HCJFH 219/09

Minister of Justice
v.
Nir Zohar

The Supreme Court sitting as the High Court of Justice
[29 November 2009]

Before President D. Beinisch, Deputy President E. Rivlin, Justices E.E. Levy, M. Naor, E. Arbel, E. Rubinstein, S. Joubran, E. Hayut, Y. Danziger

Further Hearing on the judgment of the Supreme Court in HCJ 10021/06, issued on 23 December 2008 by Justices E.E. Levy, E. Rubinstein and Y. Danziger

Facts: The respondent was convicted of various crimes and sentenced to life imprisonment in 1996, after which he was given additional sentences for crimes committed while on leave from jail. In 2004, he applied to the then-President of the State, Moshe Katzav, to reduce the duration of his sentence. Although the Minister of Justice at the time (Tzipi Livni) recommended thatthe application be denied, the President signed a letter limiting the respondent's sentence to 32 years. The Minister of Justice refused to countersign the document approving the reduced sentence, as did other Ministers of Justice who served after her. The respondent petitioned the High Court of Justice, asking the Court to order the Minister of Justice to join her signature to that of the President of the State or, alternatively, to declare that the letter approving the reduction of the respondent's sentence was valid despite the absence of the countersignature. In the original judgment, the majority (Justices Levy and Danziger) granted the petition, with Justice Rubinstein dissenting. The Minister of Justice petitioned for a further hearing.

Held: Majority opinion: (President Beinisch; Deputy President Rivlin, Justices Naor, Arbel, Rubinstein, Joubran, Hayut concurring; Justice Levy concurring in part). The pardoning power of the President of the State is an Israeli creation and is not an unqualified presidential prerogative. The basic principles of the Israeli democratic regime necessitate the imposition of a review mechanism for the President's exercise of the power to pardon. This process is expressed in the statutory requirement that the Minister of Justice must countersign and in the discretion he exercises with respect to the issue of the countersignature. The countersignature, through which the Minister of Justice assumes parliamentary responsibility for his actions, thus enables both parliamentary and judicial review of the exercise of the pardon power. This

necessary review process does not grant the Minister of Justice a veto right. The Minister may exercise his discretion to refuse to countersign only in extreme and unusual circumstances – such as when he is persuaded that the pardon decision has been reached improperly. The narrow scope of the Minister's discretion also reduces the concern that political considerations will enter into the pardoning process.

Concurrence in part (Justice Levy) – The discretion given to the Minister of Justice does not allow him to refuse to sign when he finds the President's decision unreasonable, but only when he finds that decision to have been based on irrelevant considerations, that it was made in bad faith or that it is *ultra vires*.

Minority opinion (Justice Danziger) – The Minister of Justice has no discretion with respect to the countersignature requirement, as the power to pardon has been given only to the President of the State. The entire purpose of the countersignature is to ensure that all relevant material is submitted to him for review and that there were no errors whatsoever. The possibility of the exertion of political pressure on the President – through a grant of discretion to the Minister of Justice – creates the potential for prior understandings between the President and the Minister. The indirect judicial review mechanism described in the judgment in the original petition is the preferred review mechanism with respect to the presidential pardoning power.

Petition granted. Respondent's matter to be returned to the Special Parole Committee, to the President of the State and to the Minister of Justice.

Legislation cited:

Basic Law: The President of the State, ss. 11(a)(1), 11(a)(3), 11(a)(5) –(6), 11(b), 12, 16.

Palestine Order in Council, arts. 6, 16.

Release from Imprisonment on Parole Law, 5751-2001, s. 29.

Transition Law, 5709-1949, s. 6.

Israeli Supreme Court cases cited:

[1] FH 13/60 *Attorney General v. Matana* [1962] IsrSC 16 430.
[2] HCJ 428/86 *Barzilai v. Government of Israel* [1986] IsrSC 40(3) 505.
[3] HCJ 177/50 *Reuven v. Chairman and Members of the Law Committee* [1951] IsrSC 5 737.
[4] CrimA 185/59 *Matana v. Attorney General* [1960] IsrSC 14 970.
[5] HCJ 706/94 *Ronen v. Minister of Education and Culture* [1999] IsrSc 53(5) 389.
[6] HCJ 73/85 *"Kach" Party v. Chairman of the Knesset* [1985] 39(3) IsrSC 141.

[7] HCJ 9631/07 *Katz v. President of the State* (deleted) (2008) (not yet reported).
[8] CrimFH 7048/97 *Anonymous Parties v. Minister of Defense* [2000] IsrSC 54(1) 721.
[9] HCJ 1637/06 *Armon v. Minister of Finance* (2010) (not yet reported).

Canadian cases cited:

[10] *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753.

For the petitioner — O. Mandel; E. Amir.
For the respondent — S. Faisal.

JUDGMENT

President D. Beinisch

The President of the State has the power to pardon offenders and to lighten their sentences, pursuant to the provisions of s. 11(b) of Basic Law: The President of the State (hereinafter also: "the Basic Law"), which provides that "[t]he President of the State shall have power to pardon offenders and to lighten penalties by the reduction or commutation thereof." Alongside this power, s. 12 of the Basic Law also provides that the signature of the President of the State on an official document – including a letter of pardon or regarding a lightening of a sentence – shall require the countersignature of the Prime Minister or of such other minister as the government shall decide. In a resolution dated 17 April 1949, the Government authorized the Minister of Justice to countersign the President's official documents regarding pardons and the lightening of sentences (Notice Regarding Countersignature for the Signature of the President of the State, *Yalkut Pirsumim* [Government Publications] 1949, p. 248). The nature of the countersignature and the degree of discretion that the Minister of Justice may exercise in providing it are the subject of this further hearing.

The main facts

1. The following facts provide the background for the discussion of the constitutional issue before us in the present case:

In 1996, the respondent, Nir Zohar (whose previous name was Nissim Tzarfati), was convicted of the crimes of murder, rape and kidnapping for the purpose of committing sexual crimes and was sentenced to life in prison. After he began to serve his sentence, while on a furlough from prison, he committed further crimes including extortion under aggravating circumstances, assault, false imprisonment, threatening, possession of a

knife, and witness tampering. He received additional prison sentences for these acts.

In 2004, the respondent applied to the President of the State to have the duration of his prison term shortened. In accordance with the standard procedure at the office of the President of the State and the Ministry of Justice, the application was transferred to the Pardons Department at the Ministry of Justice. Pursuant to that procedure, the Pardons Department examines the application and submits its recommendation to the Minister of Justice. Based on this recommendation, the Minister of Justice submits his recommendation to the President of the State. If the recommendation is to grant the application, a letter of pardon or a document approving the lessen sentence is submitted, along with the recommendation, for the President's signature. If the President grants the application for pardon or for a lesser sentence, the letter of pardon or the document approving the new sentence is delivered to the Minister of Justice for his countersignature. In the case before us, the Pardons Department examined the respondent's application after receiving opinions from various parties, including, *inter alia*, the State Attorney, the Israel Police and the Prison Service. Pursuant to s. 29 of the Release from Imprisonment on Parole Law 5751-2001 (hereinafter: "the Parole Law"), a Special Parole Committee reviewed the respondent's matter as well. The Committee was presented with the relevant information relating to the crimes for which the respondent was convicted and his behavior during the period of his imprisonment. The Committee decided that it was not appropriate to recommend a lighter sentence in light of the severity of the crimes for which the respondent was serving a life sentence and of the crimes he committed during the period of his incarceration. The Committee noted that a person serving a life sentence who seeks to have his sentence lightened should, when making the application, present himself as having behaved appropriately and should establish that there is a chance for a change in his behavior and provide a prediction regarding his future rehabilitation. These factors were not present in the respondent's application.

2. Then-Minister of Justice Tzipi Livni accepted the Parole Committee's conclusion and recommended that the President of the State not grant the application for a lesser sentence. Notwithstanding the Minister of Justice's recommendation, the then-President of the State, Moshe Katzav, decided to reduce the respondent's sentence and to set it at 32 years of imprisonment. On 25 December 2005, the letter approving the reduction of the sentence was transmitted from the office of the President of the State for the signature of the Minister of Justice. The Minister, who had, as stated,

recommended that the application for a lighter sentence not be granted, asked the President of the State for an explanation of the motivation for the decision to grant the respondent's application. In response, the legal adviser to the President's office replied that the decision was based on an improvement that had occurred in the respondent's behavior. This response did not satisfy the Minister of Justice because – as was argued in the state's response – neither the factual material provided to the President nor the series of recommendations made to the President mentioned any improvement in the respondent's behavior. The President did not answer an additional request for clarification sent to him by the Minister of Justice. The Minister of Justice therefore refused to countersign as required pursuant to s. 12 of the Basic Law. The Ministers of Justice who served after Ms. Livni also refused to countersign the letter approving the lighter sentence.

In light of the Minister of Justice's refusal to countersign, the respondent petitioned this Court, asking the Court to order the Minister of Justice to add her countersignature to the signature of the President of the State. Alternatively, the Court was asked to rule that the document approving the lighter sentence is valid even without the countersignature.

The judgment in the original petition

3. The Court, by a majority of opinions, with Justice Rubinstein dissenting, granted the appeal and held that the Minister of Justice's countersignature does not grant the Minister independent discretion as to whether to grant an application for a pardon or to reject it and does not give the Minister a right to veto the President's decisions. According to the majority view, the countersignature is intended to ensure that all material relevant to the decision has been properly presented and that all actions preliminary to the pardon decision, which involve various administrative parties, have been taken in proper fashion. The majority held that if the President decides to grant the application after the Minister of Justice has ascertained that all the preliminary actions for the approval of a pardon have been carried out properly, the Minister of Justice has no discretion and he must join his countersignature to the President's signature.

4. In a broad and comprehensive decision, Justice Levy analyzed the pardon power and the substance of the Minister of Justice's countersignature. Justice Levy's position, according to which the countersignature is not intended to grant any decision-making power to the Minister of Justice with respect to pardon decisions, is based on his view regarding the nature of the pardon power and the unique position that the President of the State holds

among the government authorities (Justice Levy's opinion, at para. 9). As Justice Levy noted, the power to pardon is "an original Israeli creation" in the framework of which the President does not act as an executive authority, and the pardon is not an executive act. The President of the State, Justice Levy held, is accorded a position different from that of all other state authorities and the considerations he weighs in examining applications for pardon express a state and social interest based on universal ethics and national interests, not on political considerations, "the main part of which is based on day-to-day and passing matters" (*ibid*., at para. 10). "The normative environment" of the pardon power in Israeli law, Justice Levy noted, means that the President "alone has the discretion to decide whether and how to exercise it"; he does not act as an executive agency, he is not subject to any policy designed by the government and he "exercises his power in an independent manner" (*ibid.,* at para. 13). The exclusive status of the President of the State and the unique characteristics of the power to pardon lead to the conclusion, according to Justice Levy, that "a clear distinction must be drawn between the government's part in the pardon process – as the party making a recommendation at the beginning of the process – and the power of the President as the party who is the sole decision-maker at its end" (*ibid*.). Granting any discretion to the government in the pardon process, through the Minister of Justice's countersignature, will – in Justice Levy's view – lead to undesirable results. He wrote as follows:

> 'The placement of a veto power regarding the President's decisions in the hands of other parties can impact on the status of the institution of the presidency, to the point where it would lose its unique character. It could enable the exercise of improper leverage on the President, which would adversely affect his free exercise of discretion. The involvement of party politics in the judicial branch's final determinations is a formula for the uprooting of the foundations of our democratic system and of the rule of law in its substantive sense. It can lead to a degradation of the judicial process, undermine the sense that justice is being done and do considerable damage to the public's faith in the state authorities. Moreover, by eating away at the essential boundary between the executive branch and the courts, it threatens to distort justice' (*ibid.,* at para. 16).

Justice Levy rejected two possible explanations for the countersignature: one, that it is needed as a "connecting link", the function of which is to enable indirect judicial review of the President's pardon decisions; and the other, that the countersignature is required for the purpose of verifying the

pardon and ratifying the formal constitutionality of the letter of pardon or of the letter approving the lightening of the sentence (*ibid.*, at paras. 24 and 25). Justice Levy offered a third explanation, according to which the purpose of the countersignature is the following:

> 'The countersignature is therefore intended to ensure that all the preliminary actions that administrative parties are required to carry out have been carried out properly, that all the relevant material has been collected and submitted to the President of the State for his review, and that the tools that the administrative authorities are charged with providing, and which the President requires for the purpose of making the decision, have been given to him. If the information has been found to be lacking or mistaken; if it is found that a party asking for a pardon has sought to deceive the President . . . ; if it is found that details that were relevant to the decision were omitted either accidentally or intentionally; if it is found that there was a defect in the recommendation given to the President . . . – in each such case and in others, the Minister's function is to make certain that the needed correction is made before the Minister affixes, as he is required to do, his signature. And once his signature is affixed, it signifies to the administrative authorities that the road towards implementation of a properly grounded presidential decision has been cleared. Thus, the Minister does not interfere with the President's discretion, but his function is to ensure that the President does have available to him all that is needed for the purpose of exercising the discretion that he has been given' (*ibid.*, at para. 28).

