H.C. 210/60

RABBI SOLIMON H. ABUDI
v.
MINISTER OF RELIGIONS AND 6 OTHERS

H.C. 205/60

ABRAHAM ZEPHANIA
v.
MINISTER OF RELIGIONS AND 3 OTHERS

In the Supreme Court sitting as the High Court of Justice

Silberg J., Witkon J. and Cohn J.

Administrative law—Election Committee of Chief Rabbinate Council—Character of membership—Whether members appointed or elected—Ability to resign—Validity of removal and replacement of a member—Competence of Committee acting without full complement—Majority required for decisions—Regulations prescribing the System of Elections or Appointment of the Rabbinical Council etc., 1936 *(as amended in* 1954)*—Interpretation Ordinance.*

Upon the death of Chief Rabbi Herzog, an Election Committee of eight members was nominated under the Regulations to appoint and convene an Electoral Assembly. Half of the Committee was nominated by the Rabbinical Council in January 1960 and half by the Minister of Religions in June 1960. The first meeting of the Committee was convened by the Minister in July 1960, notwithstanding the claim of the Rabbinical Council that the invitation should be a joint one. In consequence, the four Council members refused to attend but subsequently one of them, Rabbi Abu Revia, relented. Thereupon the other three tendered their resignations to the Council which after considering the matter resolved to remove Rabbi Abu Revia from membership of the Committee and to replace him by another, calling upon the other three to withdraw their resignations. The latter refused to do so but finally such refusal was accepted as was also the refusal of the replacement to act. In the meantime, the Committee continued to carry out its tasks with the four Ministerial members and Rabbi Abu Revia, after receiving an opinion from the Attorney-General that neither the purported removal nor the resignations were of legal effect, since members were elected and only the Committee itself could accept resignations and effect removals, and even if they were appointed, the character of their duties required that the appointer became *functus officio* upon making the appointment, without any further right of interference. The Council claimed that it was competent to remove Rabbi Abu Revia, that the other three could resign if they so desired and therefore that the Committee was not properly constituted and could not lawfully act by the remaining four members.

Held: (1) That the removal of Rabbi Avu Revia was devoid of all legal effect

because on appointment a member does not become an agent of the appointer, the 'umbilical cord' between them being cut (per Silberg J.) or because even though appointed to represent some interest, his appointment may not be revoked if he becomes a 'rebel' (per Witkon J.).

(2) (Cohn J. dissenting) The resignations took legal effect and there was no need for such resignations to be accepted by the Committee.

(3) (Silberg J. dissenting) the Committee, whether consisting of five effective members (if the resignations were effective) or of eight could act by a majority of its nominal complement.

Palestine cases referred to:

(1) *H.C.* 43/46—*Adel Ibrahim El Farrah v. Chairman and Members of the Electoral Committee of Khan Younis* (1946) 13 *P.L.R.* 336.

Israel cases referred to:

(2) *H.C.* 3/58; 9/58—*Yona Berman and others v. Minister of the Interior; "Izhar" Israel Oil Industries Ltd. v. Minister of the Interior* (1958) 12 *P.D.* 1493 (*translated at p.* 29)

(3) *H.C.* 19/56—*Eliezer Brandvein v. Governor of the Central Prison, Ramla, and others* (1956) 10 *P.D.* 617.

(4) *H.C.* 221/56—*Joseph Malahi v. Chairman of the Local Council, Rosh Ha-ayin* (1957) 11 *P.D.* 925.

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Spaer for the petitioner.
Hausner, Attorney-General, and *Terlo,* Deputy State Attorney, for the first and second respondents.
The third, fourth, fifth and seventh respondents were not represented.
Salomon and *Mizrahi* for the sixth respondent.

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Bechori for the petitioner.
Hausner and *Terlo* for the first and second respondents.
The third respondent was not represented.
Salomon for the fourth respondent.

SILBERG J. The petitions before us and the answers in opposition were conceived and born in the disturbed atmosphere surrounding, to everyone's sorrow, the elections to the Chief Rabbinate Counci.. This is attributable in no small measure to the existence of some very

old regulations enacted by the Mandatory Power, whose usefulness is spent. These regulations were perhaps fit and appropriate for the Jewish Settlement in Palestine but are no longer adapted to the political requirements of the State of Israel. It is to be regretted that the Israel legislature has not as yet found the time and occasion radically to alter the election regulations and put them on a proper footing so that there is no longer any room for those coupling of names, speculations, forecasts and intrigues that are liable to settle around the personalities of each of the members of the committee of eight. During the course of this judgment or at the end of it will appear the practical conclusions which we must or are liable to reach as a result of the anachronistic provisions of these regulations.

2. The curtain that was raised before us in this case revealed a scene replete with rules of law but poor in facts. Not all the "guiding spirits" were represented. Thus all that will hereafter be said in respect of the factual aspect of the matter will merely be that "relative truth" which emerges from the admissible evidence adduced in court by one or other party.

3. The legal structure upon which the dispute between the two camps took shape is to be found in the regulations which bear the lengthy title "Regulations prescribing the System of Elections or Appointment of the Rabbinical Council, Rabbinical Offices and Rabbis of Local Communities 1936" (hereafter called "the Elections Regulations") as amended on minor points in 1954 (hereafter "the 1954 amendment"). Let me here set out the provisions which touch the question before us.

> "1. Not later than one month from the coming into force of these Regulations, and subsequently not later than three months prior to the expiry of the term of office of the Rabbinical Council, the Rabbinical Council shall jointly with the General Council (*Vaad Leumi*) constitute an Electoral Committee of eight members for the conduct of the election of the Rabbinical Council. One-half of the number of members of the Electoral Committee shall be elected by the Rabbinical Council and one-half by the General Council (*Vaad Leumi*). The chairman and vice-chairman shall be elected from amongst the members of the Committee; neither shall have a casting vote. Any layman (non-Rabbi) appointed to serve on the Committee shall deliver to the General Council *(Vaad Leumi)* a declaration in writing confirming his positive attitude to the Jewish religion. The Committee shall pass

resolutions by a majority of votes, and in case of an equal division of votes the Jewish Agency for Palestine shall appoint a member with a casting vote...

2. The Electoral Committee shall address a request in writing to the Rabbinical Council to compile within one month a list of officiating Rabbis in Palestine.... The list shall be submitted to the Electoral Committee which shall nominate out of the Rabbis included therein the forty-two Rabbinical members of the Electoral Assembly for the election of the Rabbinical Council. ...If the list is not compiled within the prescribed period of one month, it may be drawn up by the Electoral Committee itself. The Electoral Committee shall provide each member with a certificate confirming his nomination as a member to the said Electoral Assembly.

3. The Electoral Committee may call upon the General Council *(Vaad Leumi)* to submit within one month a list of the Local Communities and of the names of their respective delegates to the Electoral Assembly.

The General Council *(Vaad Leumi)* shall draw up a list of the Local Communities, shall prescribe the number of their respective representatives, of whom the total number shall be twenty-eight, shall call upon the Local Communities concerned to nominate the prescribed number of candidates, and shall prescribe the number of Sephardic and Ashkenazic candidates respectively. The candidates of the Local Communities shall be appointed by the committees of the Local Communities and each candidate shall deliver to the Committee of the Local Community concerned a declaration in writing affirming his positive attitude to the Jewish religion. Upon receipt of the names of the candidates of each Local Community, the General Council *(Vaad Leumi)* shall forward the list to the Electoral Committee. In the event of the General Council *(Vaad Leumi)* failing to submit the list within the prescribed period of one month, the Electoral Committee itself may draw up the list. The Electoral Committee shall provide each member with a certificate confirming his election as a member of the Electoral Assembly for the election of the Supreme Rabbinical Council."

