**The Supreme Court sitting as the High Court of Justice**

**HCJ 2442-11**
**CrimApp 4002/11**

Before: His Honor President A. Grunis
His Honor Justice E. Rubinstein
His Honor Justice H. Melcer

The Petitioner in HCJ 2442/11: Haim Shtanger, Adv.

The Applicant in CrimApp 4002/11: The State of Israel

V.

The Respondents in HCJ 2442/11:
1. The Speaker of the Knesset
2. The Government of Israel

The Respondents in CrimApp 4002/11:
1. Hagai Zaguri
2. Ramy Azran
3. Yossi Mirilashvili

Petition to Grant an Order *Nisi* and an Interim Order and a Request to Extend a Detention

Date of Session: 12th of Tamuz, 5771 (July 14, 2011)

On behalf of the Petitioner in HCJ 2442/11: Himself; Adv. Guy Halevy

On behalf of the Applicant in CrimApp 4002/11: Adv. Shaul Cohen

On behalf of Respondent 1 in HCJ 2442/11: Adv. Dr. Gur Bligh

On behalf of Respondent 2 in HCJ 2442/11: Adv. Aner Helman

On behalf of Respondent 1 in CrimApp 4002/11: Adv. Avigdor Feldman

On behalf of Respondent 2 in CrimApp 4002/11: Adv. Moshe Sherman

# **J U D G M E N T**

**President A. Grunis:**

1. The question of the legality of two arrangements in the Criminal Procedure (Enforcement Powers – Detention) Law, 5756-1996 (hereinafter: the "**Detention Law**") stands at the center of the petition before us. These arrangements were added to the Detention Law as part of the Criminal Procedure (Enforcement Powers – Detention) (Amendment no. 8) Law, 5771-2011 (hereinafter: the "**Amendment to the Detention Law**" or the "**Law**") which was legislated by the Knesset on March 14, 2011. The **first arrangement** amends Section 53 of the Detention Law. This arrangement provides that from now on, appeals to the Supreme Court on District Court decisions in appeals on Magistrate Court decisions regarding matters of detention, release, violation of bail or motions for reconsideration, will be appealed **by permission** and not **as of right**. The first arrangement therefore provides that, from now on, the option of a second appeal will be by permission only. The **second arrangement** amends Section 62 of the Detention Law and provides that a Supreme Court judge will be permitted to extend the period of detention of a defendant who is detained until the end of proceedings, beyond nine months, for a period of up to 150 days (and to re-order this from time to time). This, in cases in which it appears that it will not be possible to conclude the trial proceedings within a period of 90 days, due to the nature of the offense, the complexity of the case or multiple **defendant**s, witnesses or charges.

**Background**

2. The Criminal Procedure (Enforcement Powers – Detention) (Various Amendments) Legislative Memorandum, 5770-2010, upon which the Amendment to the Detention Law was enacted, detailed the reasoning for the new arrangements, which were incorporated into the Detention Law. It emerges from the legislative memorandum that the purpose of the first arrangement, which, as stated, addresses the revocation of the right to a second appeal and its transformation into an appeal by permission, was to reduce the number of detention hearings being held at the Supreme Court (hereinafter: the "**First Arrangement**"), and this is what was written in the memorandum:

> "In light of the heavy workload imposed on the Supreme Court and the scope of appeal hearings, including "third instance" appeals, it is recommended to amend the law such that it will grant only one right of appeal on decisions regarding detention, release, violation of terms of bail, decisions on motions for reconsideration, while allowing the option of a second appeal by permission only. Additionally, in order to prevent courtroom hearings regarding the motion for permission to appeal, and in order to streamline the process, it is recommended that the Supreme Court hearing the second appeal (on a District Court's decision in an appeal) be authorized to dismiss an application *in limine*, based on the reasons detailed in the motion for permission to appeal, if it

did not find there to be a cause justifying granting the application."

The purpose of the Second Arrangement, which addresses the extension of the period of detention until the end of proceedings to a period of up to 150 days, was to enable flexibility in extending detentions beyond the nine months prescribed in the Law, in unusual cases in which it is clear in advance that the maximum time period for extending the detention – 90 days – is not sufficient to exhaust the legal proceedings, even given efficient and practical management of the trial. The section specified the circumstances in which, in general, an extended detention extension will be necessary. For example, in cases of complex serious crimes or in cases in which there are a large number of **defendants** or witnesses (hereinafter: the "**Second Arrangement**").

3. A bill in the spirit of the said legislative memorandum (The Criminal Procedure (Enforcement Powers – Detention) (Amendment no. 9) (Second Appeal by Permission and Extension or Renewal of Detention) Bill, 5770-2010) was presented to the Knesset on July 13, 2010, as a government bill. On July 21, 2010, the Knesset plenum passed the bill in the first reading, and it was sent to the Constitution, Law and Justice Committee, to be deliberated and prepared for the second and third readings. The committee held two meetings regarding the bill. On March 14, 2011, the bill was debated in the Knesset plenum, in accordance with the updated draft that was prepared by the committee. The Knesset passed the entire bill in the second and third readings on that same day.

   It will be noted that the First Arrangement, which addresses the right of a "third instance" appeal, underwent a number of changes over the years. At first, in Amendment no. 10 of the Detention Law of 1998 (S.H. 5748 no. 1261) the legislator distinguished between the right of a detainee to a second appeal (meaning, an appeal **before** the filing of an indictment) and the right of a defendant to a second appeal (meaning, an appeal **after** an indictment has been filed). Hence, it was prescribed that a detainee, a person released on bail, and a prosecutor may, as of right, appeal for the second time a decision regarding detainment, release, or a motion for reconsideration. In contrast, a defendant may only appeal "in a third instance" if given permission to do so by a Supreme Court judge. This provision was amended in 1995 (S.H. 5755 no. 1514), and the distinction between a "third instance" appeal prior to the filing of an indictment or thereafter was revoked, and a right to a second appeal was granted in both cases. In 1997 this section was revoked in its entirety, and was replaced by the arrangement, the change of which is deliberated in the petition before us (and which, as mentioned, allowed a second appeal as of right).

4. Here is the wording of the arrangement, as currently prescribed in the Detention Law. For the sake of convenience, the relevant statutory clauses are presented in their entirety and the additions to the Detention Law, which are the subject of our discussion, appear in bold:

> **Appeal of the Court's** 53. (a) A detainee, a person released on bail and a prosecutor may appeal a decision of a court on any matter relating to detention, release, violation of terms of bail or a

**Decision** decision on a motion for reconsideration, and a guarantor may appeal a matter of his guaranty before a court of appeals, which will hear the appeal by a single judge;

**(a1) (1) Each of those specified in sub-section (a) may motion the Supreme Court to be granted permission to appeal a District Court decision in an appeal pursuant to sub-section (a) ;**

**(2) The Supreme Court shall hear the motion by a single judge, however, the Supreme Court may deny the motion *in limine*, without a hearing in the presence of the parties; if permission to appeal was so granted, the Supreme Court shall hear it by a single judge and it may hear the motion for permission to appeal as though it were the appeal.**

**…**

**Release in the Absence of Judgment** 61. (a) If, after an indictment was filed against a defendant, he was detained for a cumulative period of nine months, and his trial in the first instance did not conclude with a judgment, he shall be released from detainment, either with or without bail.

(b) (Cancelled)

(c) …

**Extension or Renewal of Detention** 62. (a) Notwithstanding the provisions of Sections 59 to 61, a Supreme Court judge may order the extension or renewal of a detention for a period which will not exceed 90 days, and may repeat that order from time to time, and he may also order the release of the defendant either with or without bail.

**(b) Notwithstanding the stated in sub-section (a), if the Supreme Court judge was of the opinion that it will not be possible to conclude the trial proceedings within the period of 90 days stated in sub-section (a), because of the nature of the offense, the complexity of the case or multiple defendants, witnesses or charges, he may order the extension of the detention to a period which shall not exceed 150 days, and may re-order this from time to time, and may order the release of the defendant, with or without bail.**

**The Parties' Arguments**

5. The Petitioner in HCJ 2442/11, an attorney by profession, filed his petition as a public petitioner. He requests that the Court declares the Amendment to the

Detention Law void, based on two arguments. The first and main argument is a **procedural** argument and it relates to the legislative process of the Amendment to the Detention Law. According to this argument, during the legislative process, the Knesset deviated from the specific provisions prescribed in Sections 126 and 128 of the Knesset by-laws (hereinafter: the "**By-Laws**"), which delineate the manner of debating government bills. The Petitioner points to two central flaws in the process: First, after a reservation to a certain section was rejected, a separate vote was not conducted on the wording of the section as proposed by the Constitution, Law and Justice Committee (hereinafter: the "**Constitution Committee**"), but rather a vote was held on the wording of the section as proposed by the Constitution Committee together with the subsequent section, with respect to which no reservation had been submitted. This vote was conducted contrary to what is prescribed in Section 126 of the By-Laws, according to which it is necessary to vote separately on each section of the law with respect to which reservations were submitted. The second flaw relates to the fact that the chairperson of the Constitution Committee did not respond to the reservations that were submitted to some of the sections of the law, despite the fact that Section 126(f) of the By-Laws explicitly provides that "The chairperson of the committee or whomever is appointed thereby or by the committee, shall respond to those who submitted reservations." In light of these flaws, the Petitioner claims, the Knesset could not vote on the Law at the third reading, and therefore it is void *ab initio*.