According to Justice Levy, the particular purpose of the countersignature is to eliminate the key concern involved in the grant of real discretion to the Minister of Justice, i.e., that there will be political interference in the pardon decisions. Political interference, Justice Levy held, "is likely to accord primacy to narrow interests, the promotion of which reflects a temporary opportunity, consistent with a random alignment of powers, over fundamental principles, which are by their nature far removed from the spirit of the times" (*ibid.*, at para. 15). Political intervention, in the guise of a grant of discretion to the Minister of Justice, can also lead, in Justice Levy's opinion, to a mixture of personal and general interests and to the exercise of the pardon power from a narrow governmental perspective in a manner that detracts from the objective that underlies the institution of pardon (*ibid.*).

5. Justice Danziger concurred in Justice Levy's position and noted that the "power of the President of the State to pardon offenders is a unique power which is held exclusively by the pardoning authority, and it is intended to grant the President, in this area, complete freedom to decide as he wishes and in accordance with his best understanding." Justice Danziger therefore found that the "countersignature does not confer upon the government's representative the status of a partner in the decision concerning the matter of pardons, and certainly does not grant the representative any power to decide regarding the pardon decisions made by the President of the State." Like Justice Levy, Justice Danziger found that once all the relevant material has been laid before the President of the State, the government representative must countersign and has no discretion in carrying out this function.

6. In contrast to the approach of the Justices holding the majority opinion, Justice Rubinstein held that the Minister of Justice has discretion to refrain from countersigning, but its exercise will "of course occur only in *extremely exceptional* circumstances" (Justice Rubinstein's opinion, at para. 9; emphasis in the original - D.B.). Justice Rubinstein agreed that the countersignature serves as a form of review mechanism with respect to the pardon process, but in his view the purpose of the countersignature is more than that. According to him, the Minister of Justice is also authorized to examine the issue of whether irrelevant considerations had been involved in the President's decision. At the basis of this conclusion was his assumption that "there is a need for review, for those occasions on which it is required, and for preventing the misuse – heaven forbid – of the power. The Minister's countersignature must serve as a sort of 'gatekeeper' for the President" (*ibid*.). The signature, stated Justice Rubinstein, is not intended to replace or to limit the President's broad discretion, but to rule out the exercise of discretion "which is unlawful in that it is defective" (*ibid*.).

7. The Minister of Justice filed a petition for a further hearing on this judgment. On 5 February 2009, Vice-President Rivlin granted the petition and ordered a further hearing regarding the issues raised in the judgment. The present deliberation followed.

The arguments of the parties

8. In the petition for a further hearing and articulated pleadings, the State Attorney's office, acting on behalf of the Minister of Justice, argued that the majority opinion in the judgment had established a rule that contradicts the approach that has prevailed in Israeli law since the establishment of the State. This holding of the majority opinion, it was argued, transforms the

President's authority into an absolute and exclusive power in a manner that is inconsistent with the Israeli constitutional principle requiring checks and balances. In support of this argument, the State Attorney cited a series of this Court's rulings and of writings of learned scholars on the subject, which indicate that the Minister of Justice has the authority to investigate the President's decision regarding a pardon; to review it; to exercise discretion before countersigning the letter of pardon or an approval of a sentence reduction; and, as a practical matter, in exceptional circumstances, to prevent the pardon by refusing to provide the countersignature. According to this argument, a similar conclusion is to be drawn from the deliberations in the Knesset prior to the enactment of s. 12 of the Basic Law: The President of the State, which indicated that the Members of the Knesset had examined the possibility of adding letters of pardon to the list of documents that do not require a countersignature, but that this proposal was rejected. It was also argued that the Knesset Proceedings show that the Knesset was aware of the possibility that the relevant minister might refuse to sign and nevertheless chose to grant that minister the discretion that would allow him to oversee the President and thus prevent a situation in which a sensitive power would be conferred upon a single party without there being any process for reviewing his decisions. In this context, it was noted that the possibility of challenging the President's decision indirectly would not constitute a suitable alternative to the direct review involved in a countersignature requirement.

In the articulated pleadings in the petition, the State Attorney's representative also referred to the main argument on which the majority opinion is based – the concern regarding political intervention in judgments rendered by the judiciary. Her view was that there is no real cause for concern regarding such involvement since a court's decision can be changed only when there is a double signature – one from the President and one from the Minister of Justice. In a case in which the Minister of Justice recommends that a petition be granted but the President does not accept the recommendation, the court's decision remains in place. As such, it was noted, "a power that is within the discretion of the Minister of Justice may lead to the non-approval of the pardon – i.e., to non-intervention in the judicial authority's determination – *but never to the opposite*" (emphasis in the original - D.B.). In addition, it was noted that the concern regarding political intervention is reduced in light of the fact that the Minister of Justice acts with transparency in a professional legal environment and his decisions are subject to parliamentary review and direct judicial review.

As a marginal point, it was argued in the name of the Minister of Justice that the judgment establishes a new rule and that an operative final order had been given without an order *nisi* having been issued and without the Minister of Justice and the Attorney General being given an opportunity to present their fundamental positions on the issue, which they are only able to raise now in the context of the further hearing.

9. The argument was made in the respondent's articulated pleadings that the judgment provides a suitable explanation of the scope of the Minister of Justice's authority, which is limited to ensuring the propriety of the administrative process that precedes the President's decision. The limited scope of the countersignature, the respondent argued, results from the exalted position of the institution of the presidency, which is undisputed. The President is not required to provide reasons for his decisions. It was further argued that the majority position does not contradict the prevailing approach in Israeli law and the decision merely overturned the "tradition" that had been adopted by Ministers of Justice in the past. Regarding the application for pardon submitted by the respondent, it was argued that the State had acknowledged in its pleadings that the material submitted to the President is the same as the material viewed by the Minister of Justice. Hence, the respondent argued, the current Minister of Justice should be ordered to add his signature to that of the President of the State and conclude the process of reducing the sentence.

Discussion

10. This further hearing raises questions relating to the nature of the pardon power of the President of the State and the nature of the countersignature required for a decision to pardon or to lighten a sentence. The countersignature has been mentioned in the past in this Court's case law, but its nature and the scope of the discretion granted to the Minister of Justice in the context thereof had not been examined directly or comprehensively until the judgment in the original petition. The precedential nature of the subjects discussed in the petition, as well as the fact that they relate to the exercise of a unique power granted to the President of the State, form the basis of this further hearing. I will first state that for the reasons described below, I have decided to join in the conclusions reached in Justice Rubinstein's minority opinion in the judgment in the original petition. In my view, the majority opinion is very problematic.

Although the present deliberation focuses on the Minister of Justice's countersignature, it also raises serious constitutional questions. A

determination that the countersignature grants only limited discretion to the Minster of Justice (the view adopted by the majority opinion in the judgment in the original petition) or alternatively, that the Minister of Justice may, in exceptional circumstances, prevent the pardon through a refusal to provide a countersignature (as per Justice Rubinstein's minority opinion) will have significant consequences regarding the power to pardon and regarding the institution of the presidency and its place among the state authorities. The dispute raises a number of questions necessitating the determination of basic presumptions as a starting point of the discussion: Is the exercise of the power to pardon subject to review? Is the elevated position of the President of the State such that the principle of separation of powers does not apply to the exercise of his authority? Does the fact that the power to pardon allows the President of the State to intervene in the activity of other branches affect the analysis of the nature of the countersignature? These are some of the questions that must be answered in our deliberation, which by its nature is influenced by various factors, including the unique characteristics of the power to pardon; the status in our regime of the party wielding the power to pardon, i.e., the President of the State; and the rules established in this Court's case law regarding the ability to review the President's decisions, either directly or indirectly.

11. This is not the first time that the power to pardon has been discussed in depth by this Court. In a number of earlier judgments, basic principles were established with regard to the status of the President of the State as the holder of the power to pardon and criteria were formulated for the exercise of this power. The basic principles established in this case law will guide us as we examine the significance of the countersignature. Two basic principles, in particular, will inform our discussion. The first is that the power to pardon is "a part of the fabric of our democratic lives" and must therefore be interpreted "with a broad view" (FH 13/60 *Attorney General v. Matana* [1], at p. 442, *per* Acting President Agranat), as this phrase was interpreted by Justice A. Barak in HCJ 428/86 *Barzilai v. Government of Israel* [2], at p. 581). The significance of a "broad view" is that "we must view the presidential powers as part of the general distribution of powers among the State authorities" (*ibid.* [2], at p. 595). This means that in interpreting the power to pardon and the countersignature that accompanies it, we must take note of the system of government, the legal system, and the original intent behind the enactment of the Basic Law: President of the State, as well as the legal tradition that has developed since the establishment of the State through to the present time.

12. The second principle, which is related and ancillary to the first, is to be found in a determination that has been established in our case law over the years – a determination that the institution of pardons in Israel, in the format that has taken shape under our system of government, is an original Israeli creation. It is true that the power to pardon is recognized in various systems of government and that the Israeli power to pardon was originally born prior to the establishment of the State, in art. 16 of the Palestine Order in Council of 1922 which delegated the English monarch's pardoning power to the High Commissioner; however, in a long line of judgments, this Court has held that the power to pardon is no longer intrinsically related to the English monarch's power to pardon, but is instead an original, independent and primary power (see, for example, HCJ 177/50 *Reuven v. Chairman and Members of the Law Committee* [3]; CrimA 185/59 *Matana v. Attorney General* [4]; *Attorney General v. Matana* [1]; *Barzilai v. Government of Israel* [2]). It is interesting to note that although in almost all of these key cases there were disagreements among the justices regarding the scope and nature of the power to pardon, the decisions did establish a clear rule: even though the English monarch's power to pardon constituted the historical source of the Israeli power to pardon, Israeli courts are not "held captive by our legal heritage and that we lack the vigor to fashion our own constitutional doctrines" (*ibid.* [2], at p. 534, per President Shamgar).

This basic principle – of the creation of an original power of pardon, separate from the parallel British power – is of great significance in defining the characteristics of the power to pardon and the countersignature. At the basis of this principle is a determination that the President's power to pardon is not in the nature of a prerogative, as is the English monarch's power, the exercise of which is not subject to any qualification, limitation or review. This is because the powers and status of the President of Israel are not the same as the status and powers of the English monarch. This Court has previously held that because the President's power to pardon is original, it must be interpreted in accordance with "Israeli conditions" and in accordance with the law followed in Israel and the normative environment in which the power is exercised in Israel.

13. An examination of the pardon power from a "broad perspective", as well as an examination of the impact of the system of government in Israel on the scope of the power and on the nature of the Minister of Justice's countersignature, leads, in my view, to a different position from that presented by the majority justices in the judgment in the original petition. As stated, the judgment establishes that "the legislature's instruction, in enacting

the Basic Law: The President of The State, was that the President would enjoy independence in exercising his discretion pursuant to the law" (per Justice Levy, at para. 11). The majority justices therefore held that the Minister of Justice has no discretion when joining his countersignature to the President's signature and the Minister's function is one that is carried out in full at the stage preceding the decision: checking the completeness and veracity of the factual background presented to the President, which the President requires for deciding the petition. According to the justices concurring in the majority opinion, once the Minister of Justice has transferred the relevant factual material to the office of the President and the President's decision has been made to either grant a pardon or approve the lightening of a sentence, the Minister is required to attach his signature to that of the President – even if the Minister believes that the application for a pardon or for a lighter sentence should not be granted and even if he believes that the President's decision is extremely unreasonable or motivated by irrelevant considerations. In the view of the majority justices, the only way to review those decisions to pardon or to lighten a sentence that appear to be improper is through an indirect review of the President's decision, if various parties within the executive branch were to refuse to carry out the President's decision to pardon or to lighten the sentence.

In my view, the position of the majority justices is inconsistent with one of the fundamental principles of the democratic system in Israel. The majority position gives the President an absolute power, which remains unchecked and is subject to no review, in a manner that is inconsistent with the concept of checks and balances that characterizes Israeli government and Israeli democracy. It is precisely the uniqueness of the pardoning power – the exercise of which involves extra-judicial considerations of kindness and of mercy; which is not subject to any requirement that reasoning be provided; and the result of which might be intervention in and modification of the activity of any of the other three branches of government – that necessitates the existence of a control and review process, even if that process is reserved only for exceptional cases in which a concern arises that the President's decision is tainted by an extreme degree of unreasonableness or is motivated by irrelevant considerations.