The 1954 amendment provides in Reg. 4:

"4. The election of the Rabbinical Council shall take place in accordance with the Elections Regulations with the following variations and adjustments:

(1) Every reference to "the General Council" *(Vaad Leumi)* in the Elections Regulations shall be deemed to be a reference to the Minister of Religions who shall act with the approval of the Government.

(2) Every reference to "the Committee of the Local Community" in the Elections Regulations shall be deemed to be a reference to the members of the Council of the Local Authority who shall act jointly with the members of the Religious Council at a joint meeting to which there shall be summoned members of the two bodies in equal numbers...

(3) The Jewish Agency for Palestine shall no longer have the right to appoint an additional member to the Electoral Committee.

(4) Every question or doubt which may arise in connection with the election of Rabbinical Council shall be determined by the Minister of Religions."

4. To complete the picture and to render the incisive legal arguments of counsel more comprehensible, it is fitting to mention two further legal rules, one a ministerial regulation and the other a rule of case law.

(a) The Religious Communities (Organisation) (Extension of term of office of the Rabbinical Council of Israel) Regulations, 1960.

"1. Notwithstanding anything contained in Regulation 20 of the Regulations prescribing the System of Elections or Appointment of the Religious Council, Rabbinical Offices and Rabbis of Local Communities, published in the Official Gazette 1936, Supplement 2, No. 582, p. 198, the Rabbinical Council which was elected on 29 Shevat, 5715 (21 February, 1955) shall continue in office until 26 Tammuz, 5720 (21 July, 1960) inclusive or until the date of the election of a Rabbinical Council which shall take place prior thereto, which ever is the earlier.

2. These Regulations take effect on 23 Shevat, 5720 (21 February, 1960)."

As a result of a further extension (Official Gazette (Subordinate

legislation) 1019 of 16.7.1960) the period of office of the Rabbinical Council was extended to 21 October, 1960.

(b) The rule laid down by this court in *Berman v. Minister of the Interior* (2) (hereafter called "Nahalath Yitzhak rule").

In that case the Minister of the Interior, in accordance with sec. 5(1) of the Municipal Corporations Ordinance, appointed a Committee of Inquiry to express its views on the question whether the district of Nahlath Yitzhak should be removed from the area of the city of Tel Aviv. The committee comprised seven persons, among them Messrs. Ariav and Tabachnik, who were respectively representatives of two important sections of the population, the non-labour element and the Histadrut. During the sittings of the committee Mr. Ariav died and the question arose whether as a result of his death the committee was competent to continue its task. In this regard, I said in my judgment (with which my respected colleague, Sussman J., entirely concurred) the following:

> "6. A second argument of a formal kind, an argument common to both counsel, was that even if the commission was originally competent, it became disqualified upon the the death of Mr. Ariav. The respondent's answer to this was that the provisions of sec. 37 of the Interpretation Ordinance prescribe that when an act requires to be done by a group of persons exceeding two, it can be done by a majority of them, and he relied upon the decision of the Supreme Court during the Mandate in *El Farrah v. Electoral Committee of Khan Yunis* (1).
>
> This answer does not recommend itself to me. The majority of the members of a body are called a 'majority' when the members of the minority still exist and not when they have ceased to exist. Upon the death of Mr. Ariav, the remaining members became not a majority of the Commission but an incomplete, truncated commission, and a truncated commission cannot carry out the function with which the entire commission has been charged, particularly in the present instance in which a special role of representing the civic elements, was assigned to the deceased member. Accordingly, no parallel and analogy can be drawn from the decision of the Supreme Court in the case cited."

This is the Nahlath Yitzhak rule which has haunted the Court at every stage of the present deliberations. The reason behind it, although

not explained in that case, is that when the minority has ceased to exist, it is utterly impossible to compose one's doubt whether, if the minority had existed, it might not have succeeded in persuading the majority to accept its view, the question involved not having been canvassed in all its different aspects. This can be illustrated by taking the case of a judgement given without first hearing the arguments of *all* parties. The rule assumes special significance when a seat is allotted to one or more members in a composite body on the ground that they possess a special "character", such as, for instance, sex, race, religion, party affiliation, intellectual capacity, ideology or outlook—a condition of "parity" which also existed in the case of the committee before us.

5. Now briefly and focally to relate the facts necessary for the heart of the matter.

(a) On 19 February, 1960, the Rabbinical Council nominated as four members of the Electoral Committee, Rabbis A. Goldschmidt, S.H. Abudi, Z. Markovitz and E. Abu Revia. These members will hereafter be called "the Council appointees." In using the term "nominated" I do not thereby hold as yet that this was an "appointment" and not an "election." I shall return and devote para. 7 of this judgment to this question.

(b) Precisely four months later, on 19 June, 1960, the Minister of Religions, with approval of the Government, nominated as the four remaining members of the committee, Rabbis Y.L. Maimon, A. Waldenberg, Y. Kaafah and D. Shalush. These members are hereafter called "the ministerial appointees."

(c) Trouble began at once with the convening of the first meeting of the eight members of the committee. The Rabbinical Council argued that the invitation had to be sent out jointly by the President of the Council and the Minister of Religions, whilst the Minister argued to the contrary that he, and he alone, was authorised to convene the Committee, which he proceeded to do. Notices of the meeting, signed by the Minister alone, having been sent on 4 July, 1960, the Council appointees, including the said Rabbi Abu Revia, refused to attend the meeting of the Committee. Let it be said at once that on this point, so I think, the Minister and not the President of the Council was right, and that for two reasons.

(i) This trivial question of precedence belongs without any doubt to that class of questions which the Minister is empowered to decide by virtue of the said provisions of Reg. 4(4) of the 1954 amendment.

(ii) In earlier elections, as also in the 1955 elections, the meeting

was called by the Deputy Minister of Religions and nobody worried or protested about it.

I am not prepared to set aside the work of the Committee for this reason.

(d) Thereafter things came to a head. The dispute between the two "camps" grew sharper and more profound until the situation reached the impasse at which it remains today. We may note the following facts:

(i) The first meeting took place on 6 July, 1960, five members attending, the four ministerial appointees and Rabbi Abu Revia. According to his contention, Rabbi Revia was convinced, after receiving a letter from the Minister (Exhibit 7), that the latter indeed was alone competent to summon the members of the Committee. According to the contention of the other side, the matter sprang from the fact that in the meantime Rabbi Abu Revia had for private reasons decided to change camps. At that meeting Rabbi Maimon was chosen to be chairman of the Committee, to which at first all the Council appointees agreed, the fight between them and the ministerial appointees not yet having flared up.

