HCJ 9029/16

Petitioners: 1. Yitzhak Aviram, Adv.

2. Shachar Ben Meir, Adv.

v.

Respondents: 1. Minister of Justice

2. The Knesset

3. Judicial Selection Committee

4. Attorney General

5. MK Robert Ilatov

6. MK Isaac Herzog

On behalf of the Petitioners: *Pro Se*, Meir Broch, Adv.
On behalf of Respondents 1, 3-4: Yonatan Berman, Adv.
On behalf of Respondents 2, 5: Gur Bligh, Adv.
On behalf of Respondent 6: Eran Marienberg, Adv., Shimon Baron, Adv.

Petition for order nisi and interim order

The Supreme Court sitting as High Court of Justice

Before: Justice N. Hendel, Justice U. Vogelman, Justice I. Amit

Israeli Supreme Court cases cited:

[1] HCJ 3250/13 *Hebrew University of Jerusalem v. Minister of Finance*, (August 9, 2015)

[2] HCJ 7111/95 *Center for Local Government v. Knesset*, IsrSC 50(3) 485 (1996)

[3] CA 1773/06 *Shmuel Elef v. Kibbutz Ayelet HaShahar*, (Dec. 19, 2010)

[4] LCA 5247/15 *Theophilos Giannopoulos v. Himnuta Ltd*. (Aug. 28, 2016)

[5] HCJ 5167/00 *Weiss v. Prime Minister of the State of Israel*, IsrSC 55(2) 455, 468 (2001) [https://versa.cardozo.yu.edu/opinions/weiss-v-prime-minister]

[6] HCJ 3002/09 Israeli Medical Association v. Prime Minister of Israel, (June 9, 2009)

[7] HCJFH 219/09 *Minister of Justice v. Nir Zohar*, IsrSC 64(2) 421 (2010) [https://versa.cardozo.yu.edu/opinions/minister-justice-v-zohar]

[8] HCJ 3752/10 *Amnon Rubinstein v. Knesset*, (Sept. 17, 2014)

[9] HCJ 9/82 *Virshubski v. Minister of Justice*, IsrSC 36(1) 645 (1982)

[10] HCJ 849/00 *Shatz v. Minister of Justice*, IsrSC 56(5) 571 (2002)

[11] HCJ 1179/90 *Ratz Faction v. Ovadia Eli*, IsrSC 44(2) 31 (1990)

[12] HCJ 5/86 *Shas Faction v. Minister of Religion*, IsrSC 40(2) 742 (1986)

[13] HCJ 787/89 *Likud Faction v. Haifa City Council*, (Nov. 1, 1989)

[14] HCJ 3250/94 Oren v. Petah Tikva City Council, IsrSC 49(5) 17 (1995)

[15] CA 2663/99 *Shamgar v. Ramat Hasharon Local Council*, IsrSC 54(3) 456 (2000)

[16] HCJ 5743/99 *Duek v. Mayor of Kiryat Bialik*, IsrSC 54(3) 410 (2000)

[17] HCJ 1020/99 *Duek v. Mayor of Kiryat Bialik*, (Feb. 7, 2001)

[18] AAA 7697/14 *"Bar" Faction for Governance Control and Quality v. Kiryat Motzkin City Council*, (Feb. 21, 2016)

[19] AAA 1207/15 *Ruchamkin v. Bnei Brak Municipal Council*, (Aug. 18, 2016) [https://versa.cardozo.yu.edu/opinions/ruchamkin-v-bnei-brak-municipal-council]

[20] CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village*, IsrSC 49(4) 221 (1995) [https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village]

Canadian Supreme Court cases cited:

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

JUDGMENT

Justice N. Hendel:

Is the Knesset under an obligation to ensure that a member of the opposition serves on the Judicial Selection Committee at all times? This issue raises various questions pertaining to the constitutional regime in Israel and the workings of government. It is a delicate subject. On the one hand, it involves fundamental principles of the Israeli constitutional regime. The Judicial Selection Committee is a rarity in that it brings together representatives of the three branches of government—the legislature, the executive and the judiciary. The product of this encounter influences—and might even shape—the judiciary's character. On the other hand, the election of the Knesset's representatives to the Committee is effected by a secret ballot of the Knesset Members. Looking down from above, the Court is called upon to decide upon the characteristics of a Knesset Member who is supposed to select those who are to occupy the bench. But the petition has been submitted. It raises a legal question that must be settled, and the angel of justice commands "Decide!" The petition thus raises an important, delicate and complicated issue.

A. *Facts and Arguments*

1. The Judicial Selection Committee (hereinafter: the Committee) consists of nine members: three Supreme Court justices (including the President), two government ministers (among them the Minister of Justice), two representatives of the Israel Bar Association, and two members of the Knesset (sec. 4(b) of Basic Law: The Judiciary). The Members of Knesset on the Committee are elected by the Knesset by secret ballot (*ibid*; sec. 16(1) of the Courts Law [Consolidated Version], 5744-1984). For over 25 years, since 1990, the Knesset has elected at least one Committee member from the opposition parties in voting for the Judicial Selection Committee. The same happened during the last election to the Committee, held on July 22, 2015. It was during this vote that Respondent 5, Member of Knesset (MK) Robert Ilatov, was elected as a member of the Committee. MK Robert Ilatov's party, Yisrael Beitenu, sat in the opposition at the time. There was no other Member of Knesset selected to the Committee from an opposition party. Then, on May 25, 2016, the Yisrael Beitenu party joined the coalition. Since then, no Member of Knesset from the opposition sits on the Committee. This, in a nutshell, is the background of the petition.

2. The Petitioners' main argument is as follows: The practice of electing a Knesset Member on behalf of the opposition to the Judicial Selection Committee, which no one disputes, is a binding constitutional custom. By virtue of this custom, a Committee member whose party crossed over from the opposition to the coalition after that member was elected is obligated to resign, at least where there is no Knesset Member left on the Committee whose party belongs to the opposition. The Knesset is under an obligation to appoint a member of the opposition to the Committee instead of the resigning Committee member. Such is the state of affairs as regards MK Ilatov. The Petitioners have other claims as well. They believe that the desired outcome should be arrived at in view of the existence of a binding, enforceable agreement between the opposition and the coalition, or by virtue of a constitutional obligation that exists even in the absence a custom or an agreement.

Respondents 1-5 (hereinafter: the Respondents) believe that the petition should be dismissed *in limine* for laches. On the merits, they dispute the Petitioners' position. They hold that constitutional custom has not as yet been declared a binding normative source in Israel. They added that the specific practice of electing at least one Member of Knesset from the opposition to the Committee fails to meet the conditions for the existence of a constitutional custom. It was

emphasized that this practice does not, in any case, include the resignation of an incumbent Committee member. In other words, in any event, the practice only pertains to the election of a member on behalf of the opposition parties at the outset, but not to the resignation of a Committee member whose party moved from the opposition to the coalition. As the Respondents see it, even if the existence of a constitutional custom were to be established, it would have been an invalid custom, given the existence of an explicit, detailed constitutional arrangement. The Respondents also disagree with the claims regarding the existence of an enforceable agreement or independent constitutional obligation under which MK Ilatov must resign. Respondent 6 is the Chairman of the Opposition. He supports the Petitioners' position for the reasons detailed in their petition.

B. *Discussion*

3. Examining a claim of laches in submitting a petition requires examining both the "subjective" delay, from the petitioner's standpoint, and the "objective" delay, which concerns the consequences of the delay from the authority's standpoint. When weighing these perspectives against each other leads to accepting the claim of laches, one must examine the effect of rejecting the petition on the broad public interest (HCJ 3250/13 *Hebrew University of Jerusalem v, Minister of Finance* [1], para. 19); that is, whether there is serious violation of the rule of law.

Subjectively speaking, the Petitioners significantly delayed before taking any kind of action. Yisrael Beitenu joined the coalition in May 2016. For around six months, the Judicial Selection Committee went about its normal business. Only in November 2016 did the Petitioners make a move. They first approached the Minister of Justice, and then filed the present petition. The fact that the Yisrael Beitenu party joined the coalition was universally known, as was MK Ilatov's membership on the Committee. The practice of electing at least one Knesset Member from the opposition to the Committee was also within the realm of public knowledge. Indeed, even before Yisrael Beitenu joined the coalition, MK Issawi Frej brought the matter to the attention of the Speaker of the Knesset. In response, the Knesset Legal Advisor, Adv. Eyal Yinon, responded that there was no legal basis to demand MK Ilatov's removal from his tenure, even if Yisrael Beitenu were to join the coalition. Thus, the matter was already clarified by the Knesset Legal Adviser in May 2016. In this state of affairs, there is no satisfying explanation for the long period of time that the Petitioners sat idly by.

