ADALAH The Legal Center For Arab Minority Rights In Israel
عـدالــة الـمـركـز الـقـانـونـي لـحـقـوق الأقـلـيـة الـعـربـيـة فـي إسـرائـيـل
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The Israeli Supreme Court and the COVID-19 Emergency

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1. Introduction

The COVID-19 outbreak created a global public health emergency, unlike anything the world has experienced since the spread of the Spanish flu a century ago. Like any emergency, the COVID-19 pandemic posed many challenges, including to human rights. Because of the crisis, Israeli authorities were able to promulgate and justify emergency regulations and exceptional measures with relative ease, given the dangers posed by the virus to human life and the subsequent need for rapid, decisive action to mitigate such dangers. While government authorities were quick to adopt emergency measures to respond to the COVID-19 outbreak, these authorities largely failed to explore alternative measures that would have had less detrimental effects on human rights and the rule of law. In emergency circumstances, judicial review of government actions is critical, given the draconian powers wielded by the executive branch and the associated threat to human rights, and given that such powers are often concentrated in the hands of a small number of people, in the absence of authorizing legislation, parliamentary oversight, or public participation.

In the State of Israel, the government initially and immediately chose to resort to emergency regulations to tackle the COVID-19 crisis, and these regulations remained its primary tool for months. The government's approach relied on the pre-existing general and security-based state of emergency – which was initially declared in 1948 and has been continuously renewed ever since – even though the COVID-19 outbreak is a health crisis that is civil in nature. Moreover, since 1948, and relying on the security-based state of emergency, the government issued a variety of restrictions, many of which resulted in serious violations of human rights, especially the rights of Palestinians. Despite it being a civil emergency as distinct from a national security emergency, the government quickly authorized the use of special monitoring tools by the General Security Services (GSS or Shin Bet), allowing for intrusive governmental surveillance of individuals' lives. The further securitization of the civil emergency was also apparent in the roles and operations of various state security agencies in managing the COVID-19 outbreak, such as the army's Home Front Command, which managed quarantine hotels, and soldiers who distributed food and medicine to the public.[1]

[1] State security agencies involved in the establishment of the bodies used to manage the public health crisis included: the Israel National Security Council, which coordinated the work of the government; the National Control Center for the Fight against Corona, which is an initiative of the Mossad national intelligence agency and the Israeli army; and the Coronavirus National Information and Knowledge Center, the main knowledge-based

Public discourse in Israel focused mainly on the balance – or lack thereof – between the executive and the legislative branches, against the background of four Israeli national elections held in rapid succession and high levels of political instability. Less attention, however, has been devoted to the performance of the judicial branch, specifically the role of the Israeli Supreme Court when sitting as the High Court of Justice (HCJ) and hearing petitions against various governmental authorities at first instance.

Indeed, much criticism has been leveled at the Israeli Supreme Court over its historic role in legitimating human rights violations, particularly against Palestinians, in the name of "emergency" and "security" considerations. The (Emergency) Defense Regulations, 1945 – an expansive set of emergency regulations first promulgated during the British Mandate, which were even then considered draconian and were harshly criticized as such[2] – were legitimated by the Israeli Supreme Court, and formed the basis of military rule over Palestinian citizens of Israel from 1948 until 1966.[3] Since 1967, these emergency regulations have also acted as the legal basis for the military administration applied to the 1967 Occupied Palestinian Territory (OPT). In fact, the State of Israel has implemented a state of emergency for the longest period of time of any State in the world since the end of World War II. The state of emergency during the COVID-19 pandemic, a civil emergency, raised the question of whether the Supreme Court would intervene in the executive branch's decisions, or whether it would choose not to intervene based on its long-standing judicial tradition of granting the executive branch almost complete discretion during security-based emergencies. This report examines the extent of the Supreme Court's intervention in government-issued emergency regulations during the COVID-19 pandemic, in response to petitioners who looked to the court for judicial relief.

During the period under review, from January to August 2020, Palestinian citizens of Israel submitted a large number of principle petitions to the Supreme Court in response to heightened violations of their rights. Adalah was among the leading human rights organizations engaged in legal representation concerning COVID-19. The impact of the government's emergency regulations and policies were both distinct and more severe for the Palestinian citizens of Israel

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body of the government during the crisis, which was established at the initiative of the Army's Intelligence Division. *See* Report of the Knesset's Special Committee on Dealing with the Coronavirus, "Summary of Insights and Recommendations for the Future", 14 May 2020 (Hebrew), *available at:* https://main.knesset.gov.il/Activity/committees/CoronaVirus/Documents/coronareport-final.pdf.

[2] Despite their misleading name, the Defense (Emergency) Regulations – 1945 are not emergency regulations, but rather primary legislation, incorporated into Israeli law via the Law and Administration – 1948. See "Protest conference against emergency regulations" **The Attorney** C 58 (1946).

[3] HCJ 7/48 *Al-Karbutli v. Ministry of Defense* (decision delivered 1949).

as compared to their Israeli-Jewish counterparts. This impact further compounded historical discrimination and neglect of Palestinian towns and villages in Israel, which frequently lack necessary health and other public infrastructure. Many petitions before the Supreme Court demanded the protection of the rights of Palestinians and equitable access to resources, seeking, among other forms of relief: accessible COVID-19 testing sites for Palestinian Bedouin communities in the Naqab (Negev), as well Palestinian residents of East Jerusalem who reside in neighborhoods on the other side of the Separation Wall but within the municipal borders, and Palestinians living in Gaza; quarantine facilities for Palestinian Bedouin women living in unrecognized villages in the Naqab; protections of the rights of prisoners classified as security prisoners detained in Israeli prisons; protections of the rights of Palestinian workers from the West Bank who work in Israel, mainly in the construction sector; and access to remote learning programs for Palestinian Bedouin children in unrecognized villages in the Naqab.[4]

Over one year has passed since the end of the first wave of the COVID-19 in Israel, and all of the petitions filed in the initial few months have now been decided. At this point, it is possible to review the Supreme Court's performance in response to remedies sought by Palestinian citizens and by other vulnerable groups, and to determine the extent to which the court acted to protect human rights and to uphold the rule of law (as a necessary, although not sufficient, condition of their protection).

This report focuses on the Supreme Court's conduct during the first wave of the COVID-19 outbreak in Israel. For the purposes of this report, the first wave includes the period in which the Israeli Government contended with the virus in the absence of primary legislation, relying instead on emergency regulations and orders issued under the Public Health Ordinance – 1940, which falls within the authority of the Minister of Health and the Director-General of the Ministry of Health. The timeframe of the report begins on 27 January 2020 – when the Minister of Health signed an order under the Public Health Ordinance to add COVID-19 to the list of diseases of international importance that require an immediate declaration – and includes petitions filed by 31 August 2020 and subsequent developments in these cases, up until the date of this report's publication.

[4] For more on the specific impact of the COVID-19 crisis on Palestinian citizens of Israel, see Adalah's Report to UN Special Rapporteurs and Independent Experts in response to Joint Questionnaire on COVID-19 and Human rights, 4 July 2020, *available at* https://www.adalah.org/uploads/uploads/Adalah_UN_COVID-19_Report_with_Major_Findings_16.07.20.pdf

Through the course of this review, Adalah identified 88 petitions submitted to the Supreme Court on various subjects during the first wave of the COVID-19 pandemic.[5] The first petition was filed on 23 February 2020 against a decision to quarantine tourists from South Korea in an old army facility in the illegal Israeli settlement of Har Gilo, located in the West Bank on the lands of the Palestinian villages of al-Walaja and Beit Jala.[6] The last petition during the period in question was filed on 17 August 2020 on behalf of 180 citizens, arguing that the demonstrations violated the restrictions imposed by the COVID-19 emergency regulations.[7]

The report focuses on Supreme Court petitions and does not assess other legal or administrative proceedings.[8] Adalah examined appeals pertaining to the impact of the COVID-19 pandemic, and the government's actions and omissions in responding to it. Adalah identified the petitions by searching the Supreme Court's database by type of proceeding, by date (27 January 2020 – 31 August 2020), by identifying details (the ruling, if any, the identity of the named respondents, etc.), or by other information (articles in the press and other publications) indicating that the petition was thematically related to COVID-19, in at least one respect.[9] A number of petitions were not included in the review because the author was unable to ascertain whether or not they were relevant to the pandemic.[10]

[5] This number reflects the number of separate proceedings conducted; consolidated petitions were counted only once.

[6] HCJ 1430/20 *Har Gilo Cooperative Association Ltd. v. Minister of Health* (delivered February 23, 2020).

[7] HCJ 5716/20 *Musli v. Prime Minister of Israel* (delivered August 26, 2020).

[8] There is one exception: a ruling on a request to appeal an Administrative Affairs Court decision, because it was cited in many of the rulings included in this review. LAA 2199/20 *Peshe v. Ministry of Health* (delivered March 24, 2020).

[9] Adalah conducted the search using the website of the Israeli Supreme Court (Hebrew), available at https://supreme.court.gov.il/Pages/fullsearch.aspx (Hebrew).

[10] Excluded petitions include petitions in which there was no substantial decision by the Court, and petitions that were filed near the end of the period under review, the resolution of which was still unclear.

2. The First Wave of COVID-19

2.1 The outbreak of the pandemic

On 27 January 2020, Health Minister Ya'akov Litzman signed an order that added the novel coronavirus (COVID-19) to the list of infectious diseases of international importance.[11] From a legal perspective, this order paved the way for the exercise of broad authorities as stipulated in the Public Health Ordinance – 1940.[12]

The Public Health Ordinance is a remnant of the British Mandate era in Palestine. The ordinance grants sweeping powers to government officials, particularly to the Health Minister and the Health Ministry's Director-General, to deal with health emergencies involving communicable diseases. Section 20 of the Ordinance, entitled "Powers During Periods of Emergency", authorizes the Health Minister to declare the existence of a severe threat to public health. This section further authorizes the Director-General of the Health Ministry to issue various orders, inter alia, "to expel, quarantine, detain, place under supervision, medical examination and medical treatment" infected people and those in contact with them,[13] and "to place travelers from infected areas under medical supervision."[14] Under section 20, the Director-General can also prohibit people from leaving specific areas in which cases have been detected. During such health emergencies, the ordinance requires citizens to immediately report anyone infected with the disease,[15] and the ordinance subsequently imposes quarantine on infected people,[16] while authorizing medical personnel to check and disinfect any sites of infection[17] and to transfer infected people to designated hospitals and places of quarantine.[18]

During the period under examination in this report, the Director-General of the Health Ministry signed six orders that regulated main aspects of health practices during the pandemic.[19] These

[11] The Public Health Ordinance (Change in the list of communicable diseases in the second annex to the Ordinance) – 2020.
[12] Public Health Ordinance No. 40, 1940.
[13] Section 20(2)(a) of the Public Health Ordinance.
[14] Section 20(2)(g) of the Public Health Ordinance.
[15] Section 12 of the Public Health Ordinance.
[16] Section 13 of the Public Health Ordinance.
[17] Sections 14 and 16 of the Public Health Ordinance.
[18] Section 15 of the Public Health Ordinance.
[19] Public Health Ordinance (Novel Coronavirus) (Home Quarantine and Various Directives), 2020; Public Health Ordinance (Novel Coronavirus 2019) (Directives for an Employer of an Employee in Home Quarantine) (Emergency Order), 2020; Public Health Ordinance (Novel Coronavirus 2019) (Quarantine in a Hospital) (Emergency Order), 2020; Public Health Ordinance (Novel Coronavirus 2019) (Regulating Research on the Novel Coronavirus) (Emergency Order), 2020; Public Health Ordinance (Novel Coronavirus) (Restricting School Activity) (Emergency Order), 2020; Public Health Ordinance (Directives for Preventing Infection at Voting

orders required infected people and those in who have been in contact with them to enter quarantine (at home or in a hospital), and defined the criteria and conditions of such quarantine. The orders also stipulated, inter alia, the requirement to wear a mask, the prohibition on gatherings, and the requirement to enter quarantine for those returning from travel abroad. The orders however changed frequently. For example, the primary order requiring home quarantine was amended about fifty times during this period, reflecting various changes in policy.

