HCJ 3132/15

Petitioner: Yesh Atid Party led by Yair Lapid

v.

Respondents:
1. Prime Minister of Israel
2. Attorney General
3. 34th Government of the State of Israel
4. Deputy Minister of Health
5. Deputy Minister of Regional Cooperation
6. Deputy Minister of Foreign Affairs
7. Likud Faction
8. Torah Judaism Faction

Attorneys for the Petitioner: Adv. Guy Busy, Adv. Ronen Aviani

Attorneys for Respondents 1 - 6: Adv. Sharon Rotshenker, Adv. Yonatan Berman

Attorney for Respondent 7: Adv. Avi Halevi

Attorney for Respondent 8: No appearance

Dates of Hearings: 26 Av 5775 (Aug. 11, 2015); 28 Heshvan 5776 (Nov. 10, 2015)

The Supreme Court sitting as High Court of Justice

Petition for an order nisi

Before: President M. Naor, Deputy President E. Rubinstein, Justice S. Joubran, Justice H. Melcer, Justice N. Hendel

Abstract:

The petition challenged the authority of the Prime Minister to serve simultaneously as a minister responsible for a ministry under Basic Law: The Government. The Petitioners argued that the Basic Law does not empower the Prime Minister to serve simultaneously as a minister, due to the omission of sec. 33(d), which was part of the prior Basic Law: The Government of 1992, from the current Basic Law established in 2001 (hereinafter: the current Basic Law). The said provision expressly stated that "The Prime Minister may also function as a Minister appointed over an office". The Petitioner also pointed to sec. 24 of the current Basic Law, which provides for situations in which the Prime Minister may temporarily serve as an acting minister.

The High Court of Justice (President Naor, with Deputy President Rubinstein and Justices Joubran and Hendel concurring, and Justice Melcer dissenting) denied the Petition, holding:

Per President Naor: Purposive interpretation of the current Basic Law shows that the Prime Minister has the authority to serve simultaneously as a minister. The current Basic Law is silent on the issue of the Prime Minister's authority to serve as a minister responsible for a ministry. The Basic Law's silence does not constitute a negative constitutional arrangement that denies the Prime Minister authority for parallel service, but rather constitutes a positive constitutional implication. The silence of the current Basic Law is not intended to deny the Prime Minister authority to serve simultaneously as a minister. This interpretive conclusion is required by the purposes grounding the current Basic Law.

The Knesset, as a constituent authority, cannot be ascribed the desire to prevent the Prime Minister from serving as a minister. The practice of the Prime Minister appointing himself as a minister has been adopted since the earliest days of the State. It was invoked even after the Basic Law of 1992 entered into force, and even after its repeal and the entry into force of the current Basic Law. The language of the current Basic Law also provides no support for the Petitioner's approach. The arrangement under sec. 24 of the current Basic Law, which concerns the temporary appointment of an acting minister, does not indicate an intention to deny the Prime Minister authority to appoint himself as a minister in an additional ministry, nor does it indicate any material change in the accepted practice. The provision in regard to serving as a temporary acting minister was also included in the prior Basic Law. It treats of a focused, specific aspect that does not affect the issue of a permanent appointment of the Prime Minister as a minister. Moreover, the full range of the Prime Minister's authority should be examined from a broad perspective, and in a manner that acknowledges the Prime Minister's authority to make a permanent appointment, along with other particular powers established by the legislature. In addition, when the Basic Law sought to exclude the Prime Minister from the scope of the term "minister", it did so expressly.

It is difficult to ascribe to the framers of the current Basic Law an intention to create a negative arrangement in regard to the authority of the Prime Minister. In any case, in interpreting Basic Laws, it is not the subjective purpose, but rather the objective purpose of the current Basic Law that is decisive. That purpose requires an interpretation by which the Prime Minister is authorized to serve simultaneously as a minister responsible for a ministry. One of the objective purposes underlying the current Basic Law: The Government is the Prime Minister's status as "first among equals" in his government, and as possessing the power to shape his government and assign the roles therein. This is a fundamental concept of our democratic regime, which reflects the constitutional value of the separation of powers.

Justice Melcer (dissenting) was of the opinion that Basic Law: The Government does not grant the Prime Minister authority to serve simultaneously as a minister responsible for a ministry, except in the situation provided for under secs. 24(b) and (c) of Basic Law: The Government.

In conclusion, in light of the holding that the Prime Minister possesses the authority to hold additional ministerial portfolios, the Petition was denied by the Court majority, subject to the condition (*per* Deputy President Rubinstein, Justices Melcer and Hendel concurring) that the Court issue a "warning of voidance" granting the Government a period of eight months for an in-depth examination of the subject of parallel service.

Supplemental Judgment[1]

President M. Naor:

Does Basic Law: The Government grant the Prime Minister authority to serve simultaneously as a minister responsible for a government ministry? That is the question before this Court.

The Proceedings in a Nutshell

[1] This is a supplemental judgment following a partial judgment given on Aug. 23, 2015, "hereby granting an order absolute on the first head of the order nisi, *viz*., that the institution of 'Deputy Minister with the Status of a Minister' has no legal validity … I therefore recommend that we hereby grant an order absolute that Rabbi Litzman cease to serve as Deputy Minister of Health within 60 days from today (recess days inclusive). Of course, he can be appointed to serve as Minister of Health with all its legal ramifications" (*per* E. Rubinstein DP, S. Joubran, M. Melcer, N. Hendel JJ concurring, M. Naor P concurring with the holding, but dissenting as to the wording of the order absolute, being of the opinion that "I would not prevent Knesset Member Litzman from serving as a regular deputy minister, and not in accordance with the criteria established in the outline … If my opinion were accepted, we would permit Knesset Member Litzman to give notice within 60 days of whether he chooses to be a minister, or whether he chooses to be a deputy minister in the regular sense – without the outline that grants him special status relative to other deputy ministers – or whether he prefers to withdraw entirely").

1. The Petition before the Court was filed on May 6, 2015, and concerned the political institution of a "Deputy Minister with the status of a Minister". On July 7, 2015, after hearing oral arguments, we granted the Petitioner's request to file an amended petition. On July 12, 2015, an amended petition was filed, additionally requesting orders nisi on the question of the Prime Minister's authority to simultaneously serve as a minister responsible for a government ministry – a fundamental issue not raised in the original petition. We therefore decided (on July 13, 2015) to split the proceedings such that a partial judgment would be issued in regard to the issue of the institution of a "Deputy Minister with the status of a Minister", and the proceedings on the additional issue would continue thereafter. On Aug. 23, 2015, we delivered our partial judgment in which we held that the institution of "Deputy Minister with the status of a Minister" was invalid. On Nov. 10, 2015, we heard oral arguments on the issue that now requires our decision, that of the authority of the Prime Minister to serve as a minister.

2. The Petitioner argued that Basic Law: The Government does not authorize the Prime Minister to serve simultaneously as a minister. The Petitioner's argument was premised primarily upon the omission of the provisions of sec. 33(d), which were comprised in Basic Law: The Government of 1992 (hereinafter: the Basic Law of 1992), from the current language of the Basic Law, as amended in 2001 (hereinafter: the current Basic Law). The aforesaid provision expressly stated: "The Prime Minister may also function as a Minister appointed over an office". The Petitioner also pointed to sec. 24 of the current Basic Law, which addresses the instances in which the Prime Minister may temporarily serve as an acting minister.

As opposed to this, Respondents 1 – 6 argued that a situation in which the Prime Minister assumes an additional ministerial role is consistent with the current Basic Law, as well as with customary constitutional practice since the founding of the State.

Discussion and Decision

3. After carefully reading the arguments of the Parties, and further hearing their oral arguments, I have arrived at the conclusion that the Petition should be denied. In my opinion, purposive interpretation of the current Basic Law leads to the conclusion that the Prime Minister has the authority to serve simultaneously as a minister. Inasmuch as the focus of this matter is the

interpretation of the Basic Law, I shall briefly describe the changes introduced in the Basic Law over the years.

4. Basic Law: The Government was originally established in 1968 (hereinafter: the Basic Law of 1968). That law established the status of the Prime Minister as a minister who is the chief and first among the other ministers, stating that "The Government consists of the Prime Minister and other Ministers" (sec. 5(a) of the Basic Law of 1968; and see Elyakim Rubinstein, *Basic Law: The Government in its Original Form – Theory and Practice*, 3(2) MISHPAT UMIMSHAL 571, 590 (1996) (Hebrew)). This view changed with the establishment of the Basic Law of 1992, as part of a general change in the Israeli system of governance, which focused primarily upon the introduction of direct elections for the Prime Minister by the electorate. As part of that amendment, the status of the Prime Minister under the Basic Law changed to a distinct status, different from that of the other government ministers, and it was established that "The Government is comprised of the Prime Minister and Ministers" (sec. 3(a) of the Basic Law of 1992). In 2001, pursuant to a decision to repeal the direct election of the Prime Minister, the Basic Law was again reestablished. This is the current Basic Law, which essentially adopts the arrangements of the Basic Law of 1968, *inter alia*, that the Prime Minister is "first among equals" in his government (AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 834 (6th ed., 2005) (hereinafter RUBINSTEIN & MEDINA) (Hebrew)). It, too, establishes, in sec. 5(a), that "The Government is composed of the Prime Minister and other Ministers". The provisions of the aforementioned sec. 33(d), which did not appear in the Basic Law of 1968, is also entirely absent from the current Basic Law.

5. The current Basic Law is, thus, silent in regard to the authority of the Prime Minister to serve as a minister responsible for government ministry. This Court addressed the significance of that silence, obiter dictum, and without deciding the issue, in HCJ 3002/09 *Israel Medical Association v. Prime Minister* (June 9, 2009) (hereinafter: the *Medical Association* case). In that case, my colleague Justice Melcer made several comments in regard to the question of the Prime Minister's authority to serve simultaneously as a minister – a question that did not directly arise from the petition in that case. His position was that the Basic Law's silence should be construed as a negative arrangement for two primary reasons anchored in the subjective purpose of the Basic Law: first, the deletion of the said sec. 33(d), which expressly addressed the Prime

Minister's authority also to serve as a minister, and second, the arrangement established for situations in which the Prime Minister may temporarily serve as an acting minister for a period of three months, under sec. 24 of the current Basic Law. President Beinisch disagreed with the position presented by my colleague Justice Melcer. My colleague Justice Rubinstein, who wrote the primary opinion in that case, left the question open, noting that it requires "clarification in the future" (*ibid*., para. 43).

6. In my view, the Basic Law's silence does not constitute a negative constitutional arrangement, but rather a positive constitutional implication (see and compare: AHARON BARAK, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION 429 (1994) (Hebrew); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 440 (hereinafter: BARAK, PURPOSIVE INTERPRETATION) (Hebrew)). An implied meaning can be inferred from the express meaning of the text. Indeed, the implied meaning can be negative – a negative arrangement – meaning that the explicitly established arrangement will not apply to an issue not expressly addressed. But the implied meaning can also be positive, such that the explicitly established arrangement will apply to an issue that is not expressly addressed. That, I believe, is the case before us. The current Basic Law did not seek, by its silence, to deny the Prime Minister's authority to serve simultaneously as a minister. This interpretative conclusion is required by the purposes grounding the current Basic Law, which I will now address.

Purposive Interpretation of the Current Basic Law

7. The Petitioner argues that the omission of sec. 33(d) from the current Basic Law indicates a subjective purpose of preventing the Prime Minister from serving simultaneously as a minister responsible for a ministry. In my opinion, the interpretation advanced by the Petitioner is narrow, and is not appropriate to the uniqueness of the constitutional text. Indeed, the Basic Law must be interpreted "with a broad view" (*ibid*., 440). Constitutional interpretation "must be generous, not legalistic or pedantic" (*ibid*.), as is appropriate to the elevated status of the Basic Laws. In any case, in my opinion, this is the purpose that the drafters of the constitutional text intended to achieve.

8. An examination of the legislative history of the current Basic Law shows that we cannot ascribe to the Knesset, as a constituent authority, an intention to prevent the Prime Minister from

serving as a minister responsible for a ministry. This subject was not addressed in the Explanatory Notes of the current Basic Law. It also finds no expression the deliberations of the Knesset Constitution, Law and Justice Committee in preparing the current Basic Law for second and third readings, nor in the plenum debates (see: 15(3) DIVREI HAKNESSET 3145 (5761), and particularly the comments of the Chairman of the of the Constitution, Law and Justice Committee, Knesset Member Amnon Rubinstein, who pointed out the main changes introduced in the Basic Law, without mentioning the subject we are now discussing (Protocol of Hearing 258 of the Constitution, Law and Justice Committee of the 15th Knesset (Feb. 13, 2001); Protocol of Hearing 264 of the Constitution, Law and Justice Committee of the 15th Knesset (Feb. 20, 2001);); Protocol of Hearing 266 of the Constitution, Law and Justice Committee of the 15th Knesset (Feb. 26, 2001);); Protocol of Hearing 268 of the Constitution, Law and Justice Committee of the 15th Knesset (Feb. 27, 2001); Protocol of Hearing 272 of the Constitution, Law and Justice Committee of the 15th Knesset (March 5, 2001); Protocol of Hearing 273 of the Constitution, Law and Justice Committee of the 15th Knesset (March 6, 2001)).

9. My conclusion is reinforced by an examination of the pre-constitutional history of the Basic Law. The pre-constitutional history is the social and legal background of the Constitution, "for it is a well-known axiom that the law of a people must be studied in the light of its national way of life" (HCJ 73/53 *Kol Ha'am Co. v. Minister of the Interior*, IsrSC 7 871, 884 (1953) [http://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior]). The practice by which the Prime Minister is authorized to appoint himself as a minister goes back to the earliest days of the State, well before the establishing of the Basic Law of 1968 (see: 10 DIVREI HAKNESSET 233 (5716) (the Seventh Government); 23 DIVREI HAKNESSET 564 (5718) (the Eighth Government); 28 DIVREI HAKNESSET 92 (5720) (the Ninth Government); 32 DIVREI HAKNESSET 204 (5722) (the Tenth Government); 37 DIVREI HAKNESSET 2162 (the Eleventh Government); 41 DIVREI HAKNESSET 677 (5725) (the Twelfth Government); 44 DIVREI HAKNESSET 350 (5726) (the Thirteenth Government), and this is not an exhaustive list).

10. The practice also continued after the establishment of the Basic Law of 1968, although it, too, lacks an express provision in this regard (see: 97 DIVREI HAKNESSET 3403 (5744) (the Twentieth Government); 12 (1) DIVREI HAKNESSET 215 (5749) (the Twenty-third Government); 12 (2) DIVREI HAKNESSET 421 (5750) (the Twenty-fourth Government); 13 (1) DIVREI

HAKNESSET 11 (5752) (the Twenty-fifth Government), and this is not an exhaustive list). Thus, for example, Prime Minister Menachem Begin informed the Speaker of the Knesset of his successfully forming a Government, as follows:

> To the Honorable Speaker of the Knesset, Mr. Yitzhak Shamir
> Jerusalem.
>
> Mr. Speaker,
> On 21 Sivan 5737, 7 June 1977, his Honor the President of the State was kind enough to appoint me to form a Government. I respectfully inform Your Honor that, in accordance with section 13 (b) of Basic Law: The Government, I have fulfilled that task, and I will duly present the Government, its composition and the distribution of functions, before the Knesset on 4 Tammuz 5737, 20 June 1977.
>
> And this is the composition of the Government:
> Menachem Begin – Prime Minister, Simcha Ehrlich – Minister of Finance, Aharon Abu-Hatzeira – Minister of Religion, Yosef Burg – Minister of the Interior, Moshe Dayan – Minister of Foreign Affairs, Yigal Horowitz – Minister of Commerce, Industry and Tourism, Zevulun Hammer – Minister of Education, Ezer Weizman – Minister of Defence, David Levy – Minister of Absorption, Yitzhak Moda'i – Minister of Energy and Infrastructure, Gideon Patt – Minister of Construction and Housing, Eliezer Shostak – Minister of Health, Ariel Sharon – Minister of Agriculture.
>
> *During a brief transition period, the Prime Minister will be responsible for the Ministries of Welfare, Justice, Transportation, and Communications*.
>
> Respectfully,
>
> M. Begin
>
> (As published in ARYE NAOR, BEGIN IN POWER – A PERSONAL TESTIMONY, 60 (1993) (Hebrew) (emphasis added – M.N.).

11. Needless to say, the said practice has continued to this very day, even following the entry into force of the Basic Law of 1992 (see: 14(1) DIVREI HAKNESSET 13 (5756) (the Twenty-seventh Government); 15 (1) DIVREI HAKNESSET 251 (5759) (the Twenty-eighth Government); 15 (3) DIVREI HAKNESSET 3209 (5761) (the Twenty-ninth Government)), and even after its repeal and the entry into force of the current Basic Law (see: 16 (1) DIVREI HAKNESSET 124 (5763) (the Thirtieth Government); 18 (1) DIVREI HAKNESSET 486 (5769) (the Thirty-second Government); Protocol of the 16th session of the 20th Knesset, 19 (May 14, 2015) (the Thirty-fourth Government)). There was good reason for President Beinisch to note that this practice is rooted "deeply in the political tradition of the Israeli system of government", and that "it is difficult to view the omission of section 33(d) of the former Basic Law: The Government as expressing the legislature's desire to effect such a significant change in our accepted constitutional governmental regime" (the *Medical Association* case, para. 2).

12. I have also found no support for the Petitioner's approach in the language of the current Basic Law. The arrangement in regard to temporarily serving as an acting minister, under sec. 24 of the current Basic Law, does not, in my opinion, indicate an intention to deny the Prime Minister authority to appoint himself as a minister in an additional ministry. The arrangement in regard to serving as an acting minister is a special arrangement. The reason for limiting the term in that arrangement is related to the fact that serving as an acting minister does not require the Knesset's consent (see: sec. 24 of the current Basic Law), whereas the Prime Minister's serving as a minister responsible for a ministry *requires that the Knesset express confidence* (see: sec. 13(d) of the current Basic Law).

13. Indeed, the existence of one authority does not deny the other authority:

> Even the changes that the legislature effected in the arrangement regarding temporarily serving as an acting minister (now sec. 24 of the Basic Law) do not indicate a material change in the accepted, prevailing view. This, firstly, because the arrangement in regard to serving as an acting minister was included in the previous version of the Basic law, alongside the aforesaid sec. 33(d); and secondly, because, in any case, this arrangement concerns a focused, specific

> aspect, and does not, in my opinion, concern the issue of the permanent appointment of the Prime Minister as a minister. Moreover, the overall powers of the Prime Minister must be viewed broadly, in a manner that allows for the existence of the authority of permanent appointment alongside other particular powers, as established by the legislature (the *Medical Association* case, para. 2 of the opinion of President Beinisch; and see and compare HCJ 6924/00 *Shtenger v. Prime Minister*, IsrSC 55 (2) 485, 494 (2001) (hereinafter: the *Shtenger* case)).