The subjective delay and the objective delay are always intertwined. A period of six months, in itself, does not automatically mean the rejection of a petition by this Court or its further discussion. The subjective delay is examined vis-à-vis its objective consequences in the period of time that elapsed until the petition was submitted. In our case, the six months since Yisrael Beitenu joined the coalition saw the Judicial Selection Committee work intensely. Tens of judges and registrars were selected for office in the various instances. This represents action on a large scale, which has implications and poses difficulty for accepting the Petitioners' claim that the current composition of the Committee is unconstitutional. Add to this another important detail—the timing of the petition's submission. It is no secret that four new judges are expected to be selected to the Supreme Court this year. This is an exceptional occurrence in its scope. The candidates' names have long been selected and published. The Committee started its proceedings to review the candidates before the petition was submitted. Candidates were interviewed. MK Ilatov participated in said proceedings, or at least some of them. The Petitioners knew all about this, and did nothing. They themselves say, in their petition, that this is one of the key reasons for its submission, and the key argument for granting the interim order requested (but not granted). On reading this, one infers that the petition was also meant to influence the actual identity of the new judges to be selected. The relevance of the matter lies, as mentioned, in the consequences of the delay. The selection process is underway. Steps were taken by the Committee and its members to move the matter forward.

In the hearing before us, the Petitioners said they believed that the matter was handled by some internal Knesset mechanism. Only when they realized that MK Ilatov continued his tenure as a member on the Committee did they turn to the Minister of Justice and the Court. They also added that, in any case, the severity of the matter warranted its discussion on the merits. As noted, in light of the Committee's activity, including publications in the Official Gazette, the only possible determination to be made is that this is a case of subjective and objective laches. This leaves the issue of public interest and the harm to the rule of law. This issue is more complex than the various types of laches claims. I shall elaborate below, but for the moment, I will suffice in stating that the arguments raised in the petition are not simple from a factual or legal perspective. On the merits, some of the arguments are tenuous, the very least. This consideration carries weight when examining whether the public interest overrides objective and subjective laches (HCJ 7111/95 *Center for Local Government v. Knesset* [2], 499). I believe that under the present circumstances,

as detailed above and as will be explained below, the petition should be dismissed for laches. With that said, and in view of the need to examine the question of public interest due to the importance of the issue itself and in order to prevent ambiguity in that regard, we will now address the substantive disagreement between the Parties.

C. *On Constitutional Custom*

4. As stated, the Petitioners premised their petition on three primary arguments: constitutional custom, obligation by agreement or obligation by law deriving from the principles of the system, or a conflict of interests. I believe that the Petitioners have failed to demonstrate the validity of two of the arguments. I will not dwell on the analysis. Suffice it to say that the Parties have not presented any agreement between actual parties that imposes specific obligations upon the parties—as opposed to a general, ingrained practice. Neither was any legal source presented that requires accepting the Petitioners' position, assuming even the absence of any custom or agreement. Beside that, but not marginally, it is worth addressing a number of points that come up in the petition with respect to constitutional custom. They are of great importance in terms of governance and administration. The Petitioners' chain of reasoning in this context was forged of several links. Each of them raises a complexity of its own from the factual or doctrinal perspective. My intention is to address important points that were raised, which should not be left hanging unaddressed in legal space. The purpose of the following discussion is to note the highlights, without exhausting all of the questions and establishing a conclusive position.

5. *The status of constitutional custom in Israel*. In various contexts and circumstances, a "custom" or "practice" may acquire binding legal force that can decide rights and obligations under law (CA 1773/06 *Shmuel Elef v. Kibbutz Ayelet HaShahar* [3], paras. 46-50; LCA 5247/15 *Theophilos Giannopoulos v. Himnuta Ltd.* [4], para. 21. For the distinction between "custom" and "practice" and the question of the force of customs in various areas of law—including administrative, constitutional, civil and criminal law—see Gad Tedeschi, *Custom in Our Contemporary and Future Law*, 5 MISHPATIM 9 (1973) (Hebrew)). Sometimes, the law itself establishes the legal force of a practice or custom (see, for example, sec. 15 of the Contracts

(General Part) Law, 5733-1973). In fact, among the contexts in which the legislature chose to grant binding force to a custom is a certain aspect of the Knesset's work (sec. 19 of Basic Law: The Knesset, titled "Procedure and Rules": "The Knesset shall itself prescribe its procedure; insofar as such procedure has not been prescribed by Law, the Knesset shall prescribe it by its Rules; as long as the procedure has not been prescribed as aforesaid, the Knesset shall follow its accepted practice and routine").

The justifications for recognizing the binding legal validity of custom are different and diverse. First and foremost, one can point to the parties' consent to grant a given practice binding legal force. At times, such consent may take the form of a general law; at times, a private law—e.g. a contract; and at times, a custom. Notwithstanding the difference among the cases, the basis for legal obligation remains the same: the parties' consent, although, of course, the levels of obligation span a broad scale, from a very real obligation to a lack thereof. Considerable weight also attaches to considerations of reciprocity and reliance, which sometimes surround the custom.

Case law and the literature have raised the question of whether binding force can be attributed to constitutional or administrative custom under Israeli Law (see Shimon Shetreet, *Custom in Public Law*, Klinghoffer Book on Public Law, 375 (Yitzhak Zamir, ed., 1993) (Hebrew) (hereinafter: *Shetreet*); HCJ 5167/00 *Weiss v. Prime Minister* [5], 468 , *per* President A. Barak (hereinafter: the *Weiss* case)). No hard-and-fast rules have actually been laid down in this matter as yet. This Court has even refrained from doing so, choosing to emphasize that it is willing to assume that a custom exists, and accordingly continue its analysis of the issue before it (*ibid*.). It would even appear that this Court has expressed some support on a number of occasions in the direction of recognizing constitutional custom, or "constitutional convention" (see, for example, HCJ 3002/09 *Israeli Medical Association v. Prime Minister* [6], para. 9, *per* President D. Beinisch, regarding the status of the institution called "Deputy Minister with Ministerial Status"; the opinion of Justice I. Zamir in the *Weiss* case, page 477, regarding how a "transitional government" functions. As concerns the relationship between "constitutional custom" and "constitutional convention", see *Shetreet*, pp. 386-391, which links these two concepts and their legal status in Israel). Thus, for example, Justice A. Rubinstein wrote in HCJFH 219/09 *Minister of Justice v. Nir Zohar* [7], para. 5 of his opinion (hereinafter: the *Zohar* case):

> 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.

The Petitioners' argument in this regard thus carries weight. There are certainly grounds to believe that, under certain circumstances, a constitutional custom of binding legal force will be recognized (see, for example, AMNON RUBINSTEIN AND BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, vol. I, 95-96 (5th edition, 1996) (Hebrew)). I would add that a judge recognizes the advantage of the approach whereby a question left undecided should not be ruled upon if enquiry is not required to decide the case. However, I believe that a healthy constitutional system striving for evolution and clarity can expect that fundamental questions will not remain unanswered for decades (see what I said with regard to the definition of a "fundamental right" in my opinion in HCJ 3752/10 *Amnon Rubinstein v. Knesset*, [8]). At any rate, as noted, and as shall be explained, since the petition should be dismissed for laches, and since we are concerned with not just the practice but also its interpretation, I do not believe this to be the case that warrants the first ruling on the issue of the binding validity of constitutional custom.

And yet, it would be proper to proceed along the stages of analysis. The reason for this is that leaving the important issue undecided might convey a misleading message in regard to the *lex ferenda* as well, despite the Knesset's conduct in the matter for 25 years, and the evolution of the case law and the law on the opposition's status in the workings of government. In fact, this approach of further analysis without deciding the fundamental issue is in keeping with the case-law tradition, which establishes preconditions for the existence of a constitutional custom without binding rulings on its validity.

6. *The existence of a constitutional custom in our case*. Case law has suggested three cumulative tests to determine the existence of a constitutional custom in a concrete case, without,

as noted, deciding the question of whether this constitutional institution exists in Israel (the *Zohar* case, para. 32, *per* President Beinisch). The Parties' attorneys addressed the meeting of the first two tests. But in my opinion, a closer look at the case law reveals a third test that should be recognized and developed.

The first test is whether the custom exists, i.e. whether it is possible to point to the existence of an entrenched practice. This is an empirical question. *The second test* is whether the existing custom is recognized and internalized as such. Is there a "sense of obligation"? That is, did the parties intend to imbue the practice with binding significance when carrying it out. Thus, for example, as opposed to a practice perceived by the parties as desirable but non-binding, or by analogy to contract law—is it merely a kind of gentlemen's agreement that each party may stray from at will with no legal repercussions? The difference between the first two tests is that the first one involves examining conduct historically. It is an objective test. The second test examines how the relevant community perceives the conduct in question. It is a subjective test. Or if you prefer – a factual element versus a mental element. *The third test* relates to the existence of a logical rationale establishing the practice. I myself would examine to what extent the custom takes normative precedence in light of constitutional principles. This is a normative test.

