Translation from the original Hebrew by Adalah
Summary of decision issued by the Supreme Court of Israel on 15 April 2015

The Supreme Court of Israel
HCJ 5239/11, HCJ 5392/11, HCJ 5549/11, HCJ 2072/12[1]

Uri Avnery et al. v. Knesset et al.

Concerning the constitutionality of the Law Preventing Harm to the State of Israel by Means of Boycott

Summary of decision

An expanded panel of nine Supreme Court justices handed down a decision today (15 April 2015) on the petitions that challenged the constitutionality of the Law Preventing Harm to the State of Israel by Means of Boycott – 2011 (hereinafter: the Boycott Law, or the law).

The law, enacted by the Knesset on 11 July 2011, imposes tort liability on any person who knowingly issues a public call to impose a boycott on the State of Israel, that is: anyone who calls for "deliberately avoiding economic, cultural or academic ties with a person, or other entity, solely because of their affiliation with the State of Israel, one of its institutions, or an area under its control, in such a way that may cause economic, cultural or academic harm" (hereinafter: a call to impose a boycott on the State of Israel). The law also authorizes the minister of finance to institute regulations to restrict those calling for such boycott from participating in tenders for contracts with the state, and to deny them various benefits granted by the state.

The petitioners sought to challenge the constitutionality of the law, arguing that it violates various constitutional rights (primarily: the freedom of political expression, the right to equality, and the right to freedom of occupation), and does not meet the conditions defined for this purpose in the "limitation clauses" in Basic Law: Human Dignity and Liberty and in Basic Law: Freedom of Occupation. They argue that the law imposes disproportionate civil and administrative sanctions that are contrary to accepted legal principles, because of political statements. [The law] aims at silencing expressions of protest against the government's policy in areas under its control (hereinafter: the area) – and thus it restricts, unconstitutionally, the democratic means available to a minority to express its opposition to government policy.

The respondents argued that the law is designed to protect the state, its institutions and various entities in it, from a boycott that is liable to harm them, solely because of their

[1] This footnote is added by Adalah, and does not appear in the court's summary. HCJ 2072/12, *The Coalition of Women for Peace, et al. v. The Minister of Finance, et al.* is the petition filed by Adalah and the Association for Civil Rights in Israel (ACRI) on behalf of leading human rights organizations in Israel, plus associations calling for an economic boycott of the settlements in the West Bank and/or of Israel.

affiliation with the state, one of its institutions, or an area under its control. This is a worthy aim because it expresses the state's duty to protect the individuals, institutions and entities connected to it, and to prevent discrimination against the citizens of Israel on an illegitimate basis. In addition, it was argued that the law is designed to prevent harm to Israel's standing in the world, or harm to its relations with other countries and its foreign relations – and this objective is also a worthy one. It was also argued that the law's sanctions meet the constitutional "proportionality tests," and this is in light of "minimizing aspects" in the law that limit the harm it is liable to cause to constitutional rights.

The Court decided in a unanimous ruling to reject the petitions regarding sections 3 and 4 of the law, which pertain to administrative sanctions the finance minister is authorized to impose under the law on anyone who calls for a boycott of the State of Israel, or who commits to participate in such a boycott. On the other hand, [the Court decided] to strike down section 2(C) of the law, which permits the court to order anyone who calls, maliciously, for imposing a boycott on the State of Israel to pay compensation that is independent of damage, without setting a maximum sum. In addition, the Court decided in a majority opinion of (retired) President A. Grunis, President M. Naor, Vice President E. Rubinstein, Justice H. Melcer and Justice I. Amit to reject the petitions regarding sections 2(A) and 2(B) of the law, which define the tort, contrary to the opposing views of Justices S. Jubran, Y. Danziger and U. Fogelman and the separate opinion of Justice N. Hendel.

Below is a summary of the opinions of the justices on the panel, in the order in which they appear in the ruling.

