HC 3267/97
HC 715/98

1. Amnon Rubinstein
2. Chaim Oron
3. Barak Katz
4. Yossi Nechushtan
5. Baruch Olshak
6. Alon Porat
7. Ilan Freedman **HC 3267/97**

1. Major (Res.) Yehuda Ressler
2. New Student Association of Tel-Aviv University
3. 15,604 Students of Israeli Institutes of Higher Education
4. 1,100 Students of Israeli High Schools
5. Major (Res.) Ehud Peleg **HC 715/98**

v.

Minister of Defense

The Supreme Court Sitting as the High Court of Justice

[December 9, 1998]

President A. Barak, Deputy President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, I. Zamir, T. Strasberg-Cohen, D. Dorner, J. Türkel, D. Beinisch, I. Englard

Petition to the Supreme Court Sitting as the High Court of Justice

Facts: The petitioners, Members of Knesset, reserve military officers, and

student organizations, challenged a practice in which the Minister of Defense routinely grants deferrals of and exemptions from required military service to ultra-Orthodox Jewish Yeshiva students who engage in full-time religious study. They claim the exemptions, granted to an ever-growing percentage of enlistment candidates (8% in the year 1997), violate the principle of equality, exceed the zone of reasonableness, and are disproportionate. They further claim that the Minister of Defense lacks the authority to regulate the matter, and that it must be done so via legislation.

Held: The Knesset, not the executive branch, has the authority to make fundamental decisions on fundamental issues that divide society. The routine granting of exemptions and deferrals to a large group of people is such a decision; it is a primary arrangement that must be addressed through primary legislation, not administrative regulations. Although the Court has upheld the administrative arrangement in the past, relying on a statutory provision authorizing the Defense Minister to grant exemptions "for other reasons," the growing number of students covered by the exemption has pushed it beyond his authority.. At a certain point, quantity becomes quality. The Defense Minister's current practice of granting deferrals and exemptions is invalid. The Court's declaration of invalidity will take effect 12 months from the date of the decision, in order to give the Knesset time to address the matter.

Israeli Supreme Court Cases Cited

[1] HC 910/98 *Ressler v. Defense Minister*, 42(2) IsrSC 441.

[2] HC 337/81 *Miterani v. Minister of Transportation*, 37(3) IsrSC 337.

[3] HC 266/68 *Petach Tikvah Municipality v. Minister of Agriculture*, 22(2) IsrSC 824.

[4] CA 524/88 "*Pri Ha'Emek" Cooperative Agricultural Society Ltd. v. Sdeh Ya'akov Workers' Village of Hapoel Mizrachi, Agricultural Cooperative Settlement*, 45(4) IsrSC 529.

[5] HC 2740/96 Sha*nsi v. Diamond Comptroller* 51(4) IsrSC 491.

[6] HC 5016/96 *Horev v. Minister of Transportation*, 51(4) IsrSC 1{[1997] IsrL 149}.

[7] CrimA 53/54 *Eshed, Temporary Transportation Center v. Attorney General*, 8 IsrSC 785.

[8] HC 3806/93 *Manning v. Minister of Justice*, 47(3) IsrSC 420.

[9] CA 825/88 *Association of Israeli Soccer Players v. Israeli Soccer Association*, 45(5) IsrSC 89.

[10] HC 144/50 *Sheave v. Defense Minister*, 5 IsrSC 399.

[11] HC 113/52 *Zachs v. Minister of Trade and Industry*, 6 IsrSC 696.

[12] HC 7351/95 *Nevuani v. Minister of Religious Affairs*, 50(4) IsrSC 89.

[13] HC 2994/90 *Poraz v. Government of Israel*, 44 (3) IsrSC317.

[14] HC 98/54 *Lazarovitz v. Food Supervisor of Jerusalem*, 10 IsrSC 40.

[15] HC 3872/93 *Mitral Ltd. v. Prime Minister and Minister of Religious Affairs*, 47(5) IsrSC 485.

[16] CA 6821/93 *United Bank Hamizrachi Ltd. v. Migdal Cooperative Village*, 49(4) IsrSC 221.