At this stage, let us consider the first two tests. The Parties disagree on both. Further along our discussion, we shall turn the magnifying glass to the third test. Although this test occasioned no debate or disagreement between the Parties, it is of great significance for the debate.

7. *The existence of a custom*. Is the election of an opposition member of the Knesset to the Committee an entrenched practice? The Parties are not in disagreement about the existence of an entrenched, consistent practice whereby, in electing the Committee, at least one Knesset Member belonging to an opposition party is chosen. This practice has been maintained continuously, without exception, since 1990. During those years, there have been many elections to the Committee. In all of them, at least one Committee member was chosen from the opposition parties. The dispute between the Parties relates to the duty of a Committee member to resign if his party has moved from the opposition to the coalition. According to the material submitted by the Parties, this kind of situation has never occurred before. The Respondents deduce from this that there is no practice in place, and certainly none that is consistent and entrenched. The Petitioners contest this position. In their view, the practice of electing a Committee member on behalf of the opposition

parties also incorporates the resignation of the Committee member who was voted in on the opposition-member "ticket" but whose party crossed over at some point to the ranks of the coalition. A more sophisticated version of the argument is that this obligation arises when there is no Committee member left from the opposition parties, as in the circumstances of our case, and this by virtue of the principle of representation for the opposition on the Committee. Thus, it is the interpretation of the practice that is disputed on this plane.

The question of how to interpret the practice of electing at least one member from the opposition to the Committee is a good one. On the one hand, the Petitioners have a point. If an individual is voted into a given body by virtue of belonging to one political sector or the other to begin with, his conversion to another political sector upsets the balance meant to be created in the composition of said body. On the other hand, the Respondents' argument also stands on firm ground. There is no denying the difference between elections to the Committee and the resignation of an incumbent member. In HCJ 9/82 *Virshubski v. Minister of Justice* [9] (hereinafter: the *Virshubski case*), the Court was asked to rule that the membership of a member of the Judicial Selection Committee expired. The background to this petition was the election of that Committee member, MK Dov Shilansky, by virtue of being a Member of Knesset, and his subsequent appointment as deputy a minister. This is what the Court wrote in its decision:

> The question before us is not whether the Knesset can elect one of its members who is a deputy minister as a member of the Committee, but whether a Member of Knesset who was duly elected to the Committee is disqualified from continuing to serve as a member of that Committee for the interim period pending the election of two other members to the Committee by the new Knesset following his appointment as a deputy minister during the term of the new Knesset. The two questions are not the same, and even if we were to conclude that a deputy minister should not be elected as the Knesset representative on the Committee to begin with, this still does not require the conclusion that in a case like the one before us, the appointment as a deputy minister ends the tenure on the Committee (*ibid*., p. 649).

Let us recall that we are now dealing with interpretative indications as to the scope and content of the practice of electing a Member of Knesset on behalf of the opposition to the Committee. The existence of a custom, after all, is an empirical question. Hence, the interpretation of the custom also involves an empirical aspect. Under this prism, all there is to conclude from

what has been said is that there is no necessity to accept the analogy that the Petitioners wish to draw between appointment from the outset and resignation after the fact. A custom in which one criterion applies to choosing the members while another applies to the resignation of an active member makes sense. However, the flip side of the coin is that this position is not necessarily ruled out. After all, the purpose behind the practice of appointing a member of the opposition is the latter's representation on the Committee. This purpose does not change after the election to the Committee (see the opinion of Justice S. Levin in the *Virsbubski* case). One way or the other, and on the whole, this is not the place to fully explore this question of a change in party affiliation. The letter of the law likewise highlights the difficulty, as we shall discuss below.

8. *Sense of obligation*. The Respondents argue, in the framework of the second test for the existence of a constitutional custom, that the practice of electing a Committee member on behalf of the opposition was, in any event, not accompanied by a sense of obligation. The indications adduced for this include, inter alia, the fact that Committee members are selected by secret ballot; that at least on one occasion, two members from the coalition put in their candidacy for the Committee; that in the past, two members on behalf of the opposition served on the Committee; that there have been various bills proposed in the past to institutionalize the custom through legislation. These never matured into legislation. On the other hand, the Petitioners believe that these data in fact support their position that the custom was attended by a sense of obligation.

A remarkable and surprising fact is that there is no controversy among the Parties about the existence of a practice to select at least one Knesset Member to the Committee from the opposition parties (a practice called “informal agreement” by the Respondents and “constitutional custom” by the Petitioners). The reason for this is that any Knesset Member can nominate himself for election to the Committee, and the elections are held secretly. To ensure the election of at least one Knesset Member from the opposition under this voting system, a carefully planned political mechanism needs to be created. As an illustration, sec. 6(3a) of the Courts Law prescribes that among the Knesset's representatives on the Committee there shall be at least one female Member of Knesset. Section 62(d)(7)(c) of the Knesset Rules of Procedure establishes a mechanism for achieving this goal: “If a female Knesset Member … was not elected to the Committee… a second vote shall take place immediately. In the second vote, only the two female Knesset Members, who were candidates in the first vote, shall stand for election, and the female Knesset Member who

received the largest number of votes shall be considered to be the one elected instead of the male Knesset Member who received the second largest number of votes". As opposed to this, no such mechanism governing the election of a member of the opposition was laid down. Therefore, upon the institutionalization of the practice for doing so, it would have been necessary to create a sophisticated mechanism—and more importantly to our matter: a deliberate and calculated one—that would ensure the appropriate vote in advance. In some cases, the system to ensure such an election was to nominate only one Knesset Member from the coalition for election. However, this was not always the case. Thus, for example, when electing the representatives of the 18th Knesset to the Committee in 2009, two Knesset Members from the coalition parties at the time were in the race – MK David Rotem and MK Eitan Cabel – and still a representative of the opposition was elected. We therefore learn that despite the difficulty involved, since 1990, the practice has been rigorously maintained. This suggests devotion to observing the practice and a high sense of obligation.

On the other hand, the Respondents' arguments in this context are not convincing. For example, the fact that in some cases two Knesset Members from the opposition were elected cannot testify to a lack of commitment to elect at least one Committee member from the opposition parties. At best, this fact can tell us that there is no custom whereby at least one of the two Knesset representatives on the Committee should belong to the coalition. A consideration of the whole picture suggests that the practice to elect at least one Member of Knesset from the opposition was met with recognition and internalization. The practice gained true weight. It became a generally recognized given. No one challenged its validity. Let us also recall that even in the circumstances of our case, no one actually challenged the force of this practice. In the present Knesset, MK Ilatov was elected as a Committee member from the opposition benches. Even when his party moved to the coalition, the Knesset Legal Advisor addressed the issue and opined that there was no flaw involved. Without taking a position, this at any rate reinforces the force of the custom, if only at the stage of electing the Committee members, as well as the understanding that it must be honored.

Furthermore, the practice was observed reciprocally, which is of great significance when examining the sense of obligation. A look at the historical list of Knesset representatives on the Committee from the opposition parties shows that the role was filled by many different parties, alternating among them, in a kind of game of musical chairs. Just as the government changed, so

did the identity of the party benefiting from the practice. The reciprocity reinforces the validity of the practice and reveals greater devotion to it. One can sum up and say that the practice of appointing a member on behalf of the opposition parties to the Judicial Selection Committee has been accompanied by a sense of obligation for a long period of time.

9. *The existence of a custom alongside a constitutional arrangement*. Before we address the third test for the existence of a constitutional custom, we should consider another reservation of the Respondents, regarding the relationship between custom and law. Let us assume that we have cleared all the obstacles so far. Constitutional custom has been determined to be a legally valid institution in Israel. The existence of a specific custom has also been recognized. However, on a general level, such recognition is no guarantee that the Court will necessarily enforce the continuation of the custom. What does this mean? The Knesset and MK Ilatov argue that, according to case law, wherever a constitutional arrangement is regulated in detail in law, a constitutional custom will not hold. This was established, according to them, in President Barak's ruling in HCJ 849/00 *Shatz v. Minister of Justice* [10]: "What we are saying here has no bearing on the 'constitutional conventions', since they are based upon an absence of a constitutional arrangement or a lacuna" (*ibid*., p. 575; and see HCJ 1179/90 *Ratz Faction v. Ovadia Eli* [11], pp. 35-36). Indeed, we have a constitutional arrangement. Basic Law: The Judiciary, the Courts Law and the Knesset Rules of Procedure establish the make-up of the Committee, including the affiliation of its members to the various governmental authorities or to a professional body. The mechanism for electing the Knesset's representatives on the Committee is laid down. The law or the Rules of Procedure even explicitly address questions of continued tenure following changes, and of failure to meet the election criterion (such as adequate representation for women). In none of these is there a trace of the remedy sought by the Petitioners. At the same time, the possibility of resignation by a Committee member is not explicitly ruled out, be it in general or in the circumstances that are the subject of the Petition. The question is, then, whether a situation like the one before us is addressed in law in the form of a negative arrangement, or whether it is a lacuna that the legislation does not at address.