(ii) On 8 July, 1960, in view of the step taken by Rabbi Abu Revia, the three Council appointees, Rabbis Abudi, Goldschmidt and Markovitz, despatched a letter to the Council (Exhibit 10) in which they asked to be released from membership of the Electoral Committee. That letter states:-

> "To our great distress and discomfiture, a serious matter has occurred which brings into question the basis of the Committee's work, at least in a public and moral sense. We have read in the newspapers that one of the Rabbinate's representatives on the Committee, Rabbi Amram Abu Revia, who was associated with us in the said consultation [the reference is to the consultation in which all the Council appointees unanimously accepted the decision that the first meeting must take place either on the initiative of the members of the Committee themselves or on the invitation of the two bodies which had constituted the Committee] and signed the letter and was of one mind with us, and also expressed his satisfaction at the end of our meeting with our unanimity of views, saying 'And Israel encamped there opposite the mountain, as one man with one mind'. Yet after all this he attended the said

meeting without previously getting in touch with us and conducted himself as he did.

Even after the event Rabbi Abu Revia did not find it proper to maintain any contact regarding the step he had taken, which it is not necessary to elaborate. It is superfluous to describe the seriousness of the matter and the offence and consternation it has caused among the Rabbinical public and the grievous impression which this event with all its consequences and repercussions has made upon the community."

(iii) On 10 July, 1960, the Rabbinical Council considered the request of the three rabbis and after a discussion adopted the following resolutions (Exhibit 11):-

"1. In view of the conduct of Rabbi Abu Revia as reflected in this meeting, it was resolved to remove him from membership of the Electoral Committee and to cancel his appointment.

2. It was resolved to appoint Rabbi Mordechai Eliyahu of Jerusalem as a member of the Committee in the place of Rabbi Abu Revia. That Rabbi is accordingly appointed.

3. In view of the above resolutions, the Chief Rabbinate Council appeals to its three representatives, Rabbis S.H. Abudi, Goldschmidt and Markovitz, that they withdraw their request to be released from membership of the Electoral Committee."

(iv) On 14 July, 1960, the three above-mentioned rabbis addressed themselves again to the Rabbinical Council and requested that they should still be released. Their reason for this was that "the members of the Committee, representative of the Minister of Religions, do not pay any regard to this resolution of the Rabbinical Council," that is, the resolution about the removal of Rabbi Abu Revia and the appointment of Rabbi Eliyahu. With this request Rabbi Eliyahu associated himself. On the same day, the Council dealt with the plea of the four rabbis and decided to accept their resignations.

(v) In the meantime the chairman of the Committee, Rabbi Maimon, continued with the activities of the Committee—further invitations were sent to the members thereof, the Rabbinical Council sought to obtain a list of officiating rabbis and so on—on receiving an

opinion from the Attorney-General that neither the removal of Rabbi Abu Revia nor the resignation of the three other rabbis had any legal effect, until on 27 July, 1960 an order nisi (in File 205/60) issued from this court including an interim order to halt the committee's work. A similar order was made some few days later in another file (210/60).

To-day Mr. Zephania and Rabbi S.H. Abudi appear as litigants on one side and the Minister of Religions and the ministerial appointees and Rabbi Abu Revia on the other side—the Rabbinical Council was summoned as respondent No. 7 in file 210/60 but has not appeared—and the proceedings revolve around the following two basic questions:

1. whether the Rabbinical Council was competent to remove Rabbi Abu Revia, and

2. whether Rabbis Goldschmidt, Markovitz and S.H. Abudi could resign from office.

The petitioners argue that the two questions must be answered in the affirmative; the respondents on the contrary reply that it is not so and that neither the removal nor the resignations are legally effective.

6. Before we turn to elucidate these questions, we must attend to one argument that runs throughout the final submissions of Mr. Spaer. The argument is twofold, that ab initio the appointment of the four Council appointees was not a lawful one either from the point of view of the composition of the Council or from that of the date of appointment.

From the point of view of composition, the late Chief Rabbi Herzog passed away on 25 July, 1959 and the appointment of the members of the Committee by the Council took place on 19 February, 1960. At that date the Rabbinical Council did not have its full complement, lacking one of its members; although some days later, as will be recalled, the council's term of office, *as it then was,* was extended (see below para. 8). This extension, as expressly stated in Reg. 2 of the extending regulations, came into force only on 21 February, 1960. Thus, when the appointments were made, the Council was not complete and inevitably in consequence of the Nahlath Yitzhak rule it was not competent to effect the appointment of the four Council appointees.

From the point of view of date, according to Reg. 1 of the Election Regulations the Rabbinical Council is obliged to participate in "the task of constituting" the Electoral Committee "not later than three months prior to the expiry of the term of office of the Rabbinical Council"; on the day of appointment, 19 February, 1960, the Council's

5 year term of office had not yet been extended and it was due to expire on 21 February, 1960. Thus, the appointment was made later than "three months before the end of the term"—it was made *two days* before—and obviously was null and void and there is no lawful appointment of the Council appointees.

This double argument was put by Mr. Spaer with great restraint—and he himself convincingly answered the first limb, as we shall see later. It merely served him as a desperate resort after all other hope had been lost, since if we accepted his argument, the very existence of the Supreme Rabbinical Council would be put in jeopardy and it was very doubtful whether his client or clients would thank him for this. There is no need to say that the Attorney-General did not rely on this argument since his main burden was to legitimate the Committee in its full composition of eight members and enable the elections to take place as soon as possible.

Nevertheless, I do not reject this argument because of the lack of importance attached to it by the parties. I reject it because it is bad.

Mr. Spaer himself found the conclusive answer to the argument of incomplete composition in the provisions of Reg. 21 of the Elections Regulations, which provides:

> "21. If a vacancy should occur in the office of Chief Rabbi or of member of the Rabbinical Council by reason of death or resignation of the holder of such office, the vacancy shall be filled by the candidate belonging to that community....If there be no such candidate, and the deceased or resigned member be a Chief Rabbi, fresh elections shall be held in accordance with these Regulations."

Now ask yourself, if a "truncated" Council cannot function, how then will the elections take place? The answer, perforce, is that Reg. 21 is a statutory provision which excludes the operation of the Nahlath Yitzhak rule with regard to the election of the Council and permits the latter to function for this purpose even with seven members alone.

As to the point of time, my view is that one should not attach too much importance to the period of three months prescribed by Reg. 1. The period was fixed for effective operation, so that the Council and the *Vaad Leumi* (now the Minister of Religions) could manage to implement the whole complicated procedure bound up with the Council elections. But if for any reason they could not constitute the Committee until after the commencement of the three months, they might do so within

the three months period itself. Evidence for this may possibly be found in the other "period" prescribed by these Regulations. I refer to the one month given to the Rabbinical Council and the Committees of the Communities (now the Local Authorities Council) under Regs. 2 and 3. which provide that if the list is not complied by the Council or the committee of the community within one month "it may be drawn up by the Electoral Committee itself." "May be drawn up" is the term used but not "must be drawn up". Hence the period prescribed is not categorically or absolutely imperative and the same applies to the period prescribed at the beginning of Reg. 1. I am not dismayed at the words "not later than" attached to the three months, since when the calculation of time is not forward but *backwards* it is impossible *not* to use these three words there.

It should be observed here that according to what emerges from the Minutes (Exhibit 1) the Council, when making the appointments, knew already about the extension that was to come. Clearly this knowledge itself does not serve to render the appointments valid but it explains how the Council pictured to itself the carrying out of the elections.

