HCJ 2671/98

Petitioner: **The Israel Women's Network**

v.

Respondents: 1. **The Minister of Labor & Social Affairs**

2. **Baruch Marom**

In the Supreme Court sitting as High Court of Justice

[August 11, 1998]

Before Justices M. Cheshin, I. Zamir, D. Beinisch

Supreme Court cases cited:

[1] HCJ 453/94, 454/94 *The Israel Women's Network v. Government of Israel*, IsrSC 48(5) 501.

[2] HCJ 4566/90 *Dekel v. Minister of Finance*, IsrSC 45(1) 28.

[3] HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications*, IsrSC 48(5) 412.

[4] HCJ 703/87 *Crown (Keren) v. Civil Service Commissioner*, IsrSC 45(2) 512.

[5] HCJ 6163/92, 6177 *Eisenberg v. Minister of Building and Housing*, IsrSC 47(2) 229.

[6] HCJ 7175/95 *Arad v. Knesset Speaker*, IsrSC 20(1) 573.

[7] HCJ 8160/96, 6458/96 *Abu Krinat v. Minister of the Interior*, IsrSC 52(2) 132.

[8] HCJ 727/88 *Awad v. Minister of Religious Affairs*, IsrSC 42(4) 487.

[9] HCJ 98/69 *Bergman v. Minister of Finance*, IsrSC 23(1) 693.

[10] HCJ 7111/95, 8195 *Federation of Local Authorities v. Knesset*, IsrSC 50(3) 485.

[11] HCJ 953/87, 1/88 *Poraz v. Mayor of Tel Aviv Jaffa*; *Labor Faction of the Tel Aviv – Jaffa Municipality v. Tel Aviv – Jaffa City Council*, IsrSC 42(2) 309.

[12] HCJ 685/78 *Omri Mahmud v. Minister of Education*, IsrSC 33(1) 767.

[13] CA 6926/93 *Israel Shipyards Ltd. v. Israel Electric Corporation Ltd*., IsrSC 48(3) 749.

[14] HCJ 1000/92 *Bavli v. Great Rabbinical Court*, IsrSC 48(2) 221.

[15] HCJ 6051/95, 6086/95 *Rekanat v. National Labor Court et al*; *El Al Israel Airlines Ltd. v. National Labor Court*, IsrSC 51(3) 289.

[16] HCJ 693/91 *Efrat v. Director of the Population Registry*, IsrSC 47(1) 749.

[17] HCJ 104/87 *Nevo v. National Labor Court*, IsrSC 44(4) 749.

[18] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, IsrSC 42(2) 221.

[19] CFH 1558/94 *Nafisi v. Nafisi*, IsrSC 50(3) 573.

[20] HCJ 4541/94 *Alice Miller v. Minister of Defence* [20], IsrSC 49(4) 94.

[21] CA 84/64 *Beit Hananya Ltd. v. Friedman*, IsrSC 18(3) 20.

[22] CA 89/85 *Beit Herut – Workers' Cooperative for Cooperative Agricultural Settlement Ltd. v. Glassman*, IsrSC 41(3) 526

[23] CFH 7325/95 *Yediot Aharonot Ltd. v. Kraus*, IsrSC 52(3) 1

[24] HCJ 5503/94 *Segal v. Knesset Speaker*, IsrSC 51(4) 529

[25] CA 3798/94 *A. v. B*., IsrSC 50(3) 133

Labor Court cases cited:

[26] LabA MD/4-20 *"Halamish" Ltd. v. The Tel Aviv Jaffa Workers Council*, IsrLC 15, 320.

[27] LabA MH/168-3 *Alfariah v. Rotenberg*, IsrLC 19 515

[28] LabA 56/129-3 *Plotkin – Eisenberg Brothers Ltd.* (unpublished).

[29] LabA 51/8-3 *State of Israel v. Gestetner Israel Ltd*., IsrLC 24, 65.

[30] LabA 33/3-25 *Flight Attendant Crew Committee v. Edna Hazin*, IsrLC 4, 365.

American cases cited:

[31] *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973):

Israeli articles cited:

[32] Y. Tirosh, *Proper Representation of Members of Both Sexes in the Civil Service*, 30 MISHPATIM 183.

[33] I. Zamir, *Political Appointments in Judicial Review*, 21 MISHPATIM 145.

[34] O. Kamir, *What's in a Woman's Name*, 27 MISHPATIM 327.

[35] F. Raday, *About Equality* [35], in THE STATUS OF WOMEN IN SOCIETY AND THE LAW (F. Raday, C. Shalev & M. Liben, eds.) (1995) 19.

[36] C. Shalev, *On Equality, Difference and Sex Discrimination*, in LANDAU BOOK, vol. II, (A. Barak, E. Mazuz eds.) (1995) 893.

[37] A. Rosen, *Male Culture and the Status of Women in Technology*, in WOMEN – THE RISING POWER: PROMOTION OF WOMEN AT WORK, SHATTERING THE "GLASS CEILING", 2nd ed. (A. Maor, ed.) (1992) 124.

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Attorney for Respondent 1: Adv. Osnat Mendel

Judgment

Justice M. Cheshin:

1. On March 29, 1998, the Minister of Labor & Social Affairs appointed Mr. Baruch Marom to the office of Deputy Director of the IT & Information Systems Administration of the National Insurance Institute. The appointment was for a six-month trial period. Prior to the appointment, eight deputy directors held office in the National Insurance Institute, including one woman who was on leave (in circumstances under which it was reasonable to assume she would not return to work). The Petitioner – the Israel Women's Network – is a public association whose goal is to fight for the promotion of equality and justice between the sexes in Israeli society. The Petitioner

claims that the appointment is void because the Minister of Labor & Social Affairs, who holds the appointment power, failed to fulfil his important obligation to act for proper representation of both sexes among the deputy directors at the National Insurance Institute. This is the issue we will address: proper representation of members of both sexes – women and men – in the management of the National Insurance Institute in particular, and in the civil service in general.

For the reader's convenience: the Minister of Labor & Social Affairs, Respondent 1, will be referred to as the Minister or the Minister of Labor & Social Affairs; Mr. Baruch Marom, Respondent 2, will be referred to as Marom; the Deputy Director for the IT & Information System Administration will be referred to below as the IT Deputy Director.

2. The order of the discussion will be as follows: first we will look into the structure of the National Insurance Institute and its procedures for appointments insofar as relevant. We will then describe the proceedings in the appointment of Marom to the office of IT Deputy Director and explain how they fit into the Institute's system. In the last part of the opinion, we will address the legal issues that arise.

The structure of the National Insurance Institute

3. As prescribed by sec. 8(a) of the National Insurance Law [Consolidated Version], 5755-1995 (hereinafter: the Law or the NII Law), the National Insurance Institute is a statutory corporation that has three tiers of officers and employees.

The supreme authority of the National Insurance Institute is the National Insurance Institute Council (sec. 8(b) of the Law). Its main role is to oversee the actions of the National Insurance Institute and its management (sec. 12(1)). The Council Chairman is the Minister of Labor & Social Affairs (sec. 14 of the Law). He is the minister responsible for the implementation of the Law (sec. 400 of the Law), and he is the supervisor of the National Insurance Institute (sec. 8(c)). In general, the Council can be described as essentially the same as a board of directors in another corporation. The Law does not include a provision on the manner of appointment of the Council members, other than the statement that the Council's composition, manner of establishment, and conditions for termination of membership will be determined following consultation with the Labor & Social Affairs Committee (sec. 11(a) of the Law).

Second tier – under the Council – is the *Management* layer. The Management is the managerial and executive authority of the National Insurance Institute (sec. 8(b) of the Law), and it is supervised by the Council (sec. 12(1)). The members of the Management are the National Insurance Institute Director, who is the Administrative Chairman, the Vice Director and the Deputy Directors (sec. 18 of the Law). The Director, Vice Director and the Deputy Directors, are appointed by the Minister after consulting with the Council (sec. 20 of the Law).

Third tier – under the Management – is the tier of "*other employees*". They are the subject of sec. 22 of the Law (under the title "Organization"), according to which the Management appoints the "other employees of the Institute" (sec. 22(a)). What is most relevant to the present case is sec. 22(b) of the Law, whereby "the appointment of the Institute's employees under this section shall be in accordance with the rules for the appointment of State employees, with such changes as may be required…".

4. Let us summarize for our purposes and say as follows: There is no direct provision in the Law on the matter of the appointment of the Council members; the members of the Management are appointed by the Minister; the other employees are appointed by the Management in the same manner that State employees are appointed.

Marom's appointment process

5. The outgoing IT Deputy left office in October 1997, and in March 1998, as stated, the Minister appointed Marom to the vacated office. Truth be told, it is not clear to us how the Minister found Marom – or perhaps, how Marom found the Minister – however, we will briefly describe the stages of the process, insofar as they were laid out before us. We received a description of how candidates are found from Mr. Yossi Tamir, the outgoing Director of the Institute. Mr. Tamir stated as follows before the Institute's appointment committee (which we will discuss below):

> ...we did not publish a notice in the newspaper, but rather a search is performed mainly by companies that deal with such matters, and from acquaintance with people in the field…an advertisement for the position of deputy director has never been placed in a newspaper, so the Minister did not deviate from the existing practice. About 24 candidates applied, some

of whom were also directly referred to us by the Minister. Out of all of the applicants, we selected a small number of candidates. There were candidates who were referred by the Minister who were not accepted. Several candidates remained for the final stage, I interviewed them, spoke with them. In the last stage, the 4 candidates were brought to be interviewed by the Minister, and of the 4 candidates, the minister chose Baruch Marom (p. 2 of the committee minutes of March 23, 1998).