Summary of Justice H. Melcer's opinion

Justice H. Melcer wrote the main opinion for the majority. Justice H. Melcer extensively reviewed the process of the law's enactment, in its different versions, until its final wording was formulated, and the background of its enactment. In this context, Justice H. Melcer noted that the State of Israel extricated itself from the economic "Arab boycott" imposed on it in the past and which caused the state enormous damage, inter alia, thanks to specific American and European legislation, which is still in effect, that prohibited participation in the boycott, or submission to it.

In Justice H. Melcer's view, it is hard to dispute the fact that the law violates freedom of expression. However, according to Justice H. Melcer, the law does not violate the "core component of freedom of expression". It is also a proportionate violation intended for a worthy purpose, the constitutionality of which can be recognized subject to interpretation of the law's directives (and its partial annulment). This is similar to other legislation that was recognized as valid despite such violation of freedom of expression.

Justice H. Melcer noted that the law regards a "boycott" as a "chameleon concept" – sometimes it is permitted and sometimes it is forbidden. Consequently, the law in regard to "calling for a boycott" also depends on the context. Therefore, a boycott by consumers, for consumer objectives, could be possible, for example (although a "boycott of advertisements," which harms freedom of the press, is generally considered forbidden), while a boycott for political objectives will be illegitimate in certain circumstances. According to Justice H. Melcer, the law responds to the state's need to defend itself against

those who seek to destroy it, or against those who seek to change its character, via various aggressive means, including boycott. And it is a tool that the doctrine of "defensive democracy," which has become established in the Israeli legal system and in the world, recognizes as permissible to use.

According to Justice H. Melcer, the law imposes sanctions on calls for boycotting the State of Israel that seek to impose views on others through the use of economic and other means. Thus they deviate from pure freedom of expression and from its classic purpose: to enrich public discourse and present views, even if unconventional, so that political decisions in the society will be made in a free and intelligent way, with persuasion, tolerance and respect for the autonomy of the other. According to Justice H. Melcer, when the exercise of freedom of expression constitutes a tool for violating the individual right of the other to decide in the political domain in accordance with his opinions and belief, without incurring harm – it is possible to slightly curtail the protection of absolute freedom of expression. In this context, Justice H. Melcer notes that in calling for a boycott and in participating in it, there is even sometimes a sort of "political terror" [and] it is justified to restrict the rights of those who seek to take part in it. Justice H. Melcer emphasizes that these things are particularly apt in regard to calls for boycotting the academic community in Israel, because such calls undermine academic freedom itself and prevent research and instruction that are aimed, inter alia, at searching for the truth. According to Justice H. Melcer, drawing from the words of scholars, "this is in fact the boycotting of intellectualism itself, because a boycott silences the discourse."

In addition, Justice H. Melcer notes that the law, which seeks to prohibit a call to deliberately avoid economic, cultural or academic ties with a person or other entity "solely because of their affiliation with the State of Israel, one of its institutions, or an area under its control" – also promotes values of equality and a ban on discrimination. According to Justice H. Melcer, the call for a boycott, which constitutes a tort under the law, is based on "affiliation with the State of Israel" – very similar to the prohibition on discrimination based on a person's affiliation to a "country of origin." This is recognized in the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law – 2000 (and in the laws of other countries in the world) as a justified cause for assigning tort liability. In this context, Justice H. Melcer notes that discrimination on the basis of affiliation to a country of origin harms the individual based on actions and behaviors that are not dependent upon him, and constitute a sort of "collective punishment" that is inappropriate.

Moreover, according to Justice H. Melcer: "The administrative restrictions against those calling for a boycott have a sort of internal logic of their own, because how can those who call for a boycott seek assistance from the same entities they wish to boycott? From this perspective, the law applies against those calling for a boycott the same standard they themselves propose."