7. With this, I turn to the two main arguments: the validity of the removal of Rabbi Abu Revia and the resignations of the three Council appointees. The argument of the learned Attorney-General, as will be recalled, was that no legal effect attached to either the removal or the resignation and therefore the Electoral Committee persisted with its full complement of eight members.

On the first question, that of removal, the Attorney-General relied upon the three following grounds:

(a) Both the Council appointees and the ministerial appointees were in truth *elected* and not appointed and there is no authority for removing an elected person.

(b) Even if they were appointed, the character and nature of the duties assigned to them demanded that the appointer, whose task was complete with the appointment itself, should not have the right or capacity to interfere with the work of the Committee, and there can be no greater interference than the possibility itself of removing the appointee.

(c) There was no legal quorum when Rabbi Abu Revia was removed. The members of the Council according to the Law number eight; a majority is therefore five; the number who participated in the meeting dismissing the Rabbi (see Exhibit 11) was four and not five.

8. The third and last ground does not recommend itself to me at all. The late Chief Rabbi Herzog passed away on 25 July, 1959. Seven months after his death, on 23 February, 1960, the Minister of Religions made the Regulations extending retrospectively from 21 February, 1960 the term of office of the Council to 21 July, 1960. When these regulations were made the Council comprised *seven* and not eight members. Hence the authority to act granted to the Council was given to a seven-man Council alone, the quorum of which was obviously *four* and not five.

9. Likewise I do not see any basis for the first ground. The learned Attorney-General drew his main support for this from the language adopted by the regulation-maker in Reg. 1 of the Elections Regulations, where it is provided that "one half of the number of members of the Electoral Committee *shall be elected* by the Rabbinical Council and one half by the General Council *(Vaad Leumi)*". But whilst the learned Attorney-General is very precise indeed about the language of the legislator and invokes its materiality, the legislator himself who is the "master mind" is not at all exact in his terms and uses interchangeably two expressions. Thus In Reg. 1 itself, in the fourth sentence, he says "Any layman (non-Rabbi) *appointed* to serve on the Committee shall deliver to the...*(Vaad Leumi)* a declaration in writing confirming his positive attitude to the Jewish religion." The argument of the Attorney-General that this really means the special member *appointed* by the Agency in the event of an equal vote does not appeal to me at all. Why impair the position of this individual member more than that of any other member of the Committee who is not a rabbi? Is the Agency more suspect in matters of "religious qualification" than the Local Councils?

We came across this very same phenomenon of saying one thing and meaning another at another point in the Elections Regulations, according to the Hebrew version which is now binding by virtue of the Rabbinical Council (Miscellaneous Provisions) Law, 1955. Thus in accordance with Reg. 3, in the language of the legislator, the non-rabbinical representatives are *nominated* by the Committees of the Local Communities (at present the Councils of the Local Authorities) but after such appointment and their approval by the Electoral Committee, the representative receives a certificate that he was *elected* to the Assembly which elects the Rabbinical Council. Thus the one means the other, election is appointment, and accordingly nothing is to be deduced from the expression "shall be elected" in Reg. 1 and we may define the status of a member as if the phrase was everywhere "shall be nominated".

10. More—much more—serious attention is to be paid to the dispute between the parties over the second ground of the Attorney-General, in which he underscores the absence of any power to remove Rabbi Abu Revia.

Yet I prefer on this point the Attorney-General's view to that of Mr. Spaer. One can easily imagine how great would be the uproar and how debased the probity of the elections if every member of the Electoral Committee were the "personal representative" of the body which nominated him, foresworn to comply with the directions of his nominator. Mr. Spaer himself argued that the Minister of Religions had suggested to certain rabbis membership of the Electoral Committee on the condition that they undertook in writing to work for the election of a certain candidate for the office of Chief Rabbi and he regarded—and justly so—such conduct as highly tainted. I make no finding of fact at all with regard to this serious allegation. Rabbi S.H. Abudi gave evidence that he heard of this from Chief Rabbi Nissim who heard of it from Rabbi Kook. Rabbi Lufas gave evidence that the Minister of Religions told him that there was absolutely nothing in it. Neither the Chief Rabbi nor the Minister appeared before us and we have no possibility of deciding which is the true version. One thing, however, is clear and beyond all doubt, that tainted acts of this kind attributed by Rabbi S.H. Abudi to the Minister of Religions, *such acts and their "kith and kin"* are likely to occur if a vital tie survives between appointer and appointee, and the first is permitted to give the second orders even after the appointment. This consideration alone compels the conclusion that upon appointment—as the Attorney-General expressed it—the "umbilical cord" should be cut between appointer and appointee, the latter becoming a being with its own life, who may and even *must* fulfil his task according to his personal conscience, his own inner voice and not that of others, without accepting any instructions whatsoever from the person of his appointer. This conclusion necessarily involves a denial of the power of removal, since otherwise this power would be a sword of Damocles enslaving the appointee to the will of the appointer.

Sec. 22 of the Interpretation Ordinance, however, provides that an authority empowered to appoint a person to an office may also remove him therefrom, but it adds immediately "unless a contrary intention appears." Here a contrary intention is implied by reason of the very nature of the office.

In my opinion, accordingly, the removal of Rabbi Abu Revia is devoid of all legal effect and therefore obviously the appointment of Rabbi Eliyahu also is nugatory.

11. As against this, I do not accept the contention of the Attorney-General when he propounds the ineffectiveness of the three resignations, in spite of their being accepted by the Rabbinical Council. I have found no warrant for this extreme proposition, either in Jewish law or in common law and Israel case law.

(a) Jewish law. The learned Attorney-General found support for his contention in the well known rule, the source of which is in the Tosefta of Baba Bathra, that a guardian who takes possession of the property of orphans or intermeddles in their affairs cannot resile (see Shulhan Arukh Hoshen Mishpat and Rama, Art. 290, para 23; Tur Hoshen Mishpat, Art. 290, para. 30 and Beth Joseph ad. loc., subpara. 18; Magged Mishneh on Rambam, Laws of Inheritance, ch. 10, rule 5, citing Rambam and Rashba) but the matter bears no comparison. There is no need to expand on the fact that a member of the Committee is not a "guardian" and committee matters not "orphan property." Even if the analogy is stretched to the extreme and these two disparate things are mediated, Rabbis Goldschmidt, S.H. Abudi and Markovitz had most certainly not yet begun to "intermeddle" in the Committee's affairs nor received any "property". Moreover this rule of guardianship is not an absolute rule but qualified. It allows for the resignation of the guardian for good reason, such as "if he leaves town" (see Rama, ibid. and Beth Joseph on Tur, ibid., citing Rashbatz). Thus the guardian himself can in certain circumstances free himself of his duties.

(b) Common law and Israel case law. I have examined the American and local sources cited to us by the Attorney-General but have not found any relevant precedent for the present matter.

(i) The reference to 19 A.L.R. (American) 37, 38, proves nothing, since it merely indicates the policy of certain *statutes*. In this country there is no law which prohibits or penalises the resignation of a public officer.

(ii) The references to 19 A.L.R. 44-46, are evidence to the contrary. Two kinds of rights to resign are here stated (at the beginning of chapter 4) to exist, one absolute on the free volition of the officer, the other qualified, that is to say dependent upon the consent of the appointing authority. All the decisions mentioned deal exclusively with the question whether the officer may resign *without* the appointer's consent. The majority of the decisions cited permit resignation even without leave of the appointing authority. In the case before us the resignation of the rabbis was accepted by the Rabbinical Council.

