The Supreme Court sitting as the High Court of Justice

HCJ 6706/14

Before:	The Honorable President M. Naor The Honorable Deputy President E. Rubinstein The Honorable Justice S. Joubran The Honorable Justice E. Hayut The Honorable Justice H. Melcer
The Petitioners:	1. MK Hanin Zoabi 2. Adalah – The Legal Center for Arab Minority Rights in Israel 3. The Association of Civil Rights in Israel
	v e r s u s
The Respondents:	1. The Knesset's Ethics Committee 2. The Chairperson of the Knesset 3. The Knesset
	Petition to Grant an Order *Nisi*
Date of Session:	17th of Kislev, 5775 (December 9, 2014)
On behalf of the Petitioners:	Adv. Hassan Jabarin; Adv. Dan Yakir; Adv. Maisana Morani
On behalf of the Respondents:	Adv. Eyal Yinnon; Adv. Dr. Gur Bligh

J U D G M E N T (R E A S O N S)

President M. Naor:

1. On December 10, 2014, we issued a judgment without reasons in which the Petition was denied by a majority opinion (Deputy President **M. Naor**, Justice **E. Rubinstein**, Justice **E. Hayut** and Justice **H. Melcer**, against the dissenting opinion of Justice **S. Joubran**). In the judgement we ruled that:

> "1. The Petition before us addresses the decision of Respondent 1, the Knesset's Ethics Committee, which determines that Petitioner 1 violated Rule 1A of the Rules of Ethics for Members of Knesset, and instructs that she be removed from sittings of the Knesset's plenum and committees, other than participating in votes, for a period of six months, commencing on July 30, 2014, and ending on January 29, 2015. Approximately half of the period of

removal was during the Knesset's summer recess, which lasted from August 3, 2014, through October 26, 2014.

2. In the Petition, the Court was requested to intervene in and cancel the Ethics Committee's decision regarding the Petitioner. Alternatively, the Court was requested to intervene in the removal sanction that was imposed upon the Petitioner.

3. On November 9, 2014, President **A. Grunis** instructed the Respondents to inform whether they agree that the hearing be held as though an order *nisi* had been issued and based on the material that had been filed at such time. After the Respondents informed that they agree, the President instructed that the Petition be brought before an extended bench of five justices.

4. On December 9, 2014, we heard the Parties' oral arguments.

5. The six month period is meant to end on January 29, 2015. Therefore we have found it to be appropriate to give our ruling now, without reasons. The reasons shall be given separately.

6. By a majority of opinions (Deputy President **M. Naor**, Justice **E. Rubinstein**, Justice **E. Hayut** and Justice **H. Melcer**) and against the dissenting opinion of Justice **S. Joubran**, we rule as follows: There is no place to intervene in the Ethics Committee's decision that the Petitioner violated Rule 1A of the Rules of Ethics for Members of Knesset. As for the sanction: the sanction that was imposed is indeed unusual in its severity compared to sanctions imposed in the past. However, in the circumstances at hand and in light of the Petitioner's harsh words and the timing in which they were spoken, and considering that a significant part of the period of the sanction was during times of recess, we have not found it appropriate to intervene in the broad discretion that is granted to the Ethics Committee. *Inter alia*, we have taken into consideration the fact that two days ago the Dispersal of the 19th Knesset Law, 5775-2014 was legislated. In light of this law, the practical significance of intervening in the sanction is miniscule, if at all existent.

7. Therefore, the Petition is denied. There shall be no order for expenses".

We shall now elaborate on our reasons.

Background

The Complaints Against the Petitioner and Her Responses Thereto

2. The Petitioner is a member of the 19th Knesset on behalf of the Balad party. On June 17, 2014, the Petitioner interviewed on a morning program on Radio Tel Aviv (hereinafter: **the** "**Interview**"). The Interview primarily addressed the abduction of the three teenagers: the late Naftali Frenkel, Gil-Ad Sha'er and Eyal Yifrah, which occurred on June 12, 2014, in the area of Gush Etzion. The Interview was held approximately five days after the abduction, at a time when the teenagers' fate was not yet known. During the Interview the Petitioner said the following:

> "Look, look… I, let's ask a question like this, ah, naively, is it strange that people who are under occupation, who live lives that are not normal, and who live in a reality in which Israel abducts detainees every day, is it strange to you that they abduct? […] They are not terrorists […] Even if I do not agree with them, they are people who do not see any opening […] They are people who do not see any opening to change their reality, and they are forced to use these means, until Israel shall sober up a little, until the citizens of Israel, the Israeli society shall sober up a little and shall see the suffering, feel the other's suffering"

3. On July 13, 2014, in the midst of operation "Protective Edge", the www.felesteen.ps website published an article that the Petitioner wrote, and which had been previously published on the www.arab48.co.il website (hereinafter: **the** "**Article**"). *Inter alia*, the following, was written in the Article:

> "In order for Israel to be convinced that it is not possible to maintain and deepen the occupation, and for it to declare the end of the achievements of the detestable trinity: the fence, the siege and coordination, which it believed turned the occupation into a no-cost occupation absent from the Israeli reality – the Palestinians must declare the end of their own lethal trinity: coordination, negotiations and the internal dispute. We must abandon the lethal trinity and declare a popular resistance instead of security coordination and impose a siege on Israel instead of negotiating therewith, and unity instead of the internal dispute" (a copy of the Article in Arabic and its translation to Hebrew were attached as Exhibit P/5 of the Petition).

4. Following these remarks, a number of complaints were filed with the Ethics Committee against the Petitioner. The main complaint was filed on July 22, 2014, by the Chairperson of the Knesset. In this complaint the Chairperson of the Knesset stated that while he is aware of the Ethics Committee's position that the members of Knesset's freedom of political expression must be protected, he is of the opinion that the Petitioner "has long since crossed any line with respect to the

conduct that is expected of the MKs" and that the many approaches that are directed to him from the public in this matter "indicate that this is not an 'ordinary' case of a harsh or outrageous remark […], but rather continuous provocative conduct, which could materially erode the status of the Knesset in the eyes of the public." The Chairperson of the Knesset's complaint also mentioned a video clip that documents a confrontation between the Petitioner and policemen during a protest. The Ethics Committee decided not to refer to this video clip in its decision, and therefore I shall not address it.

5. The Petitioner filed a response to the complaint. In her response the Petitioner stated that she "completely rejects the vexatious complaint that is indicative of a dominating culture of racism and a need to rule others and oppress their political opinions". The Petitioner added that the complaints against her were filed on political grounds and that "one must not surrender to those who disagree with me and want to silence me and punish me and even retaliate against me." With regard to the things she said in relation to the abduction of the teenagers, the Petitioner stated laconically that "I referred to the context of the sentence in a series of media interviews and I shall not reiterate it again, and I shall ask that the Ethics Committee review them to receive a complete picture". It is not superfluous to note that the Petitioner did not attach the said interviews to her response. Based on her said statement, the Petitioner asked that the Ethics Committee reject the complaint.

The Decision which is the Subject of the Petition

6. On July 29, 2014, the Ethics Committee convened to discuss the said complaints against the Petitioner. The committee decided by a majority of opinions that the two remarks specified above constitute a violation of Rule 1A of the Rules of Ethics (Decision 16/19 of the Knesset's Ethics Committee "In the matter of Complaints against Knesset Member Zoabi" (July 29, 2014)). The committee indeed emphasized that its consistent position is that to the extent possible, the limitation of freedom of political expression of members of Knesset should be avoided; that the members of Knesset's right to express public criticism of the government is maintained also during times of war; and that the mere voicing of harsh criticism on military moves or on government policy during times of war, should not be viewed as a violation of the Rules of Ethics. However, the committee ruled that one must distinguish between legitimate protest – harsh as it may be – and encouraging the enemies of the State and legitimizing acts of terror against its citizens. The committee added that the public in Israel, like in any state, "expects that members of Parliament, who declare allegiance to the State, shall not encourage those who act against it and those who wish to kill its soldiers and citizens and shall not support them […]" (paragraphs 8-9 of the decision).

7. As for the Interview, the Ethics Committee ruled that even though the Petitioner clarified that she does not agree with the abductors, her statement that they are not terrorists and her justification of their actions – especially when the abducted teenagers' fate was yet unknown – constitutes "identifying with enemies of the State" (paragraph 9 of the decision). Regarding the Article, the committee ruled that it is not possible to interpret its content as anything other than "statements which intend to harm the State of Israel, its security and its basic interests" (paragraph 10 of the decision).

8. The Ethics Committee ruled that the Petitioner's words do not coincide with the State's best interest and prejudice the public's trust in the Knesset and the Knesset's image. Therefore, it was ruled that the Petitioner violated Rule 1A of the Rules of Ethics and imposed a sanction of her removal from the sessions of the Knesset plenum and its committees, other than participating in votes, for a period of six months, beginning from July 30, 2014, and ending on January 29, 2015. Approximately three months of the removal period were during the Knesset's summer recess, which lasted from August 3, 2014, through October 26, 2014. On December 9, 2014, the Dispersal of the 19th Knesset Law, 5775-2014, was published in the Official Gazette (*Reshumot*). This law provides that the 19th Knesset shall disperse before the end of its term and that the elections for the 20th Knesset shall take place on March 17, 2015. Consequently, the Knesset Committee decided that an elections recess shall begin on December 11, 2014, lasting until the 20th Knesset convenes (see: Knesset Committee Decision "In the Matter of the Dates of the Elections Recess and the Knesset's Activity During the Recess" (December 10, 2014)). Therefore, the remaining part of the period of removal – over a month and a half – also falls during recess.

9. To complete the picture, it shall be noted that on August 3, 2014, the Petitioner's attorneys requested, "in order to file a petition to the High Court of Justice" against the decision, to review the minutes of the Petitioner's matter and the materials presented to the committee in the process of reaching its decision. On August 7, 2014, the Knesset's legal counsel replied to the request and informed the Petitioner that pursuant to Rule 21 of the Rules of Ethics, the ethics proceedings, including the documents and the minutes in the matter thereof, are privileged. The Knesset's legal counsel explained in his response that the committee recognizes that there are exceptional situations in which public interest requires disclosure of material from its sessions, such as a situation in which the use of the material is required for the purpose of legal proceedings. However, he stated, the exception relates to the circumstances in which the material from the committee's sessions is required for other legal proceedings and not for the purpose of challenging the decision of the Ethics Committee itself. It was elucidated that the committee is concerned about creating a precedent which will adversely affect the ability of committee members to properly fulfill their duties. Therefore, he informed that the committee unanimously rejected the petition to lift the privilege from the minutes of the session, but decided that if indeed a petition shall be filed, it shall provide the minutes of the session in the Petitioner's matter, for the Court's eyes only.

The Petitioner's Appeal of the Decision

10. On August 13, 2014, the Petitioner appealed the Ethics Committee's decision before the plenum of the Knesset. The Petitioner's appeal was filed pursuant to Section 43 of the Knesset's By-Laws, which provides that a member of Knesset may appeal a decision of the Ethics Committee before the plenum, if it decided, *inter alia*, to remove him from Knesset sessions for the duration of four days of sessions, or more.

11. In her appeal, the Petitioner argued that the Ethics Committee acted *ultra vires* and in a manner that is contrary to the principle of freedom of political expression. She

further argued that it emerges from the reasoning of the decision that it is not based on a proper evidentiary foundation, and that the sanction imposed is "as far as is known, the most severe sanction that was ever imposed upon a member of Knesset", due to irrelevant considerations and is disproportionate. The Petitioner requested that the Chairperson of the Knesset schedule an urgent session before the plenum of the Knesset to hear the appeal, and on August 20, 2014, she also sent a reminder letter regarding this matter. On August 25, 2014, the Knesset's legal counsel replied to the Petitioner's letter claiming that the Chairperson of the Knesset does not have authority to convene the plenum of the Knesset during the recess (other than pursuant to Section 9(b) of the Knesset Law, 5754-1994, which empowers him to convene the plenum of the Knesset during recess, in accordance with the demand of 25 members of Knesset or of the Government). Therefore, he informed that it will not be possible to hear the appeal before the beginning of the winter session.

12. The Knesset plenum held a discussion regarding the Petitioner's appeal on October 29, 2014. The Petitioner argued before the plenum, *inter alia*, that the Ethics Committee's decision is unprecedented in its nature and severity and that this is a vindictive and disproportionate decision. The chairperson of the Ethics Committee, Knesset Member Yitzchak Cohen, responded to the Petitioner's statements. In his response, the chairperson of the Ethics Committee reiterated the committee's main reasons, as were expressed in its decision. In the vote that took place thereafter, 16 members of Knesset voted in favor of accepting the Petitioner's appeal, 68 members of Knesset objected and one member of Knesset abstained. Thus, the petition was denied.

The Petition before Us

13. The Petition before us was filed on October 7, 2014, approximately two and half months after the Ethics Committee's decision in the Petitioner's matter and before her appeal had been heard by the Knesset plenum. Therefore, and in light of the Respondents' notice dated October 20, 2014, that the appeal will be heard on October 28, 2014, the Court ruled that it is inappropriate to address the Petition before the Knesset rules on the Petitioner's appeal (Justice **Y. Danziger**, decision dated October 22, 2014). After the Knesset plenum denied the Petitioner's appeal, the discussion regarding the Petition was renewed. On November 9, 2014, President **A. Grunis** instructed the Respondents to inform whether they agree that the hearing be held as though an order *nisi* had been issued and based on the material that had been filed at such time. After the Respondents informed that they agree, the President instructed that the Petition be brought before an extended bench of five justices.

    On December 9, 2014, we heard the Parties' oral arguments.

    The Petitioners' Arguments

14. According to the Petitioners, the Ethics Committee acted *ultra vires* deciding as it did. The Petitioners claimed that the Petitioner's remarks are political remarks, which are protected by the material immunity granted to a member of Knesset under Section 1(a) of the Knesset Members Immunity, Rights and Duties Law,

5711-1951 (hereinafter: the "**Immunity Law**"). The Petitioners claimed that, following the Interview, the Petitioner explained in the media that she objects to causing harm to civilians, and to abduction of civilians in particular. The Petitioners further argued that the Attorney General examined complaints that were filed against the Petitioner following the Interview and deemed it inappropriate to open a criminal investigation into her remarks. To this regard, the Petitioners filed the State's response to the petition in HCJ 5716/14 which was directed against the Attorney General's decision in this matter (the hearing in said petition is scheduled to take place on June 10, 2015). In the aforementioned response it was noted that even though the Petitioner identified with the actions of the abductors, her statements did not amount to incitement to violence. Therefore, the Petitioners argued that the Petitioner's remarks which are the subject of the Petition are part of her freedom of political expression, and as such the Ethics Committee did not have any authority to intervene therein.

15. The Petitioners further argued that while this Court has reiterated in its rulings that the material immunity of members of Knesset does not serve as a defense against sanctions at the ethical level, that case law applies only to inappropriate conduct within the house, or to slanderous remarks against another member of Knesset, an individual or a certain public. Such remarks, so it is argued, relate to managing the internal affairs of the Knesset and the relationship between its members and therefore fall within the authority of the Ethics Committee. The Petitioners draw this argument, *inter alia*, from a principle decision of the Ethics Committee (Decision 2/19 of the Knesset's Ethics Committee "In the Matter of Remarks by Members of Knesset" (July 2, 2013) (hereinafter: "**Decision 2/19**")), which states that, as a rule, complaints regarding political remarks by members of Knesset should not be discussed.

16. The Petitioners argued that the Ethics Committee acted *ultra vires* also by basing its decision on Rule 1A of the Rules of Ethics, which "prescribes general values and principles and is not an operative provision" (paragraph 37 of the Petition). This rule, they claimed, has only a declaratory status and thus it is impossible to impose a sanction due to a violation thereof. The Petitioners claimed that the Ethics Committee is only authorized to impose sanctions in consequence of a violation of Rules of Ethics that anchor specific norms relating to morality, conflict of interest, proper activity of the Knesset and proper conduct in the house. The Petitioners further argued that this is also customary in England. Finally, it was argued that the Ethics Committee is not authorized to determine which remarks are for the benefit of, or contrary to, the State's best interest. In light of all of the reasons specified above, the Petitioners argued that the committee's decision was *ultra vires*.

17. Alternatively the Petitioners argued that the sanction imposed upon the Petitioner is "discriminatory and exceedingly severe" (paragraph 51 of the Petition). The Ethics Committee imposed its most severe sanction and for the longest possible period of time and therefore the Petitioners argued that its decision is disproportionate. According to the Petitioners this can also be deduced from a comparison to the committee's previous decisions which were quoted in the Petition itself, and namely the principle decision in the matter of remarks by members of Knesset (Decision 2/19). It shall be noted that the Petitioners

complained *inter alia*, about the Ethics Committee's refusal to provide them with the minutes of the Committee's session regarding the Petitioner's matter and requested that we instruct that they be delivered thereto. However, in the oral hearing, and due to the need for a quick ruling, the Petitioners' attorney did not insist on this, while reserving all of his arguments.