The judgment of the majority justices in the original petition would seem to confer upon the President of the State and his high office a degree of idealization that is inconsistent with the democratic perception of the Israeli regime. The President does indeed symbolize the state and he has a broad and exceptional power to cancel or modify the acts and decisions of the

legislature, the executive and the judiciary with regard to pardons. The President of the State is not a part of any of these authorities, but our legal system nevertheless does not treat the individual who is the head of the state and who symbolizes its values as a personality with unique qualities that vest in him the powers of an absolute monarch. We are all obliged to respect the President, who expresses the sovereignty of the state, but we would all agree that he does not stand above all those values that are the product of the Israeli democratic system. The President is also a human being and we cannot ignore the fact that in unusual and exceptional circumstances – which it is to be hoped will never occur – the President can also, heaven forbid, do something which is out of the ordinary or deviational, having been motivated by irrelevant or improper considerations.

Indeed, those justices who supported the judgment in the original petition agree that it is proper, under appropriate circumstances, to maintain a review process regarding the President's decision. The principal disagreement turns on the question of whether the main review mechanism is to be found in the countersignature, as my colleague Justice Rubinstein believes, or whether it is to be found, as my colleagues Justice Levy and Justice Danziger held, in a review of the administrative measures that may be carried out after the pardon decision has been made.

As stated, and as will be elucidated below, the mechanism that ensures that there is a review, and which is in conformity with the main principles of the democratic system of government in Israel, is the Minister of Justice's countersignature and the discretion granted to the Minister in the framework of that signature. A consultation and preparation mechanism is available to the Minister of Justice prior to the time at which he formulates his position regarding the countersignature. This mechanism provides the Minister with the professional tools needed for assessing the petitions for pardon for the purpose of formulating his recommendation to the President of the State. This professional mechanism operates with transparency and is subject to the rules that apply to all actions of administrative agencies. This enables parliamentary and judicial review of the exercise of the Minister of Justice's discretion; this review is not dependent on the decisions of various parties within the executive branch to either uphold or refrain from upholding a pardon decision. Such review and control should be exercised in the spirit of the unique power granted to the President of the State, taking note of his exalted position in Israel. As will be described below, in my view, the type of review of the power to pardon that is expressed in the countersignature is not the equivalent of a "veto" right held by the Minister of Justice as my

colleagues, the majority justices in the judgment in the original petition, believe; rather, it is the equivalent of a discretionary authority, the exercise of which is subject to the exercise of discretion by the President of the State.

14. The following interpretative discussion begins with the language of the statute and the manner in which the power to pardon and the countersignature have been interpreted in this Court's case law, with the comments made by Members of Knesset during the process of the enactment of the Basic Law, and with the writings of scholars who addressed the issue. A review of all three indicates that the President of the State was indeed given broad power to pardon offenders or to lighten their sentences, but at the same time, the Minister of Justice was given discretion, the aim of which is to enable parliamentary review and indirect judicial review over the exercise of the President's power. This conclusion is also supported, as we will see below, by the basic principles that apply to the pardoning power under Israeli law. These basic principles, in my view, lead to a conclusion that this is not an unlimited power. Notwithstanding the broad scope of the power to pardon, it must be viewed against the background of Israel's system of government and in light of the principle of separation of powers. Accordingly, there is – and there should be – a review process for the exercise of the power to pardon, which is expressed in the Minister of Justice's countersignature. We will also examine, below, the question of whether the practice that has developed with respect to the exercise of the power to pardon reaches the level of a constitutional convention – a convention according to which the pardon or the lessening of a sentence takes effect only upon agreement between the President of the State and the Minister of Justice. We will conclude the discussion with a reference to the concern that lies at the basis of the majority view in the decision: the fear of political intervention in the pardon process.

Interpretation of the statutory provisions of ss. 11 and 12 of the Basic Law: President of the State

15. As stated, the original source of the Israeli power to pardon can be found in art. 6 of the 1922 Palestine Order in Council, by virtue of which the High Commissioner was authorized to pardon offenders and to grant releases from fines and sentences. (For the history of the Basic Law: President of the State and interpretation thereof, see M. Landau, *Commentary on the Basic Laws: Basic Law: President of the State* (1994), at p. 33 (hereinafter: "*Commentary on the Basic Law*"). With the establishment of the State, the High Commissioner's powers were transferred to the Provisional

Government. The Constituent Assembly, which became the First Knesset, enacted the Transition Law, 5709-1949 (hereinafter: "Transition Law") and determined in s. 6 thereof that the President of the State would be authorized to pardon offenders and to reduce their sentences. This section was repealed in 1964, with the enactment of the Basic Law: President of the State, when it was replaced by the power to pardon prescribed in s. 11(b) of the Basic Law.

Section 11 of the Basic Law deals with the functions and powers of the President of the State. Thus, for example, s. 11(a)(1) provides that the President "will sign every law, other than a law relating to his powers"; he will "receive from the Government a report on its meetings" (s. 11(a)(3)); he will "sign such conventions with foreign states as have been ratified by the Knesset" (s. 11(a)(5)); and will "carry out every function assigned to him by law in connection with the appointment and removal from office of justices and other office-holders" (s. 11(a)(6)). Alongside the President's functions, s. 11(b) establishes the President's power to pardon and to lighten sentences:

> 11(b). The President of the State shall have power to pardon offenders and to lighten penalties by the reduction or commutation thereof.

The President's broad power is qualified by the countersignature requirement in s. 12 of the Basic Law:

> . The signature of the President of the State on an official document, other than a document connected with the formation of a Government, shall require the countersignature of the Prime Minister or of such other Minister as the Government may decide.

Section 12 does not distinguish between the different types of official documents for which a countersignature is required, other than establishing an exception in the case of a document concerning the creation of a government or the dissolution of the Knesset. It thus also establishes a requirement for a countersignature of pardon documents or documents approving a lightened sentence.

Section 11 creates a distinction between the *functions* assigned to the President and the *power* given to him to pardon offenders. This distinction is both linguistic (the President's functions are described as mandatory acts, as opposed to the pardoning power which is described as including a discretionary component) and structural (s. 11(a) is devoted to the President's functions, while s. 11(b) is devoted to the power to pardon). This distinction

between the functions and powers has two main ramifications. First, the distinction affects the scope of the discretion given to the President. While the President's functions are mandatory functions, which he must carry out by virtue of the law and which do not allow him any exercise of discretion, the power to pardon grants presidential discretion: he may exercise it in a particular case or he may refrain from exercising it (see Landau, *Commentary on the Basic Law, supra*, at p. 23). Second, it has been argued in the past that the distinction between functions and powers has implications for the countersignature and the discretion that is conferred in its framework. In relation to a function which involves no real discretion, the countersignature also lacks any discretionary component and remains, at its core, a ritual and formal act. By contrast, when the President is authorized to exercise discretion, as he does in the case of the power to pardon, the signing minister is also accorded corresponding discretion (see Landau, *Commentary on the Basic Law, supra*, at p. 50; on the constitutional framework of pardons in Israel, see also Y.H. Klinghoffer, 27 *Ha'uma* 320 (1969), at pp. 325-26, text included in an essay by L. Sebba, *Personal Pardon and General Pardon – Legal and Phenological Aspects* 105 (Doctoral Dissertation in Law – Hebrew University, 1975)).

16. Support for this position can be found in the two types of documents for which a countersignature is not required: documents relating to the formation of a government and a document in which the President resigns from his position. It is undisputed that in these two areas there is no need – and that it is in fact undesirable – to grant a minister or the government any discretion in the form of a countersignature requirement. This is so because it would not be desirable to give the government or one of its ministers any discretion that could impact on the President's decision to charge a particular Member of Knesset with the task of forming a government. Similarly, as a matter of course, no governmental discretion should be exercised regarding a President's decision to resign from his position. It may be understood from those documents for which a countersignature is not required that when the legislature believed that review accompanied by an exercise of discretion by a minister or by the government was not required, the relevant documents were removed from the purview of s. 12 of the Basic Law. Thus, the decision to leave the pardon documents within the scope of s. 12 means that the signing minister is given substantive discretion and the parliamentary responsibility is transferred to his shoulders. Indeed, during the process of the enactment of the Basic Law, a number of Members of Knesset submitted reservations regarding s. 12 and asked to include pardon documents and

documents approving the lessening of sentences in the list of documents that do not require a countersignature so that the President "would not be limited and blocked in any manner whatsoever" (in the words of MK Y. Kushnir, Knesset Proceedings 40 (1964), at 2085). These reservations were rejected. Then-Minister of Justice D. Yosef, clarified that the Minister of Justice would not have a veto right over pardon decisions, but the President and the Minister of Justice would have a professional and refined relationship. In the words of D. Yosef:

> 'The Minister of Justice, like others, has a relationship with the President and he also knows what is stated in the law. He knows that if the President insists on a particular matter, the Minister of Justice cannot just say "no". In such a case, they will discuss the matter between themselves, and each will try to persuade the other one, but in any event, the decision to grant a pardon is in the hands of the President alone, although the Minister of Justice must verify his signature' (*ibid.*, at p. 2086).

17. This Court's case law has adopted a similar position. Although, as my colleague Justice Levy noted, the Court has not dealt directly with the nature and scope of the countersignature, a reading of the decisions dealing with the power to pardon and the Minister of Justice's countersignature indicates that the Court has presumed – as a matter needing neither proof nor preliminary discussion – that the Minister of Justice may exercise discretion before he affixes his signature to letters of pardon or to documents approving the lightening of sentences. Thus, for example, in *Reuven v. Chairman and Members of the Law Committee* [3], Justice S. Agranat noted the following with regard to the power to pardon pursuant to the Transition Law, which was later replaced by the Basic Law: President of the State:

> 'The supervision exercised by the person standing at the head of the state's legal system – the Minister of Justice – can be seen as a sufficient guarantee of protection of the public and of the preservation of the good name of the prosecutor's profession. That Minister is in a position to recommend granting a pardon, since in the end, he is the one who is authorized to uphold – if he sees fit to do so – the President's signature on a pardon letter' (*ibid.* [3], at pp. 755-756).

Similarly, in *Attorney General v. Matana* [1], Justice Z. Berinson noted that:

> 'The final decision [regarding pardons] is in the President's hands, but it appears that he is guided by the investigation and preparatory work which is carried out by the governmental branch, and he acts in accordance with its advice. It transpires that from a practical perspective, this branch is very involved in each specific decision and regarding the general pardon policy, and in any event, without its after-the-fact consent, as manifested in the Minister's countersignature, the State President is unable to grant a pardon' (*ibid.* [1], at p. 472).

In the same case, the Acting President (S. Agranat) noted the following:

> 'Every act of pardon on the part of the President requires a countersignature of the Prime Minister or of one of the ministers in the government . . . . This means that even if the decision to pardon or to reduce a sentence must be the personal decision of the President, it is also conditional upon the recommendation of the minister concerned. This minister will ordinarily be the Minister of Justice, who has the means of conducting a detailed investigation into the circumstances of the case before submitting his recommendation to the President. It is clear that this recommendation, and therefore the decision to pardon as well, are subject to review by the Knesset and it is this possibility which must be regarded as the guarantee laid down by law against the danger referred to' (*ibid.* [1], at p. 454).

See also the ruling of Deputy President Ben-Porat, who cited with approval these comments of the Acting President and noted that "[t]here is therefore someone who is answerable to the Knesset (the Prime Minister or the ratifying minister) and this safeguard is now fortified by the possibility of challenging the pardoning decision indirectly" (*Barzilai v. Government of Israel* [2], at p. 581). Finally, Justice Cheshin held unequivocally, in HCJ 706/94 *Ronen v. Minister of Education and Culture* [5], as follows:

> 'We should recall that a letter of pardon – like any official document that the President handles, other than a document regarding the Knesset's dissolution – requires a countersignature by the Prime Minister or by another minister as decided by the government (s. 12 of the Basic Law: President of the State). An act of pardon or of a reduction of a sentence is therefore a matter of combining one opinion with another: that of the minister with that

of the President. Only when there is this combination of views will there be a pardon or a lightening of a sentence.'

18. Similar comments have been made by most of the scholars who have dealt with the issue. Thus, for example, Prof. C. Klein has noted that the countersignature "symbolizes the assumption of political responsibility by the minister who gives the countersignature" (C. Klein, 'Panel Discussion on the Subject of Pardons', 15 *Mishpatim* 9 (1985), at p. 6). See also Professor Y.H. Klinghoffer's comments at a symposium on the pardon power:

> 'Can these two members of the government – the Prime Minister and the Minister of Justice – refuse the President of the State and refrain from providing a countersignature? The problem exists not only with regard to the grant of a pardon; it also relates to the actions of the President in general. I believe that the answer depends on the nature of the President's action. If the President is required by law to take this action – if the action is, for example the appointment of a justice whom the current Appointments Committee . . . has proposed – then there is also a requirement to provide the countersignature. On the other hand, if the law grants the President discretion regarding a particular matter – if the President can choose, as he wishes, whether or not take the action – then the member of the government has the same discretion and the same choice with respect to the countersignature. The power to pardon offenders is a power involving discretion. Therefore, the member of the government may, in accordance with his discretion, refuse to provide his signature and by thus refusing, prevent the pardon from taking effect. This also appears to be the correct interpretation, when one considers that the purpose of the countersignature . . . is that the government bear parliamentary responsibility for the acts of the head of state' (Y.H. Klinghoffer, *The Constitutional Framework of the Pardon – Symposium on Pardons in Israel* (1968), at p. 6).