The Minister's statements in his affidavit will complete the description:

> …candidates who approached me, including Mr. Baruch Marom, information on whose qualifications was brought to my knowledge several months prior to that, were also referred by me to be examined by the National Insurance Institute Director …
>
> I did not receive a recommendation from parties outside the ministry with regard to Respondent no. 2, nor with regard to the other candidates, but I did orally consult with both the Director of the Ministry of Labor & Social Affairs and the National Insurance Institute Director …
>
> In the consultation that I held, it was emphasized to me that for the IT Department, at this time, the issue of the system's management and organization is of greater and more important weight than the specific professional issue, although a person who lacks experience and knowledge in the field of data processing cannot be appointed for the job…
>
> …in addition, I took into consideration the suitability and qualifications of the candidate to serve as a member in the National Insurance Institute Management in all of its fields of operation.
>
> After a process of examination of various candidates, I chose Mr. Baruch Marom out of four candidates.
>
> …the consideration of the system's management and stabilization after a reorganization and big logistic changes tipped the scales in choosing him

> for the position, although there were better computer professionals among the other candidates.
>
> There are currently several division managers in the IT Department. Their suitability for the offered position was examined, but none of them was found to be able to lead the system toward the goals that it faces. The situation was similar when the former deputy director in this area was appointed (pp. 2-4 of the reply affidavit of July 20, 1998).

Thus, from all of the aforesaid we have learned the following: out of the candidates of whom the Minister heard in one way or another, and after having consulted with the Director of the Ministry of Labor & Social Affairs and the National Insurance Institute Director , the Minister reached the conclusion that it is Marom who is the candidate suitable for the office of IT Deputy Director.

6. Once the Minister found that Marom was the proper candidate for the office, he presented the matter to two committees: the Appointments Review Committee that was established under the Government Companies Law, and to the Appointments Committee of the National Insurance Institute Council. Let us review the deliberations that were held by these two committees, in their chronological order.

The proceedings that were held by the Appointments Review Committee under the Government Companies Law

7. Pursuant to his authority in Section 18B and 60A(b)(2) of the Government Companies Law, 5735-1975 (hereinafter: the "Government Companies Law"), the Minister of Justice appointed a committee called the "Appointments Review Committee" which is a "committee for the review of the qualifications and suitability of candidates for the office of a director, chairman of the board of directors, or director of a government company…". Inter alia – and fundamental to our case – the committee is supposed to review whether the composition of the board of directors of a government company gives "proper expression to representation of both sexes." (sec. 18A(a); see para. 23 below). Since the National Insurance Institute is a statutory corporation, the aforesaid legal provision was applied to the appointment of its director and deputy directors (see: the

provisions of sec. 60A of the Government Companies Law and the provisions of sec. 20 of the National Insurance Law).

8. Thus, on December 31, 1997, the Minister requested that the Chairman of the Appointments Review Committee, Judge (emeritus) Mordechai Ben Dror, bring the matter before the committee over which he presides, for approval of the appointment of Marom to the office of IT Deputy Director.

9. At this point we will take a small step back, to the appointment of another deputy director at the National Insurance Institute, an appointment that preceded Marom's appointment. It was in the middle of November 1997 – about six months before his request with regard to Marom – that the Minister sought to appoint Mr. Efraim Shani as a member of the National Insurance Institute's Management (we should recall that the Management members are the Director, Vice Director, and Deputy Directors). As customary, and as he is legally obligated, the Minister presented the request to the Appointments Review Committee, and the committee approved the appointment. However, on November 30, 1997, the committee chairman wrote the Minister a letter as follows:

> In response to your request, I respectfully inform you that the Appointments Review Committee, pursuant to its authority under sec. 60A of the Government Companies Law, has examined Mr. Efraim Shani's candidacy for membership on the National Insurance Institute's Management.
>
> The committee approves the appointment of Mr. Efraim Shani as member of the National Insurance Institute's Management.
>
> I would like to direct your attention to the fact that in the aforesaid Management there is only one woman as opposed to 8 men (including the aforesaid candidate who was approved at the committee meeting of November 27, 1997).
>
> This state of affairs is inconsistent with the provisions of the law and the judgment in HCJ 454/94.

> *The Appointment Review Committee will examine the candidacies of men only after women candidates will be proposed to it* (emphasis added – M.C.).

Note: the judgment that is mentioned in the letter is HCJ 453/94, 454 *The Israel Women's Network v. Government of Israel* [1].

Thus, the Appointments Review Committee Chairman takes note of the discrimination against women in the National Insurance Institute's Management, and sends a quasi–warning to the Minister that the committee will "will examine the candidacies of men only after women candidates will be proposed to it ". Clear and unequivocal language.

10. Back to our case. The Appointments Review Committee examined the Minister's request to appoint Marom for office of IT Deputy Director, and on February 3, 1998, the committee chairman wrote a letter to the Minister as follows:

> I would like to inform you that in its meeting of February 2, 1998, the committee resolved not to address the candidacy of the aforementioned.
>
> The reason for that stems from the provisions of sec. 18A of the law [the Government Companies Law – M.C.] and the Supreme Court's ruling in HCJ 454/94, and the Attorney General's letter dated December 31, 1997, on the issue of proper representation of both sexes.
>
> To date, only one woman holds office in the Council as opposed to 7 men.
>
> This situation is inconsistent with the aforesaid provisions.
>
> The committee has written to you on this issue before (see the committee's decision of November 30, 1997, attached hereto), and referred you to the unfair representation of women and requested that women candidates be proposed to it.
>
> *The Appointments Review Committee will address the candidacy of the aforementioned only after women candidates will be proposed to it* (emphasis added – M.C.).

True to its previous letter, the committee denied the Minister's request and informed him that it would address Marom's candidacy "only after women candidates will be proposed to it".

11. The Minister did not despair, and following a conversation with the committee chairman, he wrote him the following letter on February 26, 1998:

> Pursuant to our conversation and correspondence on the said issue, I wish to re-emphasize the vast significance of appointment of an IT Director at the National Insurance Institute.
>
> This is a principal officer of the National Insurance Institute, who is in charge of the National Insurance Institute's entire computerized system. Such a system is the essential tool without which it is impossible to perform the current work of the National Insurance Institute that affects the entire population of the State of Israel, both with respect to timely payment of pensions and the collection of insurance fees.
>
> In addition, this deputy director is responsible for the development, operation and maintenance of the computerized systems, determination of the development approach and the necessary tools for that, provision of communication services to units at the National Insurance Institute head office and branches, centralization of data and information in the areas of social security and the establishment of a database in these areas.
>
> Furthermore, following the retirement of the previous Deputy Director, the Director decided to assume the responsibilities of the IT Deputy Director, while noting the centrality and significance of the aforesaid role.
>
> *The issue of proper representation of members of both sexes (sec. 18A) will be given proper weight in future appointments*.
>
> I will be grateful if you bring the appointment of Mr. Baruch Marom to the position of IT Deputy Director at the National Insurance Institute for the review of the committee (emphasis added – M.C.).

This letter is somewhat puzzling, if only because it does not provide an answer to the committee chairman's complaint about the failure to properly represent women in the National Insurance Institute's Management, but rather the Minister replies that the position of IT Deputy Director is extremely important. Does this mean that the importance of the position indicates that only a man can fill it properly? All that the Minister tells us is that "the issue… will be given proper weight in future appointments".

12. Thus, the issue of Marom's appointment was again raised before the Appointments Review Committee, and this time the committee accepted the request. In the words of the committee chairman to the Minister in his letter of March 11, 1998:

> At the meeting on February 2, 1998, the committee resolved not to address Mr. Baruch Marom's candidacy for deputy director and member of the National Insurance Institute's Management, in view of the fact that the Management is not properly representative (there is only one woman as opposed to 8 men).
>
> The committee wrote to you and to the deputy director of your ministry on this matter in its letter of February 3, 1998, and you both mentioned the fact that for it to be possible to appoint a woman for the National Insurance Institute's Management, it is not sufficient that a suitable woman candidate to be found. The reason for this being that under the law, a woman candidate can only be a woman who holds office as a vice director or deputy director of the National Insurance Institute (see sec.18 of the National Insurance Law). Therefore, a suitable woman candidate must first be found for appointment to the position of vice or deputy as aforesaid, so that she may then be appointed as a member of the Management.
>
> *You notified the committee that in the next appointment for the position of one of the deputy directors you intend to appoint a woman candidate to such a position and in any event, and when a woman is appointed to such a position, her candidacy for membership in the National Insurance Institute's Management will, in any event, be presented to the committee.*

> Thus, the committee was asked to approve the appointment of the aforementioned candidate subject to the aforesaid, pursuant to which the next appointment as one of the National Insurance Institute's deputies will be a woman, and that once such a woman is appointed, her candidacy will be submitted for approval by the committee as a member of the National Insurance Institute's Management.
>
> *Subject to the receipt of a letter as aforesaid, the committee approves the candidacy of the aforementioned* (emphasis added – M.C.).

The Minister undertook before the committee chairman – apparently orally – that the next appointment for a deputy's office would be a woman, and consequently, the committee agreed to approve Marom's appointment. At the committee chairman's request, the Minister put his undertaking in writing, and as he stated in his letter dated March 16, 1998:

> I would like to thank you and the committee members for having considered the qualifications of Mr. Baruch Marom for the position of IT Deputy Director and member of the National Insurance Institute's Management, and approved his candidacy.
>
> With respect to your letter, I notify you that when it is decided in the future to appoint a deputy director for the National Insurance Institute (who is also a member of the Management by virtue of sec. 18 of the National Insurance Law), I will act in accordance with what was stated in your above-referenced letter.

Marom's appointment was completed, as aforesaid, on March 29, 1998.

13. While the Minister and the committee chairman were exchanging letters on the subject of Marom's appointment, Ms. Hanna Ranel – Director of the Software Infrastructure Division of the IT Department, who has been working at the National Insurance Institute for some 26 years – wrote to the Minister and presented her candidacy for the office of IT Deputy Director. In her letter, Ms. Ranel specified her experience and qualifications, and further emphasized the importance of appointing a woman, particularly in view of the scarcity of women in the National

Insurance Institute's Management. The Minister's office confirmed to Ms. Ranel that her letter was received. Beyond that, Ms. Ranel received no further response.