Later, Justice H. Melcer states – inter alia, after a review of the body of rulings in other countries on questions similar to those the law raises – that sections 2(A) and 2(B) of the law, as well sections 3 and 4, meet the "tests of proportionality" anchored in the "limitation clauses" in the basic laws, and are within the "legislative space of maneuvering." In this

context, Justice H. Melcer emphasizes that the law does not impose a criminal prohibition on political expression, and the tort it establishes pertains only to the call for conducting a boycott. It does not assign tort liability to those who express the political views underlying the call for a boycott. Moreover, the harm the law causes to those calling for a boycott is relatively limited. According to Justice H. Melcer, it is possible to apply a narrow interpretive approach to the aforementioned directives of the law, which would endow them with constitutional validity, and the use of this method should be preferred in this case. According to Justice H. Melcer's interpretative approach, in order to constitute a cause of action for compensation under the tort defined in the law, there must be proof of damage, a causal connection between the tort and the damage, and awareness of the reasonable possibility of the damage occurring. In addition, the claim for a tort defined in the law is subject to the protections stipulated in the Tort Ordinance, and to the directives in it, which restrict the scope of compensation that can be awarded for damage to the scope of the damage that is directly caused by the tort activity.

The administrative restrictions imposed on those calling for a boycott, under sections 3 and 4 of the law, are also proportionate, according to Justice H. Melcer's ruling. This is in light of the broad discretion accorded to the government in the context of awarding benefits and grants, on the one hand, and the proceeding required for approving the sanctions under the law, which includes government and Knesset oversight, on the other hand. In this context, Justice H. Melcer also noted that the underlying objective of the administrative restrictions is: "the interest of preventing funding from organizations or people calling for a boycott of the State of Israel that discriminates against the state's citizens, through aggressive means, which in practice harms the free market of ideas and seeks to impose the boycotters' views on those hurt by the boycott. In addition, the administrative restrictions are aimed at preventing a situation in which people or entities 'bite the hand that feeds them' and conduct themselves in advance in an ungrateful way, while seeking to exploit the benefits that would enable them to expand their activity against the one that awarded them these benefits." According to Justice H. Melcer: "The granting of benefits to those calling for a boycott entails the transfer of state resources for the benefit of entities that seek to harm it and to promote discrimination against its citizens. This is a separate category that is also familiar in comparative law and which allows the authorities to define in advance situations of anticipated ingratitude and to thus deny the granting of benefits from the outset."

However, Justice H. Melcer states that applying a regime of "punitive compensation" that is unlimited, as defined in section 2(C) of the law, exceeds the "bounds of proportionality." On this level, Justice H. Melcer notes that: "where it necessary to execute a delicate balance in order to minimally violate the fundamental right of freedom of expression, and to avoid as much as possible creating a 'chilling effect' on political expression and spirited social discussion, we should not use instruments that extend beyond civil law and deviate from the classic demand of damage, which is generally a condition for civil obligation and one of the main justifications – in the doctrine of law – for approving the state's intervention in the individual's life."

Justice H. Melcer summarizes his opinion with the following sentence:

> In a concluding sentence I will say – beyond the result I reached – that, as a rule, we should prefer the historical approach that sought to restrict boycotts in their various

forms, at home and abroad, with a few exceptions (and the boycott against the State of Israel as defined in the law, is not one of them). A boycott is generally bad for any state (including the Jewish state) and is also bad for democracy and society.

Summary of Justice Y. Danziger's opinion

Justice Y. Danziger ruled that the Boycott Law substantially violates the right to freedom of expression and that this violation does meet the tests of the limitation clause in Article 8 of Basic Law: Human Dignity and Liberty. Despite this conclusion, Justice Danziger determined that it is possible to significantly reduce the law's impact through interpretation, in a way that allows the law to meet the tests of constitutionality. Therefore, he states that the appropriate interpretation of the law, which is consistent with the fundamental values of our legal system, is that only a boycott of an "institution" or an "area" that is a boycott of the State of Israel and stems from their affiliation with the state will enter the purview of the Boycott Law. A boycott of an "institution" or an "area" that is not part of a boycott of the State of Israel will not be considered to be within the purview of the law.