14. Moreover, when the current Basic Law sought to exclude the Prime Minister from the term "minister", it did so expressly (see, for example: sec. 22 of the current Basic Law). This, as opposed to the Basic Law of 1992, in which – similar to the provision of the aforementioned sec 33(d) – there were provisions that expressly included the Prime Minister in the term "minister" (see, for example: secs. 41-42 of the Basic Law of 1992, concerning delegation and assumption of powers). The reason for this difference lay in the change to a system of direct election of the Prime Minister. That change led to a need to clarify that the Prime Minister was authorized to act simultaneously as a minister, in view of the change in the Prime Minister's status relative to the ministers. The current Basic Law, similar to the Basic Law of 1968, includes the Prime Minister among the ministers without the said distinction – thus, as noted, "The Government is composed of the Prime Minister and other Ministers" (sec. 5(a) of the current Basic Law). That being the case, the need for an express provision in regard to the Prime Minister's authority to serve as a minister responsible for a ministry became superfluous:

> We would recall that the Basic Law of 1992 established that "The Government is comprised of the Prime Minister and Ministers", i.e., the Prime Minister is not generally counted among the ministers. Therefore, it was necessary to clarify that the person serving as Prime Minister may simultaneously serve as the head of a government ministry. Upon return to the parliamentary system in the Law of 1992, there was no longer any need for the said provision of sec. 33(d), inasmuch as the Prime Minister is also included among the ministers (SHIMON SHETREET, THE GOVERNMENT: THE EXECUTIVE BRANCH – COMMENTARY TO BASIC LAW: THE GOVERNMENT (to be published) (Hebrew); and see, in general, *ibid*., pp. 233-235 of the manuscript).

15. It is, therefore, difficult to attribute to the drafters of the Basic Law an intention to create a negative arrangement in regard to the authority of the Prime Minister to serve as a minister. In any case, in the interpretation of Basic Laws, it is not the subjective purpose that is decisive, but rather the objective purpose (see: BARAK, PURPOSIVE INTERPRETATION, 456). The objective purpose reflects – at a number of abstract levels – the basic concepts, values and purposes that the constitutional text was intended to achieve in a democratic state (see: ibid., 444-445). The objective purpose of the current Basic Law leads to the interpretation according to which the Prime Minister is authorized to serve simultaneously as a minister responsible for a ministry.

16. One of the objective purposes grounding the current Basic Law is the status of the Prime Minister as "first among equals" in his government (RUBINSTEIN & MEDINA, 834), and as having the authority to shape the composition of the Government and the distribution of duties therein. That is a basic concept of our democratic regime, which reflects the constitutional value of separation of powers. In this regard, the words of President A. Barak are apt:

> *The Prime Minister is a minister* (s. 5(a) of Basic Law: The Government). *Any law that derives from the status of a minister derives also from the status of the Prime Minister. Notwithstanding, the Prime Minister is a special kind of minister. He is first and foremost among the ministers*. This is the case because of several provisions in Basic Law: The Government. First, it is the Prime Minister who forms the Government. The President of the State gives the task of forming the Government to a member of the Knesset (s. 7(a) of Basic Law: The Government). When the Government has been formed by that member of the Knesset, he becomes the Prime Minister (s. 13(c) of Basic Law: The Government). […] Second, the Cabinet owes collective responsibility to the Knesset, but the ministers are personally responsible to the Prime Minister for the offices to which they are appointed (s. 4 of Basic Law: The Government). This is personal responsibility of each minister to the Prime Minister in respect of his carrying out his office as a minister. Third, it is the Prime Minister who conducts the Cabinet meetings (see and cf. s. 16(a) of Basic Law: The Government). Fourth, the resignation or death of a Prime Minister means the resignation of the Government as a whole (ss. 19 and 20 of Basic Law: The Government). Moreover, the Prime

> Minister has the power, in certain circumstances and with the consent of the President of the State, to bring about the dissolution of the Knesset (s. 29(a) of Basic Law: The Government). Finally, if a minister ceases holding office, or he is temporarily incapable of carrying out his office, the Prime Minister or another minister designated by the Cabinet deputizes for him (s. 24(b) of Basic Law: The Government). It follows that the Prime Minister is a member of the Cabinet, but his status is a special one. He is the head of the Government. It is he who *forms it. It is he who decides its composition* and who will hold the various offices in it, and it is he that directs its main activities and objectives (HCJ 5261/04 Fuchs v. Prime Minister, IsrSC 59 (2) 446, 461 (2004) (hereinafter: the *Fuchs* case) [http://versa.cardozo.yu.edu/opinions/fuchs-v-prime-minister] (emphasis added – M.N.)).

17. This purpose derives from the language of the constitutional text, and from the fundamental values of the system (see: BARAK, PURPOSIVE INTERPRETATION, 447, 449). It also derives from the case law (see: *ibid*., 448). On more than one occasion, this Court has emphasized the special status of the Prime Minister, and the broad discretion that he is granted in forming his government (see: the *Fuchs* case, 465; HCJ 5853/07 *Emunah – National Religious Women's Organization v. Prime Minister*, IsrSC 62 (3) 445, 476-478 (2007) [http://versa.cardozo.yu.edu/opinions/emunah-v-prime-minister] and the references there; also see and compare: HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel*, IsrSC 51 (3) 46, 58 (1997); the *Shtenger* case, 492; and see: RUBINSTEIN & MEDINA, 836).

18. The Petition before us concerns only the question whether the Prime Minister is authorized to serve simultaneously as a minister responsible for a ministry. To that, my answer is affirmative. I have not made any decision – one way or the other – in regard to what need not be decided for the instant case: the breadth of the Prime Minister's discretion in such matters, and the scope of this Court's intervention.

Therefore, it is my position that the second part of the Petition should be denied, without an order for costs.

Afterward

19. Following the above, I reviewed the opinion of my colleague Justice H. Melcer. My position has not changed, and I would like to emphasize several points.

In my colleague's opinion, interpretation of the current Basic Law shows that the Prime Minister lacks authority to serve simultaneously as a minister responsible for a ministry. My colleague basis his argument of the existence of a negative arrangement – which, according to his approach, derives from the omission of sec. 33(d) from the current Basic Law, and from the existence of an arrangement in regard to serving temporarily as an acting minister (sec. 24 of the current Basic Law) – and upon other provisions found in the current Basic Law, such as, the provision that a law may empower "the Prime Minister or a Minister" to make regulations (sec. 37(b) of the current Basic Law), and the provision regarding ministerial responsibility. As stated, I hold a different view. I found no basis for my colleague's approach either in the language of the current Basic Law or in its purpose. I addressed that in detail, above, and I will not reiterate. But I would emphasize that, in my opinion, interpreting the Basic Law from a broad perspective that is neither legalistic nor pedantic, shows that the authority exists, and that we should not infer a "negative", but rather an "affirmative", from the omission of the provision that expressly provided for the Prime Minister's authority to serve as a minister (sec. 33(d) of the Basic Law of 1992).

20. I cannot accept my colleague's argument that this interpretive approach yields practical difficulties. In any case, the vast majority are resolved by our customary interpretive rules and principles (such as, *lex specialis derogat lex generali* and *ejusdem generis*). I also do not agree with the statement that the current Basic Law "did not contemplate a situation in which, as a matter of course, the Prime Minister would also serve as a minister responsible for a ministry" (para. 15 of my colleague's opinion), in view of the pre-constitutional history that I reviewed in my opinion, which serves as a source for ascertaining the purpose (and therefore, I see no need whatsoever to address the status of constitutional custom).

21. As for comparative law, which my colleague addressed at length, as a rule, it is indeed an important source of interpretive inspiration, and fertile ground for broadening horizons. But such inspiration is not always appropriate. In addition to the need that the legal systems being compared have a common ideological basis and common loyalty to fundamental values, there

must also be "nothing in the historical development and social circumstances of the local or foreign system that distinguishes it enough to challenge interpretational inspiration" (BARAK, PURPOSIVE INTERPRETATION, 452 [English: BARAK, HUMAN DIGNITY AS A CONSTITUTIONAL VALUE, 92 (Cambridge, 2015)). I do not believe that such interpretive inspiration is appropriate to the circumstances of the matter before us, in view of the complex constitutional history and the material differences in the systems of governance. In any case, many of the examples adduced by my colleague in regard to the prevailing trends in Germany and England do not testify to an absence of authority, but rather to a custom of not exercising it. We are, therefore, concerned with the subject of discretion, which – as we should recall – did not arise in the matter before us.

22. To my way of thinking, some of my colleague's arguments, although raised in the context of authority, actually concern discretion. Thus, for example, my colleague pointed out that according to the proposed interpretation "the Prime Minister can also fill the roles of all of the ministers" (para. 9 of his opinion, emphasis omitted – M.N.), and he also noted the heavy burden borne by the Prime Minister, which might prevent him from devoting the necessary time and attention to his ministerial tasks (see para 17 of his opinion). My colleague further pointed out that, in certain circumstances, the Prime Minister's serving as a minister responsible for a ministry might lead to a violation of basic rights (see paras. 38-40 of his opinion). Without expressing an opinion on the merits, these issues do not concern the Prime Minister's authority to serve simultaneously as a minister, but rather the question of discretion in exercising that authority. As I stated above, it is not my intention to address issues that were not raised by the petition before us, and decide what does not require decision.

23. I will now turn to the opinions of my colleagues Deputy President E. Rubinstein and Justice N. Hendel, and especially to their conclusion. My colleagues concurred with my conclusion that the Petition be denied inasmuch as the current Basic Law did not intend to deny the Prime Minister's authority in principle to serve simultaneously as a minister. However, my colleagues held that, along with denying the Petition, we should issue a "warning of voidance" in the sense that if the currently prevailing situation does not materially change within eight months, it may be appropriate to revisit the question of authority and the exercise thereof. My colleagues arrived at this result in light of their conclusion that an extreme deviation from the

margin of reasonableness in exercising the authority could color it in the future "with the colors of a deviation from authority". In other words, my colleagues held that a "warning of voidance" would be appropriate in that the possible flaws that they identified in the *area of discretion* might justify a future finding that the Prime Minister is not authorized to serve in additional ministerial roles to a certain extent (see para. 10 of the opinion of my colleague Deputy President E. Rubinstein, and para. 3 of the opinion of my colleague Justice N. Hendel).

24. My colleagues' discussion of discretion, and the question whether flaws in the area of discretion might justify a future conclusion of lack of authority is one that deviates from the framework of the arguments raised before us in this petition. My colleagues did not suffice with a discussion of the issue of discretion. They went on to craft the remedy they propose for the petition, in view of the theoretical conclusions they reached in regard to discretion. In this regard, I would like to emphasize that the Parties did not raise any arguments in regard to the subject of discretion. The Respondents were not afforded an opportunity to argue this point. They were not afforded an opportunity to address the remedy of a "warning of voidance". The Petitioner also made it unequivocally clear that its arguments were focused exclusively upon the subject of authority (the attorney for the Petitioner stated in the course of the hearing: "My arguments are only in regard to authority. In light of the amendment, the Prime Minister lacks authority to serve in additional ministries" (p. 2 of the protocol of Nov. 10, 2015). In any case, the Petitioner did not argue that flaws in regard to discretion might lead to a lack of authority.

25. In my view, there is no room for addressing arguments that were not heard, and issues that were not raised by the Parties. Therefore, I do not believe that it was appropriate to consider questions in regard to discretion, and it was certainly not appropriate to grant relief in the form of a "warning of voidance" that was not requested, and regarding which the Respondents were not afforded an appropriate opportunity to respond. For my part, I refrain from expressing any opinion on subjects that were not raised before us. According to my approach, it is preferable to hold that "we will cross that bridge when we get to it" (see and compare: my opinion in CA 11120/07 *Simhoni v. Bank HaPoalim* (Dec. 28, 2009); my opinion in CA 11039/07 *Eliahu Insurance Co. Ltd. v. Avner Road Accident Victims Insurance Association Ltd*., (July 6, 2011); CA 1326/07 *Hammer v. Amit*, para. 2 of my opinion (May 28, 2012) [http://versa.cardozo.yu.edu/opinions/hammer-v-amit]).

I have, therefore, refrained from expressing any opinion in regard to a petition or forms of relief that are not before the Court in the procedural framework as established.

Justice H. Melcer:

1. After reviewing the opinion of my colleague President M. Naor, I am unable to concur with her position or proposed result.

In my view, it would have been appropriate to issue an order nisi in this petition for the purpose of examining the issue whether Basic Law: The Government permits the Prime Minister, in normal circumstances (that are not addressed by sec. 24(b) and (c) of the said basic Law), to serve – alongside his high office – as a minister responsible for a ministry (and accordingly, appoint a deputy minister for himself). In my view, pursuant to the order nisi, if the Respondents could not present justifying arguments, it would have been appropriate to make the order absolute in regard to all the issues, and prohibit such a double role for the Prime Minister.

2. I set out the basis for my above approach in a broad comment that I wrote in HCJ 3002/09 *Israel Medical Association v. Prime Minister of Israel* (June 9, 2009) (hereinafter: the *Medical Association* case). That case concerned a petition challenging the continued service of Knesset Member Rabbi Yaakov Litzman, who, on April 6, 2009, had been appointed to serve as Deputy Minister of Health, with the status of *Deputy Minister with the status of a Minister*. In our judgment in that case, we held that the said institution has no grounding in Basic Law: The Government. However, in light of the historical background, and in view of the quasi-reliance that had been created, we denied that petition, but made it clear that such a situation could not be repeated in the future, and we therefore issued a "warning of voidance" (see: para.41 of the opinion of my colleague (then) Justice E. Rubinstein, who wrote the primary opinion in that case, in which President D. Beinisch and I concurred).

In the *Medical Association* case, I raised a possible reason for the "warning of voidance". I presented the question whether, due to the rescission of the provision in the previous Basic Law: The Government (which was based upon the concept of direct, personal election of the Prime Minister in direct, equal, national general elections by secret-ballot), and which expressly

permitted the Prime Minister to serve as a minister responsible for a ministry, we could not say that the provisions of the current Basic Law (established March 7, 2001) *prohibited* such parallel service (except under the circumstances of secs. 24(b) and (c) of Basic Law: The Government, and that the affirmative provisions of those sections implied a negative conclusion in regard to other situations), and that inasmuch as, in any case, the Prime Minister could not serve as a minister, as noted, he could not appoint a deputy for himself in that capacity (hereinafter: the new interpretation). In this regard, I listed a number of interpretive and constitutional considerations, *inter alia*, from comparative law, that support the new interpretation, while noting that there are a few reasons justifying the practice that had been followed until that time, by which the Prime Minister occasionally served as a minister responsible for a ministry (hereinafter: the old interpretation). In conclusion, I expressed the opinion that even if the new interpretation may appear preferable, the constitutional system should be allowed to internalize this alternative, and either conform to it or respond to it. I added in this regard:

> What is required here is that if the constituent authority is of the view that the said interpretation should not be accepted, then it will surely know how to express its position – either by clarification or amendment of the relevant Basic Law (*ibid.*, para. 6(b) of my opinion).

President D. Beinisch opposed my said approach, although noting that my examination was: "comprehensive and interesting", and "raises new – and perhaps appropriate – thought about our system". However, she was of the opinion – on the basis of an examination of former case law and practice – that the change that I pointed out required express reference in the Basic Law, that she believed was lacking (*ibid*., para. 2 of her opinion).

As opposed to this, my colleague (then) Justice Rubinstein responded to my opinion as follows:

> It would seem to me that, at present, we remain in the framework of the existing constitutional custom, which was not rescinded by the current Basic Law, and which was approved by the Knesset. Therefore, no one questioned the Prime Minister's fulfilling additional ministerial roles. Deciding the questions raised by my colleague was left, by him as well, for a later date. However, as for myself, I

find the approach that my colleague proposed to be persuasive on its face, but we do not live in an ideal world, and it requires future examination, as the Chinese proverb goes: a journey of a thousand miles begins with a single step (*ibid*., para 43 of his opinion).

3. Merely six years have passed, and the problem has again arisen before us in all its ramifications, as in presenting his new government before the Knesset, on May 14, 2015, Prime Minister Benjamin Netanyahu assumed the roles Minister of Foreign Affairs, Minister of Health, Minister of Communications, and Minister of Regional Coordination, and thereafter, appointed deputy ministers in the Ministry of Health (Knesset Member Yaakov Litzman), the Ministry of Foreign Affairs (Knesset Member Tzipora Hotoveli), and the Ministry of Regional Coordination (Knesset Member Ayoob Kara).

4. In the framework of the petition filed by the Petitioner challenging the above conduct, we decided, on July 13, 2015, that the proceedings would be separated such that a partial judgment would be given in the matter of the institution of a "Deputy Minister with the status of a Minister", and that the examination of the other issue, concerning the Prime Minister's authority to serve simultaneously as a minister responsible for a ministry, would continue thereafter.

5. On Aug. 23, 2015, after hearing the arguments of the Parties' attorneys, we issued a partial judgment in which we held that the institution of a "Deputy Minister with the status of a Minister" no longer has legal force. Pursuant to that judgment, Prime Minister Benjamin Netanyahu ceased to serve as Minister of Health, and the Deputy Minister of Health, Knesset Member Yaakov Litzman, was appointed Minister of Health on Sept. 2, 2015.

6. Thereafter, on Nov. 10, 2015, we heard arguments on the second issue that had remained pending. On that question, I arrived at the conclusion that it would appear that, under normal circumstances, the Prime Minister *lacks* authority to serve as a minister responsible for a ministry, alongside his high office, inasmuch as not only is the *new interpretation* that I presented in the *Medical Association* case *preferable*, but the changes since introduced to Basic Law: The Government *require* the conclusion that it is the only *possible* interpretation.

I will, therefore, now present the reasoning. My arguments will be set out as follows: In Chapter I, I will consider the interpretation of the constitutional text from within. In Chapter II, I will present the theory of implied constitutional interpretation, and the tools and elements that compose it and which will serve me thereafter. In Chapter III, I will address the relevant constitutional and case-law history. In Chapter IV, I will proceed to an examination of the constitutional values that ground my approach, as well as the imports to be learned from comparative law in this matter. In the course of these chapters, I will, where appropriate, refute the counter arguments presented by the Respondents. In Chapter V, I will examine the power of the constitutional custom that, as argued, applies to this matter. Finally, in Chapter VI, I will present a summary and conclusions. In view of the fact that after writing my opinion, I received the opinions of my colleagues, and the afterward written by my colleague the President, I will complete my examination with a brief afterward.

I will now, therefore, present my arguments in order – first things first, and last things last.

Chapter I: Interpreting the Constitutional Text from Within

7. Basic Law: The Government, and our other Basic Laws, as well, are chapters of our future Constitution. Their interpretation is based, first and foremost, upon their written text, on the assumption that we are treating of a formal constitution, and not an unwritten constitution, which has different rules of design and interpretation. In interpreting the text of a formal constitution (hereinafter: the express constitution), significance must be attributed to the *express* meaning of the written text, but also to its *implied* meaning (hereinafter: the implied constitution) (see: Prof. Aharon Barak, *On Implication in a Written Constitution*, 1-6 (to be published in 45 (3) MISHPATIM (2016) (hereinafter: Barak, *On Implication in a Written Constitution*). The said interpretive framework is *delimited*: on the one hand, it does not treat of an "open fabric", like an unwritten constitution that is often influenced by constitutional customs and conventions (see the references in fn. 20 of Barak, *On Implication in a Written Constitution*), while on the other hand, it does not address the constitution as a code, which is assumed to be comprehensive. This is especially true in our case, where the constitutional project has not yet been completed. Therefore, alongside the constitutional norms that can be derived from the express provisions of

the Basic Law, we can also draw additional rules from what may be learned or inferred "between the lines", as if it were written there – in President Barak's metaphoric language – "in invisible ink" (see: HCJ 2257/04 *Hadash-Ta'al Faction v. Chairwoman of the Central Elections Committee for the 17th Knesset*, IsrSC 58 (6) 685, 703 (2004) (hereinafter: the *Hadash Faction* case); see and compare: LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008) (hereinafter: TRIBE); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE NY (2012) (hereinafter: AMAR).