6. The second argument raised by the Petitioner is an argument of **substance**. According to the Petitioner, the arrangements that were prescribed in the Amendment to the Detention Law are contrary to the Basic Law: Human Dignity and Liberty. The crux of the Petitioner's arguments was directed at the revocation of the right to a second appeal as of right and its transformation into an appeal by permission only. According to the Petitioner, one cannot compare between the scope of the right to appeal granted to a defendant in a primary proceeding and the scope of the right to appeal of a detainee, since the former is not necessarily being detained while his trial is being held. Furthermore, according to the Petitioner, the amendment to the Law is wrong in not distinguishing between an appeal filed by the detainee and an appeal filed by the State. According to this argument, one cannot compare between the right of the detainee to a second appeal on a decision to re-detain him (after the Magistrate Court ordered his release from detainment), and the right of the State to appeal a decision to release a defendant. According to the Petitioner, where the State appeals the Magistrate Court's decision, and the District Court accepts the appeal and orders detention, the detainee is not entitled even to one appeal as of right. Therefore, his rights are infringed. As for the second arrangement, about the possibility of extending a defendant's detention period until the end of proceedings for a period of up to 150 days, the Petitioner argued that the Law denies the detainee's right to have his matter examined and reviewed by a Supreme Court judge knowingly and in advance. Therefore, it is argued, this arrangement is not proportionate, does not befit the values of the State of Israel, was not meant for a proper purpose and infringes on a detainee's right of freedom in a scope which is greater than necessary. It will be noted that in the petition, the Petitioner also argued against the legality of an additional arrangement in the Amendment to the Detention Law, which allows the Court to order a maximum 72 hour detention given a

prosecutor's declaration regarding an intention to motion the Supreme Court to extend the detention. In the hearing we held in the petition, the Petitioner stated that he withdraws his arguments against the legality of this arrangement.

7. It will be noted that CrimApp 4002/11 was joined to the hearing in the petition before us. In this case, a detention extension of 150 additional days beyond the nine months was requested. Incidentally to the hearing regarding the application to extend the detention, the **defendants** raised arguments regarding the legality of the Second Arrangement. In the decision dated June 14, 2011, it was ruled that the constitutional arguments that were voiced in the hearing before us and that primarily relate to the Second Arrangement, will be examined in the framework of the petition before us (Justice **H. Melcer**).

**The Respondents' Response**

8. The Knesset and the State (hereinafter together: the "**Respondents**"), filed separate responses to the petition, but their arguments were similar. Therefore, we shall present the essence of their arguments together. Both the Knesset and the State rejected both parts of the Petitioner's arguments. The Knesset's response specified the proceedings that preceded the vote on the Law. The Knesset confirmed in its response that Member of Knesset Ofir Akunis, who chaired the session, added the vote on Section 2 – to which reservations had not been submitted, to the vote on Section 1 of the bill, to which a reservation had been submitted and was rejected. However, according to the Knesset, the process was not flawed, and certainly not by a "flaw that goes to the root of the process", which would justify this Court's intervention in the legislative process. While the Respondents did not deny that according to the provisions of the By-Laws, the Knesset should have put each section for which reservations had been submitted to a separate vote, they argue that the fact that the vote was held for a section for which a reservation had been submitted along with a section for which a reservation had not been submitted, does not constitute a flaw that goes to the root of the matter. The Respondents argue that, as is apparent from the minutes of the Knesset plenum session, during the course of the second reading, the plenum *de facto* voted separately on each of the reservations that were submitted to the bill, and rejected them all. It further emerges from the minutes that in the votes in the second and third readings the Knesset plenum also positively confirmed the wording of all of the sections of the Law, in accordance with the proposal of the Constitution Committee. In the Knesset's response it was further argued that the technical flaw did not lead to any substantive impairment of the legislative process or to its fundamental objective, i.e., the realization of the right of participation by the Members of Knesset. This, so it was argued, is because Members of Knesset were given two opportunities to consider their position regarding the bill. It is argued that in fact, this practice of voting in an aggregated manner on a section of law for which reservations were submitted, together with an adjacent section for which no reservations were submitted, is customary at the Knesset in many cases. Therefore, the Knesset argued it should be deemed a kind of custom that projects onto the proper interpretation of Section 126 of the By-Laws. The Knesset further argued that pursuant to Section 126(c) of the By-Laws, the chairperson of the session may vote on consecutive sections in an aggregated manner, unless a Member of Knesset demanded to vote separately on

each or any of them. In this case, it is argued, Member of Knesset Dov Khenin – who presented the reservations – did not request such a vote. According to the Knesset, this indicates that the Members of Knesset were not of the opinion that the voting process was significantly flawed or that their right to participate in the voting process was infringed.

9. The Respondents also rejected the argument that the chairperson of the Constitution Committee did not respond to the reservations to the bill. They argue that a review of the minutes of the Knesset session indicates that during the presentation of the bill the chairperson of the Constitution Committee explicitly related to the reservations and explained why they should be rejected. Therefore, the Respondents were of the opinion that the flaws in the legislative process against which the Petitioner is arguing, are simply technical flaws that at most constitute a slight deviation from the provisions of the By-Laws, and have no real impact on the legislative process.

10. The Respondents also requested to reject the substantive constitutional arguments that the Petitioner raised. In the Knesset's response it was even argued that these arguments should be dismissed *in limine*, since they were raised in a general manner without specifying the substance of the constitutional infringement or the reason why the infringement does not allegedly comply with the terms of the limitation clause. To the point, the Respondents argued that an examination of the substance of the Amendment to the Detention Law does not reveal an infringement of the detainees' basic rights, since the amendment does not relate to the original decision regarding the detention and does not deny the detainee's right to appeal the detention decision. The revocation of the right to a "third instance" appeal (i.e., a second appeal), as argued in the State's response, does not lead to an infringement of the constitutional right of freedom, since the freedom of the detainee or of the **defendant** was already denied by a previous judicial instance. It was further argued that the basic rights to freedom and dignity do not include the right that the matter of a concrete detention be heard by a third judicial instance – neither as of right nor by permission, as is indicated in the provisions of Section 17 of the Basic Law: The Judiciary, which deals with the right to appeal in Israeli law.

11. The Respondents also disagreed with the Petitioner's argument that there is an infringement of constitutional rights in light of the lack of distinction between an appeal submitted by the detainee and an appeal submitted by the State. They argue that it is not unusual because when a State’s appeal on the acquittal of the defendant as part of the primary trial is granted, the defendant also does not have a right to appeal such a judgment. In any event, it was argued, the detainee will have the option of presenting its arguments before an additional instance as part of the appeal procedures, regardless of the identity of the party appealing. This last matter, as it emerges from the Knesset's response, was also discussed at the Constitution Committee, where it was argued that it should be assumed that upon examining motions for permission to appeal, the Court will examine, among its considerations, whether the decision to detain was given following an appeal of the State and whether this prejudices the detainee in such a manner that justifies granting permission to appeal.

12. The Respondents also requested to reject the Petitioner's arguments regarding the constitutionality of the Second Arrangement, which allows a Supreme Court judge to extend a detention until the end of proceedings, for a period of up to 150 days. The State argued that since this amendment constitutes a new arrangement, which authorizes ordering the detention of a person, it infringes on the constitutional right of freedom. However, it was argued, the infringement of the right is limited and proportionate, since it is limited to unusual cases and reflects the balance underlying the bill between the principle of the finality of the process and the types of matters which should be examined in the Supreme Court, and the realization of the substantive rights of detainees and **defendants**.

13. It will be further noted that in its response, the State elaborated on the customary practice at the Ministry of Justice pursuant to which Ministry initiatives of legislation amendments in significant matters and matters of principle in the field of criminal procedure and evidence laws are presented for examination to the Minister of Justice's Criminal Procedure and Evidence Laws Advisory Committee (hereinafter: the "**Committee**"). The Committee is appointed by the Minister of Justice and is headed by a Supreme Court judge. The Committee is comprised of three additional judges (two District Court judges and one Magistrate Court judge), the Deputy Attorney General (Criminal), representatives of the State's Attorney, representatives of the Public Defender, representatives of the Israel Bar Association, a lawyer from the private sector, representatives of the Israel Police and representatives from academia. The State noted in its response that both of the arrangements being examined in this petition were presented to the Committee and that after the Committee examined them it recommended that the Minister of Justice act to amend the Detention Law so that the said arrangements would be prescribed.