(iii) The judgment of Agranat J. In *Brandvein v. Governor of the Central Prison, Ramla* (3). The Attorney-General can derive no benefit for his argument from this judgment. It is there said (at pp. 626, 627):-

> "There remains, however, another consideration which supports the construction we have decided to give to sec. 16 [of the Judges' Law, 1953]. This consideration is based upon the principle inherent in the common law that a person appointed or elected to serve in a public office assumes a public duty from which he cannot divest himself unless express provision exists in the enabling Law empowering him to do so, or *alternatively his voluntary resignation is accepted by those appointed over him...*
>
> This view, that a person appointed or elected to public office assumes a heavy public duty from which he cannot divest himself by a unilateral expression of his desire to do so etc."

A pedantic person might lay great significance upon the words "those appointed over him." The Rabbinical Council, he would argue, was not appointed over the Committee and therefore this dictum does not apply here.

I do not think that Agranat J. intended this in his judgment. The idea is that resignation may not be *unilateral.* It must receive the seal of those concerned with filling the office. In this sense, the Council also is "appointed over the committee." Thus if the office falls vacant, it can and must fill it anew in accordance with sec. 20 of the Interpretation Ordinance.* I do not agree with the argument of the Attorney-General that upon the appointment of the members of the Committee the Council was *functus officio* and could no longer act in accordance with sec.20 as aforesaid. If it were otherwise, what should the Rabbinical Council do if one of the members it appointed dies?

(iv) The judgment of Berinson J. in *Malahi v. Chairman of the Local Council, Rosh Ha-ayin* (4). This judgment is most certainly in complete contradiction to the argument advanced by the Attorney-General. After sketching the position under English common law regarding the right of resignation and the more lenient attitude under American case law, Berinson J. there went on to say (at p. 932):-

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* This section provides that a duty imposed by statute must be performed as occasion arises.

"It appears to me that the background of public life in this country and Israel public opinion towards abandoning public office is far nearer to that of the United States than of England. We have no serious fear that, Heaven forfend, there will be a lack of persons ready to assume public office. Nor does it enter the mind of anyone that filling a public post involves any proprietory or possessory right for the person in office or that the office is some kind of burden imposed upon him by the public, which he must continue to bear so long as he is not given permission to yield it up by the appropriate authority. *Such principles are completely opposed to the views which prevail among us of the character of public service and the freedom of action of the individual in his attitude towards public office, to enter upon it, to persevere in it or to give it up. Accordingly, I am of the opinion that whilst there in no provision in the enabling Law which denies or qualifies the right of the holder of public office to resign, his right to give it up voluntarily at any time continues to exist and it is enough for him to express his desire clearly and unequivocally.*"

The learned Attorney-General sought to distinguish between permanent public office and an isolated public task such as membership of the Electoral Committee. Resignation from the first is possible with or without approval of the appointing authority, from the second, never. There is no precedent for this distinction. It is also likely to bring in its wake the injurious result that the blind, the lame and the sick will thereby be compelled to continue to serve in office whatever the sorry consequences thereof.

I have not closed my eyes to the fact that in the case before us, if the resignation of the three rabbis is set aside, they still need do nothing, since their "work" will be done by others, the five members of the Committee, who constitute a majority by virtue of the provisions of sec. 37 of the Interpretation Ordinance.* Yet I think it would be an incorrect and even a very dangerous legal principle if we held that a person appointed for an isolated public task could not rid himself of it even with the approval of the appointers.

Accordingly, my opinion is that the resignation of Rabbis S.H. Abudi, Goldschmidt and Markovitz, which was accepted by the Rab-

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* "Any matter, the doing of which is placed upon a number of people more than two, may, unless a contrary intention appears, be validly done by a majority of them."

binical Council, took legal effect and they are no longer members of the Committee of eight.

12. What are the consequences? The situation is certainly neither easy nor very pleasant, but such is the law and we are not at liberty to depart from it or to "sweeten the pill" by a wrong construction. The committee to-day consists of five members alone, that is to say, it is a *truncated* committee and as a result of the Nahlath Yitzhak rule it cannot perform its functions until the Chief Rabbinate fills the vacancies by the appointment of three members. Theoretically, the Council can halt the activity of the Committee by refraining from doing anything, by not "accrediting" the three missing members. That would be "sabotage" and I hope that the Rabbinical Council will not follow this unseemly course. If it so conducts itself, somebody is likely to be found who will volunteer to apply to this court and seek an order against the Council for the appointment of members, and there will be further cause for indignity and indignation. I think that although the order made by this court may not actually exert pressure either upon one or upon the other "camp", a way will be found to right the situation and respect for the humiliated rabbinate restored.

In my opinion, accordingly, the order nisi in both files should be made absolute in the following terms:

> The committee must cease from doing any act whatsoever until the Rabbinical Council appoints the three members lacking for the lawful number of the Committee.

WITKON J. Two questions present themselves to us, one, whether the removal of Rabbi Abu Revia from office as a member of the Electoral Committee is sound in law, and two, what are the effects and implications of the resignation of the other members of the Committee, chosen by the Rabbinical Council. In answering these questions we are obliged, I think, to place in the forefront the special character of the Committee which must be constituted by the Rabbinical Council together with the Minister of Religions in accordance with the Elections Regulations. We must remember who are the constituents and who the members of this Committee, what is the structure of the Committee and what its functions. There is not much sense in speaking of "removal" and "resignation" as such in the void. The rule associated with one type of committee or function does not necessarily attach to every other type. It is very possible that it also does not attach to the type with which we are concerned.

The principal and central argument of Mr. Spaer for the petitioner was that the Electoral Committee is comprised of "representatives" of two bodies, each of which needs to elect or appoint its half. This argument was the main pillar of all his careful submissions. He regarded the four members elected to the Committee by the Religious Council as members whose task it is to represent that institution. It should, however, be noted for the sake of accuracy that the petitioner also, Rabbi Abudi, did not himself contend that such a representative is some kind of agent who must obey the instructions of his principal. The rabbi emphasized that he had to act according to his conscience. But his argument was that since the regulations assign the task of constitution to these two different bodies, the persons they choose also reflect the particular attitude of the body which elected them. One found to be lacking expects to be removed. The main thing is that when a place falls vacant, whether because of death, removal, resignation or any other reason, the Committee becomes defective in composition and is deprived of the authority to act.

