**AAA 1207/15**

Appellants:
1. **Chaim Menachem Ruchamkin**
2. **Moshe Shalom Malachi**

v.

Respondents:
1. **Bnei Brak Municipal Council**
2. **Chanoch Zeibart – Mayor of Bnei Brak**
3. **Yaakov Verzhbinsky**

Appeal of the judgment of the Tel Aviv Administrative Affairs Court in AP 056189-12-13 Judge M. Agmon-Gonen

Before: Deputy President E. Rubinstein, Justice S. Joubran, Justice N. Hendel

## Judgment

**Justice N. Hendel:**

This is an appeal of the judgment of the Tel Aviv-Yafo District Court sitting as a Court of Administrative Affairs (AP 056189-12-13, Hon. Judge M. Agmon-Gonen) denying a petition in regard to the composition of the Municipal Property Tax Discount Committee (hereinafter: the Discount Committee) of the Bnei Brak Municipality.

*The Background of the Petition*

1. The Bnei Brak Municipal Council comprises 25 members. In the municipal elections held on Oct. 22, 2013, the "Central Torah List" – a subsidiary faction of the United Torah Judaism Party (hereinafter: UTJ) – won 17 seats on the Council. The Shas faction won six seats on the Council, and the "Bnei Torah" list won only two seats. In light of the results, the Bnei Brak municipal coalition was formed by the UTJ and the Shas faction, while the Bnei Torah faction remained in the opposition.

Following the elections, on Nov. 13, 2013, the Bnei Brak Municipal Council held its first session, in the course of which the members of the Council voted on the composition of the Council's permanent committees. Prior to the session, the members of the Council were presented with a proposed list of appointments of the party representatives to the various committees, as a basis for the vote. Although from among the parties elected in the central elections, only the Bnei Torah Party remained outside of the coalition, Mr. Yaakov Verzhbinsky (Respondent 3), who was elected to the Council on the UTJ list, appeared on the appointments list for the various committees as a representative of the opposition. In the session, it was decided, *inter alia*, that Respondent 3 would serve as the opposition representative on the Municipal Property Tax Discount Committee, a defined under sec. 149D(a) of the Municipalities Ordinance [New Version] (hereinafter: the Municipalities Ordinance). At the conclusion of the session, Respondent 3 informed the Council that due to a material disagreement with the Mayor, he had decided to resign from the coalition, or in his words: "I have decided that I am actually resigning, voting nay, and I am actually going my own way, as I understand it". The Appellants in this proceeding, who are members of the Bnei Torah faction, filed an administrative petition against the appointment of Respondent 3 as the opposition representative on the Discount Committee.

*Arguments of the Parties and the Prior Proceedings*

2. The Appellants argue that the appointment of Respondent 3 as opposition representative on the Discount Committee under sec. 149D of the Municipalities Ordinance is unlawful. The Appellants present two primary arguments in support of their claim. The *first* is based upon the language of the law – sec. 149D(b)(1) lists the members of the Discount Committee, and establishes that one of its members must be "a member of the largest faction that is not

represented on the Management Committee, that received the largest number of votes". They argue that the largest faction that is not represented on the Management Committee is the Bnei Torah faction, and therefore the appointment of Respondent 3 does not meet that requirement. In their view, the section requires the appointment of one of the members of the Bnei Torah faction to the Committee. The *second* reason is directed at the definition of Respondent 3 as a representative of the opposition faction. The Appellants argue that Respondent 3 was elected as a member of the coalition, and his resignation on the day of the vote does not permit him to be defined, at least from a legal standpoint, as a member of the opposition. In effect, the Appellants' argument is that there is no opposition representative on the Municipal Property Tax Discount Committee, and that even the requirement under sec. 150A(a) of the Municipalities Ordinance that every permanent committee have at least one opposition representative, is not met.

The Respondents reject both of the Petition's arguments. In regard to the Appellants' claim that sec. 149D(b)(1) requires representation of the largest opposition faction, the Respondents argue that the section treats of a special case in which the coalition is composed of a number of small factions, while the largest faction remains in the opposition. That is not the case here, and therefore, according to their approach, the Appellants' claim that the provision of sec. 149D(b)(1) was not fulfilled should be rejected. As for the Appellants' claim that Respondent 3 only purported to resign, and that he is, therefore, not really a member of the opposition, the Respondents argue that sec. 125A of the Municipalities Ordinance establishes the conditions for defining a member of the Council as a member who resigned from his faction. Applying those tests to Respondent 3 leads to the conclusion that he resigned from his faction in accordance with the definition established by the law.

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*The Principle of Proportional Representation and its Interpretive Derivatives*

7. As noted, in its present form sec. 150A expresses the democratic principle of "proportional representation". According to this principle, the right of the minority is not expressed solely in its participation in the elected body, but also in the indirect activities of the elected body that are performed by means of committees and subsidiary bodies. This is how President D. Beinisch explained the principle:

> The principle of democratic equality requires appropriate, proportional representation of the minority, as well, and that representation is closely tied to the need to afford the represented minority a proper opportunity to express itself. The minority's right is not limited to appropriate representation in the democratically elected body, nor in its appropriate opportunity to express an opinion on matters discussed by that body, but also gives rise to a right of representation in the subsidiary bodies that act on behalf of the elected body and represent it. Denial of that right in the subsidiary bodies denies the minority the possibility of expressing its view in central areas controlled by the elected bodies by means of subsidiary bodies that all operate on a representative basis. This is particularly prominent in the field of local government, in which most of the work of the municipal council is conducted by means of committees and subsidiary bodies (HCJ 1020/99 *Duek v. Mayor of Kiryat Bialik*, para. 6 of the opinion of President D. Beinisch (Aug. 8, 2000) (hereinafter: the *Duek 1* case).