The Respondents' Arguments

18. The Respondents argued that according to case law, the material immunity does not preclude the Ethics Committee from taking disciplinary actions against a member of Knesset. According to them, particularly in light of the existence of the material immunity, which does not allow for criminal or civil action to be taken against a member of Knesset due to his remarks, it is important to allow the Knesset to deal with such remarks at the ethical level. It was argued that the case law took a principle approach and did not support the argument that the imposition of sanctions for remarks that are covered by material immunity should only be possible in cases where the remarks are harming to collegial relationships between members of Knesset or disrupt the Knesset's proper conduct. The Respondents further argued that the fact that in a long list of decisions, the Ethics Committee recognized the importance of the freedom of political expression granted to members of Knesset, and that it is necessary, to the extent possible, to refrain from limiting it, does not mean that the Committee does not have the authority to impose sanctions for political remarks. This is not a matter of authority, so it is argued, but rather a matter of discretion.

19. The Respondents further claimed that Rule 1A of the Rules of Ethics is not a declaratory rule but rather an operative provision, the violation of which can carry the imposition of sanctions. According to them, the Rules of Ethics include a variety of norms, part of which are designed as rules and part of which are designed as principles (standards) – but all of which are operative. To illustrate their argument, the Respondents stated that Rule 1A was used in the past as a basis for imposing sanctions at an ethical level in a series of cases, both as a single normative source and alongside other rules of ethics.

20. As to the exercise of discretion, the Respondents argued there was no flaw in the conclusion that the Petitioner violated the Rules of Ethics. Especially taking into consideration the broad discretion that is granted to the Ethics Committee in such matters. According to the Respondents, the sanction that was imposed upon the Petitioner is proportionate. The main reason indicated by the Respondents was that the severity of the sanction is commensurate with the severity of the violation for which it was imposed – a severity that stems from the content of the Petitioner's statements and the timing thereof, and which justifies deviating from the lenient policy which the Ethics Committee has exercised with respect to political remarks. The Respondents further argued that the Petitioner's remarks during the Interview "can be perceived as legitimization of and identification with the State's enemies who are carrying out acts of terror against the citizens of the State" (paragraph 70 of the Respondents' response), at a sensitive time – approximately five days after the abduction of the teenagers and at a time when their fate was unknown. The statement that the Petitioner does not agree with the abductors does not diminish the severity of her remarks. It is further argued that the Petitioner's remarks in the

Article can be deemed as a call to harm the State of Israel, in the midst of the fighting in the Gaza strip during the "Protective Edge" operation. The Respondents also claimed that the time the sanction came into effect, which was at the beginning of the Knesset's summer recess, should also be considered. According to the Respondents, practically speaking this was a removal that, when decided, was for approximately three months, since during the recess the Knesset plenum only assembles in rare cases and the majority of the Knesset committees convene relatively infrequently.

Discussion and Ruling

21. The main questions that are presented in this case are whether the Ethics Committee is authorized to impose sanctions against the Petitioner because of her remarks, which in and of themselves are protected by material immunity and which are not among those remarks that are defined as remarks that disrupt the Knesset's work or the internal relationships between its members; and whether there are provisions in the Rules of Ethics that authorize the Ethics Committee to impose sanctions in consequence of such remarks. If such authority exists, this shall lead to an additional question – whether such authority, in the circumstances at hand, was exercised lawfully. I shall discuss the questions in the order of their appearance.

Was the Ethics Committee Authorized to Make the Decision?

22. Section 17 of the Basic Law: The Knesset prescribes that "The members of Knesset shall have immunity; details shall be determined in the law". The details of the immunity were determined in the Immunity Law. Sections 1(a) – 1(A1) of the Immunity Law, provide:

> **Immunity in the Framework of Fulfilling a Position**
>
> 1. (a) A member of Knesset shall not bear criminal or civil responsibility and shall be immune against any legal actions, due to voting or due to expressing an opinion orally or in writing, or due to an act performed – in or out of the Knesset – if the vote, the expression of the opinion or the act were in the framework of fulfilling his position, or for the sake of fulfilling his position, as a member of Knesset.
> […]
>
> (a1) To avoid doubt, an act, including, a remark, that are not random, by a member of Knesset, which constitutes any of the following, for the purpose of this section is not deemed an expression of an opinion or an act that are made in the framework of fulfilling his position or for the sake of fulfilling his position as a member of Knesset:

(1) Denial of the existence of the State of Israel as the state of the Jewish people;
(2) Denial of the democratic character of the State;
(3) Incitement to racism due to color or racial belonging or ethnical-national original.
(4) Support of an armed struggle by an enemy state or of acts of terror against the State of Israel or against Jews or Arabs, due to their being Jewish or Arab, in Israel or abroad.

Section 1(a) of the Immunity Law grants a member of Knesset protection against criminal or civil liability and against any other legal action which could be taken, *inter alia*, due to expression of opinion in the framework of fulfilling his position. Section 1(a1) sets limits to this immunity.

23. Alongside the material immunity, Section 13E(a) of the Immunity Law authorizes the Knesset Committee to promulgate Rules of Ethics for Members of Knesset. Additionally, Section 13D of the Immunity Law grants the Ethics Committee of the Members of Knesset the authority to judge a member of Knesset, *inter alia*, in matters involving the violation of the Rules of Ethics. These authorities derive from the Knesset's constitutional authority to determine its working procedures (Section 19 of the Basic Law: The Knesset). In the matter at hand, the Committee ruled that the Petitioner violated Rule 1A(2) and Rule 1A(4) of the Rules of Ethics. These rules provide as follows:

General Values

1A. The member of Knesset –
(1) […]
(2) Is a trustee of the public and it is his duty to represent the public that voted for him in such a manner that shall serve human dignity, the advancement of society and the best interest of the State;
(3) […]
(4) Shall preserve the dignity of the Knesset and the dignity of its members, shall be devoted to fulfilling his duties in the Knesset, shall conduct himself in a manner that befits his status as a member of Knesset and shall act to foster public trust in the Knesset;
(5) […]
(6) […]

24. The sanctions that the Ethics Committee may impose upon a member of Knesset are set in Section 13D:

The Ethics

13D. (a) The member of Knesset who committed

Committee

one of the following shall be subject to be judged by the Ethics Committee of the Members of Knesset:

[…]

(3) Violated a rule of the Rules of Ethics.

[…]

(d) If the Ethics Committee ruled, by a majority of the votes of all of its members, that the member of Knesset violated the provisions of sub-section (a)(1), (1A) or (2), it may impose one of the following thereon:

(1) A comment;

(2) A warning;

(3) A reprimand;

(3A) A severe reprimand;

(3B) Denial of the right to receipt the right to speak in all or some of the Knesset committees of the plenum, for a period that shall not exceed ten days of sessions;

(3C) Limitations of his activity as a member of Knesset, including prohibiting filing bills, agenda proposals, parliamentary questions, etc. except limitations regarding the right to vote, all as the committee shall decide and for a period that it shall decide and provided that the said period shall not exceed the period that remains until the end of such Knesset's session;

(4) Removal from the sessions of the Knesset plenum and its committees for a period that shall not exceed six months, provided that the member of Knesset shall be entitled to enter the session solely for the purpose of voting;

(5) Denial of salary and Other Payments for the period of the absence as stated in Section 2(a) or denial of salary and Other Payments for a period which shall not exceed one year due to any violation of any other provision of Section 13A.

For this purpose, "Other Payments" – payment pursuant to Chapter 9 of the Knesset Law, 5754-1994, and payments by virtue of the Retirement of Office Holders in Government Authorities Law, 5729-1969.

(d1) If the Ethics Committee has ruled by a majority of votes of all of its members that a

> member of Knesset violated the provisions of sub-section (a)(3), it may exercise its authority pursuant to the provisions of sub-section (d), other than the authority under sub-section d(5).

25. From the above citations, one can conclude that the Ethics Committee may impose any sanction provided in Section 13D(d) of the Immunity Law, other than the sanction provided in Section 13D(d)(5), which addresses the denial of salary or Other Payments, upon a member of Knesset who violated any of the Rules of Ethics. In the case at hand, the Ethics Committee imposed a sanction upon the Petitioner pursuant to Section 13D(d)(4) of the Immunity Law, i.e., a sanction of removal from the sessions of the Knesset plenum and its committee for six months. *Prima facie*, it is the maximum sanction that could be imposed due to violation of any of the Rules of Ethics. It shall be noted that the option of imposing such a sanction was added in the amendment to the Immunity Law from 2002 (Knesset Members Immunity, Rights and Duties Law (Amendment no. 28), 5762-2002). I shall return to the matter of the sanction further on.

26. The parties to the Petition before us assumed that the above-quoted remarks by the Petitioner are covered by the material immunity that is granted to her as a member of Knesset, under Section 1(a) of the Immunity Law. This leads to the question whether or not said immunity **prevents** the Ethics Committee from addressing these remarks. In my opinion, the answer should be negative. In HCJ 12002/04 **Makhoul v. The Knesset**, PD 60(2) 325 (2005) (hereinafter: the "**Makhoul** Case"), this Court (President **A. Barak**, with the consent of Justices **A. Procaccia** and **S. Joubran**) ruled that the material immunity of a member of Knesset **does not** extend to the actions of the Ethics Committee against any of the members of Knesset. There it was ruled as follows:

> "It has been found that the Immunity Law, in that part that relates to the immunity of a member of Knesset, was primarily meant to allow the member of Knesset to perform his work as required and to protect him against being harassed by the executive authority. The Immunity Law was not meant to prevent the Knesset from dealing with conduct occurring within itself that violate its own Rules of Ethics. Indeed, actions and remarks that fall within the framework of material immunity benefit from broad protection. As such, a member of Knesset's immunity cannot be lifted in consequence thereof. The member of Knesset is not exposed to criminal proceedings or civil actions in consequence thereof. However, **such rule does not mean that such actions cannot be the subject of other internal proceedings of the Knesset, in general, and of the proceeding pursuant to Section 13D of the Immunity Law [a proceeding before the Ethics Committee – M.N], in particular. This does not mean that the Ethics Committee is prevented from handling them […].** Indeed, the material immunity protects the member of Knesset against legal actions being taken against him. However, such legal action

> does not include actions which the Knesset takes vis-à-vis itself, when at hand are internal Knesset matters […]" (on page 388; emphases added – M.N).

Similarly, in the **Miari** Case, the justices were of the opinion that the material immunity does not apply to sanctions which the Knesset imposes upon its members, pursuant to its By-Laws, which also incorporate the Rules of Ethics (HCJ 620/85 **Miari v. The Chairperson of the Knesset**, PD 41(4) 169, 218-219, 234 (1987) (hereinafter: the "**Miari** Case")). Therefore, according to case law, material immunity does not shield members of Knesset from the authority of the Ethics Committee (compare: Bar Association Appeal 8/79 **Sufrin v. The Tel Aviv District Committee of the Bar Association**, PD 34(4) 185, 188 (1980) (hereinafter: the "**Sufrin** Case")). The Petitioners are not asking that we deviate from this case law, but rather that we interpret it narrowly. According to them the Makhoul rule applies only to circumstances relating to remarks that were made within the Knesset building or to slanderous remarks which can disrupt the Knesset's proper work or can harm the internal relationships between its members. Whereas in the case at hand, we are dealing with, what the Petitioners refer to as "pure" political remarks made in the media. I do not accept this distinction proposed by the Petitioners. Indeed the circumstances of the **Makhoul** Case were different from those at hand, since that case regarded a sanction that the Ethics Committee imposed due to prejudicial remarks against the government, which were made during a speech in the Knesset plenum. Notwithstanding, the main question that was raised and discussed in the **Makhoul** Case was a question of principle, and it addressed the relation between the Rules of Ethics and the material immunity granted to members of Knesset. The Court ruled on this question, and determined that imposing sanctions due to unethical actions or remarks does not constitute a circumvention of the material immunity:

> "Section 13D, which anchors the authorities of the Ethics Committee, does not prejudice the material immunity that is prescribed in Section 1 [of the Immunity Law – M.N.]. **In fact, this section, which provides for an internal judgment mechanism, an ethical-disciplinary judgment, is meant to complement and realize the Immunity Law's underlying objectives. Actions taken at an ethical level do not circumvent the protection that is granted to the member of Knesset in the Immunity Law.** It is not for no reason that the Ethics Committee's authorities are anchored in the Immunity Law which determines the members of Knesset's immunity. Section 13D complements that which is stated in Section 1. Thus, **while Section 1 exempts the member of Knesset from civil or criminal liability due to unethical remarks said in the framework of fulfilling his position (or for the sake of fulfilling his position), Section 13D, which is of the same normative standing, clarifies that the member of Knesset is not absolutely exempt.** Indeed, Section 13D of the Immunity Law reflects the 'interest of the Knesset itself to denunciate negative conduct among its member, and the public importance this must be granted'[…]"

(on page 339; emphases added – M.N).

These statements are also relevant to the remarks which are the subject of our discussion, even though they were made outside of the house and not in connection with a specific organization or person. The material immunity was meant to ensure that a member of Knesset would have freedom of expression and opinion, without being concerned that this could cost him in a criminal conviction or a personal monetary charge in a civil proceeding (see: HCJ 11225/03 **Bishara v. The Attorney General**, PD 60(4) 287, 300 (2006) (hereinafter: the "**Bishara** Case"); HCJ 1843/93 **Pinchasi v. The Israel Knesset**, PD 49(1) 661, 682 (1995); Criminal Appeal 255/68 **The State of Israel v. Ben Moshe** PD 22(2) 427, 439 (1968)). Additionally, the material immunity was meant to promote parliamentary supervision of the executive authority, without being concerned of being harassed thereby. However, the material immunity was not meant to protect a member of Knesset against internal criticism applied by the Ethics Committee. As has been ruled **"The purpose of the Immunity Law was not to grant the legislative authority a mechanism that would prevent it from critiquing the actions of its members, while frustrating its constitutional authority to determine its own procedures […]"** (the **Makhoul** Case, on page 337; emphasis added – M.N). The objective of the Immunity Law is not to prevent the Knesset from taking actions at the **internal-ethical** level, pursuant to the Rules of Ethics that were determined. Such conclusion is also supported by the material differences between these arrangements: a ruling that a certain act by a member of Knesset is not covered by the material immunity or that immunity should be lifted also has implications towards entities outside of the Knesset. In contrast, the ethics proceedings are internal proceedings (see and compare: the **Miari** Case, on page 196; compare: HCJ 306/81 **Flatto Sharon v. The Knesset Committee**, PD 35(4) 118, 126 (1981) (hereinafter: the "**Flatto Sharon** Case")). Determining that a member of Knesset's remark is not covered by the material immunity could result in criminal charges, with all that that entails. In contrast, the ruling that a member of Knesset violated one of the Rules of Ethics could at most result in a partial interruption of his parliamentary activity, for a limited period of time (see and compare: Permission for Civil Appeal 7504/95 **Yassin v. The Registrar of Parties**, PD 50(2) 45 (1996); the **Bishara** Case, on pages 313-314, 318; compare: Permission for Civil Appeal 2316/96 **Isaacson v. The Registrar of Parties**, PD 50(2) 529 (1996); see also in the judgment of the European Court of Human Rights, in which the majority opinion addressed the distinction between immunity that is granted to a member of parliament and internal parliamentary critique of his conduct; A. v. United Kingdom, 2002-X Eur. Ct. H. R. 917, para 86). The harm caused by determining that a member of Knesset violated one of the Rules of Ethics is less intense than in the case of determining that material immunity does not apply to his actions. The applicability of the material immunity and its objectives can be a consideration in the framework of the Ethics Committee's decisions, but they do not undermine its authority. In light of that stated, even assuming that the Petitioner's remarks are covered by the material immunity, there was nothing preventing the Ethics Committee from addressing them pursuant to the existing Rules of Ethics.

27. As mentioned, the Petitioners further argued in a general and sweeping manner that the Ethics Committee has no authority to address political remarks by

members of Knesset and that its authority is limited to inappropriate conduct of members of Knesset within the house or to the internal relationships between the members. I do not accept these arguments. Indeed, freedom of political expression is of special importance for a member of Knesset, since it is by such means that the member of Knesset expresses the positions of the public that elected him. This is particularly true when a member of Knesset who represents a minority group is concerned (see also, in a context similar to the matter at hand, the position of the European Court of Human Rights in this matter: Szel v. Hungary, App. no. 44357/13 (Sep. 16, 2014) (hereinafter: the "**Szel** Case"); Karacsony v. Hungary, App. no. 42461/13 (Sep. 16, 2014) (hereinafter: the "**Karacsony** Case")), "The political expression – the speech, the article, the interview – are the primary workings tools of the member of Knesset" (the **Bishara** Case, on page 325; see also, ***ibid***, on page 317). The freedom of expression also affects the disciplinary rules that apply to members of Knesset (compare: Bar Association Appeal 1734/00 **Tel Aviv Jaffa District Committee of the Bar Association v. Sheftel** (January 1, 2002) (hereinafter: the "**Sheftel** Case"); Civil Service Disciplinary Appeal 5/86 **Sapiro v. The Civil Service Commissioner**, PD 40(4) 227, 237 (1986)). Due to freedom of expression, the ethical review of remarks by a member of Knesset must be as limited as possible. Indeed, the Ethics Committee instructed itself – and justifiably so – to refrain, to the extent possible, from limiting the members of Knesset's freedom of political expression. In Decision 2/19, the committee decided as follows:

> "[…] If, in all that relates to political remarks, the committee's position is that in general they should be dismissed *in limine*, even if at hand are extreme and outrageous remarks, then with regard to remarks that constitute bad-mouthing, slandering, mudslinging and humiliating of individuals and publics, the committee's position is materially different. The committee is of the opinion that such remarks materially harm the status of the Knesset and its dignity […]" (emphasis omitted – M.N).