This approach is also essentially consistent with Jewish heritage in regard to the relationship between the Written Torah and the Oral Torah, upon which I will not expand here.

8. I will, therefore, commence with an examination of the relevant, *express provisions* of the current Basic Law: The Government, and their implications for the matter before us. In so doing, I will refer to the current text of Basic Law: The Government, while, *inter alia*, bearing in mind the constitutional principle that Basic Law: The Government, as such (like every Basic Law) is undated (for the implications of this, see: CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, IsrSC 49 (4) 221, 560-561 (1995) *per* Justice M. Cheshin [http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village] (hereinafter: the *Mizrahi Bank* case). Thereafter – in view of the arguments of the Parties' attorneys and the position of my colleague the President – in Chapter III, I will separately address the influence of the vicissitudes in the "history" of Basic Law: The Government, and the case law that addresses it and its interpretation (and compare: HCJ 4031/94 *B'Tzedek v. Prime Minister*, IsrSC 48 (5) 1 (1994)).

I will, therefore, now turn to a survey of the said provisions from the perspective of a jurist examining and interpreting the various provisions of an *express constitution* from *within*.

9. Section 1 of Basic Law: The Government states as follows:

> *What the Government is*
>
> 1. The Government is the executive authority of the State.

This provision is of great significance, in that it presents (as a heading of the section) the *substance* of the collective body. On the basis of this section, the *Government* (as opposed to the

Prime Minister) is considered the Executive Branch of the State (see: SHIMON SHETREET, THE GOVERNMENT: THE EXECUTIVE BRANCH – COMMENTARY TO BASIC LAW: THE GOVERNMENT, 100, 235 (to be published) (Hebrew) (hereinafter: SHETREET, THE EXECUTIVE BRANCH)). In this regard, our form of government differs, for example, form that of the presidential system of the United States (where the President is the Executive Branch). This fundamental principle must be borne in mind, inasmuch as in the hearing of Nov. 10, 2015, the State Attorney's representative affirmed, on behalf of respondents 1-6, that according to the legal approach that she asserted, *the Prime Minister can also fill the roles of all of the ministers* (p. 5 of the protocol). That approach deprives sec. 1 of Basic Law: The Government of all meaning, as it does for sec. 5 of the Basic Law: The Government, which I will address in the following paragraph. It is worth noting in this regard that although, in his book, Prof. Shetreet supports leaving the *old interpretation* in place (*inter alia*, in accordance with the quote cited in para. 14 of the opinion of my colleague the President), he is of the opinion that a situation in which the Prime Minister is responsible for a only a few ministries "is inconsistent with the spirit of the Basic Law, according to which the Government, in its entirety, constitutes the Executive Branch" (SHETREET, THE EXECUTIVE BRANCH, p. 235).

10. Section 5 of Basic Law: The Government states:

> The Government is composed of the Prime Minister and other Ministers.

From this provision we learn several things:

(a) The collective body (the Government) comprises two elements: the Prime Minister, on one hand, and the Ministers, on the other (on the meaning of "other Ministers", see subsec. (d), below). It would thus appear that each element of this definition stands on its own, and when it was necessary to view them in common, the framers referred to them as "Government members". See sec. 5(f) of Basic Law: The Government, which instructs as follows:

> The number of Government members, including the Prime Minister, shall not exceed 19, unless the Knesset has expressed confidence in the Government, or has decided to approve the addition of Ministers to the Government, by a majority of at least seventy Members of the Knesset.

Here we should note that according to the approach presented by the Respondents, according to which the Prime Minister is also a minister, it would have been sufficient to say: "The number of Ministers shall not exceed 19". Moreover, according to the approach asserted by the attorney for Respondents 1-6, the Prime Minister can himself assume all the roles of the ministers, such that sec. 5(a) would be a dead letter.

(b) The term employed for the person who heads the Government is "Head of the Government" [*Rosh HaMemshala*] and not Head of the Ministers or First Minister.[2] I emphasize this because in England, from which we originally drew our constitutional system (see; the *Mizrahi Bank* case, p. 280; AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, vol. 1: Basic Principles 17 (6th ed., 2005) (Hebrew)), the role of the Prime Minister developed as a "constitutional convention" that was based upon an institution that came to England from France, where, after the death of Louis XIV (in 1715), the first person termed Premier Minister or Principle Minister was appointed. Pursuant to that, the English Sir Robert Walpole, who was appointed to a parallel position in Great Britain in 1722, was termed Premier Minister, and is thought of as the "First Prime Minister of England", although his official ministerial title was "The First Lord of the Treasury" (see: LORD ROBERT BLAKE, THE OFFICE OF PRIME MINISTER 6 (1975); RODNEY BRAZIER, MINISTERS OF THE CROWN 5 (1997) (hereinafter: BRAZIER); LEOPOLD O. HOOD PHILLIPS AND JACKSON HOOD, CONSTITUTIONAL AND ADMINISTRATIVE LAW 358-360 (8th ed., 2001) (hereinafter: HOOD PHILLIPS); A.W. BRADLEY AND K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 969 (14th ed., 2008) (hereinafter: BRADLEY)).

(c) We would here note that, over the course of years, the British Prime Minister also assumed various ministerial roles (as, for example, Churchill in WWII; however, the last to do so in Britain were Clement Attlee, who also served as Minister of Defence during the first 17 months of his tenure (which continued from July 27, 1945 until Oct. 26, 1951), and Harold Wilson, who also took charge of the Department of Economic Affairs in 1967 – see: BRAZIER, p. 81 fn. 81, and BRADLEY, p. 970). This practice was not foreign to the English constitutional culture, inasmuch as the office of prime minister – as noted – developed from the role of a

[2] Translator's note: The term "Prime Minister", employed as the English equivalent of the Hebrew term *Rosh HaMemshala* does not reflect the literal meaning of the Hebrew term, which is "Head of the Government".

regular minister to whom the other minsters were subject. Formally speaking, to this day the British Prime Minister also carries the titles of First Lord of the Treasury and Minister for the Civil Service (even though that government agency was disbanded in 1981), but this anomaly can be explained by the fact that it is only by virtue of these titles, and British tradition, that the British Prime Minister (under the relevant laws) can receive a salary and a pension (see: HOOD PHILLIPS, 309).

To complete the picture, I would further note that in the area with which we are concerned, even the British "constitutional convention" has been moving in the direction of the *new interpretation*, and the constitutional rule is now stated, with typical British understatement, as follows:

> No Prime Minister, however, is likely to burden himself with another department nowadays (BRAZIER, p. 81).

Moreover, in practice, in England (following the tenure of Harold Wilson as Prime Minister from 1964 to 1970), and in Canada (following the tenure of Jean Chrétien as Prime Minister from 1993 to 2003), the view that has developed is that, in principle, the Prime Minister serves only as the *conductor of an orchestra*, and as a rule, he should not also serve as one of the musicians (see: HAROLD WILSON, THE LABOUR GOVERNMENT 1964-1970: A PERSONAL RECORD (1971); JEAN CHRÉTIEN, MY YEARS AS PRIME MINISTER 33 (2010)). This is also the accepted model in Japan in regard to the status of the Prime Minister (see: Peter Gourevitch, *Domestic Politics and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 309 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds. (London: Sage, 2002).

A similar approach would appear to be expressed in Israel – even in the title of the position (Head of the Government), which embodies a departure from the classic British concept under which the holder of the office is merely "first among equal (ministers)" – *primus inter pares*. This is also how the matter was interpreted by the Committee for the Examination of the Office of the Prime Minister (whose members were: Yossi Kuchik (chair), Yael Adorn, Prof. David Dry, Prof. Gideon Sapir, and Adv. Dror Strum), which, in its discussion of sec. 5 of Basic Law: The Government, expressed the following opinion:

> We are not concerned with a first-among-equals model, but rather with a model of a prime minister who holds a different, preeminent role in relation to his ministers (Committee Report of April 2012, p. 28).

(d) As noted, the Respondents seek to rely on the wording "The Government is composed of the Prime Minister and other Ministers", and their emphasis of the word *other*, indicating that Prime Minister is also a minister. That may be a possible understanding for certain matters (for example, in regard to salary and pension – see: sec. 36 of Basic Law: The Government, and compare the English practice described in ss. (c), above), but I read the emphasis of the word *other* otherwise.

In my opinion, what we should infer from sec. 5(a) of Basic Law: The Government is that the framers sought to emphasize that the ministers are *different* (other) than the Prime Minister – the latter characterized as being *sui generis*, while the remaining ministers are "other ministers".

The interpretation advanced by the Respondents is a two-stage statement: At the first stage, they infer from the fact that sec. 5(a) of Basic Law: The Government speaks of "other ministers" that the Prime Minister is also a minister. At the second stage, they seek to apply every provision of Basic Law: The Government that mentions a minister as referring to the Prime Minister, as well, unless the constitutional text expressly states otherwise (see, for example: secs. 22(a), 24(a) and 31(a) of Basic Law: The Government). In my opinion, this approach suffers from two flaws:

(1) It "stretches" the "broad" approach to constitutional interpretation (adopted in HCJ 6924/00 *Shtenger v. Prime Minister*, IsrSC 45 (2) 485 (2001)) *beyond what is legitimate*, as constitutional interpretation – even if "broad" – must follow the middle path, faithful to the "constitutional spirit", and be understood to all, without casuistry (and compare: "We the people" of the American Constitution, and see: AMAR and TRIBE; and BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READING AND AGAINST ORIGINALISMS, Chap. 7, *Fidelity to Our Living Constitution: Honoring the Achievements of We The People* (2015).

(2) It deviates from the subject, inasmuch as the question is not whether the Prime Minister can be considered a minister at certain times and for specific purposes, but rather whether the Prime Minister can serve as the *minister responsible for a government ministry* alongside his said high office (on the distinction between the two concepts, see, for example: sec. 5(c) and 26(2) of Basic Law: The Government). According to my approach, the conclusion to be drawn in this regard, both from *the express constitution* and from the *implied constitution* (as I will demonstrate below), is negative, inasmuch as sec. 5(a) of Basic Law: The Government should be read as follows: "The Government is composed of the Prime Minister and others (who are) Ministers".

This approach is specifically expressed in many of the provisions of Basic Law: The Government (in Chap. III, concerning the relevant constitutional history, I will separately address the significance of the fact that the current wording of sec. 5(a) of Basic Law: The Government was found in the original Basic Law: The Government, was then changed in Basic Law: The Government of 1992, and returned to its original wording in Basic Law: The Government in 2001).

I will demonstrate this presently.

11. The conception of the *uniqueness* of the status and role of the Prime Minister gains additional weight to that presented above in sec. 5(b) of Basic Law: The Government, which states as follows:

> *The Prime Minister* shall be a member of the Knesset. *A Minister* need not be a member of the Knesset [the Deputy Prime Minister, when one is appointed, must also be a member of the Knesset – see: sec. 5(d) of Basic Law: The Government] (emphasis added – M.C.).

Moreover, sec. 5(c) of Basic Law: The Government, immediately following sec. 5(b), emphasizes and establishes:

> A Minister shall be in charge of a Ministry; there may be Ministers without Portfolio.

It would appear that, here, the term "minister" does not include the Prime Minister, inasmuch as complementary to and separate from what is established in sec. 5(c) of Basic Law: The Government, the provision of sec. 25(a) of Basic Law: The Government informs us that the Prime Minister is *in charge of the Prime Minister's Office*. Therefore – by virtue of sec. 25(a) – a deputy minister appointed by the Prime Minister is titled: "a Deputy Minister in the Prime Minister's Office".

12. A conclusion similar to that presented above can also be inferred from the special responsibility provision at the end of sec. 4 of Basic Law: The Government ("a Minister is responsible to the Prime Minister for the field of responsibility with which the Minister has been charged"), which precedes the provision of sec. 5(c) of Basic Law: The Government. This is the *personal responsibility* of each and every minister to the Prime Minister in regard to the fulfilling of his role as a minister (see: HCJ 5261/04 *Fuchs v. Prime Minister*, IsrSC 59 (2) 446, 461 (2009) [http://versa.cardozo.yu.edu/opinions/fuchs-v-prime-minister]). The said instruction thus makes it clear why, in general, the Prime Minister cannot serve as a minister responsible for a ministry, inasmuch as in such a case, *whence the ministerial responsibility to him*?

13. The approach presented here is also required by the separate declaration of allegiance of the Prime Minister, as such, as opposed to that of all the other ministers, as such, under sec. 14 of Basic Law: The Government. That wording is not appropriate to a prime minister *who is also a minister*, and indeed, on May 14, 2015, the Prime Minister, Knesset Member Benjamin Netanyahu, only made a declaration of allegiance as a Prime Minister, and did not make additional declarations of allegiance in his capacity as Foreign Minister, Minister of Health, Minister of Communications, and Minister of Regional Coordination (on the importance of the wording of the declaration of allegiance, see: HCJ 400/87 *Rabbi Meir Kahane v. Speaker of the Knesset*, IsrSC 41 (2) 729 (1987)).

Moreover, the provision regarding an acting prime minister, in sec. 16(b) of Basic Law: The Government, *does not* provide an arrangement for an acting minister in a ministerial position held by the Prime Minister. This, too, would appear to show that such doubling-up is impossible.

14. The Respondents' approach is also contradicted by the provision of sec. 37(b) of Basic Law: The Government, which establishes:

> A law may empower the Prime Minister *or* a Minister to make regulations in a matter decided by agreement (emphasis added – M.C.).

Under the Respondents' approach, the above "or" is apparently superfluous, inasmuch as they read "Minister" as including the Prime Minister, and it is, therefore, mystifying why, under their approach, the section is worded as it is.

15. The Respondents' approach also raises *serious practical difficulties*, as I will explain in detail:

(a) Section 42(b) of Basic Law: The Government instructs as follows:

> The Knesset may, at the request of at least forty of its members, conduct a session with the participation of the Prime Minister, pertaining to a topic decided upon; requests as stated may be submitted no more than once a month.

(Section 45 of the Knesset Rules sets out the special arrangements that apply to such sessions).

The reason for the provision is clear – to require the Prime Minister to appear before the Knesset in regard to a matter of importance to the public agenda, provided that the conditions of sec. 42(b) of Basic Law: The Government are met (see: SHETREET, THE EXECUTIVE BRANCH, pp 517-518).

Alongside this provision, sec. 42(c) of Basic Law: The Government states:

> The Knesset, and any of the Knesset committees within the framework of their tasks, *may obligate a Minister to appear before it*, and may obligate a Deputy Minister to appear before it, by means of, or with the knowledge of, the Minister who appointed him (emphasis added – M.C.).

(For the interpretation of the section, see: SHETREET, THE EXECUTIVE BRANCH, p. 518).

Now, when the Prime Minister also serves as a minster responsible for a ministry, can the Knesset, and any of its committees, *obligate* the Prime Minister to appear before it in his

capacity as a minister, and not in accordance with the procedure established under sec. 42(b) of Basic Law: The Government? I would think that the answer must be in the negative, inasmuch as sec. 42(b) would appear to be a *lex specialis* for the Prime Minister. Thus, clearly, Basic Law: The Government did not contemplate a situation in which, as a matter of course, the Prime Minister would also serve as a minister responsible for a ministry, and therefore, sec. 42(b) of Basic Law: The Government is not only exclusive and exhaustive, but it also does not treat of a situation of the kind a double role that is the subject of this proceeding.

(b) Neither Basic Law: The Government, nor The Government Law, 5761-2001, provides *any* provision concerning the voting of a prime minister who is also a minister responsible for a ministry. How, therefore, should his vote be counted? Once, or in accordance with the number of his ministerial appointments, in addition to his vote as Prime Minister? This is only because such a situation was not foreseen as a general possibility, and was not provided for by the framers and the legislature. Yet, such votes can be of critical importance for the Government, in the Ministerial Committee for National Security, and in other ministerial committees (the Attorney General addressed this matter in Directive no. 1.11.01 of Dec. 1, 1985, which was last updated in May 2015, in which he arrived at the conclusion that the number of votes in the Government is equal to the number of members of the Government, and are apportioned as one vote for each member of the Government).

(c) Let us assume, for example, that the Prime Minister assumed the post of Minister of the Economy. As such, he is supposed to serve as a member of the Judges' Election Committee for Labour Court Judges (see: sec. 4(b) of Basic Law: The Judiciary, and sec. 4 of the Labour Courts Law, 5729-1969). In such a case, would he serve under the Minister of Justice, who is meant to serve as chair of the Committee? Once again, it would appear that the law provides no solution for such a situation, inasmuch as the legislature's assumption was that such a double role was not normally possible (the situation created by the operation of sec. 24(b) of Basic Law: The Government is different and resolvable due to its temporary nature under sec. 24(c) of Basic Law: The Government, which makes it possible to postpone the sessions of the Elections Committee for a period of up to three months, or by a transfer of authority under sec. 31(b) of Basic Law: The Government).

16. To all the above provisions, we should add the sections in Basic Law: The Government that treat of the appointment of deputy ministers and their removal from office (secs. 25 and 26 of Basic Law: The Government), which condition the appointment upon the action of "the Minister in charge of the office" and the *consent* of the Prime Minister (as well as the approval of the Government), while in a case of termination by the Prime Minister, it is contingent upon prior notice of that intention to the Government and *the minister who appointed the deputy minister*. This, too, would seem to lead to the conclusion that the Prime Minister and the minister in charge of the ministry cannot usually "merge" into one personality.

17. Up until now, I have presented various provisions of Basic Law: The Government that indicate that serving as Prime Minister *is inconsistent* with serving as the minister in charge of a government ministry. I will now attempt to show "the crooked from the straight", inasmuch as Basic Law: The Government sets out *exceptions to the rule* cited at the outset, and this demonstrates that the Prime Minister can serve as the minister in charge of a ministry *only in the framework of those exceptions*. These provisions must be narrowly construed, and we must conclude in their regard that *expressio unius est exclusio alterius* (see: the opinion of my colleague the President in HCJ 10017/09 *Dolev Foundation for Medical Justice v. Government of Israel* (May 25, 2010) (hereinafter: the *Dolev Foundation* case), and my opinion in HCJ 2944/10, HCJ 8692/11 *Avraham Kuritzky v. Labour Court* (Oct. 13, 2015), and the petitions for a Further Hearing on that judgment (HCJFH 7730/15; HCJFH 7649/15) which were dismissed on Feb. 13, 2016; a further discussion of this principle will be presented in Chap. III).

The provision under discussion is that established under sec. 24(b) of Basic Law: The Government, stating:

> Should a Minister be temporarily incapable of discharging his duties, the Prime Minister or another Minister appointed by the Government will discharge his duties.

Section 24(c) of Basic Law: The Government completes the said arrangement, stating:

> The period of tenure of an Acting Minister under subsection (b) will not exceed three months.