See also the position taken by A. Rubinstein and B. Medina in their book, *Constitutional Law of the State of Israel* (2005), at pp. 1062-63. See also Z. Segal, *Israeli Democracy* (1998) at p. 196; B. Bracha, "The Constitutional Position, the Pardoning Power and Other Powers of the President of the State of Israel", *Israel Yearbook on Human Rights* (vol. 9, 1979) 190, at pp. 202-203 (1979). See also the comments of Justice (Emeritus) Landau in his *Commentary on the Basic Law*:

> ‘It could have been argued that the purpose of the countersignature is only to confirm the validity of the President’s signature on the letter of pardon, which is given only after the President has formulated his position and expressed it in the written document, to which the addition of a countersignature is a function that is imposed on the Minister as a requirement. However, this is not the accepted view and it is also not the custom that has developed concerning this subject. The custom is that the Minister carries out an active role of his own in the process of granting or refusing to grant the pardon. The main reason given for this version of the significance of the countersignature is that the Minister bears parliamentary responsibility with respect to this matter and he must explain to the Knesset, when such explanation is needed, why the pardon was given to a particular party, or why the pardon was not given’ (*Commentary on the Basic Law*, *supra*, at p. 42).

19. A review of the statutory language and interpretations thereof regarding the power to pardon and the countersignature, both in this Court’s case law and scholarly writing on the issue, indicates that the main position adopted under our law is that the countersignature requirement confers discretion upon the Minister of Justice. This is the case even if we allow that the question of the status of the countersignature has been discussed only in dicta accompanying a discussion of the power to pardon, rather than being ruled upon directly. This interpretation, as we will see below, also conforms to the practice that has developed, as a practical matter, with respect to the exercise of the power to pardon. The central importance of this interpretation can be found, in my view, not only in the fact that it conforms to the statutory language and customary practice, but also, primarily, in the fact that it is consistent with the basic principles of Israel’s system of government.

The normative framework of the power to pardon, in light of the fundamental principles of Israel’s system of government

20. As stated, the source in our law of the power to pardon is the power established in the 1922 Palestine Order in Council in the framework of the British Mandate for Palestine. The circumstances of the birth of the Israeli pardoning power under the shadow of English law has engaged this Court since its earliest days, beginning with decisions that examined the new state’s pardoning power, which was established in the Transition Law and, later, in the Basic Law (see *Reuven v. Chairman and Members of the Law Committee* [3]; *Matana v. Attorney General* [4]; *Attorney General v. Matana* [1];

Barzilai v. Government of Israel [2]). The question that runs through this Court's case law concerns the impact of the English monarch's power to pardon on the power to pardon in Israel, in light of the transfer, with certain changes, of the High Commissioner's powers to the Provisional Government, and with the establishment of the State, to the President of the State. The question arose in our case law in the context of a discussion of the scope of the pardoning power. Thus, for example, in *Reuven v. Chairman and Members of the Law Committee* [3], a question arose as to whether the grant of a pardon meant an erasure of the crime with all its consequences; in *Matana v. Attorney General* [4] and in *Attorney General v. Matana* [1], the Court examined the issue of whether the pardoning power also includes the power to commute a prison sentence to a suspended sentence; and in *Barzilai v. Government of Israel* [2], the question arose as to whether the pardoning power allowed the President of the State to pardon a person before he had been convicted at trial, based on the pardon of the General Security Service men in the "Bus 300 Affair".

21. A review of these decisions and other decisions examining the power to pardon reveals that a clear rule has been formulated over the years, according to which the Israeli pardoning power is not a direct continuation of that of the English monarch. "I cannot say," Justice Z. Berinson stated in *Attorney General v. Matana* [1], "that the Israeli legislature, in granting power to pardon to the President of the State in the Hebrew language, intended to include in it all the content that the concept of pardon had acquired over the generations in English law – a pardon which comes entirely from the Crown, without any qualification or limitation, by virtue of an ancient royal prerogative" (*ibid.* [1], at p. 976). This Court has held that the Transition Law, and following it, the Basic Law, "are original Israeli laws" and the President's powers prescribed in them are "autonomous and original. The Israel legislature, far from 'copying or omitting'" had built an "independent structure", "which must be construed as such by the courts" (*Barzilai v. Government of Israel* [2] at p. 594, *per* Justice Barak). In the framework of this independent structure, the pardoning power was given to the President of the State who, according to s. 1 of the Basic Law, stands at the head of the state. The determination that the President stands at the head of the state is primarily symbolic and serves to emphasize the parliamentary nature of the State of Israel, as distinguished from states with a presidential system of government, in which the President heads the executive branch (see Landau, *Commentary on the Basic Law*, *supra*, at p. 12). The power to pardon grants the institution of the presidency the status of a sort of separate

authority– "the pardoning authority," as Justice Cohn called it – which is conferred on the President of the State as the entity who "in his person, represents the State itself" (*Matana v. Attorney General* [4], at pp. 463 and 465 respectively).

The nature of the Israeli institution of the presidential pardon, as an independent authority which is detached from the pardoning power of the English monarch, means that the power to pardon should not be viewed as a presidential prerogative, the exercise of which is free of any qualifications or limitations. The English prerogative power is based, as is known, on the fact that the English monarch is perceived as being the source of justice and law, which is not the case with the President of the State under our system of government. At the same time, the decision to confer the power to pardon on the President of the State, who does not stand at the head of the executive branch in Israel, means that the pardoning power should not be seen as one which is controlled by the executive branch, even if it has executive characteristics. The pardoning power falls between these two ends of the spectrum. It does not grant the executive branch any extra weight in the pardon process, but it also does not place exclusive and absolute power in the hands of the President. The pardoning power, like many governmental powers in democracies in general and the Israeli system of government in particular, is the outcome of a delicate balancing act. The Israeli statute, as the above discussion shows, favors the middle road and grants the President of the State a broad power which may be exercised in accordance with the President's discretion, but it is accompanied by processes that provide for the review of the exercise of that power. The key review process, as described below, is the countersignature requirement.

22. The pardoning power and the processes for reviewing the exercise of that power are directly tied to the status of the President of the State in Israel. The President symbolizes the state and its democratic system of government and represents social and national unity, as expressed in the series of functions that are given to him, which demonstrate his official position.

It is not for nothing that the power to pardon is given to the President of the State, the individual who has the ability to weigh considerations that are not limited by the boundaries of the black letter law. Indeed, the pardoning power is a unique and special power. It is not exercised in accordance with fixed rules and the discretionary element is central to it. The exercise of the power combines considerations of kindness and mercy, which involve an element of forgiveness and absolution, together with considerations relating

to the good of the public as a whole. "The key concept behind the pardoning power," Deputy President Agranat wrote in *Attorney General v. Matana* [1], "is that in the use of this power there is a note of forgiveness and atonement; its exercise involves the element of mercy, as opposed to the element of strict law; the significance of this act is that a kindness is done for the person who is pardoned" (*ibid.* [1], at p. 445). For this reason this Court has held, in its case law, that we require "special legal rules" when we examine pardon decisions, since "we cannot nor would it be appropriate to apply [to pardoning considerations] the same administrative legal rules that ordinarily apply to the decisions of other government or administrative authorities" (*Ronen v. Minister of Education and Culture* [5], at p. 414, per Justice Cheshin).

23. Nevertheless, we should recall that the unique nature of the power to pardon lies not only in the considerations that are weighed when the power is exercised; it is also evidenced by the fact that the pardoning power, by its nature, involves intervention in the activity of the other state authorities. The grant of a pardon or the reduction of a sentence imposed on an offender involves intervention in a determination made by the judicial branch, which has rendered a judgment and imposed a penalty. It is also an intervention in the work of the executive branch, which has investigated and tried the person and is responsible for the execution of the sentence. In certain cases, the grant of a pardon or the lessening of a sentence is also an intervention in the activity of the legislative branch. This is the case, for example, when a statute establishes minimum sentences for a particular crime or requires that a suspended sentence be imposed, and their imposition is thwarted by the pardon. The combination of the broad discretion involved in the exercise of the power to pardon and the power held by the President of the State to change decisions and determinations made by the other branches is what makes the power to pardon a special power with unique strength. In effect, the question to be determined in this further hearing is whether this unique nature of the pardoning power justifies its exemption from the review processes that are standard in the Israeli system of government, the review and control exercised by the Knesset and the judicial branch being chief among them.

In my view, the answer to this is a negative one. Indeed, it cannot be said that the pardoning power is the only governmental power which, when exercised by one branch of government, has the effect of modifying the acts of other branches. However, it is generally the case that in order to preserve the basic principle of "checks and balances" that is standard under

democratic rule, the work of one branch is, at different levels, subject to the review exercised by the other branches. Therefore, the view that the President of the State is not subject to any means of review when exercising the power to pardon conflicts with the letter and the spirit of the Basic Law and with the parliamentary nature of the Israeli system of government, which is a "system that recognizes an organizational separation between the branches but supports strong cooperation among them" (Claude Klein, "On the Legal Definition of a Parliamentary System and on Israeli Parliamentarism" in 5 *Mishpatim* 308 (1974), at p. 315). Such a position would undermine the principle of separation of powers that is a foundation of the Israeli system of government and requires, on the one hand, a separation of powers between the various branches, and on the other hand, the exercise of mutual control among them (see Rubinstein and Medina, *Constitutional Law, supra*, at pp. 127-128). The basis of the idea of the separation of powers is not a "dictatorship of each branch within its own framework"; rather, there is a "mutual check and balance among the various branches. There are no walls between the branches – rather, there are bridges of checks and balances" (HCJ 73/85 *"Kach" Party v. Chairman of the Knesset* [6], at p. 158, *per* Justice Barak). A determination that the President of the State exercises the power to pardon independently, without being subject to substantive review – the major component of which is, in my view, the discretion given to the Minister of Justice in the framework of the countersignature – undermines one of the main principles of the Israeli system of government and would transform the power to pardon into an absolute power that has no place in a democratic regime. In a similar context, Justice Barak quoted the words of Justice Douglas to the effect that absolute powers are "the beginning of the end of liberty" (*Barzilai v. Government of Israel* [2], at p. 588). As President Shamgar noted in that case, "the conferment and exercise of all power can and should properly be subjected to supervision and review" (*ibid*. [2], at p. 562). This rationale is valid with respect to governmental powers in democratic regimes in general, and also to a power given to the President of the State despite, and precisely because of, his exalted position in our State. Justice Barak's remarks in *Barzilai v. Government of Israel* are particularly apt:

> 'During the era of absolute rule, when the power of pardon was wielded by the sovereign himself, there would have been little point in examining the division of authority among the different governmental organs. The ruler held supreme authority, and was therefore entitled to grant a pardon (individual or general) when so

> disposed, before or after conviction or the conduct of an investigation. It is different in a democratic constitutional regime. The sovereignty there lies with the people, the ruler is no longer omnipotent, and the rule itself is divided among the different authorities. Each has to function within its own sphere, though in general synchronization with the others and subject to mutual checks and balances. It is not in keeping with the democratic character of the regime that any authority, be it the President himself, should hold a paramount power which enables it to change a decision of any of the other authorities which have acted within their responsibility in the framework of criminal proceedings. Such a power may be fitting for an absolute ruler who wishes to show grace to his subjects, but is alien to a holder of high office who wants to serve his subjects' (*ibid*. [2], at p. 601).

24. Moreover, the power to pardon not only stands against the background of the principle of the separation of powers; the power expresses that principle since it is a type of control over the actions of the state authorities. Thus, for example, the power to pardon allows the President of the State to act with the flexibility that is sometimes required (see, regarding this matter, Leon Shelef, "Prison Ends with a Pardon", 44(1) *HaPraklit* 72 (2008-2010), at pp. 72-73). A good example of this is the power to limit the sentences of those who have been given life sentences. This power to pardon also allows the President to weigh considerations that the various authorities cannot consider in carrying out their functions, which include considerations of kindness and mercy, or considerations that can justify lessening a sentence due to a person's physical or mental condition. In addition, the pardoning power enables the "correction" of a criminal conviction when there is a concern that there has been a miscarriage of justice or a legal error. Although it is acceptable to raise such claims during a retrial proceeding in our legal system, they can also be relevant to the exercise of the pardoning power (see also the comments of Justice Agranat in *Reuven v. Chairman and Members of Law Committee* [3], at p. 747, surveying the development of the pardon in England as a means for correcting an improper conviction; see also Rubinstein and Medina, *Constitutional Law*, *supra*, at pp. 1064-1066).