14. The Petitioner in our case also wrote to the Minister, and directed his attention to Ms. Ranel's potential candidacy. In her letter, the Petitioner also pointed out the need to act for the proper representation of the sexes in the National Insurance Institute's Management. At the same time, the Petitioner also contacted the chairman of the Appointments Review Committee.

The committee chairman answered the Petitioner on March 16, 1998, stating, inter alia, the following:

> The committee over which I preside has decided to inform the Minister that it will only appoint a female candidate as a member of the National Insurance Institute's Management, and in any event, it is necessary to first appoint a woman for the position of deputy director of the National Insurance Institute.
>
> The Minister of Labor & Social Affairs agreed and confirmed in writing that the next appointment position [*sic* – M.C.] of deputy director of the National Insurance Institute will be of a woman. Obviously, this is not about just one additional appointment, but at this stage (after there is already one woman in the position) there will be at least one more woman, and thus we will also continue to maintain this principle of equality in the future as well.

And finally, about one week after the completion of Marom's (temporary) appointment, on April 5, 1998, the Minister answered the Petitioner's letter to him, as follows:

> I hereby inform you that I am acting for the promotion of women in all of the systems for which I am responsible.
>
> The promotion of women at the level of the National Insurance Institute's Management and in the other positions in this institute is and will be carried out in the future, and as necessary, to a better extent than in the past.

15. Thus far – the proceedings that in the Appointments Review Committee under the Government Companies Law.

The proceedings before the Appointments Committee of the National Insurance Institute Council

16. As provided in sec. 20 of the National Insurance Law, the Minister is to appoint a deputy director for the National Insurance Institute after consulting with the Council. The Council delegated its power to an appointments committee, and the issue of Marom's appointment was raised before that committee in its meeting of March 23, 1998 (following the approval of the appointment by the Appointments Review Committee under the Government Companies Law). The committee examined Marom's candidacy, and following deliberation, resolved to approve it for a trial period, as stated in its resolution dated March 23, 1998:

> *Resolution*: The committee advises the Minister to appoint Mr. Baruch Marom as IT Deputy Director of the National Insurance Institute.
>
> In view of the nature of the position, its centrality in the National Insurance Institute and essential nature, the committee recommends to the Minister that the initial six-month period from the date of appointment be a trial period.
>
> Upon conclusion of such period, the opinion of the National Insurance Institute Director on the functioning of Mr. Baruch Marom will be presented to the Appointments Committee.

The aforesaid resolution led to Marom's appointment for a six-month trial period.

The issues in dispute

17. The Petitioner challenges Marom's appointment to the office of IT Deputy Director at the National Insurance Institute, based on two main arguments. One argument is that the Minister failed to fulfill his obligation to act for the proper representation of women in the National Insurance Institute's Management. The second argument focuses on the issue of Marom's qualifications. According to the Petitioner, Marom lacks proper qualifications for the office of IT Deputy Director, which raises a concern that his appointment was based on irrelevant considerations, and that such irrelevant considerations also resulted in the failure to find women candidates with qualifications that are similar to, or even exceed, Marom's qualifications.

Let us begin with the second argument: the issue of Marom's qualifications.

The issue of Marom's qualifications

18. The Petitioner claims, as aforesaid, that Marom lacks qualifications to hold office as IT Deputy Director, and its main arguments are as follows:

First, the absence of any professional education in the computer field, which – needless to say – is an essential qualification for appointment to the office of IT Deputy Director. In this context it should be noted that the National Insurance Institute's Appointments Committee also raised concerns with regard to that shortcoming in Marom's professional education. So, for example, we hear the following from the Director of the Ministry of Labor & Social Affairs at the committee's meeting: "It seems to me that the candidate is suitable for the position, however, if there were someone who had previously managed professional systems, it would have been preferable". And the question is: Could no man or a woman be found who previously managed professional systems? Moreover, upon taking office, Marom requested that a professional advisor be appointed for him. This request was refused.

The Minister's answer to these arguments is that the IT Department is currently undergoing re-organization,. Therefore, what should be emphasized in appointing the Deputy Director is specifically his managerial and organizational abilities, as distinct from his computer abilities. Thus, it was Marom's organizational skills that led to him being chosen "even if among the other candidates there were better computer professionals".

The second argument: It was not proven that Marom has organizational and HR management qualifications. Neither his CV nor his interview by the committee revealed the scope of the systems that he managed or the number of people over which he was directly in charge.

Finally: The Petitioner finds support for its arguments in the doubts that arose in the Appointments Committee with respect to Marom's suitability for the designated position. Those doubts led the committee to decide to appoint him for a six-month trial period.

The Minister's answer is that Marom has proper experience, and in any event, his suitability for the position will be examined at the end of the trial period. The Minister finds support for the appointment in the decision of the Appointments Review Committee under the Government Companies Law.

19. We pondered the Petitioner's argument both in terms of the strength of the opposing considerations and in terms of whether this is the proper case for intervening in the Minister's decision. However, we have chosen to pave a different route, and have, therefore, decided not to rule on this cluster of arguments presented by the Petitioner. Moreover, Marom has been holding office since the end of March, 1998, some four-and-a-half months, and even if it would have been proper for us to address his suitability for the position, at present – approaching the expiration of the six trial-months – it would not be proper for us to do so.

Thus, let us turn to the Petitioner's main argument on the issue of discrimination against women in the National Insurance Institute's Management.

Does Marom's appointment violate any statutory provisions?

20. Pursuant to his authority under the National Insurance Law, the Minister appointed Marom to the office of IT Deputy Director of the National Insurance Institute. Did the Minister violate an obligatory statutory provision in making that appointment? Did he skip over a mandatory precondition to the appointment? And in our case, in making Marom's appointment, did the Minister breach a statutory duty for the proper representation of women in the National Insurance Institute's Management?

21. According to the Petitioner, the Minister did indeed breach a statutory duty, as set forth in sec. 15A of the State Service (Appointments) Law, 5719-1959 (hereinafter: the Appointments Law). That duty is to give proper representation to women in the National Insurance Institute's Management. Is this indeed the case? Let us set our sights on the law and find out.

Section 15A of the Appointments Law

22. Section 15A of the Appointments Law (as originally enacted) tells us the following:

> *Fair representation for members of both sexes*
>
> 15A. (a) Among the employees in the State service, proper expression shall be given, to the extent that circumstances allow, to the representation of members of both sexes (hereinafter: proper representation).

(b) If the Civil Service Commissioner deems that among the employees of a Ministry, or a unit of a Ministry, or in a type of position, there is no proper representation as aforesaid, he shall act for the promotion of proper representation, to the extent that circumstances allow.

(c) The Commissioner's acts may be performed in a plan that will include provisions on preference in a tender for a position, or a group of positions, or a rank, or a group of ranks that will be specified in the plan, and for the period to be determined therein. The plan requires the approval of the Service Committee. In this subsection, "preference" – giving preference in a tender to a member of the sex that is not properly represented, when candidates of both sexes have similar qualifications.

(d) The Civil Service Commissioner will inform the Knesset's Constitution, Law & Justice Committee of the principles of the plan as provided in subsection (c). The principles are not required to be published in the Official Gazette.

(In the meantime, the section was amended by the Equal Opportunities for Disabled Persons Law, 5758-1998, to confer rights to proper representation to disabled persons. However, we will refer to the original version, which is the currently binding version insofar as proper representation of members of both sexes is concerned).

This law derives from the principle of equality, and includes two secondary rules with respect to appointments in the civil service: first, the rule that mandates that "proper expression shall be given, the extent that circumstances allow, to the representation of members of both sexes" (sec. 15A(a)); and second, when it arises that the representation is improper anywhere in the civil service, the Civil Service Commissioner will "act" for the "the promotion of proper representation, to the extent that circumstances allow" (sec. 15A(b) and (c)). These two secondary rules are united as one, and the purpose of both is to do what can be done for the proper representation of both sexes in the civil service.

Under the assumption that sec. 15A of the Appointments Law governs Marom's appointment, it would seem that the Minister did not do what is required for the appointment of a woman to the National Insurance Institute's Management – he failed to give "proper representation" to women in the Management, and he certainly did not take "affirmative action". However, the question is: *Does* sec. 15A apply to appointments of deputy directors in the National Insurance Institute? We checked, and found no legal basis for this argument.

Section 15A of the Appointments Law can apply to appointments of deputy directors in the National Insurance Institute by virtue of three sources: By virtue of the Appointments Law, by virtue of the National Insurance Law, or by virtue of some other, third law. As for the Appointments Law, we do not find that sec. 15A applies to appointments of deputy directors in the National Insurance Institute. The Appointments Law is solely applicable in the civil service, and the National Insurance Institute is not part of the civil service. We did not find a third law and therefore only the National Insurance Law remains as a source. As for the National Insurance Law, we have seen above (in para. 3) a description of the three tiers of people holding office and working in the National Insurance Institute, and we learned that "the rules for the appointment of State employees" (as provided in sec. 22(b) of the National Insurance Law) apply to "other employees" – "other employees of the office[1][*sic*.]" in the words of sec. 22(a) of the Law – in the National Insurance Institute. The Law refers to the third tier that we discussed, as distinct from the tier of the Director, Vice Director and the Deputy Directors, and as distinct from the tier of the Council members. Thus, we find that the provisions of sec. 15A do indeed apply to the "other employees" as prescribed in sec. 22 of the National Insurance Law – "other employees of the Institute" prescribed in sec. 22(a) – and at the same time *do not* apply to the Council members or the Board members.

Thus, sec. 15A of the Appointments Law does not directly apply to the Petitioner's case.

