper test. The proper balance should be the test that there is "near certainty" of actual and severe harm to public safety. The regulation does not include an instruction regarding the nature of the "substantial suspicion," does not include the obligation to give reasons, does not require periodic review with the passage of time, does not include judicial review or an appeal procedure, and is vague and banal; the regulation is made without authority: it does not treat a problem related to safety in the prisons, but a problem related to state security and public welfare. Section 132 of the Prisons Ordinance [New Version], 5732 – 1972 (hereinafter: the Ordinance), does not empower the minister to enact regulations in these matters.

The respondents' arguments

8. The respondents argue that the new wording of the regulation does not violate the attorney-client privilege. Indeed, the prisoner is allowed to meet with counsel at a distance outside the control of another person. However, where actual intelligence indicates that the purpose of the meeting is not to give legal advice, the privilege does not apply. Where there is a substantial suspicion that the meeting will be exploited to commit, or plan, a criminal offense, the meeting does not come within the right of a prisoner to consult with counsel. This right does not include a meeting intended to plan or commit a criminal offense. The regulation sets forth the obvious, whereby a meeting that is not intended for the giving of legal advice is not protected by the law; in this context, the fact that the visitor holds the title of attorney neither adds nor detracts. The prison is not designed as a site for meetings intended for the planning or commission of criminal offenses. The respondents further argue that the regulation does not prevent a prisoner from consulting with another attorney: the prisoner is free to meet and consult with every attorney other than attorney as to whom there is the said concrete suspicion. No analogy should be made between statutes that deal with preventing a meeting with any attorney. The respondents further argue that the minister had the authority to enact the regulation. Section 132 of the Prisons Ordinance empowers the minister to enact regulations regarding "any other matter that should be

arranged to enable the efficient implementation of this Ordinance" and in matters related to "the good administration of prisons and discipline." These provisions provide the authority to enact the regulation.

The respondents also refer to the procedure that is intended to be incorporated in the order of the Prisons Commissioner. The procedure provides, respondents contend, a proper response to the questions raised in the petitions. In any event, the contentions dealing with implementation of the regulation and the procedure instituted pursuant thereto do not belong in the framework of this petition.

The scope of the right of a prisoner to meet with counsel

9. Indeed, the point of departure for discussion is the right of a person, including a prisoner, to be represented by counsel of his choice and to consult with him in conditions whereby their meeting is privileged. Even before the onset of the constitutional era, the Court several times stated the importance of this right, derived from Section 22 of the Attorneys Law. (See, for example, HCJ 193/67, *Qahawji v. Prisons Commissioner et al., Piskei Din* 21 (2) 183; HCJ 515/74, *John Doe v. Commander of the Military Police Investigations et al., Piskei Din* 29 (2) 169.) The Court reemphasized the importance of the said right also after the onset of the constitutional era (for example, in HCJ 3239/02, *Marav v. Commander of IDF Forces in Judea and Samaria, Piskei Din* 57 (2) 349; HCJ 4330/93, *Farid Gans, Attorney v. District Committee of the Israel Bar Association, Piskei Din* 50 (4) 221).

10. The said right of a person and of a prisoner to consult with counsel of his choice in circumstances that ensure that the meeting is privileged is a fundamental concept. The right is designed to enable the person to obtain professional services. These services are entitled to the attorney-client privilege (Section 48 of the Evidence Ordinance [New Version], 5731 – 1971; Section 90 of the Attorneys Law, 5721 – 1961). However, it is unfortunate that there are a few instances in which the status of attorneys and of the attorney-client privilege are misused in a way that the privileges enable the commission of criminal offenses. Meetings and contact between attorneys and clients are not intended for that purpose. Thus, a meeting intended for the purpose of committing an offense is not part of the right to meet with counsel and is not protected, as the Court has stated in a number of contexts. In Crim. App. 670/80, *Baruch Ben Israel Abuhazeira v. State of Israel, Piskei Din* 35 (3) 681, the Court dealt with the question of the admissibility of the testimony of an attorney named Golan that was given in the trial of the appellant. It was argued

that the testimony was privileged because of the attorney-client relationship between the appellant and Golan. Regarding this argument, Justice Beiski stated:

> Golan's testimony related to other things altogether. Not only did it not relate to professional services given by an attorney – they are gravely inconsistent thereto. The comments revolved around dissemination of a forged document, fabricated evidence, and misleading testimony, with the appellant trying to turn Golan into an accomplice in crime. It is inconceivable – and I find it improper that such an argument is even raised – that such matters can be deemed the kind that have a "substantive connection with the professional services given by an attorney to a client"… This lies in the purely criminal-offense domain, far, far distant from that which the legislator intended to protect by way of privilege between the client and the attorney and his employees.