In light of the proportional representation principle, the Court interpreted the expression "to the extent possible" not as a restrictive term, but rather as an expansion that requires that where the number of committee members is too small to allow for maintaining a factional ratio, preference will be given specifically to the small factions that are not represented at all, at the expense of the large faction that are already represented. It was thus held in the *Shamgar* case, which addressed sec. 19(A1)(1)(c) of the Building and Planning Law, concerning the election of representatives of a municipal council to the local building and planning board:

> The fact that the provisions of the section require action in accordance with a proportional representation of the factions "to the extent possible" does not detract from the principle of proportional representation, but rather is intended to make its implementation possible in accordance with objective constraints … therefore, we cannot accept the approach of the learned trial judge who understood the expression "to the extent possible" in the section as restricting the principle of proportional representation. It is also important to note that in view of the centrality of the principle of proportional representation, this principle applies to the entire section. Therefore, the provision at the end of the section must be

> read subject to the guiding principle. This provision establishes that a deviation from the principle of proportional representation will be made only for the purpose of granting representation to the minority where maintaining the principle of proportional representation might be to the detriment of the minority such that it would be deprived of any representation. It is, therefore, possible to deviate from the principle of proportional representation, however this is in order to ensure representation of the minority which, in the absence of the provision at the end of the section, might not be represented at all (CA 2663/99 *Shamgar v. Ramat HaSharon Local Council*, IsrSC 54 (3) 456, 464 (2000)).

In other words, when perfect proportional representation cannot be achieved, it is better to deviate from the relative ratio in favor of the small factions that are not represented at all, rather than to grant over representation to the large factions. The Court similarly interpreted sec. 249 of the Municipalities Ordinance, which treats of representation of the factions in municipal corporations. In the *Oren* case, the Court construed the expression "as far as possible" as an expression intended to broaden the principle of proportional representation:

> What this means is that the legislative provision must be observed in each and every corporation such that members of the council on the board of directors of the corporation "shall be so selected that the ratio of forces of the factions of the council is preserved as far as possible". It would therefore seem that where a faction claims that it is underrepresented on the board of directors of company "A" (for example, where its relative strength in the council entitles it to two representatives, but it is granted only one), it will not be adequate to respond that it enjoys overrepresentation on the board of municipal corporation "B" (unless this was done with its consent). This is particularly so when corporation "A" is a "very important" corporation" while company "B" is of average importance. However, since mathematical precision is not always possible, the legislature additionally instructed us in regard to proportional representation "as far as possible"… The concept of "as far as possible" is a conceptual framework – its content is not defined and detailed – and the vessel will be filled with content by the implementation of fundamental principles of the democratic regime and the

proper governance of the local council (HCJ 3250/94 *Oren v. Petach Tikva Municipal Council*, IsrSC 49 (5) 17, para. 19 of the opinion of Justice M. Cheshin (1995)).

This interpretation should also apply to sec. 150A(a) of the Municipalities Ordinance. The section's legislative history shows that it was intended to grant appropriate representation to all factions in the subsidiary bodies and permanent committees. Therefore, there must be an effort to preserve the factional composition of the council in each of the permanent committees. When this cannot be achieved due to the small number of members of a committee, it is necessary to deviate from the factional composition in favor of the unrepresented opposition factions. This broad interpretation expresses the democratic principle that the minority must be party to all the activities of the authority. However, the question still remains as to how the principle of proportional representation is realized when all of the opposition factions cannot be represented, as in the case before us. I shall address this in greater detail below.

…

*The Right of the Minority to Participate in Decision Making – An Extra-Legal View*

9. The right of the minority to participate in the decision-making process – and not just its political right to elect the decision makers – was particularly emphasized by many political philosophers in the second half of the twentieth century. It might be said that this is the third stage in the development of the democratic idea. At the principle's outset – in the Athenian Greek *polis* – it meant majority rule (the meaning of the word *demos* is "the people", and the original meaning of democracy was "rule of the people", as opposed to monarchic and oligarchic rule). In the second stage, democracy became the majority's obligation to recognize the rights of the minority, which, in the third stage, developed into the recognition that even the minority must play an integral role in the decision-making process (for a historical description of the development of the democratic idea in its various forms, see the book by Robert Dahl, who died some two years ago after serving as a professor of political science at Yale University, and who also served as President of the American Political Science Association: ROBERT A. DAHL, ON DEMOCRACY (1998)). The right to participation is now understood to be a substantive part of the democratic idea. Thus, for example, the philosopher Joshua Cohen (professor at Stanford University, and student of John Rawls) coined the term "deliberative democracy", which

emphasizes not only majority decision-making, but also and especially, the right of the minority to participate in the process (see: Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY, James Bohman and William Rehg (eds.) 67-91 (1977)). In his writings, philosopher Jeremy Waldron (political philosopher, professor at Columbia University) emphasized that the democratic process is not only a procedural process that offers an efficient means for decision-making, but is a process that expresses the substantive principle of equality and mutual respect. According to him, the basic presumption of the democratic concept is that the purpose of political decision-making is not the achievement of absolute truth, but rather the choice between competing, legitimate worldviews. The underlying presumption of a decision by the majority is that, given human variety, disputes are unavoidable, and a just decision cannot be defined *per se*. Therefore, the process must grant legitimacy to the spectrum of views and positions, and express mutual respect even for minority views. Waldron therefore emphasized that the democratic process is not a technical decision-making process, but rather a process that expresses the substantive principle of respect for differences of opinion. According to Waldron, we must operate in accordance with the Physics of Consent, which is necessary in view of the respect that one view must show for the other:

> But is that all we can say for it – that it is a successful technicality? I think we can say more, along the lines of what I called the physics of consent. Majoritarianism is not just an effective decision–procedure, it is a respectful one… Respect has to do with how we treat each other's beliefs about justice in circumstances where none of them is self-certifying, not how we treat the truth about justice itself… it is because we disagree about what counts as a substantively respectful outcome that we need a decision-procedure" (JEREMY WALDRON, THE DIGNITY OF LEGISLATION, 158-162 (1999)).