28. The Ethics Committee expressed a similar position in additional principle decisions (see: Decision 83/18 of the Knesset's Ethics Committee "In the Matter of Complaints regarding Remarks by Members of Knesset Against Persons and Organizations" (December 31, 2012); Decision 7/18 of the Knesset's Ethics Committee "In the Matter of Ethics and Freedom of Expression – the Committee's Decisions regarding Remarks by Members of Knesset" (October 12, 2009)). However, this does not mean that the committee is not authorized to address extreme expressions that amount to supporting acts of terror against the citizens of the State or identifying with such actions. The purpose of the Rules of Ethics for Members of Knesset is to maintain proper conduct by members of Knesset in order to foster the public's trust in the Knesset, preserve the dignity of the Knesset and its integrity (see and compare: the **Sheftel** Case, paragraph 22 of my judgment, Bar Association Appeal 2579/90 **Bar Association District Committee v. Anonymous**, PD 45(4) 729, 733 (1991); see also: the Report of the Committee for Preparing the Rules of Ethics for Members of Knesset, December 2006, on pages 43-45 (hereinafter: the "**Rules of Ethics Preparation Committee Report**")). The public's trust in the Knesset may also be prejudiced by remarks made by a member

of Knesset outside of the Knesset, which are not necessarily related to inappropriate conduct within the Knesset or to the internal relationships between its members. This is the case, for example, when an act or remark that is interpreted as supporting violence against citizens is concerned. A member of Knesset carries the Rules of Ethics with him wherever he goes (compare: the **Sheftel** Case, paragraphs 13-16 of my judgment). Their applicability is not limited to his relationship with other members of Knesset or internal parliamentary conduct. It is possible that the applicability of the Rules of Ethics on remarks outside of the Knesset is narrower. However, the circumstances of the case at hand are extreme. It is worth noting that the code of ethics for members of Parliament in Britain, to which the Petitioners referred, provides that the Rules of Ethics are not intended to regulate a member of Parliament's conduct in his personal life, outside the walls of the parliament. However, conduct by a member of Parliament that significantly damages the reputation or the integrity of the parliament or its members is excluded from that rule (U.K Code of Conduct for Members of Parliament (passed pursuant to the Resolution of the House of Jul. 19, 1995) § 2-3 (hereinafter: "**U.K. Code of Conduct for Members of Parliament**").

29. The Petitioners further argued that the Ethics Committee's decision in the case at hand does not coincide with its above-mentioned principle decisions which reject intervening in the members of Knesset's freedom of political expression. However, these decisions do not constitute a precedent that denies the committee of its authority to address extraordinary remarks which in its opinion constitute a violation of the Rules of Ethics. The Ethics Committee elaborated on this matter in its decision that addressed harsh remarks by a member of Knesset during the "Pillar of Defense" operation, against those he referred to as "leftists":

> "The majority of the complaints that have been filed to the Ethics Committee in the 18th Knesset were related to remarks by members of Knesset. The Ethics Committee, despite repeatedly being of the opinion that harsh and outrageous remarks were at issue, decided, in the majority of cases, not to exercise its authorities, based on an orientation of not narrowing the members of Knesset's freedom of expression […] however the fundamental principle of freedom of expression cannot protect anything a member of Knesset says, **and the committee is of the opinion that this is one of the cases in which it must intervene and express its opinion that a line has been crossed between a legitimate, albeit harsh and outrageous, statement and words of incitement. Statements in the form of 'Leftists Out', 'Leftist to Gaza' and 'Leftist Traitors' are not statements in the framework of the broad freedom of political expression which is granted to members of Knesset and do not coincide with the proper and expected conduct of a member of Knesset […]**" (Decision 85/18 of the Knesset's Ethics Committee "In the Matter of Complaints against Knesset Member Michael Ben Ari regarding Remarks" (December 31, 2012)) (emphasis added – M.N.)

30. The Ethics Committee also found it to be justified in other cases to exercise its authority with regard to remarks by members of Knesset which encouraged acts of terror or violence. For example, the committee decided to apply sanctions for statements praising Shahids (martyrs) (Decision 73/18 of the Knesset's Ethics Committee "In the Matter of Complaints against Knesset Member Ahmad Tibi due to a Speech on Martyrs Day'" (March 5, 2012) (hereinafter: the "**Decision regarding the "Martyrs Day"**")); for public support of the Intifada (Decision of the Knesset's Ethics Committee "In the Matter of a Complaint by Knesset Member Uri Yehuda Ariel against Knesset Member Ahmad Tibi" (June 24, 2003) (hereinafter: the "**Decision regarding Supporting the Intifada**")); and for the statement "Whoever removed sovereign land from the State of Israel – is to be sentenced to death" (Decision of the Knesset's Ethics Committee "In the Matter of a Complaint by Knesset Member Colette Avital against Knesset Member Arie Eldad" (June 24, 2008) (hereinafter: the "**Decision in the Matter of Knesset Member Eldad**"). Therefore, the Ethics Committee's principle decisions do not prevent its intervention in the current case and exercising the committee's authority with respect to remarks of the kind addressed in the Petition is not unprecedented.

31. An additional argument by the Petitioners regarding the Committee's authority is that there is no explicit provision in the Knesset's By-Laws or in the Rules of Ethics that authorizes the Ethics Committee to impose sanctions against the Petitioner's remarks. The Petitioners argued that Rule 1A of the Rules of Ethics – upon which the Ethics Committee's decision in the Petitioner's matter relied – is a "declaratory section that includes abstract principles and values and therefore has only an interpretational declaratory status" (paragraph 39 of the Petition), and does not have operative status. This argument, too, is to be denied. The provision of Rule 1A of the Rules of Ethics for Member of Knesset, as was presented above, prescribes fundamental values which bind the member of Knesset, such as promoting society and the best interest of the State and preserving the dignity of the Knesset and its members. Other Rules of Ethics regulate a series of specific matters, such as additional occupation of a member of Knesset (Chapter E of the Rules of Ethics) or provisions that relate to a declaration of capital (Chapter F of the Rules of Ethics).

32. The fundamental values that were prescribed in Rule 1A of the Rules of Ethics outline general criteria for the members of Knesset's conduct (compare: Bar Association Appeal 7892/04 **The Tel Aviv District Committee of the Bar Association v. Boteach**, paragraph 14 of Deputy President **M. Cheshin**'s judgment (May 10, 2005) (hereinafter: the "**Boteach** Case")), and express the need to preserve the public's trust in the Knesset. I am of the opinion that they should be considered as having an independent status, which allows imposing ethical sanctions in consequence of the violation thereof. This is necessary since naturally, specific rules of ethics do not cover all the issues that could arise at an ethical level. In the absence of a specific rule that regulates a specific situation, the member of Knesset can find guidance in advance in the general values; and retroactively, the Ethics Committee can decide that a member of Knesset violated the Rules of Ethics, by violating one of the general values (see also: the **Rules of Ethics Preparation Committee Report** on pages 45-46; Proposal for Code of Ethics that was Submitted by the Knesset Committee's Rules of Ethics Preparation Sub-Committee, 2011; Assaf Shapira "Ethics in the Knesset" **Parliament** 70

(2011). This illustrates the advantage of normative arrangements that are formatted as principles, which allow them to be applied in dynamic circumstances (for the distinction between rules and principles see, for example: Aharon Barak **Purposive Interpretation in Law** 248-249 (2003)).

33. My conclusion also coincides with this Court's judgment in the **Makhoul** Case, where the Court did not find cause to intervene in the ethical sanctions that were imposed upon a member of Knesset in consequence of violating Rule 1A of the Rules of Ethics. It shall be noted that Rule 1A, as well as Rule 2 of the Rules of Ethics, which also outlines general criteria for the conduct of the members of Knesset, has served in various cases as the basis for imposing ethical sanctions on members of Knesset (see, for example: Decision 30/17 of the Knesset's Ethics Committee "In the Matter of Mutual Complaints of Knesset Member Effi Eitam and Knesset Member Ahmad Tibi" (May 27, 2008); Decision 2/17 of the Knesset's Ethics Committee "In the Matter of a Complaint by Knesset Member Ruhama Avraham against Knesset Member Sofa Landver" (July 11, 2006)). Furthermore, general principles exist in various systems of disciplinary rules. The violation of these principles could justify imposing a disciplinary sanction upon the violating party. For example, the Rules of Ethics for Lawyers include general principles, the violation of which could raise cause for being found guilty of a disciplinary offense (see: Rules 2, 23, 32-33 of the Bar Association (Professional Ethics) Rules, 5746-1986); the **Boteach** Case, paragraph 14 of Deputy President **M. Cheshin**'s judgment; Bar Association Appeal 736/04 **District Committee of the Bar Association v. Mizrachi** PD 58(6) 200 (2004); Bar Association Appeal 2379/07 **Tel Aviv – Jaffa District Committee of the Bar Association v. Rosenzweig** (February 12, 2008); also see and compare: Section 61(3) of the Bar Association Law, 5721-1961, which prescribes that any act or omission that do not befit the legal profession are, *inter alia*, a disciplinary offense; Bar Association Appeal 15/88 **Anonymous v. The State's Attorney**, PD 43(1) 584. 588 (1989); Bar Association Appeal 17/79 **Tel Aviv Jaffa District Committee of the Bar Association v**. **Anonymous**, PD 34(3) 756, 660-661 (1980); also see: Gabriel Kling **Ethics For Lawyers** 489-494 (2001)).

34. Similarly, the Rules of Ethics for judges include general principles, the violation of which has operative implications (see: Rules 1-7, and particularly Rule 2(b) of the Rules of Ethics for Judges, 5767-2007; see also: Gabriel Kling **Ethics for Judges** 15-16 (2014)). Accordingly, the judges' ethics committee has refrained from approving certain actions in advance, based on general principles, such as the principle that a judge must refrain from actions which do not befit his status (see: Decision A/13/17 (February 25, 2013), which did not permit judges to participate in a personal mentoring venture of the Executives Program in the School of Public Policy; Decision A/11/53 (July 27, 2011), that it would not be appropriate to allow charging the parties to a legal proceeding a judge's travel expenses; see also Section 18(a) of the Courts [Consolidated Version] Law, 5744-1984, which prescribes that the Minister of Justice may file a complaint to the disciplinary court against a judge who behaved in a manner that does not befit the status of a judge in Israel). Thus, applying such a rule with respect to the Rules of Ethics for Members of Knesset is not unusual compared to other systems of disciplinary rules. In any event, the Ethics Committee has broad authority to address matters that relate to the ethics of the members of Knesset, including a matter that does **not** have a

provision in the Rules of Ethics (Rule 24 of the Rules of Ethics). It follows, *a fortiori*, that the committee is authorized to address the violation of the general values which are anchored in the rules themselves.

35. Among the general principles that are set in Rule 1A are the member of Knesset's obligations to act to advance the best interest of the State and preserve the dignity of the Knesset. The decision at hand is based on these obligations. Once I have reached the conclusion that the committee is authorized to address the violation of the general principles, it follows that it is, *inter alia*, authorized to address the duty to act for the benefit of the best interest of the State. As such, the Petitioners' argument that the Ethics Committee cannot decide who is acting for the benefit of the State, since such a decision is reserved for the voting public or that such a decision opens "a dangerous opening for political persecution" (paragraph 34 of the Petition), is in fact directed against the Rules of Ethics themselves and not towards the decision which is the subject of the Petition. In comparison, the Rules of Ethics in Britain include similar principles, including the duty of the members of Parliament to act in the interests of the nation as a whole (U.K. Code of Conduct for Members of Parliament § 4-7).

36. In light of that stated above, the decision of the Ethics Committee was given within its authority. The question that remains is whether it is appropriate to intervene on the merits of the decision. On this level, the question that arises is whether the Petitioner's remarks constitute a violation of the Rules of Ethics, and if so – whether the sanction that was imposed due to such violation befits the severity of the offense. It shall already be clarified here that the Petitioners' arguments focused on the question of the Ethics Committee's authority to address the Petitioner's remarks, and not on the question of whether the committee was correct in its conclusion that ethical obligations were violated (compare: the **Sheftel** Case, paragraph 11 of my judgment). As mentioned, the Petitioners also argued that it is appropriate to intervene in the sanction that was imposed upon the Petitioner. However, in order to present a complete picture, I shall address the question of whether or not the Rules of Ethics were violated.

The Discretionary Level: Was the Ethics Committee's Decision that is the subject of the Petition Adopted Lawfully?

37. The examination of the Ethics Committee's decision in the case at hand derives from the scope of the judicial review of the Ethics Committee's decisions (see: the **Makhoul** Case, on page 340). The scope of the judicial review of the Knesset's decisions changes in accordance with the essence of the decision under review: Legislative acts that were completed, internal parliamentary proceedings and quasi-judicial decisions (see: HCJ 652/81 **Sarid v. The Chairperson of the Knesset**, PD 36(2) 197 (1982); the **Flatto Sharon** Case, on pages 124-126)). When the Ethics Committee addresses complaints against members of Knesset, it is fulfilling a quasi-judicial duty (the **Makhoul** Case, on page 340; HCJ 7993/07 **Legal Forum for Israel v. The Knesset's Ethics Committee**, paragraph 6 of my judgment (April 30, 2009) (hereinafter: the "**Legal Forum A** Case"); HCJ 6280/07 **Legal Forum for Israel v. The President of the State**, paragraph 22 of Justice **A. Procaccia**'s judgment (December 14, 2009) (hereinafter: the "**Legal Forum B** Case")).

In principle, the judicial review that is applied to the Knesset's quasi-judicial decisions is the same as the judicial review that is directed towards quasi-judicial authorities (see: ***ibid***). However, in contrast to other quasi-judicial authorities, the Ethics Committee of the Members of Knesset, mainly addresses internal Knesset matters that relate to discipline and the ethics of its members. "[…] the essence of the activity of the Ethics Committee, in contrast, for example, from the removal of immunity which is performed by the Knesset Committee, is directed internally towards the Knesset, and in fact, in general its actions do not have any implications outside of the house of legislators" (the **Makhoul** Case, on page 343). Therefore, it was ruled that this Court's intervention in the decisions of the Ethics Committee should be in a more limited scope than the scope of intervention in the activity of other quasi-judicial entities in the Knesset (see: ***ibid***). This reflects the Ethics Committee's broad scope of discretion, when handling matters of ethics and discipline of members of Knesset. The Court may intervene when the Ethics Committee's decision was reached in violation of law, or when at hand are material matters such as a violation of basic constitutional rights, the right to due process or violation of the principles of natural justice (see: the **Legal Forum A** Case, paragraph 6 of my judgment; the **Legal Forum B** Case, paragraph 22 of Justice **A. Procaccia**'s judgment). In general, "[…] the more severe the infringement of the member of Knesset's basic rights, and the more the sanction for the actions deviates from the proper extent, this more this Court will be willing to intervene" (the **Makhoul** Case, on page 344).

38. As mentioned above, the Ethics Committee ruled that the Petitioner's remarks, in light of their content and sensitive timing, do not coincide with the best interest of the State and severely prejudice the public's trust in the Knesset and its image. Hence, the Ethics Committee ruled that the Petitioner's remarks violated Rule 1A(2) and Rule 1A(4) of the Rules of Ethics. For the sake of clarity, I shall requote these Rules *verbatim*:

> **General Values**
>
> 1A. The member of Knesset –
>
> (1) […]
>
> (2) Is a trustee of the public and it is his duty to represent the public that voted for him in such a manner that shall serve human dignity, the advancement of society and the best interest of the State;
>
> (3) […]
>
> (4) Shall preserve the dignity of the Knesset and the dignity of its members, shall be devoted to fulfilling his duties in the Knesset, shall conduct himself in a manner that befits his status as a member of Knesset and shall act to foster public trust in the Knesset;
>
> (5) […]
>
> (6) […]

The language of Rules 1A(2) and 1A(4) is broad and leaves room for the Ethics

Committee's discretion regarding the manner of their application in specific cases. Such application must be in accordance with the objectives underlying these Rules. The Rules of Ethics reflect the principle that a member of Knesset, as an elected official, is also a trustee of the public. As such, he must make the public interest a higher priority compared to his personal matters. This also leads to the need to preserve the public's trust in the Knesset, and the Rules of Ethics are a means to realize this trust (On the importance of public trust in governmental authorities in general, see HCJ 6163/92 **Eisenberg v. The Minister of Construction and Housing**, PD 47(2), 229 (1993); and also see: HCJ 4921/13 **OMETZ – Citizens for Good Governance and Social Justice v. The Mayor of Ramat Hasharon** (October 14, 2013)).