It is hard to make a case for this being a negative arrangement. In other words, it is hard to accept the idea that the purpose of the law is to prevent a Committee member from resigning given the existence of a constitutional custom meant to ensure membership on the Committee on behalf

of the opposition parties. Indeed, at times the letter of the law is explicit in such a way as to render the interpretative dilemma superfluous. Thus, for example, the law specifically states that when a Knesset has reached the end of its term, the Members of Knesset it elected to the Committee will continue to serve on the Committee until the new Knesset elects other members to replace them (sec. 6(1) of the Courts Law. Compare to HCJ 5/86 *Shas Faction v. Minister of Religion*, IsrSC 40(2) 742 (1986), regarding the members of the committee for appointing rabbinical court judges). From the explicit letter of the law, one can also infer in which cases a Committee member ceases to serve on the Committee immediately. This happens, for example, when a minister sitting on the Committee has left office (*ibid*., page 750; the *Virshubski* case, p. 649). According to the Respondents, in the present case too, we can learn from various details of the legislative arrangement that a Committee member is under no obligation to resign in circumstances like those before us. This can be understood, for example, from the provision of the Knesset Rules of Procedure that provides: "Each of the Knesset Members, who is not a minister or a deputy minister, is entitled to offer his candidature to an appointments committee" (sec. 62(b)3 of the Rules of Procedure). I have considered this provision, as well as other provisions that the Respondents have pointed to. I believe they were unable to point to an arrangement from which one can conclude, explicitly or implicitly, that the remedy sought by the Petitioners runs counter to, or is ruled out by virtue of the language of the provisions of the Rules of Procedure or the law. The law was not at all intended to regulate the issue of the affiliation of the Knesset Members on the Committee to coalition or opposition parties, either in terms of the election or in terms of their continued tenure. The law does not at all address the possibility of a Committee member resigning of his own initiative, by virtue of a parliamentary agreement, or by a custom. If there is a custom pertaining to these aspects, the existing legislation cannot disqualify it.

To complete the picture, we would note that it can be argued that the practice is binding in the first stage, when the Committee members are elected. However, once a member from the opposition parties has been elected, the practice does not obligate him to resign, even if his party joined the coalition. Admittedly, the letter of the law does not contradict this possibility, and could even be thought to be compatible with it. However, it must be admitted that it is the interpretation of the practice that poses the hard question. In other words, just as there is no dispute that the practice to initially appoint at least one Member of Knesset from the ranks of the opposition in the first stage has held true for close to a quarter of a century, it is also true that Parties have also

failed to adduce a single example where the transitioning of one Member of Knesset from the opposition to the coalition has led to his resignation from the Committee. It is not clear whether this situation ever presented itself. Indeed, this was another reason why I thought that this was not the right case for ruling whether a binding constitutional custom was possible in the Israeli system. The reason for this is that, even if we were to determine as much, we would face another hurdle in the form of the change in the party's status during the tenure. One way or the other, this is not a case of a negative arrangement in the law or the Rules of Procedure. The law does not prohibit the resignation of a Knesset Member from the Committee. The true question is not, as noted, the interpretation of a law, but the interpretation of a practice.

Let us now turn to the third test for the existence of a constitutional custom.

10. *The normative component*. Case law has suggested predicating a constitutional custom on another test—the logical rationale underlying the custom (the *Zohar* case, para. 32, *per* President Beinisch). In my opinion, the importance of the third test is the insufficiency of exclusively empirical checks, which are the purview of the first two tests. As mentioned, these tests examine whether a practice has become ingrained and understood as having binding validity. The shortcoming in both these tests lies in the content of the practice. Does that carry no weight at all? This is what I believe gave rise to the logical-rationale test. The question to ask is: Is the practice good? However, I believe this test needs to be honed and given an added, normative dimension. That is, despite the language in which the test was worded, in truth it is not just an analytic-logical test. The goal of the test is to check the compatibility of the rationale underlying the constitutional custom with the principles of the constitutional regime. In fact, this is how it was applied in the *Zohar* case (*ibid*., paras. 23, 33). The Supreme Court, sitting in an expanded panel, addressed the definition of the President's amnesty power, the nature of the Minister of Justice's countersignature within this framework, and the degree of judicial review in its regard. This is a weighty issue. In order to decide it, attention must be paid to normative aspects and values. This is what we will do. As President Beinisch said:

> The third test for the forming of a "constitutional convention" examines the rationale underlying the constitutional convention, should the latter have formed. We addressed this rationale above, and stated that the countersignature expresses the parliamentary responsibility for the amnesty power, and the possibility of subjecting the decision to judicial review. This responsibility, as mentioned, derives from the fundamentals of the Israeli

> regime, which require a process of checks and balances for the exercise of governmental powers (*ibid*., para. 33).

This position, which requires a normative component in recognizing a constitutional custom rested, inter alia, on a ruling by the Supreme Court of Canada, which reads as follows:

> The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative (*Re: Resolution to Amend the Constitution* [21], p. 888).

That is, it might have been possible to think of a different position, which does not consider the content of the custom but the facts alone—the first two tests. Despite this, a position was chosen that considers the compatibility of the custom with the system's constitutional principles.

Similar principles can be found in Jewish law. The normative status of custom is recognized (for more on the subject, see: MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES, 726-777 (1992) (Hebrew)). The Sages accorded existing custom binding halakhic weight in cases involving interpretation of the law. Thus, for example, in some cases of contention, they ruled based on the common practice "go forth and see how the public are accustomed to act" (TB BERAKHOT 45a; ERUVIN 14b). Similarly, in cases involving a lacuna in halakha (Jewish law), the Sages ruled based on the following custom: "Any law that is flimsy in court and whose essence you do not know, go forth and see what the public custom and practice are" (TJ PE'AH, Chap. 7, Halakha 5). In some cases, the Sages believed that a custom's status could even override law: "And custom cancels halakha" (TB BAVA METZIA, Chapter 7, Halakha 1). With that said, the normative power of a custom is contingent on its not being an erroneous custom, and on its conformity with the values of Jewish law. In cases where the Sages thought that the custom deviated from the appropriate law, they abolished it, even when it was deeply entrenched. Thus, for example, Rashba [Rabbi Shlomo ibn Aderet, 1235 – 1310] writes: "If it was customary not to at all enforce damage by gazing [*hezek re'iya*] into houses and courtyards—this is an erroneous custom, not a custom" (RESPONSA RASHBA, Part B, 268; see also the words of Rabbeinu Tam in the Tosafot commentary to TB BAVA BATRA 2a, *s.v.* "Parchment" [*gvil*]). Evidently, the ways of the world remain the same. The Jewish law system also attaches importance to the existence of custom, to the sense of

obligation and to logical and normative content. The similarity in law testifies to the universality and importance of these matters. The law does not cover all possibilities. People behave a certain way, and by their behavior they create a custom.

Furthermore, modern case law has even expressed the position that there is a kind of parallelogram of forces between the normative component of a custom and its factual components. The Canadian ruling cited above rested on such a position:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it"(W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed., 1959)).

Of course, if a custom is to be validated, it must be rational. This does not, however, contradict the observation that the deeper a practice is implanted in the system's constitutional principles, the easier it becomes to recognize it as a binding constitutional custom. Needless to say, a court will not readily be party to enforcing a bad custom (*cf*. an "erroneous" custom in our review of Jewish law above). However, it is also the case that a neutral custom is not the same as a worthy custom. Take, for example, a practice pertaining to the technicalities of the vote for a committee. Section 62(d)(1) of the Knesset Rules of Procedure states that the election of the Knesset Members to the committee shall involve the selection of a "ballot committee" by the Speaker of the Knesset comprising two Knesset Members from the coalition parties and two from the opposition parties. Were it proven that there was an entrenched practice of appointing six Knesset Members to this committee instead of four—three each from the coalition and the opposition—there might not be cause to enforce it if a decision was then made to deviate from it. Ours is a different situation. There is no disputing the merit in our case of selecting a member of the opposition to the Committee. This value-related aspect bears upon the custom's factual aspect. It reinforces its position. This view emanates from the combination in our case—the role of the Judicial Selection Committee vis-à-vis its composition within the bounds of the constitutional mechanism and of Israel's governance and administration procedures. To understand the full

significance of these two, it helps to elaborate on them and their importance in a democratic society.

