The Association for Civil Rights in Israel

HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger

May 2005

Opinion on the Proposed Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or a Resident of a Zone of Conflict) Law, 5762 – 2002

Summary

The proposed bill is unconstitutional.

It is unconstitutional primarily because it denies fundamental rights on the basis of nationality (citizenship) and place of residence, without any connection to the acts of the potential plaintiff or the acts of the State of Israel and its agents in the specific incident. Classifying persons as being entitled to rights and denying them rights on such grounds constitute a grave infringement of the fundamental right of equality before the law.

Existing law grants the state powerful tools with which to cope with tort claims that result from the Israeli-Arab conflict. The main tool is complete immunity given to the state and its agents for any wartime action. A wartime action is defined, under existing law, *inter alia*, as "*any action of combating terror, hostile actions, or insurrection, and also an action as stated that is intended to prevent terror and hostile acts and insurrection committed in circumstances of danger to life or limb."*[1]

The current change is not needed to block claims for wartime actions. It is intended to block claims for acts that do not result from such actions. Amendment No. 5 will impair the rule of law and human rights in places in which nobody wishes to do so: the claims that this amendment would block are the claims that result from pillage, negligence occurring in training areas, the use of firearms where there is no imminent danger to a soldier, and the like.

The drafters of the bill contend that the amendment implements a purported "accepted" principle, whereby each party to an armed conflict bears the injuries of its subjects. As we shall show, this principle does not exist in Israeli law or international law. In war, too, there are laws, and anyone who breaches the laws must pay the resultant damages. The purpose of international law is to reduce as much as possible the injury caused to civilians during time of

[1] Civil wrongs (Liability of the State) Law, 5712 – 1952, Article 1.

international conflicts. In this framework, the parties have obligations to the civilian population – obligations whose breach generates criminal sanctions and civil claims for compensation.

We live in a new international climate, in an era of globalization of the law. The international legal arena is gaining force. No state can isolate itself from the consequences of this process. The Supreme Court is moving in a direction that conforms domestic law to international law, if only to save the state and its soldiers from the results of a clash between the two legal systems. The current bill clashes sharply with international law and with the international obligations of Israel.

The proposed bill will make it impossible to sue the state in Israeli courts. It will encourage potential plaintiffs to file their claims abroad. Courts throughout the world have been opening their doors more and more to claims that ostensibly have no connection to those states, where the suits are based on the breach of fundamental rights or of the law of nations. Forbidding the filing of these suits in Israel will make it impossible for the state to argue *forum non conveniens* in the foreign court.

The existing law

The state is already exempt from liability where a person is injured in the framework of wartime actions, regardless of whether the injured person is involved in the hostilities. "Wartime action" as defined in the existing law is extremely broad:

> **any action of combating terror, hostile actions, or insurrection, and also an action as stated that is intended to prevent terror and hostile acts and insurrection committed in circumstances of danger to life or limb.**[2]

The provisions of Pequddat ha-Neziqin [the Torts Ordinance], which relate to contributory negligence and willful endangerment, enables the reduction and even voiding of compensation to a person who was injured as a result of his involvement in actions against the state. In practice, the common law indeed makes use of such provisions.

Regarding evidence, Amendment 4 of Hoq ha-Neziqin ha-Ezrahiyyim [the Civil Wrongs Law], of 2002, sets forth a number of provisions intended to make it easier for the state in matters regarding the burden of proof where the suits originate in the Occupied Territories. Among these provisions are the obligation to give notice of the act causing the injury close to

[2] Civil Wrongs (Liability of the State) Law, 5712 – 1952, Article 1.

its occurrence, the reduction of the period of limitation, and the elimination of assumptions where they would transfer the burden of proof to the state.[3]

The provisions of Amendment 5

Whereas the previous amendment to the Law placed the emphasis on the kind of incident causing injury, the proposed amendment openly and explicitly focuses on the collective identity of the person injured – whether he is a subject of an enemy state, a resident of a "zone of conflict" (and it is emphasized that Israeli communities in the Occupied Territories are not included in this term) or "a person active in a terrorist organization" (a vague and broad term that focuses on activity that is not necessarily linked to the incident in which the injury occurred).