Similarly, the original language of the Eavesdropping Law, 5739 – 1979, did not enable, under any circumstances, eavesdropping into attorney's offices. In Eav. App. 1/81, *State of Israel v. John Doe, Piskei Din* 36 (1) 614, 616, President Landau observed in this regard:

> Undoubtedly, our law needs amending so as to ensure that the door is not closed to eavesdropping of telephone conversations of an attorney. The attempt in criminal and disciplinary trials proves, regretfully, that among the large community of attorneys in the state, who do their work faithfully, there are a few who do not hesitate to breach grossly their professional duty and take part in criminal deeds. Such a corrupt attorney is liable to be a focal point for criminal activity precisely because of his professional knowledge, and the existing situation as set forth in the law under discussion is liable to turn the offices of such attorneys to a "nature preserve" for the planning and covering up of crimes. For this reason, it is extremely necessary to allow the police, in such extreme cases and with the appropriate protections, to use the device of eavesdropping also on telephone conversations of an attorney, in order to collect intelligence and evidence. This need has been recognized in legislation in the United States, and the American Bar Association also given its approval, as appears from the brochure that Mr. Blatman submitted: American Bar Association, "Standards Relating to the Administration of Criminal Justice, Electronic Surveillance, 1978 Standard 2-5.10. Privileged Communications," at pp. 25-26.
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> > This is an important subject, and the Knesset should give its opinion on the matter much more profoundly that it did in the banal provisions of Section 9 of the Law (which prohibits eavesdropping of privileged conversations – M. N.) so that the giving of the permit to eavesdrop on telephone conversations with an attorney is regulated by the Knesset itself in statute, or that the statute empower another appropriate authority to enact regulations on the subject.

Indeed, in 1995, the Eavesdropping Law was amended, with the addition of Section 9A. The section empowers the president of a district court to allow eavesdropping, in certain circumstances, also of a "privileged" conversation "if he is convinced that there is reason to

suspect that an attorney… is involved in a criminal offense" (regarding the scope of the professional services, services that do not include criminal offenses committed in the future, see App. Bar. Assoc. 17/86, *Jane Doe v. Israel Bar Association, Piskei Din* 41 (4) 770).

Note well: In the present case, we are not involved with listening into a conversation that ostensibly was allowed in certain circumstances by the previous wording of the regulation. The new regulation does not impair the privileged nature of the conversations, and does not allow in any case surveillance of an attorney-client conversation. The regulation as drafted deals with preventing a meeting in which there is a substantial suspicion that it is intended to enable a criminal offense of the kind delineated in the regulation.

11. Interim summary: A prisoner has the right to meet in prison with an attorney of his choice, for the purpose of consulting with him on professional matters, with the conversation remaining privileged. Therefore, Section 29(a) properly states that a meeting between a prisoner and an attorney that relates to professional services given by the attorney to the prisoner shall be conducted outside the hearing range of another person. The possibility of eavesdropping on an attorney-client conversation is revoked.

However, the said prisoner's right is not construed, fundamentally, to mean a meeting whose purpose is to enable the commission of a criminal offense. Such a meeting has no connection with professional services that the attorney renders to the prisoner. In this sense, Section 29(b) points out the obvious: a meeting intended to enable the commission of criminal offenses, in particular the offenses set forth in the regulation, is prohibited. The prisoner does not have a constitutionally protected right to hold such a meeting. In saying this, we have not yet said anything on the question of how it will be determined, and on what ground, and by whom, that a particular meeting is forbidden, and thus should be prevented or terminated. We now turn to these questions.

Preventing or terminating a meeting – How

12. The regulation states that the Prisons Commissioner or the prison warden may prevent or terminate the meeting. It is understood, however, that in this matter, as in every decision of the prisons authorities, the person making the final decision is not the Commissioner or the warden, but the court. The prisoner has a right to judicial review of the decision. The right to judicial review is not mentioned in the body of the regulation (just as it is not mentioned in other regulations or provisions of the Ordinance), except in Section 62 A of the Ordinance, which deals

with the petition of prisoners in any matter related to their incarceration or detention. Thus, the failure of the regulation to regulate judicial review of the decision does not make it defective. Furthermore, unlike, for example, eavesdropping or openly listening to a conversation with an attorney, preventing the meeting in the circumstances set forth in the regulation does not create irrevocable injury. It is assumed that the courts carrying out the judicial review, such as herein, will hear the matter – the decision to prevent the meeting – with the requisite speed under the particular circumstances.

13. It is hard to restrain from parenthetically observing at this point that the provision in the procedure enabling persons other than the warden or the Commissioner to delay the meeting for a few hours is not, ostensibly, consistent with the authority given in the body of the regulation. I shall not expand on this matter because the amended petitions deal with the regulation and not the procedure.