At the same time, the transitional government headed by Prime Minister Benjamin Netanyahu started to issue emergency regulations under section 39(a) of Basic Law: The Government. This section empowers the government in a "state of emergency" to "make emergency regulations for the defense of the state, public security and the maintenance of supplies and essential services." According to section 39(c) of the Basic Law, "Emergency regulations may alter any law temporarily, suspend its effect or introduce conditions." The emergency regulations remain in force for three months, unless revoked earlier or further extended by the Knesset.[20] The law stipulates two conditions for the government's exercise of this authority. The first condition states that emergency regulations "may not prevent recourse to legal action, or prescribe retroactive punishment or allow infringement upon human dignity."[21] The second condition states that emergency regulations "shall not be enacted, nor shall arrangements, measures and powers be implemented in their wake, except to the extent warranted by the state of emergency."[22]

During the period under examination, emergency regulations became the government's primary – and almost exclusive – instrument for tackling the COVID-19 crisis.[23] The government promulgated 39 emergency regulations that dealt with most aspects of the lives of citizens and residents, relating to freedom of movement, economy and financial management, health, work, state institutions, employers and workplaces, the rights of detainees and prisoners, freedom of expression, legal procedures in courts, restrictions on certain activities, quarantine, planning and construction issues, writs of execution, tax procedures, civil service, authorization for the Shin Bet to track citizens and for the police to track the location of those

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Stations Designated for those in Quarantine and at Voting Stations Designated for Infected People in Local Elections) (Emergency Order), 2020.

[20] Section 39(f) of the Basic Law: The Government.

[21] *Id.*

[22] Section 39(e) of the Basic Law: The Government.

[23] On the extensive use of emergency regulations, see Nir Kosti, "Emergency Regulations: A Contemporary and Historical Look," ICON-S-IL Blog (July 7, 2020) (Hebrew).

in quarantine, powers of arrest, places of worship and religious affairs, the lockdown of areas, among others.[24] In practice, these emergency regulations suspended or displaced a large number of existing, ordinary laws and became the main normative framework for managing the lives of citizens and residents during the first wave of the COVID-19 outbreak.

The government sought to explain and justify its broad use of emergency regulations, because Israel was in the midst of national elections and their aftermath, the third election in the past year, when the pandemic began. The elections were held on 2 March 2020, and the Knesset was sworn in only two weeks later, on 16 March 2020. However, even though Knesset committees began to operate on 26 March, thereby opening up a legislative path for regulating the battle against the coronavirus, the use of emergency regulations by the government continued up until the enactment of the Coronavirus Law in late July 2020.[25]

2.2 The legal situation

The judicial system in Israel had never before addressed a public health emergency. This unprecedented situation raised many novel constitutional questions concerning the infringement of human rights, the balance between the branches of government, the conditions for exercising emergency powers, and the limits of such powers.

An initial and primary question related to the very existence of a state of emergency and the authority such a declaration bestows upon the government to issue emergency regulations. The Basic Law: The Government vests the power to declare a state of emergency exclusively to the Knesset.[26] In issuing emergency regulations for the COVID-19 crisis, the government assumed authorities under the general and security-oriented declaration of a state of emergency, which has been regularly renewed since first declared in 1948.[27] This ongoing state of emergency was

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[24] For a complete list of emergency regulations by topics, see: https://www.nevo.co.il/general/CoronaUpdates.aspx (Hebrew).

[25] Special Authorities for Dealing with the Novel Coronavirus Law (Emergency Order), 2020.

[26] Section 38 of the Basic Law: The Government. It should be noted that the section authorizes the government to declare a seven-day state of emergency if there is an urgent need and if it is impossible to convene the Knesset. This section is not relevant in our case because it was not used. However, it underlines the Knesset's responsibility for declaring a state of emergency. *See also* Barak Medina and Ilan Saban, "Playing with a Non-Conventional Weapon," Hebrew University of Jerusalem's Law Faculty Blog (March 26, 2020) (Hebrew), *available at* https://www.hujilawblog.com/single-post/2020/03/26/%D7%9C%D7%A9%D7%97%D7%A7-%D7%91%D7%A0%D7%A9%D7%A7-%D7%9C%D7%90-%D7%A7%D7%95%D7%A0%D7%91%D7%A0%D7%A6%D7%99%D7%95%D7%A0%D7%9C%D7%99

[27] A declaration under section 9 of the Law and Administration Ordinance, 1948.

extended for four months on 17 February 2020, purportedly to support the process of "civilianizing" security legislation.[28] The extension did not anticipate the pandemic and thus did not aim to address it in any way. This raised the preliminary question of whether the government could rely on the general declaration of a state of emergency to justify the use of emergency regulations in order to contend with the spread of the pandemic. A negative answer would lead to the conclusion that the government acted without authority, and the regulations it issued were therefore invalid.[29] The COVID-19 health emergency is a special emergency that is substantially different from the type of security-related emergency that serves as the basis for the existing declaration in Israel. The Knesset should therefore have exercised its authority to declare a specific state of emergency through special legislation authorizing the government to take action during the health crisis. As explained in detail below, the Knesset did not pass such legislation, and instead the government issued emergency regulations under the general, security-based declaration.

Another question relates to the executive branch's authority to continue to issue emergency regulations after the Knesset was sworn in, on 16 March 2020, and its committees resumed their work, thereby enabling the process of enacting primary, authorizing legislation. Was the government authorized to continue to decree emergency regulations when it was possible for it to pursue primary legislation through the Knesset? And how does this fact affect the constitutionality of the regulations that had already been promulgated and the continued enforcement of such regulations? The broad emergency powers wielded by the government are clearly at odds with the principle of separation of powers, and the exercise of such powers infringe upon the legislative authority of the Knesset in a way that tilts the balance between the legislature and the executive in favor of the latter. There is also clear tension between these broad powers and the principle of the rule of law, which requires that the use of such broad powers be regulated by primary legislation.[30] Moreover, the continued exercise of these broad

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[28] The protocol of a meeting of the Knesset Defense and Foreign Affairs Committee on February 16, 2020. For more on the "civilianization" of security legislation, see Letter from the Legal Advisors of the Knesset Defense and Foreign Affairs Committee to Members of the Joint Committee on Declaring a State of Emergency, Concerning the Government's Request to Again Declare a State of Emergency (May 31, 2020) (Hebrew), *available at* https://m.knesset.gov.il/Activity/committees/ForeignAffairs/LegislationDocs23/bit020620-4.pdf. *See also* Association for Civil Rights in Israel, "The Declaration of a State of Emergency", 8 May 2020 (Hebrew), *available at* https://law.acri.org.il/he/1854; HCJ 3091/99 *Association for Civil Rights in Israel v. The Knesset* (decision published May 8, 2012).

[29] *See* Mordechai Kremnitzer and Nadiv Mordechay, "Emergency, State of Emergency and Constitutional Order," Israel Democracy Institute (March 29, 2020) (Hebrew), *available at* https://www.idi.org.il/articles/31139.

[30] For an extensive discussion on the problematic nature of emergency legislation, see HCJ 2740/96 *Chancy v. Diamond Supervisor, Ministry of Industry and Trade*, PD 54(4) 481 (1997); HCJ 6791/98 *Paritzky v. Government*

emergency powers run contrary to section 39(e) of The Basic Law: The Government, which provides that emergency regulations should only be used "to the extent warranted by the state of emergency."[31]

A third question pertains to the additional restrictions concerning the protection of human rights as stipulated in The Basic Law: The Government. Section 39(d) of the Basic Law explicitly states, "Emergency regulations may not prevent recourse to legal action, or prescribe retroactive punishment or allow infringement upon human dignity."[32] A review of the petitions submitted during the period in question indicates that many petitioners argued that the emergency regulations violated their human rights, and in particular, the right to dignity. To sketch a complete picture of the impact of the state of emergency on human rights, the report maps out some of the issues raised in the petitions submitted to the Israeli Supreme Court.[33]

Petitions submitted to the Supreme Court

One category of petitions raised the question of the separation of powers and the principle of the rule of law. The main argument raised in these petitions was that the government lacked the authority to continue to issue emergency regulations once the Knesset's committees had started to operate, thereby allowing for a transition to regular legislative proceedings.[34]

A second category of petitions protested the declaration of a state of emergency as applied to the judicial system and the Law Enforcement and Collection System Authority, claiming that the emergency restrictions violated the right of access to the courts.[35] This category includes petitions against emergency regulations that violated the rights to due process for detained and

of Israel, PD 52(1) 763 (1999); Ariel Bendor, "States of Emergency." in *The Dorit Beinisch Book*, p. 447 (eds. Keren Azulai, Ittai Bar-Siman-Tov, Aharon Barak and Shachar Lifshitz, 2018). (Hebrew)

[31] Section 39(e) of the Basic Law: The Government.

[32] Section 39(d) of the Basic Law: The Government.

[33] A number of petitions are not included in the mapping: HCJ 2278/20 *Association for Civil Rights in Israel v. Supervisor of Banks* (March 30, 2020) (petition to open banks in order to withdraw government allowances); HCJ 2386/20 *Shauli v. Prime Minister* (published August 16, 2020) (on aid to parents); HCJ 2414/20 *Landau v. Government of Israel* (published June 11, 2020) (on transparency and access to information); HCJ 2541/20 *Itach-Maaki: Women Lawyers for Social Justice v. Prime Minister* (published May 26, 2020) (on representation on advisory board); HCJ 2589/20 *Institute of Certified Public Accountants in Israel v. Government of Israel* (published April 30, 2020) (on deferral of tax payments); HCJ 2607/20 *Zalul Environmental Association v. Government of Israel* (published May 17, 2020) (on the employment of environmental inspectors); HCJ 2936/20 *National Council of Arab Mayors in Israel v. Prime Minister* (published May 21, 2020) (on funding for local government)); HCJ 2470/20 *Elkin v. Prime Minister* (published April 8, 2020); HCJ 2615/20 *Meir v. National Insurance Institute* (published May 25, 2020).