According to the amendment, the state would not be civilly liable for any injury caused to a subject of an enemy state or to a person active in a terrorist organization, except for injury caused when the person was being held as a prisoner or detainee by Israel. Furthermore, Amendment 5 exempts the state from liability for any injury to a resident of a "zone of conflict" in a zone of conflict. Even when the injury is caused outside the zone of conflict, the state will not be civilly liable to the resident of the zone of conflict if the injury resulted from an act that was done in the framework of the conflict or as a result thereof. The exceptions are injuries to a resident of "a zone of conflict" who was in Israeli custody, claims based on an act of the Civil Administration or the Coordination and Liaison Administration and a small group of traffic accidents.

The power to declare a certain area as a zone of conflict is given to the Minister of Defense. The amendment further states that a resident of a "zone of conflict" may make a request, in certain cases, to a special committee that will be set up to hear exceptional claims.

Amendment No. 5 will apply retroactively to every claim that took place after the outbreak of the Intifada, on 29 September 2000, except if the plaintiff's claim has already reached the stage in which the taking of evidence has begun.

Severe infringement of many human rights protected by Israeli and international law

Thwarting the possibility of obtaining relief is like the breach of the fundamental constitutional right, because a right that can be breached without the breach bringing about practical consequences is not a right.

[3] Civil Wrongs (Liability of the State) Law, 5712 – 1952, Article 5A.

> **Eradicating the relief or failing to recognize a remedy breaches a constitutional human right similar to the initial infringement of the right** (Aharon Barak, *Parshanut ba-Mishpat - Parshanut Huqqatit* [Interpretation in Law: Constitutional Interpretation] (1984) 705).

A commitment to human rights is empty rhetoric when relief is not available for an infringed right. Article 2 of the International Covenant on Civil and Political Rights states:

> **3. (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.**

The torts law is an important means to ensure human rights. It can ensure that the infringement of a right is not left without a response, and that, even if the infringement of the right cannot be reversed, the holder of the right should at least be compensated for his injuries:

> **Israeli private law, in general, and the torts law, in particular, are the primary source for granting relief for (physical) infringement of a protected human right… The Torts Ordinance is the source for the relief, whereas the right is enshrined in the basic laws** (Aharon Barak, *Interpretation in Law: Constitutional Interpretation* (1984), 785).

The amendment's implication is that when a child who is a resident of a zone of conflict is shot and killed negligently, the state will be immune from the obligation to compensate his family, in clear violation of the **right to life**, an infringement for which there is no remedy.

When a soldier pillages a Palestinian home, which was seized for use as an observation post, the owner will not be able to sue for his damages, and the pillaging soldier and the state will be immune from liability, in flagrant violation of the **right to property**.

When a Palestinian pedestrian is injured by an army patrol vehicle, and is hospitalized for months as a result, she will not be able to sue for damages, in flagrant violation of her **right to bodily integrity**.

When an elderly person is humiliated and delayed at a checkpoint only because he refused to play the violin, he will not be able to obtain any relief for the humiliation, in violation of the **right to human dignity** and the **right to freedom of movement**.

Amendment No. 5 creates a regime of discrimination based on group membership

The amendment does not block claims on the basis of the cause of action, but on the basis of the identity of the plaintiff and his place of residence. Thus, it constitutes forbidden discrimination. The fact that the plaintiff lives in a conflict zone or is a Palestinian is not sufficient alone to provide a relevant difference that justifies different treatment.

The opposite is true: denying people their rights under torts law only because of their place of residence or because of their subjectship is more than just a matter of **inequality**. Discrimination based on group membership is humiliating and itself **violates human dignity**.[4]

For example, an army vehicle is traveling in a conflict zone, the driver is negligent and does not turn on the lights. Also, the vehicle has insufficient pressure in the tires. As a result of this negligence, two children are run over and seriously injured at an intersection. One of the children is Palestinian, a resident of a nearby village, and the other a Jew, a resident of a nearby settlement. Even though a wartime action is not involved, the Jewish child can sue for his damages, while the Palestinian child is left without relief of any kind. This distinction is forbidden and deplorable.