The two provisions, taken together, show that when a minister ceases to serve, or is incapable of discharging his duties, the default arrangement is that the Prime Minister assumes his duties (see: SHETREET, THE EXECUTIVE BRANCH, p. 362) for a period that shall not exceed three months, and without a need for Knesset approval, which would otherwise be required (but see sec. 10(b)(6) of The Government Law, 5761-2001, which requires that, in such a case, the Government publish notice of the appointment of an acting minister in the Official Gazette).

From this we can infer that, in addition to his high office, the Prime Minister also holds a a potential office – to serve as an acting minister for a period of three months (if the Government has not decided otherwise) in place of a minister who has ceased or is temporarily unable to carry out his duties. Beyond that, it would appear that he cannot serve as a minister in charge of a ministry, inasmuch as such parallel service in other circumstances *lacks* grounding in Basic Law: The Government, as we held in regard to a "Deputy Minister with the status of a Minister" (the section that expressly authorized this in the past in the previous Basic Law: The Government was, as noted, rescinded, the consequences of which I will further address at greater length in Chapter III, below).

At this point we should note that even recently (while this Petition was pending), the authority established under sec. 24(b) of Basic Law: The Government was employed twice: *Once*, after the Minister of the Economy, Knesset Member Aryeh Makhlouf Deri, resigned from that post on Nov. 1, 2015, and *again* after the Minister of the Interior, Knesset Member Silvan Shalom, resigned from his post on Dec. 24, 2015. Then, the Prime Minister assumed their places when their resignations went into effect (in addition to his then being Prime Minister, as well as the minister in charge of the following ministries: the Ministry of Foreign Affairs, the Ministry of Communications, and the Ministry of Regional Cooperation).

This serves to show that *further authority lacking statutory grounds should not be added* to the *potential authority* imposed by law as a solution for the exigencies that may arise from time to time, which, not to mention, places a burden upon the Prime Minister in the case of its (generally unforeseen) occurrence.

In this regard, we hear the echo of Jethro's warning to Moses:

> The thing you are doing is not right; you will surely wear yourself out, and these people as well. For the task is too heavy for you, you cannot do it alone (Exodus 18:17-18).

18. A partial summary up to this point leads, in my opinion, to the conclusion that the *express constitution* (Basic Law: The Government) does not grant the Prime Minister authority, as such, to serve simultaneously as a minister in charge of a government ministry, except in the situations set out is secs. 24(b) and (c) of Basic Law: The Government (serving as an acting minister in place of a minister who has ceased or is temporarily unable to carry out his duties). The question remains whether the *implied constitution*, to the extent that it exists, might change that conclusion. I will focus on that question and what derives therefrom, below.

19. My colleague the President sets out from a different point of departure than mine. She is of the opinion that the current Basic Law is silent on the question of the Prime Minister's authority to serve as the minister in charge of a ministry in addition to his high office, as opposed to the view that I expressed, according to her analysis, in the *Medical Association* case in which, in her opinion, my position was that the silence of current Basic Law should be understood as a *negative arrangement*. According to her approach, the Basic Law's silence does not represent a negative constitutional arrangement, but rather a positive constitutional implication, in the sense of the distinctions proposed in the writings of Prof. A. Barak (see paras. 5 and 6 of her opinion). Moreover, according to her opinion, we are not concerned with a question of authority, but rather a question concerning the Prime Minister's broad discretion in forming a government (which, as we know, can be challenged separately on the grounds of unreasonableness and disproportionality, particularly when the quantity becomes a matter of quality).

Thus, both my colleague and I agree that an implied meaning can be inferred from the express meaning of the constitutional text, but while I am of the opinion that we are concerned with a negative arrangement, my colleague the President is of the opinion that we are concerned with a positive implication. Thus, she holds the view that the explicit arrangement established in the Basic Law can also apply to a subject that is not expressly addressed by it, and in her opinion, that is the case before us (this approach must still answer the question of why the constitutional implication *deviates* from the three-month period established in sec. 24(c) of Basic

Law: The Government). My colleague the President's interpretive conclusion is required, under her approach, by the purposes grounding the current Basic Law, and by the customary practice in this regard. We are, therefore, in disagreement not on the very existence of the *theory of implication*, but rather on its application to the matter before us and its scope. I will, therefore, dedicate a few preliminary remarks to this subject before proceeding to examine the disagreement on its merits.

Chapter II: The Theory of Implied Constitutional Interpretation

20. Implication theory has respectable philosophical, linguistic (in the field of pragmatics), logical, and legal roots (see: Barak, *On Implication in a Written Constitution*).

I will now present two examples that illustrate the need for implication theory and its consequences – as a negative arrangement or a positive implication:

(a) Grice, who developed the foundations of pragmatics, gives the following case as an example:

> A philosophy professor is asked by one of his students to write a letter of recommendation for a teaching position; in his recommendation, he writes that the student has good command of English and that he has regularly attended classes. It seems that we should have no difficulty in inferring from this, by implication, that the professor does not think much of the student's philosophical abilities. This meaning – a poor opinion of philosophical ability – is not learned directly from the language of the professor's statement; it is implied from the context in which it was made (see: PAUL GRICE IN THE WAY OF WORDS 33 (1989); the above example is taken from its presentation in Barak, *On Implication in a Written Constitution*, p. 2 [English: Aharon Barak, *On Constitutional Implication and Constitutional Structure*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW, David Dyzenhaus & Malcolm Thorburn, eds. (Oxford, 2016)]).

(b) In his book (cited in para. 7, above), Professor Amar analyzes the procedure for the impeachment of the President of the United States under the American Constitution. The impeachment proceedings are conducted before the Senate, but while the person who generally

presides over Senate sessions is the Vice President on the United States, the Constitution provides that when the President of the United States is tried, the Chief Justice of the Supreme Court shall preside. The reason is obvious – the Vice President has an interest in the result of the proceedings. However, the Constitution does not comprise special provisions for impeachment proceedings in regard to the Vice President, which are also conducted before the Senate. Is it conceivable that the Vice President would preside over the Senate at his own trial? The implied answer requires that we adopt an arrangement similar to that applying to the impeachment of the President, and we thus employ the doctrine of positive implication (see: AMAR, pp. 5-13).

21. We should note that the legislature's "silence" can sometimes be understood in other ways. Sometimes, that "silence" constitutes a lacuna. At other times, the "silence" represents refraining from taking a stand on a legal issue, while leaving the matter to normative systems external to the express law (see: HCJ 4267/93 *Amitai – Citizens for Good Governance and Moral Integrity v. Yitzhak Rabin, Prime Minister of Israel*, IsrSC 47 (5) 441, 457, 475 (1993)).

In light of the fact that the matter before us was already addressed in the past incarnations of Basic Law: The Government, we are not faced with a lacuna or a desire to refrain from taking a stand (compare: HCJ 2458/01 *New Family v. Approvals Committee for Surrogate Pregnancies*, IsrSC 57 (1) 419, 439 (2002)), but rather one of two possibilities: a "negative arrangement" or a "positive implication", even if we are concerned with a chance omission. To which category must we assign the subject of the petition, and what tools will help us reach the correct conclusion? On the basis of these questions, we shall ground our conclusion.

22. No one would appear to disagree in this regard that *the internal and external context is decisive.* In a constitutional environment, the internal context relies upon the wording, the structure of the constitution as whole, and upon the purposes of the constitution. The external context comprises the circumstances external to the language of the constitutional text. These extend, *inter alia*, to the constitutional and case-law history, constitutional values, and comparative law (see: Barak, *On Implication in a Written Constitution*, pp. 23 and 28; STEPHEN BREYER, MAKING OUR DEMOCRACY WORK, xii-xiv (2010)). Beyond that, the overall rationality is of great importance (see: Asa Kasher, *Gricean Inference Revisited*, 29 PHILOSOPHICA 25 (1982)), or as my colleague Deputy President E. Rubinstein put it: "Common sense is also a

member of the club" (see, for example: CrimFH 5852/10 *State of Israel v. Shemesh*, para 12 (Jan. 9, 2012); CrimA 6833/14 *Nafa v. State of Israel*, para. 68 (Aug. 31, 2015); CA 5884/08 *Kfar Vitkin v. National Insurance Institute*, para. 14 (Aug. 26, 2010)).

23. By means of the above criteria, I will try to show that the matter before us indeed concerns a *negative arrangement* (and not a *positive implication*), and that the recent constitutional developments in in Israel and abroad, as well as our fundamental constitutional values, require this conclusion. Here it is apt to note that according to the approach of Prof. Barak in his aforementioned article:

> Constitutional change may directly change the implied meaning by an explicit statement that alters it. Constitutional change may also change the implied meaning indirectly, inasmuch as adding constitutional text results in an interpretive conclusion that negates the existence of an implied meaning or that changes its content (Barak, *On Implication in a Written Constitution*, p. 14, fn 84).

Such changes *indeed took place* in the context before us, and those changes transformed the new interpretation from merely preferable to the only interpretation that is now correct.

I will now proceed to describe this in an orderly fashion.

Chapter III: The Relevant Constitutional and Case-Law History

24. The relevant constitutional and case-law history would appear to support my approach. I will review it below, while relating to the Parties' arguments:

(a) The current Basic Law: The Government (Basic Law: The Government, 5761 SEFER HAHUKIM 158; above and hereinafter, the current Basic Law: The Government) was established by the Knesset on March 7, 2001, and applied to the elections and the formation of the government as of the elections for the 16th Knesset. It repealed the previous Basic Law: The Government (Basic Law: The Government, 5753 SEFER HAHUKIM 214; above and hereinafter: the previous Basic Law: The Government), which was established by the Knesset on March 18,

1992, and which was premised upon the concept of direct, personal election of the Prime Minister.

Section 33(d) of the previous Basic Law: The Government clearly and unambiguously stated as follows:

> The Prime Minister may also function as a Minister appointed over an office.

(b) The same Basic Law included another provision (sec. 36 of the previous Basic Law: The Government), which addressed a special case – an acting Minister – and it, too, authorized the Prime Minister to serve as a minister, establishing as follows:

> (a) Should the Minister cease to serve, be absent from the country, or be temporarily incapable of discharging his duties, the Prime Minister or another Minister appointed by the Prime Minister will discharge his duties until the Minister resumes his regular duties or until the appointment of his replacement; the Prime Minister will give notification to the Government and to the Speaker of the Knesset regarding the appointed acting Minister, and the Speaker of the Knesset will give notice to the Knesset.
>
> (b) The period of tenure of an Acting Minister who ceased to serve as stated under subsection (a) will not exceed three months. At the end of that period, the Prime Minister, with the approval of the Government, may appoint a Member of Knesset as a Minister to the position vacated by the Minister as aforesaid, for a period not to exceed one year, and his appointment shall not require approval of the Knesset.

(c) Without any prior discussion of the matter in the Knesset plenum or the Constitution, Law and Justice Committee, the current Basic Law: The Government entirely *omitted* the provision of sec. 33(d) of the previous Basic Law: the Government, and established that: "The Prime Minister may also function as a Minister appointed over an office". It also changed the arrangement in regard to an acting minister, establishing, in sec. 24, as follows:

> a) Should a Minister, except for the Prime Minister, be absent from the country, the Government can charge another Minister to take his place. The Acting Minister will discharge the Minister's duties, in all or in part, as determined by the Government.
>
> (b) Should a Minister be temporarily incapable of discharging his duties, the Prime Minister, or another Minister appointed by the Government, will discharge his duties.
>
> (c) The period of tenure of an Acting Minister under subsection (b) will not exceed three months.

From the *affirmative* statement of this section, which positively states that the Prime Minister can serve as an acting minister under the conditions established in the section, it would appear that we can learn – as I showed in para. 17, above – a negative statement in regard to other situations, particularly after the *repeal* of the former section that permitted simultaneous service even under normal circumstances. (For a detailed discussion of the significance of an omission in the course of amending a Basic Law, including the inference *expressio unius est exclusio altrius*, I refer, without further discussion, to the *Hadash Faction* case, the *Dolev Foundation* case, as well as to HCJ 869/92 *Nissim Zvili v. Chairman of the Central Elections Committee for the Thirteenth Knesset*, IsrSC 46 (2) 692, 706-707 (1992), in which (then) Justice A. Barak inferred a negative arrangement from the absence of any mention of a certain situation in the law, and ruled that in such a case:

> In any case, a judge cannot compensate for what the legislature did not address.

Prof. Goldsworthy, one of the great researchers in the field of constitutional implication theory, expressed the opinion that similar weight should be given to the framer's decision to *omit* sections from the constitution (as in the case of sec. 33(d) of our previous Basic Law: The Government) as to the drafting of existing sections, their boundaries, and the structure of the constitution (see: Goldsworthy, *Constitutional Implication Revisited*, 30 QUEENSLAND L.J. 9, 21 (2011). As for a constitutional situation like that before us, he states the following:

> When the provisions of a legal instrument expressly cover only some instances of a potentially broader class, it is usually more plausible to infer that its limited coverage was deliberate, and to ascribe to it an implication that it excludes members of the class not expressly covered. That implication is expressed by the maxim *expresio unius est exclusio alterius*.
>
> Judges are surely bound not only by the framers' ends, but by the means they selected to achieve those ends. That is why it has been said that the framers' decisions to omit provisions from the Constitution are entitled to as much respect as their decisions to include provisions. Otherwise a constitution is just a set of abstract objectives, which the judges can choose to implement in any way they think fit (*ibid.*, p. 24).

25. The Respondents try to explain that sec. 33(d) was included in the previous Basic Law: The Government but omitted from the current Basic Law: The Government because, following the move to direct election of the Prime Minister, the Prime Minister constituted an institution *materially different* from other ministers, whereas, upon the repeal of direct elections, he returned to being merely "first among equals". Therefore, according to their approach, the framers returned to the formulas they had adopted in the original Basic Law: The Government, according to which – under this approach – the Prime Minister is one among the ministers (thus in sec. 5(a) of the current Basic Law: The Government, and thus in the sections addressing delegation and assumption of powers – now secs. 33 and 34 of the current Basic Law: The Government).

Unfortunately, this explanation *does not* answer the questions I raised in regard to this proposition in Chapter I (in the context of the interpretation of Basic Law: The Government from within). For example, how is this compatible with the *personal responsibility* of a minister in charge of a ministry to the Prime Minister (the end of sec. 4 of Basic Law: The Government). Moreover, this approach of the Respondents *ignores* the dramatic significance for the matter before us that must be afforded to the amendment of Basic Law: The Government of March 11, 2014 (SEFER HAHUKIM 2440 of 17 Adar II 5774 – March 19, 2014, p. 346) in regard to an expression of non-confidence in the Government, as I shall presently explain.

26. In the said amendment (hereinafter: the Governance Amendment), the framers adopted the concept of *full constructive non-confidence*, which the proposers of the Amendment "imported" from the German and Belgian constitutional law systems, with certain changes (before that, we had a *partial constructive non-confidence* approach, by which the initiators of a no-confidence motion were not required to propose an alternative Government, or express confidence in it, but rather only propose a potential *formateur*, who might form a new Government, and pass a no-confidence motion against the reigning Government by a majority of the members of the Knesset (see: Basic Law: The Knesset (Enhancement of Governance) (Amendment) Bill, HATZAOT HOK HAKNESSET 512 of 15 Av 5773, July 22, 2013, pp. 46-47; the statement of the Legal Adviser to the Knesset Constitution, Law and Justice Committee in its session of Nov. 25, 2013, at p. 29; on the history of the no-confidence apparatus in Basic Law: The Government, also see: SHETREET, THE EXECUTIVE BRANCH, 380-386)).

The current wording, which comprises full constructive non-confidence, establishes as follows, under sec. 28(b) of the current Basic Law: The Government:

> An expression of no-confidence in the Government shall be by means of a resolution of the Knesset, adopted by a majority of its Members, to express confidence in another Government that has announced its basic lines of policy, its composition and the distribution of functions among the Ministers, as stated in section 13(d). The Government is constituted when the Knesset has expressed confidence in it, and the Ministers shall thereupon assume office.

This is a "mirror image" of the provisions of sec. 13(d) of the current Basic Law: The Government, which provide as follows:

> When a Government has been formed, it shall present itself to the Knesset, shall announce the basic lines of its policy, its composition and the distribution of functions among the Ministers, and shall ask for an expression of confidence. The Government is constituted when the Knesset has expressed confidence in it, and the Ministers shall thereupon assume office.

In view of the above provisions, if the Respondents' proposition is correct, then after the establishment of full constructive non-confidence in the Governance Amendment, it should be sufficient – for the purposes of sec. 28(b) of Basic Law: The Government – that the initiator of a no-confidence motion name only a proposed alternative prime minister (who would also serve as the minister in charge of the other ministries, inasmuch as Respondents 1-6 declared, as noted, that, according to their approach, the Prime Minister can fulfil the roles of all the ministers (see para. 9, above)). We have thus – by means of the approach of Respondents 1-6 – returned to the former constitutional situation, under which it was sufficient that 61 Members of Knesset join together to topple the Government, and propose a potential prime minister, and the purpose of the Amendment will be frustrated.

It would seem superfluous to say that we should not interpret the composition of an existing Government that receives the Knesset's confidence differently from the formation of a proposed alternative Government in the course of a no-confidence vote under the Governance Amendment. Thus, the entire scaffolding upon which the Respondents built their arguments collapses, and the *new interpretation* stands alone and is as the necessary result.

We should note that in German constitutional law – from which, as noted, we drew the principles of the concept of full constructive non-confidence – the interpreters arrived at a *similar conclusion* (in the German post-war period, as since the days of Chancellor Conrad Adenauer (in the 1950s and thereafter) the German Chancellor has not assumed the role of a minister in charge of a ministry). I will address this in Chapter IV.

27. Moreover, in the framework addressed in this chapter, we consider not only changes introduced to the Basic Law, but also constitutional case law. Therefore, we should recall that, as the Petitioner noted in the hearing, objections against the Prime Minister's serving as a minister in charge of an ministry were raised even before the *Medical Association* case, in petitions filed by (then)[3] Adv. Yariv Levin and the Movement for Quality Government in Israel against Prime Minister Ehud Olmert (HCJ 7375/06 and HCJ 9617/06 respectively). The petitions challenged Prime Minister Olmert's serving as Minister of Welfare, and the petitioners argued that such parallel service was not legally possible under Basic Law: The Government, and that the such

[3] Trans. note: Yariv Levin was elected to the Knesset in 2009, and was appointed Minister of Public Security and Minister of Tourism after the 2015 elections.

service was improper from a practical point of view due to the great importance of the Welfare portfolio.

In his petition, (then) Advocate Levin argued, *inter alia*:

> Can it be argued that this is a "negative arrangement" that prevents the Prime Minister from serving simultaneously as a minister? To the best of the Petitioner's knowledge, this question has not yet been addressed by this Court. However, the Petitioner is of the opinion that a situation in which the Prime Minister holds a portfolio in addition to his role is undesirable, and inherently poses a situation of conflict of interests between his role and responsibility as Prime Minister, and the interests of the ministry of which he is in charge. This is so due to the nature of the job of the Prime Minister, which requires that he see "the big picture" and in many cases, decide upon the relative priorities among the interests of different government ministries. Clearly, it would be difficult for the Prime Minister to carry out this function when he must make such a decision in regard to a ministry over which he is in charge. Therefore, the Petitioner is of the opinion that there is good reason for the express provision of section 24 of Basic Law: The Government in regard to placing a government ministry in the hands of the Prime Minister by means of a temporary appointment, as opposed to the absence of such a provision for a permanent appointment. It would seem that even the legislature was of the opinion that a situation in which the Prime Minister also serves as a minister in a government ministry is not the desirable, appropriate situation for the proper functioning of the ministry and the government as a whole (pp 15-16 of the above petition in HCJ 7375, para. 44(c)).