25. It would therefore be wrong to detach the pardoning power from the separation of powers principle. Indeed, the President of the State enjoys a special status as the "head of state"; he does not belong to any of the other branches of government and "[h]e is a kind of additional authority to those four already existing (the legislative, executive, judicial and supervisory

authorities)" (*Barzilai v. Government of Israel* [2], per Justice A. Barak, at p. 605). However, this status of the President of the State, as well as the fact that the pardoning power is a unique power, are not sufficient to establish that the power is absolute and not subject to review by the other branches (compare Rubinstein and Medina, *Constitutional Law*, *supra*, at p. 1061).

At the same time, although the status of the President of the State and the unique aspects of the power to pardon do not justify deviation from the basic principle in a democratic regime recognizing the importance of mutual review, they have an impact on the *nature* of the review that is carried out by the other branches. It is sufficient in this context to recall, for example, the nature of judicial review of the President of the State, which consists only of indirect review. As is known, by virtue of s. 13(a) of the Basic Law, no legal action can be taken against the President. However, as Justice Cheshin noted, "the statute directs that the President is immune; the statute does not direct that the President's *actions* are immune. And indeed, the President's actions in the legal realm are neither above the law nor external to it, from which it follows that they are subject to review by the courts" (*Ronen v. Minister of Education and Culture* [5], at p. 412; emphasis in the original - D.B.).

26. The purpose of the countersignature should be viewed against the background of what has been stated above. It expresses the principle according to which "no action is taken in the state for which there is no responsibility (political or legal)" (Klein, "Panel Discussion on the Subject of Pardons", *supra*, at p. 16). The countersignature is intended to enable parliamentary review of the exercise of the pardoning power by the President of the State, who does not appear before the Knesset, is not required to report to the Knesset, and takes action at his own discretion. When the Minister of Justice's signature is joined to that of the President, the Knesset has the ability to supervise the President's actions by means of the Minister of Justice, who is able to report to the Knesset regarding the pardon decision. As Minister of Justice D. Yosef noted during the Knesset's deliberations on the second and third readings of the proposed Basic Law: President of the State, although the pardon is the President's decision, "parliamentary review of the Minister of Justice's recommendation to the President is appropriate. The President cannot be reviewed with respect to his decisions, but the Minister of Justice can be reviewed regarding his recommendations" (Knesset Proceedings 40 (1964), at 2086). For a similar view, see L. Sebba's comments in his treatise on the pardoning power:

> 'In a state which is based on parliamentary rule, it is standard to enable the legislative branch to supervise what has been done by the executive branch. The President of the State . . . does, from a certain perspective, stand at the head of the executive branch, although he is not entirely identified with it. Since the President of the State, taking into consideration his high office, does not appear before the Knesset and does not report to it, there is no way for the Knesset to receive reports on his actions or to review them. However, if a confirmation from the Government (or from one of its representatives) is attached to the President's decision, the Government (or the representative) will be charged with defending this decision' (L. Sebba, *Personal Pardon and General Pardon, supra*, at p. 243).

27. Naturally, it is clear that if the Minister of Justice was obligated to accept the President's decisions on the subject of pardons without objection or appeal, the Minister's review (or that of the Government or Knesset) would have no force. Review, as described, is possible only if the Minister of Justice has discretion regarding the decision as to whether or not to attach a countersignature. Thus, "the Minister bears the parliamentary and public responsibility for his signature, and it cannot be imposed on him if he is unable to exercise discretion regarding the matter" (see Rubinstein and Medina, *Constitutional Law*, *supra,* at pp. 1062-1063). For this reason, it cannot be said that the countersignature is intended only to verify the President's signature or to confirm that the administrative acts preceding the Minister of Justice's recommendation to the President were properly executed. Regarding these two matters, what would be the reason for there to be review, if the Minister of Justice were obligated, at the end of the process, to attach his signature even if he believes that the application for pardon should not have been approved? Only real discretion will allow for the full execution of the review process involved in the countersignature. This was the position taken by Knesset member Y. Shoffman, who sought to exclude pardon documents from the list of documents requiring a countersignature, during the discussion of the second and third reading of the proposed law:

> 'The idea [of the countersignature] is that the President of the State does not bear political responsibility, because political responsibility is borne by the Government, and therefore any document that he produces must also receive the Government's or a minister's countersignature; and if the Knesset finds that this document is incorrect – it will call upon the Government to bear political

> responsibility, not the President. This is the idea of this clause, and as I said, it is in full conformity with the entire structure of the institution of the President of the State, as we understood it in the proposed law' (Knesset Proceedings 40 (1964), at 2084).

28. An acknowledgement of the Minister of Justice's discretion regarding the decision whether to attach his signature does not lead to the conclusion that the Minister is a full partner in the pardon decisions. The power to pardon is indeed conferred upon the President of the State and he is the principal authority in this regard. The Minister of Justice carries out an important function within the pardon process, but he must exercise his discretion subject to the fact that the primary power is given to the President. Although the Minister of Justice's discretion is not limited to the issue of verifying the President's signature or ascertaining that the factual infrastructure required for the President's decision is complete, this does not mean that there are no limitations on such discretion. The Minister of Justice's ability to refuse to affix a countersignature must be limited to exceptional and unusual situations. Generally, these will arise only when the Minister is persuaded that the President's decision has been influenced by irrelevant considerations, was not made in good faith or suffers from a fundamental material flaw.

29. A similar interpretation regarding the significance of the countersignature and the manner in which the Minister of Justice's discretion is exercised can be found in Attorney General's Guideline No. 4.4002 (1 May 1975, 1 June 2003) entitled "Countersignature for the President's Signature on Pardons" (Attorney General M. Shamgar's guideline, and a later guideline of Attorney General E. Rubinstein). The Guideline states that the Minister of Justice has the power to refuse to countersign, although the situations in which this may occur are unusual and extreme. The Attorney General's Guideline, to which we will return below, states that the rule is that the countersignature will be added. There will "not be many" situations in which the Minister of Justice will refuse to countersign and the "exception in which the Minister expresses his opinion to the President that he is not prepared to provide the countersignature must be that exceptional and extreme situation in which the Minister feels that as a matter of conscience, he cannot take part in the act of pardoning and he cannot defend it at all, from a public or parliamentary perspective."

30. The countersignature is, first and foremost, intended to enable parliamentary review of the exercise of the pardoning power. However,

alongside parliamentary review, the countersignature also enables indirect judicial review of the power to pardon through a direct attack on the actions of the Minister of Justice. This review is carried out on the basis of the reasons formulated in this Court's case law. Since the Minister of Justice's signature is required on every letter of pardon or approval of the lessening of a sentence, indirect judicial review does not depend on decisions taken by elements within the executive branch to uphold or refuse to uphold the pardon decision, as proposed in the opinion of my colleague, Justice Levy. Rather, review is made possible, in principle, with each exercise of the Minister of Justice's discretion. It should be further noted, as a side point, that the possibility raised by Justice Levy, to the effect that the review mechanism will operate through the bodies involved in the execution of the pardon, who may refuse to carry out the President's pardon decision, is not a practical one. Such a scenario would actually confer upon these authorities a power that has not been given to them, the power to review the President's exercise of discretion.

31. In conclusion, an examination of the normative framework of the pardoning power in Israel leads to the conclusion that the basic principles of the Israeli system of government mandate review processes regarding the exercise of the power to pardon by the President of the State, which are expressed in the Minister of Justice's countersignature. The review processes, as noted above, do not equate the power of the Minister of Justice to that of the President of the State; rather, the Minister has the status of an authority who assists the President of the State and can, in exceptional, special and unusual cases, prevent the implementation of a pardon.

This interpretation, which views the countersignature as a tool that enables direct parliamentary review and indirect judicial review of the power to pardon, is not, as stated, foreign to Israeli law. It conforms to the language of the Basic Law and is consistent with its legislative history. It comports with Israeli case law and the writings of most scholars who have dealt with the subject. Moreover, the practice that developed over the years regarding the treatment of application for pardons is such that the power to pardon is exercised in the spirit of this interpretation. According to this practice, the Minister of Justice takes an active part in the pardon process; the standard perception, as it has been expressed in reality and as it is presented in the state's response, is that a decision to pardon or to lighten a sentence can be carried out only with the joint consent of both the President of the State and the Minister of Justice. Proof can be found in the fact that prior to the respondent's case, there had been no incidents of irreconcilable differences of

opinion between the President of the State and the Minister of Justice and they always found a way to exercise the power to pardon in a manner acceptable to both of them. This, of course, does not mean that they were always initially in agreement on the matter. However, it does show that the President of the State and the Minister of Justice felt an obligation to engage in a dialogue and eventually come to an agreement. It may be assumed that this consent meant that the Minister has sometimes retreated from his original position and that sometimes it is the President of the State who has accepted the Minister of Justice's recommendation.

Indeed, the decision-making processes for pardon applications in Israel are mostly based on a set of customs that developed over the years. This is the case regarding the relationship between the President of the State and the Minister of Justice as well as with regard to the work of the Pardons Department at the Ministry of Justice, whose functions are not anchored in law but in custom. As is known, although applications for pardon are submitted to the President's residence, they are transferred to the Pardons Department at the Ministry of Justice (see Attorney General's Guideline no. 4.400 (1 July 1974, 6 March 2003, 8 May 2003), entitled "Procedure for Handling Pardon Applications"). Pardon applications submitted by those tried by a military tribunal or a military court are transferred to the office of the Minister of Defense for his opinion. The Pardons Department at the Ministry of Justice is responsible for preparing all the preliminary clarification stages, after which its recommendation is transmitted to the Minister of Justice. The Minister of Justice examines the Department's recommendation and formulates his recommendation to the President of the State. If the Minister of Justice's recommendation is to grant the petition, a draft letter of pardon or a draft of a document approving a lessened sentence is attached to the recommendation. If, after the President reviews the recommendation, he chooses to reject it, the pardon is not executed. If the President chooses to grant the pardon application, he signs the letter of pardon and transmits it to the Minister of Justice who will affix his countersignature.

This set of procedures, part of which, as stated, is anchored in s. 12 of the Basic Law and part of which is the result of the development of the work procedures that are anchored in the Attorney General's Guidelines, raises a question that does not necessarily need to be decided in the context of this discussion, *viz*., whether or not a "constitutional convention" has been created over the years, whereby the Minister of Justice has discretion with

regard to attaching a countersignature, and a pardon decision or a decision to lighten a sentence is reached only with the consent of both officials.

Constitutional convention

32. A constitutional convention, a concept which has not been discussed extensively in our law, is "a rule with a normative basis, which establishes a standard manner of behavior for state authorities and government officials" (Shimon Sheetrit, "Limitations of a Transition Government", in *Yitzhak Zamir Volume on Law, Administration and Society* (Y. Dotan and A. Bendor, eds., 2005), 737, at p. 745). Constitutional conventions are mentioned mostly in the context of questions of government authority and the exercise thereof; they can regulate the division of powers among the various government authorities and outline the manner in which a particular power will be exercised. In unusual circumstances they can even determine that a power that is established in a law or in the constitution does not need to be exercised at all. Constitutional conventions can sometimes fill a gap in the constitution or adjust the written statutory or constitutional provisions to changing times. (See the definition of constitutional conventions provided by Peter Hogg, *Constitutional Law of Canada* (5th ed., 2007), at p. 21, according to which constitutional conventions "prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all.") Constitutional conventions, as Sir W. Ivor Jennings, described them –

> ' . . . provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas. A constitution does not work itself; it has to be worked by men. It is an instrument of national co-operation, and the spirit of the co-operation is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that co-operation' (W.I. Jennings, *The Law and the Constitution* (1943), at pp. 80-81).

In many states, including England and Canada, constitutional conventions are an integral part of the governmental system and effectively regulate the manner in which key governmental powers are exercised (see, for example, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1945), at pp. 417-473; P. Hogg, *Constitutional Law of Canada*, *supra*, at pp. 21-30). Incidentally, it is interesting to note that in England – the source of the Israeli

pardoning power – the power to pardon is given to the monarch, but a constitutional convention establishes that the king or queen will exercise his or her power only in accordance with the recommendation of the cabinet minister responsible for the subject. Therefore, if the minister recommends the denial of an application for pardon, the king or the queen will not act contrary to the recommendation, even though, theoretically, the power to pardon belongs to the monarchs (see, for example, the concluding report of the British Ministry of Justice on prerogative powers, including the pardoning power: *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report*, at p. 15: "The power is exercised by the Sovereign on ministerial advice", available at: http://www.justice.gov.uk/publications/docs/royal-prerogative.pdf,).