Contrary to the view of the majority justices, Justice Danziger believes that the Boycott Law violates the core component of freedom of expression, which is a constitutional right of primary importance in our legal system. The call for a political boycott is an instrument for achieving political objectives in a peaceful way and it enables any person to express his political views, to influence his future and to decide which values should be promoted with his resources. The way the law defines the expression "boycott of the State of Israel" also applies its directives in the case of a boycott of the territories of Judea and Samaria (hereinafter: the area) only, which is not accompanied by a boycott of the entire state. Since the fate of the area and the settlements located there are subject to fierce political and public disagreement in Israel, Justice Danziger believes that those who are interested in expressing their dissatisfaction with government policy vis-à-vis the area and who call upon others to oppose this policy, are entitled to the full protection accorded to political expression in our constitutional system.

Justice Danziger ruled that the Boycott Law violates freedom of political expression in a direct and particularly severe way, because this violation of freedom of expression is based on the content of the political expression. In addition, Justice Danziger determined that the administrative sanctions in the Boycott Law, by preventing participation in a tender and limiting entitlement to benefits, substantially violates freedom of political expression and the principle of equality. Justice Danziger added that the general authorization given to the minister of finance in section 4 of the law, to withhold support from any entity calling for a boycott of the State of Israel, and including any entity calling for imposing a boycott on a person due to his connection to the area, allows, a priori, a consideration of the political views of the supported entity, regardless of the concrete objective of the support, thus violating the supported entity's freedom of political expression and the principles of pluralism and equality.

Justice Danziger ruled that in order to justify these violations of the constitutional right to freedom of political expression, the social benefit of the law must be greater than its damage. Indeed, he determined that the law promotes several important public interests.

However, he emphasized that the social benefit in the law varies according to the nature of the particular boycott. Thus, preventing a boycott of the State of Israel is consistent with the state's right to defend itself against those who seek to harm it, but this is not the case in regard to a boycott aimed only at the area, for example. This type of boycott entails an internal Israeli political issue and cannot be considered an expression against the existence of the state as such.

In order to avoid the severe consequence of annulling the law in light of its unconstitutionality, or the use of the "blue pencil" doctrine – where the court strikes down the law's unconstitutional directives, leaving the rest of the directives in effect, in a way that is similar to judicial legislation – Justice Danziger ruled that it is possible to achieve a similar objective through interpretation, without ordering the annulment of any of the law's directives. Justice Danziger emphasized that the interpretative solution is a proportionate solution that reduces the extent of judicial involvement in Knesset legislation, and assigns appropriate weight to the principle of separation of powers among the authorities.

Thus, Justice Danziger proposed that section 1 of the Boycott Law, which serves as the introduction to the law and outlines the scope of its application, should be interpreted narrowly, in a way that enables only a certain "type" of boycott to cross the threshold of the law – a comprehensive boycott of the State of Israel as such. Consequently, not every boycott of an institution or area "belonging" physically to the state would be included under the law's definition, but only a boycott of an institution or area that is part of a boycott of the entire state. He determined that this interpretation is also consistent with the purpose of citing the institutions and areas in section 1 of the law, which was intended to reinforce the arrangement for contending with the typical boycott the law is designed to address – a boycott of the State of Israel. In order to fulfill this purpose, without expanding the application of the law beyond what is necessary, Justice Danziger ruled that the affiliation between the "institution" or "area" and the State of Israel should be interpreted as a specific connection. The practical relevance of this interpretation is that a call for boycotting the state's institutions, or calls to boycott territories controlled by the state, which are not accompanied by a call for a comprehensive boycott of the state, would not be included in the purview of the law.

Nonetheless, in light of the fact that his interpretative stance was not accepted, Justice Danziger joined the panel's majority opinion that section 2(C) of the Boycott Law, which permits imposing compensation for committing a tort without proof of damage, deviates from the basic principles of civil law [and] has the characteristics of a punitive fine and thus should be annulled as unconstitutional.

<u>Summary of Justice N. Hendel's opinion</u>

According to Justice N. Hendel, the petition juxtaposes the individual's freedom of political expression, on the one hand, and Israeli society's desire to defend itself against severe and harmful activity, on the other hand. Justice Hendel believes that in order to balance the various rights and interests, section 2 of the law – tort damage – should be annulled, while retaining sections 3 and 4 of the law – participation in tenders and denial of benefits.