[34] *See infra* section 4(1).

[35] *See, e.g.*, HCJ 2030/20 *Movement for Quality Government in Israel v. Minister of Justice* (published March 18, 2020); HCJ 2130/20 *Association for Civil Rights in Israel v. Minister of Justice* (published April 2, 2020).

imprisoned people, because of restrictions on the right to consult with legal counsel and the right to family visits, as well as limits on the right of imprisoned people to attend court hearings in person.[36]

A third category of petitions directly addressed the right to health.[37] A number of these petitions demanded access to COVID-19 tests for various groups, such as the Palestinian Bedouin citizens in the Naqab (Negev),[38] Palestinian residents of Jerusalem neighborhoods beyond the Separation Wall,[39] and nursing home residents and employees.[40] Another petition demanded access to quarantine facilities for Palestinian Bedouin women in unrecognized villages.[41] Other petitions called for protections for the right to health of imprisoned and detained people, including through proper medical treatment, improved conditions of incarceration designed to prevent and mitigate the spread of COVID-19 in Israeli prisons and detention centers, and other procedures to contend with the pandemic in prison.[42]

A fourth category of petitions focused on the direct impact of the emergency regulations on a whole range of other basic rights. One of these petitions challenged regulations that enabled the Shin Bet intelligence services to gather information on COVID-19 patients, in violation of their right to privacy;[43] while another set of petitions was submitted against restrictions on the

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[36] *See, e.g.*, HCJ 2280/20 *Ghanem v. Israel Prison Service* (published April 7, 2021).

[37] For additional petitions on health-related issues, see, e.g., HCJ 2669/20 *Physicians for Human Rights – Israel v. Minister of Health* (published May 7, 2020) (on Israel's obligations to the Palestinian residents of the West Bank and Gaza); HCJ 4739/20 *Tron NGO for Internet Users v. Prime Minister* (published July 12, 2020) (on the lack of an opportunity to contest quarantine notices); HCJ 2596/20 *The Union of Mayoral Advisors on the Status of Women in Israel v. Minister of Interior* (published June 2, 2020) (on women's status in local governments and its recognition as essential work).

[38] *See, e.g.*, HCJ 2359/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Prime Minister* (published April 14, 2020) [hereinafter: "*Tests in the Negev* case"].

[39] HCJ 2471/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Ministry of Health* (published April 16, 2020) [hereinafter: "*Tests in East Jerusalem* case"].

[40] *See, e.g.*, HCJ 2466/20 *Association of Nursing Homes and Assisted Living in Israel v. Government of Israel* (published April 16, 2020); HCJ 2710/20 *Association of Assisted Living Residents in Israel v. Minister of Health* (published May 10, 2020). In this context, see also the petitions against transferring elderly patients from geriatric hospitals in order to convert the hospitals for coronavirus needs: *Peshe* case, *supra* note 8; HCJ 2233/20 *Pardes Hana-Karkur Local Council v. Ministry of Health* (published March 26, 2020).

[41] HCJ 3301/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Minister of Interior* (published June 24, 2020) [hereinafter: "*Quarantining of Women* case"].

[42] *See, e.g.*, HCJ 2234/20 *Israel Bar Association v. Minister of Public Security* (published April 6, 2020); HCJ 2279/20 *Physicians for Human Rights – Israel v. Israel Prison Service* (published March 31, 2020); HCJ 3300/20 *Hamoked – Center for the Defense of the Individual v. Israel Prison Service* (published June 16, 2020); HCJ 2904/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Israel Prison Service* (published July 27, 2020) [hereinafter: "*Gilboa Prison* case"]; HCJ 2321/20 *Mevorach v. Minister of Public Security* (published April 6, 2020); HCJ 2346 *Nechushtan v. Israel Prison Service* (published March 31, 2020); HCJ 2365/50 *Baranes v. Minister of Public Security* (published April 1, 2020); HCJ 3643/20 *Amsalem v. Minister of Public Security* (published June 10, 2020); HCJ 3668/20 *Hayeb v. Minister of Public Security* (published June 14, 2020).

[43] HCJ 2109/20 *Ben Mayer v. Prime Minister* (Published April 26, 2020) [hereinafter: "*Shin Bet tracking* case"].

freedom of movement in relation to entering and exiting Israel,[44] on movement in the public spaces,[45] and on the declaration of certain regions as restricted.[46] Other petitions were filed against restrictions on the right to demonstrate,[47] and the freedom of religion and worship.[48] Another group of petitions argued against restrictions imposed on the right to engage in any occupation, profession or trade, and the infringement of the right to equality and labor rights of various groups, including salaried workers,[49] business owners,[50] self-employed individuals,[51] pregnant women and women undergoing fertility treatment,[52] Palestinian workers[53] and elderly people.[54] Finally, there were petitions filed seeking to protect the right to education and equality in education, given the restrictions imposed on schools and educational institutions.[55]

[44] *See, e.g.*, HCJ 4205/20 *Plony [John Doe] v. Ministry of Interior* (published July 1, 2020); HCJ 5628/20 *Katner v. Ministry of Interior* (published September 14, 2020); HCJ 5518/20 *Shilo v. Minister of Interior* (published September 23, 2020).

[45] *See, e.g.*, HCJ 2705/20 *Smadar v. Prime Minister* (published April 27, 2020).

[46] *See, e.g.*, HCJ 2435/20 *Lewenthal v. Prime Minister* (published April 7, 2020); HCJ 2491/20 *Ramot Allon Community Director v. Government of Israel* (published April 14, 2020); HCJ 4327/20 *Mayor of Elad v. Prime Minister* (published June 28, 2020).

[47] *See, e.g.*, HCJ 2468/20 *Hadas v. Prime Minister of Israel* (published April 8, 2020); HCJ 5078/20 *Padida v. Israel Police* (published August 16, 2020); *Musli* case, *supra* note 7.

[48] *See, e.g.*, HCJ 2394/20 *B'emunato Yichye v. Prime Minister Benjamin Netanyahu* (published April 16, 2020); HCJ 2818/20 *Etzion v. Prime Minister* (published May 19, 2020); HCJ 2931/20 *B'emunato Yichye v. Prime Minister* (published May 10, 2020); HCJ 2956/20 *Rosenblat v. Prime Minister* (published May 10, 2020); HCJ 2960/20 *Moshav Meron's Representative on the Merom Hagalil Regional Council v. Government of Israel* (published May 10, 2020); HCJ 2971/20 *Mashiach v. Ministry of Religious Services* (published May 11, 2020); HCJ 2999/20 *Fluk v. Minister of Religious Services* (published May 11, 2020).

[49] *See, e.g.*, HCJ 1899/*20 National Labor Federation in Israel v. Government of Israel* (published April 4, 2020); HCJ 2277/20 *Michael Decker Law Firm v. National Insurance Institute* (published March 31, 2020).

[50] *See, e.g.*, HCJ 2176/20 *Doron, Tikotzky, Kantor, Gutman, Ness, Amit Gross & Co. Law Office v. Government of Israel* (published March 22, 2020); HCJ 2305/20 *Shuzepo Trade Ltd. v. Prime Minister* (published April 16, 2020); HCJ 2397/20 *Doron, Tikotzky, Kantor, Gutman, Ness, Amit Gross & Co. Law Office v. Government of Israel* (published May 12, 2020); HCJ 3011/20 *Manrib v. Government of Israel* (published May 21, 2020); HCJ 3432/20 *Mondial Wedding Hall v. Government of Israel* (published June 7, 2020); HCJ 3887/20 *M. S. and Sons, Ltd. v. Government of Israel* (published July 7, 2020); HCJ 4753/20 *Organization of Swimming Pool Managers v. Government of Israel* (published July 12, 2020); HCJ 4794/20 *Holmes Pace International v. Prime Minister* (published July 15, 2020); HCJ 4979/20 *Holmes Place Int'l Ltd. v. Prime Minister* (published August 5, 2020).

[51] *See, e.g.*, HCJ 2382 *Institute of Tax Consultants in Israel v. Prime Minister* (published May 3, 2020); HCJ 3008/20 *Herzliya for its Residents NGO v. National Insurance Institute* (published June 21, 2020); HCJ 2418/20 *National Association of Coastal and Upper Water Fishing v. Minister of Agriculture and Rural Develepment* (published May 10, 2020).

[52] *See, e.g.*,: HCJ 2486/20 *Touma-Suleiman v. Prime Minister* (published April 20, 2020); HCJ 2656/20 *Plonit [Jane Doe] v. Prime Minister* (published June 4, 2020).

[53] *See, e.g.*, HCJ 2730/20 *Kav Laoved v. Minister of Health* (published September 24, 2020).

[54] *See, e.g.*, HCJ 2759/20 *Rivi Beller v. Prime Minister* (published May 6, 2020).

[55] *See, e.g.*, HCJ 2398/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Prime Minister* (published May 20, 2020); HCJ 2784/20 *Atar v. Prime Minister (published May 26, 2020); HCJ 3200/20 Netivot Municipality v. Director-General of the Health Ministry* (published May 26, 2020); HCJ 3299/20 *Lambarsky v. Minister of Health* (published May 24, 2020); HCJ 2503/20 *Makom v. Ministry of Education* (published April 20, 2020); HCJ 4710/20 *Hebrew University of Jerusalem v. Minister of Higher and Secondary Education* (published

3. A Quantitative Analysis of the Supreme Court's Rulings[56]

3.1 The outbreak of the pandemic

Of the 88 petitions filed during the period under review, the Israeli Supreme Court conducted only 29 hearings on 27 of these petitions. Only two petitions were accorded two hearings: the petition on the Shin Bet tracking[57] and the petition on emergency regulations that prevented the entry of visitors and attorneys to prisons.[58]

Thus, the Court conducted hearings in only 30% of the 88 petitions filed. In the other 70% of the petitions, the Court reached a decision without a hearing whatsoever. The Court ruled on 24 petitions (about 27% of all petitions) without even requesting the respondents to submit a response that addresses the arguments raised by the petitioners.

3.2 Court orders

The Court granted an order nisi (order to show cause) in only two of the 88 petitions and conducted hearings in another two cases, as if an order nisi had been granted. In these cases, the State was obliged to respond to the petitioners' legal arguments in-depth. The four cases were: the petition against the Shin Bet tracking;[59] the petition against the certificate of illness for the workers in quarantine;[60] the petition challenging the government's authority to continue issuing emergency regulations after the Knesset resumed;[61] and the petition against public demonstrations.[62]

The Supreme Court issued only one temporary injunction during this entire period, in the Shin Bet tracking case.[63]

July 16, 2020); HCJ 5082/20 *Society for the Protection of Nature in Israel v. Government of Israel* (published August 10, 2020).

[56] The information in this section is updated as of 1 July 2021.

[57] *Shin Bet tracking* case, *supra* note 43.