The question of when, in our system, a custom is transformed into a constitutional convention has not been discussed at length in the case law of this Court and the issue has not yet been decided. In similar legal systems, the standard is to invoke three tests that help to determine whether a custom has been transformed into a binding constitutional convention. First, one must examine whether the practice has in some manner taken root as a custom; next, it must be determined whether there is an "awareness of obligation", i.e., whether the officials and authorities who have acted in accordance with the constitutional convention in the past felt that they were obligated to act do so; and finally, the court must determine whether there is a logical rationale at the basis of the practice that has taken shape over the years and which has become a constitutional convention (see the definition of the tests and the application in the Canadian Federal Supreme Court's opinion, *Re Resolution to Amend the Constitution* [10], at p. 888; see also P. Hogg, *Constitutional Law of Canada*, *supra*, at pp. 23-25).

33. Going beyond what is required, as stated, I believe that generally, the approach presented above also characterizes the attitude towards the development of a "constitutional convention" in our system whereby the constitutional spirit takes shape from the manner in which it is implemented as a practical matter. Furthermore, various stages can be discerned in the development of the implementation of constitutional principles. First, there is a practice, then a "custom" according to which the authorities act, and then finally the custom becomes a "constitutional convention". Once a custom has become a "constitutional convention", the authorities, as well as officials, understand that there is an obligation to act in accordance with it and the courts will, as a rule, honor the actions of the authorities that are anchored in

the constitutional convention (see P. Hogg, *Constitutional Law of Canada*, *supra*, at p. 25-26).

Under the tests described above, I tend towards the view that from the manner in which the power to pardon has been exercised in Israel, we can conclude that a "constitutional convention" has crystallized. According to this convention, the Minister of Justice has discretion in terms of providing the countersignature and his actions regarding this matter are carried out in cooperation with the President of the State. From a historical perspective – examined in the context of the first test, that of past precedents – we see that as stated and as far as is known, over the years, there have not been any implacable disputes between the President and the Minister of Justice of the type that have led to the latter's refusal to countersign. Two key sources indicate that there has been a sense of obligation to act in a certain manner, which is what is examined in the context of the second test. *First*, this Court's case law has consistently clarified that the Minister of Justice has discretion with respect to the decision to countersign pardon documents. *Second*, the Attorney General's Guidelines dealing with this matter unequivocally established that the countersignature is a matter regarding which the Minister of Justice enjoys discretion and that he or she may, in exceptional cases, refuse to affix his signature. The Attorney General's Guidelines are extremely important in our context, since, as is known, Attorney General's Guidelines are binding on the government and the interpretation established in them is an official reflection of the existing law as long as a court has not held otherwise (see: Yitzchak Zamir, *Administrative Power* (1996), at p. 776; see also *"Kach" Party v. Chairman of the Knesset* [6], *per* Justice Barak, at p. 152: "Authority to interpret the law for the executive branch lies with the Attorney General, and his interpretation binds it internally"). Guideline 4.4002 provides that the power to pardon is the President's, but the need for a countersignature has "led to the development of a custom according to which the Minister conducts the investigation regarding each application for pardon and submits to the President of the State the material regarding the matter, along with his recommendation, either affirmative or negative." The Guideline also provides that if the President of the State does not accept the Minister's recommendation to reject the application for pardon, the President and the Minister of Justice must attempt to persuade each other. At the same time, according to the Attorney General, the Minister of Justice can refuse to countersign in an exceptional and extreme case "in which the Minister feels that as a matter of his conscience, he cannot take part in the act of pardoning and he cannot defend it on principle, from a public or parliamentary

perspective." (See also a similar interpretation proffered by Attorney General Meni Mazuz in a letter dated 11 May 2006, attached to the state's pleadings and marked as A/4.)

The third test for the creation of a constitutional convention examines the rationale underlying the constitutional convention (in the event that one has formed). We discussed this rationale above and found that the countersignature expresses parliamentary responsibility for the exercise of the pardoning power and the ability to subject the pardon decision to judicial review. This responsibility, as stated, results from the main principles of the Israeli system of government, which require a system of checks and balances with respect to the exercise of governmental powers.

34. The application of the above three tests to the pardoning power, as well as the manner in which the power has been exercised during all the years of the existence of the State of Israel indicate that a developed custom relating to the work of the Pardons Department and to the relationship between the President and the Minister of Justice has reached the level of the creation of a "constitutional convention". However, as stated, it is not necessary at this time to decide that question. In my view, the existence of a custom – whether or not it has reached the level of a constitutional convention – only strengthens the conclusion that the Minister of Justice has discretion regarding the matter of the countersignature. This conclusion is supported by other important arguments that justify the existence of a review mechanism with respect to the exercise of the pardoning power.

35. It should also be mentioned that the legislature saw fit to establish additional mechanisms for defining the President's discretion with respect to pardon decisions. Thus, in 2001, in s. 29 of the Parole Law, the legislature granted discretionary power to the Special Parole Committee that deals with applications submitted by those serving life sentences, to have limitations placed on the duration of their sentences. Section 29 of the Law provides that the Special Parole Committee may recommend that the President lighten the sentence of the prisoner by commuting his sentence into a fixed prison term – after at least seven years have passed from the time the prisoner began serving his sentence, and provided that the period recommended by the Committee is not less than 30 years. The section further specifies the considerations that the Committee may weigh in making its recommendation and provides that in the case of a prisoner serving a life sentence, the Committee may, at any time, at the request of the President of the State or of the Minister of Justice, recommend that the power to pardon be exercised.

The importance of the above-mentioned s. 29 for the interpretation of the power to pardon emerges in light of the situation that existed before its enactment. Section 29 of the Law was enacted because of the refusal of then-President Ezer Weizmann to limit the sentences of those serving life sentences. Although no one disputes that the power to pardon also includes the power to refuse to pardon – and in this case, to refrain from limiting a sentence – the legislature decided to promote greater uniformity in the operation of the sentence-limitation mechanism, which is a part of the pardoning power, by establishing the Special Parole Committee. Moreover, the Law also provides that the Special Parole Committee may not recommend the reducing a sentence to a period of less than thirty years. To a certain degree, the attempt to bring about greater uniformity in the limitation of sentences resulted from the fact that the limitation of a sentence and the use of an application for a pardon have become almost routine; both have become elements that are part of the manner in which the power of pardon is exercised in our legal system.

The significance of s. 29 of the Law is, therefore, twofold. First, the Law establishes an additional review mechanism, beyond the President's power to pardon. When the President of the State decided, in sweeping fashion, not to use his power – as happened during President Ezer Weizmann's term of office – the legislature created a qualification, albeit one that was limited in scope. Second, before s. 29 was enacted, the President of the State could choose whether to limit a sentence, and if he chose to limit a sentence, he could choose the length of time to which it would be limited. In the present statutory situation, it appears that in view of the recommendation of the Parole Committee, acting by virtue of the Law, the sentence cannot be limited to a period of less than 30 years. As a side point, we do not see the need to adopt a position regarding the significance of a President's decision to limit the sentence of a prisoner serving a life sentence other than in accordance with the recommendation of the Special Parole Committee or the provisions of the Parole Law, as no arguments regarding this matter have been raised before us (see, in this context, the position adopted by Justice Levy in HCJ 9631/07 *Katz v. President of the State* [7]).

Concern for the politicization of pardons

36. One of the key factors underlying my colleague Justice Levy's conclusion that the Minister of Justice has no discretion regarding the countersignature is the concern that political considerations will become a factor in decisions regarding pardons. According to Justice Levy's position,

granting discretion to the Minister of Justice is likely to "[detract] from the purpose in light of which this legal institution was developed" and could adversely affect the institution of the presidency to the point that it would "uproot its unique character" (paras. 14 and 16 of Justice Levy's opinion). Justice Levy also held that in light of the fact that pardon decisions will have the effect of changing determinations that have been made by the judicial branch, there is a concern that political pressure will be brought to bear upon the President of the State, which could lead to contempt for the legal process and to a miscarriage of justice.

In my view, there is no real danger that Justice Levy's harsh prediction would be realized. The apparent danger of intervention in decisions in the judiciary branch is relevant only when a court's final decision is modified. Such a change will take place only when the President approves an application for a pardon – that is, when there is agreement between the President of the State and the Minister of Justice regarding the pardon. This is so because even if the Minister of Justice recommends that an application for a pardon should be granted, if the President chooses to deny the application, the Minister of Justice cannot force the President to accept his recommendation. Once the Minister's recommendation is transmitted from the Ministry of Justice to the President's residence, the President can, of course, accept the recommendation or reject it. The first to sign the letter of pardon or the document approving the lesser sentence is the President. When the President refuses to sign, the pardon does not ensue. The operative significance is that the decision of the judiciary remains in force. If the President decides to grant the application for a pardon, the concern with respect to political intervention has no real significance since it is the *President* who has chosen to make the decision to pardon.

Of course, we cannot ignore the fact that the Minister of Justice is a political figure. The very fact of the Minister of Justice's involvement in the pardon process signifies that political considerations are likely to become part of that process. It is precisely because of this that the importance of the countersignature as a means of parliamentary and judicial review over the Minister's considerations – if those considerations are irrelevant or improper – becomes clear. In this review process, the actions of the Minister of Justice relating to the pardon power can be examined with respect to the question of whether they deviate from the realm of what is legal or whether they involve the application of improper pressure on the President of the State. The review can be carried out by the government and the Knesset. It can also take the form of direct review by the court. In the latter context, the court can apply

the rules of administrative and constitutional law to the Minister's actions. These rules require, *inter alia*, that the Minister make a decision based on an adequate factual infrastructure; weigh only relevant considerations; consider the recommendations of the various entities that examine the applications for pardons; and give proper weight to each piece of information submitted to him, including details relating to the applicant's record of convictions and to his behavior during his incarceration. These rules and the professional mechanism in the context of which the Minister of Justice acts have the capacity to significantly reduce the risk that the Minister will introduce political considerations; his exercise of discretion will be subject to review.

An aside: a comparative law view

37. We began our discussion of the case before us with the basic principle concerning the Israeli pardoning power, recognized in our case law over the years and which my colleague, Justice Levy, also accepts – the fact that the power is "an original Israeli creation". This principle, which runs through the Israeli case law, not only affects the interpretation of the pardoning power; it also affects our ability to learn from pardon arrangements followed in other states.

My colleague Justice Levy provided a broad and impressive description of the pardon arrangements followed in a long list of states throughout the world. The survey that appears in my colleague's opinion indicates that different states use a variety of mechanisms regarding the exercise of the pardon power. Various arrangements also exist with respect to the involvement of parties within the executive branch in the pardon process, including with respect to the possible need for a countersignature.

The question of whether we can look to the arrangements followed in other countries in construing the pardoning power was dealt with at length in the judgments of this Court that examined that power. As stated, the early judgments dealing with the issue rejected the view that we are required to interpret the power to pardon in the spirit of the power of the English monarch. This Court highlighted the importance of interpreting the pardoning power against the background of the basic principles of Israeli democracy. The basis of this approach is the perception that the power to pardon, like other sovereign powers, is based on unique characteristics of the Israeli democratic regime. It has previously been held, therefore, that information obtained from the study of comparative law can be used only with extreme caution, although such information can teach us about the various possibilities with regard to the exercise and interpretation of the pardoning

power. I therefore share the view that only qualified importance may be attributed to the pardon arrangements established in other countries, in which the structure of governmental powers is significantly different from the structure of powers in the State of Israel. Thus, "however similar the scope of the powers held by similar officials in other countries," stated Justice A. Barak in *Barzilai v. Government of Israel* [2], "we must in the final analysis construe the President's own power against the domestic constitutional background, and in the end we can gain but limited interpretative guidance from the situation in other countries" (*ibid*. [2], at p. 596).

38. The pardoning power, as stated, takes different and various forms in different legal systems. My colleague Justice Levy elaborated on this point. There are states in which the pardoning power is granted to the head of state (the king, president or governor-general), while in other states the pardoning power is conferred only upon the parliament or the judicial authority. There are states in which the pardon process involves an advisory committee, while in other states exclusive power is granted to a single government body. In some states pardons can be granted only after a conviction, while other states allow pardons before convictions as well. In some states only the penalty can be affected, while in other states the pardon strikes out the conviction itself. In certain states a pardon is given only in extreme, unique and exceptional circumstances in which there is a concern that a fair trial was not conducted, while in other states pardons are used relatively frequently. In some states a pardon decision can be attacked either directly or indirectly in court, while in other states there is no right to appeal to the court regarding such decisions. Certain states have established a requirement that the government or a government minister must countersign, and some states have given up this requirement; among those states in which there is a countersignature requirement, different and various explanations are given for its significance and scope (see, among many others: L. Sebba, "The Pardoning Power – A World Survey", 68(1) *J. Crim. L. & Criminology* 83 (1977); see also the examples cited in the opinion of President M. Shamgar in *Barzilai v. Government of Israel* [2], at pp. 549-551). Indeed, there is no single universal pardoning model. Because the power to pardon is rooted in the fundamental principles of the system of government, "virtually every legal system has fashioned its own peculiar perspective on the subject, in harmony with its other governmental institutions" (*ibid.* [2], at p. 550, per Justice Shamgar). For this reason, even if the arrangements in other countries are examined, they should be treated with extreme caution. Thus, for example, it is doubtful that we can learn from a judgment of the Italian Constitutional Court,

regarding which Justice Levy notes that "this is the normative environment in which the pardon exists in our legal system as well" (para. 13 of the judgment). Although the Italian judgment deals with a question that is similar to the one discussed in this further hearing, the differences between the status of the President of the State there and here, the different functions given to the President of Italy by the Italian constitution that are not given to the President of the State of Israel, and the distinctions involved in the exercise of the power to pardon as such are indicated by the judgment of the Italian court, including the possibility of the Italian President applying to the constitutional court, make it difficult to draw an analogy between the rules established there and our law.