D. *Opposition, Majority Rule and Everything in Between—the Principle of Proportional Representation*

11. Beyond the questions of doctrine pertaining to the interpretation of the law, to the status of custom in general, and in the context of the Judicial Selection Committee in particular, the question before us transcends the concrete case and touches on a broad issue in the theory of state: the principle of proportional representation and the minority's right to participate in decision-making processes. In view of the importance of the subject—and particularly in regard to the Judicial Selection Committee—I wish to elaborate on it level by level. The principle of "proportional representation" frequently reappears in the rulings of this Court relating to the representation of political parties on the various Knesset committees and local authorities (see HCJ 787/89 *Likud Party v. Haifa City Council* [13]; HCJ 3250/94 *Oren v. Petah Tikva City Council* [14]; CA 2663/99 *Shamgar v. Ramat Hasharon Local Council* [15]; HCJ 5743/99 *Duek v. Mayor of Kiryat Bialik* [16]; HCJ 1020/99 *Duek v. Mayor of Kiryat Bialik* [17]; AAA 7697/14 *"Bar" Faction for Governance Control and Quality v. Kiryat Motzkin City Council* [18]). This principle establishes the need to aspire to have parties—including minority parties—proportionally represented according to size on every committee appointed by the public authority (see, for example, Rule 102(a) of the Knesset Rules of Procedure (May 13, 2016); sec. 150A of the Municipalities Ordinance [New Version]; sec. 19(a1)(1)(c) of the Planning and Building Law, 5725-1965). Given the large number of parties in Israel's parliamentary system, it is not always possible for all parties to have representation. In such cases, it was determined that opposition parties should be allowed to appoint a representative on their behalf (on the constitutional aspects of the issue, see: Yigal Marzel, *The Constitutional Status of the Parliamentary Opposition*, 38 MISHPATIM 217 (2009) (Hebrew), which notes the recognition—formal as well—of the status of the chairman of the opposition).

In AAA 1207/15 *Ruchamkin v. Bnei Brak Municipal Council* [19] (hereinafter: the *Ruchamkin* case), I dwelt on the minority's right to representation on the various committees, and on the democratic importance of this right from the perspective of political philosophy and the

system of Jewish law. This case centered on the appropriate way to select representation of the minority party on the Municipal Property Tax Discount Committee. It was determined that here, too, adequate representation for the minority party was required. While the legislative and normative framework in the Municipalities Ordinance differs from the one in our case, the rationales put forward in the *Ruchamkin* case also apply to the various Knesset committees, and all the more so—as shall be explained below—to the Judicial Selection Committee.

The *Ruchamkin* case emphasized that the full realization of the democratic idea is not just majority rule, and does not suffice with the majority's recognition of the minority's rights—modern democracy sees value in the participation of the minority in leadership and in the decision-making processes:

> The right of the minority to participate in the decision-making process – and not just its political right to elect the decision makers – was particularly emphasized by many political philosophers in the second half of the twentieth century. It might be said that this is the third stage in the development of the democratic idea. At the principle's outset – in the Athenian Greek *polis* – it meant majority rule (the meaning of the word *demos* is "the people", and the original meaning of democracy was "rule of the people", as opposed to monarchic and oligarchic rule). In the second stage, democracy became the majority's obligation to recognize the rights of the minority, which, in the third stage, developed into the recognition that even the minority must play an integral role in the decision-making process (*ibid*., para. 9).

The minority's participation does not detract from the majority's status. The majority's governance is reflected in the fact that, by its very definition as the majority, it has a greater share than the minority. As a result, within the democratic decision-making procedure, which adds up the number of votes, the "fingers" of the majority will prevail. However, involving the minority in the decision-making process reflects an egalitarian, respectful treatment of everyone, and allows mutual discussion and persuasion. These ingredients enrich the discourse, and they are what lends legitimacy to majority decisions, even when they are deeply opposed to the minority position:

> … minority participation in the process is a central element of the legitimacy of majority decision-making in the eyes of the minority, which must accept the majority decision even when it considers the decision itself to be wrong. The minority must not feel that it has a lesser status than the majority. According to this view, debate and voting are not merely decision-

> making rules, but also preserve equality, and are the basis of the legitimacy of the majority's decision(*ibid*., para. 9).

12. It should be noted that the broader perspective of comparative law also shows that many countries have arrangements that enshrine the minority's right to participate in the various committees: England and Australia have, alongside specific arrangements relating to the composition of the committees, a general provision of law stating that their composition must mirror that of the parliament (in England, see: Standing Orders of the House of Commons, art. 86(2); in Australia, see: Standing Orders of the Senate Committees, art. 22A(2a). In Canada, the law prescribes an arrangement that makes it mandatory to appoint, alongside the committee chairperson, an official representative for the opposition and another representative of an opposition party (Standing Orders of the House of Commons, art. 106(2)). Now that we have looked at the legislative arrangements practiced in other legal systems, let us also briefly recall the Jewish law's approach to the matter.

13. As I said in the *Ruchamkin* case, this is also the approach of Jewish law, wherein the majority decision is only binding when arrived at following debate and minority participation. Based on this principle, Rashba ruled that a rabbinical court's majority ruling is only binding when it had been made after debating and deliberating matters in the presence of all the judges: "There is no majority consent unless the majority consent is arrived at in the presence of all as a matter of general law" (RESPONSA RASHBA 3:304). This is how this was summarized there:

> The Tosefta places the emphasis upon changing times and circumstances: "Rabbi Judah says, why are the opinions of a single person from among the many recorded? So that if the time requires them, they can be relied upon" (TOSEFTA, Eduyot 1:4). These explanations assume that a majority decision does not make the court's decision the only one of significance. The rejected minority opinion is not viewed as an error or mistake, but rather as a theoretical halakhic possibility that – while not the position adopted in practice at the time – may become so at other times. This is another reason for granting the minority the opportunity to express its view (*ibid*., para. 10).

This holds true for all those cases where the decisions of the democratic majority are accepted, but they are of special value when it comes to the Judicial Selection Committee. The

Judicial Selection Committee is unique in its status, as shall be explained. At the same time, it highlights the principle of proportional representation and even adds to it. This is what I shall now address.

E. *The Judicial Selection Committee*

14. The judicial appointment procedure is unlike any other appointment procedure carried out by the executive or the legislative branches (on administrative decisions by the legislative branch, see: Yoram Danziger, *Strengthening Knesset Decisions*, 34 HAPRAKLIT 212 (1982) (Hebrew); YITZHAK ZAMIR, ADMINISTRATIVE AUTHORITY, vol. I, 122 (2010) (Hebrew)). This is not an act of vertical delegation that allows the authorities to act via their long arm, as is the case of other committees, but a quasi-"constitutive" decision that establishes a horizontal, independent power that is parallel to the powers that form it, as "tongs are made with tongs" (MISHNAH, AVOT 5:6). While it is clear how the legislature and the executive are elected – the legislature is established based on the democratic principle of proportional representation, and the executive is based directly and arithmetically on counting the votes of the majority parties – not so the judiciary, which is an independent branch not directly derived from the majority parliamentary vote. The principle of judicial autonomy and independence forms the core of the idea of the separation of powers as regards the judiciary, according to the western tradition of the separation of powers fathered by Montesquieu (a political philosopher, jurist and member of parliament in 17th century France). In order to ensure that justice is done while fully safeguarding civil rights, the judicial branch must be detached from the other branches. Indeed, the principle of judicial independence guarantees that judicial discretion is only exercised with the principles of justice and the rule of law in mind, with no influence from extraneous entities and considerations (for an elaboration, see the volume published by the American Academy of Science: 137(4) DAEDALUS, ON JUDICIAL INDEPENDENCE (2008); in addition, see: JUDICIAL INDEPENDENCE IN CONTEXT (Adam Dodek and Lorne Sossin, eds. (2010); AHARON BARAK, JUDICIAL DISCRETION 265 (1987) (Hebrew)). One must bear in mind that under the constitutional model adopted by the large majority of western countries and in the Israeli legal system, the judiciary might even strike down decisions by the legislature.

Hence, the judicial branch is not—and must not be—the long arm of the legislative or executive branches. The judiciary must be autonomous and independent of the other branches. With that said, the judiciary is one of the three branches of government, and must manifest a commitment to the citizenry and democratic values. It does not operate in a void, but in various aspects, in clear collaboration with the other branches. As in the famous words of President A. Barak:

> The judge's autonomy and independence allow him to brave the daily waves. He must give expression to society's long-term, fundamental trends, rather than to short-term, fleeting needs… It is in fact the judge, who has neither sword nor purse but only his autonomy and independence, training and experience, who is capable and worthy of reflecting the people's fundamental perceptions. It is precisely his being divorced from the need to be elected from time to time that detaches the judge from the need to give expression to current sentiments, and it is that which gives him the ability and the power to give expression to deep values, which might at times be unpopular (Aharon Barak, *The Role of the Supreme Court in a Democratic Society*, 21 IYYUNEI MISHPAT 15-16 (1998) (Hebrew). See also: CA 6821/93 *Mizrahi Bank v. Migdal* [20], 427).