**Discussion**

**The Arguments regarding the Legislative Process of the Amendment to the Detention Law**

14. The Petitioner's arguments regarding flaws in the legislative process of the Amendment to the Detention Law focus on the proceedings in the Knesset plenum during the second reading. According to the Petitioner, the legislative process did not comply with the provisions of Sections 126 and 128(a) of the Knesset By-Laws. Section 126 of the Knesset By-Laws, entitled "Proceedings for Second Reading" and Section 128(a) entitled "Voting at Second Reading", prescribe as follows:

> 126. (a) The discussion in the second reading shall begin with a speech on behalf of the committee, by the chairperson of the committee or a committee member appointed thereby for such purpose, or, in the chairperson's absence, by a committee member appointed thereby for that purpose by the committee, and the speech on behalf of the committee shall be deemed as a proposal to adopt the bill in the second reading.

> (b) The chairperson shall put each of the sections of the bill to a separate vote.
>
> (c) The chairperson may put consecutive sections for which no reservations were submitted to a vote together, unless a Member of Knesset demanded to vote separately on each or any of them or on one of them.
>
> (d) If a reservation was recorded for a specific section, the person submitting the reservation shall be given the right to speak for five minutes to explain the reservation.
>
> (e) The chairperson may, with the consent of the person submitting the reservation and of the chairperson of the committee, combine the explanations for the reservations of a number of sections at once.
>
> (f) The chairperson of the committee, or whomever appointed thereby or by the committee for such purpose, shall respond to the reservations.
>
> (g) The right granted to each member of government to speak on behalf of the government at any stage of the discussion is also granted, at the second reading, to the deputy minister whose ministry is in charge of implementing the proposed law.
>
> …
>
> 128 (a) The chairperson shall first vote on the proposal of the party making the reservation; if the proposal by the party making the reservation is not adopted, the section, as drafted by the committee, shall be voted upon; if the proposal of the party making the reservation is adopted, he shall vote on the section as drafted in line with the reservation.

15. There is no dispute that Section 126 of the By-Laws explicitly provides that the chairperson of the session must put the sections of the bill to a vote one at a time, unless there are consecutive sections for which reservations were not registered – in which case the chairperson may put them to a collective vote (assuming he was not requested to act otherwise by one of the Members of Knesset). There is also no dispute that in accordance with that stated in Section 126 of the By-Laws, the chairperson of the Constitution Committee (or another committee member appointed thereby) should have presented the bill to the plenum and responded to reservations to the bill.

    In the case at hand, the legislative process indeed did not precisely correspond with the provisions of Sections 126 and 128 of the Knesset By-Laws. The chairperson of the session did not act in accordance with Section 126(c) in all

that relates to voting on Section 1 of the bill (relating to the revocation of the right to appeal and its transformation into an appeal by permission), when it put Section 1 of the bill, with respect to which a reservation had been registered, to a vote along with Section 2 of the bill, with respect to which a reservation had not been registered. Additionally, the chairperson of the Constitution Committee did not respond to the reservations **after** these were presented by Member of Knesset Dov Khenin, but rather, as argued in the Knesset's response, the reservations should be deemed as having been given at the outset of his statement, when he presented the bill to the plenum. The question that arises is whether these deviations from the provisions of the By-Laws should lead to the conclusion that the Law is void or voidable, as the Petitioner claims.

**The Court's Intervention in the Legislative Process**

16. The legislative processes in Israel are prescribed, pursuant to Section 19 of the Basic Law: The Knesset, in the Knesset By-Laws. The Knesset By-Laws "prescribe provisions, pursuant to which the Knesset's authorities must act, in the house's 'internal' procedures" (HCJ 652/81 **Sarid v. The Speaker of the Knesset**, PD 36(2) 197, 202 (1982); hereinafter: the "**Sarid Case**"; see also Tzvi Inbar "The Legislative Processes in the Knesset" ***Hamishpat*** A 91 (5753)). Thus, in order for a "law" to pass, a series of provisions prescribed in the By-Laws, must be satisfied (see, HCJ 975/89 **Nimrodi Land Development Ltd. v. The Speaker of the Knesset**, PD 45(3), 154, 157 (1991); hereinafter: the "**Nimrodi Case**"). At the basis of the legislative process is the obligation to conduct three hearings in the Knesset plenum and to enable a discussion in the Knesset committee relevant to the bill, in order to prepare the bill for the second and third readings (***ibid***, *ibid*). The Knesset By-Laws distinguish between a private bill, which is presented by one or more Members of Knesset and a bill presented on behalf of the government. The Seventh Chapter of the Knesset By-Laws, which includes Sections 126 and 128, which are relevant to the case at hand, addresses discussions regarding bills on behalf of the government. This chapter outlines the legislative process from the submission of the bill to the Knesset, through the first reading and the discussions at the relevant Knesset committee and ending with tabling the bill for the second and third reading. Sections 126 and 128 focus specifically, on the particular procedures of voting on the bill at the second and third reading.

17. A series of rulings by this Court prescribes the conditions upon which the Court will intervene in internal parliamentary proceedings, and specifically, the circumstances in which a statue would be declared void on the grounds of flaws in the legislative process (see, *inter alia*, HCJ 4885/03 **Israel Poultry Farmers Association Agricultural Cooperative Society Ltd v. The State of Israel**, PD 59(2) 14 (2004) (hereinafter: the **Poultry Farmers Case**); HCJ 5131/03 **Member of Knesset Litzman v. The Speaker of the Knesset**, PD 59(1) 577 (2004)). In the first cases in which the scope of this Court's intervention in internal parliamentary proceedings was examined, the Court ruled that even though it is authorized to examine the Knesset's internal decisions, it will tend to intervene in internal parliamentary proceedings in a limited way, taking into consideration the extent of the alleged infringement of the fabric of the parliamentary relations (see, HCJ 761/86 **Miari v. The Speaker of the Knesset,**

PD 42(4) 868 (1989) (hereinafter: the "**Miari Case**"); the **Sarid Case**; the **Nimrodi Case**). In accordance with this criterion, it was prescribed that when the alleged infringement is slight and "does not impact the structural foundations of our parliamentary system" (the "**Sarid Case**", page 204), the Court will tend to avoid intervening in the Knesset's internal working procedures (see also, the **Miari Case**, page 873; Suzie Navot "Twenty Years After the "Sarid Test": Revisiting Judicial Review of Parliamentary Decisions" ***Mechkarei Mishpat*** 19 721 (5762-5763)).

18. This case law, which allows limited review of the internal work of the Knesset, was interpreted even more narrowly in matters related to judicial review of the legislative process. Justice Barak elaborated on this in the **Miari Case**, on page 873, when ruling that:

> "The High Court of Justice is not required to exercise every power with which it is vested. The Court has discretion in exercising the power. Exercising this discretion is of particular importance in matters related to the judicial review of the activity of entities of the legislative authority. Therefore, we will intervene in internal parliamentary proceedings only when there is a allegedly significant infringement which prejudices substantive values of our constitutional system… This self-restraint must be, first and foremost, exercised when the process in which the intervention is requested is the legislative process itself."

The constitutionality of the Arrangements Law was discussed during this Court's intervention in the legislative process in the **Poultry Farmers** Case. In this case Case it was held that the criteria for the Court's intervention in the legislative process, and for the declaration of a law as void due to flaws in the process of its legislation. Therefore, it was held that "the Court must examine, in each and every case, whether it was tainted by a flaw that "goes to the root of the process" which would justify judicial intervention, and that only a flaw that **severely and significantly** infringes on the fundamental principles of the legislative process in our parliamentary and constitutional system will justify judicial intervention in the legislative process (the **Poultry Farmers Case**, page 42, original emphases). The fundamental principles of the legislative process, so it was held in the **Poultry Farmers Case**, include, *inter alia*, the principle of the majority rule, the principle of formal equality – pursuant to which each of the Members of Knesset has one vote, the principle of publicity and the principle of participation – which guarantees the right of each Member of Knesset to participate in the legislative process (***ibid***, page 43).

19. Does the case before us indeed involve such a flaw that “goes to the root of the process" and severely and significantly infringes on the fundamental principles of the legislative process? The answer is no. The underlying purpose of the process prescribed in the Seventh Chapter of the Knesset By-Laws, and particularly in Sections 126 and 128 which are relevant to the case at hand, is to ensure that the reservations to the sections of the bill being voted on are heard. An additional

purpose underlying the legislative process is to ensure that the Members of Knesset choose, in accordance with their vote, one of the drafts for each of the sections of the bill – either the draft that was proposed by the Constitution Committee or the draft that was proposed by the Members of Knesset who raised reservations. In order to realize these purposes, Section 126 prescribes a detailed procedure, in the framework of which the Members of Knesset are presented with drafts of the sections proposed in the bill, and those raising reservations are given an opportunity to express their position. Section 126 further prescribes that the chairperson of the relevant committee (or someone on his behalf) respond to the reservations and present the committee's position regarding the arguments that were raised by those with reservations. After the various positions are presented to the Members of Knesset they are requested to vote in the second reading. The chairperson of the session is required to put each section and reservation to a vote one at a time to ensure that the Members of Knesset are aware that these sections were subject to some kind of dispute, and that by their vote they are supporting one of the proposed drafts.