A preliminary hearing was held in those petitions on Jan. 29, 2007 (before President D. Beinisch, Deputy President E. Rivlin, and Justice D. Cheshin), during which the Government informed the Court that a Minister of Welfare would soon be appointed. Therefore, a brief judgment was issued that very day, in the following language:

> In light of the State's notice that a Minister of Welfare will soon be appointed, and at the suggestion of the Court, the Petitioners withdrew their petitions while reserving their arguments. The petitions are dismissed.

Thereafter, on March 19, 2006, a Minister of Welfare was indeed appointed (Knesset Member Yitzhak Herzog).

It would appear that the said sequence of events and the above quote speak for themselves. This chapter has thus proven that even the constitutional and case-law history lead to the conclusion that, in general, simultaneous service by the Prime Minister as a minister in charge of a ministry is prohibited.

In the following chapter, I will show that even the relevant constitutional values and inspirations from comparative law all lead to the same conclusion.

Chapter IV: The Underlying Constitutional Values, and the Implications of Comparative Law for the Matter before Us

28. In his book (above, para. 7), Professor Amar, one of the great constitutional jurists in the United States, and one of the developers of the theory of constitutional implication there, explained that a constitution should not be read literally, but rather faithfully to its framers and its beneficiaries (the citizens), and that this should be accomplished in light of the constitutional values that ground it. He writes in this regard (*ibid*., p. 6):

> The key that unlocks the door is the simple idea that no clause of the Constitution exists in textual isolation. We must read the document as a whole. Doing so will enable us to detect larger structures of meaning — rules and principles residing between the lines. For example, although no single clause explicitly affirms a "separation of powers," or a system of "checks and balances," or "federalism," the document writ large does reflect these constitutional concepts. This much is old hat.

(Further on, he argues that it is sometimes possible to infer an implied meaning *contrary* to the explicit text of the Constitution, in which regard I agree with the opinion of Prof. Barak, who is of the view that that would be going too far, inasmuch as the implied meaning – even as analytically defined – cannot contradict the explicit meaning (see: Barak, *On Implication in a Written Constitution*, pp. 6 and 16)).

I will now turn to an analysis of the relevant constitutional values, which all lead to the understanding that the Prime Minister *cannot* generally serve as a minister in charge of a ministry.

29. What are those fundamental values underlying the existing Basic Laws that lead to the conclusion that the Prime Minister cannot generally serve as a minister in charge of a ministry? We are concerned with three such principles:

A. The concept of checks and balances, and the principle of the separation of powers, which instruct us that the Prime Minister is precisely what his title states – no more and no less. The comparative law sources of inspiration are: Prime Ministers of Common Law countries, and more recently – following our adoption of the German apparatus of full constructive non-confidence – the status of the German Chancellor, developing a model of a "*Democratic Prime Minister*", is worthy of note.

B. The principle of legality, which holds that, as a rule, every governmental act requires legal authorization, without which there is no authority (as opposed to this, an individual may do anything, unless his liberty or rights have been lawfully restricted).

C. Subservience of the institutional Basic Laws to the basic rights anchored in the value-based Basic Laws (Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation), and all that derives therefrom.

I will now elaborate and explain.

A. *The Concept of Checks and Balances and the Principle of the Separation of Powers*

30. Various models have been developed in the democratic world – some more successful and some less – in regard to the person who stands at the head of the Executive Branch. In Israel

– with the exception of the period of direct election of the Prime Minister – the Prime Minister is not directly elected by the public, but rather by the Knesset by means of a vote of confidence or no-confidence in the Government formed (after establishing a coalition). In this regard, the election of the Israeli Prime Minister is similar to that of the German Chancellor (see: SHETREET, THE EXECUTIVE BRANCH, p. 26), and to the procedure for electing the Prime Minister in England and most other Common Law countries. Thus, we can examine the models that determine the status and functions of the prime ministers of those countries, and draw inspiration in regard to the matter before us.

31. As I showed in para. 10(c) above, the British Prime Minister serves, at the very least, as the *conductor of an orchestra*, and therefore, over the last decades, he does not, as a rule, assume any additional role of a minister in charge of another government ministry. This rule was the result of the development of British *constitutional convention* and the tremendous burden borne by the prime minister of a modern state, as well as in consideration of the need that the prime minister appear "neutral" in regard to the ministries, and decide the disagreements that arise among them without any personal involvement.

32. In Germany, too – which unlike England, has a formal constitution – most constitutional interpreters are of the opinion that the *new German constitution* (established after the Second World War) does *not* permit such parallel roles. The matter arose for discussion there after Chancellor Konrad Adenauer also served as Foreign Minister in the years 1951-1955 (the matter was not challenged then in court), although it should be noted that since 1955, the practice was not repeated.

In his book, Prof. Roman Herzog, who served as President of the German Constitutional Court and later as President of Germany, expresses the view that (by virtue of article 64 of the German Constitution) the German chancellor cannot serve as a minister in charge of a government ministry, as he must present to the German President "the list of his Ministers", and he cannot include himself in that framework. Moreover, the chancellor is not supposed to trespass the boundaries of the Government, which is the Executive Branch (this reason is similar to the opinion of Prof. Shetreet that was cited above in para. 9) (see: Herzog, in MANUZ/DURIG. GRUNDGESETZKOMMENTAR, Band 1, May 2008, Art. 64 GG, para 1-7).

A similar (if less decisive in regard to legality) view is expressed by Prof. Busse, who is of the opinion that the reason for the said position is that the chancellor must be "neutral" among his ministers and among the various ministries (see: Busse, in BERLINER, KOMMENTAR ZUM GRUNDGESETZ, C art. 4 GG, p.10 et seq.).

Prof. Schenke holds a view similar to that of Prof. Busse, but according to his approach, the reason is the burden borne by the chancellor (see Schenke, in BONNER KOMMENTAR ZUM GRUNDGESETZ, December 2014, Art. 64 GG, P.59 et seq., fn 134).

Despite differences in nuance in their views, all the German scholars are united in the view that the model of the German chancellor is one of a "Democratic Prime Minister". This model yields the following rules:

A) The prime minister must always be conscious of the principles of democracy, and delineate the government's policy for his ministers, while remaining "neutral" among them.
B) The prime minister must avoid institutional conflicts of interest in his relationship with the various government ministries.
C) The prime minister must perform optimally, such that the burden he bears not impair his ability to duly carry out his duties, and not impair the necessary relationship between authority and responsibility.

33. A similar constitutional approach has also developed of late in the United States, expressed both in the written constitutions of the states and in constitutional implication, by which the principle of separation of powers must be enhanced and applied even to the personal separation between the holders of different offices (see: Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994)).

In this regard, the authors write as follows:

> [t]wo hundred years of American history have added their gloss, and today we largely understand the separation of powers to include a one person, one office codicil. Unwritten traditions disfavor plural office holding of any kind. These

> traditions, together with the Incompatibility Clause itself, now form a vital part of America's structural "Constitution" (*ibid*., pp. 1047-1048).

Further on, they add:

> These facts make clear that the rule of one person, one office is fast becoming the constitutional norm in America…America has progressed from a separation of powers to a separation of institutions to a separation of personnel (*ibid*., p. 1155).

34. In view of the above comparative law sources, it can be said that even our concept of the prime minister, in accordance with Basic Law: The Government, should be conceived in light of the model of a "Democratic Prime Minister" who is a "conductor" of an "orchestra of ministers" (but is not one of them). In this regard, we should strictly ensure that conduct under the color of the current Basic Law: The Government not indirectly lead to the regime introduced by the former Basic Law: The Government, which approached, to some degree, a "presidential model". Here we should note that "parallel tenure" also raises political science problems in the current regime, inasmuch as it "sends a message" both to serving ministers and to the opposition that they have a "chance", so to speak, to be appointed to vacant offices, and this presents a latent impairment of their independence (see and compare: the statement of Advocate Sigal Kogut in the session of the Knesset Constitution, Law and Justice Committee on Oct. 21, 2013, concerning the Governance Amendment (pp. 13-14)).

35. In our context, we should also bear in mind that the prime minister carries a burden that is unlike almost any other in the world. In addition to his tasks under Basic Law: The Government and the Government Law, 5761-2001, he is responsible for, runs and directs the National Security Council in accordance with the National Security Council Law, 5768-2008, he is responsible for the General Security Service under the General Security Service Law, 5762-2001, as well as in charge of the Mossad, the Atomic Energy Commission, and the Biological Institute. In addition, the prime minister is granted direct powers, *inter alia*, under the Secret Monitoring Law, 5739-1979, the Archives Law, 5715-1955, the Administrative Courts Law, 5752-1992, the Government Companies Law, 5735-1975, the Jerusalem Development Law, 5748-1988, the Statistics Ordinance [New Version], 5732-1972 (by virtue of which he is in charge of the Central Bureau of Statistics), and he is responsible for the implementation of the

Anti-Drugs and Alcohol National Authority Law, 5748-1988 (see: SHETREET, THE EXECUTIVE BRANCH p. 312).

Thus we find that adding to the functions of the Prime Minister – who is already overburdened by law -- not on the basis of statutory provisions as above, but by his additional appointment as a minister in charge of government ministries (and here not one, but four!) impairs governance and goes to the very root of authority, as no person on earth, as gifted as he may be, can simultaneously perform so many tasks. Moreover, it is only natural that, under such circumstances, the deputy ministers who were appointed by the Prime Minister, were, in practice, granted the status of "Deputy Minister with the status of a Minister", an institution that we abolished in our Partial Judgment.

The above phenomenon also leads to an improper separation between authority and responsibility. My colleague Deputy President E. Rubinstein warned of such situations in the past in his article *Basic Law: The Government in its Original Form – Theory and Practice*, 3(2) MISHPAT UMIMSHAL 571, 589-590 (written in memory of the late Prime Minister Yitzhak Rabin), and saw them as "an absolutely improper situation from both a legal and public point of view", which "empties the concept of responsibility of any material content" (*ibid*., p. 590).

In his book MAKING OUR DEMOCRACY WORK (2010), Associate Justice of the United States Supreme Court, Prof. Stephen Breyer, asserts that in such situations, it is the role of the Court *to put things right in order to allow democracy to function*, as is required by the Constitution, and as is expected of leaders by the citizenry.

B. *The Legality Principle*

36. The legality principle states that an administrative authority has only the powers granted it by law (see: HCJ 5936/97 *Dr. Oren Lam v. Mr. Ben Tzion Dal, Director General of the Ministry of Education, Culture and Sport*, IsrSC 53 (4) 673 (1999) [http://versa.cardozo.yu.edu/opinions/lam-v-dal] (hereinafter: the *Lam* case); HCJ 1405/14 *Prof. Shimon Slavin v. Deputy Director General of the Ministry of Health* (Aug. 7, 2014) (hereinafter:

the *Slavin* case); HCJ 6665/12 *E-CIG Ltd. v. Director General of the Ministry of Health* (Dec. 12, 2014) (hereinafter: the *E-CIG* case)).

According to the approach presented by Prof. Itzhak Zamir in his book THE ADMINISTRATIVE AUTHORITY, vol. 1, 73 (2nd expanded ed., 2010) (Hebrew), the said principle derives from the very nature of democracy, stating:

> Democracy grants sovereignty to the people. It is the people who grant the Government, and every other administrative authority, whatever authority they hold. It does so by means of laws. The powers that the law grants an authority are all the powers that the authority has. Thus, the law is not only the source but also the limit of every function and every power of every authority.
>
> There are two aspects to the principle of legality in administrative law: the principle requires that every administrative act first be authorized by law, and second, be in accordance with the law [*ibid*., p. 73; and also see: CA 1644/04 *Ramle Municipality v. Banks' Clearing House Ltd.*, IsrSC 60 (3) 330 (2205); and see: DAPHNE BARAK-EREZ, ADMINISTRATIVE LAW, vol. 1, chap. 4 (2010) (Hebrew)].

From a constitutional perspective, this principle has a number of exceptions, the most important of which for the matter before us is that which may legitimate an administrative action when, and only when, the action is *required* by constitutional implication, and the constitution does not expressly deny such authority (see: Barak, *On Implication in a Written Constitution*, pp. 18-19).

37. In the matter before us, even the Respondents agree that after the repeal of sec. 33(d) of the former Basic Law: The Government, the Prime Minister does *not* have express authority generally to serve as a minister in charge of a ministry, as well, while on the other hand, as I believe I have adequately explained above, such authority is not only not required by any constitutional implication, but rather it is *contrary* to constitutional implication, inasmuch as we are concerned with a negative arrangement. It also impairs the *principle of separation of powers*. Moreover, even according to the alternative view – which holds that there is a positive implication – under the circumstances, it does not have the power to overcome the *legality*

principle, nor does it fall within the *exception* to the principle. Moreover, the arrangement implied by analogy *deviates from the original constitutional arrangement* (which is restricted to situations of necessity, and limited to a period of only three months).

C. *The Subservience of Institutional Basic Laws to Basic Rights*

38. Basic Law: The Government (like the other Basic Laws) is a chapter in Israel's constitution, pursuant to the approach delineated by the "Harrari Decision".[4] As such, it is integrated with the other *institutional Basic Laws* (Basic Law: The Knesset and Basic Law: The Judiciary), from which we derive the *principle of the separation of powers*, as well as with the *value-based Basic Laws* (Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation), which ensure the individual's basic rights (from which the various subsidiary rights are derived).

39. Under sec. 11 of Basic Law: Human Dignity and Liberty, and sec. 5 of Basic Law: Freedom of Occupation, all governmental authorities are required to respect the rights granted by these Basic Laws. Thus, the prime minister and the government must respect, *inter alia*, freedom of speech and freedom of the press, which were recognized as constitutionally protected subsidiary rights that are of sufficient importance to void a law repugnant to them, insofar as the violation does not meet the requirements of the Limitation Clause (see: HCJ 5239/11 *Avneri v. Knesset* (April 15, 2015) [http://versa.cardozo.yu.edu/opinions/avneri-v-knesset]).

To continue the description and analysis, we would note that in the current Government, the Prime Minister also assumed the position of Minister of Communications, which is the only ministry for which he did *not* appoint a deputy minister.

This comprises two flaws:

(a) As the head of the Executive Branch, the Prime Minister's serving as Minster of Communications would appear to violate the separation of powers, inasmuch as the modern world views the communications media as a kind of fourth branch. This conduct presents an improper return to the days when the Israeli Prime Minister's Office was in charge of the

[4] Trans. note: On Israel's constitution and the Harrari Decision, see: CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village*: http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village.

electronic media, and the matter was viewed as impairing democracy. It also ignores the fact that laws were passed to ensure the *independence* of the Public Broadcasting Authority, as well as of the Second Authority, which supervises private radio and television broadcasting.

(b) The matter violates *freedom of the press* as a *basic right* without meeting the requirements of the Limitation Clause. In this regard, I would recall that from early on the press and journalists are not subject to, and do not require any material licensing for their occupation (see and compare: HCJ 5627/02 *Saif v. Government Press Office*, IsrSC 58 (5) 70, 76 (2004) [http://versa.cardozo.yu.edu/opinions/saif-v-government-press-office]); HCJ 10324/07 *Shurat HaDin v. Government Press Office* (July, 1, 2008); the *Slavin* case; the *E-CIG* case; also see: YISGAV NAKDIMON, JOURNALIST'S PRIVILEGE, 165-174 (5773-2013); SHIRAN YAROSLAVSKY-KARNI & TEHILLA SHWARTZ-ALTSHULER, REGULATING THE CONFIDENTIALITY OF JOURNALISTIC SOURCES IN ISRAEL, 77 (Policy Papers 104 – Israel Democracy Institute, 2015) (Hebrew)).

40. The above example is just one of many situations that could result from double roles, and I will not, therefore, provide further examples. Nevertheless, inasmuch as we now live in a "global village", I deem it proper to refer to additional comparative law material, and the lessons learned therefrom. I shall do so in the following subchapter.

Additional Parallels from Comparative Law

41. An examination of other democratic states in regard to a prime minister serving as a minister in charge of a ministry reveals that this is unacceptable in countries (like Australia and Denmark) in which there is no express authority (in the constitution) (as opposed to New Zealand and Poland, for example, where the constitution includes an express provision as we had in sec. 33(d) of the former Basic Law: The Government), for reasons similar to those that I presented above for prohibiting such a dual role. I would, however, note that in Nigeria, the head of the Executive Branch, Mr. Muhammadu Buhari (who is titled "President") recently appointed himself (Sept. 2015) Minister of Energy (due to the turmoil in the world energy market), without express constitutional authority, but the matter led to a constitutional crisis that has not yet been resolved.

42. The Respondents attempted to offer two replies to these arguments:

(a) The Prime Minister's appointment as a minister in charge of the ministries he assumed was ratified by the Knesset in voting confidence in the Government when it was presented by the candidate for prime minister.

(b) The practice of the prime minister serving as a minister in charge of a ministry is a constitutional custom that should be recognized as valid.

With all due respect, these arguments are unfounded, as I shall explain.

A Vote of Confidence by the Knesset cannot validate an Absence of Authority

43. The accepted view in constitutional and administrative law is that a Knesset *decision* is not a law, and therefore, it cannot deprive this Court of its authority to review the constitutionality of the reviewed conduct in a case of deviation from authority (see: HCJ 157/63 *Buchsbaum v. Minister of Finance*, IsrSC 18 (1) 115, 131 (1964); and see: BARUCH BRACHA, ADMINISTRATIVE LAW, vol. 1, 244 (5747) (Hebrew)).

We should note that it was held in the past that an absence of authority could be remedied by *means of a law* (see; HCJ 243/52 *Bialer v. Minister of Finance*, IsrSC 7 424 (1953)), however that holding was the subject of severe scholarly criticism (see: Hans Klinghoffer, *On Emergency Regulations in Israel*, in HAIM COHN (ED.), PINCHAS ROSEN JUBILEE VOLUME, 86 (1962) (Hebrew); Benjamin Akzin, *The Bialer Decision and the Israeli Legal System*, 10 HAPRAKLIT 113 (5714); on the entire issue, also see: AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, vol. 2, *Government Authorities and Citizenship*, 947 (2005); and recently: HCJ 4374/15 *Movement for Quality Government in Israel v. Prime Minister*, paras. 123 and 128 of the opinion of my colleague Deputy President E. Rubinstein (March 27, 2016)).

It should be further noted that, in any case, today, even ratification by means of legislation is not of decisive effect, inasmuch as a law can now be voided for repugnance to the Limitation Clause. However, there is some significance to a Knesset decision, as in consideration of the decision, the result will be one of *relative voidness*, which will prevent the annulling of actions taken prior to the declaration of voidness by the Court.

44. I will now proceed to examine whether the Respondents' "last line of defense", regarding the constitutional practice followed in the past, justifies their approach.