In a similar vein, philosopher Thomas Christiano (professor of political philosophy at the University of Arizona) is of the opinion that excluding the minority from the decision-making process reflects a substantive conception of the moral value of the minority's view, and violates the right to equality among citizens:

> …makes it amply clear to those who are excluded that their interests are not treated as equally worthy of advancement. The excluded can see that they are

> being treated as if they have a lesser moral standing (Thomas Christiano, *The Authority of Democracy*, 11 (2) JOURNAL OF POLITICAL PHILOSOPHY 1 ,11 (2003)).

According to his approach, minority participation in the process is a central element of the legitimacy of majority decision-making in the eyes of the minority, which must accept the majority decision even when it considers the decision itself to be wrong. The minority must not feel that it has a lesser status than the majority. According to this view, debate and voting are not merely decision-making rules, but also preserve equality, and are the basis of the legitimacy of the majority's decision. As he wrote:

> Democracy is the only way to resolve disagreement that remains faithful to public equality. This is what makes democracy a uniquely just solution to political conflict and disagreement. It is what ensures that democracy legitimates outcomes even when they are unjust in the eyes of some (*ibid*., p.12).

The brief theoretical foundation that we have presented in regard to the right of the minority to participate in the decision-making process is consistent with the trend of the case law presented above, which anchors the various aspects of the principle of "proportional representation" as part of the political structure of Israeli democracy.

*The Principle of Proportional Representation in Jewish Law*

10. It is interesting to observe how the broad spectrum of the democratic principle is reflected in our sources. To that end, I will devote a few paragraphs to the principle of proportional representation in Jewish law. The core principle of democracy – majority rule – is entrenched in the constitution of Jewish law in the biblical verse: "You shall not follow a multitude to do evil; nor shall you bear witness in a suit, turning aside after a multitude, so as to pervert justice" (Exodus 23:2). The end of this verse, "after a multitude, so as to pervert justice" was interpreted by the sages as instructing that in the case of a dispute, one must decide in accordance with the majority.[1] Thus the Tosefta explains: "To incline after the majority[2] – even if you say thus and

[1] Trans. note: The interpretation given to the verse is based in part upon the fact that the words generally translated into English as "turning aside" and "pervert (justice)" – *lintot* and *lehatot* respectively – can be understood as to

your fellows says thus, the rule is in accordance with the majority" (Tosefta Berakhot 4:12). However, on the basis of the beginning of the verse, this instruction was understood by the sources not only as a procedure for rendering judgment, but as the preferable procedure for debate prior to rendering judgment – i.e., for the procedure and not just for the result. The phrase "nor shall you bear witness in a suit, turning aside after a multitude" was interpreted in the Mekhilta as expressing the duty of a judge to speak his mind and not be influenced by the opinion of the majority or other factors: "Do not say in the course of judging that I agree with my master, but state your opinion" (Tosefta Sanhedrin 3:8). Rashi, in his commentary to the Bible (*ad loc.*), emphasizes the individual's duty to state what he thinks, even if his opinion contradicts that of the majority: "Render judgment as it is, and let the iron collar hang on the neck of the many". This emphasis upon the duty of the minority to state its opinion without regard for the opinion of any authority, or even the opinion of the majority, reflects the view that the opinion of the minority is important and necessary to the deliberative process.

On the basis of this principle, Rashba [Rabbi Solomon ben Abraham Adret, (1235–1310)] ruled that the majority opinion of a court is binding only when rendered after discussion and debate held in the presence of all the judges:

> Even in the Great Sanhedrin, if seventy of them sat individually and condemned or acquitted, their decision is not binding unless seventy one sat together and debated the matter, in case one might see evidence or make a strong argument that would be accepted by his colleagues who would adopt a different view, but if they sat together and debated the matter, the decision is in accordance with the majority (RESPONSA RASHBA 5:126. And also see: Eliav Shochetman, *A Majority of the Whole - The Legal Status of Decisions Accepted in a Knesset Plenary which is Not Full*, REFLECTIONS ON JEWISH DEMOCRACY, Benny Porat (ed.) 407 (2010) (Hebrew)).

Rashba attributes the need for the presence of all the members of the Sanhedrin to the quality of a decision arrived at through a procedure in which the minority is afforded the opportunity to present its view. A decision made without hearing the view of the minority may

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"lean", "decide" or "incline". Thus, the phrase can be interpreted to mean "incline after the majority" or "decide according to the majority" (and see, e.g., TB Sanhedrin 2a and 3b).

[2] See fn. 1.

not take account of the full scope of considerations, and should, therefore, not be deemed binding. In Rashba's opinion, the principle that the majority opinion must be arrived at with participation of the minority must also apply to decisions of elected public officials. In this regard, he rules: "There is no majority consent unless the majority consent is arrived at in the presence of all as a matter of general law" (RESPONSA RASHBA 3:304).

An example of this approach according to which a majority decision must be made with the participation of all in administrative proceedings can be found in AAA (Beer Sheva) 15/05 *Mifalei Tovala Ltd. v. Head of Municipal Property Taxes of the Eilat Municipality* (2006). In that case, heard by the Beer Sheva Administrative Affairs Court, it was argued that contrary to the legal requirement, and as a result of practical problems, only two, rather than three members of the Municipal Property Tax Committee participated in the meeting. However, the State's attorney representing the Committee argued that since a Committee decision requires a majority, the practice adopted was that, in general, only two committee members meet. When the two members arrive at an agreed position, a decision is reached accordingly, while the third member participates only when there is a disagreement. In rejecting that approach, I relied upon a judgment of the Rabbinical Court according to which the participation of the third member is required, even if he is in the minority, because he could potentially sway the majority (App 5728/135 *Mafdal Youth v. Mafdal [National Religious Party]*, Rabbinical Courts Judgments7 225, *per* Chief Rabbi Yitzhak Nissim, Rabbi Eliezer Goldschmidt concurring, Rabbi Yosef Eliashiv dissenting).