[17] HC 693/91 *Efrat v. Director of Population Registrar of the Ministry of the Interior*, 47(1) IsrSC 749.

[18] HC 953/87 *Poraz v. Mayor of Tel Aviv-Jaffa*, 42(2) IsrSC 309.

[19] HC 122/54 *Aksel v. Mayor, Councilors and Residents of the Municipality of Netanya*, 8 IsrSC 1524.

[20] HC 200/57 *Bronstein v. Beit Shemesh Local Council*, 12 IsrSC 264.

[21] HC 124/70 *Shemesh v. Companies Registrar*, 25(1) IsrSC 505.

[22] HC 144/72 *Halipi v. Minister of Justice*, 27(1) IsrSC 719.

[23] HC 333/85 *Aviel v. Minister of Labor and Welfare*, 45(4) IsrSC 581.

[24] CA 723/74 "*Ha'aretz" Newspaper Publishing Co.* v. *Israel Electric Co.*, 31(3) IsrSC 281.

[25] FH 9/77 *Israel Electric Co. v. "Ha'aretz" Newspaper Publishing Co.*, 32(2) IsrSC 337.

[26] HC 301/63 *Streit v. Israeli Chief Rabbinate*, 18(1) IsrSC 598.

[27] HC 249/64 *Baruch v. Customs and Duty Supervisor*, 19(1) IsrSC 486.

[28] HC 3914/92 *Lev v. Tel-Aviv-Jaffa Regional Rabbinical Court*, 48(2) IsrSC 491.

[29] HC 453/94 *Israeli Women's Network v. Government of Israel*, 48(5) IsrSC 501.

[30] HC 5394/92 *Hopert v. "Yad Vashem," Holocaust Memorial Authority*, 48(3) IsrSC 353.

[31] HC 726/94 *Klal Insurance Company v. Finance Minister*, 48(5) IsrSC 441.

[32] HC 1255/94 "*Bezeq," Israeli Communications Company v. Communications Minister*, 49(3) IsrSC 661.

[33] HC 5319/97 *Cogan v. Military Attorney General*, 51(5) IsrSC 67.

[34] HC 1064/94 C*omputest Rishon LeTzion (1986) Ltd. v. Transport Minister*, 49(4) IsrSC 808.

[35] CA 239/92 "*Egged" Transportation Cooperative Society v. Mashiach*, 48(2) IsrSC 66.

[36] HC 4541/94 *Miller v. Defense Minister*, 49(4) IsrSC 94.

[37] CrimApp 537/95 *Ganimat v. State of Israel*, 49 (3) IsrSC 355.

[38] HC 4562/92 *Zandberg v. Broadcasting Authority*, 50(2) IsrSC 793.

[39] HC 7111/95 *Center of Local Government v. Speaker of Knesset*, 50(3) IsrSC485.

[40] HC 3434/96 *Hopfnung v. Speaker of Knesset*, 50(3) IsrSC 57.

[41] HC 5503/94 *Segal v. Speaker of Knesset*, 51(4) IsrSC 529.

[42] HC 450/97 *Tenufa Manpower and Maintenance Services, Ltd. v. Minister of Labor and Welfare*, 52 (2) IsrSC 433.

[43] FH 2/82 *Ressler v. Defense Minister,* 36(1) IsrSC 708.

[44] HC 98/69 *Bergman v. Finance Minister*, 23(1) IsrSC 693.

[45] HC 114/78 *Borkan v. Finance Minister*, 32(2) IsrSC 800.

[46] EA 2/88 *Ben-Shalom v. Central Elections Committee for the Twelfth Knesset*, 43(4) IsrSC 221.

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

[48] HC 355/79 *Katalan v. Prison Authority*, 34(3) IsrSC 294.

[49] HC 1715/97 *Investment Managers' Bureau v. Finance Minister*, 51(4) 367.

[50] HC 40/70 *Becker v. Defense Minister*, 24(1) IsrSC 238.

[51] HC 448/81 *Ressler v. Defense Minister*, 36(1) IsrSC 81.