39. It is, therefore, my opinion that the committee's conclusions did not deviate from the broad range of discretion granted to it. The Petitioner's statements in the Interview and the Article were interpreted as a support of terror and the killing of civilians. In the case at hand it is not criticism of the government's policy during wartimes that is at issue and not even criticism of legislation in the Knesset or of other political maneuvers of the majority. The severity of the matter is enhanced considering the timing of the Petitioner's remarks, just a few days after the abduction of the teenagers, at a time when their fate was unknown, and in the midst of the "Protective Edge" operation. Additionally, the cumulative effect of the Petitioner's remarks, which were published in proximity to each other, must also be taken into consideration. Considering all of the circumstances of the current case – the Petitioner has gone too far. The Ethics Committee ruled that the Petitioner's statements amount to "legitimizing acts of terror against the citizens of the State", and that this is a violation of the Rules of Ethics. Indeed, words of support of terror of any kind, from either side, could severely prejudice the public's trust in the Knesset and its image. Therefore, and taking into consideration the nature of the Petitioner's remarks and their timing, it is inappropriate to intervene in the committee's conclusions that the Petitioner's statements severely harm the public's trust in the Knesset and its image, and violate Rule 1A(4) of the Rules of Ethics. The committee further ruled that the Petitioner's remarks violate rule 1A(2) of the Rules of Ethics that, *inter alia*, provides that a member of Knesset shall act to advance the State's best interest. It appears that the main objective of this rule is to guarantee that members of Knesset will act for the sake of the public interest, and shall not take advantage of their status and authorities for the sake of personal matters. In the case at hand, *prima facie*, the Petitioner's remarks were not intended to promote her personal affairs. Notwithstanding, it appears that both extreme remarks and actions which legitimize acts of terror against the citizens of the State do not coincide with the State's best interest (compare: the **Miari** Case, on pages 226-227). The Petitioners themselves agreed that statements that encourage and support violence are not legitimate. In support thereof, both in the Petition and in the hearing before us, the Petitioners provided a series of "explanations" of the Petitioner's remarks, and asked that we not perceive them as supporting terror. With respect to the Petitioner's statements regarding the abductors of the teenagers – "they are not terrorists" – it was explained that the Petitioner's principle position is not to use the term "terror" in Israeli media. Since, according to her, the term "terror" is used in Israeli media only to describe Palestinian violence and not to describe Israeli violence against the Palestinian population. As to the Petitioner's Article, the Petitioner's intention when calling upon the Palestinians to turn to

"popular resistance" and to impose a "siege" on Israel, which was interpreted by the Ethics Committee as supporting a violent uprising against the State of Israel, was not explained in the Petition. In his oral arguments before us, the Petitioner's attorney explained that the Petitioner's intention in her Article was to encourage non-violent civil Palestinian resistance, and to express support for a "political siege" on Israel. In response to our questions, the Petitioner's attorney even stated that if the Petitioner's intention was to support a military siege, this would be problematic. However, these explanations were given **retroactively**, by the Petitioner's attorney, and not by the Petitioner herself. The Petitioner did not provide them to the Ethics Committee in her filed response and not even to the Knesset plenum in her appeal. It would have been appropriate for the Petitioner's explanations to be given in the framework of her response to the complaint that was filed to the Ethics Committee, and at least in the framework of her appeal of the committee's decision (compare: the **Makhoul** Case, on page 344). In any event, these explanations – which as mentioned were only given retroactively – are not sufficient to justify our intervention in the Ethics Committee's decision. The Petitioner's remarks were not published in the media with explanatory notes. The spirit of the statements, despite the Petitioner's later reservations, is that of identification with acts of terror and support of violence, as a means of attaining political objectives. In my opinion, in these circumstances it is inappropriate to rule that the Ethics Committee's decision that the Petitioner violated the Rules of Ethics was flawed in a manner that justifies our intervention. I shall clarify that this judgment only addresses the violation of the Rules of Ethics by the Petitioner, and no other matter.

40. The Petitioners requested that we intervene in the sanction that was imposed upon the Petitioner, due to it being, according to them, discriminatory and disproportionate. We have ruled, by a majority of opinions, that such intervention is inappropriate in the circumstances at hand. I elaborated above on the fact that the Ethics Committee has broad discretion, and this is true also with regard to prescribing the sanction. However, the committee's broad authority is not to be interpreted as a permit to impose arbitrary sanctions. When imposing a sanction due to the violation of the Rules of Ethics, the Ethics Committee must take a variety of considerations into consideration. In general, the sanction imposed must be proportionate to the severity of the ethical offense committed by the member of Knesset (see: the **Makhoul** Case, on page 344). Subsequently, the committee must take the severity of the offense and the circumstances in which it was committed into consideration. As to remarks by members of Knesset, their content, subject matter and timing must, *inter alia*, be taken into consideration. A remark that slanders or humiliates individuals and publics does not carry the same consequence as another extraordinary and extreme remark (see also in this matter: the Ethics Committee's Decision "In the Matter of the Amendment of the Knesset Members Immunity, Rights and Duties Law, 5711-1951" (June 24, 2002)). Among all of its considerations, the Ethics Committee must also include the circumstances of the concrete member of Knesset who is being judged thereby, including the question whether he expressed remorse for his actions and his entire disciplinary past (for Ethics Committee decisions in which such considerations were considered, see, for example: The Knesset's Ethics Committee's Decision "In the Matter of Ziv Price, Eliezer Dvir and Pinchas Wolf against Knesset Members Ahmad Tibi, Taleb el-Sana and Jamal Zahalka" (June 22, 2004) (hereinafter: the

"**Decision in the Matter of Knesset Members Tibi, el-Sana and Zahalka**"); the Knesset's Ethics Committee's Decision "In the Matter of the Complaint by Knesset Member Limor Livnat, Minister of Education, Culture and Sport against Knesset Member Issam Makhoul" (December 21, 2004); the Knesset's Ethics Committee's Decision "In the Matter of the Complaint by Knesset Member Uri Ariel against Knesset Member Issam Makhoul" (July 19, 2005); the Knesset's Ethics Committee's Decision "In the Matter of the Complaints of Knesset Member Arie Eldad and Knesset Member Uri Ariel against Knesset Member Issam Makhoul" (July 26, 2005); the **Makhoul** Case, on page 344; and compare to Decision 64/18 of the Knesset's Ethics Committee "In the Matter of a Complaint by Knesset Member Danny Danon against Knesset Member Hanin Zoabi" (January 3, 2012) (hereinafter: "**Decision 64/18**")). It must also take the punishing standard in similar cases into consideration.

And From These General Principles – To the Case at Hand.

41. In the circumstances at hand, we have not found it appropriate to intervene in the sanction that was imposed upon the Petitioner. The Ethics Committee has a broad range of proportionality and the Petitioner's remarks are especially severe, particularly – considering their timing. The severity of the statements is also reflected in the Attorney General's decision in the Petitioner's matter. While the Attorney General did not find justification to open a criminal investigation in this case, he did find it appropriate to state that his decision does not prevent taking actions against the Petitioner at an administrative or ethical level (also compare with: the **Sufrin** Case, on page 188). The Ethics Committee also took the impact of the decision and its accompanying sanction on the Petitioner's freedom of expression into consideration among the entire considerations, and emphasized the importance of the right to publicly criticize the government during times of war. The Ethics Committee indeed weighed relevant considerations from every direction, which were reflected in the reasoned decision. The Petitioner was given the right to be heard both before the committee and before the Knesset plenum, in the framework of her appeal. In addition, according to the data on the Knesset's website, the decision to reject the Petitioner's appeal was adopted by a significant majority, which also included members of Knesset from the opposition, and on the other hand, one of the members of Knesset from the coalition voted in favor of accepting the Petitioner's appeal. The proceeding in the case at hand was conducted while maintaining the Petitioner's procedural rights. The Petitioner's conduct during the procedure created the impression that she did not take it seriously. As mentioned, some of her explanations were first presented during oral arguments before us, by her attorney and not by her.

42. Indeed the sanction that was imposed upon the Petitioner – being removed from sessions of the Knesset's plenum and its committees for the maximum possible period of time – is the most severe sanction in the existing scale of penalties. There was no dispute that this sanction had never in the past been imposed for the maximum period of time prescribed in the Immunity Law. However, in the circumstances of the case, the Petitioners' argument of discrimination and lack of proportionality, cannot be accepted. This is not the first time that the committee attributes significant severity to such remarks, remarks that encourage acts of terror or violence (see: the Decision regarding the "Martyrs Day", the Decision

regarding Supporting the Intifada). At the ethical level – which is meant, *inter alia*, to preserve the public's trust in the Knesset – remarks that express support of terror or violence against citizens, are no less serious than threats or slander that are directed at a specific sector or person. In this context it shall be noted that the majority of the decisions that were quoted in the Petition do not address remarks of this kind, and in any event not remarks during times of war or terror events. I have not ignored the judgments in the above-mentioned Szel Case and Karacsony Case, in which the European Court of Human Rights addressed fines that were imposed on opposition members of Parliament in Hungary, due to unethical conduct during sessions in parliament. At issue there, were acts of protest against a controversial bill (in the Szel Case) and acts of protest against the conduct of the majority party (in the Karacsony Case). These acts of protest included, *inter alia*, waving signs. The European Court ruled that indeed the fines that were imposed infringed the members of Parliament's right to freedom of expression in a disproportionate manner and ordered that they be cancelled; however the remarks in these cases are less severe than in the case before us. The Ethics Committee indeed has never before imposed a penalty of removal for the duration of six months, but penalties of this kind had been imposed for shorter periods of time – both for remarks and for actions (see, for example: Decision 7/19 of the Knesset's Ethics Committee "In the Matter of a Complaint by the Chairperson of the Knesset against Knesset Member Meir Porush" (November 13, 2013) (removal from Knesset plenum sessions for two weeks); Decision 66/18 of the Knesset's Ethics Committee "In the Matter of a Complaint by the Chairperson of the Knesset against Knesset Member Anastasia Michaeli" (January 10, 2012) (removal from sessions of the Knesset plenum and its committees for a month); The Decision in the Matter of Knesset Member Eldad (removal from sessions of the Knesset plenum and its committees for one day); The Decision in the Matter of Knesset Member Tibi, el-Sana and Zahalka (removal from sessions of the Knesset plenum and its committees for two days)). An examination of the Petitioner's entire disciplinary past indicates that her remarks have been discussed by the Ethics Committee many times. In some of the cases it was found that she did not violate the Rules of Ethics or that it is inappropriate to impose a sanction for her remarks, and in some of the cases various penalties were imposed upon her (see, for example: Decision 64/18; Decision 55/18 of the Knesset's Ethics Committee "In the Matter of Complaints against Knesset Member Hanin Zoabi due to her Participation in the Flotilla to Gaza in May, 2010" (July 18, 2011); Decision 52/18 of the Knesset's Ethics Committee "In the Matter of a Complaint by the Legal Forum for Israel against Knesset Members Hanin Zoabi and Jamal Zahalka" (July 5, 2011)). I shall at this point note that in my opinion no weight should be attributed to the mere filing of complaints against a member of Knesset, as in the case at hand. According to the law, any person may file a complaint against a member of Knesset (Section 1of the Knesset Members Ethics Procedure (Complaints)). Many complaints are not accepted and many are dismissed *in limine*. Granting weight to complaints that were filed – even if they were not found to have any substance – could lead to abuse of this tool and to unjustified harm to members of Knesset. However, this consideration did not receive significant weight in the decision which is the subject of our discussion.

43. I shall not deny that I was concerned by the "quantum leap" in the sanction that was imposed in this case. As may be recalled, the sanction of removal was added

to the Immunity Law in 2002, and as such, in general, should be imposed gradually (see and compare: Criminal Appeal 1042/03 **Meretzplas Limited Partnership Ltd. (1974) v. The State of Israel** PD 58(1) 721, 731-732 (2003); Criminal Appeal 7936/13 **Levy v. The State of Israel**, paragraph 46 of Justice **N. Solberg**'s judgment, paragraph 2 of my judgment (December 16, 2014)). However, from a practical perspective, we are not dealing in this case with the Petitioner's **complete** removal from the Knesset's activity for six months. The summer recess, during which the Knesset operates in a limited format, took place during the first half of the removal. During the recess the Knesset plenum convenes only in extraordinary cases and Knesset committees also convene less frequently. As such, during the recess the two committees in which the Petitioner is a member convened only five times (but it shall be noted that meetings of other committees were also held), while according to the Knesset's website, during the month of November, these committees held more than twenty meetings. Furthermore, there was an elections recess during the seven weeks that remained of the period of removal, from the time of the hearing before us that was held on December 9, 2014, and the judgment that was given the following day. Therefore, the **practical** significance of intervening in the sanction in these circumstances is miniscule, if at all existent. I shall emphasize that in any event, the Petitioner's right to vote was not denied, and furthermore, that the sanction does not prevent the Petitioner from using parliamentary tools, such as filing bills, proposals or questions. At issue also is not a suspension from the Knesset (compare: the **Flatto Sharon** Case, on page 126). Considering all of the reasons mentioned above, I have not found justification for our intervention in the broad discretion granted to the Ethics Committee.

44. Epilogue: The Petition is denied without an order for expenses, as stated in our judgment dated December 10, 2014.

The President

Justice E. Hayut

1. I concur with the opinion of my colleague the President, both with regard to the question of the Ethics Committee's authority to impose sanctions against the Petitioner for the remarks which are the subject of the Petition and with regard to the conclusion that the authority in the circumstances at hand was exercised lawfully. I also share my colleague's remarks (paragraph 43 of her opinion) regarding the excessive severity of the sanction that was exercised in the case at hand. However, like my colleague, I am of the opinion that it is inappropriate to intervene since in the case at hand the severity of the sanction has *de facto* been mitigated to a considerable degree, given the fact that the majority thereof occurred during the summer recess – and this was taken into consideration by the committee – and during the election recess – even though this was not known at the time the sanction was imposed.

   Due to the matters that emerged in this Petition, the importance of which cannot be overstated, I have found it appropriate to add two short comments: one – relates to not exposing the minutes of the Ethics Committee and the material presented thereto to be reviewed by the Petitioner despite her request in this

matter, and the second – relates to limiting the freedom of political expression of an elected official who represents a minority group in society.

The Refusal to Deliver the Minutes of the Committee and the Material Presented thereto to the Petitioner's Review

2. My colleague elaborated in her opinion on the fact that the Petitioner approached the Ethics Committee and requested, "in order to file a petition to the High Court of Justice", to review the minutes of its meetings and the material presented thereto in preparation for it reaching a decision, but was refused. The Knesset's legal counsel reasoned the refusal by referring to Rule 21 of the Rules of Ethics for Members of Knesset, which provides that the ethics proceedings, including the documents and the minutes, are privileged, and are not to be published except with the committee's written permission, and subject to the terms it shall prescribe. The legal counsel further stated in his response to the Petitioner that while the use of material and minutes of the committee's meetings for the purpose of legal proceedings is one of the exceptions the committee recognizes in this context, it is his position that this should not include a legal proceeding that is meant to challenge the decision of the Ethics Committee itself, due to the concern that this could adversely affect the committee members' ability to properly fulfill their duties. Finally, the legal counsel stated in his response to the Petitioner that if the Petition shall be filed, the minutes of the committee's session shall be delivered for the Court's review only. And indeed, immediately following the filing of the Petition, the Respondents delivered the minutes of the committee's session, in a sealed envelope to be reviewed only by the members of the bench.

During the hearing that was held before us on December 9, 2014, the Petitioners' attorney informed us that in order to make the hearing more efficient and to move it forward, he does not insist on the arguments he raised in the Petition regarding the refusal to provide him with the minutes of the committee's session and the material that had been presented thereto, while reserving his arguments in this matter. As such, my colleague did not find it necessary to refer to this matter in her opinion. Without setting rules in the matter, I find it appropriate to note that in my opinion the Knesset legal counsel's reasons for refusing to make the minutes of the committee's session and the material that had been presented thereto available to the Petitioner, create non-negligible difficulties, in light of the distinction he made between general legal proceedings and legal proceedings that are intended to challenge the disciplinary decision that was adopted by the committee. It appears to me that not making the minutes and the material available to the Petitioner in these circumstances significantly impairs her ability to effectively challenge the decision and therefore it appears to me that the position presented by the Knesset's legal counsel in this context should be reexamined. This Court has elaborated in the past on the intensity of an individual's interest to receive detailed information regarding a proceeding – disciplinary or other – in which a decision regarding him has been reached, especially in the context of a judicial proceeding against which he wishes to take action, so as to allow him to exercise his right to due process. In HCJ 844/06 **Haifa University v. Oz** (May 14, 2008) it was ruled in this context as follows:

> "Whatever the extent of concern that the functioning of the

> university examination committees will be impaired, that concern is subordinated to the need to allow the employees who were harmed by the conclusions of these committees to defend themselves against that which was attributed to them and to prove their argument that the decision regarding them was not lawfully adopted… The underlying rationale of this approach is that there is a significant social interest in giving the employees the possibility of exhausting their rights, and the interest of the efficient functionality and existence of such examination committees, however important it may be, does not in and of itself justify recognizing the material as privileged. **This is certainly relevant when, as in the case at hand, there was a proceeding before a judicial instance which is addressing a question of the legal validity of the petitioner's decisions regarding changing the terms of employment of respondent 1 and terminating the employment of respondents 2 and 3. In this context, the interest that exists that the said examination committees be efficiently functional is subordinated to the respondents' right to due legal process, in the framework of which they shall be granted the possibility of reviewing all of the material relevant to establishing the arguments against terminating their employment in the School of Theatre**" (the **Oz** Case, paragraph 18, see also: Permission for Civil Appeal 7568/00 **The State of Israel – Civil Aviation Administration v. Aharoni**, PD 55(5) 561, 565 (2001)).