Freedom of expression is the lifeblood of democracy, and distinguishes between a democratic society and one that is not. The starting point of the entire discussion is that a call for a boycott constitutes an expression of opinion – political expression. Freedom of political expression has special importance. From the perspective of a democratic society, freedom of political expression facilitates the exchange of ideas in the arena in which the most significant normative arrangements in public life are determined. It helps to fulfill the democratic component of majority rule, and constitutes a means of monitoring the authorities' decisions. From the perspective of human dignity, a call for a boycott is, sometimes, a call for a person to act in accordance with the dictates of his conscience and to fulfill his values. In this context, Justice Hendel examined the three types of sanctions that appear in the law.

Section 2 of the law offers the possibility of suing for damages against those who call for a boycott. Justice Hendel believes that this section does not meet the test of constitutionality. According to Justice Hendel, "privatization" of the possibility of defending the public interest and placing it in the hands of the individual – is liable to create a significant chilling effect against freedom of political expression. Numerous lawsuits would become an instrument of political jockeying in the courtroom, with the aim of creating a new and difficult reality. The damage in this reality would occur even if the litigation fails. Implementation of section 2 of the law would also require the courts to become deeply involved in complex political issues, and to contend with the inherent ambiguity of the Boycott Law. It would be best if such work is not conducted within the walls of the procedural courts.

Section 3 of the law deals with preventing those who call for a boycott from participating in a tender. Justice Hendel believes that this section meets the test of constitutionality. Here we are dealing with restricting participation in a public tender and the creation of a new tort. The sanction is imposed by a public authority, according to the criteria of public and administrative law, and consistent with the directives defined in the justice minister's authorization and in the approval by the [Knesset] Constitution, Law and Justice Committee. At the same time, Justice Hendel emphasized the need to confirm that the section is implemented in a rational way. For example, take the case in which the owner of a bus company, who calls for a boycott of the territories of Judea and Samaria, enters a tender competition to transport pupils in Ariel, as opposed to a case in which he competes in a similar tender to transport pupils in Tel Aviv. It seems that it is easier to justify rejecting his participation in the first tender, than rejecting his participation in the second tender.

Section 4 of the law deals with denying various benefits – for example, tax benefits. This section also passes the test of constitutional review, primarily for the same reasons described in regard to section 3 of the law. Justice Hendel added that it would be best to exercise the authority under section 4 only after formulating regulations, or at least after defining instructions or procedures. Otherwise, the finance minister in practice would be authorized to impose sanctions on this sensitive issue according to his sole discretion.

Justice Hendel extensively reviewed the legislation and court rulings in the world, and in the United States in particular. This review did not include any example of a tort claim based on a call for a boycott, and it seems that there is no provision for an individual to sue another individual for making such a call. The power to fight against the phenomenon of a boycott is

reserved for the state, via administrative sanctions. The state, and not the individual, is subject to administrative law, which mandates reasonable, fair and equal enforcement. Moreover, the main arrangements throughout the world pertain to prohibitions on participating in a boycott, not in calling for a boycott, which constitutes political expression. Justice Hendel believes that this situation fits well with the proposed operative result – annulment of section 2 only, and with the main underlying rationale: a distinction between the state imposing a proportionate administrative sanction and defining a new tort that is subject to the discretion of each individual. This will maintain the balance between the state's right to set policy on boycotts and protecting freedom of political expression – the jewel in the crown of freedom of expression. It can be said that this outcome creates defensive democracy against those who rise up against it. Yet it preserves the democratic character of the society and the ideal of freedom of expression. It is an important component that distinguishes between a democratic state and one that is not.