[52] HC 179/82 *Ressler v. Defense Minister,* 36(4) IsrSC 421.

[53] LCrim 1127/93 *State of Israel v. Klein,* 48(3) IsrSC 485.

American Cases Cited

[54] *Mistretta v. United States*, 488 U.S. 361 (1989).
[55] *Industrial Union Dept. v. American Petrol Inst*., 448 U.S. 607 (1980).
[56] *Rapp v. Carey*, 44 N.Y. 2d 157 (1976).
[57] *United States v. Robel*, 389 U.S. 258 (1967).
[58] *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).
[59] *Myers v. United States*, 272 U.S. 52 (1926).
[60] *Kent v. Dulles*, 357 U.S. 116 (1958).
[61] *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).
[62] *Wayman v. Southard*, 23 U.S. 1 (1825)..
[63] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

International Cases Cited

[64] *The Sunday Times v. The United Kingdom* (1979) 2 E.H.R.R. 245.
[65] *Malone v. United Kingdom* (1984) 7 E.H.R.R. 14.
[66] *Leander v. Sweden* (1987) 9 E.H.R.R. 433.

German Cases Cited

[67] 8 BVerfGE 274 (1958).
[68] 33 BVerfGE 125 (1972).
[69] 34 BVerfGE 52 (1972).
[70] 49 BVerfGE 39 (1978).

Canadian Cases Cited

[71] *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927.

Israeli Books Cited

[72] 2 A. Rubinstein, *Hamishpat Haconstitutzioni shel Midinat Yisrael [Israeli Constitutional Law]* (5th ed. 1996).

[73] 1 B. Bracha *Mishpat Minhali [Administrative Law]* (1987).

[74] 1 I. Zamir, *Hasamchut Haminhalit [Administrative Power]* (1996).

[75] Y. Dotan *Hanchayot Minhaliot [Administrative Guidelines]* (1996).

[76] 2 A. Barak, *Parshanut Bimishpat [Interpretation in Law]* (1993).

[77] 1 B. Aktzin, *Torat Hamishtarim [Theories of Government]* (2 ed. 1968).

Israeli Articles Cited

[78] I. Zamir, *Chakika Minhalit: Michir Hayieelut [Administrative Legislation: Price of Efficiency]*, 4 Mishpatim 63 (1973).

[79] Y.H. Klinghoffer, *Shilton Hachok Vichakikat Mishneh [Rule of Law and Administrative Regulations]*, in Sefer Klinghoffer al Hamishpat Hatzibori 105 (I. Zamir ed., 1993).

[80] B. Bracha, *Chakikat Mishneh [Administrative Regulations]*, 1 Mishpat U'Mimshal 411 (1993).

[81] B. Bracha, *Likrat Pikuach Parliamentary al Chakikat Mishneh [Parliamentary Supervision of Administrative Regulations]*, 7 Iyunei Mishpat 390 (1979-1980).

[82] A. Barak, *Pikuah Batei Hamishpat al Tichikat Mishneh [Judicial Supervision Administrative Regulations]*, 21 Hapraklit (1965) 463.

[83] C. Klein, *Al Hahagdara Hamishpatit shel Hamishtar Haparliamentary vi'al Haparliamentarism Hayisraeli [Legal Definition of Parliamentary Regime]*, 5 Mishpatim 308 (1973-1974).

[84] I. Zamir, *Hanchayot Hayoetz Hamishpati Lamemshala – Chakikat Mishneh, Nohel Vihanchaya [Attorney General Guidelines]*, 11 Iyunei Mishpat 339 (1986-1987).

[85] A. Barak, "Subordinate Legislation" 16 *Scripta Hierosolymitana* (1966) 219.

[86] F. Raday, *Chukatizatzia shel Dinei Haavodah [Constitutionalization of Labor Law]*, 4 Shnaton Mishpat Haavodah 151 (1994).

[87] R. Ben-Israel, *Hashlachot Chukei Hayesod al Mishpat Haavodah Vimaarechet Yachasei Haavodah [Implications of Basic Laws for Labor Law]*, 4 Shnaton Mishpat Haavodah 27 (1994).