[58] *Ghanem* case, *supra* note 36.

[59] *Shin Bet* case, *supra* note 43.

[60] HCJ 1633/20 *"Sal" of Nursing Services v. State of Israel* (published July 27, 2020).

[61] HCJ 2399/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Prime Minister* (published August 16, 2020) [hereinafter: "*Emergency Regulations* petition"].

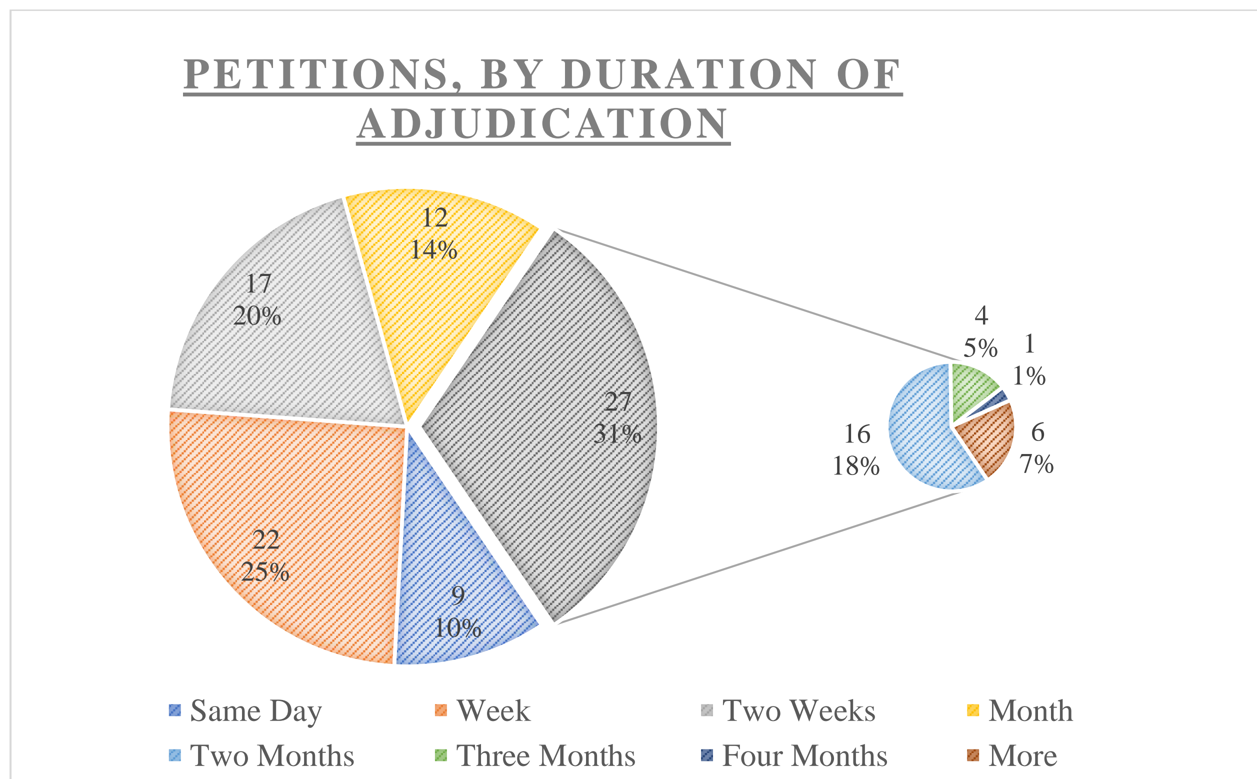
[62] *Padida* case, *supra* note 47.

[63] *Shin Bet* case, *supra* note 43, ruling on March 19, 2020

3.3 Duration of time of petition adjudication

At the time of this writing, the Court has issued final decisions in all but one of the petitions. The only case still pending concerns the establishment of ritual purification centers for Palestinian citizens of Israel who died from COVID-19.[64] While a final decision has not yet been delivered, the most recent decision in the case indicates that the petitioner requested the dismissal of the petition, and that the Court will soon decide about the case expenses.[65]

Of the 87 petitions (plus one still pending), the Court issued a ruling within one month of the petition's submission in 60 cases (69%). Nine petitions were decided within a single day (10%), 22 within a week (25%) and 17 within two weeks (20%). The Court adjudicated 16 other petitions within two months (18%), four within three months (5%), and one within four months (1%). The Court took longer than four months to adjudicate the remaining six petitions (7%).



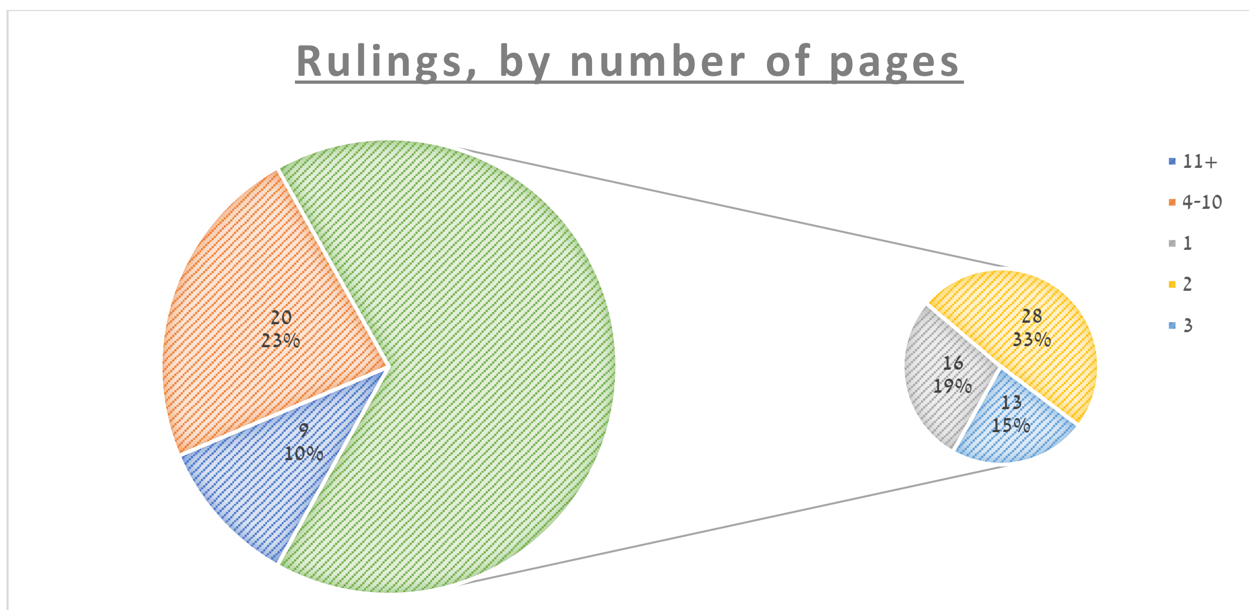
Of the adjudicated petitions, the case that took the longest to decide is the petition against the regulations preventing lawyers and families from entering prisons. The petition, submitted on 26 March 2020, was subsequently amended and limited to more specific questions, and was ultimately adjudicated only on 7 April 2021, one year later, and was eventually dismissed. The

[64] HCJ 5442/20 *Association for Civil Rights in Israel (ACRI) v. Ministry of Interior* (pending).
[65] *Id.*, decision dated June, 30 2021.

next longest periods of adjudication were for: the petition challenging the legality of imposing fines (165 days);[66] the petition concerning the rights of Palestinian workers during the pandemic (149 days); and the case challenging the constitutionality of the sweeping certificate of illness for those in quarantine (148 days).[67]

3.4 Length of the rulings

The majority of rulings were very short in terms of their page length, compared to other decisions issued by the Israeli Supreme Court relating to comparable petitions. The longest ruling was 37 pages.[68] Nine rulings (10%) were more than ten pages ("long rulings"), while 58 rulings (67%) were very short, spanning fewer than three pages ("technical rulings").



3.5 Minority opinions and the lead judge in the case

Another salient feature of the decisions is that in none of the 87 cases was there any significant disagreement about the ruling or its reasoning among the justices expressed in a minority opinion. At most, justices chose to add their comments to the main ruling, while concurring with the ultimate Court decision.

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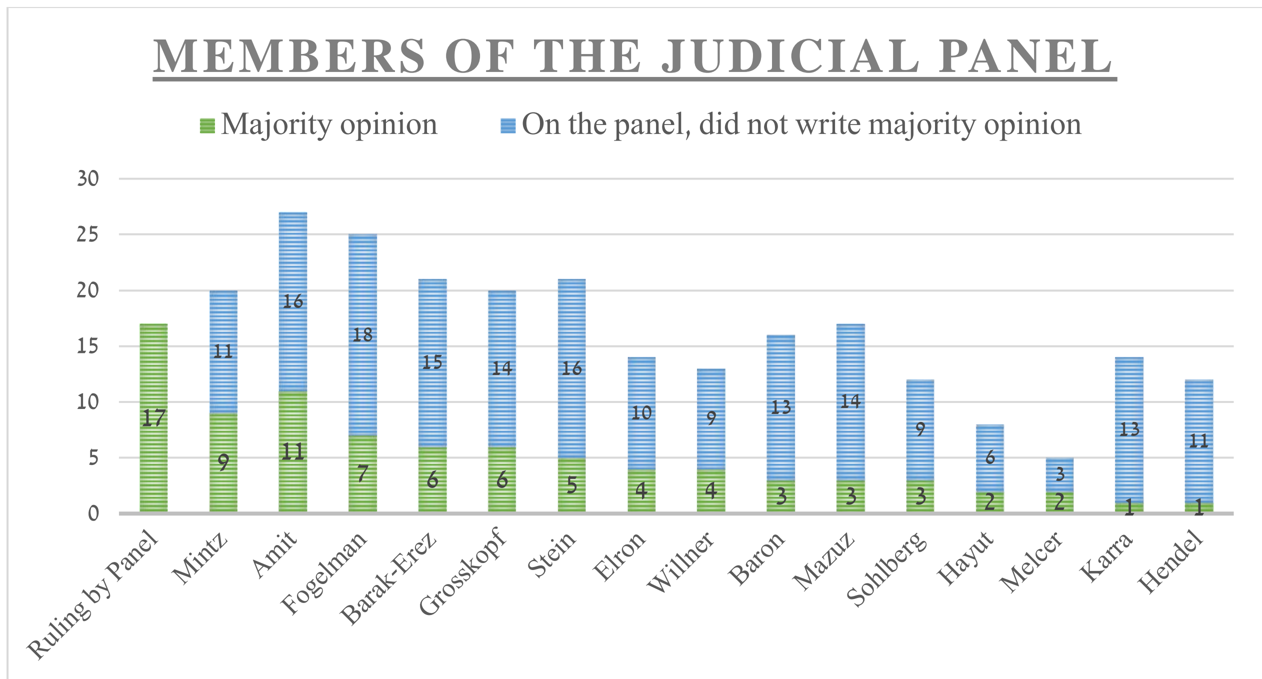
[66] HCJ 5314/20 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Attorney General* (published January 10, 2021) [hereinafter: "*Fines* case"].
[67] *Kav LaOved* case, *supra* note 53; *"Sal" of Nursing Services* case, *supra* note 60.
[68] *Shin Bet* tracking case, *supra* note 43.