It is my position that the intensity of this interest is certainly not weakened when at hand is a disciplinary proceeding that is being taken against a member of Knesset, and in this context it is not superfluous to add that the proper balance between the need to preserve the proper functionality of the Ethics Committee – the importance of which was elaborated upon in the Knesset's legal counsel's response – and the Petitioner's right to due process, can be obtained by way of stipulating terms and preventing the exposure of certain details, for example with regard to the identity of the speakers in appropriate cases, as per the committee's authority pursuant to the end of Rule 21 (see and compare: HCJ 7793/05 **Bar-Ilan University v. The National Labor Court in Jerusalem**, paragraph 20 (January 31, 2011); Administrative Petition Appeal 6013/04 **The State of Israel – Ministry of Transportation v. The Israel News Company Ltd.** PD 60(4) 60, 96 (2006)). In any event, once the Petitioners did not insist on their argument in this matter, then, as my colleague chose, the ruling on this matter can be left for another time.

Limiting the Freedom of Political Expression of an Elected Official who Represents a Minority Group in Society

3. In her opinion, my colleague elaborated on the distinguished and special status of the freedom of political expression in the order of constitutional rights, particularly when at hand is a member of Knesset who represents a minority group. This position is grounded in the past rulings of this Court, in HCJ 11225/03 **Bishara v. The Attorney General**, PD 60(4) 287, 336-338 (2006), and in the ruling of the European Court of Human Rights (Szel v. Hungary, 44357/13 (2014) at para 69; Karacsony v. Hungary, 42461/13 (2014) at para 72) to which my colleague referred. See also Tarlach Eoghan McGonagle, Minority Rights and Freedom of Expression: A Dynamic Interface (PhD Thesis, University of Amsterdam, 2008) for the special importance of protecting the freedom of expression of minority groups, in general, and the duty imposed on the state to restrain the infringement of this freedom of expression and to take measures to allow it to be realized.

   However, the attempt to define what a "minority group" is, is not always an easy task (see and compare for example: Michael M. Karayanni, *Groups in Context: An Ontology of a Muslim Headscarf in a Nazareth Catholic School and a Sephardic Ultra-Orthodox Student in Immanuel* 1, 42 (January 12, 2015). Available at SSRN:http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548548; Civil Appeal 466/83 **Shahe Ajemian, Archbishop in the Armenian Church in Jerusalem v. Archbishop Yeghishe Derderian**, PD 39(4) 737, 747 (1986)), and it should also be noted that at times there can be situations in which it appears that it is actually the freedom of expression or other freedoms of the majority that are at risk and need steadfast protection against being infringed upon by certain minority groups. In any event, the freedom of political expression of an elected official, as well as an elected official who represents a minority group, is not absolute, but rather, as any other constitutional right, is relative, and it is not a freedom that is free of any limitations whatsoever. Like my colleague, I am of the opinion that in the case at hand, the Petitioner's remarks crossed the line and exited the zone worthy of protection in the name of freedom of political expression, even considering the fact that she represents a minority group in Israeli society. The Petitioner's statements in the Interview, regarding the abduction of the teenagers, reflect understanding and legitimization of the atrocious act of abduction, and identify with those who committed the act, whom, according to her, should not be referred to as "terrorists". The words the Petitioner wrote in the Article that was published on various websites are no less severe from the perspective of the Rules of Ethics that apply to someone who serves as a member of the Israeli Knesset. In that same Article, the Petitioner went so far as to hand out advice as to the effective ways in which it is possible to fight the State and to harm it. *Inter alia*, it was written in said Article: "**We** must abandon the lethal trinity and declare a popular resistance instead of security coordination and impose a siege on Israel instead of negotiating therewith". These words, when voiced by a person who is a member of the Israeli Knesset, justify the steps taken by the Ethics Committee, because they illustrate that what the Petitioner had in mind when writing that Article was neither "the advancement of society and the best interest of the State" nor "fostering public trust in the Knesset". The Petitioner advocates to cease the coordination and the

negotiations between Israel and the Palestinians, which according to her are nothing but part of what she refers to as the "lethal trinity" and instead of negotiations and coordination she calls for popular resistance and imposing a siege on Israel. The Petitioner's attorney's attempt to retroactively argue that this is not a call for violence, is perplexing, *inter alia*, given the manner the term "popular resistance" is *de facto* implemented in the reality of our lives.

It is important to emphasize that remarks, and particularly remarks by elected officials, which constitute criticism and even extremely harsh criticism, of government policy are completely legitimate, and this is true with respect to remarks that emphasize the suffering of the other party to a conflict and which exhibit empathy towards and understanding of such suffering. This Court elaborated on this in the early days of the State, when stating that the difference between an autocratic regime and a democratic regime is marked by the possibility that is granted to the representatives chosen by the people to scrutinize the acts of government at any time **"Whether to cause such acts to be rectified and create new arrangements in the State, or to bring about the immediate termination of those 'governing' or their replacement by others when comes the elections"** (HCJ 73/53 '**Kol Ha'am' Company Ltd. v. The Minister of Interior** PD 7(1) 871, 876 (1953)). However, as mentioned, the Petitioner's remarks, for which the Ethics Committee deemed it appropriate to apply sanctions against her, completely deviated from this legitimate category, even if one takes into consideration the special caution that must be applied when dealing with the freedom of political expression of an elected official who represents a minority group.

4. My colleagues emphasized the excessive severity that accompanies the Petitioner's remarks given that they were made during times of war and crisis. I am of the opinion that it is inappropriate to set different criteria for the protection of the freedom of expression during times of crisis compared to those that should be applied during times of calm. However, it is clear that the likelihood and feasibility of harming other essential interests could be of different intensity during times of crisis. President **A. Barak** elaborated on this in HCJ 7052/03 **Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister of Interior**, 61(2) 202 (2006), when he stated that:

> "Indeed, Israeli constitutional law has a uniform approach to human rights during times of relative calm and during times of enhanced war. We do not recognize a sharp distinction between the two. We do not have special balancing laws for times of war. Of course, human rights are not absolute. They can be limited during times of calm and times of war… During times of war the likelihood that damage to a public interest shall occur is greater, and the harm to the public interest is more intense, and as such it is possible to limit rights in the framework of the existing criteria… Indeed we do not maintain two systems of rules or balances, one for times of calm and other for times of terror. There is a uniform set of laws and balances, which applied both during times of calm and times of terror (the **Adalah** Case, paragraph 20; see

also: Abrams v. United States 250 U.S. 616, 627-628 (1919)).

Based on the grounds listed by my colleague the President, to which I added a few comments, I am of the opinion that the Petition is to be denied.

Justice

Deputy President E. Rubinstein

A. I concur with the comprehensive reasons written by my colleague, the President.

B. I shall add some brief remarks: Section 1(A1) of the Knesset Members Immunity, Rights and Duties Law, 5711-1951 is somewhat of a mirror image of Section 7A of the Basic Law: The Knesset which was adopted a short while earlier and defines when a list or a candidate shall be prevented from participating in the elections to the Knesset.

C. Section 7A of the Basic Law: The Knesset, which was adopted on the 4th of Iyar, 5762 (May 15, 2002) (***Sefer Hachukim*** 5762, 410) prevents a party or a candidate from participating if their goals or actions "explicitly or implicitly include one of the following: (1) denial of the existence of the State of Israel as a Jewish and democratic state; (2) incitement to racism; (3) support of an armed struggle by an enemy state or of a terrorist organization against the State of Israel".

D. Section 1(A1) of the Immunity Law which was adopted on the 13th of Av, 5762 (July 22, 2002) (***Sefer Hachukim*** 5762, 504) excludes that which is listed below from the material immunity of Section 1(A1) of the law which addresses a vote, an expression of opinion or an act while fulfilling the position or for the sake thereof – and we shall already take note of the similarity to Section 7A of the Basic Law:

> "(1) Denial of the existence of the State of Israel as the state of the Jewish people.
> (2) Denial of the democratic nature of the State;
> (3) Incitement to racism due to color or belonging to a race or ethnic national origin;
> (4) Support of an armed struggle by an enemy state or of acts of terror against the State of Israel or against Jews or Arabs due to their being Jewish or Arab, in Israel or abroad."

E. It is not necessary to conduct a meticulous comparison between Sections 1(A1) of the Immunity Law and 7A of the Basic Law in order to receive the impression that we are dealing with provisions that are comparable and correspond to each other. The legislators of Section 1(A1) had the model of the Basic Law before them; see the bill that was filed by Knesset Members Eliezer Cohen, Zvi Hendel, Michael Nudelman and Nissim Ze'ev, ***Hatzaot Chok*** 5762, 210, which explicitly addresses this. I shall note that I reviewed the discussions in the plenum in the first reading on January 29, 2002 (in the second and third readings on May 27, 2002, no real discussion was held) and the matters discussed were split between left and right; there was also a reservation to the bill by Minister Dan Meridor. In

any event, the amendment was legislated.

F. In light of the above, it is clear that we are dealing with the core of the Israeli parliamentary duty to which the members of Knesset pledge allegiance pursuant to Section 15(a) of the Basic Law, as follows: "I pledge myself to bear allegiance to the State of Israel and faithfully to fulfill my mandate in the Knesset"; Knesset Member Zoabi also pledged this when declaring "I Pledge" (Section 1(c) of the Knesset Law, 5754-1994). We are not dealing with a marginal matter, but rather one which is undoubtedly at the root of being a member of Knesset; the legislators of Section 1(A1) of the Immunity Law – as mentioned – viewed the matters therein as drawing sustenance from Section 1A of the Basic Law. This Court applied a very restrained approach in the context of Knesset Member Zoabi's candidacy to the Knesset with regard to her compliance with the terms of Section 7A of the Basic Law: The Knesset. Until now an extremely lenient approach was preferred with respect to her, and I shall only mention Election Approval 9255/12 **The Central Election Committee for the 19th Knesset v. Knesset Member Hanin Zoabi** (judgment dated December 12, 2012, reasons dated August 30, 2013); where President Grunis spoke (in paragraph 34) of Knesset Member Zoabi's activity which "comes very close to the grey area of which Section 7A warns and which it is meant to prevent", and of evidence that came close "to that 'critical mass' of evidence that justifies disqualification" – but the line was not crossed. Additional justices on the bench in that judgment expressed a similar spirit, but the judicial policy of narrowly and stringently interpreting the causes in Section 7A of the Basic Law as being designated for "most extreme cases which cannot possibly be dealt with using ordinary democratic tools" (paragraph 35), was upheld. In the context of the elections, a non-excluding approach was preferred, and subsequently the judicial and democratic tolerance was flexed to its limits. I mention this because ultimately the legal significance is that once Knesset Member Zoabi was elected to the Knesset and pledged allegiance to the State, she is in her position by right and not by grace; see Nathan Alterman's unforgettable poem "The Rebuke to Tawfik Toubi" (**The Seventh Column** A 276) of the 1950's (also quoted in my article "On Equality for Arabs in Israel" in my ***Netivei Mimshal UMishpat*** book (5763-2003), 278), in which, *inter alia*, it was said "Such is the nature of democracy: Her servants owe gratitude to no person; In part it may not be easy, but if it shall not go without saying, it shall not be understood by us at all". Often the things that Knesset Member Zoabi says and does are not easy for many Israelis, but they are to be considered "the choosing of the lesser of two evils" (as the words of the *Mecelle*), and her parliamentary right is in place.

G. We now approach the Rules of Ethics, which are an internal parliamentary layer, and in my opinion should be interpreted both based on their content and taking into consideration the general background of a member of Knesset's obligations, on the one hand, and his or her immunity and the exceptions thereto, on the other hand. Particularly due to the broad material immunity, the Rules of Ethics are the little that can be done to restrain deviations, "a pressure release valve" to maintain a framework of parliamentary norms. My colleague listed the general values underlying the Rules of Ethics (in paragraph 23), and in the matter at hand, we are dealing with Rule 1A(2) which designates the member of Knesset as "a trustee of the public and it is his duty to represent the public that voted for

him in such a manner that shall serve human dignity, the advancement of society and the best interest of the State;" and with Rule 1A(4) pursuant to which the member of Knesset shall "preserve the dignity of the Knesset and the dignity of its members, shall be devoted to fulfilling his duties in the Knesset, shall conduct himself in a manner that befits his status as a member of Knesset and shall act to foster public trust in the Knesset". Indeed, these rules address fundamental values, but, similarly to my colleague (paragraph 32), I do not accept the argument that they do not have an independent standing; in my opinion they are the **soul** of the Rules of Ethics, they are what gives them their real essence and their proper application.

H. As my colleague mentioned (paragraph 26), the parties to this Petition assumed that the Petitioner's remarks which are the subject of the complaints are covered by the material immunity by virtue of Section 1(a) of the Immunity Law, which – as mentioned – grants immunity "due to voting or due to expressing an opinion orally or in writing, or due to an act performed – in or out of the Knesset – if the vote, the expression of the opinion or the act were in the framework of fulfilling his position, or for the sake of fulfilling his position, as a member of Knesset". I shall take the liberty to doubt whether Knesset Member Zoabi's words which we are addressing meet the criteria of Section 1(A1)(4) which excludes "support of an armed struggle by an enemy state or of acts of terror against the State of Israel or against Jews or Arabs, due to their being Jewish or Arab, in Israel or abroad." However, even with the lenient assumption that my colleague described, it is clear that there is nothing preventing discussing Knesset Member Zoabi's remarks at an ethical level.

I. We shall briefly review the actual remarks.

J. First of all, the interview on June 17, 2014, five days after the abduction of the three teenagers Naftali Frenkel, Gil-Ad Sha'er and Eyal Yifrah, may G-d avenge their deaths. According to Knesset Member Zoabi, the abductors, the abductors of innocent teenagers, "are not terrorists… even if I do not agree with them, they are people who do not see any opening…, and they are forced to use these means". It is known that throughout the world and in international law there are disputes as to the definition of terror, and it has already been said that a freedom fighter for one is a terrorist for the other. But is there a humane human in their right mind who would not deem the abduction of the teenagers and their cold blooded killing anything other than terror? Must the national liberation for the Palestinians, for which Knesset Member Zoabi is wishing, pass through despicable crimes of terror? And the stretched explanation that was voiced, that her statements were said because terror is only attributed to Arabs and not to Jews cannot hold water, *inter alia*, because acts of terror by Jews are on more than one occasion referred to as "Jewish Terror", and an simple surfing on the internet with such headline will prove this. Terror is terror is terror, regardless of who performs it, Jews, Arabs or others. Hence, can it be said, in this case, that the value of a member of Knesset's duty to serve human dignity, as appears in Rule 1A(2), was not violated? – There is no greater human dignity than the sanctity of life itself; "There shall be no violation of the life, body or dignity of any person as such." (Section 2 of the Basic Law: Human Dignity and Liberty, and see also Section 4 of the Basic Law).

K. Secondly, the call in the article dated July 13, 2014, to the Palestinians "… to impose a siege on Israel instead of negotiating therewith". These words should not be read as a sacred text with multiple interpretations, but given the context of the matters which is "(Israel's – E.R.) detestable trinity: the fence, the siege and the coordination", it is extremely difficult to interpret the call to "impose a siege on Israel" as only a "political siege" (not that such a call in and of itself would be permitted and legitimate), but rather as an armed siege. If we shall read these statements in light of the "State's best interest" chapter in Rule 1A(2) of the Rules of Ethics, we shall ask ourselves whether a call to impose a siege on the State can be in the "State's best interest" – and this is not a political slogan of "saving Israel from itself", which some of Israel's "friends" raised in the past, but, as my colleague stated, rather an unexplained statement – which simply means joining forces with the State's enemies. The answer cannot be positive; and the forced interpretation that was given, even though it was not from the member of Knesset but rather from those supporting her, is not convincing. In light of all of that stated above, one cannot cast a doubt regarding the violation of the Rule of Ethics.

L. Indeed, Knesset Member Zoabi is from a minority in Israel – and it is appropriate to apply interpretation that takes this into consideration and expands the limits of patience and tolerance; but in the case at hand, as my colleague also stated (paragraph 39) it simply went too far. Of course, this is enhanced by the timing, during the search for the teenagers, while the sounds of the cries of the mothers and fathers were heard, and during severe combat – the member of Knesset was undermining any common ground that exists and should exist among the entire Israeli public, without any explanation which could, even at a stretch, be acceptable.

M. One must not criticize the members of the Central Ethics Committee, who, when dealing with the **ethical** level, did not take the approach of those three monkeys who do not hear, do not see and do not speak, since at hand are the core and essence of principle, central ethical obligations. Therefore, I agree with the rulings of my colleague, the Deputy President, for example in paragraphs 31-32, 35, 39, in the principle questions that were addressed here. At issue is not the matter of the limits of the freedom of expression, which the State of Israel maintains on a very high level, as emerges from the rulings of this Court – and I personally doubt whether the type of statements that underlie this case would even be acceptable in a country that maintains ultimate freedom of expression such as the United States, pursuant to the First Amendment of its constitution. The matter at hand is the ideological base that is – or should be – shared by all members of Knesset, and which in the absence thereof – there is no survivability. I shall re-emphasize that in my opinion one of the more burdening parts of the story, as also emerges from the words of my colleague, in addition to the statements themselves, is the explanations – or the lack thereof – with respect to the remarks; it is clear that Knesset Member Zoabi's explanations are extremely stretched, and her attorney had to, skillfully, try to fill voids, at times in an impossible manner, as is stated in the Bible: "Wilt thou put out the eyes of these men?" (**Numbers**, 16, 14).