There is a partition between the judicial branch and the other branches. The same goes for the other branches. Note that this is a partition, not a wall. The life of democratic society and the democratic state as it has developed requires some interaction. Hence, too, the need for checks and balances. The correct measure of these systems is vital, but we will not dwell on this. In our case, we shall focus on the judiciary, the public and the democratic principle. We shall ask how the gap can be bridged between the judiciary's autonomy and independence, and its being one of the three branches of government, owing loyalty to the public. How does one resolve the tension between the two principles?

15. The gap between these two requirements is bridged, inter alia, by two basic requirements of the judiciary, beside the demand for autonomy and independence: accountability and reflection (see: Shimon Shetreet, *Fundamental Values of the Justice System in Israel*, JUSTICE ORR VOLUME – A COLLECTION OF ARTICLES IN HONOR OF JUSTICE THEODOR ORR 525 (2013) (Hebrew); Shimon Shetreet, *Institutional and Substantive Aspects of the Justice System in Historical Perspectives*, 10 MISHPAT VE'ASAKIM 525, 572-583 (2009) (Hebrew)). In order to fulfil these requirements, there formed, inter alia, a mechanism that is unique to the judicial system, namely the court of appeals.

Open hearing constitutes an important tool for the court, as well. However, we will not discuss internal review here, but external aspects. I will briefly specify these requirements, and then show that they, too, lend special weight to the importance of having the minority represented on the Judicial Selection Committee.

A. Accountability: Even though the judiciary is not directly elected by the public, it is one of the state's branches of government, it is accountable to the public, and thus to the legislature and the executive, as well. This was aptly expressed by Prof. Yoav Dotan:

> A governmental system where the composition of the reviewing body directly reflects the political balance of power in parliament is a system susceptible to a series of failures from a constitutional perspective. For we have already said that at the very heart of the concept of constitutionality stands the view that one is justified in imposing certain limitations on the power of the representative legislator… On the other hand, the fact that the judicial review institution can be (and should be) less representative than the legislature does not mean that these institutions should be free of any duty of democratic accountability (Yoav Dotan, *Judicial Review of Legislation – The Accountability Question*, 10 MISHPAT UMIMSHAL, 495-496 (2007) (Hebrew)).

Whereas the principle of judicial independence allows the courts to be loyal to judicial integrity and the values of the law, of morals and of justice, accountability is what ties the judicial branch to the public and its values. This was aptly described by Stephen Burbank, a professor of law at the University of Pennsylvania:

> Judicial independence is merely the other side of the coin from judicial accountability. The two are not at war with each other but rather are complements; neither is an end in itself but rather a means to an end (or variety of ends); the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and court systems; and there is no one ideal mix of independence and accountability, but rather the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system" (Stephen B. Burbank, *Judicial Independence, Judicial Accountability and Interbranch Eelations*,137(4) DAEDALUS, ON JUDICIAL INDEPENDENCE 17 (2008)).

The judiciary is not an island. Judging—and more precisely, the judge, any judge—must rule to the best of his understanding and conscience, in line with the law and its requirements. The

integration of the principle of autonomy and independence with the duty of accountability creates a proper balance between its being one of the branches of the democratic state, and its responsibility for the fundamental principles of the legal system and the binding norms. As a derivation from this duty, scholars and legal experts have emphasized the duty of reflection that applies to the judiciary.

B. *Reflection*: As mentioned above, the judiciary must be autonomous and independent. In keeping with this, it is accepted that the principle of representation does not apply—certainly not fully and formally—to the judiciary. The latter must remain neutral and professional, steer clear of political labelling, and remain loyal to the values of law, justice and equity. And yet, even though the principle of representation does not apply to it, it must reflect the public within which it operates. This is the principle of reflection, which was adopted in many western countries and was even expressed in a number of international treaties (Sonia Lawrence, *Reflections: On Judicial Diversity and Judicial Independence*, in JUDICIAL INDEPENDENCE IN CONTEXT (Adam Dodek and Lorne Sossin, eds, 2010); Shimon Shetreet, *The Administration of Justice: Practical Problems, Value Conflicts, and Changing Concepts*, 13 U.B.C.L Rev. 52 (1973); Shimon Shetreet, *On Assessing the Role of Court in Society*, 10 MANITOBA L.J. 399 (1980); The Montreal Universal Declaration on the Independence of Justice, 10 June 1983, Act 2.15; Mt. Scopus Approved Revised International Standards Independence § 7 (2008)). This also appears in the conclusions of the committee on the procedures for the election of judges headed by Justice Y. Zamir (March 12, 2011): "When the professional level and personal qualities exist in due measure, weight should also be attributed to the principle of social reflection" (chap. 16, para. 1).

However, the relationship between the court and the principle of representation and reflection is more complex and not unidimensional. This relationship is not built upon formal, binding, rigid, arithmetic and mathematical rules, but on social sensitivity in the right dose, alongside professional considerations. This might also be reflected in the way that judges are selected.

The importance of reflection also stems from considerations of visibility and public trust (Shimon Shetreet, *The Doctrinal Reasoning for More Women Judges – The Principle of Reflective Judiciary*, in WOMEN IN LAW 183 (1998)), but more than that, from substantive considerations of justice. Prof. Alon Harel explains that the legitimacy of the court, despite not being subject to the

principle of representation, derives from the principle of compatibility, whereby: "… rules and principles need to be sensitive to the public's moral beliefs" (Alon Harel, *The Democratic Justification for Judicial Review*, 5 MOZNEI MISHPAT 90 (2006) (Hebrew)). Further on, it is explained that reflecting the public's values is a delicate balancing act between contradictory values. It is not the same as an accurate vote count:

> The normative judgments of citizens involve different, complex values anchored in different practices, ways of life and world views. Sensitivity to such judgments in a democracy involves complex processes, and it is by no means self-evident that the compatibility requirement dictates the adoption of every majority-backed decision. Alternatively, it could be argued that the compatibility aspect of democracy can manifest itself in different ways, and there is no reason to claim *a priori* that "vote counting'" better serves the compatibility aspect than alternative mechanisms (*ibid*., p.. 91).

The legitimacy of the judiciary stems from and depends on this branch of government fulfilling a different role to that of the other branches. Strip society of the judiciary, and it is doubtful that it would long endure. It is no coincidence that, as Jewish law sees it, the children of Noah—the nations of the world—are subject to a mere seven commandments, of which only one is a positive commandment, namely the adjudication commandment—the duty to maintain a legal system (TB SANHEDRIN, 56a). One might ask: Are various systems such as health and education not also vital for society? But Jewish law is resolute. It would seem that the origin and foundation of the public systems together with the individual's relations depend upon the legal system. Of course, the role of the legal system is not only to prevent social chaos, but also to improve society and contribute to making it more just. Against this background, the principle of judicial independence is vital for all of society. Thus, contrary to the decisions of the executive, which acquire their validity by virtue of the majority vote of the executive and even the legislature, judicial decisions also acquire their validity by virtue of reflecting the entirety of the public's values.

16. The distinctive characteristics of the judiciary—autonomy and independence, the duty of accountability and the principle of reflection—give the representation of the minority on the Judicial Selection Committee a unique added value of great importance. And note, this procedure is not about norms that are binding upon the judiciary itself, but about the arrangements relating

to the Judicial Selection Committee. However, as I shall now explain, these arrangements are influenced by the character of the judiciary and the guiding principles applicable to it. It is my opinion, as said, that in addition to the principle of adequate representation that applies to the Judicial Selection Committee as to all other committees, it applies most particularly to this committee. I shall explain.

A. *Autonomy and independence*. The judiciary must be a neutral, autonomous entity that is independent of political players. For that to happen, the Judicial Selection Committee must also, to the extent possible, be a neutral committee, which does not patently represent a political faction or party. In this sense, the broader the representation—and if it also includes opposition members—the greater the independence. Where judges are appointed by a committee that is political in nature, this might "taint" the identity of the judges and violate the principle of autonomy and independence. It follows that in order to fulfil this important principle fully, there is value to the Judicial Selection Committee having representatives from both the coalition and the opposition.

B. *Accountability*. As explained above, the fact that the judiciary must be independent does not make it unaccountable. It is its accountability that ties the judiciary to the other branches of government and the public. It should be noted that the tension between these two principles lies at the heart of the disagreement on the proper procedure for appointing judges in all western countries (Charles G. Geyh, *Methods of Judicial Selection and their Impact on Judicial Independence*, 137(4) DAEDALUS, ON JUDICIAL INDEPENDENCE 86 (2008)).