It appears to me that this argument loses sight of the true character of the Electoral Committee. As will be recalled, the Regulations in their original form of 1936 gave the task of constitution to the Rabbinical Council and the *Vaad Leumi* jointly, and in the event of deadlock between the members chosen by these two bodies the right to decide rested in a member appointed by the Jewish Agency. To my mind, even in this dualism of the two bodies, the Council and the *Vaad Leumi*, it is difficult to see any recognition of the existence of special interests. It is true that the Rabbinical Council is a rabbinical-religious institution, whilst the *Vaad Leumi* is a "secular" institution which represents the people in all its streams and strata. But this difference between the religious and secular approach is certainly not relevant to the differences of opinion which have now revealed themselves between the Council and the Minister. However, if no hint is to be found in the old regulations for the representation of bodies possessing different attitudes, how much more so with the regulations of 1954. The latter—the handiwork of the then Minister of Religions—became currently necessary upon the establishment of the State. The Minister of Religions now took the place of the *Vaad Leumi* concomitantly with the abolition of the deciding vote which the Jewish Agency had previously possessed. Two things followed upon this amendment. The first, whilst during the Mandate the law in the religious field had honoured the principle of the autonomy of the institutions of the Jewish Settlement in the country, now under the State the order of things was put upon a national basis. Thus the

matter of the Rabbinate is one for the public as a whole. Secondly, the maker of the new regulations apparently had no fear of divisions and differences of opinion among those elected by the Council and those elected by the Minister along "party" lines and thus no longer saw need to provide means for resolving any stalemate among the members of the Committee. If he still left the authority to choose one-half of the members of the Committee in the hands of the Rabbinical Council, he certainly did so out of the consideration that this institution was more likely to choose prominent people who could be trusted to carry out the task. By the same token also, such persons would be of the same mind as the Council. But I do not see, nor have I heard from counsel for the petitioner, what special material standpoint there could be for the Council to be represented by its members on the Electoral Committee as against the second body, the Minister of Religions. I do not think that the latter who made the 1954 regulations thought at the time to further any particular attitude—if not to say "interest"—that the Council members, as distinguished from his own, would be intended to represent. In this regard, the position of the Council is unlike that of political parties, professional organisations, communities and the like, when they send representatives to inquiry committees and similar bodies, although it behoves even such "representatives" to display independence of mind and not merely to march to orders. I therefore think that the whole basic approach to be inferred from Mr. Spaer's argument was mistaken from the outset.

Against this background, one must consider the validity of the removal. It is clear to me that neither the Rabbinical Council nor the Minister of Religions may remove a member chosen by them when he loses grace or ceases to be a person of confidence and trust. I see no need here to deal with all the occasions which may justify removal. In this judgment I limit myself to the circumstances which served as the occasion for the removal of Rabbi Abu Revia, as these were disclosed to us. Indeed I think that these circumstances were disclosed sufficiently for their purpose even without the addition of the explanations which could have been advanced by the Rabbinical Council itself. The matter is clear to all that this member's attendance at the Committee's meeting summoned by the Minister of Religions alone, despite his previous agreement not to attend nor to engage in further consultations with the other members, meant in the eyes of the Council and its other nominees a deviation and a breach of the discipline which in their view he owed. They declared him a "rebel". This is certainly not a ground for his removal, and that *a fortiori*. For if even a number of an elected body,

who serves as representative of the party interest of his electors, as for instance a party member in the Knesset or on a local council or any other body, is not under the domination of his electors and they may not control how he discharges his mandate, how much more so a member of the kind here under consideration. There is certainly nothing wrong for such a member to receive guidance from the body which chose him and to act in its spirit. But from this it is not to be concluded that when a member throws off the yoke of discipline, those who sent him may revoke his mission. Once chosen, he sits in his own right and ceases to be subject to the governance of those who chose him. Why does this rule apply doubly to a member of the Electoral Committee? Because from the very structure and function of the Committee it follows that all its activity is confined to one end and must be carried out within a fixed time. Not only that the election itself is tied to a limited period, but the function is an isolated one and does not continue indefinitely. We would reach a state of chaos if the electing body were at liberty to go back on its choice and elect another at any time, so long as the Committee had not completed its work. In accordance with what sec. 22 of the Interpretation Ordinance states, a contrary intention is here implied from the very task and the mode of election involved.

I now pass to the question of the resignations and I must confess that this question worried me not a little. We have heard much from counsel of both parties about the right or the absence of the right of a person to resign from an office to which he has been elected or appointed. At the end of it all, it seems to me that no such person is to be denied the right to resign, at least when his resignation is acceptable to the body from which he accepted office. Even on the strictest view, a person may resign with the consent of his principal. I have not overlooked the argument of the respondents that upon the election of its members the Council completed its work and thenceforth the Council had no contact or connection with them. On the other hand and without laying down any firm rule of law, since differences are revealed in the observations of Agranat J. in the *Brandvein* case (3) and those of Berinson J. in the *Malahi* case (4), I see the difficulty in accepting the view of the Attorney-General that a person elected to be a member of the Electoral Committee cannot resign whatever the circumstances. It seems to me that the question is quite another one—and it is the only question which interests us here: what are the implications of this "resignation" and what is its effect regarding the continuance of the work of the Electoral Committee. The Attorney-General and Mr. Salomon relied upon sec. 37 of the Interpretation Ordinance and contended that the

Committee may continue to function, whilst Mr. Spaer seized upon what was said in the matter of Nahlath Yitzhak in the *Berman* case (2) and contended that upon the resignation of three of its members the Committee was nothing but a "truncated" Committee deprived of the legal basis for fulfilling its task.

In my opinion, no assistance is to be had from the Nahlath Yitzhak case. I agree for the purposes of the present case that a committee constituted, wholly or partly, of representatives of different interests would be disqualified from functioning if the place of one such representative were filled for extraneous reasons, and particularly if as against him an adherent of the opposing interest continued to be a member, but in two respects what happened in the Nahlath Yitzhak matter differs from the present case. The first difference is that there, in the Nahlath Yitzhak matter, one of the committee members appointed to represent a special interest, had died, whilst in our case the Committee was "truncated" with the express intention of obstructing its further activity, for thus and not otherwise must we construe the resignations. I do not think at all that what was said in the Nahlath Yitzhak matter, in consequence of the death of one of the committee members, would have been said, if that member or the body whose affairs he needed to represent had indicated their refusal to participate in the committee's deliberations. The second and main difference is that the Electoral Committee is not comprised of representatives of different interests. I have already spoken about this above and there is no need to expand on it.

If the committee is not to be disqualified in reliance upon the Nahlath Yitzhak case, is its work valid in accordance with the rule in sec. 37 of the Interpretation Ordinance? This rule empowers the majority to do everything which must be done by a number of persons more than two. Here Mr. Spaer argues that this rule does not apply except where every member of the body is in being, but if the body is deficient because of the death or resignation of a member, there is nothing in the rule to regularise any act done by the remaining members of the body, who constitute a majority. He did not draw our attention to any precedent one way or the other, which could uphold his argument or contradict it. From the point of view of its consequences, I hesitate greatly in accepting the argument in a case such as the one before us, since there is nothing in law to enable a single member to vitiate the work of a committee and silence it completely by sending in his resignation. This would involve the total domination by the minority of the majority. Again, I see the difficulties likely to be created in the event of a member's resignation or the divestment of his qualification. If such

a member was assigned to represent a vital interest, it is possible that by his absence the committee would be "truncated" and then the rule of the Nahlath Yitzhak matter would apply. But if he did not represent any special outlook and attitude and was indistinguishable from the rest of his colleagues and his place fell vacant because of death or resignation, is it the intention of sec. 37 that the committee should carry on without him? I have considered the matter and in the end have reached the conclusion that indeed so it follows from the plain meaning of the terms of this provision. But more than this, in the present case we are dealing with the resignation of three members who took this step with the express intent that they should no longer be associated with the work of the Committee. They washed their hands of the whole business. Is there any difference between such "resignation" and ceasing to have any connection with the work of the Committee? In my view there is no real difference. In the face of a resignation, whose whole purpose is to set at nought the intention of the rule-maker and render it nugatory, one cannot say that a contrary intention is implied in these regulations. In the absence of any provision to the contrary for the case of resignation of this kind, it is not to be assumed that the rule-maker meant them to be thwarted.