An example of a relevant distinction is the distinction, set forth in Article 5 of the Law, between a wrong that is done in the framework of a **wartime action** and another wrong. The distinction is based on the recognition that there are claims that "are not suitable for handling in the ordinary torts law," because they take place in a special situation of wartime actions, a situation in which the risks that the wrongdoer takes on himself are very great, as opposed to claims that should be examined in the context of the ordinary torts law, although the wrong alleged is done in occupied territory and against civilian population.

Amendment No. 5 to the Law is not intended to block claims originating from wartime actions or acts that are of a somewhat similar nature. These claims are already blocked under existing law. The amendment is intended to block the claims of residents of the Occupied Territories and of "enemy" subjects or "residents of a zone of conflict" which do not originate in wartime actions, and this makes it wrongfully discriminatory.

The amendment is so sweeping that it discriminates against Palestinian litigants also in claims that have nothing to do with wartime actions, such as claims for pillage, explosion of dud explosives in training areas, police violence, abuse and humiliation at checkpoints, physical violence, and unjustified shooting in which soldiers' lives are not under threat, and

[4] HCJ 4541/94, *Alice Miller v. Minister of Defense, Pisqe Din* 49 (4) 94.

breach of the rules of engagement. All this when the plaintiff falls within the classification made by the statute and the defendant is the state. (The very same injury would be amenable to suit where any other plaintiff or defendant is involved.)

Discriminating against Palestinian litigants contravenes the right to equality, in general, and the right to equality before the court, in particular. International law also requires the courts not to discriminate between litigants. Article 14 of the International Covenant on Civil and Political rights, mentioned above, states:

> **All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.**

The state uses the following argument in an attempt to justify its discriminatory treatment: since Israeli litigants are unable to sue the Palestinian Authority for their damages resulting from the conflict, it is not improper to treat Palestinians similarly in cases in which they were injured by Israel in the conflict. This is a demagogic argument and is not factually correct. Since the beginning of the Intifada, Israelis have filed many claims in Israeli courts against the Palestinian Authority, and Israeli courts have placed many attachments on money intended for the Palestinian Authority that Israel is holding.

Either way, the Palestinians do not live in an independent foreign state alongside Israel. For almost forty years, they have been living under the effective control of Israel. There is a very close affinity between the Occupied Territories and Israeli territory. In practice, the whole area between the Jordan River and the Mediterranean Sea can be viewed as one control system.[5] The situation is very different from a battle between two sovereign entities. The claim that there is an international symmetry, which renders the severe discrimination acceptable, is astonishing.

Amendment No. 5 infringes the right of access to the courts

Amendment No. 5 will prevent certain litigants, on completely technical grounds, such as their being subjects of an enemy state or residents of a conflict zone, access to the courts in Israel. It is important to note that the State of Israel does not allow Palestinians to sue for damages in local courts in the West Bank and in Gaza, but requires them to file suits

[5] Menachem Hofnung, *Yisra'el: Bithon ha-Medina mul Shilton ha-Hoq* [Israel: State Security versus the Rule of Law] (2nd Ed., 2001) p. 28 and the references in footnotes 69 and 70.

in courts in Israel. Refusing to let them file claims in Israel is not a good-faith action, and ostensibly leaves Palestinians injured by the army's actions without remedy.

Closing the doors of the courts in Israel before Palestinians from the Occupied Territories follows a number of less extreme provisions of law that were enacted in 2002, among them reduction of the period of limitation and conditioning a claim on the submission of a notice of injury soon after the incident occurred. Now it is proposed to block access to the courts completely and in a sweeping manner.

As we shall discuss at further length below, the amendment gives an opening to Palestinians to initiate civil actions in foreign and international courts. However, dragging potential plaintiffs to foreign courts will place a heavy burden on them in investigating their claim. However, more than anything, it will impair the interest of Israel itself in having the claims against it handled in local courts, by judges who live in Israel and identify with the state and the constraints it faces.