N. Finally, as to the sanction, which ultimately ended up being more in the symbolic dimension than one of essence or substance, since, as my colleague described, it was eroded between a recess and elections, and therefore it clearly had a weak impact.

O. Upon reading the opinion of my colleague, Justice Hayut, in paragraph 2, regarding the delivery of the minutes of the Ethics Committee's session to the Petitioner, I shall request only to state that we are dealing with a very delicate balance, which is intended to protect the committee members' freedom to express themselves freely on the one hand, and fairness towards the injured member of Knesset, on the other hand. As my colleague mentioned, this matter has emerged in other contexts as well. The difficulty is that even when the exposure of certain details, such as the identity of the speakers, is prevented, it is easy to comprehend that the matter still remains complex, since in a small committee (as opposed, for example, to the other Knesset committees which are large), anyone who is able to figure things out will not have difficulty identifying the speakers. Since the matter remains to be further addressed, it does not have to be ruled upon now.

P. Further to the remarks of my colleague, Justice Melcer, I shall concur with his statements regarding the relationship between law and ethics. It is known that ethical duties also apply to us as judges. The Jewish Law also addresses the distinction between ethics and the letter of the law, and as we – Judge Eran Shilo and myself – wrote in an article that is scheduled to be published in the **Zvi Tal Book**, "Judicial Ethics in Jewish Law", "The rules of ethics are rules that professionals took upon themselves, as opposed to the law – which is externally imposed upon them, as upon the entire public"; Furthermore – "The distinction between ethics and law is what allows the judge, in circumstances that justify it – to exercise discretion with respect to the norms that are prescribed, knowing that the letter of the law that guarantees a just trial shall not be prejudiced". In the case at hand, we are dealing with the legislator itself, who also prescribes the law and not only the rules of ethics, and therefore we can adjust that which is stated and say that the Rules of Ethics are directed internally, towards the sphere of parliamentary conduct, while the law that is legislated by the Knesset is directed externally, towards everyone. However the ethical matters in the Knesset are obviously uniquely public due to the institution's status and importance, and they are meant to draw behavioral lines so that the legislator shall know its own limits, not only through constitutional review but also within the boundaries of conduct that befits those who represent the entire Israeli public.

Q. My colleague, Justice Melcer, addressed the pledge of allegiance, similarly to my words in paragraph F above. It is known that the wording of this declaration is defined and a member of Knesset is not permitted to add anything thereto (HCJ 400/87 **Kahane v. The Chairperson of the Knesset** PD 41(2) 729); The declaration (Section 15(a) of the Basic Law: The Knesset) addresses "Bearing allegiance to the State of Israel and faithfully fulfilling my mandate in the Knesset"; similarly, the President of the State is also required to "bear allegiance" (Section 9 of the Basic Law: The President), as are the Prime Minister and ministers (Section 14 of the Basic Law: The Government), judges (Section 6 of the Basic Law: The Judiciary – which was applied as early as in 5708 (my book **The Judges of the Land** (5741-1980), 79); religious judges (Section 10 of the

Religious Judges law, 5715-1955); Qadis (Section 7 of the Qadis Law, 5721-1961), and Madhhab Qadis (Section 13 of the Druze Religious Courts Law, 5722-1963), as well as the State Comptroller, pursuant to Section 9 of the Basic Law: State Comptroller. In my opinion, by pledging this allegiance those filling these positions express the expectation of an extra degree of loyalty by any personality filling a governmental position, beyond the basic loyalty imposed by citizenship (see Section 5(c) of the Citizenship Law, 5712-1952, in which a person being naturalized pledges to be a "loyal citizen". The pledge of allegiance is a deep moral instrument, and as stated, is at the root of being a member of Knesset, and is a common thread that connects all holders of senior positions in the government system, in the framework of their mandate. One must either be a great believer or greatly naïve, to be of the opinion that Knesset Member Zoabi's statements which we are addressing here, constitute bearing allegiance.

R. As to the position of my colleague, Justice Joubran: There is no dispute regarding the centrality of freedom of political expression and the significance of the material parliamentary immunity, even what at issue is the expression of outrageous opinions. This is true for all and especially in the case of minorities from various sectors. This stems from us being a Jewish and democratic state, and from the legacy of the prophets of Israel, and as prophet **Isaiah** said (58, 1) "Cry aloud, spare not, lift up thy voice like a horn, and declare unto my people their transgression, and to the house of Jacob their sins."; see also the principle paragraph in the Declaration of Independence which establishes the State of Israel on "the foundations of freedom, justice and peace as envisaged by the prophets of Israel"; and Section 1 of The Foundations of Law Law, 5740-1980. My colleague is of the opinion (paragraph 17) that also when dealing with ethics it is necessary to apply restraint, and I especially agree when dealing with "politicians who are judging politicians", in the Knesset's Ethics Committee, when – without heaven forbid insulting anyone – there is an inherent concern regarding political considerations being involved in the material considerations. However, we are dealing with ethics in which severity of sanctions do not get to the root of the matter (and in the matter at hand has been wondrously eroded), and with a message which has already been described in the various opinions here.

S. Where do I disagree with my close colleague Justice Joubran? In laying down the line. For example, my colleague (paragraph 19) distinguishes between one who "acted not for the advancement of the best interest of the State" and one who "did not act to advance the best interest of the State", and he is of the opinion that "neutral actions by members of Knesset which on the one hand do not advance the best interest of the State and on the other hand do not harm it, shall not be included in the prohibition". Even if such distinction is appropriate, and I shall not address this (but see the words of our colleague Justice Melcer, in paragraph 7), this is not what is at issue, since the words of Knesset Member Zoabi which we are addressing are blatantly not in the best interest of the State. According to Justice Joubran (paragraph 20), Section 1A(2) of the Rules of Ethics, which imposes upon a member of Knesset to act "in a manner that shall serve human dignity, the advancement of society and the best interest of the State", should be interpreted in a liberal manner, and its sanctions shall be limited to extreme cases. In my opinion, even in the most far reaching liberal interpretation, calling for the

imposition of a siege on your own state and supporting terror cannot – with all due respect – be interpreted with common sense and in the eyes of an ordinary person – as neutral, certainly not as an act "in the State's best interest". I am sorry, but this is nothing other than a blatant an act against the State's best interest. There are ethical boundaries and I shall not address the question of the boundaries of freedom of expression, and the manner of dealing with expressions that are not only provocative but tap existential roots.

T. In summation: The (Middle) Eastern culture to which all of us, each sector, person and style, belong, attaches great importance to honor. Ethics is part of the values and manners between people. In the Jewish world this shall be referred to in various contexts as the theory of values (ethics). I shall quote statements that I had the opportunity to write in my article "The Equality of Minorities in a Jewish and Democratic State" ***Zehuyot*** 3 (5773-2013), 140. It is said there (on page 142) that "Mutual respect between Jews and Arabs in Israel is necessary. This is emphasized due to the importance that the culture surrounding us, the culture of the (Middle) East, attributes to the matter of honor, a culture that is expressed in words such as *'Sharaf* (honor) and *'Kilmat Sharaf'* (word of honor)" and hereinbelow (pages 143-144) "I myself perceive honoring my fellow-person, first and foremost as something natural that stems from within oneself, … this is also the case, *mutatis mutandis*, of course, with respect to matters related to the relations with Israeli Arabs within" and further on (page 145) "the principle prescription for relationships between the majority and minority in the State of Israel is complex – it is a matter of awareness and insights, which call for reciprocity. It includes Jewish insight as to the need for respect towards the Arabs and an ongoing, relentless, effort, to amend the gaps in equality in all spheres – as mentioned, I see myself as one of the first who was willing to stand up for the task of amending and bridging the gaps. However, awareness and insights are also necessary from the other side, among some of the Arab leadership in Israel… it must recognize and understand that the objective of the struggle must be **equality**, and the Jewish population cannot be concerned that at hand is a struggle against the essence of the State of Israel as a Jewish and democratic state". Indeed, this was said in the context of the state being Jewish and democratic, but they are relevant also when referring to terror. When three families and an entire country were worried about the fate of teenagers who had been abducted (and murdered) by evils, according to Knesset Member Zoabi, they are not terrorists, an ordinary person shall then ponder whether to accept her stretched explanations, and in my opinion the answer is crystal clear. This is also true with respect to the "siege sophistry", and no more words are needed.

Deputy President

Justice H. Melcer

1. I concur with the exhaustive and measured judgment by my colleague, President **M. Naor**.

   However, due to the importance of the matters, I take the liberty to add a few words regarding the distinction between the prohibition of law and the prohibitions of ethics, since in the case before us the matter that emerged was

whether Knesset Member **Hanin Zoabi** violated the **Rules of Ethics for Members of Knesset** (hereinafter, also: the "**Rules of Ethics**") and whether judicial intervention in the sanctions that were imposed thereupon by the **Knesset's Ethics Committee**, is appropriate. I shall briefly address below the said distinction, and its derivatives and implications.

2. Prof. **Asa Kasher**, in his article **Professional Ethics** (published in **Ethical Issues for Professionals in Counseling and Psychotherapy**, ed. Gaby Shefler, Yehudit Achmon, Gabriel Weil, pages 15-29 (Y"L Magnes – 5763-1993)) distinguishes between ethics and law using the terms of shelf and threshold, and clarifies that along the range of possible courses of actions:

> "There appear to be two lines, one at the top of the ladder… even if not at its very top, and one at the bottom of the ladder… even if not at its very bottom. The top line shall be called the 'shelf'. In this picture it represents ethics. The bottom line shall be called the 'threshold'. In the current picture it represents the law.
> These lines, the 'shelf' and the 'threshold' divide the entire range into three natural parts: the segment from the 'shelf' and upwards, the segment between the 'shelf' and the 'threshold' and the segment below the 'threshold'. It is important to understand the essence of each of these three segments, in order to properly understand the relationship between the world of ethics… and the world of law…
> The 'shelf' represents the professional ethics, the practical ideal of professional conduct. It is the 'shelf' of proper conduct… an action at the height of the 'shelf' or above it is proper conduct, as it is conduct that is in accordance with the practical ideal of professional conduct. The segment from the 'shelf' upwards, within the range of possible courses of actions, is the **proper sphere** of conduct…
> The 'threshold' represents the law…, the binding approach of legal conduct, the 'threshold' of permitted conduct pursuant to the law, from a legal perspective. An action at the height of the 'threshold' or beneath it constitutes… conduct that is contrary to the binding approach of legal conduct…
> For the sake of accuracy, we shall mention a simple aspect of the relationship between the 'shelf' and the 'threshold', in this picture, which is not at all obvious in any context. In the picture proposed here, the 'shelf' is always higher than the 'threshold'. In reality, the relationship between a certain 'shelf' and a certain 'threshold' could, at times, be more complex…
> Between the 'shelf and the 'threshold' is the **interim sphere**. An action in this sphere constitutes improper conduct, from an ethical perspective, since it is under the said 'shelf', but it is concurrently deemed a permitted action, from a legal perspective, since it is above the said 'threshold'…"
> (*Ibid*, on pages 23-24, original emphases – H.M)

Justice **Yitzhak Zamir**, who also dealt extensively with the distinction between law and ethics – added as follows in HCJ 2533/97 **The Movement for Quality Government in Israel v. The Government of Israel** PD 51(3) 46, on page 61 (1997):

> "It is the law that determines the limit between law and ethics. Furthermore, the law nibbles away at ethics. Rules of ethics can become rules of law. From time to time the legislator will prescribe this, and from time to time the courts will rule this, when it turns out that the power of ethics, in and of itself, does not prevent wrong behavior or severe consequences. In such an event, the law, on more than one occasion, will step in and help the ethics. See: **Y. Zamir** "**Ethics in Politics**" ***Mishpatim*** 14 (5747-5748) 250".

See also the opinion by Justice **M. Cheshin** in HCJ 1993/03 **The Movement for Quality Government in Israel v. Prime Minister Ariel Sharon**, PD 57(6) 817, on pages 917-918 (2003).

3. In the Petition before us – we are not dealing with the **legal sphere** which, for example, prescribes in Section 7A of the **Basic Law: The Knesset** terms and conditions that allow preventing a list of candidates from participating in, or a person from being a candidate for, elections to the Knesset. This is the **threshold** and as such, its interpretation and application are exercised narrowly and its judicial review is meticulous.

   See: Election Approval 9255/12 **The Central Elections Committee for the 19th Knesset v. Knesset Member Hanin Zoabi** (judgment from December 30, 2012; reasons from August 30, 2013, and review the references mentioned therein).

4. The Petition here addresses **a different matter**, since it focusses on the **rules of conduct** that apply to a person who was elected to serve as a member of Knesset. These bind the member of Knesset by virtue of Sections 13D and E of the **Knesset Members Immunity, Rights and Duties Law, 5711-1951** (hereinafter: the "**Knesset Members Immunity Law**"). These **Rules of Ethics** demand that a member of Knesset behave as expected of an elected official presiding in the Knesset, which is the "**State's House of Representatives**" (Section 1 of the **Basic Law: The Knesset**). This is the **threshold**. The said threshold leans on two supporting beams:

   (a) The pledge of allegiance, which the member of Knesset declares by virtue of Sections 15 of the **Basic Law: The Knesset** and Section 1(c) of the **Knesset Law, 5754-1994**, and on this matter I concur with the position of my colleague, the Deputy President, Justice **E. Rubinstein**.

   (b) The Rules of Ethics of the "House of Representatives"

   I shall address each of the two said sources separately below:

Pledge of Allegiance

5. Since the dawn of political thought and democratic history the pledge of allegiance has had more than just ceremonial meaning, but also deep substantial relevance. Indeed, as early as in ancient Greece, the governors in the Police were required to swear their allegiance to the **unification of the state**, and Plato, the reputed jurist of such time, in his book: **Laws** (Volumes III 685 and XII 960) wrote that the pledge of allegiance has both legal significance and political importance. Aristotle, in his book: **Politics** (Volume III, 1285) analyzed the meaning of the pledge of allegiance as a means of securing the rule of law. See: Matthew A. Paully, I Do Solemnly Swear: The President's Constitutional Oath: Its Meaning and Importance in the History of Oaths (1999) *ibid*, on pages 45-52. See also: Suzie Navot "The Knesset Chapter on the Constitution Draft: Three Remarks" ***Mishpat U'mimshal*** 10 593, 624-633 (the chapter on the status of the pledge of allegiance) (5767) (hereinafter: "**Navot on the Status of Pledge of Allegiance**"); Yigal Marzel "On a Judge's Pledge of Allegiance" **Orr Book** 647 (5773-2013; hereinafter: "**Marzel on the Pledge of Allegiance**").

   Therefore, anyone who crossed the threshold and his/her candidacy was approved and he/she was elected to the Knesset, must still declare allegiance in order to actually take the position, This is the significance of the pledge of allegiance, in the framework of which the member of Knesset **undertakes**:

   > "To bear allegiance to the State of Israel and to faithfully fulfill his mandate in the Knesset".

   It indeed turns out that while candidates to the Knesset must first cross the threshold and after they are elected they must represent their voters – those who sent them and their party – still the **common denominator for all members of Knesset** is the **pledge of allegiance** from which the **shelf is derived**. If the pledge, which has a uniform wording for all members of Knesset, and which cannot be deviated from in any way – is not made, the members of Knesset cannot function in the Knesset (see: Section 16 of the **Basic Law: The Knesset**; HCJ 400/87 **Kahane v. The Chairperson of the Knesset**, PD 41(2) 929 (1987); see also: **Marzel on the Pledge of Allegiance** page 651 and 664-665).

   Comparative law further demonstrates that not only is a person who is not willing to pledge allegiance not entitled to benefit from his rights in parliament, but that the "house" may deny, or *de facto* limit the rights and actions in parliament of a person who violates his said pledge. Compare: McGuinness v. The United Kingdom, case no. 39511/98 ECHR (1999); **Spanish Constitutional Court** decisions: number 101 dated November 18, 1983; number 122 dated December 16, 1983, number 8 dated January 25, 1985; number 119 dated June 21, 1990, and number 74 dated April 8, 1991. See: **Navot on the Status of the Pledge of Allegiance**, on pages 628-631 and see Prof. Aparicio Perez' article that is mentioned in Prof. **Suzie Navot**'s said article, in the framework of which the following was written (free translation from Spanish by Prof. **Navot**):

   > "The member of parliament benefits from a dual status: the

> one which derives from his status as an elected person and a representative, since his status stems from the fact that he was elected by the public in the framework of his party: and that of a member in a representative organ. The fact that a member of parliament is "elected" does not automatically grant him the rights in the representative organ, meaning, the parliament… This duality is possible. In certain cases, the parliament may, by virtue of its internal arrangements, even take away the mandate a member of parliament received and remove him. The fact that a person was elected as a member of parliament is a condition for him to participate in the common organ referred to as the parliament. However, in order to be included in this organ, the elected person must fulfill the material conditions to be included in this organ. Only after the member of Parliament has fulfilled these terms, can he be considered a 'parliamentarian'…"

It is appropriate to add here that both the **European Court of Human Rights** and the Spanish Constitutional Court **denied judicial intervention** in decisions that limited parliamentary participation from those who refused to pledge allegiance, and ruled that even the right to vote in parliament (which was not denied from Knesset Member **Zoabi** in this case) may be limited, provided that the prevention is meant to attain a proper goal and is proportionate. See: **Navot on the Status of the Pledge of Allegiance**, on page 630. With respect to the applicability of the proportionality criteria in the context of immunity and the denial thereof – also compare with that stated in the judgment in Cordova v. Italy (No. 1 and No. 2), Application no. 40877/98 and Application no. 45649/99, which was given by the European Court of Human Rights (dated April 30, 2003).