3.6 Outcome of the proceedings

During the first wave of the COVID-19 pandemic, among the petitions under review, the Supreme Court received only two petitions (2%) that did not directly pertain to the government's use of emergency powers.

The first petition filed challenged the use of Shin Bet tracking to gather information on citizens and residents who had contracted COVID-19 or those who had been in contact with them.[69] The Supreme Court ruled that under existing law, the Shin Bet could not be authorized to help battle the COVID-19 outbreak, and that if the government wished to continue to utilize the Shin Bet's capabilities, the government must anchor this authorization in primary legislation passed by the Knesset. This petition initially addressed the use of emergency regulations to empower the Shin Bet tracking, and thus was included in this study. However, in light of subsequent developments, the petition was revised and the ruling ultimately focused on interpretation of the Shin Bet Law. Therefore, the ruling did not pertain to the government's use of emergency powers.

The second petition, which was brought by employers, questioned the constitutionality of the sweeping certificate of illness that the Ministry of Health issued to quarantined workers.[70] The ruling on this petition did not address human rights or the power to decree emergency

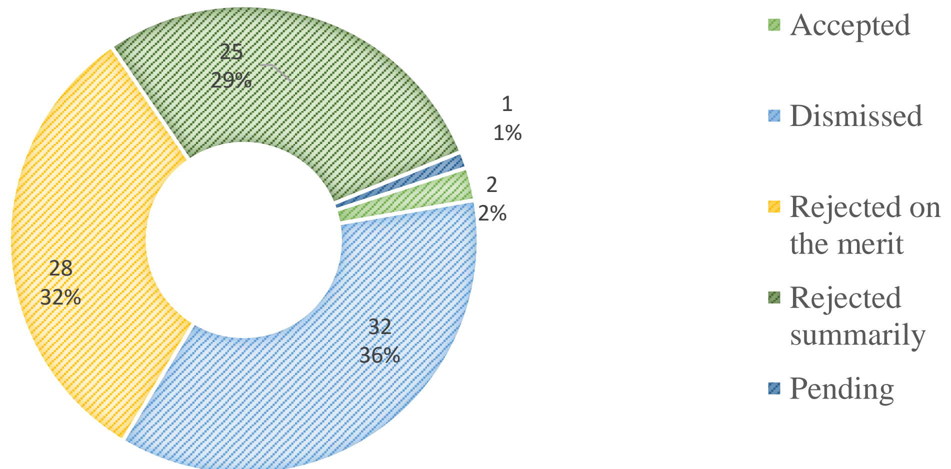
[69] Id.
[70] *"Sal" of Nursing Services* case, *supra* note 60.

regulations; rather, it interpreted existing legal arrangements. The petitioners asked the Court to declare salaried workers, who were not actually ill but who were forced into quarantine by the regulations, as workers on unpaid leave. The petitioners also demanded that the State compensate employers for the losses they suffered by paying sick leave for those quarantined employees, who were not covered under the definition of "illness" in the Sick Pay Law-1976. The Court ruled that the Sick Pay Law did not authorize the Ministry of Health to issue a sweeping certificate of illness, which compelled employers to pay their workers, as if on sick leave. The ruling stated, inter alia, that the law's requirement of a direct connection between illness and sick pay, denied these workers the right to sick pay, since they were not absent from work due to their physical condition (i.e., illness), but rather due to a legal event (i.e., the government's quarantine order). Consequently, the Court declared the sweeping certificate of illness invalid as of 30 September 2020.

While the Supreme Court accepted the arguments raised in the petition against the use of the Shin Bet's technologies for contact tracing of confirmed COVID-19 patients, the Court rejected the other petitions challenging the government's emergency powers and its exercise of such powers.

The Court rejected 53 petitions (60%): 28 (32%) were rejected on the merits (32%) and another 25 were rejected summarily (29%).[71] The Court dismissed 32 petitions (37%), while 14 (16%) were exhausted or rendered moot due to changes in the factual or legal circumstances. The Court dismissed 13 other petitions at the request of the petitioners.

[71] It is not always entirely clear whether the petition was rejected or summarily rejected, and sometimes the Court mixes the use of these terms. In such unclear cases, we examined the rationale of the decision and whether the decision included a discussion of the merits of the petitioners' arguments, especially if the petition was categorized as a petition rejected on the merits.



During the period covered by this report, there was a steep increase in the Court's use of threshold grounds to dismiss petitions. In fact, the Court frequently cited the failure to exhaust non-judicial proceedings as the grounds for dismissal: it was cited as at least one of the grounds for dismissal in 19 rulings.[72] The Court's first decision in a case was often to determine whether the petitioners had exhausted non-judicial proceedings.[73] Moreover, the Court not only deferred to government authorities to determine whether petitioners had exhausted such proceedings, but also demanded that the petitioners wait a "reasonable" period of time for a response from the relevant authorities before petitioning the Court.

The requirement of exhausting remedies is, in many cases, a reasonable and justifiable demand. However, the Supreme Court frequently insisted upon this demand even during the emergency period, which raised many problems, as the emergency regulations granted the government expanded powers without proper parliamentary oversight. This lack of parliamentary oversight, together with the heightened potential for violations of human rights, should have led to more judicial review, not less. Such judicial review is even more critical as the emergency regulations in question severely breach human rights, enter into immediate effect (and are sometimes enforced even before being officially published), and are often defined as 'short-term' measures. In such circumstances, the insistence on granting additional time for the

[72] *See, e.g.*, *Har Gilo Cooperative Association Ltd.*, *supra* note 6; *Movement for Quality Government in Israel*, *supra* note 35; *Shuzepo Trade Ltd.* case, *supra* note 50; *Hadas*, *supra* note 47; *Manrib*, *supra* note 50.
[73] *See, e.g.*, *Doron (HCJ 2176/20)*, *supra* note 50.

government to respond practically rendered petitioning the Court a futile practice. In addition, the Court was quick to dismiss petitions when faced with a change in the underlying facts of the case.

The Court also imposed fees on the petitioners in five of the adjudicated petitions.[74] In two cases, the Court awarded costs to the petitioners: the respondents were ordered to pay NIS 50,000 in one case and NIS 1,000 in the second case.[75]

All of the above leads to the conclusion that the Court, in practice, did not intervene in the government's decisions during the emergency period, and did not accept any petition regarding the emergency regulations or their effects.

[74] In the *Doron (HCJ 2397/20)* case, *supra* note 50, the petitioners were ordered to pay costs of NIS 3,000; in the *Gilboa Prison* case, *supra* note 42, the petitioners were ordered to pay costs of NIS 5,000; in the *Hamoked – Center for the Defense of the Individual*, *supra* note 42, the petitioners were ordered to pay costs of NIS 2,500; in HCJ 5605/20 *Levy v. Government of Israel* (published August 12, 2020), the petitioners were ordered to pay costs of NIS 1,000; in the *Fines* case, *supra* note 66, the petitioners were ordered to pay costs of NIS 5,000.

[75] In the *"Sal" of Nursing Services* case, *supra* note 60, the Court imposed costs of NIS 50,000 on the respondents; in the *Shilo* case, *supra* note 44, the Court imposed costs of NIS 5,000 on the respondents.

4. A Qualitative Analysis of the Court's Rulings

This section takes an in-depth look at how the Court addressed the new legal questions raised by the public health emergency prompted by the COVID-19 outbreak. Judicial review of the main questions encompassed: (1) the authority to declare a state of emergency and issue emergency regulations; and (2) the infringement of human rights.

4.1 Government powers in emergencies

The petitions against the Shin Bet tracking were the first to present arguments against the government's authority to issue emergency regulations during a health emergency and the limits of such authority. In mid-March 2020, the government issued emergency regulations that granted the police broad powers to gather information on the location of citizens and residents as well as regulations empowering the Shin Bet to employ various measures to track COVID-19 patients and individuals who came into contact with these patients. Four petitions were filed against these regulations, and the Supreme Court heard and consolidated the petitions into a single case.[76]

Regarding the declaration of a state of emergency, the petitioners argued that the government was only empowered to issue emergency regulations under section 39 of the Basic Law: The Government, only if the Knesset declared a state of emergency under section 38 of that law. The petitioners contended that the existing and continuously-renewed declaration of a security-related state of emergency did not authorize the use of emergency regulations in the "civil" emergency during the COVID-19 crisis.[77]

The Court heard the petitions on 19 March 2020, issued a temporary injunction prohibiting the emergency regulations empowering the police to collect location data of citizens, and ruled that if a Knesset committee was not formed to enable parliamentary oversight by 24 March

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[76] *Shin Bet tracking* case, *supra* note 43. The other three original petitions were: HCJ 2135/20 *Association for Civil Rights in Israel v. Prime Minister*; HCJ 2141/20 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Prime Minister*; HCJ 2187/20 *Union of Journalists in Israel v. Prime Minister*. The arguments in the various petitions were not identical. However, for the purpose of discussion in this report, we combined all of the questions, without regard to the identity of the individual petitioners, just as the Court did in ruling on the petitions in a consolidated case.

[77] For more on this petition, see Lila Margalit, "On the Importance of a Specific Declaration of Emergency: Israel's Constitutional Emergency Framework through the Lens of the Covid-19 Crisis", Israel Democracy Institute (May 2021) (Hebrew), *available at* https://www.idi.org.il/media/16335/on-the-importance-of-a-specific-declaration-of-emergency-israels-constitutional-emergency-framework-through-the-lens-of-the-covid-19-crisis.pdf;and Kremnitzer and Mordechai, *supra* note 29.

2020, then the Court would also invalidate the emergency regulations authorizing the Shin Bet tracking. The regulations related to the police ultimately expired, and the respondents informed the court that they did not intend to renew them. The emergency regulations authorizing the Shin Bet tracking, on the other hand, were replaced by a government decision under section 7(6) of the Shin Bet Law, which empowers the government to assign the Shin Bet additional roles. In light of these developments, the Court instructed the petitioners to revise the petitions.

The Court's ruling, handed down on 26 April 2020, did not address the constitutional questions prompted by the emergency regulations related to the Shin Bet, but instead discussed the legality of authorizing the Shin Bet via a government decision under the Shin Bet Law. According to the ruling, a severe danger to state interests vital to national security arose when the pandemic broke out, which in turn mandated urgent measures. Therefore, the authorization granted under section 7(b)(6) of the Shin Bet Law could be seen as sufficiently explicit authorization for taking steps such as the government's decision. When deciding whether to extend this authorization, however, and in light of the passage of time, the Court concluded that the danger posed to state interests and the urgency to address such danger were no longer sufficient to extend the authorization under which the first arrangement had been made and that the government should therefore turn to primary legislation.