The rationales underlying the proposed bill

Rejection of the first rationale: each side bears its own damages

In the words of the drafters of the bill, "The accepted rule is that, during armed conflict between nations, each side bears its injuries and cares for its injured." They contend that Israel is bearing the injuries of its citizens from the hostile actions, and that they cannot obtain compensation from the Palestinian side. The same law must also apply to Palestinian injured.

At first, we should say that this rationale is factually incorrect. Israelis have filed many claims, at home and abroad, against the Palestinian Authority and against other Palestinian entities for injuries sustained as a result of the terrorism for which they were responsible. As of September 2004, claims filed in Israel alone have amounted to some six billion shekels [approximately $1.4 billion in June 2005]. Large sums of money of the Palestinian Authority have been attached in the framework of such claims – some 800 million shekels as of September 2004 [approximately $180 million].[6]

This rationale is inconsistent with the laws of war. International law indeed holds that each side bears its injuries when the injury is caused by lawful operations in the context of a legal war. However, when the laws of war are violated, the breaching party must make compensation for the violations. Article 3 of the Hague Convention of 1907 states:

> **A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay**

[6] *Ha'aretz,* 4 September 2004.

> **compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.**

Therefore, a state cannot avoid civil liability for acts that it carried out in violation of the laws of war and international humanitarian law.

For example, when Iraq attacked Israel in the first Gulf war, it was compelled to compensate Israeli residents who were injured or suffered damage as a result of the missiles attack, because the attack was illegal and a flagrant breach of international law and the laws of war. Thus, we see that as long as an act contravenes the laws of war, the act is subject to compensation. On the other hand, a justified act can never be subject to compensation (even if the injured party is innocent), and a claim based on the act will be rejected by courts in Israel also under existing law.

Obligations resulting from the laws of war

The purpose of international humanitarian law is to protect civilians from the harsh results of conflicts. Therefore, it established special obligations that the sides must comply with as regards civilians who are caught in areas of conflict. Humanitarian law rejects the principle, proffered by the drafters of the amendment, whereby each side only has obligations to its subjects, and to them alone. The fundamental purpose of international humanitarian law is to apply the principle which states that the two sides bear a heavy obligation to each and every person among the civilian population in the area in which the conflict is taking place, including the enemy's citizens.

For example, the Fourth Geneva Convention grants the status of "protected persons" to "those who, at a given moment, and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals"(Article 4).

Some of the fundamental rights of "protected persons" are set forth in Article 27 of the Convention:

> **Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.**

> **Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.**
>
> **Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.**
>
> **However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.**

International law creates obligations that military forces must meet regarding citizens of the enemy. In the terms of torts law, "affinity" or "conceptual duty of care" are concerned. The proponents of the bill turn things upside down. A situation of conflict, which imposes, under international law, obligations on the state toward the enemy's citizens, would now create an exemption. The special rights of the protected citizen would be rendered meaningless, without an effective remedy for their breach. The principle that breach of international law requires that compensation be made gives way to the law of a jungle that alienates victims of the conflict.

The bill, which professes to reflect an "accepted" principle, flies in the face of international law and Israel's international obligations.

> ***The State of Israel is a member of the family of nations.*** **It should not breach its obligations** (Aharon Barak, *Parshanut ba-Mishpat - Parshanut ha-Haqiqa* [Interpretation in Law - Statutory Interpretation] (1983) 577).

Rejection of the second rationale: the claims that are the subject of the bill are not suitable for being decided in the framework of the ordinary torts law

The general principle for state liability in civil actions is set forth in the Civil Wrongs Law. "For the purpose of civil liability, the state shall, save as hereinafter provided, be regarded as a corporate body" (Article 2). **The state is not entitled to a special status in comparison with that of any other person.** Where a security company is liable under law – so, too, must the state be liable. Where a particular person would win his suit – so, too, must another person win. **Not the identity of the parties, but the nature of the incident is that which must dictate the legal decision**.