It follows therefore in my opinion that the remaining members of the Committee, who are the majority, are competent to continue with their work. Like my respected colleagues, I also am not happy with this conclusion that leaves to the five what the law entrusted to eight. But I cannot see any escape from this except in one of two ways. It is possible for the Council now to re-elect three members to make up the number. If it does so, I also think that the time factor will not stand in the way. If the Council does not take this course, the Government could consider whether this is not a case for putting into effect the provisions of sec. 23 of the Interpretation Ordinance, under which it has the authority to direct that others shall replace those who have resigned.

I advise to discharge the orders nisi.

COHN J. I am of the same opinion as my respected colleagues that the removal of Rabbi Abu Revia from membership of the Electoral Committee is of no effect. To the reasons given therefor by Silberg J., I wish to add that an express rule exists in Common law under which a body that participates in the constitution of another body (as the Rabbinical Council here participated in forming the Electoral Committee) may not deny a member of the constituted body his membership therein even

if it has originally appointed him for that purpose (see Halsbury (Hailsham edn.), Vol. 8, p. 32, para. 46). As for sec. 22 of the Interpretation Ordinance, upon which Mr. Spaer placed reliance, and according to which the authority empowered to appoint a person is also empowered to remove him from office, this provision is conditional upon there being no indication to the contrary in the enactment which grants the power of appointment. The intention implied in the Elections Regulations is that upon the appointment of the members of the Electoral Committee, the link ceases, that umbilical cord so to speak, mentioned by my colleague Silberg J. in his judgment, is cut between the appointer and the appointed, in such a manner that assures the appointed person not only the freedom of voting and selection but also freedom from the threat of compulsory unseating; for without freedom from such threat, there can be no freedom at all of thought, voting and choice.

I also concur, with respect, in the view of my colleague, Silberg J., that neither the laws of guardianship and charity overseers in Jewish law nor the Common law rules relating to Crown service can tell us anything in the least about the legal effect of the "resignation" of the petitioner and his colleagues from membership in the Electoral Committee. This alone is to be said—even according to my colleagues—that once the link is broken between the Rabbinical Council, the appointer, and the petitioner and his friends, the appointed, it seems to me that the Rabbinical Council is no longer competent to accept their resignation—in as far as it may be necessary for someone to accept the resignations before it can become effective; it is evident that the resignations need to be accepted by the body from which the resignations are made and not by the body which appointed them.

For me, however, the question of the effect of the resignation as such does not call for decision in this case and therefore I will not express any opinion either upon the right for a person to resign from a public duty office which he voluntarily and after thought took upon himself, or upon the nature, compass and application of the law decided in the *Berman* case, (2) according to which a truncated committee is not a committee. In my view, the Electoral Committee here was lawfully appointed and lawfully exists and as long as it carries on its work by a majority of its members it acts lawfully (sec. 37 of the Interpretation Ordinance).

It is quite true that when a person is appointed for any task, and that also at his will or wish, he is not compelled to carry it out—except in those cases in which this court will intervene and issue a mandatory

order. In the absence of such a court order, the person on whom the task falls may at his wish faithfully discharge it and at his desire be indolent, negligent or remiss. Negligence and remissness may sometimes result from psychological motives, whether controllable or not; sometimes they may result from cool calculation or an emotional reaction to a slight upon one's pride or in obedience to the demand of one's conscience. Such negligence and remissness manifest themselves in many ways; sometimes the person vociferously proclaims his conscience and its effects upon him; sometimes he endeavours to justify his feebleness; sometimes he passes his conduct over in silence as if everything was as it should be; sometimes he conceals his default by feverish activity. As to the lack of effort itself in fulfilling the task, it is immaterial what the motives are and what form it takes. And so long as the court is not asked to enquire into his conduct and the reasons themselves, I would not be prepared to judge the measure of justification or necessity or the extent of the fault and lack of responsibility in such conduct or such reasons.

So also is it in the case before us. For reasons and motives of their own the petitioner and his fellows refuse to carry out the task put upon them with their consent to act as members of the Electoral Committee and properly participate in its work. I shall express no opinion as to the nature of these reasons and motives and I shall assume in favour of the petitioner and his colleagues that these are well considered and powerful and that indeed it is conscience which prevents them from filling the office which they undertook. Since there is no petition before the court to order them to do so, nothing remains for us but to leave them in the state of passivity which they have chosen.

Unless a person is given the power to choose for himself whether to act or not to act, he has no authority to force his decision upon another. It is patently clear that in order to attain any political or public purpose, the act or omission of an individual is in most cases insufficient. Success is conditional upon carrying others along with him. If the nonfeasance, directly or indirectly, results because the person does not desire to or cannot acquiesce in the outcome originally anticipated from the act had it been performed not necessarily by him alone but by others with him, it is natural that he should try with all his power to render it undone by others as well, since otherwise he will not achieve his aim. Such compulsion of others is always wrong even if exercised by means apparently quite lawful and legitimate. At least there is no law or judge in this country to set the seal upon any use of methods which prima facie seem

lawful and legitimate but the purpose of which is to force an action upon a public body or to impede it in the fulfilment of its function.

These words are uttered with regard to the term "resignation" which the petitioner and his co-members adopted in announcing their decision to divest themselves of the burden of the Electoral Committee. If such resignation means that each of them has rid himself of the trouble of attending the meetings of the Committee or of raising his hand in voting, or of any interest in or attention to or preoccupation with the deliberations of the Committee and its activities, so be it. It is his right and no one can deny it to him. But if such resignation means amputating the Committee and killing it altogether and forcing the compulsory removal of the remaining members, this court must come to the rescue so that none of the conspirators succeed in rendering the law impossible of proper implementation. Such a conspiracy may indeed succeed if a half or a majority of the members of the Committee who desire its demise so contrive. But it follows that at least a majority of the members of the Committee are needed to carry out the plan and in such a case the active minority will be frustrated by the obstructive majority. As long, however, as the activists are the majority and the others the minority, it is not to be given to the latter to thwart the majority.

I regard the announcement of the petitioner and his fellows to the Rabbinical Council (Exhibit 10), which he repeated in evidence before us, as a notice by agents to their principal that in consequence of the conduct of Rabbi Abu Revia they were not prepared to sit with him and therefore could not participate in the work of the Committee. This communication the Rabbinical Council found acceptable and the Council—I fear, without any power—released them from the duty of taking part in the Committee's work. In this regard, in my opinion, it is immaterial what language was employed in the announcement which was made. The legal position does not differ whether you call their ceasing to act "resignation" or "strike" or "self proscription" or any other term expressive of taking a vow of self denial. Even after such announcement and without the active participation of the petitioner and his friends the Electoral Committee continues to exist in its original composition.

Accordingly there is in my opinion no occasion for appointing others as members of the Committee in place of the petitioner and his friends. Even if there were occasion or need for this, it is clear to me that the Government could not appoint them by virtue of sec. 23 of the Interpretation Ordinance, as Mr. Salomon tried to argue before us.