Rules of Ethics for Members of Knesset

6. These are relevant to the matter at hand, since in the framework of Section 1A thereof they further anchored **general values** that apply to the member of Knesset. In the framework of these **rules** – the member of Knesset must (*inter alia*):

(1) Fulfill his position out of loyalty to the basic values of the State of Israel as a Jewish and democratic State;
(2) Act as a **trustee of the public**, and fulfill his duty to represent the public that voted for him **in a manner that will serve** human dignity, the advancement of society and the **best interest of the State**;
(3) Diligently uphold the laws of the State of Israel and act to advance the principle of the rule of law;
(4) **Preserve the dignity of the Knesset** and the dignity of its members, be devoted to fulfilling his duties in the Knesset, **conduct himself in a manner that befits his status as a member of Knesset, and act to foster public trust in the Knesset**;
(5) Fulfill his mandate in the Knesset responsibly, honestly and fairly, out of dedication to his status as a leader in society, and strive to serve as a personal example for proper behavior;

(My emphases – **H.M.**)

As to the "dignity of the Knesset", Section 2 of the **Rules of Ethics** provides that: "The member of Knesset shall uphold the **dignity of the Knesset** and the dignity of its members, **shall act in a manner befitting his status and duties as a member of Knesset, and shall avoid using his immunities and rights as a member of Knesset in an improper manner**" (My emphases – H.M.)

7. In light of Knesset Member Zoabi's conduct which was the subject of the complaints that were filed against her – it can certainly be said, as was ruled in the decisions which are the subject of the Petition, that she **violated** Section 1A of the Rules of Ethics for Members of Knesset, and particularly the provisions of the above sub-sections (2) and (4) of the said Rules, since, according to my position, she was not diligent about maintaining allegiance to the State (see: Yaffa Zilbershats, **Loyalty to the State**, **Zamir Book**, 491 (2005); **Marzel on the Pledge of Allegiance** 669-673). These violations were reflected in the "understanding" Knesset Member Zoabi exhibited towards the acts of the abductors of the teenagers: **Naftali Frenkel, Gil-Ad Sha'er and Eyal Yifrah**, may their memories be blessed, and in her calls to impose a siege upon Israel. In doing so she not only **ethically violated** her fiduciary duty towards the State of Israel, but also prejudiced her status as a **trustee of the public**, who is meant to act in a manner that shall serve the advancement of the best interest of the State (sub-section 1A(2) above). She also deviated from her obligation as one who is required to uphold the **dignity of the Knesset** and act in a manner that befits her status as a member of Knesset, and to act to foster the public's trust in the Knesset (above sub-section 1A(4)). See: Suzie Navot "The Member of Knesset as a 'Trustee of the Public'" ***Mishpatim*** 31(2) 433 (particularly *ibid*, on pages 518-520) (5761). In this context my colleague, Justice **S. Joubran** states that in his opinion an ethics violation is possible "when a member of Knesset **acts not for the advancement of the best interest of the State**, as opposed to a situation in which he **did not act** to advance its best interest" (original emphases – H.M.) I am willing to accept this interpretation, however, even according thereto – Knesset Member **Zoabi**'s conviction of an ethical offense is **not** to be cancelled. Calling for a siege on the State of Israel is explicitly an **act not for the advancement of the best interest of the State** and here we must clarify that for this purpose it makes no difference whether at hand is a "military siege" or a "political siege", as Knesset Member **Zoabi's** attorney **retroactively** argued before us.

8. Here one should note that it is possible that MK **Zoabi** also violated additional Rules of Ethics however since this was not reflected in the decisions which are the subject of the Petition – I shall refrain from addressing this, just as I shall also presume (although this presumption could be disputed, in light of the provision of Section 1(A1)(4) of the **Knesset Members Immunity Law**) that the material immunity applies with respect to her actions, which are the subject of the complaints, in all that relates to criminal, or civil, liability (as opposed to ethical liability – see: HCJ 12002/04 **Makhoul v. The Knesset**, PD 60(2) 325 (2005) and see Barak Medina and Ilan Saban, "Expanding the Gap?" on the Scope of a Member of Knesset's Right to Support Resistance to the Occupation, Following HCJ 11225/03 **Bishara v. The Attorney General**, ***Mishpatim*** 37 219, on page

236, footnote 42 (5767)).

9. Before ending I shall add and emphasize that I concur with the words of my colleague, Justice **E. Hayut**, with respect to the right to review the minutes of the Ethics Committee when at issue is a disciplinary proceeding that is being held against the member of Knesset. This is warranted by the principle of "proper process".

10. In summary: All that is stated above leads to the conclusion that in the circumstances of the matter (including the **actual** duration of the sanctions that were imposed upon the Petitioner) – it is inappropriate to intervene in the **ethical decisions** that were issued in the matter of the Knesset Member **Zoabi**, which are the subject of the Petition.

    I shall end with a note, as I also remarked in the hearing, that it is not for no reason that the Petitioners and their educated attorneys did not find even one case in comparative law in which a member of parliament called for a siege against his state, and was absolved.

Justice

Justice S. Joubran

1. Is the Knesset's Ethics Committee (hereinafter: the "**Ethics Committee**" or the "**Committee**") authorized to apply sanctions of one kind or another due to political remarks that one of its members said or wrote outside of the Knesset, when such remarks are covered by the material immunity granted to a member of Knesset? If so, did the Ethics Committee exercise its authority lawfully? These are the two questions we are to rule on in this Petition.

2. After hearing the Petition, this Court, by a majority of opinions, decided to deny it. My opinion was different, and had it been heard, we would have ruled that the Ethics Committee exercised its authority unlawfully, and we would have cancelled its decision. At the end of our judgment, we ruled that our reasons would be given separately, and now the time for the reasons has come.

3. As mentioned, the Petitioner argued that the Ethics Committee lacks the authority to impose a sanction upon her for remarks that are covered by the material immunity that is granted to a member of Knesset. She also argued that the things that she said and wrote do not constitute a violation of the Rules of Ethics. My colleague, President **M. Naor**, is of the opinion that the Ethics Committee was authorized to address the Petitioner's remarks and that in the current case it exercised its authority lawfully. I agree with my colleague the President on the matter of the authority. I am also of the opinion that the Committee is authorized to address the Petitioner's remarks. The scope of disagreement between me and my colleague relates to the discretionary level. I am of the opinion that the Petitioner did not violate the Rules of Ethics, and therefore, the Committee's authority was exercised unlawfully. I shall add a few words on the authority level, and thereafter shall discuss the discretionary level.

The Authority Level

4. The Ethics Committee operates by virtue of Section 19 of the Basic Law: The Knesset, which constitutes authorization for regulating the Knesset's work proceedings in By-Laws, and by virtue of the Knesset Members Immunity, Rights and Duties Law, 5711-1951 (hereinafter: the "**Immunity Law**"). The two main provisions which are relevant to the case at hand are:

> 1. (a) A member of Knesset shall not bear criminal or civil responsibility **and shall be immune against any legal action**, due to voting or due to expressing an opinion orally or in writing, or due to an act performed – in or out of the Knesset – if the vote, the expression of the opinion or the act were in the framework of fulfilling his position, or for the sake of fulfilling his position, as a member of Knesset.
>
> 13D. (a) The member of Knesset who committed one of the following shall be subject to be judged by the Ethics Committee of the Members of Knesset:
> […]
> (3) Violated any of the Rules of Ethics.

5. The Rules of Ethics appear in the Knesset's By-Laws and their power is vested by virtue of Section 13E(1) of the Immunity Law. In the matter at hand, the Ethics Committee ruled that the Petitioner violated Section 1A of the Rules of Ethics which prescribes, in the relevant parts, that:

> 1A. The member of Knesset –
> …
> (2) Is a trustee of the public and it is his duty to represent the public that voted for him in such a manner that shall serve human dignity, **the advancement of society and the best interest of the State**;
> …
> (4) Shall preserve the dignity of the Knesset and the dignity of its members, shall be devoted to fulfilling his duties in the Knesset, shall conduct himself in a manner that befits his status as a member of Knesset and shall act **to foster public trust in the Knesset**;

6. The Petitioner's approach is that there is no place for the Ethics Committee to act if the member of Knesset's action is protected by material immunity. According to this approach, Section 1(a) of the Immunity Law requested to exclude these matters from the Committee's authority. This approach was denied in HCJ 12002/04 **Makhoul v. The Knesset** PD 60(2) 325 (2005) (hereinafter: the "**Makhoul**" Case). In that matter, it was ruled that the Ethics Committee's decision is not a "legal action" which is included in Section 1(a) of the Immunity Law, and therefore a member of Knesset is not immune from facing it. This ruling coincides with the purpose of Section 13D of the Immunity Law, which anchors the Ethics

Committee's authority to address the violation of the Rules of Ethics and to apply sanctions on members of Knesset for such violations. This ruling also coincides with the interpretive proceeding which should be applied to Sections 1 and 13D of the Immunity Law. Thus, it was ruled in the Makhoul Case that normative harmony requires the interpretation that at hand are two provisions which complement each other, rather than there being a contradiction between two provisions that are mutually exclusive (*ibid*, on pages 334-335). Therefore, I am of the opinion that that stated in Section 13D complements that stated in Section 1 and does not contradict it.

7. The Petitioner raised an additional argument on the authority level, that the Ethics Committee is not authorized to discuss **political** remarks by members of Knesset and that its authority is limited to remarks that substantially disturb the work of the Knesset and relate to the social relationship within the Knesset. Indeed, the position of the Ethics Committee in its decisions is that "in all that relates to political remarks, the Committee's position is that in general they should be **dismissed *in limine***, even if at hand are extreme and outrageous remarks". However, I am of the opinion, as is my colleague, the President, that this does not mean that the Ethics Committee lacks authority to discuss these remarks (see paragraphs 27-28 of her opinion). Indeed, my opinion is that one must distinguish between remarks that are only political, and remarks that constitute bad-mouthing and slandering of individuals and publics. However, I am of the opinion that the distinction does not have to be made at the authority level, but rather at the **discretionary level**. Meaning, in the scope of judicial review which should be applied on decisions that discuss these remarks and the scope of protection that should be given to remarks of such nature, as I shall elaborate below.

The Discretionary Level
Limiting the Freedom of Political Expression of an Elected Official

8. At the discretionary level, the Court examines the merits of the Ethics Committee's decision. In the case at hand, whether the Petitioner, through her remarks, violated the Rules of Ethics by virtue of which she was convicted. This matter is directly related to the question of members of Knesset's freedom of political expression and the question of the limitation thereof. I am of the opinion that the point of reference in this matter lies in the recognition of the importance of guaranteeing the existence of elected official's freedom of political expression and of striving to promote it.

9. "The political expression – the speech, the article, the interview – are the member of Knesset's primary working tools" – so wrote President **A. Barak** in HCJ 11225/03 **Knesset Member Dr. Azmi Bishara v. The Attorney General** PD 60(4) 287, 326 (hereinafter: the "**Bishara**" Case). Political expression is the core of parliamentary activity and constitutes a primary tool for the member of Knesset to perform his main duty – expressing his position and the positions of the public that voted for him on public matters.

10. In order to guarantee that the member of Knesset shall be able to faithfully fulfill his position and represent the public that voted for him while giving free and full expression of his opinions and perspectives, without fear or concern, the legislator

chose to grant the members of Knesset material immunity against being criminally charged or against a civil law obligation, for remarks that were expressed in the framework or for the sake of fulfilling their position. This immunity is essential to guarantee the democratic character of the ruling government. In the **Bishara** Case it was ruled as follows:

> "The purposes underlying the material immunity are varied. They are meant to protect the fundamental political freedoms. They are meant to allow proper activity of the legislative authority. They reflect a desire to guarantee the member of Knesset's independence and freedom of action. They are meant to strengthen the democratic rule. On the other hand, one must not ignore the other (general) purposes of the Immunity Law" (*ibid*, on page 323)

One can learn of the importance of protecting the members of Knesset's freedom of political expression, which is reflected in the material immunity granted to them, and of the tight linkage between it and the proper activity of the democratic process, from the spirit of the words of President **S. Agranat** in Criminal Appeal 255/68 **The State of Israel v. Avraham Ben Moshe**, PD 22(2) 427, 435 (1968), when he examined the actions of a person who was harassing a member of Knesset due to words spoken by such elected official:

> "The right of a member of a house of representatives, in this forum or elsewhere, to voice his views on the "cutting-edge" political questions, without fear and concern that he will be harmed by anyone who does not support such perspectives or who is convinced that they are dangerous for the nation – such right is but only a tangible reflection of the tight linkage that exists between the principle of freedom of expression and dispute and the proper activity of the democratic process. Moreover, due to the significant importance we attribute to the later aspect of the discussed principle, the legislator deemed it fit to grant the members of Knesset an entire system of privileges, which are meant to guarantee that each of them shall be able to express their opinion and formulate their positions, regarding the political issues that require solution and decision, in an open and free manner and without them having to be accountable for them to any person or authority. I mean the various immunity rights… one of which is that which is prescribed in Section 1(a)…"

11. The Israeli legislator even adopted a rather broad model of material immunity in Section 1(a) of the Immunity Law. This immunity applies also to actions and not only to voting or expressing an opinion and spans over the activity of the member of Knesset within the walls of the Knesset and outside thereof, and applies also after he ceased being a member of Knesset (see: HCJ 620/85 **Miari v. The Chairperson of the Knesset**, PD 41(4) 169, 204 (1987) (hereinafter: the "**Miari**" Case); the **Bishara** Case, on page 301). The broad scope of the material immunity indicates the great importance the legislator attributes to protecting the

members of Knesset's freedom of expression. This protection is not meant to serve the member of Knesset's personal well-being, but rather is meant to guarantee the right of all of the citizens to full and effective political representation – that their opinions be heard, through their elected representatives, in the public discourse, in general, and in the house of legislators, in particular.

12. It shall be noted that guaranteeing the existence of freedom of political expression is also important when at hand are aggravating and outrageous remarks and ideas, and it is especially important for members of Knesset who express ideas that are perceived as such by the majority of the public. Indeed "Freedom of expression is also the freedom to express dangerous, aggravating and deviant opinions, which disgust the public and which it hates (HCJ 399/85 **Kahane v. The Executive Committee of the Broadcast Authority**, PD 41(3) 255, 279 (1987)). The essence of the importance of this right is granting protection to words that are not popular and not in consensus and which can even grate on the ears.

13. There is no denying that guaranteeing the existence of freedom of free political expression and minimizing the limitation thereof is especially critical for members of Knesset who belong to minority groups in the population. My colleague, Justice **E. Hayut**, elaborated in her opinion on the special importance of protecting the freedom of expression of minority groups in general. I am of the opinion that when **members of Knesset** are at issue, this is all the more relevant. There is great significance to protecting the freedom of expression of minority groups in the parliament and restraining the infringement thereof. So as to guarantee effective and egalitarian representation of the minority groups in the parliament, in a manner in which their voice shall be heard and not excluded. This approach is grounded in the rulings of this Court. For example, in the **Bishara** Case, President **A. Barak** stated, in the context of the members of Knesset's material immunity, that protecting freedom of expression is "vital particularly for citizens who are members of minority groups in the population. In this sense the material immunity also advances civil equality by also protecting the right of the members of the minority groups in the population to full and effective political representation, and protects them by protecting the member of Knesset who is representing their affairs and their perspectives against the power of the majority" (*ibid*, on page 323).

14. This approach was also recognized in the judgment of the European Court of Human Rights (Szel v. Hungary, 44357/13 (sep. 16, 2014) at para 69; Karacsony v. Hungary 42461/13 (sep. 16, 2014) at para 72), to which my colleagues also referenced. As mentioned, the European Court cancelled the conviction of an ethical offense of four opposition members of Parliament in Hungary, due to their remarks in the framework of acts of protest. In that matter, it was ruled that in a democratic society, freedom of expression is a tool of supreme importance for members of Parliament. It was also ruled that this freedom of expression is particularly necessary for members of Parliament who belong to minority groups, in order to guarantee their right to express their positions and the right of the public to hear these positions.

One can also learn of the importance of protecting freedom of expression of minority groups from the spirit of the judgment of the European Court of Human Rights in Jerusalem v. Austria ECHR 26958/95. In that case it was ruled that interfering with an opposition member of parliament's freedom of expression calls for broader scrutiny by the Court:

> "Interference with the freedom of expression of an opposition member of parliament, like the applicant, calls for closest scrutiny on the part of the Court" (at para 36)."