20. In the case before us the chairperson of the session acted properly with respect to most of the sections in the bill, but did not do so when putting section 1 of the bill to a vote. A review of the minutes of the session reveals that the Members of Knesset first voted on the reservation regarding section 1, and only after it was rejected did they move on to vote on section 1, but along with section 2 of the Law. Indeed, according to the provisions of the By-Laws, the Members of Knesset should have voted on section 1 **separately** from the vote on section 2. However, this deviation does not constitute "a substantial flaw that goes to the root of the process". Due to the separate vote on the reservation, which preceded the vote on the section, it appears that a distinction was made between the draft proposed by those who raised the reservation and the draft that was proposed by the committee. As such, the primary purpose of the legislative process was realized, and therefore no room for the argument that the root of the process was flawed in a manner justifying declaring the Law void.

21. The argument that the legislative process was substantively flawed because the chairperson of the Constitution Committee did not respond to the reservations that were raised by Member of Knesset Dov Khenin, is also to be rejected. As mentioned, the position of the Knesset was that the chairperson of the Constitution Committee responded to the reservations when presenting the Law for the second and third reading. Personally, I doubt if the intention of the section was an **advance** response to reservations that are yet to be presented during the discussion. As stated above, Section 126 prescribes a certain chronological sequence in order to allow the committee that examined the bill to convince the Members of Knesset to support the bill in accordance with the draft proposed. Reversing the order – so that the response to a potential reservation is made before the reservation is presented –misses to some extent the point underlying the section. Therefore, it would be better had they avoided that and acted in accordance with the sequence prescribed in Section 126. However, in the case at hand the minutes of the session indicate that this deviation did not lead to a significant flaw at the root of the process. It seems that Member of Knesset David Rotem, the chairperson of the Constitution Committee, knew of the reservation that Member of Knesset Dov Khenin would present after him, and therefore

explicitly stated:

> "The Hadash group proposed a few reservations which request not to cancel the right to a second appeal in decisions regarding detention and to allow the extension of detention beyond the nine months by 100 days instead of by the 150 days proposed by the committee, and to enable a "bridging" detention of 36 hours instead of 72. We request to reject the reservations, which upset the balance between making the court procedures more efficient and the detainee's rights" (Divrei Haknesset 36 42 (2011)).

After Member of Knesset Dov Khenin finished presenting the reservations, the chairperson of the session turned to Member of Knesset Rotem and asked him if he wishes to respond. Once he received a negative answer (from Member of Knesset Ze'ev Bielski) the chairperson said: "He doesn't want to, we shall proceed immediately to voting" (Minutes of the Knesset plenum dated March 14, 2011, page 47. The Minutes were attached to the petition and marked Annex C). It merges from here that the option of relating to the reservations was examined but rejected, probably because of the things voiced by Member of Knesset Rotem when presenting the bill to the Members of Knesset. As mentioned, it would have been better had the committee's response to the reservations been presented **after** they had been presented to the Members of Knesset, but in the case at hand, it appears that Member of Knesset Rotem's reference satisfies the principle need for a reference to the merits of the reservations, even if the sequence in which it was presented constituted a procedural violation of the provisions of the By-Laws. It will be parenthetically noted that in any event those who could have been prejudiced by the fact that the reference to the reservations was given in advance and not after they were presented to the committee, are those **supporting** the bill and not those objecting to it; since the response to the reservation is intended to convince the Members of the Knesset to vote for the draft proposed by the committee and not by those raising reservations.

Inconclusion, although the Members of Knesset deviated from the provisions of the By-Laws in the legislative process, this deviation was not a flaw at the root of the process, which infringes on the fundamental principles of the legislative process in Israel, in a manner that would lead to declaring the Law void.

**The Arguments regarding the Arrangements in the Law Infringing on the Right of Freedom**

22. The Petitioner's second argument was directed to the merits of the arrangements. As mentioned, according to the Petitioner, these arrangements result in disproportionate infringement of the right of freedom. It will be noted at the beginning that the Petitioner's arguments in this matter were general and unclear. The Petitioner did not specify the nature of the infringement of the right of freedom, and did not clarify why the infringement does not satisfy the terms of the limitation clause. On these grounds alone the Petitioner's arguments could have been rejected (on burdens of proof in constitutional petitions see CA

6821/93 **United Mizrahi Bank Ltd v. Migdal Cooperative Village**, PD 49(4) 221, 428-429 (1995) (hereinafter: the "**Mizrachi Bank Case**"); HCJ 366/03 **The Association for Commitment to Peace and Social Justice v. The Minister of Finance**, 2nd paragraph of Justice **D. Beinisch**'s judgment (December 12, 2005)). Nevertheless, and in light of the importance of the main constitutional right discussed in the petition, we shall discuss the merits of this argument (see in this context, HCJ 6055/95 **Tzemach v. The Minister of Defense**, PD 53(5) 241, 268 (1999); hereinafter: the "**Tzemach Case**").

**The Stages of Judicial Review**

23. As is known, the constitutional review customary in our legal system is divided into three main stages. At the first stage (the "Infringement Stage"), the Court examines whether the law infringes on a constitutional right. If it is found that the law does not infringe on a right, the constitutional examination ends. If it is found that the law infringes on a constitutional right, the examination proceeds to the second stage, in which the Court examines whether the law satisfies the conditions prescribed in the limitation clause. The limitation clause conditions the validity of an infringement on the satisfaction of cumulative conditions: the infringement is prescribed by a statute or pursuant to a statute by virtue of explicit authorization therein; the infringing statute befits the values of the State of Israel; the infringing law is intended for a proper purpose, and the last condition, the proportionality condition, requires that the infringement is no greater than necessary. If the law satisfies the four conditions of the limitation clause, the infringement is constitutional, if it doesn't - the constitutional examination reaches the third and final stage, the consequence stage. At this stage, the Court is required to rule as to the consequences of the constitutional infringement (for the stages of the constitutional examination, see, among many others, the **Mizrachi Bank Case**, page 428; HCJ 1715/97 **The Israel Investment Managers Association v. The Minister of Finance** PD 51(4) 367, 383-389 (1997); HCJ 1661/05 **Hof Azza Regional Council v. The Israel Knesset**, PD 59(2) 481, 544-548 (2005)).

24. Each of the constitutional examination stages has an important purpose in the entire constitutional analysis. The **first stage** of the constitutional examination (the "Infringement Stage") is meant to determine the conceptual scope of the constitutional right. The boundaries of the constitutional right are outlined at this stage, by interpreting the relevant right and balancing it with other rights. The **second stage** of the constitutional examination (the "Limitation Clause") is meant to determine the degree of protection of the right, and the "boundaries" of the legislator and the restrictions imposed on it when infringing on constitutional rights (see, HCJ 10662/04 **Hasan v. The National Insurance Institute**, paragraph 24 of President **D. Beinisch**'s judgement (February 28, 2012)). Obviously, there is a reciprocal relation between the two stages. The limits of the constitutional right are not only determined by outlining the conceptual scope of the right but also by outlining the degree of protection they shall be given. However, the distinction between the stages should not be blurred. Each of the stages has its own balances and independent objectives. Therefore, in my opinion, it is better not to skip the first stage of the constitutional examination, even if ruling at this stage is not simple, unless circumstances justify skipping

this stage. This is the case, even if the discussion at the second stage will lead to the conclusion that the law satisfies the proportionality criteria (see CrimA 4424/98 **Silgado v. The State of Israel**, PD 56(5) 529 (2002)). Interpreting the right at the first stage, in order to determine its extent, and ruling whether there is an infringement of the constitutional right, will assist clarifying the scope of the constitutional rights. It will ensure that the Court will not be swamped with motions to examine the constitutionality of each and every law (see the **Mizrachi Bank** Case, Justice **Y. Zamir**'s position, on pages 470-471; see also my position in HCJ 7052/03 **Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister of Interior**, PD 61(2) 202, 513-514 (2006); hereinafter: the "**Adalah Case**"). It will prevent debasing and diluting the constitutional rights and weakening the protection they are granted against infringement (regarding the matter of the two stages of the constitutional examination, see HCJ 10203/03 **"The National Census" Ltd. v. The Attorney General**, PD 62(4) 715 (2008)). Indeed, once two central stages of the constitutional discussion have formed in our system, each of them must be granted its proper place. We will turn then to examining the first stage in the case at hand.

**Do the Arrangements of the Law Infringe the Right of Freedom?**

25. With respect to the question whether there is an infringement of the right of freedom, the Respondents distinguished between the two arrangements discussed in this petition. As for the First Arrangement, which cancels the right to a second appeal and transforms it into an appeal by permission only, the Respondents were of the opinion that this arrangement does not infringe on constitutional rights at all, since the First Arrangement does not address the original decision regarding the detention and does not deny the right to appeal the detention decision, but rather only determines that the second appeal will be by permission and not as of right. As for the Second Arrangement, the State agreed that since it constitutes a new statutory provision that authorizes the Court to extend the detention of a person who has been detained until the end of proceedings by 150 additional days, it should be deemed an arrangement that infringes on the right of freedom. The dispute between the parties, thus, relates to the question whether the First Arrangement infringes on the right of freedom.