Pursuant to this principle, the common law, and customary practice, have over the years reduced the immunity of the state. Special considerations of accepted legal policy is required to justify an exception to this rule.[7]

One of the exceptions is that of "wartime action". The emphasis in the common law as regards a wartime action is not the parties involved in the court action, nor even the general events, around which the tort claim revolves. **The question is not whether the injury was caused during the period of a conflict, in the zone of conflict, or to a resident of a zone of conflict. The question is whether the act that caused the injury had the characteristic of a wartime action:**

> **You must examine the action – not the war.[8]**

The nature of the exception relating to a wartime action was discussed by the Court in 2002 in *Bani 'Uda.*[9]

In the same matter, the Court explained that the scope of the damage sustained in hostilities, the kinds of danger and the magnitude of the dangers taken, which have the characteristics of a battle, are not appropriately handled by the legal tools available within the ordinary torts law:

> **Wartime actions create, by their quality and nature, dangers, which the "routine" system of laws are not intended to cope with.**

And it is noted:

> **The approach is not that "a wartime action" is outside the borders of the law. The approach is that the question of civil liability for a wartime action must be determined outside the classic torts law.**

In general, these injuries are handled in international frameworks and in international agreements.

Israel has been the occupying power in the Occupied Territories for close to 40 years, and although during the years of the Intifada, the level of violence increased in the occupied territory, it surely cannot be said that every action carried out by the soldiers during this period was a wartime action exempt from the obligation to make compensation. Many of the actions were of a policing nature and were intended to maintain public order.

---

[7] CA 243/83, *Jerusalem Municipality v. Gordon, Pisqe Din* 39 (1) 113, 131-134.
[8] CA 5964/92, *Bani 'Uda et al. v. The State of Israel, Pisqe Din* 56 (4) 1 (hereinafter: *Bani 'Uda*)
[9] Ibid.

> **The army is carrying out in Judea, Samaria, and Gaza varied "actions", which create dangers of various kinds. Not all the actions are of a "wartime" nature** (*Bani 'Uda,* p. 7).

As we have shown, the state already has broad immunity for wartime actions. The immunity is based on the kind of action – in accordance with the rationale that these particular kinds of actions are not suitable for handling in the framework of classical torts law.

As regards this rationale, the proposed bill therefore adds nothing.

Quite the contrary. The bill brings together wartime actions and non-wartime actions, and thus perverts the original rationale on which the rule regarding wartime actions is based, by switching the focus from the nature of the act to the period and place in which it is done, and to the identity of the person injured.

Rejection of the third rationale: the large number of cases creates evidentiary problems, leaving the state unable to defend itself

The drafters of the proposed bill contend that the large number of exceptional cases during the Intifada, and the ongoing hostilities, creates evidentiary problems for the state, which justify the immunity.

This argument is baseless. The burden of proof lies with the plaintiff, and the burden is not easily met. Though the drafters' arguments are correct, the difficulty in proving the facts in each and every case harms the potential plaintiffs more than the state, because they bear the burden of proof.

Amendment No. 4, of 2002, made four changes that increase the burden facing the plaintiff and make it easier for the state to defend itself against claims:

A. The potential plaintiff must notify the Ministry of Defense about the incident in which the injury occurred within 60 days from the day of the incident. Upon failure to give notice, as a rule, the person is not permitted to file a claim. This provision is designed to make it easier for the state to investigate and gather evidence about the incident in a timely manner, while severely restricting the potential plaintiff's right of access to the courts.

B. The period of limitation in claims regarding IDF activity in the Occupied Territories was shortened to two years, the objective being to make it easier for the state to locate its witnesses and gather evidence.

C. The provisions of the torts law, which place the burden of proof on the defendant, do not apply (as a rule) to such claims. The plaintiff must prove details that he cannot

know other than by investigation conducted by the state, such as what exactly took place among the IDF soldiers that led to the negligent gunfire at him.