14. In similar manner, the regulation's provisions indeed do not require giving a right to be heard prior to the making of the decision. However, that obligation already exists under law (see Zamir, *Administrative Authority* (Vol. 2, 1996), pp. 796-797; HCJ 654/78, *Riba Gingold v. National Labor Court et al., Piskei Din* 35 (2) 649, 654-655). The procedure establishes the rules for hearing the contentions, but this obligation in any event exists by law, and its breach may be raised by the prisoner in his petition. Therefore, the failure of the regulation to state expressly the obligation of giving the prisoner and his attorney the right to be heard is not reason for its nullification.

15. Another question relates to the test that the Commissioner or warden uses in deciding whether to forbid the meeting. This question touches on interpretation of the regulation. The petitioners also attack the test – "substantial suspicion" – that justifies exercise of the authority. The regulation uses the language "a substantial suspicion exists [that the meeting] will enable commission of a criminal offense." What is a "substantial suspicion?" It seems that the weight of the administrative proofs raising the suspicion must be especially strong, taking into account the nature of the right ostensibly infringed. We should also mention that the regulation does not empower the Commissioner or the warden to prohibit a meeting because of a substantial suspicion that the meeting will enable the commission of any criminal offense. The offense must be one that endangers a person's welfare or safety or public safety or state security. In this sense, the regulation is proportionate.

My conclusion so far is that the arrangement established in the regulation in and of itself is proper, and does not infringe a protected constitutional right. I can now turn to the petitioners' contention that the arrangement must be set forth in statute and not be made as a regulation.

The arrangement – By statute or regulation

16. The petitioners' contention that the arrangement must be set forth in statute and not regulation has a number of aspects: we are dealing with a primary arrangement, and thus, the petitioners' state, it must be found in a statute and not in a regulation; other statutes set forth arrangements for preventing meetings with an attorney, and the regulation must be consistent with those arrangements; the enabling statute – the Prisons Ordinance – does not empower the Minister to enact regulations that prohibit such a meeting. Even if you contend such authority exists, the regulation deals with matters that are found outside the realm of prisons. The regulation professes to exercise authority regarding the prevention of criminal offenses "outside" the prison. I shall discuss the various aspects of the petitioners' contentions, but not necessarily in the above order.

17. At first glance, the petitioners' argument – whereby the law prohibiting an attorney-client meeting is arranged in various provisions of primary legislation, and no deviation from those statues should be allowed nor should it be possible to bypass them by secondary legislation pursuant thereto – is persuasive. The petitioners point out Sections 31-34 of the Criminal Procedure (Enforcement Powers – Detentions), 5756 – 1996, which sets forth explicit provisions on the right of a detainee to meet with an attorney and consult with him without delay and in private, and a mechanism for limiting it to set periods of time; Section 6 of the Imprisonment of Illegal Combatants Law, 5762 – 2002, and Section 13 of the Imprisonment of Illegal Combatants Regulations (Detention Conditions), 5762 – 2002, which were issued pursuant to the said law; Section 12 of the Emergency Regulations (Detentions) (Conditions of Holding Persons in Administrative Detention), 5751 – 1991. These enactments deal in detail with the right, and limitations on the right, of various kinds of detainees to meet with an attorney. Ostensibly (but only ostensibly), the regulation under discussion involves the prevention of a meeting in similar fashion to that arranged in the said legislative enactments, and thus it must be classified as an integral part of those enactments and certainly must not deviate from them.

18. The petitioners' argument is persuasive at first glance. The point of departure of the mentioned enactments and of the regulation before us is the same principle with which we opened our discussion – the right of every person to consult with the attorney of his choice. However, the

various pieces of legislation that we mentioned dealt with the prevention of an attorney-client meeting, that is, restricting the possibility of obtaining advice. The regulation that is presently under review deals with preventing a meeting that, based on a substantial suspicion, is not essentially a meeting between an attorney and his client, but only a masquerade of such. The regulation deals with the prohibition of a meeting whose purpose is to enable certain criminal offenses. The only thing common between the prohibition on a meeting that is the subject of the mentioned pieces of legislation and prevention of the meeting pursuant to Section 29 (b) is the name. The mentioned enactments deal with a meeting which in principle is allowed but is denied, with the limitations set forth, for interrogation needs or because of a fear that messages will be transmitted to outside the detention facility openly or by code (see HCJ 3239/02, *supra,* at pp. 380 – 382). On the other hand, the regulation deals, as explained, with a meeting in which there is no intention to provide professional services, but to enable commission of a criminal offense. There is good reason why Section 29A of the Prisons Regulations states that the provisions of Section 28 and 29 apply to a detainee provided that the meeting is not limited pursuant to Sections 29-30 of the Criminal Procedure Law [Consolidated Version]. 5742 – 1982 (now Sections 34-35 of the Criminal Procedure (Enforcement Powers – Detentions) Law, 5756 – 1996). The regulation under review, Section 29(b), lies on a different plane from the limitations of an attorney-client meeting in the list of enactments mentioned. The mechanisms set forth in the enactments limiting the meeting do not relate to the matter regulated by Section 29 (b).