26. As we elaborated above, the first stage in the constitutional examination requires the interpretation of the constitutional right. This interpretation, as President **A. Barak** said (in a minority opinion), "Does not restrict nor expand. This is an interpretation that reflects the Israeli society's understanding of the substance of human rights, based on their constitutional structure and in accordance with the constitutional measurements that were prescribed in the basic laws, all while considering that which is of value and fundamental and rejecting that which is temporary and passing (the **Adalah Case**, page 356). Does a constitutional interpretation of the right of freedom lead to the conclusion that the right incorporates the option of filing a second appeal **as of right** on decisions regarding matters of detention, release, violating terms of bail or a motion for reconsideration (and on decisions of the District Court regrading matters of bail)?

27. I believe that there is no dispute that the right of freedom, in general, and the right of freedom from detention, in particular, is a fundamental right in Israel. It

is anchored in Section 5 of the Basic Law: Human Dignity and Liberty, which prescribes that: "There shall be no deprivation or restriction of the freedom of a person by imprisonment, detention, extradition or otherwise." "Personal freedom" as Justice **Y. Zamir** says, "is a constitutional right of first degree, and practically speaking it is also a prerequisite for exercising other basic rights… personal freedom, more than any other right, it is what makes a person free. Therefore, denying personal freedom is an especially severe infringement" (the **Tzemach Case**, page 261). Detention infringes on a person's freedom in the most basic way. Detention denies the freedom from a person who has not yet been convicted by law and is still presumed innocent. At times, detention denies the freedom of a person who is only suspected of committing an offense, and his detention is necessary solely for interrogation purposes. Therefore, the infringement of freedom, which is the direct consequence of the detention, requires taking cautionary measures prior to instructing that a person be detained (see CrimApp 537/95 **Ganimat v. The State of Israel** PD 49(3) 355, 405 (Deputy President **A. Barak**) (1995); hereinafter: the "**Ganimat Case**").

28. The Respondents' position, as mentioned, was that there is no infringement of the right of freedom since the First Arrangement does not address the actual detention decision itself, but rather the possibility of appealing such decision as of right. Indeed, there is no dispute that the detention itself infringes on the right of freedom in the most substantive manner. However, does it follow that only the original decision regarding the detention infringes on the right of freedom? Does an infringement of the procedural frameworks that are meant to realize the right of freedom and protect it, not amount, at least in some cases, to an infringement of the right of freedom itself? In other words, does the right of freedom also encompass the procedural process that accompanies the detention decision? In my opinion, interpreting the right of freedom as applying only to the detention decision is an excessively limiting interpretation of the scope of the right. The importance and centrality of the right of freedom – in and of itself and as a means to promote and realize other rights – requires a broader interpretation of the right, so that it will also apply to procedural protections and procedural arrangements that are directly related to the right and its realization. Interpretation of this spirit was adopted in previous rulings of this Court. For example, it was held that the legitimacy of denying freedom depends of the identity of the entity authorized to deny the freedom and the manner in which freedom is actually denied (see, HCJ 2605/05 **The Academic Center for Law and Business (Registered Amuta) v. The Minister of Finance**, paragraphs 29-30 of President **D. Beinisch's** judgment (November 19, 2009)). It was further held that maintaining a fair detention process is a constitutional principle that derives from the protection of the rights to freedom and dignity (CrimApp 8823/07 **Anonymous v. The State of Israel**, paragraph 19 of Deputy President **E. Rivlin**'s judgment (February 11, 2010); hereinafter: the "**Anonymous Case**"). Indeed, this interpretation of the right of freedom, as a right that also applies to procedural protections directly and tightly related to the protection of the right, also coincides with the customary principle in our system that constitutional rights are to be interpreted from a "broad perspective" (see the words of Deputy President **S. Agranat** in FH 13/60 **The Attorney General v. Matana**, PD 16 430, 442 (1962); HCJ 428/86 **Barzilay v. The Government of Israel**, PD 40(3) 505, 595 (1986); see also President **A. Barak's** words that the "Constitutional interpretation is not pedantic, not

legalistic… indeed, constitutional interpretation is from a 'broad perspective'… but the constitutional interpretation is a legal interpretation; it is part of our interpretation theory" HCJ 4128/02 Adam, Teva V'din - **Israel Union for Environmental Defense v. The Prime Minister of Israel**, PD 58(3) 503, 518 (2004)).

29. In the matter at hand, the question is whether the option to file a second appeal as of right and not by permission is one of those procedural protections directly and tightly related to the right of freedom, such that denying it constitutes an infringement of the right itself (although it is important to note that the right to appeal, in and of itself, is considered a provision of substantive law as opposed to procedural law (see HCJ 87/85 **Arjub v. IDF Forces Command**, PD 42(1) 353, 361 (1988); hereinafter: the "**Arjub Case**")). In my opinion the answer is no. Without setting hard rules regarding the procedural protections that will fall under the rubric of the right of freedom – a matter which should be examined on the merits of each case – it cannot be said that the scope of the constitutional right of freedom expands as far as granting the option of a second appeal on detention decisions as of right. This conclusion can be inferred, *inter alia*, from a review of the scope of the right to appeal in our legal system.

30. Section 17 of the Basic Law: The Judiciary provides the fundamental rule that "A judgement of a court of first instance, other than a Supreme Court judgment, can be appealed as of right". In a series of judgments this Court has discussed the nature of the right to appeal (see the **Arjub Case**, on pages 360-363; CrimA 111/99 **Schwartz v. The State of Israel**, PD 54(2) 241, 271-272 (2000) and the references appearing therein; LCrimA 3268/02 **Kozali v. The State of Israel**, paragraph 6 of the decision (March 5, 2003)). Although the importance of the right to appeal has been recognized in case law, the question of its constitutional status in not sufficiently clear (see, for example, Shlomo Levin, "Basic Law: Human Dignity and Liberty and Civil Procedure" ***Hapraklit*** 42 451, 462-463 (5755-5756); but see the positions of Registrar **Y. Mersel** in LCivA 9041/05 **"Imrei Chaim" Registered Amuta v. Aharon Wisel** (January 30, 2006) that since the right of appeal was anchored in the Basic Law: The Judiciary, it is customary to view it as a right that has a constitutional status. See also: Asher Grunis, Tel Sela "The Courts and Procedural Arrangements" **The Shlomo Levin Book** 59, 64-67 (2013). In any event, it has been held that even if the right to appeal is deemed a constitutional right, then as all the other rights, it also is a restricted and not absolute right, and it is weighed against organizational principles of stability and finality (See CApp 3931/97 **Efraim v. Migdal Insurance Company Ltd.** (August 5, 1997)).

31. The central rule in our system, pursuant to Section 17 of the Basic Law: The Judiciary, grants a litigating party the right that its matter be heard in only two instances. A hearing in a third instance will only be held, as a rule, by permission. The said Section 17 applies regardless of whether it is a criminal, civil or administrative matter, but it does not relate to interim decisions – with respect to which there is a distinction between the criminal, civil and administrative fields. In the criminal field, other than special cases, there is no right to question interim decisions. In the civil field, there is no right to appeal interim decisions, but it is possible to request permission from the appellant instance to appeal (Sections

41(b) and 52(b) of the Courts [Consolidated Version] Law, 5744-1984; see also the Courts (Types of Decisions for which Permission to Appeal will not be Granted) Order, 5769-2009; LCivA 3783/13 **I.D.B. Development Company Ltd. v. Shamia** (June 5, 2013)). In the administrative field, permission to appeal may only be requested with respect to certain interim decisions (see, Section 12 of the Administrative Courts Law, 5760-2000). In addition, Section 41(b) of the Courts Law provides that a District Court judgment in an appeal can be appealed to the Supreme Court if permission was granted by the Supreme Court or by the District Court in its appeal judgment (for a review of the appeal arrangements customary in our legal system, see CrimA 4793/05 **Navon v. Atzmon** (February 6, 2007); hereinafter: the "**Navon Case**").