In addition to the Shin Bet tracking case, petitions were submitted regarding emergency arrangements pertaining to the courts and the Bailiff's Office. The Supreme Court summarily rejected the first petition.[78] The Court further dismissed the second petition in order to allow the respondents to examine – during the year following the coronavirus crisis – the authorization to issue such regulations.[79] A third petition sought to cancel the declaration of the state of emergency; it was also rejected.[80]

The question of the government's authority to issue emergency regulations arose again, from a different perspective, through a petition that challenged the legality of the government's continuing resort to emergency regulations after the new Knesset had been sworn in and after its committees had resumed operation. The petitioners cited prior Supreme Court rulings as

[78] *Movement for Quality Government in Israel* case, *supra* note 35. Another petition sought to open Law Enforcement and Collection System Authority files onlin. HCJ 2540/20 *Abulafia v. Minister of Justice* (published May 4, 2020).
[79] *Association for Civil Rights in Israel* case, *supra* note 28.
[80] *Levy* case, *supra* note 74.

precedent,[81] and the petitions were supported by an assessment made by the Attorney General, who warned the Prime Minister of the illegality of continuing to use emergency regulations given the availability of pursuing primary legislation through the Knesset.[82] The Supreme Court nonetheless refrained from issuing a temporary injunction in the case, despite repeated requests by the petitioners.

The Supreme Court scheduled a hearing on the petition before an expanded panel of five justices on 7 May 2020, a full month after the petition was submitted, and conducted the hearing as if a temporary injunction had been granted. At the time, 38 emergency regulations were in effect, the latest of which was due to expire in August 2020. The respondents told the Court that they were working to promote primary legislation in the form of a "framework law," and the Court asked them to provide updates on the progress of this legislative effort. On 16 August 2020, after the respondents informed the Court that the Knesset had passed the Law of Special Powers for Dealing with the New Corona Virus (Temporary Order) Law – 2020 (hereinafter: the "Coronavirus Law"),[83] and several days before the last of the emergency regulations were due to expire,[84] the Court dismissed the petition as no longer relevant.

In its short ruling, the Court did not address the merits of the two questions raised by the petition – first, concerning the authority to issue emergency regulations under the umbrella of the ongoing declaration of a security emergency, and second, relating to the legality of the ongoing issuance of emergency regulations after the resumed operation of the Knesset. Instead, the Court sufficed with a general statement, noting that "[o]ne would have expected" the government to have acted much faster in proposing legislation to the Knesset to replace the emergency regulations. That is, the Court recognized that the government's conduct was inconsistent with existing judicial precedents and that the government should have availed itself of the Knesset much sooner.

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[81] *See, e.g.,* HCJ 2994/90 *Poraz v. Government of Israel*, PD 44(3) 317, 321 (1990).
[82] The Attorney General's letter is available in Hebrew at https://www.adalah.org/uploads/uploads/AG_Letter_to_PM_060420.pdf.
[83] Emergency regulations issued under Basic Law: The Government were slated to expire prior to the enactment of the Coronavirus Law. Consequently, the Knesset passed a number of laws to keep the regulations in effect. *See, e.g.,* Amending and Maintaining the Validity of Emergency Regulations (The Novel Coronavirus – Enforcement) Law, 2020; Amending and Maintaining the Validity of Emergency Regulations (The Novel Coronavirus – Restriction of Activity) Law, 2020; Amending and Extending the Validity of Emergency Regulations (The Novel Coronavirus –Quarantine in a State Quarantine Facility) Law, 2020; Amending and Extending the Validity of Emergency Regulations (The Novel Coronavirus – Restricted Area) Law, 2020.
[84] The Emergency Regulations (The Novel Coronavirus – Maximum Number of People under Electronic Surveillance) Law – 2020 remained in effect until August 25, 2020.

This key petition raised arguments concerning the legality of emergency regulations, the government's main instrument in regulating life during the COVID-19 emergency period; and the opinion of the Attorney General confirmed the unlawfulness of the continued use of such regulations. Nonetheless, the petition remained pending for four months, before eventually being dismissed on the grounds that it had become moot. In this way, the Court shirked its judicial responsibility to decide on these fundamental legal matters and thereby enabled the government to continue to act, despite the clear illegality of its actions. This outcome is even further problematic considering the fact that the illegality of the government's actions were also raised again and again in at least seven other petitions. The Court refrained from discussing or ruling on this issue in those cases as well, on the pretext that the matter would be decided in the framework of a key petition that was still pending.[85] Further, this petition was preceded by others that sought to cancel some or all of the emergency regulations, but the Court summarily dismissed all of those earlier petitions.[86]

The Fines petition further developed the argument of lack of authority.[87] This petition, which was filed prior to the ruling on the main petition challenging the emergency regulations overall, challenged the legality of four emergency regulations that criminalized violations of various government-imposed restrictions (such as violating the quarantine requirement or failing to wear a mask in public spaces) and imposed administrative fines.[88] The petition sought to cancel all of the fines imposed under these four regulations, and challenged both the constitutionality of establishing criminal offenses through emergency regulations and the authority to issue emergency regulations after the Knesset had reconvened.

This petition remained pending for about five months before it too was dismissed. While the Court approvingly cited the ruling in the main petition challenging the emergency regulations

[85] *B'emunato Yichye (HCJ 2394/20)* case, *supra* note 48; *Doron* case, *supra* note 50; *Lewenthal* case, *supra* note 46; *Smadar* case, *supra* note 45; *Etzion* case, *supra* note 48; HCJ 3140/20 *Association for Progressive Democracy v. Prime Minister* (published June 4, 2020); *Mayor of Elad* case, *supra* note 46. In HCJ 2798/20 *Liran-Shaked v. Government of Israel* (published June 18, 2020), the petitioners asked the Court to hear the case together with the petition on emergency regulations, but the court declined to do so and ultimately rejected the former petition due to a change in the factual situation.

[86] In HCJ 2194/20 *Bockman v. Prime Minister of Israel* (published March 25, 2020), the Court summarily rejected a petition requesting the cancellation of all regulations and orders issued to address the coronavirus crisis, on the grounds that the regulations and orders infringe upon human rights. In the *Shuzepo Trade Ltd.* case, *supra* note 50, the Court summarily dismissed a petition that sought to cancel Emergency Regulations (The Novel Coronavirus – Restriction of Activity), 2020.

[87] *Fines* case, *supra* note 66.

[88] Emergency Regulations (The Novel Coronavirus – Enforcement) – 2020; Emergency Regulations (The Novel Coronavirus – Restriction of Activity) – 2020; Emergency Regulations (The Novel Coronavirus – Restricted Area) – 2020; Emergency Regulations (The Novel Coronavirus – Quarantine in a State Quarantine Facility) – 2020.

and its criticism of the government's failure to revert to primary legislation, the Court also explicitly rejected the argument that the emergency regulations had been issued without authorization. Justice Amit based this ruling on the precedent of judicial non-intervention in numerous petitions against the regulations that had raised the same argument regarding lack of proper authority. In his view, the precedent indicates that this argument was insufficient to tip the scales in favor of the petitioners.

In effect, the Supreme Court's failure to intervene in earlier petitions filed during the COVID-19 crisis was used as justification for the perpetuation of an illegal situation, in violation of the rule of law. The Court's rejection of arguments claiming lack of authority came ten months after the main petition challenging the emergency regulations was submitted, and after the expiry of all the emergency regulations. Thus, throughout this period, the Court enabled the government to operate under a cloud of illegality.

4.2 The protection of human rights

In this section, the report focuses on two specific groups of petitions challenging human rights violations during the period in question. The first group of petitions contested various restrictions imposed by the government, including the lockdown, restrictions on freedom of movement, and restrictions on routine economic activity. The second group of petitions involved the right to health, demanding that the executive branch take action to protect health or to provide accessible and equitable health services.

4.2.1 Petitions against government-imposed restrictions

Petitions against the lockdown

Bnei Brak was the first city in Israel to be declared a restricted area and subjected to a lockdown, and its residents petitioned the Supreme Court against this declaration.[89] While the Court recognized that the lockdown infringed upon basic rights, such as freedom of movement, it ultimately determined that the infringement was proportional and dismissed the petition.

The same question was raised before the Court for a second time, following a lockdown imposed on the Ramot Allon neighborhood in Jerusalem.[90] In this case, too, the Court

[89] *Lewenthal* case, *supra* note 46.
[90] *Ramot Allon Community Director* case, *supra* note 46.

dismissed the petition, noting that the government's decision had been made on a factual basis and therefore it found no reason to intervene. Justice Baron elaborated:

> In routine times, we could not condone such serious infringement of constitutional rights such as freedom of movement and the right to privacy and property and the freedom of occupation [employment]. But we are now in "coronavirus days," and the potential dangers in the spread of this pandemic are tangible […] In these extraordinary circumstances, and despite the high costs of these demands on the population in Israel, from some more than others, it is clear that there is no alternative but to mobilize the whole society to fight the spread of the virus, each person within their own four walls …[91]

Not only did Justice Baron find justification for the violation of these rights, but she also expected Israeli citizens and residents to accept this infringement, and even to "mobilize" themselves despite the violations in order to prevent the spread of COVID-19. The justice apparently refused to apply the proportionality test, which requires one to examine the purpose of the rights violation, the rationality of the connection between the violation and the purpose, the existence of alternatives that would have a less detrimental impact on individual rights, and the benefit of the violation weighed against the damage inflicted.

While expressing reservations about this statement, Justice Amit concurred with Justice Baron's ruling, stating that:

> Even as the coronavirus moves through our streets … the criticism – parliamentary and judicial – is not muted. In a state of emergency, and especially in the current times, our finger should not be too quick on the trigger, and the infringement of basic constitutional rights must be proportional and as focused as possible.[92]

The Court reached a similar conclusion in the petition against the lockdown imposed on the city of Elad.[93]

Petitions against restrictions on activity and on movement

Other restrictions challenged in a number of petitions pertained to the freedom of movement and assembly. Six separate petitions were filed against the restrictions that prevented access to Mount Meron on the Jewish religious festival of Lag B'Omer.[94] The Supreme Court ruled that there was no need to intervene in the government decision, because the restrictions indicated that the government took action in a sensitive way after considering a range of relevant

[91] *Id.*, para. 11 of Justice Baron's decision.
[92] *Id.*, para. 1 of Justice Amit's decision.
[93] *Mayor of Elad* case, *supra* note 46.
[94] See details in *supra* note 48; *Smadar* case, *supra* note 45.

factors.[95] Likewise, the Court noted that it was indeed possible to assume that the restrictions violated certain rights to some degree, but that these rights were subordinate to the right to life.[96] Such an assumption poses many problems, as, instead of balancing the rights of the individual versus the public interest in preventing gatherings during the pandemic, the Court expressed public interest as the collective's right to life. In this type of balance, the infringement of individual rights is always justified.[97] Another important takeaway involves the Court's inability to exercise judicial review on regulations that change so frequently, enter effect immediately, and are in force for a limited period of time. Here, the transitory nature of emergency regulations itself becomes a reason for non-intervention.