Chapter V: Rejecting the Argument that Constitutional Custom can authorize the Double Role

45. The Respondents argue that prior to the various iterations of Basic Law: The Government, during the period it was in force, and after the entry into force of the current Basic Law: The Government, it was the constitutional practice that, from time to time, the prime minister also served as a minister in charge of various government ministries. That, in their opinion, is sufficient to sanction the said conduct.

46. With all due respect, the Respondents do not accurately portray the legal situation in this regard. Where there is a written constitution, a constitutional custom *does not* have the power to *add* to the provisions of the constitution and create *ab nihilo*. A constitutional custom can, at most, lead to the ignoring of a constitutional provision that has become a dead letter due to lengthy disuse: see: Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. OF COMP. LAW 641 (2104), where the author writes in this regard:

> Statutory desuetude occurs when some combination of the sustained non-application of a law, contrary practice over a significant duration of time, official disregard and the tacit consent of public and political actors leads to the implicit repeal of that law. By analogy, constitutional amendment by constitutional desuetude occurs when an entrenched constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by preceding and present political actors [*ibid*., p. 644].

To this end, the author cites with approval the approach of Prof. David Law, who referred to such constitutional provisions that have come to be ignored due by custom as "Zombie provisions" which "endure in a formal sense but are for all intents and purposes, dead" (see: David S. Law, *The Myth of the Imposed Constitution*, in DENIS J. GALLIGAN & MILA VERSTEEGS (EDS.), SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTION, 239, 248, 250 (2013); and see: Prof. Shimon Shetreet, *Custom in Public Law*, in ITZHAK ZAMIR (ed.), KLINGHOFER VOLUME ON PUBLIC LAW, 375, 399 (1993) (Hebrew)).

47. The decisive proof that the above is correct can be found in the Partial Judgment in regard to the institution of "Deputy Minister with the status of a Minister", which we *invalidated* even though it was a constitutional custom.

This applies here *a fortiori*, in view of both the repeal of sec. 33(d) of the former Basic Law: The Government, and the multiplicity of ministerial positions that the Prime Minister currently holds, which testify that we are on a slippery slope on which the *increased quantity becomes qualitative and nullifying* (and compare: HCJ 910/86 *Ressler v. Minister of Defence*, IsrSC 42 (2) 441 (1988) [English: http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf]); HCJ 5016/96 *Horev v. Minister of Transportation*, IsrSC 51 (4) 1 (1997) [http://versa.cardozo.yu.edu/opinions/horev-v-minister-transportation]); HCJ 3267/97 *Amnon Rubintein v. Minister of Defence*, IsrSC 52 (5) 481 (2001) [http://elyon1.court.gov.il/files_eng/97/670/032/A11/97032670.a11.pdf]; HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset*, IsrSC 61 (1) 619 (2006); HCJ 6298/07 *Ressler v. Knesset* (Feb. 21, 2012) [http://versa.cardozo.yu.edu/opinions/ressler-v-knesset]); HCJ 6051/08 *Rosh Pina Local Council v. Minister of Religious Services* (May 8, 2012)).

Moreover, in the past, the claimed constitutional custom was invoked (usually by prior declaration) for a *limited period*, whereas in the case before us, there was no undertaking by the Respondents to terminate the situation, as was the case, for example, in HCJ 7375/06 and HCJ 9617/06, above, and in the example cited by my colleague the President in para. 10 of her opinion.

We have thus arrived at the summation and conclusion stage, which will briefly be presented in the following chapter.

Chapter VI: Summary and Conclusions

48. What follows from all the above is:

(a) Interpreting the constitutional text from within shows that the current Basic Law: The Government provided *no* basis for the possibility of the prime minister serving as a minister in

charge of a ministry (and needless to say, appointing deputy ministers for himself, as such), while simultaneously serving as prime minister.

(b) The theory of implied constitutional interpretation, and the indicators that serve to uncover the said implication, lead to the conclusion that we are not concerned with a *negative arrangement* in regard to serving in double roles, nor with a positive implication that would permit it. This can be derived from the constitutional history of the amendments to Basic Law: The Government, and was also echoed in the arguments of the Petitioners who first raised this matter before the Court, as well as in prior case law. In addition, the constitutional values grounding these matters, and the lessons learned from comparative law, all lead to the same understanding. Moreover, even if we were concerned with a positive implication, the present situation deviates from the "model arrangement" established under sec. 24 of the current Basic Law: The Government, which is limited to a period of only three months.

(c) A constitutional custom does not have the claimed power to maintain the conduct challenged in the Petition.

(d) The above conclusions are based, *inter alia*, on:

(1) The appropriate status of the prime minister in accordance with the current Basic Law: The Government, under which he is meant to act as a "Democratic Prime Minister", and as a "conductor" of an "orchestra of ministers" (and not as one of the musicians);

(2) The burden borne by the prime minister by virtue of his statutory duties, and the need to ensure his "neutrality" in regard to the ministers and the ministries so as not to find himself in an improper institutional conflict of interests.

(e) The above conclusions are supported by the principle of the separation of powers and by the legality principle, and are required by the necessary subservience to such basic constitutional values as freedom of the press.

49. In the United States, the above truths were already clear in 1789, when President George Washington thought fit to observe:

> The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and

> appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust [30 WRITINGS OF GEORGE WASHINGTON, 333-334 (May 25, 1789) (John C. Fitzpatrick ed., 1939)].

Our own sources predate that in saying: "If you grasp a lot, you cannot hold it; if you grasp a little, you can hold it".[5] Our leaders would do well to act accordingly.

Chapter VII: Responses and Comments to my Colleagues' Opinions

50. I have just received the opinions of my colleagues Deputy President E. Rubinstein, Justice S. Joubran, and Justice N. Hendel, as well as the additional comments that my colleague the President wrote in response to my approach and the positions of my colleagues. These important matters require comment, and I will do so briefly.

51. My colleagues share the President's view that Basic Law: The Government, in its current form, does not deny the Prime Minister authority to serve simultaneously as a minister in charge of a ministry. However, my colleagues Deputy President E. Rubinstein and Justice N. Hendel, and to a certain degree, my colleague Justice S. Joubran, as well, are of the opinion that the bounty of portfolios currently held by the Prime Minister could possibly lead to a situation of unreasonableness that could result in an absence of authority.

52. After carefully reading all the above opinions, I have not changed my view that we are already confronting a situation of lack of authority, for the many reasons that I set out above. But in view of the position of my colleagues, I am willing to concur in the approach of Deputy President E. Rubinstein, which my colleague Justice N. Hendel also supports, that the Petition be denied subject to issuing a "warning of voidance" to the Respondents (as we did in the *Medical Association* case).

My colleague Deputy President E. Rubinstein takes the view that the prime minister's serving in the additional role of a minister (Minister of Defense, or Minister of Foreign Affairs, or any other ministry that requires his special attention) is possible in terms of authority and discretion, inasmuch as it is not unambiguously prohibited by the current Basic Law: The

[5] Translator: TB Rosh HaShana 4b; Yoma 80a.

Government, and has precedent. My colleagues Justices N. Hendel and S. Joubran ask that we not take a decisive stand on the issue of the number of ministries that a prime minister may hold, inasmuch as the Petition concerns the prime minister's *authority* to serve as a minister in charge of a ministry, in addition to his role as prime minister, and not the *reasonableness* of his appointment to a number of government ministries. However, they, too, are of the opinion that the *scope* of the use of that authority may justify this Court's intervention in the future. Therefore, my colleague Justice N. Hendel thought as I that it would be proper to issue an order nisi in the Petition, and he is even willing to issue a "warning of voidance", as proposed by my colleague the Deputy President.

53. In light of the above – and due to the need to express the overall consensus of the different opinions – I am willing, in the alternative, to join in the approach of my colleague Deputy President E. Rubinstein that we issue a "warning of voidance" to the Respondents. A similar consensus approach was adopted in CFH 3993/07 *Jerusalem Assessment Officer v. Ikafood Ltd*. (July 14, 2011), in which my colleagues (then) Justices M. Naor and E. Rubinstein and Justice S. Joubran joined in the operative result proposed by my colleague Justice E. Hayut, without retracting their principled opinions in regard to the matter before the Court in that case.

I would further note that some sub-constitutional support can be found for the approach of my colleague the Deputy President in the provision of sec. 8 of the Service in the Military Reserves Law, 5768-2008 (enacted before the decision in the *Medical Association* case, and prior to the recent amendments to Basic Law: The Government). The said provision *assumes* the possibility that the prime minister will also serve as Minister of Defense, and establishes as follows:

> 8. (a) Notwithstanding the provisions of sections 6 and 7, in emergency circumstances and being convinced that State security requires it, the Minister [the Defense Minister – H.M.], with the approval of the Government, may –
>
> > (1) Order the call-up of any reserve soldier for reserve duty, as established in the order, at a time and place indicated in the order, to report and serve in reserve duty for as long as the order remains in force;

(2) Authorize, by order, a calling-up officer or appointee, to call up a reserve soldier to report and serve as aforesaid in paragraph (1).

(b) (1) If the Minister is convinced that, due to the urgency of the matter, a reserve soldier must be called up for service under subsection (a) before it is possible to obtain Government approval, he may, with the consent of the Prime Minister, issue a call-up in emergency circumstances without the said approval. *If the Prime Minister is serving as Minister of Defense, he shall consult with the Deputy Prime Minister, if one has been appointed*;

(2) If the Minister acted under the provisions of paragraph (1), he will immediately notify the Government, and it may approve the call up with or without changes, or not approve it. If the Government approve the call up for service, it will be deemed to have been approved in advance by the Government in accordance with the provisions of subsection (a). Such a service call-up shall terminate seven days after its issuance, unless approved by the Government before then.

(c) As soon as possible, and no later than 48 hours from its issuance, an order in accordance with subsections (a) or (b) will presented by the Minister for the approval of the Committee, which may approve it with or without changes, not approve it, or bring it before the Knesset. Such an order will terminate after 14 days of the day of its issuance, unless approved by the Committee or by the Knesset before that [emphasis added – H.M.].

I also find it appropriate to note – in regard to the orchestral conductor model that I mentioned earlier – that there are a few conductors who, in addition to conducting, also play one (and only one) instrument along with the orchestra, but these are a very rare exception that actually testifies to the rule.

54. My colleague Justice N. Hendel is of the opinion that in the interim – while the "warning of voidance" is in force – the constituent authority can amend Basic Law: The Government, and state its opinion on the matter. I do not reject that approach, and I even expressed a similar view in the *Medical Association* case. I also agree that the call to the constituent authority to frame the

basic structure of the Israeli regime in Basic Laws is not to be understood as an order. However, his further holding that, in any case, we do not have the authority to order the legislature to legislate should be restricted to certain exceptions (see: Aharon Barak, *The Constitutional Right to Protection and the Duty to Respect It* (to be published in 17 MISHPAT UMIMSHAL) (Hebrew); Ronen Poliak, *The Court and the Duty to Legislate* (paper presented at the conference in honor of the retirement of Supreme Court President (Emeritus) Asher Grunis, not yet published (Hebrew)).

15. My colleague the President is of the opinion that we should not issue a "warning of voidance", inasmuch as such relief was not requested, and the Respondents were not granted an appropriate opportunity to respond to it. To that my colleague the Deputy President responds:

> "Woe is me because of my Creator [*yotz'ri*] and woe is me because of my evil impulse [*yitzri*]",[6] but remaining silent would, in my view, render our decision as a sort of "certificate of approval" for the existing situation, which is not our intention. "Let me speak, then, and get relief" (Job 32:20) legally speaking, and perhaps also do some good. In any case, if the matter arise again, we will happily hear the arguments of the parties.

In this regard, I add my voice to that of my colleague the Deputy President. There are two reasons for this:

(a) If, for example, the parties do not raise a relevant legal provision, would our judgment ignore its existence and its consequences for the petition (while denying it), even if only in regard to the future? In my opinion, the rule should be similar in regard to unreasonableness or disproportionality that appears to be revealed before us.

(b) In HCJ 7311/02 *Association for Support and Defence of Bedouin Rights in Israel v. Beer Sheva Municipality* (June 22, 2011) (hereinafter: the *Association for Support* case), the Court majority (Justices A. Procaccia and S. Joubran, Justice M. Naor dissenting) issued an order absolute that appeared to deviate from the order nisi granted in the petition.

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[6] Translator: see, e.g., TB Berakhot 61a. The rabbinic proverb is equivalent to the saying "damned if I do, and damned if I don't".

That result was grounded, *inter alia*, upon the reason that the order absolute could be viewed as a "small part" comprised by the general "whole" of the original order nisi.

Without expressing a conclusive opinion as to the disagreement that arose in that regard in the *Association for Support* case, the matter before us follows that one *a minore ad maius*, as even here we are concerned with a "small part", and moreover, here we are denying the Petition, subject to a "warning of voidance" regarding which – if the matter remains unchanged – the Petitioners can file a new petition in the future, and the rights of the Respondents are reserved for the future proceeding. That is also what we did in the *Medical Association* case, and the concatenation of events that led to the – unanimous – Partial Judgment shows this to be an appropriate approach.

Conclusion

56. In closing, I believe it fitting to recall the lesson taught us by Rashi in his commentary to Genesis 18:2 (*parashat VaYera*), in explaining the reasons for *three* visiting angels appearing before our Patriarch Abraham, by citing Genesis Rabba 50:2:

> One angel cannot carry out two missions.

Deputy President E. Rubinstein:

1. Is the Prime Minister permitted to hold one or more ministerial portfolios in addition to serving as Prime Minister? This is the burning question at the heart of the disagreement between my colleague the President and my colleague Justice Melcer. The Petitioner basis its argument that it is prohibited on the change in Basic Law: The Government that omitted the "historical" provision that permitted a prime minister to serve as a minister (the old sec. 33(d)), and the provision regarding a "temporary" acting minister (the current sec. 24). The Respondents are of the opinion that the world continues to spin on its axis, as it always has, the omission is of no consequence, and the current practice is not contrary to law. I will put the cart before the horse and say that, in my opinion, the current situation tends toward the position of my colleague the

President, and thus would appear to rest on unsound footing if it were considered in terms of reasonableness, inasmuch at that might lead to an absence of authority, as my colleague [Justice Melcer] argues. I will not now set matters in stone, as we have not heard arguments on this aspect, but I would I would apply – and sooner rather than later – the "warning of voidance" issued in HCJ 3002/09 *Israel Medical Association v. Prime Minister* (2009) (hereinafter: the *Medical Association* case), in regard to the institution of a "Minister with the status of a Minister" (para. 41 of my opinion), as I shall briefly explain.

2. My colleague the President presented the history of the subject, and arrived at the conclusion that the current silence of the Basic Law, as opposed to the previous situation "does not constitute a negative constitutional arrangement, but rather a positive constitutional implication" (para. 6), from a broad view of the pre-constitutional history that preceded Basic Law: The Government, constitutional history, and longstanding practice. In her opinion, the arrangement regarding a temporary acting minister does not preclude the "established" authority. In accordance with her approach, the *objective purpose* of the matter, which may be learned, *inter alia*, from the history, requires a fundamental view that a prime Minister is also authorized to serve as a minister in charge of a ministry.

3. As opposed to this, my colleague Justice Melcer is of the opinion that the seeds of the present stage were planted in his opinion in the *Medical Association* case, reached fruition in our Partial Judgment, and in place of the "Deputy Minister with the status of a Minister" that has passed form the world, a redeemer has come to the Ministry of Health in all its glory. In the *Medical Association* case, my colleague expressed the opinion that the Prime Minister could not serve as a minister in charge of a ministry, except for a temporary period (under the said sec. 24), and in any case, could not appoint a deputy minister. My opinion in regard to that comment was, as my colleague noted, that the matter should be examined in the future, and "as the Chinese proverb goes, a journey of a thousand miles begins with a single step" (para. 43 of my opinion). In a wide-ranging survey of Israeli and comparative law, my colleague expressed the view that the very legal assumption (to which I would add: even if it is only theoretical in a rational reality) that the prime minister can fulfill the roles of *all* the ministers (as stated in response to a question posed to the Respondents' attorneys in the hearing before us in this case), empties all content from the provisions of the Basic Law in regard to the nature of the Government as an Executive

Branch (sec. 1), and in regard to the status of the prime minister in relation to the ministers (sec. 5(a)), as the prime minister, by his title and function, is not a "minister" like the others ministers, not "first among equals", but holds a special status that is unlike that of a minister who is "in charge of a Ministry" (sec. 5(c)). My colleagues brings various proofs, which for the sake of brevity, I will refrain from repeating. As opposed to our colleague the President, he is of the opinion that our matter presents an implied negative arrangement, rather than a positive implication, and in his view, the omission of sec. 33(d) from Basic Law: The Government in its current form expresses a negative arrangement, in accordance with the provision in regard to full constructive non-confidence in sec. 28(b) of the current Basic Law. In his view, according to the fundamental values of our system, the heavy burden borne by the prime minister, and the legality principle, the "prime minister is the conductor of an orchestra", and not one of the musicians. He is of the opinion that the customary practice that had been followed until now was limited in time, and in any case it should be declared void, as was the case of a "Deputy Minister with the status of a Minister".

4. My colleague the President replies that the pre-constitutional history that reflects the purpose does not support my colleague Justice Melcer's position in regard to *authority*, and that we are, therefore, concerned with *discretion*, which is not part of the Petition and does not require our decision (such as the subject of the burden borne by the Prime Minister due to the large number of ministries for which he is responsible).

5. Which path shall the interpreter choose? Two decades ago I wrote an article, which was also cited by my colleague Justice Melcer, called "*Basic Law: The Government in its Original Form – Theory and Practice*, 3(2) MISHPAT UMIMSHAL 571 (5756) (Hebrew), which was later reprinted in a slightly revised form in my book PATHS OF GOVERNANCE AND LAW, 79 (5763-2003) (Hebrew). The article was written shortly after I completed seven-and-a-half years of service as Government Secretary in four governments, and included some of the lessons learned in the course of those years. In the meantime, for seven years I sat at the Government table as Attorney General (February 1997 until the end of 2003), and further lessons were learned, which did not change the main conclusions. In that article, I wrote at length about the "game of portfolios", under the title "Responsibility: Distortion and Impropriety", and gave

examples of anomalous situations in the government that I will not revisit here (see my book at pp. 97-98). Among other things, here is what I wrote (p. 98 of the book):

> Another type of impropriety, less in the formal sphere (but eventually, there as well) and more in substance, was reflected in the Prime Minister's holding portfolios like the Ministries of Religion and Interior over an extended period, which prevented true ministerial administration of the ministries, and emptied the concept of responsibility of all material content…The above focuses attention on questions of the culture of governance and respect for the rule of law – a subject that, first and foremost, requires internalizing the values and principles in governmental practice, and is primarily an educational process to which it is doubtful that attention is being paid.

What was thus some decades ago, has grown before our very eyes. Today, the Prime Minister also holds the portfolios of the Ministries Foreign Affairs, Economy, Communications, and Regional Development. Even according to the approach of my colleague the President, which would indeed appear to reflect the objective and subjective intents, to which I shall return, I would say that it is clear that we are concerned with an unhealthy process of problematic exercise of authority, even if the intentions are good and the exigencies substantial. The apparent theoretical possibility of multiple portfolios itself raises concerns. My longstanding opinion, as quoted above, is that in such a situation there is "impropriety, less in the formal sphere (*but eventually, there as well*) and more in substance…" (emphasis added – E.R.). The question is, even assuming authority, can "distortion and impropriety" (as the chapter heading of my article) in the exercise of authority eventually lead to an absence of authority? This is not a legal impossibility. As Justice Mishael Cheshin stated in HCJ 1730/96 *Sabih v. Commander of IDF Forces*, IsrSC 50 (1) 353 (1996), there can be a situation of "an unlawful decision…that is not supported by proper discretion, *a decision that is tantamount to one made in deviation from authority*" (emphasis added; also cited by Justice Mazuz in HCJ 6745/15 *Khalid Abu Hashia v. Military Commander* of the West Bank (2015) para. 16).