32. It emerges from this review that a litigant has a vested right that its matter be heard only before two instances, the trial instance and the appellate instance. A hearing in a third instance is subject to receive permission from the authorized instance. This scope of the right to appeal is based on a number of foundations. First, it has been held in previous rulings of this court that the existence of a right to appeal strengthens the fairness and reasonableness elements of the judicial process and allows an additional opening to discovering errors. However, it was held that this reason alone should not enable multiple "appeals on appeals", and that "there must be a limited format that distinguishes between an appeal as of right and an appeal by permission" (the **Arjub Case**, on page 372). Secondly, it has been held that interpretation leads to the conclusion that a litigating party must request permission to appeal is not equivalent to denying the right to appeal (see CivApp 4936/06 **Aroch v. Clal Finances Management Ltd.** (September 25, 2006)). Thirdly, it has been found that "doing justice does not necessitate such a comprehensive examination **of every** matter" (ALA 103/82 **Haifa Parking Ltd. v. Matzat Or Ltd.**, PD 36(3) 123, 125 (1982); original emphasis), and that limiting the right to appeal allows to define the discussion in a manner that promotes the principle of finality of the process. An additional reason that underlies this approach is the issue of the courts' workload. It is clear that if every matter were to be brought before three instances, this would impose a heavy workload on the court system. The meaning of such overload is an infringement on the right of litigants that legal processes conclude within reasonable time. Therefore, the customary case law here is that a litigating party has one right to appeal, and that the authorized court will concede to the motion for permission to appeal in extraordinary cases only, in which there is legal or public importance that a certain matter be examined by a third instance (***ibid***, on pages 125-126).

33. It could be argued that in detention procedures it is necessary to deviate from the ordinary customary rules regarding the right to appeal. Thus, it would be argued that in detention procedures a different approach, which is more lenient with the detainee, is required, in light of the possible infringement of a person's freedom. Therefore, while the right to appeal, in general, includes only one appeal as of right, the right to appeal in **detention matters**, as a right that is protected in the framework of the right of freedom, also encompasses the option to file a second appeal as of right. I do not accept this argument. While I do not dispute the need – which is expressed in the legislation and in the rulings of this Court – to recognize the special status of detention procedures (see, for example, CrimApp

3357/03 **Kaabiya v. The State of Israel** (May 1, 2006); **Anonymous Case**, paragraphs 19-21 of Deputy President **E. Rivlin**'s judgment; CrimApp 3899/95 **The State of Israel v. Jamal** PD 49(3) 164, 167 (1995)), this special status does not necessitate recognizing that the right of freedom includes a right that two different instances be required to examine a detention decision (for criticism on the right to a second appeal in detention decisions, see CrimApp 45/10 **Masarwa v. The State of Israel** (January 8, 2010)). In fact, accepting this position would lead to an anomaly not only between the detention laws and the other legal fields, but also within the detention laws themselves. Take for example a case in which a person was detained until the end of proceedings. Section 21 of the Detention Law grants the court to which an indictment was filed authority to order the detention of the **defendant** until the end of proceedings. Where an indictment was filed to the Magistrate Court, and the Court decided to detain the **defendant** until the end of proceedings, the detainee will be able to appeal the decision to the District Court as of right, and today, following the First Arrangement, it will be able to request permission from the Supreme Court to appeal. In comparison, a defendant against whom an indictment was filed to the District Court and the Court decided to detain him until the end of proceedings, will be able to appeal to the Supreme Court as of right, but he will not have the option to request permission from an additional instance to appeal. Will we say that the latter's right of freedom was infringed because he is not able to bring his matter before three instances? Can we not assume that the infringement of his freedom could be more severe, since in most cases detainment until the end of proceedings for an indictment filed to the District Court might continue for a more extended period of time than detainment until the end of proceedings for an indictment filed to the Magistrate Court?!

34. It follows that it cannot be said that in order to realize and protect the right of freedom, it is necessary that three instances review a detention decision. The meaning is that regardless of whether we classify the detention decision as a judgment or as an interim decision (see, for example, regarding the definition of a "judgment", CA 165/50 **Epstein v. Zilberstein** PD 6 1201, 1210 (1952); see also LCrimA 7487/07 **Yakimov v. The State of Israel – The Head Military Prosecutor** (April 16, 2008)), the fact that the detainee is not *a-priori* entitled as of right to have his matter heard by three instances, will not change. Furthermore, the fact that different decisions were adopted in each of the instances does not impact the scope of the right to appeal, and consequently, the right of freedom. Thus, there is no significance to the fact that a Magistrate Court chose to release a detainee while the District Court reversed that decision. The fact that conflicting decisions were given does not, in and of itself, lead to the conclusion that the detainee has a right that his matter be heard before a third instance (see the **Navon Case**, paragraph 7 of my judgment). The fact that different decisions were given in each of the instances is certainly a circumstance, among various circumstances, that the Supreme Court will consider when deciding if it is appropriate to concede to the motion for permission to appeal. This fact in and of itself does not create an automatic entitlement to an additional appeal as of right.

35. It is important to note that the injury that might be caused to the detainee, which is severe in and of itself, cannot justify a holding that he is entitled to be heard in three instances. There are many other situations in which a significant

infringement of rights can occur, but this is not sufficient to impact the scope of the right to appeal. Suffice it to mention that there is no right of appeal at all on petitions to the High Court of Justice – the decisions of which could have a significant impact on the individual – (but rather only a petition for a further hearing, the causes for which are narrow and limited); and that there is only one right of appeal on criminal or civil judgments. Indeed, there is no dispute that the infringement of a person's freedom as a result of detention is severe, and therefore, it constitutes an important circumstance when examining the detainee's matter, including in the decision whether to grant permission to appeal to the Supreme Court. However, this is not an exclusive circumstance in the sense that that right to a second appeal is a part of the protections that fall under the rubric of the constitutional right of freedom, such that its denial is an infringement of the right itself. We will further note parenthetically that the First Arrangement, which was examined in the Petition, does not only address detention decisions, but also appeals on decisions relating to release, violation of terms of bail, motions for reconsideration and appeals on District Court decisions regarding bail. It is clear that the level of injury in the latter cases is not identical to that of detention and, therefore, the justification to deviate from the ordinary rule of a hearing before two instances, is even weaker in these cases.

An examination of the Supreme Court's decisions in motions for permission to appeal on decisions regarding detention, pursuant to the First Arrangement, reveals that the Court indeed takes the infringement of the right of freedom into consideration when ruling whether permission to appeal should be granted. Although the case law is that permission to appeal will be granted when the motion raises a legal question of importance as a principle, which exceeds the matter of the parties to the proceeding, the Court was willing to adopt a broader approach and to also grant motions for permission to appeal when there are special and extraordinary individual circumstances which justify a hearing before a third instance (see, for example, CrimApp 2786/11 **Gerris v. The State of Israel**, paragraph 7 of the decision (April 17, 2011); CrimApp 4900/12 **The State of Israel v. Anonymous**, paragraph 8 of the decision and the references there (June 25, 2012); CrimApp 4706/12 **Anonymous v. The State of Israel**, paragraph 8 of the decision (June 21, 2012); CrimApp 1200/13 **Azulay v. The State of Israel**, paragraph 9 of the decision (February 24, 2013)).

36. The conclusion is that the First Arrangement does not infringe on the right of freedom. It will be noted that the Petitioner did not raise arguments in his petition regarding the potential infringement of the First Arrangement of the right to due process or the right to access courts. Therefore, we did not see it necessary to address the infringement of these rights. As we have not found there to be an infringement of the right of freedom, this ends the constitutional examination of the First Arrangement.

**Does the Second Arrangement Satisfy the Conditions of the Limitation Clause**

37. As mentioned, there was no dispute between the parties that the Second Arrangement infringes on the right of freedom. We are therefore left to examine whether this arrangement satisfies the conditions of the limitation clause. For the sake of convenience, we will requote the language of the Second Arrangement:

> (b) Notwithstanding that which is stated in sub-section (a), if a Supreme Court judge was of the opinion that it will not be possible to conclude the trial proceedings within the period of 90 days stated in sub-section (a), because of the nature of the offense, the complexity of the case or multiple **defendant**s, witnesses or charges, he may order the extension of the detention to a period which shall not exceed 150 days, and may re-order this from time to time, and may order the release of the **defendant**, with or without bail.

38. The first condition of the limitation clause requires that the infringement be by a law or pursuant to a law. There is no dispute that in the case at hand this condition is satisfied, since the Second Arrangement is prescribed in the law amending the Detention Law. The second and third conditions address the purposes of the infringing law. According to the second condition, the infringing law must befit the values of the State of Israel, and according to the third condition it should be demonstrated that the infringing law is intended for a proper purpose. We will now examine both of these conditions.

39. The purpose of the Second Arrangement, similar to the purpose of the entire amendment, as it emerges from the explanatory notes to the bill, was "to shift the balance between the principle of finality and the types of matters that should be examined by the Supreme Court and the realization of the substantive rights of detainees and **defendant**s " (Explanatory notes to the Criminal Procedure (Enforcement Powers – Detention) (Amendment no. 9) (Second Appeal by Permission and Extension or Renewal of Detention) Bill, 5770-2010, Government Bills 533). Regarding the Second Arrangement, the legislative memorandum stated that: "Experience shows that in some cases it is clear in advance that the maximum time period for extending the detention prescribed in these sections is not sufficient to exhaust the legal proceedings. This is sometimes the case in cases of complex severe crimes in which the **defendant**s are detained until the end of the proceedings against them, in which there are many witnesses. At times, numerous hearings are required, which significantly extends the duration of the trial, and consequently the period of the **defendant**'s detention (the legislative memorandum was attached to the State's response dated July 7, 2011, and marked Res/1).