In another case, the petitioners asked the Court to cancel restrictions imposed on certain acts of worship in outdoor spaces. The Court recognized the infringement on the petitioners' freedom of religion and worship, yet ruled that the restriction was proportional.[98] In another proceeding, ultra-right-wing petitioners sought to exempt al-Haram al-Sharif and the Al Aqsa Compound (the Temple Mount) from the restrictions on movement and assembly, and to allow Jews to pray there. Again, Justice Amit first recognized the infringement on religious rights but ruled that this infringement was outweighed by the need to protect public health and security.[99] One of the Court's longest rulings in terms of page length during this period addressed the prohibition on cemetery visits on Yom HaZikaron (Israel's Memorial Day). Justice Amit wrote that, in this case, "[the infringement of the constitutional right is obvious" in the areas of freedom of movement, freedom of expression, and personal autonomy.[100] The justices devoted four full pages to examining the proportionality of rights violations in this case, and approved the restrictions.

Additionally, two petitions asked the Court to enforce the restrictions on gatherings, including demonstrations; both were ultimately rejected.[101] Petitions were also submitted against the restrictions that applied to people returning from abroad. These petitions included a request to

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[95] *B'emunato Yichye* case, *supra* note 48.
[96] *Rosenblat* case, *supra* note 48.
[97] For more on the importance of distinguishing between rights and interests, and on the impact of this distinction on the selected type of balance, see Oren Gaza-Ayal and Amnon Reichman, "Public Interests as Constitutional Rights?" *Mishpatim* 41 97 (2018) (Hebrew). *See also* Prof. Reichman's lecture at the Minerva Center for the Rule of Law under Extreme Conditions entitled, "Judicial Review and the Coronavirus – Preliminary Reflections on the Israeli Case," *available at* https://www.youtube.com/watch?v=DVc--17W8kA.
[98] *B'emunato Yichye* case, *supra* note 48.
[99] *Etzion* case, *supra* note 48.
[100] *Smadar* case, *supra* note 45, paras. 8-9.
[101] *Padida* case, *supra* note 47; *Musli* case, *supra* note 7.

deny the entry of yeshiva students from the United States,[102] a demand to exempt the spouses and children of citizens from the restriction and allow their entry,[103] and a petition to open the border crossing to Egypt.[104] A further category of petitions focused on the effect of these restrictions on businesses. The Court dismissed all the petitions submitted in this regard without any legal discussion, let alone any acknowledgment of human rights violations.[105]

In summary, it is apparent that the Supreme Court more readily recognized a violation of constitutional rights in the context of classic civil and political rights, such as freedom of movement and freedom of religion. However, the Court chose to balance the violation of individual rights with the violation of the collective's right to life, rather than with the public interest in protecting health. In this type of balance, restrictions on individual rights will always be found to be justified and proportional. Another salient aspect in this context is the dimension of time: the Court refused to exercise proper judicial review because the regulations frequently changed, took effect immediately, and remained in force for only limited periods of time.

4.2.2 The right to health

A number of petitions were submitted to the Supreme Court on the protection of the right to health. These petitions generally included a demand for state action that the petitioners viewed as necessary to ensure the protection of individual and community health and equal access to health services.

Three petitions argued that various groups lacked access to COVID-19 testing. The first petition sought to make COVID-19 testing accessible to residents of recognized and unrecognized Palestinian Bedouin villages—where access to health facilitates in general is limited—in order to enable them to exercise their right to health on an equal basis.[106] The Court summarily rejected the petition without discussion, citing the lack of clear grounds for intervention. The ruling, written by Justice Stein, determined that there was no infringement of the Palestinian Bedouin citizens' rights because the scope of the state's mission to provide testing is complex. For this simple reason, he added, "the petitioners' claim of inequality will

[102] HCJ 5593/20 *Bilt v. National Coronavirus Project Coordinator* (delivered August 12, 2020); HCJ 5682/20 *Kovitznki v. Minister of Interior* (delivered September 9, 2020).
[103] *Plony* case, *supra* note 44; *Katner* case, *supra* note 44.
[104] *Shilo* case, *supra* note 44.
[105] *Shuzepo Trade Ltd.* case, *supra* note 50; *Organization of Swimming Pool Managers* case, *supra* note 50; *Holmes Place International* case, *supra* note 50; *M. S. and Sons, Ltd.* case, *supra* note 50; *Mondial Wedding Hall* case, *supra* note 50.
[106] *Tests in the Negev* case, *supra* note 38.

collapse as long as it is found that the state designed its national mission based on relevant and professional considerations."[107]

According to Justice Stein, when eligibility for testing is the same "for each and every person," and there is no claim of discrimination at that level, then the [state's] decision is not tainted by irrelevant considerations and there is no scope for intervention. In his view, "The petitioners' claim of discrimination is therefore reduced to transportation difficulties and costs as a factor that limits the accessibility to tests."[108] Consequently, he concludes that "the discrepancies in transportation costs" are negligible compared to the benefit of these tests, which are essential and even life-saving: "The magnitude of the health benefit of the COVID-19 tests the State provides to all its residents minimizes the grievance concerning the transportation cost – and any similar complaint – and undermines the claim of discrimination …"[109]

In this case, judicial review was limited to examining whether improper considerations were at play, without examining the nature of the infringed right and the significance of inaccessibility, and without investigating whether the residents enjoyed the right in an equal manner. According to Justice Stein, the claim of discrimination here is only a grievance because of "discrepancies in transportation costs," which are deemed negligible relative to the "benefit" the State provides in the form of COVID-19 testing. The Court understood this "benefit" – and not as a right – as apparently not subject to equal distribution. This ruling, which imposes the "additional marginal cost" of providing services on the citizens rather than on the State, is contrary to existing case law.[110]

Justice Amit noted that, given the "lack of clarity about the resources currently available to the state on the subject of tests, there is no room for our intervention in the allocation of resources, as requested by the petitioners." Nonetheless, he added, "The respondents are obliged to 'keep a finger on the pulse' and examine the need in accordance with developments …"[111]

The assumption that state authorities are doing everything possible in these circumstances appears repeatedly across many rulings; the Court assumes the good faith and good intentions

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[107] *Id.*, para. 7.
[108] For more on the problematic nature of this analysis of the criteria of proportionality, see Prof. Reichman's lecture, *supra* note 97.
[109] *Tests in the Negev* case, *supra* note 38, para. 9.
[110] This argument was explained in depth in: Nadiv Mordechay, "Judicial Review of Administrative Decisions by the Ministry of Health," Israel Democracy Institute, 30 April 2020 (Hebrew), *available at* https://www.idi.org.il/articles/31454
[111] *Tests in the Negev* case, *supra* note 38, para. 3.

of the government, and holds no legal discussion of the extent of any human rights violations, or of any adverse effect on the rule of law. In the context of equality, this view stands in contradiction to many years of Supreme Court rulings that adopted the outcomes test for examining infringements on the right to equality, and not a test based on discriminatory intent.[112]

Another petition demanded access to tests for Palestinian residents of Jerusalem neighborhoods that lie beyond the Separation Wall.[113] Residents of these neighborhoods live in over-crowded and densely-populated conditions, lacking basic infrastructure and access to health services, and are thus particularly vulnerable to the spread of COVID-19. The Court rejected the petition without a hearing, relying solely on the State's response. The State told the Court that the Clalit HMO branches in these neighborhoods would begin conducting COVID-19 tests for its members. That is, the Court considered it sufficient for the government to declare its good intentions and make commitments and thereby deferred judicial review, regardless of whether these commitments were fulfilled or whether they eliminated the risk to the lives of the residents.

A third petition regarding COVID-19 tests was submitted to the Court by the Association of Nursing Homes and Assisted Living in Israel, of particular importance given the high-risk of COVID-19 spread in such facilities and the vulnerable elderly population these facilities serve. Among the desired remedies, the petition demanded that the Minister of Health order weekly COVID-19 testing for all assisted-living residents, caregivers, staff, and service providers.[114] The Court rejected the petition due to a lack of grounds for intervention, citing the rulings above, and the Court's determination that the number of tests and the prioritization for conducting them were a matter of professional judgment, in which the Court refrains from interfering absent proof of improper considerations.

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[112] *See, e.g.*, HCJ 11163/03 *High Follow-up Committee for Arab Citizens in Israel v. Prime Minister of Israel*, PD 61(1) 1 (2006).
[113] *Tests in East Jerusalem* case, *supra* note 39.
[114] *Association of Nursing Homes and Assisted Living in Israel*, *supra* note 40. In this context, we note that a number of petitions were filed that pertain to the conduct of nursing homes or assisted living facilities. *See* HCJ 3046/20 *Meron v. Minister of Labor, Social Affairs, and Social Services* (delivered May 21, 2020); *Association of Nursing Homes and Assisted Living in Israel* case, *supra* note 40; HCJ 3447/20 *Association of Nursing Homes and Assisted Living in Israel v. Government of Israel* (delivered June 30, 2020). In addition, two petitions addressed the conversion of nursing homes into coronavirus facilities: *Peshe*, *supra* note 8; *Pardes Hana-Karkur Local Council* case, *supra* note 40. For an interesting discussion of the latter two petitions, see Mordechay, *supra* note 110.

Another petition demanded the provision of preventive quarantine solutions for Palestinian Bedouin women, citizens of Israel, living in unrecognized villages in the Naqab (Negev).[115] These women possess no material conditions for at-home quarantine, and social restrictions prevent them from using State-provided quarantine facilities located far from their villages. The State has recognized these unique needs in various official documents.[116] However, the Court rejected this petition, too, on the grounds that it was "a sweeping and theoretical petition", and that "there is no concrete injured party, as far as is known." This ruling raises many difficulties concerning the demand to provide preventive health services, especially given the potential impact on morbidity rates. The Court also refused to intervene concerning the need for a plan of action to address the special needs of this group, noting:

> The petitioners raise a concern, which though it may materialize in the future (and perhaps, heaven forbid, even in the near future), is theoretical at the time of the petition's submission and discussion. For this reason, the relevant authorities, based on their best professional judgment, believe that there is no need at this stage to address the aforementioned concern, and that it will be possible to properly address it if and when the need arises. Conducting this type of risk assessment, and defining priorities based on it, is at the core of administrative discretion, and it is difficult to see the basis for judicial intervention in it.[117]

Another group of petitions centered on prisoners' right to health. Prisons are always a source of concern during an epidemic because of the potential for disease to spread quickly due to the over-crowded and because of the high rates of poor health among the prison population. This concern adds to the already heightened risk of human rights violations in prisons.