6. I find myself confronting a dilemma. The reality, which has expanded before our very eyes since the filing of the Petition, is one in which the Prime Minister holds no fewer than four additional ministerial portfolios for an extended period, as opposed to the brief transition period

permitted by the Basic Law, and shouts concern. It may be that the situation partly derives from real political exigencies of one type or another, but clearly, even if this is proper from a formal perspective, it is materially improper. Are we not approaching the "red line" where unreasonableness translates into an absence of authority? Can one person, no matter how talented – and there is no doubt as to the Prime Minister's talents – who is "the busiest of the busy, the quintessence of busy" (see para. 23 of our Partial Judgment in this Petition) properly attend to such a bounty of roles, each of which, or at least the great majority of which, require the maximal attention of a "full-time position" and more – the Ministry of Foreign Affairs, the Ministry of the Economy, the Ministry of Communication, and the Ministry of Regional Cooperation? Is the public receiving the service it deserves from a minister? It would appear to me that even the Prime Minister – who is more knowledgeable than any other – would not say so, no matter how good and fit the civil servants who bear the day-to-day burden. It is, therefore, highly doubtful that the answer to the question could be in the affirmative. Indeed, there have been various precedents, particularly in regard to a single, important ministerial role, in our nation's history – particularly in regard to the Ministry of Defence during the tenure of David Ben Gurion as the first Prime Minister and Minister of Defense (and Levy Eshkol, as well (until 1967), Yitzhak Rabin, Ehud Barak, and for brief periods, Menachem Begin and Yitzhak Shamir), and the second Prime Minister, Moshe Sharett, also served as Minister of Foreign Affairs. It may be that we should not preclude this possibility, even though times have changed, as have the burdens associated with each of these ministries – which is certainly the case in regard to the Ministry of Defence and the Ministry of Foreign Affairs, speaking from my own personal experience in those Ministries. In terms of what is desirable, my colleague Justice Melcer is correct in bringing examples from other important governments throughout the free world in which the prime minister is the "conductor of an orchestra" but does not also play one of the instruments. We are thus confronted with the question of how to address a situation in which the Prime Minister amasses portfolios, whatever the considerations may be, not merely for a brief transition period, but rather "for the duration".

7. In this regard, I cannot but recall the advice of Jethro to his son-in-law Moses, upon seeing him sit in judgment "from morning until evening" (Exodus 18:13), saying "…What is this thing that you are doing to the people? Why do you act alone, while all the people stand about you from morning until evening?" (18:14). He then warns Moses: "…The thing you are doing is

not right; you will surely wear yourself out, and these people as well. For the task is too heavy for you; you cannot do it alone" (18:17-18). He, therefore, offers the advice: "You shall also seek out from among the people capable men who fear God, trustworthy men who spurn ill-gotten gain. Set these over them as chiefs of thousands, hundreds, fifties and tens" (18:21). Some see Jethro as the first organizational consultant, at least in Jewish law. How appropriate these words are for the situation before us. Jethro's warning to Moses is not only about his own strength, but also about the influence upon the people, as Rashi notes in regard to the words "too heavy for you": "Its weight is greater than your strength". All of administrative theory in one chapter.

8. Here, then, is the dilemma: The Petitioners limited their petition to the question of authority, rather than to that of reasonableness. Therefore, as noted, the issue of reasonableness was not argued before us at all. It is, therefore, problematic to justify the present use and implementation of the theory of unreasonableness evolving into a lack of authority in regard to so sensitive an issue.

9. In the framework of this petition, it would appear that the old legal situation – supported by my colleague the President – must prevail at present. As opposed to my colleague Justice Melcer, I do not believe that the omission of the authorizing provision reflects the legislative intent of the constituent legislator. From my acquaintance with the system, I am of the opinion that we are concerned with an incidental omission of what seemed self-explanatory, as it had been the practice since the 5th of Iyyar 5708[7] that the prime minister fulfilled an additional ministerial role. I would, therefore, not currently view it as a negative arrangement, even though one may certainly be drawn in that direction when confronted with so long a train of ministries coupled to the Prime Minister's engine, and perhaps I would not say so decisively if we were concerned with only one important ministry, and no more. I will not presume to enter into the lofty debate on "implication" of one sort or another. In simple terms, I think it very difficult to assume that anyone in the Knesset thought that the door to an additional ministerial portfolio was closed before the prime minister, and history also presents an "objective purpose", and thus the opinion of my colleague the President. As opposed to this, I doubt that any of the legislators gave any thought to the possibility of a "slippery slope" of an abundance of portfolios, even as matter of common sense. In total, I am of the opinion that we must follow the legal approach of my

[7] Translator: The date of Israel's independence.

colleague the President. However, and without setting matters in stone, I must add a clear warning of voidance in regard to "unreasonableness that evolves into a lack of authority". I believe it necessary that this Court, dedicated to the desire for good governance, give notice of this possibility with a view to the not-so-distant future. As for myself, I am of the opinion that our duty to the lawfulness of the regime requires that we state that if the existing situation remains materially unchanged for a period of – let us say – some eight more months, and is again brought before us for judicial review, the arguments will, of course, be heard with an open heart, but the issue will be ripe for the full review that was not carried out in this petition.

10. As brevity is appropriate following the fine words of my colleagues, I will not go on at length, but will reiterate that while authority appears to exist at present, it verges upon descending into unreasonableness that evolves into a lack of authority, and therefore I believe a "warning of voidance" is appropriate, and better that the situation be corrected earlier, so that it be reasonable, in one way or another, for proper governance. For the present, I concur with my colleague the President.

11. In view of the opinion of my colleague Justice Hendel, I would add: there is justice to his comment (paras. 4 and 5) that a subject that is left largely ambiguous in the current Basic Law: The Government should be clarified legislatively. This also derives from the growing number of tasks placed upon each ministry (see para. 6 of my opinion). This also has consequences for governance and democracy, and in light of his experience and acquaintance with the many responsibilities at his doorstep, the Prime Minister is certainly the first to know this. I say this in the simple terms of the limits of human ability when confronted with mountains of decisions, even beyond the potential questions of conflicts of interests, in order to avoid reaching the "straw that breaks the camel's back". As Deputy President M. Cheshin wrote in CA 1761/02 *Antiquities Authority v. Mifalei Tahanot* Ltd., (2006) para 57, in regard to the implementation of the doctrine of relative voidness, "We should recall and observe: common sense and human wisdom are our best and most loyal friends. We will always have them in our quiver, and in interpreting the law and rendering judgment, we will always hold them in our grasp in order to see whether or not they are nodding in assent".

12. Finally, my colleague Justice Hendel noted (para. 5) the importance of legislation in Jewish law (or perhaps we should say – the importance of the clarity of legislation), and cited

Rabbi A.I. HaKohen Kook in regard to the power of the nation in the absence of a monarchy in Israel – or if you like, the power of democracy. I cited this in my article *Jewish Monarchy versus Dina DeMalkhuta: On Judge Dr. Gershon German's Book "King of Israel: Permanent Sovereignty in light of Halakha and the Status of Knesset Legislation in Halakaha"*, 22 MEKHKAREI MISHPAT 489, 494-493 (5766-2006) (Hebrew). Rabbi Kook's ideas were further developed by Rabbi Shaul Yisraeli, one of the leading Zionist rabbinic scholars, editor of the *HaTorah veHaMedina* anthologies that addressed questions of statehood upon the founding of the State of Israel (see their reprints in BETZOMET HATORAH VEHAMEDINA (Rabbi Y. Shaviv, ed.) (5751), and additional references in my article, and see the lecture of Prof. A. Edrei upon receiving the Zeltner Prize (March 22, 2016)). Democracy is a wonderful idea. Its implementation, and the prevention of its paralysis or disintegration will be achieved, *inter alia*, by a system of laws that enables its translation to a working reality, despite exigencies and difficulties, By this judgment, we hope to contribute to that effort.

13. Lastly, I cannot avoid addressing my colleague the President's comment in regard to a "warning of voidance". "Woe is me because of my Creator [*yotz'ri*] and woe is me because of my evil impulse [*yitzri*]", but remaining silent would, in my view, render our decision as a sort of "certificate of approval" for the existing situation, which is not our intention. "Let me speak, then, and get relief" (Job 32:20) legally speaking, and perhaps also do some good. In any case, if the matter arise again, we will happily hear the arguments of the parties.

Justice S. Joubran:

1. I have read and reread the opposing opinions of my colleagues President M. Naor and Justice H. Melcer, and although the reasoning of my colleague Justice M. Melcer is enlightening, I concur in the opinion of my colleague the President.

2. As my colleague the President explains, the practice of the prime minister serving simultaneously as a minister is an accepted practice in the Israeli governmental system (see paras. 9-11 of her opinion. And see HCJ 3002/09 *Israel Medical Association v. Prime Minister*, para. 2 of the opinion of President D. Beinisch (June 9, 2009)). I agree with her approach according to which the absence of an express provision granting this authority to the prime

minister does not constitute a negative arrangement, but rather a quasi-positive constitutional arrangement. Without following the rich and enriching path of my colleague Justice H. Melcer, it would seem to me that viewing the omission of the authority in the amended Basic Law: The Government (of 2001) as a negative arrangement would require the concrete, knowing consideration of the legislature of the consequences of the change brought about by the amendment's silence (see and compare: HCJ 43/16 *Ometz – Citizens for Proper Administration and Social Justice in Israel v. Government of Israel*, para. 70 of my opinion (March 1, 2016)). This, in particular, when we are concerned with a significant constitutional change that alters a practice deeply rooted in the Israeli system.

3. However, in my opinion, the *scope* of the exercise of this authority is what might justify the intervention of this Court, particularly when we are concerned with an authority that is *implied* rather than express. While, in the past, the prime minister indeed served as a minister – as the Respondent detailed in Appendix R/7 of its response – this generally concerned serving in one, or at most two ministries – generally the Foreign Ministry and /or the Ministry of Defence. In the few instances in which the prime minister served as the minister responsible for three or more ministries, it was only for a limited time, rather than permanently. Thus for example, from the example cited by my colleague the President in para. 11 of her opinion, we can see that then Prime Minister Menachem Begin served as a minister responsible for the Ministries of Welfare, Justice, Transportation and Communications for a "*brief transition period*". In practice, that period indeed continued only for a few months – four in total – from June 20, 1977 until Oct. 24, 1977.

4. In my view, the present situation challenged in the petition, in which the Prime Minister is responsible for a number government ministries for an unlimited period – without express authority under the Basic Law – is problematic. At present, in addition to his broad authorities as first among equals, the Prime Minister also exercises the authorities of several ministries of no insignificant influence. Great, exceptional power is concentrated in his hands, such that in practice, his governance is "governance by the Prime Minister". I would note that I am doubtful that such a situation is appropriate in a democratic regime. To that one might add doubts as to the effective performance of the government when one person amasses ministries, particularly when that person is, as my colleague the Deputy President noted, "the busiest of the busy" (see:

SHIMON SHETREET, THE GOVERNMENT: THE EXECUTIVE BRANCH – COMMENTARY TO BASIC LAW: THE GOVERNMENT 235 (to be published) (Hebrew)).

These fears only increase in view of the fact that the authority is implied rather than express. This is so because, by nature, the borders of implied authority are unclear and are more susceptible to interpretation – a characteristic that, in my opinion, requires greater care in its exercise so it not result in a lack of authority. Similarly, my colleague the Deputy President was of the opinion that while there is authority, the situation threatens to degenerate into one that is unreasonable to the point of an absence of authority. However, as my colleague the President pointed out, we are concerned with a petition challenging the Prime Minister's *authority* to serve as a minister in addition to his role as Prime Minister, and not with the *reasonableness* of his serving as a minister in charge of a number of government ministries. I am of the opinion that such authority – although only implied – indeed exists, and therefore, I see no need to broaden the scope of review at this time.

5. In light of all the above, I concur in the opinion of my colleague President M. Naor.

Justice N. Hendel:

1. On Aug. 23, 2015, a partial judgment was given in this petition, in the framework of which this panel held that the institution of a "Deputy Minister with the status of a Minister" lacked validity, and we ordered that Yaakov Litzman, who then served as Deputy Minister of Health with the status of a minister, cease to serve in that position within 60 days (hereinafter: the Partial Judgment). We are now concerned with another aspect of the petition, regarding the question of the Prime Minister's authority to serve simultaneously as a minister in his own Cabinet.

On May 14, 2015, the Knesset voted confidence in the 34th Government, led by Benjamin Netanyahu, who had decided to retain four government ministries in his own hands: the Ministries of Foreign Affairs, Communications, Health, and the Regional Cooperation. Pursuant to the Partial Judgment, the Ministry of Health was entrusted to Yaakov Litzman. Various ensuing developments led to the transfer of the Economy portfolio to the Prime Minister, such that at the time of this writing, the Prime Minister continues to fill four permanent ministerial

positions. The Petitioner argues that Basic Law: The Government does not permit the Prime Minister to serve as the minister of a government ministry in parallel to his role as Prime Minister, regardless of the size of the ministry, the scope of his activities, or the number of portfolios (hereinafter: parallel service). Therefore, the Petitioner asks that we invalidate Netanyahu's status as a minister in each of the four ministerial positions that he holds.

A disagreement has arisen among my colleagues on this issue. According to the view of my colleague President M. Naor, the silence of Basic Law: The Government should not be deemed a negative arrangement that denies the Prime Minister authority for parallel service. On the contrary, the objective purpose of the Basic Law – as well as the practice's deep roots in Israeli political tradition – show that the legislative silence creates a "positive constitutional implication", and extends the general provisions regarding the appointment of ministers to the Prime Minister, as well. This view was joined by my colleagues Deputy President E. Rubinstein and Justice S. Joubran, each in his own way. As opposed to them, my colleague Justice H. Melcer is of the opinion that there is no avoiding the conclusion that Basic Law: The Government does not authorize the Prime Minister to serve simultaneously as a minister in charge of a government ministry. In his view, an analysis of the various provisions of the Basic Law shows that the prime minister is not deemed a minister, and thus the general arrangements that apply to other ministers cannot be applied to him. In view of the constitutional history and the fundamental principles of the legal system, such as the separation of powers and the legality principle, the Basic Law's silence in the matter should be viewed as a negative arrangement.

After reviewing the material, I am of the opinion that we are concerned with a complex, multifaceted issue. Therefore, were my opinion accepted, we would hereby issue an order nisi instructing the Respondents to explain their position, if only in order to allow for its thorough, comprehensive examination. However, this suggestion was not accepted by my colleagues. On the merits, I have decided to concur in the result arrived at by my colleague the President that the petition, in its present aspect, be denied. However, in my view, we should not suffice with a binary analysis of the status of parallel service. In other words, as I shall further explain, the answer in regard to this practice should not take the form of a red light or a green light, inasmuch as the factual circumstances may lead to a different conclusion in appropriate circumstances. In order that my position be understood properly, some expansion is necessary. At this point, I will

state in a nutshell that my answer to the question of the legality of parallel service is rather a yellow light.

2. Before addressing the implications of the concrete factual foundation, I will preface in stating that my conclusion that the petition be denied requires that we contend with two significant legal hurdles. The first and primary one is the omission of the express authorization provision that previously appeared in sec. 33(d) of Basic Law: The Knesset (1992), which stated: "The Prime Minister may also function as a Minister appointed over an office". The current Basic Law, which was established in 2001, repealing its predecessor, does not comprise a similar provision, which would seem to indicate an intention to deviate from the prior arrangement, and deny authority for parallel service. However, the State's attorney, Adv. Sharon Rotshenker, supplied a convincing response to this argument, explaining in the hearing that the omission should be viewed against the background of the broader revisions of Basic Law: The Government over the years. As she explained, the original Basic Law: The Government of 1968 also did not comprise an express authorization, as there was no need. As opposed to that, the Basic Law established in 1992 adopted the direct-election system, by which the prime minister was directly elected by the public. Due to that change, which introduced a material distinction between the prime minister, who was elected by the public, and the other government ministers, there was a need for the express anchoring of the prime minister's parallel authority to wear a ministerial hat. However, upon the repeal of direct elections and a return to the old parliamentary system in the current Basic Law, the prime minister and his ministers once again stand on an identical normative plane. Therefore, express authorization for parallel service is no longer required. As a result, the omission should not be viewed as intending a negative arrangement. On the contrary, it reflects the idea that "what was", prior to the short-lived transfer to direct elections, is "what will be".

As noted by my colleague the President (para. 8 of her opinion), this conclusion is supported by the fact that there was no reference whatsoever to the subject of parallel service either in the Explanatory Notes of the current Basic Law, or in the course of the its establishment by the Knesset. Inasmuch as we are concerned with a political practice that is nearly as old as the State, the argument that the legislature sought to uproot it offhandedly, without any consideration

of the objectives and consequences of such a step, is far from convincing, particularly when there is an acceptable alternative explanation for the omission.

The second hurdle is that of constitutional implication theory, which, according to my colleague Justice H. Melcer, shows that Basic Law: The Government intended to create a negative arrangement in regard to the matter before us. However, over and above the general complexity of implementing this theory – even in the American legal system where it was born – the following point is salient to its dismissal. My colleague compared the relationship between the constitutional text and its inferred interpretation to the relationship between the Written Torah and the Oral Torah. This comparison is, indeed, useful in explaining the doctrine, but precisely for that reason, and against the background of the accepted practice of Israeli political tradition, it serves to detract from the weight of the doctrine in the matter before us. In other words, the lack of harmony and congruence between the Oral Torah – i.e., the apparent constitutional implication – and the existing custom raises the question whether that Oral Torah is actually an appropriate interpretation of the Written Torah that is Basic Law: The Government, or whether we are concerned with an error by the decisors in understanding the legislative language. Indeed, my colleague impressively described the inherent problematics of the prime minister serving as the minister of a particular ministry – whether due to an erosion of the principle of the separation of powers, or the possible violation of basic rights, or due to various aspects of "practical perception" in regard to the status of a regular minister, and the problem that arises when he is also the prime minister. However, in my opinion, a long road separates a finding that parallel service is undesirable and concluding that there is a constitutional arrangement that prohibits it. In this sense, the existing practice by which prime ministers served as ministers in their governments provides a significant indication that the flaws pointed out by my colleague do not cross the threshold of illegality, and do not translate into a constitutional restriction upon parallel service. And note that I am not arguing that custom "overrides" a constitutional provision. On the contrary, in the spirit of the analogy to the Oral Torah, I believe that it would be appropriate to apply the Talmudic principle that "when any law is unclear before the court and you do not know what is right, go and see what the public does, and act accordingly" (Jerusalem Talmud, Peah 7,5). In the absence of an express provision in the matter – as we see from the disagreement among my colleagues – custom, even if not obligatory, may shed light on the situation and show us the law. That being so, and without taking a stand *de lege*

ferenda, I cannot concur with the opinion of my colleague that the Prime Minister lacks authority to serve as a minister, regardless of the circumstances.