Section 18A of the Government Companies Law

23. Everyone agrees that sec. 18A of the Government Companies Law does not apply to Marom's appointment. However, as we will see below, the description of the relevant background

[1] Ed: should be "the other employees of the Institute".

will be incomplete if we do not discuss this legal provision as well, if only briefly. Section 18A tells us as follows:

> *Proper representation for both sexes*
>
> 18A. (a) The composition of a board of directors of a government-owned company shall express proper representation of members of both sexes.
>
> (b) Until expression of proper representation as aforesaid is achieved, the ministers will appoint, to the extent that circumstances allow, directors who are members of the sex that is not properly represented at such time in the company's board of directors.

If we compare this section of the law to sec. 15A of the Appointments Law (see para. 22 above) we can see that the two are substantially the same, and two purposes unite them: one, by way of a principle, to give proper representation to members of both sexes in various institutions, and two, in view of the unfortunate history with regard to the improper representation of women (we say "women" although the language of the law is neutral) – to act for the preference of women in appointments to such institutions.

Like sec. 60A of the Government Companies Law, sec. 18A – and additional provisions of the Government Companies Law, as well – were applied to statutory corporations. However, sec. 18A – unfortunately – as distinct from other provisions of the Government Companies Law – was only applied to the appointment of members to the National Insurance Institute Council. Originally, sec. 18A was not applied to the appointment of directors of government companies, and for this reason, it would appear, it was also not applied to the appointments of the National Insurance Institute Director, Vice Director and Deputy Directors. Hence, this law that prescribes equal representation and affirmative action does not apply to the appointment of the members of the National Insurance Institute's Management.

24. Now, let us take a closer look at the National Insurance Law and be amazed by the miracle, if it indeed is a miracle. As we have seen (above, para. 3), the offices and positions at the National Insurance Institute are arranged in three tiers: the Council tier – which is the upper tier; the Management tier – which is the middle tier; and the tier of the "other employees of the Institute"

– which is the third tier. The Council tier – the upper tier – is subject to sec. 18A of the Government Companies Law. The Council must express proper representation of members of both sexes and "until the expression of proper representation is achieved" the ministers must exercise affirmative action. The same also applies to the bottom tier – the tier of "the other employees of the Institute" – that must bend the knee and bow to the provisions of sec. 15A of the Appointments Law. The civil service must express proper representation of members of both sexes, and in the absence of proper representation, the Service Commissioner (in our case: the Management) must act to further proper representation by various methods listed in the law. But as for the middle echelon – the Management – the manner of appointment of its members, surprisingly, neither bends the knee nor bows to any statutory norm whatsoever. As it is written: "A thousand may fall at thy side, and ten thousand at thy right hand; it shall not come nigh thee" (Psalms 91:7).

25. Now that we have found that the appointment of a deputy director of the National Insurance Institute is neither subject to sec. 15A of the Appointments Law, nor to sec. 18A of the Government Companies Law, has our journey has come to a dead-end? In appointing a deputy director of the National Insurance Institute, can the Minister choose whomever he pleases without being bound by any norm whatsoever that pertains to equality of the sexes? Or does some binding norm apply to the Minister? This is the question that we will now address, turning from the general to the particular, from the wide to the narrow, from basic principles to rules, and from the legal system as a whole to the National Insurance Law.

From the general to the particular

26. Our path will be as follows: first we will discuss principles that apply to the process of appointment of people to the civil service; we will move on to discuss the principle of equality as one of the aforesaid principles; we will bring ourselves closer to the principle of equality in applying it to "members of both sexes", we will try to understand the unique nature of the principle of equality between women and men; we will move on to legislative affirmative action; and we will try to learn of the existence – or non-existence – of a doctrine granting proper representation to women in public entities.

Basic principles of appointment procedures in public law; the principle of equality; the principle of equality between women and men

27. The rules of tenders apply to the majority of offices and positions in the civil service. Any tender – if performed properly and with integrity – has the power to maximize the best: anyone who fulfills the tender conditions can present candidacy, and ultimately, the best candidate will be chosen. The tender method will bring the best, not the closest, to the civil service: LabA MD/4-20 *"Halamish" Ltd. v. The Tel Aviv Jaffa Workers Council* [26], 327. Admittedly, the tender method did not succeed in eliminating discrimination against women. For this reason – among others – sec. 15A(c) of the Appointments Law was also enacted (see para. 22 above). For the interpretation of this provision of the law, see: Y. Tirosh, *Proper Representation of Members of Both Sexes in the Civil Service* [32]. However, everyone would agree that the tender method is the best that has been found until now – if you will: the method that constitutes the lesser of evils to maximize the best and minimize the worst.

In the present case, the Minister is not obligated to issue a tender, and in any case – and unlike in a tender – no person has a right to propose his candidacy for the office of Deputy Director of the National Insurance Institute. Thus, for example, Ms. Hanna Ranel, Director of the Software Infrastructure Division at the IT Department and an National Insurance Institute employee for some 26 years. Ms. Ranel proposed her candidacy for the office of IT Deputy Director, however, other than a confirmation of the receipt of her letter, she received no response whatsoever.

Thus, the relevant question is, are there no public-law norms that provide guidance to the Minister and obligate him to act in a certain manner?

28. The appointment of a deputy director at the National Insurance Institute is an act in the field of public law, and like any act in the public field, the appointment is subject to the accepted norms of public law (which constitute public law). When acting within public law, the appointing authority acts as a public trustee, and as nothing belongs to a trustee, so, nothing belongs to the appointing authority. And as a trustee, it is required to behave like a trustee: with integrity and fairness, and without weighing irrelevant considerations, reasonably, equally, and without discrimination, see HCJ 4566/90 *Dekel v. Minister of Finance*, [2] 33; HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications*, (the *Euronet case* [3]); HCJ 703/87 *Crown (Keren) v. Civil Service Commissioner*, [4] 519; HCJ 6163/92, 6177 *Eisenberg v. Minister of Building and Housing*, (the *Eisenberg* case [5]). The best will win and those who are not quite as good will wait their turn. Thus, for example, the authority may not take political party affiliations

into consideration for a candidate's benefit (HCJ 4566/90 *Dekel* [2] above, and pursuant thereto, Itzhak Zamir's article *Political Appointments in Judicial Review* [33]; HCJ 7175/95 *Arad v. Knesset Speaker* [6], 604-610; LabA MH/168-3 *Alfariah v. Rotenberg* [27]; HCJ 8160/96 6458/96, *Abu Krinat v. Minister of the Interior* [7]. There are formal qualification considerations – such as specific education – but even if a certain candidate fulfills such educational prerequisites, even then the appointing body may take additional, pertinent considerations into account, both for and against: the *Eisenberg* case [5] at 256-257; HCJ 727/88 *Awad v. Minister of Religious Affairs* [8] 491.

Holders of authority to appoint or choose are obligated to act with integrity and fairly, without taking irrelevant considerations into account, reasonably, equally and without discrimination. If they fail to do as is required of them, an inappropriate person may be appointed or chosen. If a proper person is not chosen, public service will suffer. However, the reason that such duties that are imposed on the holder of the authority to appoint or choose does not solely concern a certain appointment or choice. Our concern is not only about a specific improper appointment, but also the fear that the disease will spread and the culture of appointments in the civil service will be forever lost. Moreover: anyone improperly appointed, will follow the same crooked path that he was taught when he must make appointments or choices. The parents have eaten sour grapes, and children who saw their parents will also eat sour grapes. We all know where this path leads.

29. A fundamental principle of governance – standing head and shoulders above all other principles – is the principle of equality, and by its other name: the principle of non-discrimination. Equality is "… a fundamental principle of our constitutional regime" (HCJ 98/69 *Bergman v. Minister of Finance* [9], 698, *per* Justice Landau). So it is in the public law, and so in every single aspect of our life in society. "The principle of equality, is with us from time immemorial, it is the beginning of all beginnings, and all the rest is merely commentary and clarification" (HCJ 7111/95, 8195 *Federation of Local Authorities v. Knesset* (the *Federation of Local Authorities* case [10]), 501); and see, *ibid*, 499*ff*. Justice Barak stated similarly in HCJ 953/87, 1/88 *Poraz v. Mayor of Tel Aviv Jaffa*; *Labor Faction of the Tel Aviv – Jaffa Municipality v. Tel Aviv – Jaffa City Council* (the *Poraz* case [11]), 332:

> … nothing is more destructive to a society than the feeling of its sons and daughters that double standards are being applied to them. The feeling of inequality is among the harshest of sensations. It harms the forces that unite society. It harms a person's self-identity.

And see the *Federation of Local Authorities* case [10]), at 503:

> And discrimination, as we know, is the worst of all evils. Discrimination utterly undermines relationships among human beings. A sense of discrimination paralyzes and destroys the fabric of human relationships. We encounter the phenomenon of discrimination daily: in the workplace, at home, standing in line, in the attitude of holders of authority to citizens and residents. So it is in personal discrimination, social discrimination, ethnic discrimination, each and in every type of discrimination. Discrimination destroys families. Ongoing discrimination will destroy a nation and bring a kingdom to its knees. Thus, little wonder that the enlightened members of society in every place and in every generation act to eradicate discrimination. It is an unceasing battle – a daily battle. It may be likened to pushing back the sea, where if you rest for but a moment, you will be swept away and engulfed. Obviously, day-to-day human relationships are primary, and even if we don't strictly fulfil the commandment of "love your neighbor as yourself", we will certainly demand, and are demanded, to comply with the injunction that "anything that is hateful to you, do not do to your fellow.

There is no need to further elaborate. If we know this – we know everything; and if we don't – we know nothing. The principle of equality flows through every fiber of the law, and is an integral part of the genetic code of each and every legal rule. That is the case for every law and that is the case in the law of tenders, in which the principles of equality and non-discrimination are fundamental: HCJ 685/78 *Omri Mahmud v. Minister of Education* [12], 778; CA 6926/93 *Israel Shipyards Ltd. v. Israel Electric Corporation Ltd*. [13], 770; the *Dekel* case [2]; the *Crown* case [4], 521.