D. If the defense of the state is impaired as a result of the lack of cooperation of the Palestinian Authority regarding the summoning of witnesses and the like, the lack of cooperation can be grounds for dismissing the claim.

Parenthetically, it should be mentioned that the drafters of Amendment No. 4 instituted these provisions to cover everyone who was injured by the IDF in the Occupied Territories – regardless of his citizenship and his place of residence. They clearly understood that applying these laws explicitly only to certain population groups would be deemed unconstitutional.

The evidentiary problems that the plaintiffs face, and which the bill' drafters note, are for the most part the result of the state's failures.

The obligation to investigate the incident is unrelated to torts law, but is an independent obligation. This obligation is derived from the values held by the state and by the army, whereby every exceptional case is to be examined and investigated. It is an obligation that applies by virtue of Israeli and international criminal law. It is an obligation that arises independently from the obligation to protect and respect the human rights of the civilian population.

Now, the state seeks to benefit from its systematic breach of its obligations. This is intolerable. On the contrary, if there is an evidentiary problem, it is that the state does not meet its obligation to investigate exceptional incidents. One would expect the army to increase the pace of the investigations, add personnel, improve documentation of the incidents at the time they occur.

Granting immunity would undoubtedly also affect the motivation of the army to investigate cases. Now, the army must investigate, at least, to defend itself against claims. Immunity would give it an obvious negative incentive to investigate exceptional cases, in which soldiers were involved, creating a clear opening for moral decline and violation of the purity of arms.

Amendment No. 5 will expose Israel to claims in foreign courts and international tribunals

International law has changed a great deal in recent years. Complex processes have led to a decrease in the principle of sovereignty and in increased international adjudication, criminal and civil. Just a short time ago, the State of Israel felt the arm of the international court in the opinion given in the matter of the separation fence. That opinion states in clear terms that construction of the fence violates international law, which requires Israel to compensate the persons who were injured as a result of its construction.

States show special sensitivity to the breach of the laws of war and of fundamental human rights. Special courts have been established in various locations to try war criminals. Many states, Israel among them, have included war crimes and crimes against humanity in its criminal code, which is justiciable in the domestic courts also when the offender has no ties to the state in which he is being tried.

There have also been enormous changes in the handling of civil actions. Foreign and international courts have been increasingly ready to hear suits relating to the violation of human rights or breach of the law of nations. To facilitate the handling of such suits, the rules on ties to the forum, immunity of a foreign sovereign, and the like have become more flexible.

The European Court of Human Rights routinely orders that compensation be made to persons whose rights have been infringed by a state subject to its jurisdiction. The court will intervene in cases in which the defendant state does not offer a proper remedy. For example, when the state fails to thoroughly investigate and the injured person is left without relief, the court will intervene and order a substantial compensatory payment to the plaintiff.

The appropriateness of the forum is one of the primary considerations taken into account by foreign courts and international tribunals. The common understanding is that the claim must be adjudicated in the most appropriate forum. Denying a plaintiff the right of access to the domestic courts, which are considered the appropriate forum, because of a sweeping immunity given the state, is the classic case that invites the foreign court to intervene.

It should be noted that the grant of sweeping immunity in courts in Israel does not guarantee the state's agents from being sued in foreign courts. These suits are often not directed against the state, but against soldiers and government officials, and the claims are filed against them when they are staying abroad.

If enacted, the amendment would be unconstitutional

The amendment, if enacted, would be unconstitutional. It would strike at the fundamental beliefs of a democratic society, discriminate between one person and another, leave fundamental rights of residents of territory occupied by the state without remedy for their breach and, therefore, render them meaningless. This law would contravene Hoq Yesod: Kevod ha-Adam we-Heruto [Basic Law: Human Dignity and Liberty] and should be voided.

For the law not to be voided, the state must prove that the severe harm caused by the law meets the conditions of the limitations clause: it must conform to the values of the State of Israel as a democratic state, be for a proper purpose, and be proportional.