In the matter before us, the view of Rabbi Joseph of Trani (A rabbi of Safed, and Chief Rabbi of Turkey (1538–1639) aka Maharit) is of particular importance. In his view, like that of Rashba, the requirement that decisions be made with the participation of all applies not only to judicial decisions but also to edicts dependent upon consent. Maharit's reasoning is based upon the view that the minority does not agree to accept the decisions of the majority when its view is not heard:

> Even though they all agreed that decisions would be made by the majority, a majority of everyone is required… and just as there [in a court] we do not rule according to the majority unless all the judges participate, this is also so in this case, *for if not for this condition among them, the majority could not compel the*

> *minority* in a matter in which there is a gain or loss that could harm the minority, *but now that they have agreed to follow the majority as if it was with the consent of all, it must be according to the opinion of all, with each and every one presenting his opinion before them*, and then the majority is followed, and if it is not done in that manner, their action is void (RESPONSA MAHARIT 1:95; and also see 58. Emphasis added).

Maharit is of the opinion that there are situations in which the validity of the majority's decision is based upon the consent of the entire public (and not upon a biblical instruction, as in the case of the judgment of a court). In such a case, consent to accept the majority decision is contingent upon the participation of the minority in the decision-making process. When a decision is made by the majority without participation of all the members, the decision is invalid, inasmuch as the condition of hearing the minority was not met. Maharit does not explain the requirement of hearing the minority on the basis of the potential of the minority to persuade the majority, but rather upon the broader principle that the minority has an inherent right to participate in the process by virtue of agreement. Here we find a democratic principle of participation according to which the consent of the minority to accept the decision of the majority is contingent upon being afforded the right to participate in the decision-making process. Only when the minority is granted the right to be heard is the majority opinion democratic rather than tyrannical.

I will conclude with an additional insight of Jewish law, which also relates to the right of the minority. The Mishna and the Tosefta ask about the importance of preserving the minority opinion, although rejected by the majority. The answer, presented in two different sources, is that it is needed not only in order to understand the issue in the context of fulfilling the mitzvah of Torah study, but also because today's minority may be tomorrow's majority. Thus, for example, the Mishna states that a future court may rule in accordance with the minority opinion: "And why do they record the opinion of a single person among the many, when the halakha must follow the opinion of the many? So that if a court prefers the opinion of the single person, it may rely upon him (Mishna, *Eduyot* 1:5). The Tosefta places the emphasis upon changing times and circumstances: "Rabbi Judah says, why are the opinions of a single person from among the many recorded? So that if the time requires them, they can be relied upon" (Tosefta, *Eduyot* 1:4).

These explanations assume that a majority decision does not make the court's decision the only one of significance. The rejected minority opinion is not viewed as an error or mistake, but rather as a theoretical halakhic possibility that – while not the position adopted in practice at the time – may become so at other times. This is another reason for granting the minority the opportunity to express its view.

Armed with these principles, we can approach another issue that remains to be decided.

…

**Justice E. Rubinstein:**

1. I concur in the comprehensive opinion of my colleague Justice Hendel, first and foremost, because he arrived at a just result under the circumstances. Its message is that of rights of the minority, in this case in a municipal body, *substantively* and not merely *formally*. This provides a foundation for legal issues in general in the field of constitutional and administrative law. Indeed, we should bear in mind that the majority is not necessarily right. There is importance to it being a majority, and it is significant for the purpose of deciding, but hearing the voice of the minority is essential both in order to persuade, and so that another option may be available when the time comes. When we are treating of the opposition, in all its ramifications, and the role of the opposition and its participation, we are concerned with substantive, and not merely formal participation. In other words, this is the theory of limits – the theory of proportionality *stans pede in uno*.

2. Respect for the minority is foundational to a democratic system, see HCJ 3166/11 *Gutman v. Attorney General* (2015) in regard to the importance of representation of minorities (and paras.4*ff*. of my opinion, in regard to the representation of the Arab minority). In the sixth chapter of his book ON THE ESSENCE AND VALUE OF DEMOCRACY, entitled "The Majority Principle" (p. 100), the distinguished scholar Hans Kelsen writes of parliamentary majority – but in this regard, there is no difference between a parliamentary and a municipal majority:

> It is telling that experience has shown it to be compatible with *protection of minorities*. For the concept of a majority assumes by definition the existence of a *minority*, and thus *the right of the majority* presupposes the *right* of a minority to exist. From this arises perhaps not the necessity, but certainly the possibility,

> of *protecting* the minority from the majority. This *protection of minorities* is the essential function of the so-called *basic rights* and *rights of freedom*, or *human and civil rights* guaranteed by all modern constitutions of parliamentary democracies (emphasis original – E.R.).

In the preface to his Hebrew translation of Kelsen's book, former Supreme Court Justice Prof. I. Englard writes (p. 15): "Kelsen emphasizes the decisive importance of the existence of a minority that is entitled to constitutional protection by entrenched fundamental rights". And see Chap. 6 of the Knesset Law, 5754-1994, which establishes the status of the Head of the Opposition, and see DR. Y. MARZEL, THE STATUS OF POLITICAL PARTIES (2004), 119-118 (Hebrew).