19. Does the enabling statute – the Prisons Ordinance – empower the minister to enact regulations regarding the prohibition of a meeting the purpose of which is to prevent the commission of a criminal offense outside the prison? My answer is yes. Section 132(17) of the Ordinance authorizes the Minister to enact regulations in "any other matter that should be arranged to enable the efficient implementation of this Ordinance…. the good administration of prisons and discipline and secure custody of prisoners within prisons and when they are working outside the prison."

Chapter 6 of the Prisons Ordinance arranges (not thoroughly) the connection between the prisoner and the outside world. As regards security prisoners, the Court approved an arrangement made by the Office of the Prisons Commissioner that enables, in principle, restricting telephone calls. On this point, Justice Zamir held:

> The main interests to be taken into account in establishing an arrangement regarding communication between security prisoners and the outside world, together with the prisoner's right, are regulation and security, *not only in the prison itself, but outside it as well*. This means that state

> security is an interest that has to be taken into account in this matter. This is so because a person is incarcerated not only as punishment for committing a crime, but also to protect society from him. Thus, the Prisons Service is charged with ensuring that security prisoners do not contact by telephone persons hostile to the state where the contact is liable to harm state security. To achieve this objective, the Prisons Service may make an arrangement that will prevent such contact or make it difficult to carry out." (App. Adm. App. 1076/95, *State of Israel v. Samir Kutar, Piskei Din* 50 (4) 492, 503 (emphasis added).

If this is the case regarding an arrangement in the Commissioner's directives, the principle applies even more so where an arrangement is set forth in a regulation. The primary legislator empowered the secondary legislator to ensure order and safety in the prisons. It must not be forgotten that, by their very nature, prisons contain a concentration of offenders who endanger the public.

20. Does the arrangement have to be found in primary legislation, or is it sufficient that it appear in a regulation? On the question of when an arrangement must be set forth in primary legislation, this Court spoke at length in 3267/97, *Amnon Rubinstein v. Minister of Defence, Piskei Din* 52 (5) 481. As explained there, the fundamental criteria (the primary arrangements) must be set forth in primary legislation. The secondary legislation of the administration and its individual acts (secondary arrangements) must carry out the fundamental criteria set forth in the primary legislation. However, the distinction between a primary arrangement and a secondary arrangement is not sharp. The nature of the social arrangement, its social repercussions, and the degree of harm to the individual's liberty all affect the scope of the primary arrangement and the degree of detail required of it; also, in a modern democracy, it is difficult to maintain completely the philosophy underlying the primary arrangements. In special, exceptional circumstances, the fundamental rule may prevail over the considerations of efficiency, and it would be proper to nullify the secondary arrangements for the reason that they are not based on the primary arrangements. Indeed, in extreme circumstances, secondary arrangements have been voided upon determining that the matter should be set forth in primary legislation. This occurred in *Rubinstein* on the question of the drafting of yeshiva students. This also occurred in HCJ 355/79, *Katlan v. Prisons Service, Piskei Din* 34 (3) 294, in which the Court held that forcing a prisoner to take an enema in order to reveal drugs must be set forth in primary legislation that empowers the secondary legislator. But these are, indeed, extreme cases that require a decision by the primary legislator.

21. The case before us does not fall, in my opinion, among those cases in which the arrangement must be found in statute, though it can, of course, appear there. Let us return to our point of departure: the regulation does not limit the giving of legal services to the prisoner. It limits the

misuse of the attorney's role in a way that the meeting with him enables the commission of a criminal offense. Arrangement of the present matter is not a primary arrangement. It does not necessarily have to be found in statute. And it should be mentioned that, based on facts before us, as of today, the implementation of the regulation according to its second version and its present version has been extremely limited. In the request for additional particulars, Attorney Yakir, counsel for petitioners in HCJ 1437/02, asked if Section 29 (b) in its second version or present version had been used. In a response that was submitted by consent, it was stated that , since the new procedure took effect, no attorney has been forbidden entry. Prior to commencement of the procedure, an attorney who ostensibly held a license to practice law by the Palestinian Authority was not permitted to enter the prison because he did not meet the relevant conditions. Three attorneys were not allowed to visit security prisoners after cellular phones were found among their items after they had declared, upon entering, that they did not have any devices other than those they had deposited. When given the opportunity to explain, they indicated that they did not represent the prisoners on a legal matter; thus, they were not entitled to enter the prison as attorneys. The matter involved here, we see, is marginal, and the petitioners in their petition did not point out any concrete case in which the right of any person was truly violated. The petitioners have the right to raise the fundamental question regarding the validity of the regulation. However, the minimal magnitude of the problem that raised the need for enactment of the regulation must also be taken into account, in my opinion, on the question of whether the matter must be set forth in primary legislation.