Improper purpose and extraneous considerations

In that the rationale underlying the amendment can easily be refuted, it is clear that the purpose of blocking Palestinians from gaining access to the courts cannot be justified, and is therefore an improper purpose.

The real purpose may be to exempt the army from its current obligation to act with caution, and to give it greater freedom of action in the Occupied Territories. This purpose is neither proper nor desirable.

It may be that the purpose of the amendment is economic, an attempt by the state to save money. Such a purpose is surely improper.

Amendment No. 5 is inconsistent with the values of the State of Israel as a democratic state

The State of Israel views itself as a Jewish and democratic state, member of the enlightened states of the world. It considers itself, *inter alia*, bound by international customary and treaty-based law. Israel has repeatedly contended that it respects its international obligations.

The amendment flagrantly breaches Israel's international obligations as the occupying power in the Occupied Territories.

The State of Israel professes that its subjects have effective and free access to court. The State of Israel has for many years been proud of its willingness to open its courts to claims filed by Palestinians. The state has also garnered much favorable public relations in the international sphere from this fact.

By granting the state absolute immunity, the amendment denies in one broad sweep the right of access to the courts.

The State of Israel professes equality and human dignity. It professes equality before the law and equality of litigants before the courts.

The amendment constitutes flagrant discrimination based on the identity of the plaintiff and his place of residence. This discrimination is based on generalization and is humiliating. It marks innocent persons as enemies and terror activists, the amendment leaves persons injured by the state without an effective remedy although they have done nothing wrong, for no other reason than that they are Palestinians.

The State of Israel professes purity of arms and the morality of its army. Israel contends that its army is the most moral army in the world. The amendment grants sweeping immunity to completely immoral acts that are committed by soldiers and police officers. The state does not

carry out investigations and exploits its omissions as grounds for immunity to tort claims. A moral army does not act in such a manner.

The State of Israel professes a strong and independent judicial system. The amendment denies powers of the courts. The amendment transmits a message that the judicial system cannot be trusted to distinguish between a wartime action, which deserves immunity, and a non-wartime action, for which liability should be attached.

The State of Israel professes judicial sovereignty. The State of Israel contends that there are judges in Jerusalem. The State of Israel professes an independent judiciary. As stated, the amendment will expose Israel to claims in foreign courts and international tribunals. Does Israel want foreign judges to decide the question of which operations in the Occupied Territories are legal and which are not?

The amendment is not proportional

In examining the proportionality of the amendment as regards the rationales the legislator seeks to advance, it is necessary to examine the change in the law in comparison with the tools offered by the law as it presently stands.

The primary rationale is that each side should bear its injuries and losses. The second rationale is that, in wartime actions, the danger is different and does not enable a hearing according to the ordinary torts law. These rationales are true only as regards legal wartime actions. The amendment does not strengthen these rationales because existing law satisfies these needs in the case of wartime actions. Therefore, the amendment fails the test that there be a causal relationship between the means and the ends.

The amendment illegally discriminates between litigants who were illegally injured by the state it severely breaches human rights, it is sweeping in application. Thus, the amendment fails to meet the least-harm test.

The exception set forth in the amendment does not render it proper. According to the exception, a committee that will be established can order the payment of compensation to a resident of the conflict zone who is injured in exceptional circumstances. This means cannot be a substitute for access to court and protection of rights. Fundamental human rights are involved. A right, where the relief provided for its breach is an act of benevolence, is the same as a right without remedy for its breach.

The amendment also fails to meet the third test of proportionality – the question of harm - benefit in the broad sense. The benefit accruing from the amendment is, as stated, marginal, in comparison with the rationales that the amendment seeks to advance in that the existing law enables a good response. On the other hand, the harm is the grave infringement of the rights

of Palestinians, including children and the elderly, who are not involved in the hostilities. The harm also occurs in the international sphere – Israel will be exposed to judicial scrutiny by foreign and international courts.

The exceptions in the amendment do not make it proper

The amendment makes an exception to the sweeping immunity it grants to the state in a number of cases, which are enumerated in an annex. These may be changed by the Minister of Defense.