3. As we know, Knesset committees are composed on a factional basis (rule 102 of the Knesset Rules), and the opposition is mentioned in the rule (rule 6(a)(2)) that the chair of the State Control Committee will be a member of the opposition. But the legislature went further in the Municipalities Ordinance [New Version] in requiring opposition representation under sec. 150A, and even further in sec. 149D(b)(1) in requiring that the Discounts Committee will include "a member of the largest faction that is not represented in the Management Committee, which receives the largest number of votes". While the term "opposition" was not employed here, it is clear that that is the intention. Also see sec. 149C(a)(c)(1) according to which the chair of the Municipal Control Committee must be a member of the opposition, as in the case of the Knesset, and see AAA 7697/14 *B.R. Faction v. Kiryat Motzkin Municipal Council* (Feb. 21, 2016) para. 19. The above are in the spirit of protection of minority rights, and it is in that spirit that we must interpret the law.

4. My colleague cited some of the treasures of Jewish law on the subject of democracy. I will add several of my own to reinforce his worthy remarks.

*Turning aside after a Multitude*

5. As my colleague noted, deciding on the basis of a majority is expressly recognized on the basis of the biblical verse "turning aside after a multitude" (Exodus 23:2). In his *SEFER HAMITZVOT*, Maimonides lists following the majority among the 613 mitzvot: "… to follow the

majority when the sages disagree about any of the laws of the Torah. The same applies to a private case in regard to Reuven and Shimon, as for example, if the judges of their city disagree whether Reuven or Shimon owes money, they must follow the majority …" (Positive Mitzva 175). According to Maimonides, this verse instructs the sages to follow the majority even in the interpretation of the law – "about any of the laws of the Torah" – and to follow the majority of the court in deciding the law in specific cases. The verse is, therefore, a general principle of interpretation, as well as a rule for making legal decisions. The famous story of the Oven of Akhnai is instructive as to the importance the Sages attributed to majority decision-making:

> On that day R. Eliezer presented every argument in the world, but they did not agree. He said to them: "If the halakhah is as I say, this carob tree will prove it." The carob tree was uprooted a hundred cubits from of its place, others say four hundred cubits. They responded: "No proof can be adduced from a carob tree." He then said to them: "If the halakhah is as I say, the stream of water will prove it." The stream of water flowed backwards. They responded: "No proof can be adduced from a stream of water." He then said to them: "If the halakhah is as I say, the walls of the academy will prove it." The walls inclined to fall. But Rabbi Yehoshua rebuked the walls. He said to them: "If scholars are engaged in a halakhic dispute, who are you to interfere?" They did not fall out of respect for Rabbi Yehoshua, and they did not return upright, out of respect for Rabbi Eliezer; and they remain inclined. He then said to them: "If the halakhah is as I say, it will be proved from Heaven." A Heavenly voice called out: "What do you have against Rabbi Eliezer, inasmuch as the halakhah is always in accordance with his view." But Rabbi Yehoshua arose and said: "It is not in Heaven." What did he mean by "it is not in Heaven?" Rabbi Yirmiah said: "Since the Torah was given at Mount Sinai, we pay no attention to a Heavenly voice because You have written in the Torah at Mount Sinai: 'One must incline after the majority'[3]" (Babylonian Talmud, Bava Metzia 59b).

The story thus emphasizes that the halakha is decided by majority decision, and not in accordance with voices from Heaven. Similarly, we find:

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[3] See n. 1, above.

> Rabbi Yannai said: if the Torah were handed down cut and dried, [the world] would not have a leg to stand on. Why is this so? "And God said to Moses" – [Moses said to God]: Master of the Universe, teach me what the law is? He said to him: "Incline after the majority". If the majority says to acquit – acquit. If the majority says to convict – convict, so that the Torah be interpreted 49 ways impure and 49 ways pure" (Jerusalem Talmud, Sanhedrin 4:2).

The verse "incline after the majority" is conceived as an instruction for deciding when there are divergent interpretations of a particular law. In such a case, the decision will be made in accordance with the majority. That is also what we find in the Mishna (*Eduyot* 1:5): "And why do they record the opinion of a single person among the many, when the halakha must follow the opinion of the many? So that if a court prefers the opinion of the single person, it may rely upon him". In other words (according to the *Tosafot Yom Tov* commentary [Rabbi Yom Tov Lipmann Heller (ca. 1579 – 1654)] *ad loc*.) "…as we have seen when later scholars decide the law in accordance with an individual opinion among the early scholars, even if the majority disagreed with him, and if we did not have the opinion of that early individual scholar, the later scholars would be unable to reject the opinion of the early scholars on the basis of their own view …". According to the distinguished scholar Menachem Elon, this mishna concerns the "legislative" authority of the rabbis – their power to make edicts and decrees contrary to earlier sources of Torah interpretation" (JEWISH LAW, vol. 1, 444 (1973) (Hebrew)).

As noted, following the majority is also the rule for courts. Thus Maimonides, following the Mishna, states: "When a court is divided - some saying that the defendant is not liable, and others say that he is liable – we follow the majority. This is a positive mitzvah of the Torah, which states: 'Incline after the majority'" (MAIMONIDES, MISHNEH TORAH, *The Sanhedrin and the Penalties in their Jurisdiction* 8:1), and see E. SHOCHETMAN, PROCEDURE IN THE RABBINICAL COURT, vol. 2 (5771 edition) 1139; and although the majority opinion is decisive and the minority as though non-existent, we are required to publish the minority opinion (p. 1143).