40. The underlying purpose of the Second Arrangement was to reduce the number of Supreme Court hearings on motions to extend detentions in particularly complex cases in which it is clear that the period of time the legislator allocated (90 days beyond the nine months of detention) will not be sufficient to conclude the trial. That, even when the trial is conducted efficiently and purposefully it cannot be said that this is not a proper purpose. In light of the heavy workload imposed on the Supreme Court and the entire justice system, reducing the number of detention extension hearings – in special circumstances and based on criteria prescribed in the law – is a proper and vital purpose. This purpose will allow the Court to dedicate time to other proceedings before it, including other criminal cases and detention procedures, and reduce the period of time required to rule

thereon. In this context, we will mention Section 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides a series of conditions for a fair trial, including the need to conclude legal proceedings within a reasonable time. It cannot be said that this purpose does not befit the values of the State of Israel as a Jewish and democratic state. Reducing the time of handling cases and responding to the needs of those approaching the court system is a purpose that definitely befits the values of the State.

41. The main question to be decided with respect to the Second Arrangement is its compliance with the proportionality condition. As is known, it is customary to divide the condition that the infringement is no greater than necessary into three sub-tests. The **first sub-test** examines whether there is a rational connection between the means selected by the law and the purpose thereof. In the case at hand, it is clear that there is a rational connection between the means – extending detention by 150 days instead of by 90 days – and the purpose of reducing the number of hearings in the Supreme Court. The **second sub-test** examines whether the selected means is the less harmful means. As stated in the State's response, the means selected balances between the infringement of the detainee's freedom and the need to adjust the options to extend the detention in order to fit complex cases, cases of severe crimes and cases in which it is clear to the Court that a 90 day extension will not be sufficient. One of the main balances outlined in the Law is that the Law did not revoke the option of extending a detention by 90 days (pursuant to Section 62 of the Detention Law), but rather left that as is, and allowed the Court to choose, as a matter of discretion and as an exception to the "standard" detention extension, the option of extending the detention by 150 days. An additional balance is that the authority is vested with a judge of the highest instance. Furthermore, in order to exercise this authority, one of the special conditions listed in the section, which lead to the conclusion that it will not be possible to conclude the examination of the case in a shorter period of time, must be satisfied, i.e., the nature of the offense, the complexity of the case or multiple **defendant**s, witnesses or charges. These balances indicate that the legislator selected the less harmful means in order to realize the purpose.

42. The third sub-test, the proportionality test "in the narrow sense", requires that there be a reasonable relation between the infringement of the constitutional right and the social advantage derived from it. This test is also satisfied in the case at hand. Prior to the amendment of the Law, there was a problematic situation as motions to extend detentions beyond nine months would be filed to the Supreme Court, and the Court would grant the motions in cases in which it was clear that the trial was not foreseen to conclude within 90 days. And then, upon the lapse of the 90 days, a motion would again be filed to the Supreme Court, and so forth. In one of these decisions, Justice **A. Procaccia** elaborated on the need to adjust the Detention Law to the reality of "mega-cases" in which a large number of **defendant**s are indicted together and many witnesses testify. In CrimApp 644/07 **The State of Israel v. Natser** (February 20, 2007), Justice Procaccia stated:

> "Section 61 of the Detention Law limited the basic time period for detention until the end of proceedings to nine months, without making any distinction between types of criminal proceedings that are to be adjudicated based on

> the judicial time that is necessary for their examination. He did not draw a distinction between the types of charges with regard to the complexity of the issue to be decided. Similarly, the period of nine months of detention was applied equally to indictments relating to one or a small number of **defendant**s, and to indictments that include a long list of **defendant**s. Additionally, no distinction was made regarding the duration of the detention for trial purposes, between charges in which it is necessary to have a small number of prosecution witnesses testify and those in which it is necessary to have dozens of witnesses testify. Moreover, Section 61 of the Law did not reflect the judicial time actually required for conducting proceedings that involve large criminal organizations, which by their very nature require investment of extensive resources and judicial time. This provision of the Law does not reflect the deep changes that occurred in the nature of crime in the country as a result of the escalation of the development of criminal organizations and the complexity and severity of their activities, which have greatly increased over the last decade, and which clearly impact the judicial time required to rule in criminal proceedings related to them. The procedural needs in managing complex cases which involve multiple **defendant**s, charges and witnesses, do not generally coincide with the Law's uniform and general determination regarding nine months of detention as a basic period in which the criminal proceeding should be concluded" (paragraph 17 of the decision). See also CrimApp 7738/06 **The State of Israel v. Sharon Parinian**, paragraph 10 of the decision (October 5, 2006).

The Second Arrangement attempts to solve this problem, by providing the Supreme Court judge deliberating the motion to extend the detention the option to choose between a "standard" detention extension, up to 90 days, and a "special" detention extension up to 150 days. The Second Arrangement only allows to do this in special cases in which the Court is convinced that the judicial time required to conclude the criminal proceeding is expected to be especially lengthy in light of the complexity of the case, or the existence of multiple **defendant**s or multiple witnesses. The Court must be convinced that the proceeding is conducted by the trial court efficiently, and that the detention extension is not requested because of an inefficient conduct of the trial. In my opinion, the combination of these circumstances strikes the proper balance between the infringement of freedom – which no one disputes exists – and the purpose underlying the Second Arrangement.

43. The conclusion is that the Second Arrangement complies with the proportionality condition. It follows that the infringement of the right of freedom is proportionate, and the Petitioner's arguments regarding the illegality of the Second Arrangement should be dismissed. In this framework, the indirect attack

regarding the legality of the amendment, the arguments for which were presented as part of the hearing regarding the detention extension in CrimApp 4002/11 is also dismissed.

**Summary**

44. It emerges from the stated above that both of the arguments presented by the Petitioner in HCJ 2442/11 are to be denied. Procedurally speaking, while we found that the legislative process of the amendments which are the subject of this petition deviated from the provisions of the Knesset By-Laws, the deviation did not constitute a "flaw that goes to the root of the process", which justifies this Court's intervention. On the merits of the amendment, we also rejected the Petitioner's substantive arguments (which are largely identical to the arguments raised in CrimApp 4002/11). We held that the revocation of the right to appeal "in a third instance" while only granting permission to appeal, does not infringe on the right of freedom, although we found that in certain circumstances, which will be determined in each case on its merits, the constitutional right of freedom also extends to the procedural proceedings bound with the exhaustion of the actual right. We further held that the amendment that allows to extend a detention by 150 days infringes on the right of freedom, but this infringement complies with the limitation clause, and is therefore constitutional. The result is that both parts of the petition are denied.

45. One methodological note before summation. In the case before us the legislator brought about a change in an existing law. This is not a new law that is meant to address a matter that was not regulated by law. There is no doubt that the amending law discussed in the petition adversely affects, to some degree, the state of suspects and **defendant**s compared to the previous legal situation. However, the mere adverse change does not necessary lead to the conclusion that there is an infringement of a constitutional right or that the amendment does not satisfy the conditions of the limitation clause. We must distinguish between the **constitutional threshold** and the **legal status** preceding the amendment to the Law. Indeed, with regard to the two arrangements, the legal status that preceded the amendment set a higher threshold than the constitutional threshold, as suspects and **defendant**s had the right to file a second ("third instance") appeal and the detention extension period was limited to 90 days. However, as emerges from the analyses we presented, the constitutional threshold is lower than the threshold the legislator had set under the arrangement preceding the amendment to the Law. Therefore, the fact that the Law was amended and lowered the **legal** threshold does not, in and of itself, lead to the conclusion that the **constitutional** threshold was infringed with the adoption of the amendment to the Law. Graphically speaking, it can be said that when amending the law, the legislator has leeway between the legal threshold prescribed before the amendment (which, as mentioned, was higher than the constitutional threshold) and the constitutional threshold. As long as the amendment to the law did not prescribe a threshold lower than the constitutional threshold, the new arrangement cannot be deemed unconstitutional. In this context we should mention the validity of law clause in the Basic Law: Human Dignity and Liberty (Section 10). This section sets a different threshold: even if the law preceding the Basic Law infringes a constitutional right and does not satisfy the limitation clause, it shall not be

deemed invalid (subject to the interpretation of the law the validity of which is preserved under Section 10 of the Basic Law, see the **Ganimat Case**, pages 375-76, 389-401, 410-417), even if had such law been legislated today, we would have said that the constitutional threshold had been infringed.

46. Epilogue. The petition is denied. The constitutional arguments raised in CrimApp 4002/11 are also denied. In the circumstances of the matter – no order for expenses is issued.