30. Having said all that, we know now what we knew already in the beginning: when appointing a deputy director of the National Insurance Institute, the Minister must act with integrity, fairness, and without irrelevant considerations. And most important in the present matter: he is obligated to act equally and without discrimination.

31. The principle of equality is, in theory and in practice, the father, or perhaps we should say, the mother principal. When we incorporate it into any legal subject, the principle of equality adapts to its surroundings, and at the same time, it affects its surroundings. The principle of equality in election laws is not the same as the principle of equality in the law of tenders, and the principle of equality in the laws of tenders for services or goods is not the same as the principle of equality in tenders for a position in the civil service. In practice, the principle of equality constitutes a bundle of principles, of which equality in the abstract is the common denominator. The principle of equality between the sexes, between women and men, holds a place of honor among those secondary principles.

32. This all began in our legal system with the Declaration of the Establishment of the State, in which the founders assumed the obligation that the State of Israel will "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex…". This undertaking in regard to the status of women was concretely expressed in the Women's Equal Rights Law, 5711-1951, in which sec. 1 states: "A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceeding, against women as women, shall be of no effect". More than instructing us as it does, this section of the law heralds the status of women in law. In the words of Justice Barak in HCJ 1000/92 *Bavli v. Great Rabbinical Court* [14], 240:

> The Women's Equal Rights Law is a "majestic" law". It establishes the principle of equality in the State's legislation. This principle is explicitly mentioned in the Declaration of Independence which determines that the State of Israel will ensure equality among its inhabitants "irrespective of religion, race or sex". The aforesaid principle is among the basic principles of the Israeli legal system.

33. This was the beginning, and as we followed our path and the sound of the trumpet grew louder and louder [Exodus 19:19]. One law followed another, and another, and all of them – one

by one – were braided into the wick of equality. Below are some of the laws (not necessarily according to the order of their enactment): the Male and Female Workers (Equal Pay) Law, 5756-1996 (replacing the Male and Female Workers (Equal Pay) Law, 5724-1964). Section 1 of the law determines its purpose, the purpose of equality, and reads:

> This law is intended to promote equality and prevent discrimination between the sexes in all that concerns wages or any other compensation in relation to work.

It is immediately followed by sec. 2 of the law:

> *The right to equal wages*
>
> 2. Female and male workers employed by the same employer in the same workplace, are entitled to equal wages for the same work…

Similarly, the Equality of Opportunities in Labour Law, 5748-1988, states:

> *Prohibition of Discrimination*
>
> 2.(a) An employer shall not discriminate between his employees or between applications for employment on the basis of their sex…with respect to any of the following:
>
> (1) acceptance for employment;
>
> (2) conditions of employment;
>
> (3) promotion;
>
> (4) training or professional studies;
>
> (5) dismissal or compensation for dismissal;
>
> (6) benefits and payments given to an employee in relation to retirement.
>
> (b) For the purposes of subsection (a), the setting of irrelevant conditions shall be seen as discrimination.

(c) …

And see and compare: HCJ 6051/95, 6086/95 *Rekanat v. National Labor Court et al*; *El Al Israel Airlines Ltd. v. National Labor Court* [15]; LabA 56/129-3 *Plotkin – Eisenberg Brothers Ltd.* (the *Plotkin* case [28]); LabA. 51/8-3 *State of Israel v. Gestetner Israel Ltd*. [29].

The Names Law, 5716-1956, originally saw a wife as following her husband with respect to her surname. Later, the law was amended (in the Names (Amendment No. 3) Law, 5756-1996), and since that amendment, a woman hold holds the same right as a man. See: Orit Kamir, *What's in a Woman's Name* [34], and see: HCJ 693/91 *Efrat v. Director of the Population Registry* [16].

Lastly, we will mention the Authority for the Advancement of the Status of Women Law, 5758-1998, and its purpose as stated in sec. 1:

> *Purposes of the Law*
>
> 1. The purposes of this law are to advance equality between the sexes in Israel, to achieve coordination among the bodies that treat of the status of women in Israel, to promote education, legislation and enforcement in these areas, to promote activity for the prevention of violence against women, to provide the government with the tools and information needed to achieve these purposes, and to establish a central authority that will act to implement these principles.

34. Needless to say, the principle of equality that we are discussing is in essence "substantive" equality, and substantive equality simply means justice and fairness.

> A close examination will reveal – unsurprisingly – that "substantive equality" is nothing other than one of the derivatives of justice and fairness. Justice and fairness have many aspects, one of those aspects is equality. The principle of equality can be formulated in many ways that are not identical to one another: equal prospects, equal results, equal starting point, equal resource allocation, equal needs, etc. However, "substantive equality" in each of the aforesaid is synonymous – both in theory and in practice – with justice and fairness as viewed by the members of a specific society in a

> specific period. In other words: equality that leads to justice, equality whose path is the path of fairness (the *Federation of Local Authorities* case [10], 502).

We should further remember that the principle of equality looks to the result: as pure as a person's intention may be, if the result of his actions is discriminatory, his actions will be annulled, or as Justice Bach stated in HCJ 104/87 *Nevo v. National Labor Court* [17], 759:

> I am prepared to assume that the Petitioner's employers did not intend to discriminate against her and the other women employees when they signed the work constitution. However, the Respondent's intention is inconclusive with regard to the issue that we are required to decide, since the test for examining the existence or non-existence of discrimination is objective and not subjective. It is not the motive for creating a difference between men and women that decides the matter, and in order to determine that discrimination exists, the final result as reflected in the social reality must be examined.

And so stated Justice Barak in the *Poraz* case [11] (at pp. 333-334):

> …the city council did not seek to infringe the principle of equality because it believed that it is wrongful. The opposite is true. Many city council members repeatedly stated that they accept the principle of equality, however they were not prepared to realize it. Thus, they violated it. The question is not only about the motive of those who decide; the question is also about the result of the decision. A decision is wrongful not only when the motive is to infringe equality, but also when the motive is different but equality is prejudiced in practice.

See further: Frances Raday, *About Equality* [35]; Carmel Shalev, *On Equality, Difference and Sex Discrimination* [36].

35. Over the years, the word of the legislature in regard to the equality of women went hand-in-hand with the case law that interpreted the law, filled the cracks, and that stood on its own two feet by virtue of the basic principle of equality. Thus, for example, Deputy President Elon ruled in

HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* (the *Shakdiel* case [18], 240, on the issue of non-selection of a woman as a member of the religious council:

> …the exclusion of a female candidate from appointment to a religious council, because she is a woman, clearly contradicts a fundamental principle of Israeli law which prohibits *discrimination* on grounds of sex. This fundamental principle was laid down in the Declaration of Independence, and is among those fundamental principles that have been given expression in legislation, and is not merely an "unwritten" right that derives from the judicial legislation of this court.

And in like manner, Justice Barak stated (*ibid.*, 274):

> Between two possible interpretations, we must choose that which guarantees equality in the optimal manner, and reject the interpretation that contradicts equality. It follows that we must interpret the Religious Services Law in a manner that guarantees equality of the sexes. Indeed, it is a fundamental principle of our constitutional regime that equality between men and women be ensured, and that a man should not be discriminated against because he is man, nor a woman because she is a woman.

That was also the case in the *Poraz* case [11] when a local authority refrained from choosing a woman for the assembly that selects the city rabbi, merely because she was a woman, regarding which Justice Barak said (at p. 322):

> The set of considerations that the city council may take into account is the set of considerations that falls within the "four cubits" of the Religious Services Law and the regulations. This set of considerations is determined through the interpretation of the Religious Services Law and the regulations. Such interpretation should take into account the language of the law and the regulations on one hand, and the purpose of the law and the regulations on the other … It should further be assumed that such purpose includes – in the absence of contradictory evidence – purposes designated to fulfill values and principles of our legal system. The interpretation of the

> language of the law and the regulations against the background of their (particular and general) purpose, leads, in my opinion, to the conclusion that a consideration that denies a woman, as a woman, the ability to be included in the selecting assembly due to the practical concerns that I pointed out, is an irrelevant consideration, inasmuch as it contradicts the purpose underlying the law and the regulations, which is the purpose of realizing the principle of equality.

Similar statements were made by the Court, *per* Justice Bach, with respect to the obligation of women to retire at a younger age than men, and in his own words (the *Nevo* case [17], 761):

> When the court encounters a distinction between groups, it must carefully examine whether such distinction is not based on stereotypical perceptions that derive merely from prejudice.
>
> Establishing the discriminatory distinction between men and women in regard to retirement age reinforces the perception that women cannot be equal in the job market and this, in effect, infringes the equality of opportunities for women.

If all of the aforesaid is not enough – and it appears that it is – below is another contribution from CFH 1558/94 *Nafisi v. Nafisi* [19], 626:

> The point of departure of my journey is to be found in the principle of women's equality, a principle that has been accepted and taken root in Israeli law – in statute and in case law ... Any attempt to challenge this principle of women's equality would be the equivalent of heresy in our society. The community property presumption between spouses – a presumption created by the courts – is like a branch that sprouted from the tree of equality, and it is from equality that it draws its strength. This is also true of the provisions of the Law and its resource balancing agreement, which were also derived from the principle of equality. In the *Bavli* case - as we are all aware – the Court gave strong support to the community property rule between spouses as an outgrowth of the principle of equality,

> whether as a derivation of the Women's Equal Rights Law, or whether as an independent rule in its own right...
>
> Moreover, the principle of equality between men and women and between spouses has assumed the status of an overarching principle in Israeli law – or, if you prefer, a fundamental principle – and within its prescribed boundaries all other normal provisions and rules will kneel and bow.