The way in which the Israeli legislature chose to strike a balance between the principles is by means of the Judicial Selection Committee. In this respect, the Committee has to reflect the fact that the judiciary is not a long arm of the executive, but a twin sister on an equal footing with the executive and the legislature. This being the case, it is right to include the opposition's representative on the Committee, as well. This makes for full representation of the legislative branch. Note that the law itself provides representation for all three branches, and two members of Knesset as far as representing the legislature. It was not for nothing that the legislature decided upon representation by two Knesset Members, allowing the creation of a proper balance—as was indeed with the practice over time—between the coalition and the opposition. One must keep in

mind that the appointment of judges is not an act of the executive, but a constituent act of all three branches of government together.

C. *Reflection*. The two aspects presented above concern the framework characterizing the judiciary, and not the Committee's effects on the nature of judging. As presented above, the reflection principle expresses a deep, substantive concept of the judge's craft. "A judge sits among his people". Thus, even though the judiciary is not held to the principle of representation, it is fitting that the choice of those selecting judges should reflect balances within society and the administration. Excluding the opposition from the Judicial Selection Committee could be detrimental to the value of reflection, and thus prevent the enhancement of public faith in the power of the strength of the judiciary.

This is another expression of the principle of proportional representation. As mentioned in the beginning, substantive democracy is not just a way of deciding by majority, but of including the minority in the decision-making process. Such is the case in all areas and, so too, in the Judicial Selection Committee. In addition, as explained in detail, the special character of the Judicial Selection Committee lends particular importance to the minority's representation on the Committee.

A substantive clarification is in order. The court is not a political institution, nor is the Judicial Selection Committee. The law says: "A committee member shall vote in accordance with his own discretion, and will not be obligated by the decisions of the entity on whose behalf he is a member on the committee" (sec. 6 of the Courts Law). The members of the Judicial Selection Committee must exercise their own discretion. Some might claim that a different approach can be extracted from the principles of accountability and reflection. This is not so. Accountability and reflection concern the public at large, with its values and principles. These are incorporated in the law. It is in this sense that minority representation is needed. It seems that the minority should be a part of the picture, not outside it. Its presence on the Judicial Selection Committee is desirable. Its values are part of the value system reflected in the law. This is a sensitive distinction: accountability and reflection—yes; representation for specific entities—no. The legislature was aware of this distinction, giving it expression in the Courts Law, which establishes a "representative" division as regards the Committee's composition—three branches of government and professional representatives—alongside a rule of independent discretion. This also explains

why the election to the Judicial Selection Committee is secret. Independent discretion is also granted in the process of electing the Committee's members. This delicate way is the right way to look at these matters.

17. I shall now turn to a brief examination of the sources of Jewish law on the issue of appointing judges. The commandment of appointing judges appears in the Torah verses : "Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, throughout thy tribes: and they shall judge the people with just judgment" (Deuteronomy 16:18). The verse does not impose the duty of appointing judges specifically upon the leadership, but uses general language. Bible commentator Don Isaac Abravanel (Spain and Portugal, 15th century) infers from this verse that judges were not appointed by the leadership, but by the people:

> And the master prophet clarified by this that the judges who are to be in Israel, should not be appointed by the king, or on his behalf, but should be appointed by the people. That is to say, that each and every tribe should appoint the suitable judges in each of their towns. That is why he says: "which the Lord thy God giveth thee, throughout thy tribes". This implies that the Lord your God assigns the appointment of judges to your tribes, who will appoint them in their gates. Not the king (Abravanel's Torah Commentary, Deuteronomy 16:18. See also: Michael Vigoda, *Appointment of Judges*, 83 PARASHAT HASHAVUA (2002) (hereinafter: Vigoda) (Hebrew)).

Abravanel's commentary reflects an awareness that the judicial system has to be autonomous and independent of the executive, and so the appointment of judges should also fall to the public.

It seems that Abravanel is concerned with the establishment of the judicial system in his and our times, in the absence of a Sanhedrin. For one might say that there is no disputing that at the time of the Sanhedrin, the appointment of judges, called s*mikhah*, was done by the Sanhedrin with the consent of the Nasi, as described in the Jerusalem Talmud: "They decreed instead that the court shall not appoint without the Nasi's approval, and the Nasi shall not appoint without the court's approval" (TJ SANHEDRIN 6b. See also Maimonides' description in MISHNEH TORAH, Sanhedrin 4:1). However, even when the appointment was in the hands of the Sanhedrin, the sources show that, beside the importance of the judge's knowledge of the Torah, the sages gave

weight to his public stature as a key factor in his ordination. We learn this from the Tosefta in tractate Sanhedrin:

> They used to send out and examine every one who was wise, levelheaded, sin-fearing and of mature age, with whom people are content. Such a one they made a judge in his city"(tSanhedrin 7:1).

In other words, beside the principle of autonomy and independence reflected in Abravanel's words, the judge must be held in public esteem. Grounds for this requirement can already be found in the Torah. Faced with Jethro's criticism of the burden placed upon him, "why sittest thou thyself alone, and all the people stand by thee from morning unto even?" (Exodus 18:14), Moses seeks out worthy judges capable of sharing in the task of adjudication. To do this, he addresses the public: "Take you wise men, and understanding, and known among your tribes, and I will make them rulers over you" (Deut. 1:13). Rashi, in his comment on the verse, explains the need to appeal to the public in order to find the judges: "Men whom you recognize, for if one were to come before me wrapped in his tallith, I would not know who he is and of what tribe he is, and whether he is suitable. But you know him, for you have raised him. Therefore, it says, 'known among your tribes'" (Rashi's Commentary on Deut. 1:13). A similar idea is presented by Nahmanides in his commentary on that verse: "And they were known to be judges from the start. For everyone would say: This one is fit to be a judge" (Nahmanides' Commentary on Deut. 1:13).

The tension between the aspiration to have the judge be a neutral party with no bias toward those who select him, and the requirement for him to be acceptable to the public and reflect its values, was resolved in different ways in the Jewish communities throughout history (see: Vigoda, *ibid*, and his references; Michael Vigoda, *The Rabbinical Courts and the Appointment of Judges in Jewish Law*, 12 MACHANAIM (1996) (Hebrew)). However, despite the differences between communities in the procedures for electing judges, the two principles—the judge's independence and the principle of reflection and accountability—are also present in the Jewish law sources. On the one hand, a judge must be independent and detached from the ruling authorities, and on the other hand, his appointment depends on his being accepted and esteemed by the public, which is also an active partner in his selection process.

In our case, of particular interest is the passage in a book written by a justice of this Court—S. Assaf—describing the appointment of rabbinical judges in the Krakow community, as documented in the community journals (*pinkasim*):

> On the first day of *hol hamo'ed*, the four "heads" and five "*tovim*" [community leaders, *parnassim*] and the fourteen members of the community council convened and took upon themselves "in true faith, with the consent of the Almighty and the consent of this congregation", that they have neither undertaken nor shall undertake any conspiracy with anyone regarding the election, and that each of them shall express his opinion for the sake of heaven and in the public interest. Those assembled cast ballots into ballot box, with the name of one person only written on each ballot. The s*hamash* [beadle] draws nine notes from the ballot, and those written on them are considered to be first electors. The nine electors step inside the synagogue, and the *shamash* has them take an oath before the open Holy Ark to elect five important, honest people as second electors. The *shamash* immediately gathers the five second electors in the synagogue and makes them swear that, in selecting all the community's officers, they will take into account only the public good. After the oath, they are put into a special room in the community building, where they sit "enclosed and secluded, no one leaves and no one comes to them… with the guards standing even at night to guard their doors", and they select judges, community leaders, *tovim*, accountants and the rest of the community's officers for the coming year (from SIMCHA ASSAF, COURTS AND THEIR PROCEDURES AFTER THE SEALING OF THE TALMUD 44 (1924) (Hebrew)).

Rabbinical judges are not appointed directly by the publicly elected officials, but by a special committee of "first electors" appointed by them. This practice reflects a balance between two values: On the one hand, it is the publicly elected officials who appoint the committee, thus maintaining the principle of "reflection"; but on the other hand, the appointment committee is elected in semi-random fashion by a "draw" of nine names out of 23 proposed by the community heads, which is also a way to fulfil the principle of autonomy and independence between the judges and the heads of the community. Thus, one might find some similarity in principle between the selection method used hundreds of years ago and the Judicial Selection Committee in place in Israel.

18. In concluding this matter, the question of selecting judges is not strictly procedural. It embodies a fundamental question about the democratic and constitutional characteristics of the judiciary. The system that took shape in Israel over the years, with a view to balance the principles,

determines that the appointment of judges is to be handled by the Judicial Selection Committee in its aforementioned composition, consisting of professional representatives alongside representatives from all three branches of government. Against this backdrop, the Knesset did well in establishing a practice, for a quarter of a century, whereby the legislature is to be represented by two Members of Knesset, as a requirement for equal representation by a member of the coalition alongside a member of the opposition. I have expressed my position that more weight should be accorded to a practice to the extent that it reflects a worthy constitutional position. This is not a sole consideration. To this one must add, as mentioned, the internalization of the practice, but this consideration adds weight of its own to the validity of the existing practice. The practice has normative components. The convergence of the principle of proportional representation for the minority and the Judicial Selection Committee strengthens the conformity of the practice with the State of Israel's constitutional system of the early 21st century. This is the actual practice, and it should thus be followed—if not more than that—in the future as well.