*A Decree that the Majority of the Public cannot bear*

6. Although, as we have seen in the early rabbinic sources and in Maimonides, the law is decided by the sages, nevertheless, at times, the public also has a hand in deciding the law. Thus it was held that a decree becomes valid only if the majority of the public has accepted it or can bear it, but if not, it is automatically void. Thus Maimonides writes (*Rebels* 2:5-7):

> 5. When a court sees it necessary to issue a decree, institute an edict, or establish a custom, they must first contemplate the matter and see whether or not the majority of the community can maintain the practice. A decree is never issued for the community unless the majority of the community can maintain the practice.
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> 6. If a court issued a decree in the belief that the majority of the community could maintain it, and after the decree was issued, the majority of the community raised doubts and the practice did not spread throughout the majority of the community, the decree is nullified, and the community cannot be compelled to follow it.
>
> 7. If the sages issued a decree and imagined that it spread among the entire Jewish people, and the situation remained unchanged for many years, and after a long period of time, another court checked throughout the Jewish community and found that the decree had not spread throughout the Jewish community, it has the authority to rescind the decree. And even if it is of lesser stature than the original court in wisdom and in number, it can rescind it.

We thus have before us flexibility built upon general public conduct in a sort of pragmatic democracy.

*Communal Enactments and the Majority and Minority*

7. Over the generations, in the absence of a central legal authority that made it possible to make binding decisions by majority, Jewish law developed the institution of communal enactments [*takanot hakahal*] that allowed the public to enact halakhically valid norms for itself.

The institution of communal enactments originated in early practices that permitted communities and professional associations to enact laws for themselves:

> The townspeople may compel one another to build a synagogue and to buy a scroll of the Torah and the Prophets, and the townspeople can stipulate as to prices and measures and the wages of workers … the townspeople may say that one who presents himself before so-and-so shall pay so much, and one who presents himself before the ruler shall pay so much, any who releases or pastures his cow in the vineyard will pay so much, and one who pastures such an animal will pay so much…and the wool weavers and dyers can stipulate that all will have a share in any merchandise that comes into the town (Tosefta, Bava Metzia 11:23-24).

Pursuant to these rules, the responsa literature held that communities had the authority to establish binding enactments for their members. Jewish law scholars found support for making such enactments in the Jewish civil law principle "*hefker beit din hefker*" ["what the court declares ownerless is ownerless"] (ELON 564-565), and the Jewish criminal law principle "*beit din makin ve'onshin shelo min hadin*" ["a court may mete out punishment not prescribed by the Torah"] (*ibid*., 566-569).

In this regard, Rashba (Rabbi Solomon ben Adret, Spain, 13th-14th cents.) addresses the question of whether men appointed to adjudicate criminal matters by community enactments and by the state could hear the testimony of [halakhically] inadmissible witnesses:

> It would appear clear to me that you may do as you see fit, inasmuch as those matters that you raised apply only to a court that judges in accordance with Torah law as a Sanhedrin or such like. But one who holds office by state enactments does not actually rule upon the laws of the Torah but according to what he must do at the time according to the authority of the state…and all of those things apply only in a court that acts according to the Torah. Consider David who killed the Amalekite upon his own opinion. And so they said: they mete out punishment not prescribed by the Torah, and this is not to transgress the Torah but to build a fence around the Torah. And there was a case of a person who rode a horse on the Sabbath and was brought before a court and stoned. And it is not that such is the

> law, but rather the times required it, as we find in the chapter *Ha'isha Rabba* in Tractate Yevamot (90b). All the more so in your case, where the consent was primarily that you do what you think right, as was written in the letter of enactment that you referred to. And so the matter would appear clear for us and all places in which there is an enactment among them on such matters (RESPONSA RASHBA 4:311).

Communal enactments were generally enacted by the majority and bound the minority (ELON 580-581). In his response, the Rosh (Rabbeinu Asher, Ashkenaz & Spain, 13th-14th cents.) provides the following explanation:

> You ask whether two or three of the average people in the city can exempt themselves from the agreement made by the community, or a ban imposed on something. Know that on public matters the Torah said "incline after the majority", and therefore in every matter that the community agrees, we follow the majority, and individuals must obey what the majority has agreed to, for if not, the community will not agree to anything if individuals have the power to withdraw their consent. Therefore, the Torah instructs that in every matter of consent of the many "incline after the majority" (RESPONSA ROSH 6:5).

Thus, the Rosh expanded the Talmudic rule adopted by Maimonides in regard to interpretation of the Torah and the procedure of the courts into a principle applying to "public matters" on the basis of public need (ELON 583). The opinion of the minority is heard, but the majority decides.

*The Rights of the Minority in Communal Enactments*

How is the minority heard, and how are its rights protected? Addressing the question of whether the members of a community could rescind the permission granted to the members of another community to conduct business in their city, the Rema (Rabbi Moses Isserles, Poland, 17th cent.) wrote:

> It is clear that the community leaders do not have the authority to enact anything except in accordance with the law, and may not oppress individuals, *and the majority does not have the power to steal from an individual* (emphasis added – E.R.). As the Maharik (Moreinu Rabbi Joseph Colon, Italy, 15th cent.) wrote on such a matter in *Shoresh* 1, and as Rashba wrote in a responsum cited by Bar Sheshet (Rivash – Rabbi Isaac ben Sheshet, Spain, 14th-15th cents.) in responsum 477: In regard to community A that wished to make an enactment imposing a tax on all property held in the city or in another city, and they wished to do this in order to obligate an individual who resided among them, and he replied: As to your statement on the power of the community to make rules and laws in this regard, it would appear to me to be nothing but theft, and they cannot legislate theft etc., and how does a majority concern this? It is therefore clear that the members of the community are permitted only to make enactments in regard to what the law places under their jurisdiction, and not anything that they may conceive, which never was and never will be the case (RESPONSA REMA 73).