Conclusion

39. For the reasons above, I believe that the position adopted in the judgment in the original petition, whereby the countersignature is intended only to confirm that all the processes that are preliminary to the pardon decision made by the President of the State have been carried out in full and nothing more, greatly restricts the Minister of Justice's discretion in a manner that is inconsistent with the basic principles of the Israeli system of government, the statutory language, and the case law interpreting the power to pardon. In my view, we must not abandon the principle that there is no governmental power that is not subject to review, including those powers given to the President of the State. This principle requires that the Minister of Justice be given discretion with respect to affixing a countersignature to a President's decision to pardon or to lighten a sentence, in a manner which allows for parliamentary and judicial review of the exercise of the pardoning power. This review, as noted above, should be exercised moderately and after taking into consideration the nature of the pardoning power and the exalted status of the President of the State who holds it. Therefore, if my view is accepted, I would uphold the position of the Minister of Justice with regard to the essence of the appeal.

Regarding the specific matter before us, as time has passed and personnel changes have taken place at the President's residence and at the Ministry of Justice since the respondent applied for a limitation of his sentence, I propose to my colleagues that we rule that his matter be returned to the Special Parole Committee and to the current President of the State and Minister of Justice, who will exercise their powers taking into consideration this Court's holdings in this further hearing.

Justice M. Naor

I share the view of the President that an examination of the normative framework of the pardoning power in Israel leads to the conclusion that the basic principles of the Israeli system of government require processes for review of the exercise of the President's pardoning power – processes which are expressed in the countersignature of the Minister of Justice. These review processes do not make the Minister of Justice an authority whose power is equal to that of the President of the State. Rather, his status is that of an ancillary authority to the President, an authority which has the power, in exceptional, special and unusual cases, to prevent the implementation of a pardon. The Minister of Justice himself is subject to public criticism and review by this Court. Therefore, as President Beinisch has proposed, the position of the Minister of Justice should be accepted.

I also concur in President Beinisch's recommendation that the respondent's case be returned to the Special Parole Committee and to the current President of the State and the Minister of Justice.

Deputy President E. Rivlin

I concur with President Beinisch's decision. For all the reasons provided by the President, I agree that the Justice Minister may independently decide whether to add his or her signature to that of the State President on a clemency order. As noted, this approach is consistent with the previous decisions of this Court. *See*, *Reuven v. Chairman and Members of the Law Committee* [3], at 755 - 56 (Agranat, J.); *Attorney General v. Matana* [1], at 472, (Berinson, J.); *Id*. at 454, (Agranat, Acting President); *Barzilai v. Government of Israel* [2], at 581, (Ben-Porat, Deputy President); and *Ronen v. Minister of Education and Culture* [5], at 412, (Cheshin, J.). This view is also consistent with the legal guidelines provided by the Attorney General and reflects the position of most legal scholars who have addressed the issue. (See the sources cited in paragraph 18 of my colleague's opinion.)

> The basic principles of a democratic regime, which are based on mechanisms of checks and balances, do not allow for any absolute power to remain in the hands of the State President with no oversight or review. Nevertheless, and as my colleague emphasized, the authority given to the Minister of Justice to refuse to affix his signature to a clemency order should be limited only to the most exceptional and unusual cases. The fact that this is the first time a Minister of Justice has refused to sign a

clemency order demonstrates that this case is an exceptional case in which the Minister of Justice may utilize her discretion.

Justice E. Arbel

There is no dispute as to the exalted status of the President of the State. Nor is there any disagreement regarding the fact that he has a unique and special power to pardon offenders and to lighten their sentences. This power is accompanied by a requirement for the countersignature of the Prime Minister or that of another minister – the Minister of Justice. Regarding the nature of the countersignature, and the scope of the discretion given to the Minister of Justice, I am in full agreement with my colleague, President Beinisch. I concur in her findings and in the reasoning elucidated in her opinion. This issue is a very important one and raises serious constitutional questions.

The grant of discretion to the Minister of Justice, which allows him/her to refrain from providing a countersignature, is necessary and unavoidable. At the same time, he or she may exercise this discretion only cautiously, in exceptional circumstances. My colleague, President Beinisch, believes that the Minister of Justice's involvement should be limited to cases in which he or she is "persuaded that the President's decision is tainted by an extreme degree of unreasonableness or is motivated by irrelevant considerations." I agree with this position, although it is clear that even in such a case, a significant degree of discipline and restraint will be required.

In light of the rarity of the cases in which the Minister of Justice will intervene in the decision of the President of the State to grant a pardon – which can be inferred from past experience and the principles proposed in the President's opinion – I do not share the concern that the grant of discretion to the Minister of Justice, or of a veto right, as my colleague Justice Levy termed it, will harm the status of the institution of the presidency or take away its unique nature. I do not believe that it will lead to the application of political pressure. This is the minimum review and oversight required by the basic principles of Israel's democratic system of government in order to maintain the basic principle of "checks and balances" among the various authorities.

Justice E. Hayut

I concur in the judgment of my colleague, the President, and with the reasoning and reasons set out in it. Indeed, the interpretation she followed

with respect to the significance of the pardoning power granted to the President of the State and the nature of the countersignature of the Minister of Justice on pardon and sentence-lightening documents, as a signature involving a certain degree of discretion is, in my view, consistent with the basic principles of a democratic regime, as reflected in Israel's legal system.

Justice S. Joubran

I concur in the instructive and comprehensive opinion of my colleague, President Beinisch, according to which the basic principles of Israel's system of government, primarily the principle of the separation of powers among the branches, require that there be processes for review of the exercise of the pardoning power of the President of the State, as expressed in the Minister of Justice's countersignature. This conclusion is based on the relevant legislative history, on the Attorney General's Guidelines and on the decisions of this Court, as described at length in my colleague's opinion. I also concur with President Beinisch's position that the Minister of Justice should be authorized to refuse to affix a countersignature to the President's decision only in exceptional and unusual circumstances, in which the Minister has difficulty supporting the pardon and has been unable to change the President's mind.

President Beinisch discussed the issues that arose in the further hearing before us, including –I would stress – the concern about involvement of irrelevant political considerations in the pardon decisions, in detail. First, there is a presumption that the Minister of Justice will exercise his discretion in this context in an apolitical manner which is free of irrelevant considerations. Of course, if a suspicion should arise that the Minister of Justice has not acted in this manner, the doors of this Court are open and it has the power to review the Minister of Justice's decision in this matter, as it can review any other administrative decision. Secondly, I sincerely hope that when providing a countersignature for pardon matters, the Minister of Justice will recall that although he is a political personality, with regard to a pardon – which has an apolitical character – he must see himself first and foremost as executing an official matter of state and will act accordingly.

I also concur in President Beinisch's recommendation that the respondent's case be sent to the relevant parties for re-examination.

Justice E. Rubinstein

1. I have not changed my view, as it was stated in the judgment forming the subject of this proceeding (hereinafter: "the original judgment"), and

which is now the majority view, as stated by the President. The following principles formed the core of my opinion:

> 'The idealistic perception of a decision which has nothing behind it and which looks forward only, as in the approaches mentioned by my colleague and as in the approach of my colleague himself, is, I believe, suitable only for those who dwell in the heavens and not for human beings. It is true that the President's decisions cannot be appealed, but it is for this reason specifically that there is a need for review, for those occasions on which it is required, and for preventing the misuse – heaven forbid – of the power. The Minister's countersignature must serve as a sort of "gatekeeper" for the President of the State. Let me be clear: the countersignature does not negate discretion – it negates only discretion that deviates from the law in that it is defective.' (Compare also the remarks of Justice Berinson in *Matana v. Attorney General* [4]; A. Klagsbald, "A Note on the Scope of the Immunity of the President of the President of the State", 7 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 238 (1979), at pp. 243-244.)

One may ask whether the Minister, who is a political personality, is fit to serve as the "review unit" vis-à-vis the President? . . . The answer is that although the matter is not problem-free, there are nevertheless quite a few mechanisms surrounding the Minister, as noted by my colleague, and when these mechanisms are in place, the chance that the Minister will act improperly is greatly reduced. Moreover, the Minister is subject to the direct review of this Court sitting as the High Court of Justice, something which is certainly undisputed. On the other hand, we cannot ignore the complexity (or the strangeness, in the words of Klagsbard, *supra*, at p. 240), of the indirect attack mechanism, should the Minister of Justice be prevented, from the outset, from exercising discretion in the course of the act of pardoning, while the exercise of discretion is required of administrative bodies, who in like matters generally do not have discretion (paras. 10, 12).

I also discussed (in paras. 14-17) the nature of the pardon from the Jewish perspective, as one of God's attributes, which according to at least one approach, "is not detached from the strict legal perspective . . . as in the words of the prophet, 'I will espouse you with righteousness and justice and with goodness and mercy.' (*Hosea* 2:21) (para. 17)." I will not repeat all my comments, which can be found where they were originally written.

2. For this reason, I concur in the opinion of my colleague, President Beinisch, and with the remedy she proposed (para. 39). She refers to the differences between the English monarch and the President of the State of Israel with respect to their being subject to review (paras. 20-21). I wish to stress that in the Jewish tradition, the king's actions are also subject to review. The Mishnah indeed states that the "king does not judge and he is not judged" (Babylonian Talmud, *Sanhedrin* 2b), but alongside this Mishnah, the Babylonian Amora, Rav Yosef also cites a tradition:

> 'They spoke only of the kings of Israel, but kings from the House of David – they judge and are judged . . . why not the kings of Israel? Because of an event that occurred . . . . (Babylonian Talmud, *Sanhedrin* 19a).
>
> And in modern Hebrew: The Mishnah spoke only of the kings of Israel [the kings of the biblical Israelite kingdom], but the kings of the House of David [of the united kingdom and of the biblical kingdom of Judea] – they judge and are judged . . . . And what was the reason that they said that the kings of Israel do not [judge and are not judged]? Because of an event that occurred.'

This means that as a rule, the king, too, "judges and is judged," but with respect to the kings of Israel – who, in the words of Maimonides in his commentary on the Mishnah there, "ruled evilly and did not attribute importance to humility and modesty and did not tolerate the truth" – it was established that they cannot be judged "because of an event that occurred." And what was the event? An event involving King Yannai, one of the kings of the house of the Hasmoneans, who instilled fear in his judges, until "[the angel – E.R.] Gabriel came and struck them to the ground and they died" (Babylonian Talmud, *ibid*.). Although Rav Yosef's interpretation is inconsistent with the sweeping language in the Mishnah or other binding sources (see, for an example, *Tosafot*'s commentary there, s.v. "but the kings of the house of David"), the Jewish sages viewed the situation of a government entity that is not subject to review as even more problematic. (I do not deal here with the question of which specific legal matters are referred to in this Mishnah; the presentation of the principle is sufficient for our purposes.)

3. As a marginal point, I add that the question confronting me as I wrote my original opinion and which confronts me again now, is whether it is possible or desirable to distinguish between different countersignatures. In particular, I looked at s. 11(a) of the Basic Law: President of the State. Do we

say that the same discretion exercised by the Minister of Justice when countersigning a presidential pardon can be (and perhaps should be) exercised by the President of the State when he signs laws passed by the Knesset or "treaties with foreign countries that have been ratified by the Knesset"? Further, is it correct to make a distinction between the Minister of Justice's discretion regarding a countersignature on a letter of pardon and the discretion that ministers must exercise when they countersign other documents coming from the President?

4. This question need not be resolved for the purpose of deciding the matter that is before us and is not dealt with expressly in the original judgment (nor in a comprehensive and interesting article published following that judgment, Y. Nehushtan, "The Status of the Countersignature in the Framework of the Pardon Process: After HCJ 10021/06 *Zohar v. Minister of Justice*", 2 *Mishpatim Al Atar* 25 (2010), which supports the position now taken by the majority). A possible answer may be found in the distinction made by President Beinisch "between the *functions* given to the President and the *power* granted to him to pardon offenders" (para. 15; emphasis in the original), and possibly in her remarks regarding the formulation of a "constitutional convention". There are also other reasons for distinguishing between the "countersignature" in s. 12 of the Basic Law: President of the State and other types of signatures (and between a letter of pardon and other "presidential" documents). These possible lines of thought contain solutions to some of the questions that remain before me in light of the position that I proposed in the original judgment, which has now been accepted as the majority opinion.