22. Thus, I shall propose to my colleagues that the petition be denied, and that Section 29(b) of the Prisons Regulations, 5738 – 1978, in its present text, not be nullified.

[signed]
Justice

Justice E. Hayut

1. Unfortunately, I am unable to agree with the conclusion of my colleague, Justice M. Naor. In my opinion, we should hold that Section 29 (b) of the Prisons Regulations, 5738 – 1978 (hereinafter: Section 29(b)), is void, for the reason that the enactment of an arrangement restricting a meeting between a prisoner and his attorney requires explicit and detailed sanction in primary legislation.

2. A person has the right to receive legal services, and this right, which includes the right to meet with an attorney and the right to be represented by him, is a fundamental right that fulfills the liberty given him to appoint an agent as he wishes; he also has the right to due process (HCJ 6302/92, *Rumhiya v. Israel Police Force, Piskei Din* 47 (1) 209, 212; HCJ 1843/93, *Pinhasi v. The Knesset et al., Piskei Din* 49 (1) 661). The right to receive legal services is especially significant in the case of representation of a prisoner, and this because of the limitations placed on him as a prisoner, and also because prisoners are often engaged in proceedings of a legal nature. Indeed, when the question arises as to the right of a person to receive legal services, the domain for examination of the infringement is the domain of fundamental rights, and the criteria applying in this domain are constitutional criteria.

3. In her opinion, my colleague points out that Section 29(b) is not designed to harm the right of a prisoner to receive legal services. Its entire purpose is to prevent the misuse of the meeting with an attorney to commit a criminal offense, and it goes without saying that a meeting intended for such improper purpose does not come within the protected right to receive legal services. I believe that the fact that the regulation seeks to achieve a proper purpose cannot deny the potential infringement of the right of a prisoner to receive legal services. Quite the opposite: such infringement will lead, presumably, to an inevitable *side* effect of application of the regulation in some cases. The probability test set forth in the regulation is, as it states, whether a "substantial suspicion" exists. A "substantial suspicion" is not a certainty. A "substantial suspicion" also is not close to certainty. Among the prisoners as to whom there is a "substantial suspicion" that their meeting with an attorney will enable commission of an offense will almost surely be some whose purpose in holding the meeting is to obtain legitimate legal services. The right of these prisoners to receive legal services will be harmed. Also harmed is their right to select an attorney with whom they wish to meet and consult. This harm may be necessary, and I am not expressing a position on the question of the normative test that should be applied in the relevant circumstances. But should it be set forth in secondary legislation? And insofar as it is found in secondary legislation, what provision gives proper sanction to such need?

4. Section 132 (17) of the Prisons Ordinance [New Version], 5732 – 1971 (hereinafter: the Prisons Ordinance), states that the Minister is empowered to enact regulations regarding:

> Any other matter as to which this Ordinance directs that regulations may be enacted, and any other matter that should be arranged to enable the efficient implementation of this Ordinance, the safety and efficiency of the prison guards, the good

> administration of prisons and discipline and secure custody of prisoners within prisons and when they are working outside the prison.

My colleague believes that this general authority is sufficient to sanction enactment of Section 29(b). Indeed, a comparable enabling section, pursuant to which the Prisons Service directives and the Prisons Commissioner's Orders were enacted – Section 80A of the Prisons Ordinance – is construed as also enabling the enactment of arrangements intended to prevent harm to state security (for example, when maintaining telephone contact with hostile persons and entities), and not only arrangements intended to safeguard order and safety inside the prisons' walls (see App. Adm. App. 1076/95, *State of Israel v. Kuntar, Piskei Din* 50 (4) 492, hereinafter: *Kuntar*). However, it seems to me, with all due respect, that, in light of the nature of the right liable to be harmed (a fundamental right) and the manner of the harm (restricting the meeting and the liberty to chose the attorney), the present case is different from that which was heard in *Kuntar*. The magnitude of the right that is liable to be infringed by the limitations set forth in Section 29(b), and the nature of the harm, require explicit and detailed sanction in primary legislation, and the general authority given in Section 132 (17) of the Prisons Ordinance is insufficient. The fact that the regulation presently under review is not intended to harm the fundamental right directly, and the fact that the potential violation of the right is in this case only incidental to application of the regulation, which is intended to prevent misuse of the meeting between prisoner and their attorneys, do not convince me that my conclusion is faulty. The importance of explicit and detailed authority set forth in primary legislation is a result of parliamentary debate, during which all the constitutional considerations relating to the specific issue as well as to the alternative arrangements taken into account, which distinguishes it from a general authority (compare HCJ 355/79, *Katlan v. Prisons Service, Piskei Din* 34 (3) 294, 303).