The Ethics Rules

15. As to the ethics rules. As mentioned, the point of reference in any legal examination of the matter being discussed – including the examination of the ethics rules - is the recognition of the supreme status of freedom of expression in our legal system and the importance of minimizing interference therewith. I agree with my colleague, the President, that freedom of expression also projects onto the laws of ethics that apply to members of Knesset (see paragraph 27 of her opinion). This Court has ruled in the past that "Freedom of expression projects onto and has implications for all the other branches in our legal system, including disciplinary rules" (Bar Association Appeal 1734/00 **Tel Aviv Jaffa District Committee of the Bar Association v. Sheftel**, paragraph 25 of the judgment of (then) Justice **M. Naor** (January 1, 2002)). This Court applied a similar approach with respect to the disciplinary rules that apply to civil servants (Civil Service Disciplinary Appeal 5/86 **Sapiro v. The Civil Service Commissioner**, PD 40(4) 227 (1986) (hereinafter: the "**Sapiro**" Case)). In that case it was ruled that:

> "We must be diligent about the promotion and existence of freedom of expression, even in light of the reasonable assumption that there is a difference, in terms of the range of permitted actions, between an ordinary citizen and a civil servant, and consequently there are certain limitations on the public remarks by a civil servant […], the qualifications that are imposed upon civil servants, should, to the extent possible, be minimized. Additionally, general and unspecified reservations should not be imposed upon the civil servants, but rather their classification should be limited to those circumstances in which there is near certainty of damage or harm to the public service or to the interests it serves (*ibid*, on pages 236-237)

I am of the opinion that this is all the more relevant when at issue is the limitation of members of Knesset's freedom of political expression, since their political expression is the main tool for them to perform their duty. Therefore, the question is what are the criteria for ruling that a member of Knesset violated the ethics rules? I am of the opinion that one can learn of the proper criteria from looking at the laws of the members of Knesset's material immunity. As mentioned, the broad scope of material immunity that is granted to the members of Knesset embodies the supreme importance the legislator attributed to

protecting their freedom of expression. I have listed the reasons for this in the paragraphs above, and, as I have demonstrated, previous rulings of this Court have also done this well. It appears that these reasons are relevant also when at issue are the ethics rules. My colleague, Deputy President **E. Rubinstein** is of the opinion that "Particularly due to the broad material immunity, the Rules of Ethics are the little that can be done to restrain deviations, 'a pressure release valve', to maintain a framework of parliamentary norms" (paragraph G of his opinion). Indeed, a conviction of an ethical offense is generally considered less severe than a civil or criminal conviction against which the material immunity protects, and generally the sanctions accompanying it are less severe. It appears that this also justifies distinguishing between the extent of the democratic tolerance which applies in each set of rules. Thus, there can be remarks that do not cross the red lines that are defined by the material immunity and are covered thereby, while they do constitute ethical violations. However, a conviction of an ethical offense is also not a trivial matter, and the sanctions accompanying it can be especially severe, as in the current case – removal from the sessions of the Knesset's plenum and its committees for a period of six months. This can create a chilling effect for members of Knesset. In my opinion, this approach requires the Ethics Committee to apply restraint when limiting members of Knesset's freedom of expression and convicting them under the laws of ethics, for political remarks.

16. It is important to note in this context that that which is stated above is relevant when at issue is the violation of an ethical provision in the matter of a member of Knesset's **purely political remark** - as in the case at hand – and not when dealing with remarks that constitute **slander or bad-mouthing**. The reason for this is the degree of importance that should be attributed to political expression, since it promotes a free market of opinions and reflects the perspectives of the voting public. This is in contrast with the second type of expressions which do not promote these values, but rather harm the status and dignity of the Knesset and deteriorate the public discourse in Israel. This also coincides with the approach of the Ethics Committee itself, as it emerges from its decisions:

> "To the extent possible, the limitation of the members of Knesset's freedom of political and ideological expression should be avoided, even when the words they say are harsh and outrageous. The right of freedom of expression constitutes a tool of supreme importance for members of Knesset, within the Knesset and outside thereof, the essence of the importance of this right is granting protection to words that are not popular and which can even grate on many ears. **However, if, in all that relates to political remarks the position of the committee is that that in general they should be dismissed *in limine*, even if at hand are extreme and outrageous remarks, then with regard to remarks that constitute bad-mouthing, slandering, mudslinging and humiliating individuals and publics, the committee's position is materially different.** (Decision 2/19 of the Knesset's Ethics Committee "In the Matter of Remarks by Members of Knesset" (July 2, 2013)).

17. In the case before us the Ethics Committee decided that the Petitioner violated both of the values prescribed in Sections 1A(2) and 1A(4) of the Rules of the Ethics, which read as follows:

> 1A. The member of Knesset –
> …
> (2) Is a trustee of the public and it is his duty to represent the public that voted for him in such a manner that shall serve human dignity, **the advancement of society and the best interest of the State**;
> …
> (4) Shall preserve the dignity of the Knesset and the dignity of its members, shall be devoted to fulfilling his duties in the Knesset, shall conduct himself in a manner that befits his status as a member of Knesset and **shall act to foster public trust in the Knesset**;

The Ethics Committee ruled that "The Member of Knesset's words that were written and spoken in sensitives times do not coincide with the best interest of the State, even if we grant this term an expansive interpretation, and they constitute a violation of the duty of allegiance that applies to members of Knesset". It was further ruled that "The words severely prejudice the public's trust in the Knesset and its image, which is also reflected in the large number of complaints that were filed with the Committee".

18. The above-mentioned Section 1A prescribes basic values which outline general criteria for the conduct of members of Knesset. As my colleagues, I am of the opinion that even though at hand are basic values that do not delineate a sanction alongside them, they benefit from an independent status and members of Knesset who act in contradiction to that stated therein, can be convicted by virtue thereof. Thus, a conviction of an ethical offense based on Section 1A(4) would be appropriate when a member of Knesset prejudices the harms the Knesset or the members thereof (the **Makhoul** Case; Rules of Ethics Preparation Committee Report, December 2006, on page 46), or when a member of Knesset acts in a manner that prejudices the public trust. In my opinion, it appears that a conviction of an ethical offense based on Section 1A(2) would be appropriate when a member of Knesset **acted not for the advancement** of the best interest of the State as opposed to a situation in which he **did not act to advance** its best interest. Such interpretation takes into account that neutral actions by members of Knesset which on the one hand do not advance the best interest of the State, and on the other hand do not harm it, shall not be included in the prohibition.

19. According to my position, an interpretation that expands the limits of patience and tolerance is appropriate in this matter as well. In my opinion, one must act with a strict and stringent criterion when determining that a member of Knesset violated the values of "advancing the best interest of the State" and "fostering the public's trust". General and unspecified limitations should not be imposed upon a member of Knesset, but rather the classification should be limited to those extreme cases. Consequently, the member of Knesset should be granted broad freedom of action and his actions and words should be **interpreted liberally**,

such that only the **extreme and clear substance** of the contents of his words can be the basis for his conviction (compare: the **Miari** Case, on page 212). There are a number of reasons for my said position. **Firstly**, the specific provision deals with political remarks, which by their nature are intertwined with the member of Knesset's duties. As such, members of Knesset who engage in political expression as a main part of their position, are at a high risk of committing this ethical prohibition (compare: the **Bishara** Case, on page 326); **Secondly**, in light of the broad language in which the values of "advancing the best interest of the State" and "fostering the public's trust" are drafted, there is a concern that if members of Knesset shall be exposed to severe sanctions, which can reach six months of being removed from the sessions of the Knesset's plenum and its committees (Section 13D(d)(4) of the Immunity Law), this could chill their ability to express themselves without fear also in cases in which what they are saying does not constitute an ethical offense. **Thirdly**, members of Knesset often express themselves in controversial matters in a manner which could appear to be callous and outrageous to part of society. This is especially true in the divided Israeli society (see: E. Benvenisti "Regulating Freedom of Expression in a Divided Society" ***Mishpatim*** 30 29 (1999)). Hence, it is natural that in light of the Petitioner's perspectives and the platform of her party, she will find herself expressing positions regarding the Israeli-Arab conflict, and the risk that her statements shall be interpreted by a large part of society, as statements that harm the State's best interest, is great. (Compare: the **Bishara** Case, on page 327).

20. Given the above, one must examine whether the Petitioner, through her remarks, violated the Rules of Ethics. Meaning, is the Ethics Committee's decision which is the subject of the Petition, lawful. Examining the merits of the Committee's decision raises a question of the scope of judicial review of the Ethics Committee's decisions. I shall now address the examination of this scope and thereafter examine, in the form of applying the general rule to the specific case, whether the current case justifies our intervention.

The Scope of Judicial Review of the Ethics Committee's Decisions

21. Case law prescribes that the scope of judicial review is impacted by the type of decision which is the subject of the review (see: HCJ 652/81 **Knesset Member Yossi Sarid v. The Chairperson of the Knesset** PD 36(2) 197 (1982)). As my colleague, the President, elaborated, it was ruled in the **Makhoul** Case that in general the Ethics Committee has broad room for maneuver and consequently the room for judicial review is relatively narrow (*ibid*, on page 343). I agree with this position, however, each case is examined on its own merits and the scope of the judicial review is determined in accordance with the circumstances of each case. In the **Makhoul** Case, the main reasons for determining the relatively narrow scope of judicial review were that the Ethics Committee's decisions are closer to the sphere of the Knesset's internal matters; that its decisions harm the member of Knesset in a relatively mitigated manner; and that at issue are matters which generally have a small impact outside of the Knesset. Therefore, it was ruled that the extent of this Court's intervention shall be less than that which is exercised with respect to other quasi-judicial decisions that are in the framework of the Knesset's authority. However, these reasons are not relevant in the current case. Since at hand are political remarks that were said **outside** of the Knesset and

which do not relate to its internal affairs or its conduct or to the conduct of any of its members. The Ethics Committee's decision in the current case harms the core of the freedom of political expression, and as such its impact outside of the Knesset is not small. In my opinion in such cases, when the Committee examines purely political remarks, there is no justification for the judicial review to be narrower that the judicial review of other quasi-judicial decisions.

22. This ruling coincides with the ruling in the **Makhoul** Case, that when examining the Ethics Committee's decision, the Court shall take into consideration those consideration that relate to the severity of the infringement of the basic rights and the proportionality of the sanction that is imposed by the Ethics Committee. Indeed, ethics rules are not a cover for infringing basic rights that are granted to a member of Knesset. When the Knesset wishes to exercise its authority and qualify the rights granted to a member of Knesset by law, it must comply with the legal criteria that are required for exercising this authority (see: the **Miari** Case, on page 196). The more severe the infringement of the member of Knesset's basic rights, and the more the sanction for the act deviates from the proper extent, the more this Court will be willing to intervene (see: the **Makhoul** Case, on page 344). In the case before us the member of Knesset's freedom of expression was infringed. The fact that at hand is a member of Knesset from a minority group exacerbates the infringement and justifies broader judicial review. In this matter, the words of Justice **E. Rivlin** in the **Bishara** Case, are relevant:

> "In any event the special significance of judicial review in those cases in which basic human rights are at issue, should be recognized. **It is here that it is important that the judicial review exhaust its full power and ability**. This ability shall serve it if it shall succeed in refraining from scattering its legal and social resources which are nurtured by the public's trust, when the scope of deference expands. This is true in general, and particularly when immunity relating to freedom of expression is at issue, and in the case at hand – **not just expression, but political expression, and not just political expression, but political expression of a member of Knesset, and not just a member of Knesset, but a representative of a minority group**" (*ibid*, on page 337) [emphases added – S.J.]

From the General Rule to the Specific Case

23. I shall now examine the Petitioner's remarks in light of that stated. I shall state at the outset that in my opinion the Petitioner did not violate the Rules of Ethics. I did not reach this conclusion easily, and it is not obvious. Indeed, in my opinion this is quite a borderline case. The Petitioner's statements, at the timing in which they were said, are harsh and in my opinion near the line beyond which it could not be said that they comply with the Rules of Ethics. However, in my opinion, given the circumstances of the matter, and considering the entire considerations, the proper conclusion is that ultimately the Petitioner did not violate the Rules of Ethics. The main reason for this is that one cannot extract any clear and unequivocal content, that amount to a violation of the ethical values, from her

remarks, but rather her remarks were vague, some had reservations attached and some had explanations that were later attached, as I shall immediately describe in detail.

24. As for the call in the article dated July 13, 2014, to impose a siege on the State of Israel, the Petitioner did not state what type of siege she is calling for – whether a political siege or a military siege. The Petitioner's attorney claimed in the hearing before us that the Petitioner meant the imposition of a political siege and not the imposition of a military siege. I agree with my colleague the President that the words of the Petitioner's attorney were stated retroactively and that the Petitioner should have presented this explanation to the Ethics Committee. However, I am of the opinion that this interpretation that was suggested by the Petitioner's attorney – that the call is for a political and not a military siege – is at least possible, and could be implied from the words the Petitioner wrote. In this context, I do not agree with my colleague, the Deputy President, that it is very difficult to interpret the call "to impose a siege on the State of Israel" as only a political siege, but rather as a military siege.

25. As to the Petitioner's statements in the interview dated June 17, 2014, that the abductors of the teenagers "Are not terrorists", these statements were accompanied at the time they were said, by a reservation from the act of abduction, as it was said "even if I do not agree with them". Following the said interview, the Petitioner explained in the media that she objects to the abduction, that she does not agree with this act and that she objects in principle to harming civilian population, Israeli and Palestinian. As to her remark "They are not terrorists", she explained that it is her principle position not to use the term "terror" in the Hebrew press. I am of the opinion that in the circumstances of the matter, these words by the Petitioner somewhat soften her remarks in the interview. There are two reasons for this. Firstly, the statement "They are not terrorists" was made **orally**, in an interview, as a response to the interviewer's question. Meaning, the Petitioner did not have time to redraft or refine her statements, or retract them before they were made public. A similar position was expressed in the European Court of Human Rights in Mondragon v. Spain 2034/07, where it was ruled that the Court must take into account the fact that the statements were made orally during a press conference so that it was not possible to redraft or retract the statements before they were made public:

> "The Court further takes account of the fact that the remarks were made orally during press conference' so that the applicant had no possibility of reformulating' refining or retracting them before they were made public (at para 45)".

Secondly, the Petitioner provided explanations in the media to the meaning of her remarks with regard to the teenagers' abductors, in order to convince the public that she objects to the act of abduction and to harming civilian population. The Petitioner explained that the statement "They are not terrorists" stems from her principle position against using the term "terror" in Israeli media, and not from her identifying with the act of abduction. Even if these explanations which the Petitioner provided to the media, do not reflect her inner feelings, the fact that they are possible explanations, is sufficient to somewhat soften her remarks. I

agree with the position of my colleague, the President, that extreme acts or expressions which legitimize acts of terror and which encourage and support violence against civilian population, cannot overcome the ethical prohibitions. However, as I explained above, this is not exclusively and unequivocally implied from the Petitioner's statements, in light of her reservations when they were said and in light of her later explanations. One must also add that the Attorney General ruled on July 24, 2014, that a criminal investigation shall not be opened against the Petitioner for her remarks regarding the teenagers' abductors. The explanation given to this by the deputy Attorney General is that the Petitioner's reservation from the act of abduction "creates difficulty in perceiving the statements as inciting abduction". It appears, from all of that stated above, that one cannot extract **clear and unequivocal** content from the Petitioner's remarks that amount to a violation of the ethical prohibitions.

26. As for the timing in which the statements were said, I concur with the remark by my colleague, Justice **E. Hayut**, that one must set uniform criteria for the protection of freedom of expression during times of war and times of calm (see paragraph 4 of her opinion). In my opinion, the supreme status of the freedom of expression is also reserved during times of war. The Ethics Committee also ruled in its decision which is the subject of the Petition that "The right of members of Knesset to express positions that are not in consensus and to express public criticism on the government, is reserved also during times of war". It shall also be noted that the distinction between times of calm and times of crisis is not always sharp and clear, particularly in the Israeli reality. In this context the words of President **A. Barak** in HCJ 7052/03 **Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister of Interior**, 61(2) 202 (2006), to which my colleague referred, are relevant:

> "Furthermore, it is not possible to make a sharp distinction between the status of human rights during times of war and their status during times of peace. The line between terror and calm is thin. This is true everywhere and certainly in Israel. It is not possible to sustain this over time. We must treat human rights seriously both during times of war and times of calm" (*ibid*, in paragraphs 20-21).

However, as my colleague, Justice **E. Hayut**, stated "the likelihood and feasibility of harming other essential interests could be of different intensity during times of crisis."

27. In summary, in light of the great value of granting members of Knesset free political expression and minimizing the limitation thereof as much as possible, particularly when at issue are members of Knesset who belong to minority groups, and in light of the broad language of the ethical provisions by virtue of which the Petitioner was convicted, the conviction of members of Knesset by virtue of these provisions should be limited only to cases in which the content of the statements is clear, unequivocal and extreme. In the case before us, I am of the opinion that one cannot extract clear and unequivocal content from the Petitioner's statements, both in light of her reservations from the act of abduction while making the remarks and in light of her later explanations in the media.

Therefore, it is my position that the decision of the Ethics Committee was reached unlawfully.

28. In light of all that stated, if my opinion were to have been heard, we would have accepted the Petition and cancelled the Ethics Committee's decision in the Petitioner's matter.

Justice

It was decided by a majority of opinions as stated in the judgment of President **M. Naor**.

Given today, the 21st of Shvat, 5775 (February 10, 2015).

President	Deputy President	Justice
Justice	Justice	