The President

**Justice E. Rubinstein**

a. I agree with the result reached by my colleague the President and with the essence of his legal constitutional analyses, subject to a few remarks. Indeed, this amendment to the Criminal Procedure (Enforcement Powers – Detention) Law, 5756-1996 (the Detention Law) is not suited for constitutional judicial review, but in my opinion there is a difference between its two parts. The arrangement amending **Section 53 of the Detention Law** is an amendment that revokes a most unusual situation compared to other countries and the past in our own country, a situation in which the Supreme Court is required, as of right, to consider a detention as a third instance, as we experienced until recently. In contrast, the arrangement amending **Section 62 of the Detention Law** is not a simple arrangement, since its implication is an extension of up to 150 days – five months of detention – instead of 90 days, without judicial review, this is not simple at all. Indeed, as my colleague explained (paragraph 42, and as emerges from the explanatory notes to the Criminal Procedure (Enforcement Powers – Detention), Amendment no. 9 (Second Appeal by Permission and Extension or Renewal of Detention) Bill, 5770-2010, following the recommendation of the Criminal Procedure and Evidence Laws Advisory Committee, headed by this Court's Justice (currently Deputy President) Miriam Naor, **Government Bills** 5770, 1229-1330 and the words of Justice Procaccia in CrimApp 644/07 **The State of Israel v. Natser** (February 20, 2007)) – the 150 days arrangement does not exceed the constitutional proportionality test; as it was designated for special cases "in which the Court is convinced that the judicial time required to complete the criminal proceeding is expected to be especially lengthy in light of the complexity of the case, or the existence of multiple defendants or multiple witnesses.." Legally speaking, I agree with this. However, alongside this I would like to raise a small warning flag and say that I think that in practice, a 150 day extension should certainly be the exception.

b. Regarding the matter of extending detentions by a 150 days, I think that it is necessary to distinguish between the authority and its exercise. As mentioned, the authority, in and of itself, is within the boundaries of the constitutional proportionality. See for example Section 5(c) of the Imprisonment of Unlawful Combatants Law, 5762-2002, where judicial review once every six months was prescribed. However, I will admit that when the case at hands relates to the denial of freedom from a person who is presumed innocent, I would tend to allow relatively frequent judicial review, and five months is a long time. Therefore, one must be extremely diligent in complying with all of the conditions of the law as

prescribed and the justification in the circumstances, **including the conduct in the trial court**, in order to grant 150 days. I will add that based on my impression of the decisions handed down by this Court, approximately a half of the motions for 150 days were not granted and 90 days were granted instead, and the vast majority of the remaining ones were by consent. I will not specify so as not to overburden.

c. As for the second appeal, that is deliberating the case in a third instance (the amendment of Section 53), it is obviously clear that the right to an appeal in and of itself has a distinguished status (see Section 17 of the Basic Law: The Judiciary, regarding an appeal on a judgment of court in the first instance, which was granted constitutional status; see also Y. Ben Nun and T. Havkin **The Civil Appeal** (3 ed., 2013) page 35; Y. Mersel "The Right to Appeal or an Appeal as of Right? Section 17 of the Basic Law: The Judiciary and the Essence of an Appeal" **The Shlomo Levin Book** (2013) 141; the references in my opinion in LCivA 5208/06 **Davis v. Malca** (June 29, 2006) and in LFamA 8194/08 **Anonymous v. Anonymous** (December 10, 2008)). However, in the matter of a third instance I will add a few short words from the "field". The third instance appeal as of right in Section 53 was first legislated in the during the period in which the entire Detention Law was legislated, meaning, a short while after the Basic Law: Human Dignity and Liberty was legislated in 1992 and as part of the effort to give it substance; see the review of the legislative history in the explanatory notes to the bill at hand on pages 1328-1329; as it emerges therefrom, in the far past, even an appeal by permission was not an option; the option to request permission was granted in 1988, and in 1996 it became a right. Amendment no. 8 of the Detention Law transpired in light of the lessons learned by the Criminal Procedure and Evidence Law Advisory Committee, headed by Justice Naor, lessons which all of us at this Court have shared. I will quote from my words in CrimApp 6003/11 **Taha v. The State of Israel** (August 18, 2011):

> "The legislator decided that this Court, given the workload it carries, cannot continue with what it has been doing for years, and which clearly has moral value, in light of the presumption of innocence and the essence of the detention – denying freedom, that is - allowing third instance appeals as of right. This, I believe, is unique to this Court compared to fellow courts in democratic states, many of which (see the United States, Britain and Canada) only address appeals by **permission**. When I have told a Supreme Court judge from these countries of the number of cases we have per year (currently approximately 10,000 cases and a few years ago up to approximately 12,000 cases per year) compared to theirs (80 per year), and that each detention has an appeal as of right to this Court – he became sympathetic or anxious. This does not mean that the door has been locked for cases that should be permitted to appeal to this Court as a third instance, and the legislator left this open to be developed by case law; for a review of current case law see the decision of Justice Amit in CrimApp 5702/11 **Tzofi v. The State of Israel**

(August 8, 2011)."

d. It appears that there is no dispute, and it is common sense, with all due sensitivity to the denial of freedom which results from the detention of a person who is presumed innocent, and that it is not feasible in the long term to have the public resources to deliberate this as of right in three judicial levels. Until the amendment "Israel had something that did not exist in any nation, a right to a detention being heard in two appellate instances …" (CrimApp 3932/12 **Elafifi v. The State of Israel** (June 3, 2012)). Changing this does not contradict the approach that the right to appeal is a constitutional right of some degree or another. Indeed, in practicality, those night and Sabbath eve and afternoon hearings of appeals as of right regarding "detention days" (detention for interrogation purposes), of which we had our share over the years, hardly exist anymore. Permission to appeal in a third instance is granted scarcely. In this sense, the legislator reinstated "reasonable normalcy", taking into consideration that there already is one appeal as of right, as prescribed. Upon review of my colleague Justice Melcer's remarks, with which I agree, I also noticed that the "**right** of the option to request permission to appeal" which he addresses, can also be found in this Court's customary practice. In contrast, for example, to the United States, where the denial of a motion for permission to appeal, is summarized in the words "*cert denied*" – in Israel the denial of such a motion is well reasoned and in great detail.

e. As said, I concur with my colleague the President.

Justice

**Justice H. Melcer**

I agree with the comprehensive and meticulous judgment of my colleague, President **A. Grunis**, and with the emphases of my colleague, Justice **E. Rubinstein**.

In light of the importance of the distinctions that arose in this case, I allow myself to add two insights:

(a) Alongside the right to appeal – the option to **request permission to appeal** is also a **right**, however narrower than the former. It follows that the second alternative – requesting permission to appeal – can be seen as a means of review of the decision which is the subject of the request, and **this is sufficient** after the initial constitutional right to appeal has been exhausted. A similar approach and development can also be found in comparative law - see for example:

**In the Unites States:** Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST 1 (2008)**.**

**In Canada:** R v Gardiner [1982] 2 S.C.R. 368 **;**
Bora Laskin, *The Role and Functions of Final Appellant Courts: The Supreme Court of Canada*, 53 CAN. BAR REV. 469, 471 (1975)**.**

**In Australia:** *Smith Kline & French Laboratories (Australia) Ltd. v Commonwealth*

(1991) 173 CLR 194;
David Solomon, *Controlling the High Court's Agenda*, 23 U.W AUSTL. L. REV. 33 (1993);
Sir Anthony Mason, *The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal*, 15 U. TAS. L. REV. 1 (1996);
Marrie Kennedy, *Applications for Special Leave to the High Court* 1 High Ct. Q. Rev. 1 (2005);

**See also:** John Anthony Jolowicz, Appeal and Review in Comparative Law: *Similarities Differences and Purposes* 15 MELB. U. L. REV 618. (1986)

In this context, remember that in contrast to the motion for permission to appeal, in our country's legal system there are certain situations in which even this limited right (to motion for permission to appeal) is denied (even if only during the trial) – see: Sections 41(c)(1) and 52(c)(1) of the **Courts (Consolidated Version) Law, 5744-1984**. **The Courts (Types of Decisions for which Permission to Appeal shall not be Granted) Order, 5769-2009**. This is the law with regard to most interim decisions in criminal proceedings. See: the President's decision in LCivA 3783/13 **I.D.B Development Company Ltd. v. Shamia** (June 5, 2013). **The difference in the case at hand requires further consideration.**

(b) The arrangement amending Section 62 of the **Criminal Procedure (Enforcement Powers – Detention) Law**, 5756-1996, that allows a Supreme Court judge to extend detention up to 150 days, in certain given cases – is within the framework of the "**statutory leeway**" (also referred to as the "boundaries of proportionality"), albeit, in my opinion, it is situated at the "**far end**" of such boundaries. It follows that constitutional relief should not be granted, since intervention of such nature in such circumstances is reserved only to the most extraordinary cases, and this is not the case here. See: HCJ 1661/05 **Hof Azza Regional Council v. The Prime Minister**, PD 59(2) 481 (2005); my judgment in HCJ 6784/06 **Major Shlitner v. The Director of Pension Payments** (January 12, 2011).

The appropriate remedy in such cases is judicial restraint in exercising the authority, and this is indeed how we act.

Justice

It was decided as stated in President **A. Grunis**' Judgment

Given today, 18th of Tamuz, 5773 (June 26, 2013).

The President Justice Justice