Concerns about the lives and health of prisoners were greatly heightened by emergency regulations issued by the State in mid-March 2020, which prevented family and attorneys from entering prisons and visiting prisoners.[118] According to the accompanying explanatory notes, the rationale behind these regulations was to prevent the virus from entering the prisons by isolating the prisoners. These regulations violate the right to family visits, the right to legal consultation, and the right to access the courts. Moreover, the restrictions cut the prisoners off from the world outside of the prison, making it impossible for anyone but official visitors or

[115] *Quarantining of Women* case, *supra* note 41.
[116] *See, e.g.*, "An Outline Plan for Isolation Facilities in Arab Society", prepared by the Center for Controlling and Monitoring Corona (Israeli government), available at: https://www.gov.il/BlobFolder/generalpage/arab-documents-corona/he/news_2020_corona_arab-muni_bidud-arab.pdf. (Hebrew)
[117] *Quarantining of Women* case, *supra* note 41, para. 11.
[118] Emergency Regulations (Preventing the Entry of Visitors and Attorneys to Detention Facilities and Prisons) – 2020.

state officials to monitor what was happening within the walls of the prison and ensure the protection of the prisoners' lives and health.[119] This infringement is compounded in the case of Palestinians designated as "security prisoners", who, unlike other prisoners, are denied the right to use the telephone and call their families.

A number of petitions sought to confirm that the Israel Prison Service (IPS) was suitably prepared for the spread of the pandemic, and demanded that it reduce the risk to prisoners by adapting the conditions of incarceration to the circumstances.[120] The Court rejected or dismissed all of these petitions.

A key petition concerning prisoners' rights challenged the legality of the emergency regulations prohibiting prison visits.[121] The petitioners argued, inter alia, that the regulations disproportionally violated the basic rights of prisoners, and emphasized the illegality of the regulations in relation to the right of access to the courts, in violation of section 39(d) of The Basic Law: The Government – especially given that convicted security prisoners – overwhelmingly Palestinians - were prevented from consulting with their attorneys if no court hearings were scheduled in their case. Although this petition also challenged the underlying foundation of the IPS's plan to tackle the spread of the coronavirus in prisons, the Court refrained from ruling on the legality and proportionality of this policy.[122]

Another petition sought to apply the requirement of social distancing – which the Ministry of Health determined was the most effective means of fighting the pandemic – in the cells of

[119] While the entry of official visitors such as representatives of the Israeli Bar Association, the Public Defender's Office and the International Committee of the Red Cross was not prohibited during this period, the oversight of such entities – which, as far as we know, was conducted in a limited way during the first wave of the coronavirus – was insufficient to overcome the difficulties of monitoring the rights of each and every prisoner, or to address the difficulties encountered by the prisoners' families in receiving information. In this context, we note that even the right of Israeli parliament members to enter the prisons was severely curtailed during that period, and a request that the Supreme Court issue a temporary order allowing Arab Members of Knesset to visit – in the framework of a petition challenging the entire restriction – was not granted. *See* HCJ 4252/17 *MK Jabareen v. The Knesset* (request for a temporary injunction on May 3, 2020).

[120] See the petitions listed in *supra* note 42.

[121] This entailed two petitions that were heard together: *Ghanem* case, *supra* note 36, and HCJ 2282/20 *Bachar v. Prime Minister*.

[122] The Court conducted two hearings on the petition and the respondents submitted a number of updates on: (1) changes they instituted to minimize the regulations' infringement on the right to maintain communication with family members, and on the rights to legal consultation and access to the courts; and (2) progress on a legislative initiative on this subject after the expiration of the aforementioned regulations in June. Recently, due to various developments, the Court asked the petitioners to amend the petition and limit it to the issue of maintaining contact with family members. The amended petition is available in Hebrew at http://www.hamoked.org.il/files/2020/1664158.pdf (Hebrew).

security prisoners at the Gilboa prison.[123] The Court rejected the petition, ruling that social distancing regulations do not apply because prisoners are "individuals who stay together in a single place of residence." The Court also noted that the IPS had adopted a series of measures to contend with COVID-19 – measures the constitutionality of which were not discussed. In addition, the Court stated that since the morbidity rate in the prisons is lower than in the general population, the petition did not bring to light a concrete problem that demands a solution. As a result, the Court imposed costs on the petitioners. This petition came in the context of a number of steps initiated by the IPS to reduce crowdedness in the prisons, steps that were applied only to criminal prisoners, and not to security prisoners.[124] Unfortunately, about three months after the ruling, there was a COVID-19 outbreak among security prisoners in the Gilboa prison, in which approximately 100 prisoners were infected.[125]

In the great majority of rulings, the Supreme Court did not classify the infringement claimed by the petitioners as a violation of the constitutional right to health and equal access to healthcare. The Court refrained from engaging in any constitutional discussion of the violation of the right to health. Moreover, the Court adopted a very stringent approach that granted the State broad discretion in managing the spread of the virus, including in the allocation of resources and its mode of organization.

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[123] Since the prison guards are in close contact with the prisoners and, at the same time, are exposed to infection through their contact with the general population.

[124] A number of prisoner petitions were filed against these arrangements. See the list of petitions in *supra* note 42.

[125] For more on this subject, see Adalah's letter to the Israel Prison Service, available in Hebrew at https://www.adalah.org/he/Content/View/10177 (Hebrew).

5. Summary and Conclusion

The rulings reviewed above paint a bleak picture of the Israeli Supreme Court's record in protecting individual rights during the first wave of the COVID-19 health crisis. According to the quantitative analysis conducted of rulings on petitions filed up until 31 August 2020, the Court rejected or dismissed 85 of 88 petitions, ruling on only two cases and with the third one still pending before the Courts. During this period, the Court very rarely issued an order nisi (order to show cause). Orders nisi were issued only in two petitions, and two other petitions were heard as if an order nisi had been issued. The Court ordered only one temporary injunction.

In terms of the length of time of adjudication, the Court rejected one group of petitions immediately (10% on the same day and 25% within a week of filing); most of these cases were rejected without a hearing in the presence of the two parties (70%), and others were rejected without requesting a response from state authorities (27%). 67% of the rulings were short, at under three pages. The Court adjudicated a second group of petitions over an extended period of time; in this instance, the Court often asked the State to provide updates on various developments, which frequently made ruling on the petition unnecessary. There was no minority opinion expressing a substantial disagreement between the justices in any of the rulings.

The qualitative analysis conducted on the rulings underlines the Court's inclination to refrain from intervening in the government's decisions. The salient features of this tendency towards judicial non-intervention is further discussed below.

Strategies of avoidance

The Court adopted a number of avoidance strategies, seemingly to exempt itself from an in-depth discussion and decision on fundamental questions of rights and the use of emergency powers. These strategies included, inter alia, the extensive use of threshold grounds of exhaustion of remedies; the rejection of petitions due to purported changes in their factual or normative bases, even when such changes were neither substantial nor eliminated the underlying violations; repeated requests for the State to submit updates, usually about the progress of legislative proceedings, until such time that the petitions became moot; and refraining from offering guidance or defining a normative framework to provide general guidelines for exercising powers in the future.

The Court did not rule on fundamental questions pertaining to the regime of emergency regulations and the government's conduct during the first six months of the pandemic, including: concerning the state of emergency as a civil health emergency that differed in essence from a security emergency; the need for a separate declaration as mandated by the Basic Law: The Government; and the government's authority (and the limits thereof) to use emergency regulations once the Knesset had been sworn in. The Court was also reluctant to intervene in petitions concerning the protection of human rights, and dismissed or rejected the overwhelming majority of such petitions.

These avoidance strategies are not new, as the Court has often acted in such ways to avoid ruling on questions when it wished to refrain from doing so. However, the use of these strategies became very pronounced during the first wave of COVID-19, particularly when set against the backdrop of the sweeping powers wielded by the government and the increased potential for human rights violations through the exercise of such powers.

The increased use of threshold grounds

The Supreme Court made extensive use of threshold grounds to reject petitions, arguing in particular that non-judicial proceedings had not been exhausted and requiring that the relevant state authorities be given a "reasonable" amount of time to respond, even when the petitions argued that the infringement of human rights was extremely disproportionate. This requirement later resurfaced in rulings on petitions challenging the constitutionality of the laws that replaced emergency regulations.

Since the petitions challenged temporary regulations and legislation, the requirement to exhaust non-judicial proceedings appeared to be a strategy to avoid issuing a ruling: by the time proceedings between the petitioners and the relevant authority had been exhausted, the regulation or measure was likely to have expired. Therefore, the increased use of threshold grounds, at time when the factual and normative reality was frequently changing, effectively rendered petitioning the Court a futile exercise. In practice, the Court decided not to intervene in a rapidly changing reality and not to grant timely relief. Furthermore, the use of threshold grounds has a chilling effect on potential petitioners, deterring them from resorting to the Court.

Precluding judicial review of a changing reality

The Court chose to preclude the possibility of judicial review in times of pandemic, under the pretext of the changing circumstances. For example, the Court often dismissed petitions due to

changes in their factual or normative bases. There is ostensibly some logic to this approach. However, the Court also dismissed petitions when the changes were minor and did not undermine the petitioners' arguments concerning violations of their human rights, or when it was clear that the factual change was not definitive and that the resulting violations were likely to recur in the near future. Moreover, the Court often seemed to request repeated updates from the State as a strategy to stall until the point that a change would occur that would obviate the need to decide on the matter.

Further, some emergency regulations and their restrictions took effect immediately or were in effect for a short period of time, sometimes for only a few days. In such cases, the Court chose not to address the short-term violations of human rights, regardless of their severity.

Suspending human rights protections

The only cases in which the Court recognized human rights violations were cases pertaining to classic political rights, such as the right to freedom of movement. In no petition did the court recognize a violation of social rights, primarily the rights to health and to equal access to healthcare. Even in the cases where the Court did recognize human rights violations, the protection of these rights was suspended for the sake of protecting the right to life of the collective. In this situation, the constitutional rights of the individual were usually at a disadvantage.

Moreover, the Court did not examine the violations and their proportionality, or lack thereof, at the constitutional level, but only at the administrative level: it sufficed with examining the reasonableness of the decision and checking for flaws in the decision-making process, while operating under a presumption of sound administration. In examining the right to equality, the Court adopted the test of intentional discrimination, which is a retreat from the Court's long tradition of ruling according to the outcomes test, which does not consider whether there was discriminatory intent.

The aforementioned lack of judicial review, especially at a time when broad powers were concentrated in the hands of the government, and in the absence of parliamentary oversight, effectively granted the government free rein to issue emergency regulations at its sole discretion.

Given the absence of any significant judicial review during the COVID-19 crisis, the government may act similarly in future civil emergencies, relying on Supreme Court rulings

that approved the government's authority to issue emergency regulations without any parliamentary oversight, merely on the basis of a general declaration of a security-based state of emergency. The Court's failure during the COVID-19 crisis has turned the protection of human rights in times of emergency into a 'no man's land', in which the executive branch has the final word in balancing the public interest with individual rights.

These conclusions are consistent with much of the criticism against the Supreme Court's judicial tradition in the context of protecting human rights from the government's sweeping use of emergency powers and security-based considerations. Even in the midst of the COVID-19 pandemic, despite the civil nature of the public health emergency, the Court did not exercise its duty to conduct a substantive judicial review and to provide protection for individuals against human rights violations. This conduct raises fundamental concerns about human rights and the rule of law in the future.