Regarding all the persons to whom the amendment relates – a subject of an enemy country, an activist in a terrorist organization, and a resident of a zone of conflict – the state will be civilly liable when the injury is sustained when that person is a detainee or prisoner in the custody of the State of Israel. This exception is obvious, and does not render the proposed bill void.

Regarding residents of a zone of conflict only – the first exception states that the state will be civilly liable for injuries caused by *an intentional* act by a member of its security forces, and only if and when that member is convicted by a conclusive judgment. Where the soldier is convicted of criminal negligence and serves a prison sentence for the offense, the victim will not be entitled to compensation.

It should be noted that, in light of the policy on conducting investigations since the outbreak of the second Intifada, there have been few criminal investigations opened against soldiers, even in cases in which innocent persons were killed. Therefore, the number of soldiers who are likely to be convicted of offenses in which there is an element of intention or malice is insignificant.

This exception is, therefore, offered as a fig-leaf, and is illusory.

Another exception applies to suits in which the cause of action involves an act by the Civil Administration or the DCO [District Coordination Administration] that was unrelated to the conflict or did not result from it. The extent to which this exception can be applied is unclear.

The last exception, too, covers only residents of the zone of conflict, and relates to traffic accidents in which a security forces' vehicle is involved. However, this exception is a mixed blessing. It is so narrow that it fails to cover most of the accidents.

For example, this exception does not apply to traffic accidents of a vehicle "incidental to operational activity". Would, for example, the state be exempt where the injury arises from a military patrol striking a Palestinian vehicle after the military vehicle fails to obey a stop sign? Would the driver of a vehicle traveling negligently on an administrative task to a combat sector benefit from immunity although the area where the accident occurred was quiet

at the time and the accident was unrelated to the hostilities? It should be recalled that most travel in the Occupied Territories is "operational" even if it is done routinely.

Another condition is that the registration number or identity of the driver of the military vehicle be known. The state would be exempt in every hit-and-run case and in every incident in which the person injured does not manage to document the license number of the vehicle that struck him.

Retroactive application of the amendment

The retroactive application of the amendment is improper in and of itself.

The amendment changes the substantive law. It applies to events that occurred years before, and retroactively denies the property right of persons to compensation. Many litigants who already filed claims at great financial expense would be harmed as a result of the reliance they placed on the existing law.

Retroactive application of the amendment would require the dismissal of court proceedings and the voiding of decisions already given. These actions would constitute flagrant interference by the legislative branch in the activity of the judicial branch, in gross violation of the separation of powers.

Also, applying the amendment retroactively is an act of bad faith by the state. This bad faith is evident from the foot-dragging and prolonged hearings in the preliminary stages, which have been common practice for quite some time. Following the enactment of Amendment No. 4, which shortened the period of limitation to two years, many suits were filed. A few months ago, the state filed wide-scale applications to allow it to delay filing its response for six months. No specific reasons relating to the individual cases were provided; the applications were stated in a fixed, general format. As a result, the time it takes from the filing of the complaint to the time the evidence is heard in court grew substantially, and often extends, as a result of the state's handling of the file, for years.

Conclusion

The Israeli-Arab dispute is most grim. It creates bitter feelings of pain and rage. However, a dispute between peoples is also governed by statute and law.

> **Even in a time of combat, the laws of war must be followed.**
> (HCJ 3114/02, *Barake v. Minister of Defense, Pisqe Din* 56 (3) 11). [Translation: Supreme Court website]

The harsh feelings generated by the dispute do not justify collective treatment of the population classified as an "enemy". They do not justify discarding the fundamental

principles of our legal system. They do not justify legislation that is the complete opposite of the law of nations, legislation that completely contradicts it, and which will turn Israel into a pariah state in the international community.

The branches of government – the executive branch and even more so the legislative branch – must internalize the declaration made by the Court:

> **The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties** (HCJ 5100/94, *Public Committee Against Torture in Israel v. Government of Israel, Pisqe Din* 53 (4) 817, 844-845). [Translation: Supreme Court website]