From the Rema's responsum, based upon the sources cited, we learn that the majority does not have the power to make any enactment "they may conceive" against the minority, and they may not "oppress" individuals. This is one of the principles of justice and equity by which halakhic scholars assessed communal enactments (ELON 616-623). Another principle that derives from this requires that an enactment apply equally to all the members of the community (ELON 624). Thus, Ritva (Rabbi Yom Tov Asevilli, Spain, 13th-14th cents.) wrote:

> And thus my late teacher would say: In regard to every enactment that the majority of the community, which is more important in number and wisdom, agrees to, *even if the minority stands and shouts, they are obligated by what the majority has decided. But only if the majority believes that the enactment benefits the community can they enact thus upon the entire community equally* (NOVELLAE RITVA, *Avoda Zara* 36b, *s.v. Katuv beshem Harav Rabbeinu Yona*) (emphasis added – E.R.).

8. In the spirit of the above, we may also consider how halakha views Israeli democracy, which like any democracy, is premised upon majority-minority relations, but which is also subject to legal and constitutional checks and balances. This question addresses several different issues: the relationship to democratic elections; whether it is permissible to appoint a government on the basis of democratic elections, even though the halakhically ideal Jewish government would seem to be a Jewish monarchy; the relationship to minority groups and their participation in the Israeli democratic process, both in regard to elections and governments, and in regard to law; and in "miniature", such questions of majority and minority arise in the case before us, which is restricted to a limited municipal issue.

*The Democratic Regime*

9. One of the approaches to recognition of the modern form of democracy can be found in the writings of Rabbi Isaac HaKohen Kook, Chief Rabbi of Mandatory Palestine until his death in 1935, in RESPONSA MISHPATEI KOHEN. According to that approach, in the absence of a king, his authorities pass to the entire nation, which can decide how to implement them:

> Inasmuch as the laws of the king also regard all that concerns the general situation of the nation, it would appear that when there is no king, those legal authorities return to the nation in its entirety…In regard to all that concerns general administration, whoever leads the nation deals with the laws of the king, which are the general needs of the nation that are required for the time and reality (RESPONSA MISHPATEI KOHEN 144) (Hebrew)).

Rabbi Isaac HaLevi Herzog, Chief Rabbi of Israel at the end of the Mandate and in the first decade of the State, cited this in his article *On the Establishment of a State prior to the Coming of the Messiah* published in his book A CONSTITUTION FOR ISRAEL ACCORDING TO THE TORAH (Dr. I. Warhaftig (ed.) (Hebrew)). Under the subject "The Authority of a King in Our Day", Rabbi Herzog wrote:

> And if you say that we do not have a king, I would say that as long as he is not granted an eternal dynasty, he need not be from the House of David, and a king who is not of the House of David does not need to be anointed with the anointing

> oil, and the king's authority derives only from the people, as he was chosen by the people. And so we may say that the entire people, and primarily the People of Israel residing in the Land of Israel as aforesaid, holds the authority of the king in regard to matters of the nation. And if the vast and decisive majority declares war, that is like the decree of the king, and it has the power to compel (RABBI Y.I. HALEVI HERZOG, A CONSTITUTION FOR ISRAEL ACCORDING TO THE TORAH, vol. 1, 129 (1989) (Hebrew)).

Thus, according to this approach, the authority of the king derives from the people. And when there is no king, authority returns to the people, which can make decisions by majority.

10. Beyond what has been presented above, in his article *Israeli Democracy in Halakha* (20 TEHUMIN 131-144 (Hebrew)), Dr. Isaac Geiger presents various opinions according to which a democratic regime is halakhically preferable for four reasons expressed by rabbis and halakhic decisors: the Torah commands us to create a proper regime, and proper states now employ democratic regimes, and it is therefore appropriate that Israel do the same; democracy comprises ideas that derive from Judaism – the people as the source of authority, majority rule, the rights of the minority, limitation of human government, etc.; a democratic regime limits the power granted to human government, and is thus closer to the Kingdom of Heaven; and lastly, this form of government encourages the individual to bear responsibility for the public, and see in regard to the latter, Rabbi Yeruchem Levovitz, the *mashgiach* (ethical advisor) of the Mir Yeshiva in Poland-Belarus in the 1920s-1930s, who presented two concepts: "the public person" and "one who bears the burden of his fellow" (see his book *DA'AT CHOKHMA UMUSSAR* (5727) vol. 1, 25-31 (Hebrew)) which describes Moses (29) "who would bend his back to carry the burden of Israel, and did not do so only to help them, but so that he could sense all their troubles and pains to the extent that a person can feel them…", and a person who bears the burden is also "the public person" (*ibid.*, p 11); and also see Rabbi Mordechai Greenberg, *NOSEH BA'OL IM CHAVERO* (Kerem B'Yavneh Yeshiva) (Hebrew).

Among Dr. Geiger's sources we find Rabbi Yehuda Gershuni (Poland-Israel-U.S.A., 20th cent.), who wrote:

> Indeed, the better form of leadership in administering the state is "that a single opinion not dominate", as an individual may err…if the nation recognizes the

> responsibility of the public and knows what society is and understands the organization of society; if the nation recognizes that the general good and happiness must be preferred over the good of any party, then there is no other course but government by the public, "by the community", by the people themselves…only government by the people by means of a parliament of elders is the proper government, and only in such times as the people are not yet able to govern by the elders is rule by an individual temporarily needed, and take care in this. He [the Netziv – Rabbi Naftali Zvi Yehuda Berlin, Head of the Volozhin Yeshiva, Russia, 19th cent.) explains that as long as there is public consent to run the state by representatives, there is no commandment to appoint a king. And only when the people demand the appointment of a king, and can tolerate autocratic rule, is the Sanhedrin commanded to appoint a king for them (*ibid*., p. 136).

And thus Rabbi Yoel Bin Nun (Israel, 20th-21st cents.) wrote:

> The concept of democratic government, in which there is no omnipotent element, divides power among different elements. There is no personage that is identified fully or partly as the government. This approach is the closest of all to the correct, proper and desired solution that balances the rule of humankind and the rule of Heaven. This is so because the democratic concept can also look to the Kingdom of Heaven and even be subject to it (*ibid*., 139).