Moreover, discrimination on the grounds of gender was also recognized, as articulated by Justice Dorner, as infringing the right to dignity under Basic Law: Human Dignity and Liberty:

> The degradation of a human being violates his dignity. There is no reasonable way of construing the right to dignity, as stated in the Basic Law, such that the degradation of a human being will not be considered a violation of that right.
>
> Indeed, not every violation of equality amounts to degradation, and therefore not every violation of equality violates the right to dignity. Thus, for example, it was held that discrimination against small political parties as opposed to large parties, or against new parties as opposed to old parties, violates the principle of equality … Notwithstanding, such infringements of the principle of equality, which have even led to the disqualification of Knesset laws, did not express degradation, and so they also did not involve a violation of human dignity.
>
> This is not the case with certain types of discrimination against groups, including sex discrimination, and also racial discrimination. Such discrimination is based on attributing an inferior status to the victim of discrimination, a status that is a consequence of his supposedly inferior nature. This, of course, is inherently degrading to the victim of discrimination (HCJ 4541/94 *Alice Miller v. Minister of Defence* [20], 132).

36. We reviewed the provisions of several laws, and presented case law that was issued by the courts: case law that interpreted laws, case law that found a place between gaps in the laws, and case law that stands on its own two feet. The common denominator of all such provisions of law and case law was – and is – the pressing social need to recognize the equal status of women and to act for the reinforcement of equality. The laws are "progressive" laws, as is the case law.

37. From a bird's eye view, the laws and case law may appear somewhat strange, and may to present nothing but a tautology. I assume that the day will come when children will chuckle at the statutes and case law in which adults now take pride.

For example, women are entitled to equal wages "for the same work" as provided in sec. 2 of the Male and Female Workers (Equal Pay) Law (above, para. 33). Is the law not stating the obvious? Is packing 500 boxes a day different depending on whether it is performed by a man or a woman? Was the legislature's intention not clear and self-evident even before it was articulated? Would we not have derived what the legislature says from the principle of equality itself? The same applies to the provisions of the Equality of Opportunities in Labour Law. Does the law not say what we have long-known – that women must not be discriminated against merely because they are women? This goes for these two laws and for all of the other laws. All of these laws – these and others as well – were only intended to eliminate unlawful acts of discrimination that put down roots in our society. The legislature's instructions were only intended to declare to the world which norms do – and should – prevail here. The explicit words of the law were intended to declare the need to uproot wrongful conduct to which we have become accustomed, and to place women where they should have been from the outset. Indeed, slowly but surely, the legislature has created new norms – norms that were perhaps not self-evident – but essentially the laws were intended to *declare* norms, and thereby establish them in the life of the law and of society. And incidentally to establishing the norms, the legislature – rightfully – deemed fit to set sanctions for their violation, all as provided in each and every law.

Laws that we presented and case law that we reviewed appear to us as points of light. The light is the light of equality, equality between women and men, for all intents and purposes. If we step from one point of light to the next, the doctrine of equality will reveal itself in all its glory.

From equality to representation

38. Reuven and Shimon are competing in a tender for a position in the civil service. Levi, chairman of the tender committee, is a close friend of Reuven. Levi would like to help Reuven, and tips the tender in Reuven's favor. Shimon was discriminated against in the tender. The tender was not performed on terms of equality and should be annulled. This act of discrimination is a one-time act, although it may repeat itself – and indeed does so – often, and under a variety of circumstances. This is *particular* discrimination. It would also be particular discrimination if we

were to change the details and assume that the competitors are Reuven and Leah. If Levi tips the tender in favor of Reuven merely because he is Reuven's friend, this too would be particular discrimination.

The discrimination that we are now discussing is different. The discrimination of a woman – as a woman – is generic discrimination. Thus, for example, in the above example, if Levi were to prefer Reuven because he is a man – or decide against Leah because she is a woman – this would be generic rather than particular discrimination. Another example of generic discrimination is discrimination against someone because of his skin color or race. Generic discrimination, as has already been said, is discrimination that critically injures a person's dignity. A person does not control his sex (female or male), his skin color (black, yellow or white), or the wholeness of his body (disabled or not). In his lifetime, a person does all that he can to acquire wisdom and knowledge, to be a good, generous person, affable and honest, and yet he is rejected in favor of others merely for such characteristics over which he has no control – a genetic or other characteristic.

At this point it would be proper to examine the words of Justice Brennan in *Frontiero v. Richardson* (1973) [31], at pp. 685-87:

> It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena. . .
>
> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility".... And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or

> contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. (citations omitted) (footnotes omitted).

39. Discrimination against women has plagued society from time immemorial, for hundreds and thousands of years. Such ongoing discrimination has created certain lifestyles and thought patterns that have put down deep roots, so much so that it sometimes seems – by way of hyperbole – that they created a kind of mutation in our genetic system. In any event, we all know that it is impossible to uproot these patterns overnight. Moreover, ongoing discrimination over the course of so many years has created layers of discrimination – one on top of another – and thus we have cumulative discrimination – discrimination in the attire of a quasi-status. For example, clearly a woman cannot serve in an Air Force aircrew (the *Alice Miller* case [20]); clearly a woman is unsuited to serve as a member of a religious council (the *Shakdiel* case [18]); clearly a woman is unsuited to be included in the assembly that selects a city rabbi (the *Poraz* case [11]), clearly a woman should retire at age 60, while a man can retire at 65 (the *Nevo* case [17]); clearly a woman is not suited "to work after 4 P.M." (the *Plotkin* case [28]); clearly a female flight attendant's track to promotion does not lead – like that of a male flight attendant – to the rank of purser but only less (LabA 33/3-25 *Flight Attendant Crew Committee v. Edna Hazin* [30]); clearly a woman's right to vote in meetings of an agricultural cooperative society is inferior to that of her husband (CA 84/64 *Beit Hananya Ltd. v. Friedman* [21]); clearly a woman cannot be the "head of household" in an agricultural cooperative society, and receive the associated "right to work" that is "reserved for men only" (CA 89/85 *Beit Herut – Workers' Cooperative for Cooperative Agricultural Settlement Ltd. v. Glassman* [22]); and many more.

40. Reformers have taken a number of routes to uproot such wrongful thinking patterns that afflict us. One of the routes was through imposing a duty to give representation to women in various entities. Generic discrimination – such as discrimination against women – inherently raises the representation issue. In generic discrimination – as distinct from particular discrimination – it is as if the person who is being discriminated against "represents" the discrimination of an entire class. The dark-skinned is discriminated against merely because of his dark skin; the woman is discriminated against merely because she is a woman. This means that the black man and the

woman each "represents" discrimination against their class: he – all blacks; she – all women. To rectify this situation, the reformers in our case chose the route of imposing a duty to arrange for representation of women in workplaces, on boards of directors, etc. The same issue (but not it alone) gave rise to the institution of affirmative action, which also derives from the deficient "representation" of women.

41. The provisions of secs. 15A of the Appointments Law and 18A of the Government Companies Law may serve as fitting examples of imposing norms that mandate ensuring proper representation of women in the civil service and on the boards of directors of Government Companies, and of adopting affirmative action to achieve the goal of proper representation (see above, paras, 22 and 23). Section 15A of the Appointments Law was originally intended to apply to the civil service, but as we have seen, the legislature extended the scope of its application to the majority of National Insurance Institute employees, as well. As for sec. 18A of the Government Companies Law, the legislature saw fit to extend its scope as well, and applied it to statutory corporations (see above, paras. 22-24). To complete the picture, we will add that the Government decided, pursuant to its authority under sec. 3 of the State Service (Appointments) Law, 5719-1959, to apply sec. 15A(a) of the Appointments Law to all of the local authorities (in a decision dated August 14, 1997, published in the Official Gazette on September 2, 1997, No. 4563 for the year 5757, on page 5392). The aforesaid are not the only relevant examples.

We find a somewhat esoteric example in the Cinematograph Films Ordinance, 1927, under which the Censorship Board reserved at least one spot for a woman (in accordance with sec. 3 of the Ordinance, a censorship board will be established consisting of the chairman and several additional members "of whom one at least shall be a woman"). However, more important in our case are the laws that were enacted in recent years. Thus, for example, sec. 4 of the Senior Citizens Law, 5750-1990, provides for the establishment of a public council for senior-citizen issues, and the law prescribes (in sec. 4(b)) that "at least one third of the council members shall be women". Section 48 of the National Health Insurance Law, 5754-1994, requires the establishment of a national health insurance council. Section 49 establishes the number of council members and the bodies to be represented therein, and sec. 49(b) further determines:

> *Composition of the Health Council*
>
> 49. (a) …….

(b) At least one quarter of the panel of members appointed from among the government employees shall represent both sexes. The panel of representatives in a body represented by three or more, shall include representation of two sexes [*sic*].

(The words "two sexes" at the end of sec. 49(b) seems to have been a *lapsus calami*, and the intention most probably was, "both sexes").

Section 1 of the National Battle against Road Accidents Law, 5757-1997, establishes a "steering committee" for the National Road Safety Authority. Section 11(a) of the law determines that the steering committee shall be composed of 7 members, and sec. 11(c) further determines that "the steering committee shall give proper expression to the representation of members of both sexes, insofar as possible in the circumstances of the matter".

Moreover, sec. 13 of the same law establishes an advisory committee for the National Road Safety Authority. The advisory committee is composed of 21 members, and as prescribed by sec.13(b): "At least eleven of the committee members shall be women.".

The National Authority for Certification of Laboratories Law, 5757-1997, establishes a seven-member council, and in accordance with sec. 8(b)(3), the representatives of the Minister of Finance and Minister of Science on the council "shall be members of the sex that is not properly represented at such time in the entire council." The law also establishes a thirty-member "advisory committee" and, in accordance with sec.16(c) thereof, "at least one half of all of the advisory committee's members shall be women".

Section 9 of the Authority for the Advancement of the Status of Women Law, 5758-1998, establishes an authority for the advancement of the status of women, and mandates the appointment of a 35-member "advisory committee". Section 9(a) of the law lists various entities that will be represented in the committee, and sec. 9(e) prescribes that "in the composition of the members that will be appointed under subsecs. (b)(2) and (3) there will be representation of each of the sexes of at least forty percent of the members" (subsecs. b(2) and (3) speak of 18 representatives of the 35 members). It should be added that in accordance with sec. 3 of the law "the duties of the authority shall be performed by the director [the term is in the female gender – ed.] of the authority", and we cannot assume that the use of the female gender also encompasses the male gender.