5. This approach is enshrined in decisions of the Supreme Court over the years. For example, President Barak states in HCJ 3267/97, *Rubinstein et al. v. Minister of Defence, Piskei Din* 52 (5) 481, 520, as follows:

> …There has been a clear line of the common law which holds that where the legislative arrangement infringes an individual's liberty, it is generally required that the authorization of the administration in the primary legislation is clear, explicit, and unequivocal…
>
> This approach is – as was held in *Miterny* – of a general nature, and applies in every case in which authority is given to infringe an individual's basic liberties…
>
> This line of case law led to an increased protection of the individual's rights. Authorization of the primary legislator was construed generally

> as enabling infringement of an individual's liberty only if made explicitly, clearly, and unequivocally…

This was the law in the past, and even more so now, following enactment of the Basic Law: Human Dignity and Liberty (*Ibid.,* 523).

Further support for this approach can be found in the following: other restrictions relating to infringement of the right to receive legal services by reducing the person's freedom to select an attorney as he wishes, are all arranged in primary legislation (see Section 14 of the Criminal Procedure Law [Consolidated Version], 5742 – 1982; Section 6(b) of the Imprisonment of Illegal Combatants Law, 5762 – 2002; Section 8(b) of the Emergency Powers (Detentions) Law, 5739 – 1979).

In conclusion, I suggest that the interim injunction be made absolute, and hold that Section 29(b) is void. However, it appears to me that it is not desirable that the nullification be immediate, and the decision voiding the section should take effect at a set time in the future to enable the legislator to consider the need to arrange the matter in enabling primary legislation, as stated. A transition period of nine months seems reasonable to me under the circumstances, taking into account the necessary legislative process, and taking into account the relevant considerations, among them the injury that may be caused to public safety as a result of the absence of any normative means during the interim period to prevent meetings between prisoners and their attorneys, where a substantial suspicion exists that the meeting will be misused and enable the commission of a criminal offense (on prospective nullification as one expression of the theory of proportional nullification[??], see HCJ 551/99, *Shekem Ltd. v. Director of Customs and VAT et al., Piskei Din* 54 (1) 112, 120, and the references cited there, and compare HCJ 10/00, *Ra'anana Municipality v. Transportation Supervisor, Tel Aviv and Central Districts et al., Piskei Din* 56 (1) 739).

[signed]
Justice

Justice E. Rivlin

1. I have studied the opinion of my colleagues, Justice M. Naor and Justice E. Hayut. Having considered the matter, I concluded that I agree with the opinion of Justice Hayut. Therefore, I concur in her conclusion that Section 29(b) of the Prisons Regulations, 5738 – 1978 (hereinafter: Section 29(b)), is void. My reasons follow.

1. As my colleagues stated, the right to representation is a fundamental right in Israeli law. This is true in general, and in a criminal proceeding in particular (Crim. Misc. Appl. 5136/98, *Nahum Manber v. State of Israel, Takdin Elyon* 98 (3) 770). Also, detainees and prisoners have a fundamental right to meet with an attorney (see HCJ 3412/91, *Sofiyan v. Commander of IDF Forces in the West Bank, Piskei Din* 47 (2) 843, 847-848). "The point of departure is that every detainee has the right to meet and consult with his attorney. This is a constitutional right. It is one of the expressions of the detainee's human rights. It expresses 'the great principle' of criminal procedure in a democratic state" (HCJ 6302/92, *Rumhiya v. Israel Police Force, Piskei Din* 47 (1) 209, 212).

Various reasons underlie the right to representation. "The main point of departure is that every person has the freedom – a result of the autonomy of free will – to appoint an agent as he wishes. This right is important when the agent is an attorney. This right has especial importance when the attorney represents the individual against the government. Its paramount importance is expressed in representation of a suspect or defendant in criminal proceedings" (HCJ 1843/93, *MK Pinhasi v. The Knesset, Piskei Din* 49 (1) 661, 717). A person requires the right to representation to ensure all his other rights. It is necessary in order to safeguard the right to remain silent (see Crim. App. 96/66, *Piskei Din* 20 (2) 539, 546). It is necessary to give effect to the right to liberty, dignity, and property. The judicial proceeding, and surely holding a person in detention or in prison, raise a situation in which human rights may be violated. Legal representation is necessary to ensure that the infringement of these rights, if they are infringed - occurs only after a fair hearing conducted in accordance with law. We should recall that, "In our judicial world, where every proceeding is conducted in accordance with stringent procedures and in the mysterious language of statute and procedure, the first and basic right of every defendant is, or should be, that he is represented by a person who is learned in this field and speaks this secret language" (H. Cohen, "On Defendant's Rights," *26 Hapraklit* 42 (5730 – 1970).