Dr. Geiger, however, hedges his approach in stating that he refers only to formal democracy – majority rule – and not to liberal democracy, owing to various fears, among them an excessive universalism at the expense of the Jewish aspect.

*The Relationship to the Minority in the State of Israel*

11. In conclusion, I will cite my opinion in HCJ 3166/14 *Gutman v. Attorney General*, para. 4 (2015):

> On the eve of the establishment of the State, Rabbi Yitzchak Isaac HaLevi Herzog, Chief Rabbi of Israel upon its establishment, who energetically strove to

incorporate Jewish law into state law, dedicated a special work to constitutional issues in the new State. An important chapter was reserved for "The Rights of Minorities according to Halakha", which he deemed "the most difficult matter in regard to the democratic character of the State" – see his book A CONSTITUTION FOR ISRAEL ACCORDING TO THE TORAH, vol. 1, *Governance and Law in the Jewish State* (Itamar Warhaftig (ed.) 1989) 12 (Hebrew). His halakhic conclusion is that the State constitutes a form of "partnership" between the Jews and the non-Jews (pp. 20-21) that also allows for the appointment of non-Jewish judges (pp. 24-25), and according to his approach, the Arab population participates in the elections (p. 95). As the editor, Dr. Warhaftig, notes, the rabbi "takes the conditions of the United Nations (in the resolution of Nov. 29, 1947 – E.R.) as a given that the State will be democratic, and that there will be no ethnically based discrimination against minorities (Introduction, p. 34). Rabbi Herzog also employs the term "a Jewish democratic state" in regard to the partnership (note 1, at p. 22). Clearly, he struggles with no few halakhic problems, but arrives at a conclusion that comprises a realism that he grounds in halakha. Rabbi Ben-Zion Meir Hai Uziel, the Sephardic Chief Rabbi at the time, addresses this in his response (*ibid*., pp. 244-245), stating the opinion that there is no need to go into the particulars in this matter, so as not to raise contention, "and in fact, we need not address this, inasmuch as we did not conquer the land but were granted it upon express conditions, among them that the minorities in the state be granted fully equal civil rights"; and see Dr. G. German, A KING OVER ISRAEL, THE HALAKHIC VIEW OF PERPETUAL SOVEREIGNTY, AND THE STATUS OF KNESSET LAWS IN HALAKHA (2003) (Hebrew) 742-745; and Rabbi Dr. S. Federbush, THE LAW OF KINGSHIP IN ISRAEL (5765), a book written close to the time of the establishment of the State that argues that minorities – recognized as *gerim toshavim* ["resident aliens"] under halakha – should be viewed as "cultured, moral citizens who are entitled to enjoy all the rights of citizenship granted to Jews in the Hebrew State, and we are commanded to treat them as brothers and aid them in their time of need" (p. 59).

In his article *The Jewish Question in the Jewish State* (5719) (published in his book LEFRAFKIM (5763) 307 (Hebrew)), Rabbi Yechiel Yaakov Weinberg (author

of RESPONSA SERIDEI EISH) writes concerning the Jewish character of the State (p. 310) that the State "has the right, and not merely the right but the duty, to grant equal rights to all its citizens, without any discrimination among citizens", but that does not detract from the State's duty "to preserve the independence of the national culture, and a Jewish way of life as one of the foundations of this society…". Thus we find both sides of the equation expressed. As opposed to this, to complete the picture, see the position of E.M. Shach, leader of the Hareidi Lithuanian community, who expressed opposition to the idea that important State decisions might be decided pursuant to the vote of Arab Knesset members, LETTERS AND ARTICLES, vol. 5, 126 (5755) (Hebrew): "…is this, in their opinion, the vision of the State of Israel, is this what generations of Jews awaited, the belief they died for…to be granted a Jewish government that relies upon the inclusion of Arabs?". This is expressed as part of a view rejecting democratic government in general (cited in Moshe Hellinger, *On Democracy and the State of Israel as a Democratic Country,* in RELIGION AND POLITICS IN JEWISH THOUGHT: ESSAYS IN HONOR OF AVIEZER RAVITZKY (2012) 567, 588) (Hebrew)).

And see my article *Malkhut Yisrael le'umat Dina DeMalkhuta* (pursuant to the aforementioned book by Dr. G. German), 22 MEHKAREI MISHPAT 489 (20060 (Hebrew).

12. To return to our particular issue, I concur with my colleague's analysis. In my opinion, there is good reason that the Discounts Committee "warranted" "special treatment". In addition to the reasons brought by my colleague (para. 12) concerning the quasi-judicial functions of that committee, we should bear in mind the simple facts – we are concerned with money, a lot of money. Every discount represents a reduction in the municipality's treasury, and in no few municipalities there may be – without wishing to misspeak – pressure for property tax discounts by "the close to entitled" and the "quasi-entitled". Representation of the largest opposition faction on the Discount Committee under sec. 149D(b)(1) creates one of the gatekeepers, alongside the Treasurer, the Welfare Administration, the Collections Administration, and the Legal Adviser. The opposition member is meant to be the political "gatekeeper". That being so, we have before us a specific section as opposed to general section 150A (see, recently, LCA 2015/15 *Palevski v. Makor Formica Ltd.* (Aug. 4, 2016) para 4). Perhaps there should be better

harmony between the wording of the relevant sections 149 and 150A, and that “opposition” should be written in each case (it is mentioned in sec. 150A, but not in the prior sec. 149D). But clearly the intention is one, and even if sec. 150A was enacted later, its specificity prevails.

13. In conclusion, I concur with my colleague.