The provisions of that section apply only when a statutory duty or power is imposed upon the person who is prevented from carrying out his task or whose office falls vacant, but not when the power or duty is that of a committee or body of which that person is only one member.

In view of the conclusion I have reached, which falls within the category of a decision on the facts, there is no need also to decide the question of law whether sec. 37 of the Interpretation Ordinance deals only with a majority of the members of a body when all of them exist, even though they do not in fact join in doing the act concerned, or whether it deals with a majority of members in any event, either when they all exist or when some are lacking. This distinction is not of importance for the matter before us, since even if sec. 37 were construed restrictively, its provisions would apply here where all the members of the Committee are alive and in office. But because the distinction has in practice occupied the great codifiers, and out of respect for the parties who appear before us and counsel who have cited Jewish law as well, I have given much thought to the relevant Jewish law and shall briefly consider it.

There is no difference of opinion among the jurists that in judicial acts the majority decision of judges or arbitrators is not followed unless all were present at the hearing. Even if one out of ten or one out of a hundred is removed, the structure will collapse.—

> "since the majority prevails only when it has reached its decision after all have considered the question and not if some are absent. For it may be said that had the latter been present, they might have shown some reason for reversing the view agreed upon by the majority and the majority might have adopted it....This is obvious for judicial purposes and it applies likewise to arbitrations. There is never a majority unless it emerges from a body as a totality after due deliberation. But a mere majority out of a whole which considers or assesses or implements a matter by itself and not in consultation with the total body or not in its presence can decide nothing."

(Responsa of Ritba, 85; so also Responsa of Rashba cited in Tur Hoshen Mishpat, 9, 13.)

The learned Attorney-General argued that the functions of the Electoral Committee are quasi-judicial and thereby sought to give some reason why its members may not resign. I do not accept this argument since were I to regard our Committee as quasi-judicial, even I also would hold that there is no majority unless all are present and participate

in the hearings. For the distinctive feature of a judicial or quasi-judicial act is to judge between contending parties and not as the Attorney-General tried to argue the independent exercise of discretion. The latter attends judicial and administrative activities but the exercise of discretion required for electoral purposes does not exceed in extent, independence and nature that required for an administrative act upon which the rights of others depend.

There is an additional reason for this rule which has been laid down for judicial acts. The right of the defendant is to be judged by each member of the competent body and not simply by a majority of them. "For it is said 'Thou shalt not follow a majority for evil'. I infer that I may follow them for good. If so, why is it said 'To incline after the majority' ? To teach that the majority to incline after for good is not the one to incline after for evil, since for good a majority of one suffices..." (Mishnah Sanhedrin, 1, 6).

This is applied in our Jewish sources not only to judicial but also to quasi-judicial acts, to those which involve a benefit for one person and a loss for another, as with the imposition of taxation and compulsory payments (Responsa MaHarik, Principle 1), in which the majority is not important unless all were present at one and the same time; and it is only where a different practice has taken root that regulations may be made by majority decision without being sanctioned in plenum (Responsa of Mabit, Hoshen Mishpat, 264).

Although I do not know of any precedent for the election of a Chief Rabbi by a majority of voters not all in session, the question itself arose and created bitter dispute in connection with the restoration of *Semichah* [appointment and ordination] to the office of judge in the fourth decade of the sixteenth century. The rabbis of Safed finally decided to act in reliance on a ruling by Maimonides in his commentary on Mishnah Sanhedrin, that the scholars of Palestine can ordain judges although they themselves are not ordained, and they accordingly ordained their leader, Rabbi Jacob Berab. The ordination certificate being despatched to the rabbis of Jerusalem for them to join in the ordination and in turn receive ordination from the newly ordained rabbi, the leader of the Jerusalem rabbis, Levi Ibn Habib, rejected it and argued not only that there was no warrant to revive ordination but also that the decision of the Safed rabbis was invalid since although the latter formed a majority of the Palestinian scholars, their majority decision was reached in the absence of all and although it is true that the views of the majority are binding this only applies in the case of a majority of a complete totality. In the words of Habib,

"It is a positive commandment of the Torah to follow the majority as long as the consensus of the majority ensues from deliberations in which all participate.... But when the consensus of the majority arises without deliberation in which all participate it is no consensus, for had the majority heard the arguments of the minority, they might have acknowledged their force and changed their minds.... In the present matter, it would have been fitting for the majority view to prevail if we had all met together and discussed the matter face to face, or at least consulted through correspondence...and since neither was done, your consensus of view cannot be regarded as that of a majority."

These observations and others of greater length were published by Habib in his Kontres HaSemichah, whereupon Berab did not hold his hand and published a pamphlet of his own in reply. Pamphlets then passed between the parties three times, in the course of which mutual recriminations waxed bitter. At first Berab merely answered Habib's observations that the consensus of opinion of the Safed rabbis was a nullity by observing "Woe to the ears that have heard this" but in his second pamphlet he went over to a personal attack not only by saying that Habib's pamphlet demonstrated that the latter was an ignoramus but by mentioning Habib's past as a Christian when a Portuguese Maranno and contrasting his own clear past, his piety and great learning. Habib stormed back by accusing his opponent of overweening pride and defamation and by suggesting that the Safed Rabbis though numerous were of inferior endowment, whilst the Jerusalem rabbis though few in number were men of high capacity; and what was the worth of a majority if the best were not among them? He also accused the Safed scholars of affronting the Jerusalem scholars and of discourtesy—for had they been deferential how could they have thought of presenting the Jerusalem rabbis with a fait accompli? I only mention these mutual calumnies and accusations to show that there is a precedent for this kind of thing and not to denigrate the reputation of either Rabbi Jacob Berab or Rabbi Levi ibn Habib. For our present purpose, it is fitting to note that in his reply to Habib's objections, Berab held that a question such as the ordination of judges does not require either consultations or judicial enquiry but simply ordination by the person authorised thereto and thus there was no need for a majority in full session but any majority was competent to act. Special weight attaches to this decision in view of the fact that the great pupil of Berab, Rabbi Joseph Karo, ordained him and also in turn received ordination from his teacher

when the latter was compelled to leave the country and go to Damascus because of Government displeasure.

It was later ruled that in non-judicial matters where it was necessary "to safeguard religious matters when people are urging a departure from scriptural behest and it is essential to set up a fence...all acknowledge that the power lies in a majority as such to make such amendments as they deem the situation to require for good public ordering" (Responsa of Maharik, Root 180). And I dare to think that from the point of view of the litigants before us this formulation attaches to the question of the election of the Rabbinical Council of present day Israel. It is a religious affair and this generation urges departure from the scriptures, and if the majority as such does not act nothing will be done.

In addition, it is decided law that where a regulation exists that the majority view is to be followed—as it exists in the Election Regulations in respect of the Electoral Committee—"let what the majority decide even without the participation of all be valid and subsisting" (Responsa of Rashdam, Yoreh Deah, 151). In another Responsum authority is to be found for the view that if after agreement has been reached on a matter "some die and some move away, the agreement persists" and whatever is done thereafter is valid and subsisting, although some are absent (Responsa of Mabit, op. cit.) and in fact there is no alternative, since otherwise a community will never agree upon anything if the power remains in the individual to nullify the agreement (Responsa of Rosh, Rule 6, Article 5).

In my opinion the orders nisi should be discharged.

Orders nisi discharged.
Judgment given on August 29, 1960.