Summary of Vice President E. Rubinstein's opinion

The vice president, Justice E. Rubinstein, concurred with the view of Justice H. Melcer that the Boycott Law should be approved subject to the annulment of section 2(C) of the law. According to the vice president, the court should take extra caution in intervening on issues that are clearly matters of state, just as it refrained in the past from intervention in the disengagement affair, in HCJ 1661/05 Gaza Coast Regional Council v. Knesset of Israel, PD 59(2) 481, in the context of the disengagement decision itself. The vice president also notes that the question should be examined through an historical, diplomatic and political prism that is unique to the State of Israel, which was subject to the Arab boycott in its early days and today is exposed to calls for boycott by various organizations, first and foremost the BDS movement, as they rise against us in every generation to destroy us. Thus, even though the law violates to some extent the freedom of expression accorded to the petitioners and other organizations, this violation is proportionate for the most part, and meets the tests of the limitation clause.

The vice president believes that the call for a boycott is not like other expressions that are protected under the broad cloak of freedom of expression; this is because the call for a boycott by its very nature violates the freedom of expression of the other and silences discourse, using means that impose the boycotter's view on those who oppose his view, unlike an effort to persuade the other. He draws from American law on this issue, and notes that even though the American legal system grants the widest protection to freedom of expression, it is possible to discern that the broad protection extended to a political boycott is granted in cases in which the boycott is based on a protest over values protected in the Constitution or in the law, for example discrimination on racial grounds, as opposed to political boycotts of other types, as in our case.

The vice president also believes that a distinction should be made between a person who engages in a boycott and a person who calls for a boycott; while the former operates in the private sphere, the latter operates, by calling for others to take action – to boycott – in the public sphere. Thus, when an individual boycotts a person or company for his own reasons, he is operating in the private arena and, therefore, the state is unable to intervene in his set of considerations. On the other hand, when an individual calls for boycotting the products of others, he moves himself from the private arena to the public arena, and therefore it is not

unreasonable, in the vice president's opinion, that he will thus be exposed to greater obligations because of this, as the legislature did in the past in the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law – 2000, and as it did in our case by imposing the tort sanction when the boycott is made on the basis of place of residence or activity of the boycotted entity. For these reasons, the vice president found that the tort sanction stipulated in sections 2(A) and 2(B) of the law meets the tests of constitutionality.

The vice president ruled similarly in regard to the administrative sanctions stipulated in sections 3 and 4 of the law. In his view, it is premature to hear the petitions in regard to these sections as the finance minister has yet to define relevant directives and regulations. Therefore there is no place for the exceptional intervention of this court in invalidating laws before it is clear to what extent, if at all, the petitioners' freedom of expression is violated in this context. In principle, he believes that the state has the right to decide that it will not enter into contracts with private entities that act in opposition to the state's policy and, in practice, against the state itself. In his words: "the state has to be the world's greatest fool to allow benefits from its funds to private entities or to enter into contracts with private entities who call for boycotting individuals or companies because of their affiliation with the state, one of its institutions or areas under its control; this is like a person who comes to hit another person, and the latter provides him with a club so that he can hit him harder." Therefore, there is no cause to intervene in these sections of the law. However, the vice president notes that despite the fact that section 4(B) allows the finance minister to restrict entitlement to benefits in regard to those calling for a boycott even prior to instituting relevant regulations, there is room for expediting the establishment of regulations in order to ensure an orderly procedure.

However, in regard to section 2(C) of the law – compensation without proof of damage – the vice president believes that it goes one step too far. Compensation without proof of damage is an exception to tort law, which aims to express the society's aversion to the actions of the wrongdoer in serious cases. This is by deterring the wrongdoer, and others like him, from committing the wrongful action in the future, even if no damage was caused to another, or at least if such damage, or the extent of such damage, was not proven. In regard to section 2(C) of the law in question, the matter is different. The main reason – if not also the only one – this law was created is to protect the residents of the territories of Judea and Samaria from the damage caused to them as a result of the activity of those calling to boycott them, a controversial issue in Israeli public life. In order to achieve this objective, sections 2(A) and 2(B) of the law are sufficient. These sections do not excessively violate the petitioners' freedom of expression in imposing an obligation to compensate for damages caused. In the vice president's opinion, section 2(C) of the law violates this delicate balance; it significantly restricts the freedom of expression accorded to the petitioners by creating a chilling effect at a higher level, and on the other hand it protects those targeted by a boycott even when they do not suffer damage. Thus, there are ostensibly other means that would serve the objective the law seeks to achieve, and which entail a lesser violation of the petitioners' freedom of expression, by proving damage. This is sufficient to determine that section 2(C) of the law is unconstitutional.