F. *Conclusion*

19. Everything we have said can be summarized as follows: The petition's submission was seriously delayed. The Petitioners failed to act in the months following Yisrael Beitenu's crossover to the coalition, with no plausible explanation provided. During these months, the Committee worked intensively. In particular, proceedings were initiated to consider candidates for the Supreme Court. The implications of accepting the petition at the present time might directly affect these sensitive proceedings. Moreover, the Petitioners are asking us for a first-ever decision on the status of constitutional custom in Israel. They want us to determine that such a custom exists in our case, while extending the custom by interpretation to cases in which it was never applied. Consequently, we cannot grant the petition in its current form. With that said, it is important for the Court to state its position on the practice of appointing at least one Knesset Member from the opposition parties to the Committee. In my view, without deciding the issue of constitutional custom, its continued existence is very important, and this by virtue of constitutional principles of the system, which recognize the principle of proportional representation. The current parliamentary thinking is that the opposition should not be left to sit idle in a corner pending the

next elections. It has a role to play. Its contribution is important for the Knesset's work. This is what emerges from the law and the case law presented above.

We have seen the strength of the principle of proportional representation in Israel's governance and administration procedures. We have shown the importance of the Judicial Selection Committee. The legislature itself saw fit to bring together an unusual forum comprising senior members of the judiciary and the executive, as well as representatives of the legislature elected by secret ballot, along with professionals. One would be hard-pressed to point to a forum so unique in its composition in other contexts. However, when it comes to the Judicial Selection Committee, this is required. The combination between the two—the principle of proportional representation and its significance, and the Judicial Selection Committee—sheds light on the practice to elect a representative from the opposition parties to the Committee. The combination explains it historically. It emphasizes its importance as a value against the background of the constitutional principles of the system. All of these serve as an important foundation in examining the existence of a constitutional custom as well.

Let me stress once more that I am not deciding all of the Petitioners' claims. The questions are not easy. The answers to them raise some complexity. But the wise have eyes to see. Let us say that from a forward looking perspective and in terms of desirable governance—and possibly even beyond—it is right to maintain the practice whereby the opposition parties are represented on the Judicial Selection Committee. Let us spell this out: We are not intervening in the present case. However, should the Knesset decide, come the next election to the Judicial Selection Committee, not to appoint a representative from the opposition parties on its behalf in the election of the Committee—it will face a serious legal hurdle. Moreover, one might think that the Knesset would do well to consider formulating the vague rule into a clear rule. One way or another, should it be decided to depart from this practice, the parties' arguments are reserved for them.

Let us end by going back to our opening words, where it was clarified that this petition and its content are delicate and sensitive: The relationship between the Court and the Knesset in carrying out its role of appointing representatives to the Judicial Selection Committee. But it seems that, rather than tension, what was created is a kind of normative harmony. The Knesset did well to adopt the practice for 25 years. This is proper. In this, it served as an example for developing society as a Jewish and democratic society.

20. I would recommend that we dismiss the petition without an order for costs. The very act of submitting the petition made a contribution, even if the petition has been dismissed.

Justice I. Amit:

I concur in dismissing the petition.

1. My colleague Justice N. Hendel has painted a broad, fascinating canvas of judicial autonomy, drawing widely on the hidden treasures of our sources and on comparative law. The independence of judges underlies the democratic system, and none dispute the importance of this principle. One of the conditions required in order to guarantee the autonomy and independence of judges in Israel is that the four representatives of the legislative and executive branches not be homogeneous. The great danger inherent in this kind of situation has not escaped the Knesset, and there is a reason why a kind of constitutional convention formed over the years that the votes in the Knesset to elect the representatives to the Committee would be held in such a way that at least one of the two representatives would belong to the opposition (I would note that in one past case, a situation came about where two representatives of the opposition were elected). This is the customary practice and also the proper normative state of affairs, as the Knesset's attorney confirmed to us. The Knesset is therefore to be commended for having followed and for following this practice for years.

2. The case before us is "accidental", an exceptional instance born of political vicissitudes, where a party whose members sat on the opposition benches (and I am not addressing the question of whether every party that is not in the coalition is "automatically" considered an opposition party for the purposes of representation on the Committee) crossed the lines to the coalition benches. Cases like these come under section 6(1) of the Courts Law [Consolidated Version], 5744-1984, which states as follows:

> 6. These provisions shall apply in the matter of the Judicial Selection Committee, where, in accordance with section 4 of Basic Law: The Judiciary (hereinafter: the Committee):

> (1)The Knesset shall elect by secret ballot the two Members of Knesset who shall serve as members of the Committee; they shall serve as long as they are Members of Knesset, and if the Knesset's term has ended—until the new Knesset elects other members in their stead, and all subject to the provisions of the Knesset Law.

It appears that the legislature did not envisage the exceptional case before us, but the provisions of the law are clear, and the practice and custom yield to an explicit law of the Knesset. For me, this is reason enough to reject the petition, and to do so without laying down hard-and-fast rules regarding constitutional custom as a binding legal source.

3. The petition has raised an important issue that deserves consideration. The legislature would do well to enshrine the customary practice we pointed to above in the Courts Law. This was done in Amendment no. 74 of 2014, which added sec. 6 (3a) to the Law in order to ensure female representation on the Committee:

> 3a. At least one of the representatives of the Supreme Court justices on the Committee, at least one of the government representatives on the Committee, at least one of the Knesset representatives on the Committee and at least one of the representatives of the Israel Bar Association on the Committee shall be women;

Let me note that in other contexts, the legislature has taken into account the need to guarantee the opposition proper representation. Thus, sec. 13D(a) of the Knesset Members Immunity, Rights and Duties Law, 5711-1951, establishes types of cases where a Knesset Member would be subject "to judgment by the Ethics Committee", and sec. 13D(b)(1) of said law states as follows:

> The Ethics Committee shall consist of the four Knesset Members who will be appointed by the Speaker of the Knesset, for the term of that Knesset, taking into account, inter alia, the parties making up the Knesset, two of them members of the coalition parties and two of them members of the opposition parties; the Speaker of the Knesset shall designate the chairperson of the Ethics Committee from among its members;

The legislature thus saw to it that the Ethics Committee would not be solely made up of Knesset Members belonging to the coalition, in order to ensure the autonomy and independence of this committee. If such is the case for an internal, quasi-judicial Knesset committee, then all the more so when it comes to the Judicial Selection Committee, whose composition is meant to guarantee the principle of autonomy and independence on which the entire judicial system hinges. And indeed, the importance of this issue did not escape the eyes of Knesset Members in the past who tabled private-member bills in each of the last four Knesset terms in order to set this practice in law. But we need not go that far. The incumbent Minister of Justice, Ayelet Shaked, was aware of the importance of this principle while still a Knesset Member, and I shall refer to the private-member bill she submitted at the time, together with MK Yariv Levin (P/1994/19). The private-member bill, as it relates to the Knesset's representatives, proposes that "one shall be a representative of the coalition parties and one a representative of the opposition parties", and the explanations for the proposed amendment read as follows:

> It is proposed to bindingly establish in law the *practice* whereby the Knesset's representatives to the Judicial Selection Committee are elected one from the ranks of the coalition and one from the ranks of the opposition, *in order to ensure that the choice of Knesset representatives, too, reflects the variety of views prevalent among the public as expressed in the elected composition of the Knesset* (emphasis added—I.A.).

At the very least, the Knesset would do well to anchor the existing practice in the Knesset's Rules of Procedure, where representation is given to members of the opposition parties in various frameworks of parliamentary activity.

Justice U. Vogelman:

Like my colleague Justice Hendel, I too believe that the petition should be dismissed *in limine* owing to the delay in its submission. As a result, I did not see fit to take up the hefty question regarding the place of constitutional custom as a binding legal source in our legal system, nor determine the necessary preconditions for its formation. I say this even as I share my colleagues' view that the Knesset's customary practice of electing a representative from a coalition party and a representative from an opposition party for membership on the Judicial Selection Committee is

worthy and serves important governance purposes. Therefore, it is also my view, and without deciding the question of whether a constitutional custom applies in general or in the circumstances of this case in particular, that the Knesset would do well to regulate the issue explicitly.

Needless to say, in the absence of such regulation, should the Knesset fail to elect a representative on behalf of the opposition parties during the next elections for the Judicial Selection Committee, the arguments of all parties are reserved for them.

The petition is dismissed without an order for costs, as stated in the opinion of Justice N. Hendel.

Given this day 5 Shvat, 5777 (Fe. 1, 2017).