Finally, on June 30, 1998, Amendment (no. 11) to the Companies Ordinance (Representation of both Sexes on a Board of Directors of a Public Company) Law, 5758-1998, was published. Following the amendment sec. 96B(a) of the Companies Ordinance [New Version], now states (the amendment is emphasized):

> *Appointment and qualifications*
>
> 96B. (a) At least two public directors shall serve on the board of directors of a company, elected by the company and certified by the committee that they met the qualifications set in this title. *If one of the positions of a public director is vacated in a company in which all of the members of the board of directors are of one sex, at least one of the directors of the public shall be of the other sex*.
>
> (b) …

42. In conclusion, we reviewed a number of women's "representation provisions" in the new Israeli legislation. Such representation provisions do not speak only of themselves; they speak of a new, hitherto unknown zeitgeist in the Israeli legal system. There is a fresh breeze blowing through the laws of Israel. Elsewhere in our opinion (see above, para. 37), we compared provisions of the law that pertain to equality for women and the prohibition to discriminate against them to points of light. We connected all of the points of light and behold, an Israeli legal doctrine revealed itself – a doctrine whose power extends beyond the particular provisions of law. Connecting the points of light has created a kind of critical mass, and thus a doctrine of far-reaching consequences was created. Just as in the case of that doctrine, so it is in the case of the doctrine now revealed in the present matter: the provisions of the law that pertain to the proper representation of women are also like points of light. Connect the points of light and you will see that a kind of critical mass is created that also gives rise to a doctrine or, at the very least, a quasi-doctrine. If you prefer, a doctrine in formation has revealed itself to us.

Let us consider it. The representation provisions that we reviewed in the legislation vary; the representation provisions in one law are not identical to the representation provisions in another law. However, absolutely all of the representation provisions, despite their differences, individually constitute a crystallization of the same substance and expresses the same basic principle. That principle is: granting proper representation to women and men in public entities as

a need required by the principle of equality. Each one of those provisions reflects and reveals, in its defined and delineated areas, the same basic principle of equality.

43. Against the background of all of the aforesaid, the question that now presents itself is: what is the doctrine or quasi-doctrine that we can derive from the law and case law? To what extent is a duty imposed on the authorities to bring about proper "representation" of women? We will now turn to this and other related questions.

The representation of women as an element of the discretion of a competent authority

44. The following is how man was created on the sixth day of the Creation (Genesis 1:27):

> So God created man in His own image; in the image of God He created him; male and female He created them.

This is what the book of the generations of Adam tells us (Genesis 5:1-2):

> This is the book of the generations of Adam, in the day that God created man, in the likeness of God made He him; male and female created He them, and blessed them, and called their name Adam, in the day when they were created.

Both the male and the female were created – created together – in the image of God. The woman and the man are one: she too is Adam, he too is Adam, they are both Adam.

That is how it was and how it should have been; that is how it is and how it should be; that is how it will be and how it should be. Let us remember and heed.

45. The question whether a situation of inequality and discrimination has been created will be examined – as we have seen – according to the results and not according to the intentions. Good intentions are insufficient to bring about a nice day, and insufficient to be of any help if the result obtained is one of discrimination. Indeed, the phenomenon that is revealed to us is one in which women are absent from public entities to an extent and in circumstances that the laws of statistics would be hard pressed to explain without introducing the element of discrimination into the equation. In order to avoid misinterpretation we will quickly add: we did not – and will not – say that discrimination is the sole factor that led to the situation in which there is only one woman (on leave, and in circumstances in which it would have been reasonable to assume that she would not

return to work) out of nine deputy directors in the National Insurance Institute. However, it is hard to be disabused of the impression that discrimination played a role in this phenomenon – directly or indirectly – and perhaps even a considerable role. We do not mean special discrimination – certainly not conscious discrimination – within the National Insurance Institute. As we said above, we are concerned with generations-long discrimination, of strata of discrimination that accumulated on top of one another over many years.

46. We have extensively discussed the principle of equality and its application in the relationship between men and women. We discussed various provisions of law that mandate equal treatment of women. We further discussed provisions of law that mandate giving representation to women in various public entities. Legislation and case law together have shown us the way, and the way is that of the doctrine that everything that can be done must be done to arrange for "appropriate representation" of women in public entities. In other words, when making a selection or an appointment in public entities, the competent authority must consider the proper representation of women, or perhaps we should say, the representation of members of both sexes.

We have learned time and again that an authority's discretion is fed by two tributaries. The source of one tributary is the law under discussion: the purpose of the law, the principles of the law, and the particular provisions of the law. The source of the other tributary is the legal system as a whole: the purpose of the legal system, its principles and values, and the doctrines that sustain it (see, for example, the *Poraz* case [11], 328*ff*). The National Insurance Law speaks of establishing a management for the National Insurance Institute, and outlines the boundaries of its powers. Provisions that pertain to the management are framework provisions, skeletal provisions, "dry" provisions. However– like the other provisions of the National Insurance Law, and like all the laws of the State – they are immersed up to their necks in the tributary of principles, values and doctrines. These principles, values and doctrines of the legal system – or perhaps we should say: of Israeli society as viewed through the lens of the law – constitute an integral part of the genetic code of all the provisions of the law and all the case law of Israeli law. The rules of the law do not live without them. It can even be said, as we have said elsewhere, that such "credo" principles of the legal system precede the particular rules of the law (see: CFH. 7325/95 *Yediot Aharonot Ltd. v. Kraus* [23] p. 71*ff* ; HCJ 5503/94 *Segal v. Knesset Speaker* [24] p. 562; CA 3798/94 *A. v. B*. [25] 165*ff*).

Having learned all the above, we shall add that a sincere, honest effort to position women at the same starting point as men, and vigorous actions to give proper representation to women in the civil service are duties intertwined with the general doctrine that requires proper expression for the representation of both sexes in the civil service. The meaning of this is that in each appointment or selection in the civil service, the competent authority must do its best to realize the requirements of the doctrine.

47. What is "proper representation"? A review of the statutes that speak of proper representation shows us that they are not uniform. Some of the provisions determine rigid models of proper representation, and some determine flexible ones; some determine that among the members of a certain entity there will be a certain percentage of women and some do not determine a certain percentage. Among those that do determine a specific percentage, the provisions of the laws are not identical. My colleague Justice Mazza addressed this issue of "proper representation" in the *Women's Network* case [1], saying, inter alia, as follows (pp. 527-528):

> I accept that the term "proper representation" — with regard to the representation of both sexes in the composition of a board of directors — must be construed in accordance with the special circumstances of the case. This means that we are not speaking of fixing equal quotas, or any quotas at all, for the representation of either men or women; but we are speaking of giving proportional representation to each of the sexes, and the proper degree thereof should be determined in accordance with the character, the purposes and the special needs of the Government or statutory corporation under discussion, and according to the distribution of the candidates of both sexes found to be suitable for the specific office that is sought. It is possible that the conclusion that derives from this premise is that in the absence of proven circumstances that justify giving greater weight to members of one sex, 'proper expression' should be interpreted to require equal representation for men and women. However, in general and specifically, we must take care not to instill an approach that holds that giving *any* representation to women may be deemed giving women *proper* representation [emphasis original – M.C.].

In the present matter, there is no need to delve any deeper in order for us to reach the conclusion that women are not fairly represented in the National Insurance Institute's Management. Prior to Marom's appointment, there were eight active deputy directors in the management, including one female deputy director on leave (in circumstances in which it could have been assumed that she would not return to work). Moreover, as we have seen, the Minister was explicitly told that the representation of women in the National Insurance Institute's Management was inappropriate, and he is presumed to have known so himself. Even if we were to say that representation of less than one half is "proper representation" – and we do not say so – in our case we are indisputably far, very far, from proper representation. Let us say it explicitly: women have no representation in the National Insurance Institute's Management.

48. What conclusion does this require? Is it that the Minister has a *case-law duty* to appoint a woman for the office of IT Deputy? We believe that this is not necessarily the case. Even if we were to say that the Minister has a duty to do whatever can be done – under the circumstances of each and every case – to give fair representation to women in the National Insurance Institute's Management, it would be improper to add that the aforesaid duty must translate itself – in our case – into an actual appointment of a woman for the office of IT Deputy. Had the legislature constrained us by a legal provision requiring the appointment of a woman, then needless to say, we would heed the order. However, we are now wandering in the field of principles and doctrines. Trees of discretion grow in this field, and we must strictly examine whether everything that was required was done or omitted in this area.

After all the above, let us say that in the circumstances that were revealed to us, we would have expected to hear *some* explanation from the Minister for the failure to grant representation to women; *viz*., in the present matter, a justification for not appointing a woman for the office of IT Deputy. We did not hear an explanation or a justification, and we are unaware of any proper explanation or justification.

49. What duty does the case law impose upon the Minister? All would concede that it is, first and foremost, to enquire whether there is a woman in the Israeli workforce who is suitable to fill the office of IT Deputy. What did the Minister do in this regard? We have the answer in his affidavits. Thus, for example, he says in para. 6 of his affidavit of July 1, 1998:

> Of the various candidates who were proposed for the position after the National Insurance Institute Director searched for candidates, inter alia, in manpower firms and among the professionals, and the Director of the Ministry of Labor and Social Welfare, who has a strong background in this area was also asked to recommend candidates, I was not offered a suitable female candidate for the position who had qualifications similar to those of Respondent no. 2.

And in para. A of the reply affidavit dated July 20, 1998:

> The searches that were performed by the National Insurance Institute Director, which were intended to find the person most suited to the position (not necessarily a male candidate) – failed to identify a suitable female candidate.