3. The Petitioner chose to put all its eggs in the basket of lack of authority, and refrained from raising arguments against the manner of the Prime Minister's exercise of discretion. The Petitioner's attorney made this unequivocally clear in the hearing on Nov. 11, 2015, responding to a direct question that "I am arguing only in regard to the issue of authority". That being the case, we could end the discussion of the petition at this point, in view of the holding that the appropriate interpretation of the arrangements under Basic Law: The Government, as a whole, point to there being authority, in principle, for parallel service.

However, in light of the fundamental aspects of the issue, and in view of the partial factual grounds presented to the Court, I believe it proper to devote a few words to the grounds of reasonableness and proportionality, so that the result I reached – denial of the petition – not create a mistaken impression in regard to my reasons, and the full legal picture as I understand it. As I stated, in the context of this petition I held that the Prime Minister has the authority, in principle, to serve simultaneously as a minister in his Government. However, as I shall explain, that does not comprehensively permit parallel service. The extent and scope of the parallel service influences its reasonableness, and an extreme deviation from the margin of reasonableness may color it in the future with the colors of a deviation from authority (on the fine line between reasonableness and illegality, particularly in view of the implied nature of the authority for parallel service, also see paras. 5 and 9 of the opinion of Deputy President E. Rubinstein, and para. 4 of the opinion of Justice S. Joubran).

Clearly, we cannot countenance a situation in which a prime minister appoints himself as a minister in all the government ministries, and effectively sit alone at the government table. Such a step would render the institution of the government devoid of all content. Even if, formally speaking, each such ministerial appointment would be valid, the final result would be unacceptable. That would also certainly be the case if the prime minister were to take responsibility for ten ministries. As opposed to this, some would argue that parallel service in one government ministry, in accordance with the longstanding practice, is firmly within the margin of reasonableness. Between these two extremes there is a gray area for which we cannot

establish a hard-and-fast numerical formula. In any case, it is clear that the quantitative aspect is significant for the reasonableness of parallel service.

Along with the number of ministries that a prime minister wishes to run, there is also considerable significance – from the perspective of reasonableness – to their quality, for example, the scope of activity involved in their regard, their centrality to the work of the government, and the extent of their influence upon basic rights. This is so in two aspects. First, it can influence the force of the legal problems involved in parallel service, such as the fear of institutional conflicts of interest among the various roles of the prime minister, harm to the status of the government as an independently functioning body, or a possible erosion of basic rights. Second, an analysis of reasonableness must also attribute importance to more practical considerations. The prime minister bears heavy responsibility for the security and welfare of the citizenry of Israel, and he fulfills a long list of roles by law. There are grounds to fear that adopting an additional heavy burden, in the form of a number of government ministries with a broad scope of activity, will impair his ability to dedicate himself to the tasks he faces, and require that he allocate his resources in a manner that is neither optimal nor efficient. This fear grows as the ministerial burden increases – both quantitatively and qualitatively.

Even the most capable person, with the best intentions, is subject to the limits of time that we all share, and which cannot be modified or expanded. In this regard, it is worth recalling the Biblical story already mentioned by some of my colleagues: When Jethro, Moses' father-in-law, saw that Moses sat alone in judgment, he said to him "What is this thing that you are doing to the people? Why do you act alone, while all the people stand about you from morning until evening?" […] The thing you are doing is not right; you will surely wear yourself out, and these people as well. For the task is too heavy for you; you cannot do it alone" (Exodus 18:13, 17-18). Moses accepted this criticism, proceeded to appoint additional judges, and no longer bore the burden of cases alone. The Hebrew expression "wear yourself out" ["*navol tibol*", literally "wither away"] is borrowed from the plant world, but is true in regard to a person, and even to a person serving as a leader (see and compare the commentary of Rabbi Samson Raphael Hirsch on Exodus 18:18). Thus we find that even if it is hard to establish the limits of ability, there can be no doubt that such limits exists, and it would be best to take that into account both for the good of the country and of the leader.

In summary, the parameters of the dispute set by the Petitioner do not make it possible for us to examine the reasonableness of the Prime Minister's serving as Minister of Foreign Affairs, the Economy, Communications, and Regional Cooperation, and therefore we cannot make a finding as to whether that might constitute a deviation from authority. *In any case, this is not the time for such a decision.*

In view of the problems presented by parallel service – particularly against the background of a multiplicity of hats with vast authority, and the responsibility and burden assumed by the Prime Minister – it would seem that *the time has come* to issue a "warning of voidance" in regard to the unclear legal future of this practice (see Liav Orgad and Shai Lavie, *Judicial Directives: Normative and Empirical Assessmen*t, 34 TEL AVIV UNIVERSITY LAW REVIEW 437, 447-449 (2011) (Hebrew) (hereinafter: Orgad & Lavie). In other words:

> The Governmental regime must consider that this judgment, even if it did not result in judicial intervention due to the background described, is a warning sign for the future. What the average person cannot accept as logical and reasonable, and that has another solution, should be resolved in the proper way, that is fair to all and that realizes the spirit of the law [HCJ 3002/09 *Israel Medical Association v. Prime Minister*, para 41 of the opinion of Deputy President E. Rubinstein (June 9, 2009) (hereinafter: the *Medical Association* case)].

This is how this Court acted in the *Medical Association* case, when it explained that the institution of a deputy minister acting as a minister "is an institution that is approaching the end of the road", and that there is no alternative to appointing a "minister in all its ways and means" (*ibid*.). As may be recalled, the warning given in that matter became an order in the Partial Judgment in this petition. In this case, we cannot hold that the Government must act in a specific way, such as the absolute rejection of parallel service, inasmuch as – as I noted above – the margins of reasonableness and proportionality may justify less comprehensive arrangements. In addition, here we are giving the authorities an opportunity to consider a legislative amendment that would arrange the matter of parallel service by filling in what is lacking, and not merely by relating to the existing law. In these ways, the issue of parallel service differs from that of the status of a deputy minister, regarding which the warning of voidance comprised a clear directive in regard to the desired action – absolutely annulling the institution. Nevertheless, there is more

in common than what divides: in both cases it became clear that the conditions for granting operative relief had not yet ripened, the questions in regard to the legality of the practice could lead to future judicial intervention, and therefore it is appropriate that we grant the governmental authorities an opportunity to develop a balanced arrangement.

I therefore concur with the position of my colleague Deputy President E. Rubinstein that "if the existing situation remains materially unchanged for a period of – let us say – some eight more months, and is again brought before us for judicial review […] the issue will be ripe for the full review" (para. 9 of his opinion). While the arguments of my colleague Justice Melcer do not, in my opinion, lead to a conclusion that the Basic Law entirely prohibits authority for parallel service, they ground and reinforce a cause of unreasonableness to the extent that, in certain circumstances, the unreasonableness of parallel service may be tantamount to a deviation from authority. Therefore, it is appropriate that we follow the course set in the *Medical Association* case, and issue a warning of voidance.

4. Another significant reason for my decision is to be found in the general conception of the proper status of legislation in the State of Israel. In his book THE DIGNITY OF LEGISLATION, New Zealand scholar Jeremy Waldron – one of the leading thinkers in the areas of political philosophy and the philosophy of law – argues that, normatively and conceptually, the institution of legislation should be viewed as a "dignified mode of governance and a respectable source of law" (p. 2). In his opinion, in view of the permanent lack of societal agreement on certain issues, decision-making by means of an elected body is "not just an effective decision-procedure, it is a respectful one" (*ibid*., p. 158). This is the case because it respects the existence of different views about the "truth" (even if it may be absolute), and grants them all equal standing.

For my part, I would like to take the idea of "dignified" legislation in a different direction. The dignity of legislation can be viewed, to some extent, like a promissory note. Recognition of the dignity of legislation raises expectations for corresponding conduct by the legislature, i.e., recognition of the importance of its exercise of the decision-making process, and anchoring its decisions in clear, detailed legislation. Over 200 years ago, Thomas Jefferson – one of the Founding Fathers of the United States, the principal author of the Declaration of Independence, and the third President – addressed the vital need for establishing rules, regardless of their content, noting:

> Whether these forms be in all cases the most rational or not, is really not of so great importance. It is much more material that there should be a rule to go by, than what that rule is that there may be an uniformity of proceeding in business, not subject to the caprice of the Speaker, or captiousness of the members. It is very material that order, decency and regularity, be preserved in a dignified public body [THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE, Sec. I (2nd. Ed., 1812)].

While this refers to the need for establishing a legislative procedure, it also points to the importance of establishing clear procedures that do not allow for fleeting caprice or changing needs, but rather provide for clear, dignified decisions upon the relevant questions.

Other thinkers who have addressed the characteristics of legislation, among them Joseph Raz – a prominent philosopher of law, ethics and politics – have pointed to the basic need for creating clear legislation that enables people to plan their conduct intelligently:

> All laws should be prospective, open, and clear. One cannot be guided by a retroactive law […] The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it [JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979)].

If that is the case in regard to ambiguous law, then absolute silence – which leaves the public and the courts in a fog – is all the more problematic. The disagreement among my colleagues on the question of interpreting the legislative silence in regard to parallel service, including the position that entirely rejects the authority, testifies to the importance of an explicit arrangement of the matter. In fact, in the matter before us, this is of even greater importance inasmuch as the issue of parallel service affects the foundations of the structure of the Israeli regime, and requires an in-depth examination of the relationship between the prime minister and the institution of the Government. As Israel approaches its 68th birthday, we can expect that the process of the development and maturing of Israeli law will lead to a clear, lucid institutionalization and arrangement of the structure, powers and relationships of the governmental authorities.

5. I would add that Jewish law emphasizes the practical importance of legislation, and the need for establishing clear, detailed arrangements for guiding the public, and particularly the Executive authority. Thus, the Torah requires that a King of Israel "when he sits on the throne of his kingdom, he shall write for himself in a book a copy of this law […] and it shall be with him, and he shall read in it all the days of his life […] keeping all the words of this law and these statutes, and doing them" (Deut. 17:18-19; and see SEFER HACHINUCH, Mitzva 503).

"Translating" this into 21st century language shows us that Jewish law ascribed great importance to creating a detailed, obligatory legislative framework, for reasons similar to those noted by Jefferson: the need to ensure that the Executive Branch not act on the basis of passing whims, while exploiting its great power, but rather subjugate its discretion to transparent, clear, uniform rules. In effect, the requirement that the king always have the entire Torah with him, in all its 613 mitzvot – and not, for example, just the Ten Commandments – demonstrates that loosely anchored principles are insufficient. The Executive must be provided with detailed legislative protocols that define its path. Of course, the requirement that the king read the Torah all the days of his life shows the need for the Executive to internalize the legislative procedures.

Another aspect of Jewish law relates to the role of the Knesset. About a hundred years ago, Rabbi Abraham Isaac HaKohen Kook – later the Chief Rabbi – established the rule that "because the laws of the realm also relate to the general situation of the public, in the absence of a king, those legislative rights revert to the people as a whole". Rabbi Kook explains that the elected representatives of the people – which, I would add, now means the Knesset – fulfil the role of the king (RABBI ABRAHAM ISAAC HAKOHEN KOOK, RESPONSA MISHPAT KOHEN, 144, para. 15 (Hebrew)). The requirement that the king write and read the Torah, and keep it with him, thus emphasizes the "duty" of the Knesset not only to protect the rule of law, but also to establish it in appropriately detailed arrangements that will guide the public.

Of course, the gap between the ideal and the real is unavoidable, and any expectation of the immediate, full arrangement of every matter in primary legislation is unrealistic – certainly in view of modern reality. However, the State of Israel is nearly seventy years old, but we have not yet been provided with a comprehensive legislative arrangement of the regime, the various governmental authorities and the relationships among them – as we see from the matter before us. Although I do not agree with the result that my colleague Justice H. Melcer reached, his

thorough and enlightening opinion highlights the current deficiency, and demonstrates the ambiguity created by the silence of the constituent authority on an issue of primary importance. An examination of the current Basic Law: The Government shows that there is appropriate attention to detail in some matters. Thus, for example, the eligibility rules for ministers are defined (sec. 6), the number of ministers in the Government is limited (sec. 5(f)), there are arrangements for the termination of ministerial tenure and for replacing a minister (secs. 22-24). However, the above discussion demonstrates that, to a large extent, primary issues are absent. Can the prime minister serve as a minister? Can he serve as the only minister? Is there a minimum number of ministers? Answers to these questions can be supplied by general legal doctrines, as we have done in the matter of this petition. However, as we approach the span of a life (Psalms 90:10), it would be fitting that the State address the matter of parallel service in clear, express legislation.

I would emphasize that this is particularly so in regard to the matter at hand – delineating the fundamental character of the Executive Branch, including such basic elements as defining the status of the prime minister, and the relationship between him and the members of the Government. It is but proper that the fundamental structure of the Israeli regime be given express, coherent constitutional expression, rather than be created by ad hoc judicial precedents that are not founded upon the express directives of the Knesset.

6. Indeed, as this Court has repeatedly explained, we do not have the authority to order the legislature to legislate (HCJ 4491/13 *Academic Center for Law and Business v. Government of Israel*, para. 48 of the opinion of President A. Grunis (July 2, 2014)). However, calling upon the legislature – or more precisely, upon the constituent authority – to anchor the fundamental structures of the Israeli regime in the Basic Laws is not an order. On the contrary, it is "judicial advice" intended to improve, advance and clarify the constitutional core (see Liav & Orgad, pp. 441-445) in an attempt to achieve a delineation of a reasonable, balanced arrangement that will limit the gray area, and thereby lessen the extent of judicial intervention in regard to the matter of parallel service.

There is nothing new in our holding in regard to the possible connection between extreme unreasonableness and deviation from authority, as the matter is well-founded in the case law. In this sense, implementing the warning of voidance relies upon a legal analysis of the issue. Along

with this, we should emphasize that the warning does not order the legislative arrangement of the matter of parallel service. It is motivated by the desire to limit judicial intervention, and expresses both respect for the legislative institution (in the spirit of Waldron, cited above), and the value of mutual respect among the authorities – constituent, legislative, and executive. Exposing the warning signals that light up, permits the Knesset and the Government to make a timely choice of a course of action that may render future judicial intervention unnecessary.

To state it more concretely, my opinion is that it is possible to contemplate judicial intervention in regard to the subject of parallel service on the basis of the quality and quantity of the ministries held by the Prime Minister, on the basis of unreasonableness that translates into a lack of authority. In the absence of an express constitutional arrangement, there is a vacuum that, as a rule, leads to a broadening of the Court's discretion. In view of the importance of the issue of parallel service, we may have no choice but to conduct future judicial review of the matter. However, from my perspective, it would be better if the Knesset were to express its view, as comprehensively as possible, in order to clarify the legal situation, reduce the need for future review, and at the very least, reduce its scope. Thus, for example, an arrangement that would expressly address not only the general authority for parallel service, but also the number and nature of the portfolios that a prime minister may hold, and the conditions therefor, would contribute to directing the practice, and to governmental stability and development.

7. Lastly, I would like to respond briefly to the opinion of my colleague President M. Naor (paras. 23-25 of her opinion), who is of the opinion that it would not be appropriate to issue a warning of voidance, and that an examination of the subject of the exercise of discretion, as opposed to the existence of authority for parallel service, deviates from the arguments presented in this petition. I will begin with the practical aspect. Even had a warning of voidance not been issued – and precisely because the ground of reasonableness was not addressed before us, as my colleague rightly emphasized – it would be possible to file a new petition focused upon this point immediately following the rendering of this judgment. That being the case, the warning of voidance serves as a kind of "stay of execution" before future petitioners, as it grants the Government a period of eight months for an in-depth examination of the issue of parallel service, including the possibility of addressing it in the Basic Laws, as I emphasized above.

From a legal perspective, we should bear in mind that there are two aspects to the ground of reasonableness (see Margit Cohen, *Unreasonableness in Administrative Law: Comparative Aspects and Some Normative Comments*, in THEODOR ORR VOLUME 773, 792, Aharon Barak & Ron Sokol eds. (2013) (Hebrew); for a different approach, see Itzhak Zamir, *Judicial Review of Administrative Decisions: From Practice to Theory*, 15 MISHPAT VA'ASAKIM 225, 262 (2012) (Hebrew)): one, sometimes referred to as "the new reasonableness", requires that an authority weigh all the relevant considerations deriving from the purpose of the law, and only them, and grant each one its appropriate weight. However, there is another aspect to reasonableness, which might be termed "classic reasonableness", and which is the central to the matter at hand. In referring to this aspect, the case law already stated sixty year ago "that the matter of reasonableness is actually but one of the forms of deviation from authority" (CA 311/57 *Attorney General v. Dizengoff and Associates Ltd*., IsrSC 13 1026, 1037 (1959)). That is the case where clearly extreme unreasonableness is concerned, which clashes with the objective of the relevant law and its purpose.

It is true, as the President noted, that the Petitioner chose not to relate to the ground of reasonableness, including its classical aspect. Of course, it is its right to "bet the house" and argue that the Prime Minister is not authorized, in any case, to serve as a minister – an argument that was even accepted by my colleague Justice H. Melcer. However, we cannot ignore the fact that various arguments presented by the Petitioner – for example, the burden upon the Prime Minister, or the possible harm that parallel service presents to the principle of the separation of powers and the independent status of the Government – have direct impact upon the subject of reasonableness, at least in its classical sense. In practice, both sides related to the hypothetical possibility that the Prime Minister might chose to hold all the ministries – a subject that is certainly relevant to a consideration of the ground of reasonableness. Therefore, even though I found that the Petitioner's arguments were insufficient to deny the authority for parallel service, it is appropriate to examine their potential weight in regard to the interpretation of the *scope* of the authority, such that it be consistent with the demands of reasonableness. Therefore, we are left no choice but to say that arguments that were considered in this Petition in regard to the interpretation of the silence of Basic Law: The Government in regard to parallel service underlie the warning of voidance. "Two hundred includes one hundred", and the remedy of absolute denial of parallel service also comprises the remedy of partial denial, for the same reasons and

upon the same grounds: the difficulties in realizing it, which may have consequences for the interpretation of the Basic Law.

In summary, the ground of reasonableness was not directly raised before us, and therefore, I will not express an opinion as to the concrete, factual grounds that are the subject of the petition. Nevertheless, a principled, theoretical analysis of the issue leads me to the conclusion that we should not erect a wall separating reasonableness from authority, and that the issue of reasonableness constitutes a part of the examination of the question of authority. In my view, issuing a warning of voidance advances the full examination of the subject of parallel service, and is desirable form the perspective of the relevant bodies – from the Government to the constituent authority.

8. In conclusion, I concur with my colleagues President M. Naor, Deputy President E. Rubinstein, and Justice S. Joubran that the petition should be denied, subject to a warning of voidance, as stated in the opinion of the Deputy President, with which Justice Melcer concurred in his alternative position.

Decided by a majority opinion, against the dissenting opinion of Justice Melcer, to deny the petition by reason of the fact that the Prime Minister has the authority to hold additional ministerial portfolios. This, subject to the position of Deputy President Rubinstein and Justices Melcer and Hendel in regard to a "warning of voidance".

Given this 5th day of Nissan 5776 (April 13, 2016).