The right to meet with an attorney has firmly established roots in our law. It was first recognized by the common law (Crim. App. 307/60, *Yassin v. Attorney General, Piskei Din* 17 (3) 1541). It is expressly set forth in various pieces of legislation, among them the Criminal Procedure (Enforcement Powers – Detentions) Law, 5756 – 1996. Today, it can even be argued that various aspects of this right have a constitutional basis in the Basic Law: Human Dignity and Liberty (see HCJ 3412/91, *Sofiyan v. Commander of IDF Forces in the West Bank, Piskei Din* 47 (2) 843 (basing the right on personal liberty); HCJ 4330/93, *Haim Landau v. District Committee of the*

Israel Bar Association, Piskei Din 50 (4) 221 (basing the right on the autonomy of free will); and compare Crim. App. 6613/93, *Smirk v. State of Israel, Piskei Din* 54 (3) 529).

3. Does Section 29(b) infringe the right to counsel? My colleague Justice Naor rightly says that Section 29(b) was not enacted to make it possible for a prisoner to receive legal services, but to prevent its misuse. Indeed, the "'professional services' of an attorney can relate to criminal offenses, but that is when the offense has already been committed and the offender retains the services of an attorney for that purposes, such as to represent him in the criminal proceedings against him, but where the offender informs his attorney of his intention to carry out an offense in the future, and even does so, then the client is not interested in the attorney's professional services, and this is not the kind of activity that is related to the professional services that an attorney provides" (App. Bar. Assoc. 17/86, *Jane Doe v. Israel Bar Association, Piskei Din* 41 (4) 770; see, also, Eav. App. 1/81, *State of Israel v. John Doe, Piskei Din* 36 (1) 614). Clearly, professional services of an attorney do not include a meeting that will "will enable the commission of an offense that endangers the welfare or safety of a person, or public safety, or state security – in the language of Section 29(b).

However, I, like my colleague Justice Hayut, believe that this fact negates the potential harm to the right to counsel. The proper purpose of the provision, and the fact that it is intended to filter out forbidden meetings from among all the meetings between prisoners and attorneys does not negate the potential of harm to the right to counsel that results from the probability test set forth in the regulation – the "substantial suspicion" test – whose application is subject, according to the regulation, to the discretion of the Commissioner or the prison warden. The sanction set forth in the Regulation, where the Commissioner or the warden believe there is a substantial suspicion that the meeting will enable the commission of a criminal offense, is to prevent the meeting (in advance) or to terminate it. It can be said, therefore, that Section 29(b) enables – albeit for a proper purpose – infringement of the right to counsel of prisoners who wish to consult with their attorney regarding a legitimate legal matter. The proper purpose does not eliminate the potential infringement of the right, but, at the most, in conformity with certain conditions, turns it into a legal and constitutional infringement. Therefore, the question is raised regarding the balance between conflicting interests. As Justice D. Beinisch said in another context, "The right of a suspect and defendant to remain silent, the right to counsel and the right to due process are countered by significant public interests, such as the war on crime, the protection of state security, and public welfare…" But before we substantively examine this balance, we must relate to a preliminary question – what is the proper legislative way to make this balance.

4. Indeed, before we make the substantive examination as to whether a legislative enactment meets the constitutional criteria, we should examine whether the necessary legislative procedure was met prior to infringing a fundamental right. The requirement that infringement of a fundamental right be done only in primary legislation or in secondary legislation pursuant to explicit authority set forth in primary legislation has been part of our law dating back to before enactment of the basic laws on human rights. President Shamgar stated the logic standing behind the conception that infringement of a fundamental right is allowed only by legislative enactment. In HCJ 337/81, *Miterny v. Minister of Transportation, Piskei Din* 37 (3) 337, he stated:

> Establishing defined and special ways to alter a fundamental right is in great degree the main means to ensure that the subject is properly examined as to its substance: a right should not be restricted except following careful study and discussion, because diminishing the right can lead, as a result, to a distortion of the nature of the social or political regime, to one degree or another. We have said that the place of a fundamental right in a legal system is subject to the degree that the substantive rule of law is maintained, and the change in the scope of the right necessarily also affects continuation of the rule of law. Thus, the importance of establishing defined legislative means, through which it is allowed to alter the application and scope of the fundamental right.

Based on this conception, President Shamgar further stated:

> The examination of the secondary legislation based on restrictions that are sketched out in the primary legislation is, of course, especially careful when the restriction is placed on a fundamental right: in every instance, the secondary legislator requires, as mentioned above, explicit authorization from the primary legislator, and we return here also to the question of the interpretation of the provision. Because of the special constitutional status of a basic law, it will be examined with especial care as to whether the authority given by the primary legislator, if it exists, that it was the primary legislator's intent to grant the secondary legislator the power to alter the restrictions and scope of a basic law.
>
> When the authority is general and banal, it is natural, as a result of the aforesaid, that it will be construed in a way that denies the giving of authority to limit a basic right.
>
> A basic right cannot be revoked or restricted other than by explicit legislation enacted by the primary legislator; furthermore, as long as a basic law does not direct otherwise, also by the secondary legislator, who was empowered to so act by the primary legislator.