Our request to produce documents on the searches that were performed was answered as follows:

> There are no documents that attest to a search for a suitable female candidate. If a suitable female candidate had been found, her candidacy would have been considered in a pertinent manner and perhaps even with a certain advantage (para. D of the reply affidavit dated July 20, 1998).

What do we learn from all this? That truth be told, there was no search for a female candidate for the office of deputy director as required. In any event, no proper search was performed. Indeed, the statement that the "search that was performed by the National Insurance Institute Director … failed to identify a suitable female candidate" is too general and vague to fulfill the requirements of an efficient, serious search for a suitable female candidate. The Minister did, indeed, consider the candidacy of two women – including Ms. Ranel who proposed her own candidacy – but did not find them suitable for the position. However, that does not suffice.

> Rabbi Isaac said: If a man says to you: I have labored and not found – do not believe him. If he says, I have not labored but have found – do not believe him. If he says, I have labored and found – you may believe him (TB Megilla, 6b).

50. In the *Women's Network* case [1], our colleague Justice Mazza articulated the scope of the duty in a search for a suitable candidate, and we can do no better than to quote him in his own words (*ibid*, 529):

> …the burden of proof that in the circumstances of a specific case it was not possible to appoint a woman rests with the appointing minister. This burden is not a light one. In order to discharge it, the appointing minister must show that he examined the possibility of appointing a suitable female candidate, but discovered that, in the circumstances of the case, this was impossible. Even his duty to make such an examination is not simple. In order to discharge it, the minister must adopt reasonable measures to locate a suitable female candidate. The scope of these measures depends on the type of appointment in question. When he must appoint a director from among the employees of his ministry, the examination must encompass all the female employees in his ministry who prima facie have the basic qualifications required. If he must choose the candidate from among the general public, his examination must encompass those sectors of the population where a suitable female candidate is likely to be found. This does not mean that the minister must seek, at any cost, to locate an unknown female candidate who has the necessary qualifications. But he also will not have done his duty by making a "formal" search for any female candidate. In order to do his duty properly, he must adopt reasonable measures designed to lead to the discovery and appointment of a suitable female candidate. For this purpose, it is not impossible that the Minister will seek assistance not only from his assistants and advisors, but also from external public bodies (such as business guilds, professional associations and societies, trades unions, the universities, women's organizations, etc.) and of professional authorities (such as the Adviser on the Status of Women in the Prime Minister's Office), who have in their possession the relevant information which he needs and who may recommend candidates with the qualifications required for the various appointments.

As we can see, in attempting to achieve proper representation of women in public entities, a real duty is imposed on the competent authority to search for suitable female candidates. In our case, the Minister of Labor was unable to lift the burden imposed on him to search, and further initiate a search in order to achieve proper representation of women in the National Insurance Institute's Management.

51. In the present case, we heard the following from the Petitioner with respect to women in the computer industry:

> Since the beginning of the 1990s, women have made up 50% of undergraduate and graduate students in computer science. Since the 1970s, there has been a constant increase in the rate of women in system programming and analysis, from 20% in 1972 to 37% in 1992. Despite the discrimination from which women in the field of programming and computers suffer, including through discriminatory bars to managerial positions, in 1997, women managers were found in 45% of the companies and plants in the software industries.

The Petitioner based these statements on A. Rosen, *Male Culture and the Status of Women in Technology* [37]..

The Petitioner further submitted two affidavits containing many names of potential women candidates who could have easily been located – women candidates from the civil service, public service, and even the private sector – all women who hold senior positions in the computer industry. In principle, all of them could have successfully filled the office, if only their candidacy had been properly considered. And if the Minister sought to find a candidate specifically suited to manpower ("HR management") issues, he no doubt could have found many more women candidates.

> He turned this way and that way, and he saw that there was no man… (Exodus 2:12).

That was Moses' way of finding out whether or not there was anyone around. He looked to the right, he looked to the left, and then:

He struck the Egyptian and hid him in the sand (*loc. cit.).*

A person who turns this way and that way, does not do enough. As we can see, this is what happened on the following day:

> When he went out the next day, he saw two Hebrews fighting; and he said to the one who was in the wrong, "Why do you strike your fellow Hebrew?" He answered, "Who made you a ruler and judge over us? Do you mean to kill me as you killed the Egyptian?" Then Moses was afraid and thought, "Surely the thing is known." (*ibid*, 13-14).

We, too, were not convinced that the Minister turned this way and that to find a woman. Will the Minister indeed say to us:

> Which my soul sought yet, but I did not find; one man out of a thousand I found, but a woman among all these I did not find. (Ecclesiastes, 7:28)?

Indeed, each generation and its scholars, each generation and its female leaders. These days we will not accept such a statement as appropriate . If that is the Minister's answer – and that was, indeed, his answer – we will say: we find the answer unacceptable. We were not convinced that a real search was carried out, a true search, to find a woman for the contemplated office. Had a tender been published for filling the office, there probably would have been women – not only one – who would have proposed their candidacy. Since a tender was not published, the Minister is required to do the utmost to reach such women, to examine their qualifications, and to compare their qualifications among themselves and between them and Marom.

52. To complete and clarify we will add that the burden of investigation and consideration of potential women candidates in the *Women's Network* case [1] was different, in terms of its (immediate) legal source, from the burden imposed on the Minister of Labor in our case. In the *Women's Network* case [1], the issue addressed was sec. 18A of the Government Companies Law and the proper interpretation of that provision (see above, paras. 23, 47 and 50). The law itself imposed a substantive duty of "proper representation", and from such duty the Court derived a secondary duty to act in order to find a suitable woman candidate. The case before us is different in that the substantive duty imposed on the Minister is a case-law duty to consider the issue of proper representation of women in public entities, and to do what can be done to give them proper

representation. Such a case-law duty inherently states a secondary duty that is imposed on the Minister, which is a positive duty to gather information ("to investigate and search, to gather information from administrative authorities or other entities and perhaps even seek the opinions of experts" (the *Euronet* case [3], 424, *per* Justice Zamir). To sort out the relevant information, ascertain its credibility, and give it suitable weight (the *Euronet* case [3], 423-426). Thus, the duty we are discussing is an autonomous being. While, it relies – in one way or another – on various provisions of law and on the basic principles of the legal system, ultimately it stands on its own two feet, as a duty from the case law: it is born of the case law and it lives within the case law.

53. There are tenders and there are "quasi-tenders", and the duties imposed on the publisher of a quasi-tender are very similar to the duties imposed on the publisher of a tender (see and compare: the *Israel Shipyards* case [13] 767*ff*). The duties that apply to the Minister in the search for women candidates to fill the position of IT Deputy resemble the duties that apply to the publisher of a quasi-tender. It is not enough to sit back and do nothing. The duty is a positive one: to climb the tree, squeeze between the branches, put out a hand and search for the fruit; not merely to stay on the ground and wait for the ripe fruit to fall into your lap. The Minister must guide himself like Moses guided the spies when he sent them to tour the land of Canaan:

> And Moses sent them to spy out the land of Canaan, and said unto them: Get you up here into the South, and go up into the mountains; and see the land, what it is; and the people that dwelleth therein, whether they are strong or weak, whether they are few or many; and what the land is that they dwell in, whether it is good or bad; and what cities they are that they dwell in, whether in camps, or in strongholds; and what the land is, whether it is fat or lean, whether there is wood therein, or not. And be ye of good courage, and bring of the fruit of the land and now the time was the time of the first-ripe grapes. (Numbers 13:17-20).

If this is carried out, the woman will most certainly be found.

54. We will add the obvious which is that the manner of assessment of the female – and male – candidates must be thorough, rational and pertinent. General assessments of candidates are insufficient. The assessments must be based on methodical, pre-determined tests, and on a pertinent weighting of each and every candidate. That is how we will be able to avoid the

preconceptions that have clung to us, to all of us; that is how we will be able to do justice for each female and male candidate.

55. In conclusion: once the office of IT Deputy in the National Insurance Institute was vacated, and once it was learned that there were only men in the National Insurance Institute's Management, a case-law duty was imposed on the Minister to search – to diligently search – for a woman with suitable qualifications to fill that office. We do not find that the Minister fulfilled that duty.

The remedy

56. When appointing Marom to the office of IT Deputy, the Minister failed to fulfill his duty to seriously consider the principle of proper representation of women. The question is only what conclusion should we draw from this?

If it were now shortly after the appointment, we might have revoked the appointment and returned the matter for consideration by the Minister in the proper, required manner. We will not do so for these two cumulative reasons: First, some four-and-a-half months of the six-month trial period of this appointment have already elapsed. Although Marom himself did not appear before us – and consequently did not argue on his own behalf – we will appoint ourselves his guardians and say that it would be unjust if we were now to ignore those months as if they never existed. Indeed, the "fait accompli" rule is not relevant to Marom, but in examining the competing interests it seems that we will not do justice if we send him home. Second, and pursuant to the first reason: Marom is now in a trial period and no one knows what will transpire at the end of the period. Thus we said to ourselves, let us add the good to the useful and accompany the trial period with an act that ought to have been carried out from the outset and was not performed as required.

57. Thus, we rule as follows: for the present – and until the expiration of the trial period – Marom will be able to continue in his position as IT Deputy. However, over the following months, the Minister must perform his duty according to the doctrine – the duty to act for proper representation of women: to make efforts and act diligently to find suitable women candidates to fill the position of IT Deputy at the National Insurance Institute; to bring the proper women candidates before the committees, and thereafter decide who will be the IT Deputy. Needless to say, until the Minister's final decision, Marom will not be granted a permanent appointment to the office of IT Deputy, and the trial period shall continue until the final decision (unless it is decided

to terminate it earlier for whatever reason). In this sense, we make the order absolute. Under the circumstances, there will be no order for costs.

Justice I. Zamir:

I concur.

Justice D. Beinisch:

I concur.

Decided in accordance with the opinion of Justice M. Cheshin.

Given this day, 19 Av 5758 (August 11, 1998).