5. In conclusion, I am very much in favor of the doctrine of the constitutional convention described by President Beinisch. In my view, over and above the criteria that she mentioned, recognition of the institution of a constitutional convention has educational and moral importance. It radiates stability and continuity in the normative system and makes it possible – even in a state in which the work of establishing a constitution has not been completed and whose constitutional institutions are not fully rooted in a constitution which is written like the rest of its law – to instill a sense of a constitutional tradition that passes from generation to generation. In my view, this is a matter of invaluable importance.

Justice E.E. Levy

1. I have read the comprehensive opinion of my colleague the President as well as the opinions of my other honorable colleagues. I also read Dr. Yossi Nehushtan's above-mentioned incisive article, which was written following our original judgment. Although I still take the view that this is a new path and not just a step along the route of an existing constitutional convention, I am prepared to go further along this path with my colleagues than I did in my initial opinion.

I too, "since the handing down of the judgment – and against the background of the further hearing itself – … have not stopped questioning myself as to whether my approach was properly based in the law," (CrimFH 7048/97 *Anonymous Parties v. Minister of Defense* [8] at p. 744, per President Barak), and therefore, after giving much thought to the matter, I accept that there is an advantage in implementing a mechanism that ensures the legitimacy of the President's determinations in pardon cases. This is because of the sensitivity of the issue and because of the special status of the President of the State, who, it has been held, is not subject to direct judicial review. I would, however, emphasize that this mechanism should be available only with respect to those decisions which, were they tested according to administrative law, would be deemed utterly void – i.e., decisions made on the basis of irrelevant considerations, or which have been made other than in good faith or which are *ultra vires*. I do not believe that the Minister of Justice should be given any role to play in the assessment of the reasonableness of the President's decisions. In my view, a defect in terms of reasonableness should not by itself serve as a ground for a refusal to countersign. Nevertheless, such a defect is able to indicate the presence of one of the grounds that I have mentioned above.

2. My original view was, and still is, concerned with the intervention of the executive branch in the act of the pardon, lest the executive become a partner in the exercise of presidential discretion. Such intervention would not only detract from a presidential prerogative that has an established status in our legal system and threaten to involve the executive branch in the decisions of the courts, in violation of the principle of balancing between the branches of government, but as a matter of substance, is likely to bring about the involvement of irrelevant considerations in the act of the pardon. In truth, if there was initially a concern that the President of the State would become dependent – in practice, if not in theory – on the preliminary recommendations of the Ministry of Justice, this concern becomes much

greater if it is necessary to obtain the Minister's later consent to the presidential decree. Not only is this liable to give the Ministry of Justice and the Minister who heads it, at least, an equal status regarding pardon matters; it is also evident that it could create a bargaining system, "along the lines of 'support my candidacy, and I will support your candidate'" (HCJ 1637/06 *Armon v. Minister of Finance* [9], at para. 11, per Justice Levy). The serious concern is that such a "negotiation" could be hidden since it will have aspects which by their nature will not reach the awareness of external parties – either those applying for pardons, or the public, or the courts in which the judicial review takes place. Such negotiations, which naturally accompany a joint exercise of discretion, do not and cannot limit the Minister of Justice's impact to "exceptional and extreme circumstances" – in the language used above.

My original opinion entered into uncharted territory, in which a number of doctrines with completely different perspectives on the nature of the countersignature presented themselves. The main part of what I wrote then was directed at the rejection of the doctrine concerning the "parallel power" (Nehushtan, "Status of the Countersignature", *supra*, at p. 33). The scholars whom I cited were vigorously opposed to this idea and none of my colleagues dispute my position rejecting this view (and any view similar to it) entirely. Other legal systems which, in my view, have more in common than not with the Israeli system in this regard, have also reached this conclusion. This is so because the negative impact that interests connected to governmental survival and party politics will have on matters in which no such considerations should be allowed is not tied specifically to the institution of British royalty or to the president of the Italian republic in particular. These are fundamental questions that arise in any democratic legal system, in which one of the government institutions is given the power to change a final determination made by the courts.

It is therefore appropriate to limit the power of the Minister of Justice to an area with well-defined boundaries, within which he will not be given any role in shaping the content of the determination that has been made, or in evaluating its substance. For this reason, I am completely unable to accept the position expressed in *Ronen v. Minister of Education and Culture* [5], at p. 412, whereby "the act of pardon or of lightening of a sentence is a joining of one view to another view: the joining of the Minister's view to that of the President of the State." In my view, the Minister's signature cannot serve as anything other than a stamp of confirmation with regard to the fact that the decision that was made complies with the basic requirements of a governmental action, meaning that it was made by the authorized party, that

all the required information was placed before the President of the State – as stated in my original judgment – and weighed on its own merit, and that the decision is not the result of any improper motivation or arbitrariness. That, and no more.

3. Since I have found support for the position that most of the cases in which the question under discussion arises are not of the type dealt with in the above-mentioned judgments – *Attorney General v. Matana* [1] and *Barzilai v. Government of Israel* [2] (per President Beinisch, at para.30; Nehushtan, "Status of the Countersignature", *supra*, at p. 43) - it appears that the outline of the review which is being proposed here (and in my view its function is to ensure judicial review more than parliamentary or public review, see Nehushtan, *supra*, at p. 31) is a good balance between the independence of the President of the State's discretion and the concern of which my colleague, President Beinisch, wrote in para. 23 of her opinion, regarding the existence of a power that is not subject to any review.

4. Thus, I am prepared to accept the position that the requirement of a countersignature on pardon matters provides a means for overseeing decisions regarding which there is a concern that their origin is improper, which cannot be challenged in any other way. In my view, the issue of reasonableness should be left in the hands of the President of the State.

Justice Y. Danziger

1. After reviewing President D. Beinisch's comprehensive and learned opinion, I have reached the conclusion that I cannot concur in her position. My opinion remains as it was. Once the President of the State has signed a letter of pardon, the Minister of Justice is also required to attach his countersignature, and he may not exercise any discretion, nor can he "veto" the President's decision – because the President's power to pardon offenders is a unique power of the pardoning authority, and it is intended to grant to the President of the State, in this area, full freedom to act as he wishes and in accordance with his best understanding.

2. As will be recalled, in the original judgment, I concurred in the opinion of my colleague, Justice E. Levy. Today as well, my position is supported by Justice Levy's comprehensive and in-depth reasoning in that judgment, which I see no need to describe again here. I will mention that in my opinion in the original petition, I reasoned, like Justice Levy, that the President's power to pardon does not fall within the definition of an executive act: it is a presidential prerogative which grants the President of the

State full freedom to decide the petitions for pardon as he sees fit. I further emphasized in my opinion in the original judgment that the countersignature is not intended to give to the government's representative the status of a partner in a decision regarding pardon matters, and certainly not the power to decide them. I reasoned then, and I still believe now, that the entire purpose of the countersignature is to ensure that all of the information that is relevant to the President's decision has been submitted to him for his review, and that no mistakes whatsoever have occurred. Unlike my colleague Justice Rubinstein, I believed and still believe today that once the relevant material has been placed before the President of the State and once he has decided to pardon a particular person, then even if the Minister of Justice does not agree with the President's decision, he is required to affix his countersignature, because if this is not the case, the representative of the executive branch will be given a sort of "veto" right regarding the President's decisions in an area in which the President alone has been given discretion to make such decisions.

3. I wish to add a number of comments regarding President Beinisch's opinion in the further hearing. Like my colleague Justice Levy, I also believe that President Beinisch's position does not refer to an "existing constitutional convention"; rather, we are dealing with a "new path" that does not necessarily conform to the constitutional history of the State of Israel with respect to the characteristics of the functions of the President of the State in general, and in particular with respect to his power as the pardoning authority, as Justice Levy stressed extensively in the framework of the judgment in the original petition, while describing at length the nature and sources of the President's pardoning power.

4. President Beinisch's central criticism of the position presented by the majority judges in the original judgment – a position that I still hold – was that it is unreasonable that the President of the State would not be subject to any oversight or review, in contrast to the other branches of the constitutional regime in the State of Israel, and in violation of the principle requiring a system of "checks and balances", which is one of the basic principles of a democratic system.

However, I believe that the majority opinion in the original petition provided a proper response to President Beinisch's concern. Remarks made in the opinion serve to clarify that the President of the State is not placed above the law and even he is subject to control and oversight, in a manner consistent with the principle that requires a system of checks and balances.

Thus, para. 23 of Justice Levy's original judgment outlines the manner in which judicial review over the President of the State's pardoning power is exercised. Although this is indirect review, it nevertheless leads, in the end, to the same result as the direct review preferred by President Beinisch in her opinion in the further hearing. As Justice Levy held:

> ' . . . Indeed, once a decision has been made regarding the grant of a pardon – and in any event it is only then that there is a matter which can be upheld – the implementation of the decision requires the actions of various administrative bodies. These are subjected, without difficulty, to review which is based on rules of public law. The (direct) review of their actions is the springboard for the (indirect) review of the President's decision. As Justice Berinson wrote: "There is no need to disqualify the [President's] act itself. It is sufficient for us that we refrain from validating it and provide no assistance for its execution"' (*Matana v. Attorney General* [4], at p. 979).

Consequently, I cannot understand the claim that the majority opinion in the judgment in the original petition is inconsistent with the principle requiring a system of checks and balances.

5. In light of the existence of an indirect mechanism for review and supervision of the pardoning power of the President of the State, it is not at all clear to me why a system of direct review is *prima facie* preferable, when such is inconsistent with the nature and functions of the President in general and with the unique characteristics of the institution of pardon in particular. Moreover, I believe that the practical significance of President Beinisch's opinion is to give the Minister of Justice a right to "veto" the decision of the President of the State to pardon a particular person, and it is specifically in this way that I believe that harm is done to the principle of checks and balances on which President Beinisch bases her opinion. Since this harm to the principle of checks and balances can be avoided by opting for the indirect review mechanism, I believe that this route should be preferred over direct review, which serves to erode the nature and uniqueness of the pardoning power.

6. The additional reason for preferring the indirect review mechanism is that a political figure should not be given a "veto" right over the decisions of the pardoning authority – as my colleague, Justice Levy, noted in the judgment in the original petition. The reason for this is that a political figure is likely to weigh irrelevant considerations that are not among those that the

President of the State should generally take into consideration in deciding to pardon a particular person – such as sectoral considerations that reflect the "voter's interest", or the interest of a particular group that the political figure champions. The institution of the pardon, as my colleague, Justice Levy, explained, does constitute an intervention in a judicial decision, and for this reason, the public interest requires that the decision to pardon a particular person must not be influenced by political considerations. As Justice Levy wrote in the judgment in the original petition, the prohibition against introducing political considerations into the framework of an act of pardon flows from the characteristics of that institution in the Israeli legal system, and the unique outlines of its character, which clearly separate it from the executive branch's area of jurisdiction.

7. President Beinisch writes that there is no real concern regarding the effect of political pressures on the decision of the President of the State to pardon a particular person. President Beinisch further notes, as do my other colleagues in the panel, that the cases in which the Minister of Justice can intervene in the President's decision are rare and unusual. However, even if no direct political pressures are exerted on the President, and even if such intervention would be possible only in rare and unusual cases – the fact of the possibility of the Minister of Justice's intervention will always be in the background, and the President will always be aware of it; for this reason, when he comes to pardon a particular person, the President could, heaven forbid, act so as to reach prior agreements and understandings with the Minister of Justice. This is something that needs to be avoided, for the sake of the public interest in the "clean nature" and purity of the institution of the pardon, and in order to prevent any adverse effect on the public's faith in the institution of the presidency in general, and in the pardoning authority in particular.

8. In conclusion, I note that I cannot concur in the current position taken by Justice Levy, according to which the Minister of Justice may refuse to affix his countersignature when he believes that the President's decision was made due to irrelevant considerations. The reason for this is that if indeed the President relied on irrelevant considerations, the way to exercise review and supervision over such cases is through the indirect judicial review mechanism, as I have noted above, and as explained by Justice Levy in his judgment in the original petition. Since the indirect judicial review mechanism is, in my view the preferred review mechanism, in light of the unique nature of the pardoning authority, this is the mechanism that should be

used, even when the matter involved is a concern that the President has made a decision based on irrelevant considerations.

9. Finally, I retain my view as expressed in my opinion in the original judgment, and I do not believe, even after reviewing President Beinisch's learned opinion, that there is any reason to change it.

Decided as *per* President Beinisch's opinion, with which Deputy President Rivlin, and Justices Naor, Arbel, Rubinstein, Joubran and Hayut concurred and with which Justice Levy concurred in part, and against the dissenting opinion of Justice Danziger.

22 Kislev 5771.
29 November 2010.