<u>Summary of Justice I. Amit's opinion</u>

Justice I. Amit concurred with the opinion of Justice H. Melcer in finding that the law meets – albeit with great difficulty – the test of proportionality, with the exception of subsection 2(C) of the law pertaining to punitive compensation.

Justice Amit ruled that the law violates freedom of political expression, which is the core of the right to freedom of expression. Nonetheless, Justice Amit emphasized that contrary to the impression that might be created from reading the petitions, the law does not apply to a person who boycotts the State of Israel, an area under its control or an entity affiliated with it, and does not prevent any person or entity from expressing their opinion on the question of continued Israeli control of the area. The law only prohibits the publication of a public call to impose a boycott. Justice Amit found that the call for a boycott, as a call for action, is not a regular expression; rather, it is in the range between a pure expression and behavior. Thus, although the law indeed violates some of the fundamental grounds of freedom of expression, the violation is less severe. Justice Amit also determined that a public call to impose a secondary boycott on a person solely due to his affiliation with the State of Israel violates the very core of human dignity because of its use against an innocent person as a means of achieving a political objective. As such it is not included in the type of expressions that justify the strongest protection of freedom of expression.

In discussing the tort anchored in section 2 of the law, Justice Amit noted the vagueness and lack of clarity emanating from the language of the section, inter alia, on the question of the causal connection, the damage, the emotional foundation, the relations between the tort and the torts framework, possible defenses for the respondent and the remedies available to the plaintiff. However, in light of the interpretative and mitigating solutions proposed, Justice Amit concurs with the opinion of Justice Melcer that this does not justify overturning the law. However, in regard to section 2(C) of the law that deals with compensation, for example, Justice Amit determined that this entails punitive compensation that creates a real "chilling effect" on freedom of expression. This, particularly in light of the combination of the vagueness vis-à-vis the scope of the tort's application and the lack of a ceiling for the amount of compensation and criteria for awarding them. This situation, which is liable to create excessive deterrence, means that subsection 2(C) of the law violates the freedom of expression to an extent that is greater than necessary.

<u>Summary of Justice U. Fogelman's opinion</u>

Justice U. Fogelman believes that the constitutional remedy that should be granted is a declaration of annulment of section 2(C) of the law, as well as deletion of the phrase "or an area under its control" cited in section 1 of the Boycott Law. Justice Fogelman also noted the fact that maintaining the law's validity requires interpreting it such that it applies only to cases in which the sole reason for "deliberately avoiding economic, cultural or academic ties with a person, or other entity" is their affiliation with the State or Israel or one of its institutions. (That is, a critical view of the State of Israel's policy, including in regard to its control of the area of Judea and Samaria (hereinafter: the area), would not be included in the prohibition on calling for a boycott.)

Justice Fogelman noted that a call for imposing a boycott on the area is a clear political expression and the law is liable to silence it. He determined that freedom of expression is violated by imposing a burden on the possibility of expression because a person could be

held liable for damages if he calls for a boycott; and he also takes the risk of not being able to participate in a tender or being denied various benefits the state offers. He also noted that the fact that the legislature chose to create specific arrangements in regard to these expressions constitutes a violation of freedom of expression, because most of the citizens – who abide by the law – will choose to act in a way that is consistent with its directives.

Justice Fogelman noted in his opinion that the restrictions the law imposes on a call to boycott the area violate each of the purposes of freedom of expression: they prevent a public discussion and do not enable fair competition among various ideological views; they violate the democratic proceeding because the law hinders a person's ability to disseminate and voice his views to others, including views that are opposed to the government's position, as well as the ability of others to respond and decide how they wish to act; and they hinder the ability of the individual – both the listener and the speaker – to exercise his autonomy, which is his ability to tell the story of his life.