This philosophy was clearly reflected in the limitations clause, found in Section 8 of the Basic Law: Human Dignity and Liberty and Section 4 of the Basic Law: Freedom of Occupation. The limitations clause states that violation of a protected right must be made by a "statute" or "according to statute." At the basis of this component of the limitations clause, it was said, lies the

principle of the rule of law in its formal aspect and its narrow-substantive aspect (A. Barak, *Interpretation in Law – Constitutional Interpretation* (5755 – 1995) 489). This component is intended to express the need for the explicit approval of the sovereign prior to the violation of basic rights.

5. As appears from the survey of my colleague Justice Naor, Section 29 underwent various formulations since 1978. Every amendment improved the situation – as regards protection of the right to counsel – in comparison with the law that preceded it. Does this fact give "immunity" to the amending law, or at least bring about a "softening" of the constitutional criteria that the legislation must meet? The answer to this question was given by this Court. In HCJ 6055/95, *Sagi Tzemach v. Minister of Defence, Piskei Din* 53 (5) 241, Justice Y. Zamir stated, regarding primary legislation that provides a benefit:

> The court, in examining the legality of a law in light of the Basic Law: Human Dignity and Liberty will give weight to the fact that it involves, if it involves, a law that provides a benefit. But, as stated, the fact that a statute gives a benefit does not make the statue immune from judicial review in accordance with the Basic Law.

In his treatise *Interpretation in Law – Constitutional Interpretation* (5755 – 1995) 563, Prof. Barak spoke about the relevant considerations to be taken into account:

> The question arises as to whether there is place for less stringent requirements – from the perspective of the limitations clause – regarding new legislation that amends an old statute. Indeed, if the normal requirements of the limitations clause applies, the new legislation – which seeks to improve the human rights in comparison with the old law – is liable to fail constitutionally. The obvious result is return to the old law, which violated human rights to a much greater extent. What the did the wise men achieve in making their amendment? According to this line of reasoning, a special limitations clause is needed for a new law that amends an old law. It may be argued, in opposition to this approach, that the Basic Law: Human Dignity and Liberty does not contain two limitations clauses – one for the new "regular" statute and the other for the new statute amending the old statute – but one limitations clause only. Furthermore, the distinction between a "new" new statute and a new statute that amends an old statute is difficult and liable to create uncertainty. Finally, and this is the main point in my opinion – it is not proper to dilute the requirements of the limitations clause. This clause sets certain minimum requirements for the legislator, and these requirements should be used in every new legislative enactment that the legislature enacts. The nullification of the new legislation, which amends the old statute because its provisions do not meet the requirements of the limitations clause, is not a permit for legislative failure. It should serve as an incentive to more profound change, which will be consistent with the provisions of the limitations clause.

Therefore, even legislation that provides a further degree of benefit – and certainly secondary legislation that provides a further degree of benefit – must meet constitutional requirements. In our matter, the very fact that Section 29(b), in its new version, professes to cause a lesser violation of the right to consult with an attorney, confirms the law that preceded it, does not negate the demand for explicit enabling legislation, prior to violation of a fundamental right by secondary legislation. The rules on this matter were laid out before the enactment of the Basic Laws regarding human rights, and are certainly appropriate and correct, and even more so, today.

6. Remaining, then, is the question of whether Section 29(b) was enacted pursuant to specific and explicit authority to violate the right to meet with an attorney. The Respondents rely, on this matter, on the provisions of Section 132 (17) of the Prisons Ordinance [New Version], 5732 – 1971 (hereinafter: the Prisons Ordinance). Do these provisions include the requisite authority? On this point, I concur with the position of Justice Hayut, who responded in the negative. At the end of Section 132 (17) of the Prisons Ordinance, I found no hint that explicit authority was given to the secondary legislator to violate the right to counsel. General statements regarding authority to enact regulations in "other matters that must be arranged to ensure the efficient implementation of this ordinance" and in matters related to "the administration of the prison, and their discipline" – are insufficient.

For these reasons, I join the opinion of Justice Hayut. Like her, I believe that this decision voiding the regulation should be suspended for nine months in order to enable the legislator to give its opinion on the need to arrange the matter in primary legislation.

[signed]

Justice

It is decided by majority opinion as stated in the opinions of Justice E. Hayut and E. Rivlin, and contrary to the opinion of Justice M. Naor.

Given today, 18 Shvat 5764 (10 February 2004).

[signed]	*[signed]*	*[signed]*
Justice	Justice	Justice