In light of all this, Justice Fogelman concurred with the conclusion of Justice Danziger that in regard to expressions pertaining to the area, the violation of freedom of expression does not meet the tests of the limitation clause. However, in his view, in the absence of a sufficient linguistic foundation, this difficulty cannot be resolved via interpretation, and the appropriate remedy is to delete the phrase "or an area under its control" from the Boycott Law, so as to separate its invalid part from the valid and healthy part of this law.

Later in his opinion, Justice Fogelman noted that it is possible to find an interpretive framework for preserving the validity of the law (in wording that derives from the constitutional remedy it offers) – and preserving [the law] is preferable to declaring it invalid. This interpretation, he determined, would lead to a situation in which only a boycott aimed at the State of Israel or one of its institutions as such would be "caught" within the bounds of the Boycott Law. Thus, a "mixed" expression, which expresses a critical view of the policy of the State of Israel (or of one of its institutions) in a particular field would not be included in the prohibition stipulated in the Boycott Law; however, critical expression vis-à-vis the very existence of the State of Israel would be "caught" in it. It was demonstrated that a call such as "don't buy blue and white products. Israel's policy toward the area of Judea and Samaria is unacceptable" would not come under the Boycott Law because this call expresses a critical view of the state's conduct.

Subject to annulment of section 2(C) of the law and deletion of the phrase "or an area under its control," and according to an interpretation that the Boycott Law applies only when the sole reason for the call to "deliberately avoid economic, cultural or academic ties with a person or other entity" is his affiliation with the State or Israel or one of its institutions – Justice Fogelman did not find a cause to declare the full annulment of the law under discussion.

<u>Summary of President M. Naor's opinion</u>

President M. Naor concurred with the opinion of Justice H. Melcer that the law establishes a proportionate arrangement, with the exception of section 2(C) of the law. The president's view is that despite the fact that the call for a boycott falls within the bounds of freedom of political expression, there is no prohibition on restricting it as long as the conditions of the

limitation clause are met. In regard to the law's purpose, the president noted that the State of Israel finds itself in a situation of defending itself against boycotts in the international arena and its effort to defend itself from the various damages this may cause serves a worthy objective. The president went on to note that the legislature's decision not to distinguish in this matter between a call for boycotting the state and a call for boycotting what the law calls "an area under its control" is within the framework of the discretion granted to the legislature. Therefore, there is no place for the court to intervene in the legislature's decision to defend against a boycott not only of the state itself, but also of enterprises and institutions established in the area with the state's consent and sometimes with its encouragement. On the question of the arrangement's proportionality, the president noted that she sees eye to eye with her colleagues, who determined that sections 3 and 4 of the law establish a proportionate arrangement, while clarifying that it will be possible in the future to challenge the arrangements that are defined, if defined, under these two sections. In regard to section 2(C) of the law, the president's view is like that of her colleagues – that this section does not meet the tests of proportionality. Prior to concluding, the president noted that she had reservations about other directives in section 2, primarily because of the question raised by Justice N. Hendel about leaving enforcement in the hands of individuals as opposed to the state's hands. However, in the president's view, the interpretation offered by Justice H. Melcer for this section narrows the scope to the necessary minimum, and it is better to interpret as Justice Melcer did than to annul it.

Therefore, as noted, President M. Naor joins the opinion of Justice H. Melcer and the other justices who concurred with him.

Summary of the opinion of (retired) President A. Grunis

(Retired) President A. Grunis joined the ruling of Justice H. Melcer.

Summary of Justice S. Jubran's opinion

In Justice S. Jubran's view, section 2(C) of the law should be annulled and the interpretative approach of Justice Y. Danziger should be adopted in regard to calling for a boycott of a person because of his affiliation with an area under the state's control. With respect to sections 3 and 4 of the law, in his view they meet the conditions of the limitation clause and there is no cause to annul them.