[88] A. Yuran, *Hamahapacha Hachukatit Bimisoi Biyisrael [Constitutional Revolution of Tax]*, 23 *Mishpatim* 55 (1994).

[89] A. Barak, *Hakonstitutzionilazatzia shel Maarechet Hamishpat Biakvut Chukei Hayesod Vihashlachoteha al Hamishpat Haplili [Constitutionalization of the Legal System – Criminal Law*], 13 Mechkarei Mishpat 5 (1996-1997).

Foreign Books Cited

[90] B. Schwartz, *Administrative Law* (3rd ed. 1991).

[91] D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2d ed. 1997).

[92] D. Schoenbrod, *Power Without Responsibility* (1993).

[93] L.H. Tribe, *American Constitutional Law* (2d ed. 1988)

[94] D.P. Currie, *The Constitution of the Federal Republic of Germany* (1994).

[95] P.W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992).

[96] A.C. Aman and W.T. Mayton, *Administrative Law* (1993).

Foreign Articles Cited

[97] U. Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 Admin. L. Rev. 213 (1994).

Miscellaneous

[98] Standing Committee's Report for Renewed Examination of Enlistment Exemption for Yeshiva Students (1988).

[99] State Comptroller, 39th Annual Report – 1988 and Accounts for Fiscal Year of 1987 (1989).

[100] State Comptroller, 48th Annual Report – 1997 and Accounts for Fiscal Year of 1996 (1998).

Jewish Law Sources Cited

[a] *Tractate Sabbath*, 132:1.

[b] Jerusalem Talmud, *Tractate Yoma*, 8:5.

JUDGMENT

President A. Barak

This court examined the deferral of military service for Yeshiva [religious seminary – ed.] students for whom "Torah is their calling" [who engage in full-time religious study – trans.] in HC 910/86 *Ressler v. Minister of Defense* (hereinafter- *Ressler* [1]). According to the statistics presented to the Court in *Ressler* [1] of those who enlisted in the I.D.F. in 1987, 1,674 Yeshiva students had their military service deferred (constituting 5.4% of the total). The total number of students included in the arrangement for the deferral of military service in that year was 17,017. Against this backdrop *Ressler* [1] held that the Minister of Defense was authorized to defer the drafting of Yeshiva students and that his exercise of discretion to that effect was within the zone of reasonableness. In my opinion in that case, I stated:

> ... ultimately, the number of Yeshiva students who receive deferrals is significant. There is a limit, which no reasonable Minister of Defense is authorized to exceed. Quantity becomes quality.

Id. at 505.

Ten years have passed since that case was decided. The number of Yeshiva students included in the deferral of service arrangement has risen constantly. According to the statistics presented to us, in 1997, about 8% of all the enlistees eligible for service were granted a deferral, based on their being full-time Yeshiva students. The total number of Yeshiva students included in the arrangement that year was 28,772 (as of August

1997). The arrangement's social ramifications are of gargantuan proportions. Indeed, increasingly, feelings of inequality are tearing the fabric of Israeli society. Moreover, some of the Yeshiva students being granted deferrals – namely, those who cannot successfully adjust to the full-time study of Torah – find themselves in an untenable predicament; they do not study for they are unsuited for it; they do not work, for fear of exposing their failure to meet the conditions of the arrangement. The result is an ongoing breach of the law, inhibited personal growth and harm to the work force. The issue before us today is whether or not these and other ramifications cross the line beyond which "quantity becomes quality." Does the complex situation in which Israeli society finds itself mean that this entire issue can no longer be regulated via the service deferral granted by the Minister of Defense? Does the situation presented before us today not warrant the conclusion that this entire matter ought to be resolved by Knesset legislation, capable of addressing the problem in all its complexity? These are the painstaking questions with which we are confronted today.

The Facts

1. The history of granting deferral of military service to full-time Yeshiva students (students for whom "Torah is their calling") is in truth the history of the State of Israel itself. We dwelt upon this in *Ressler* [1] at 449-51. It was the first Defense Minister, Mr. David Ben-Gurion, who ordered that the enlistment of full-time Yeshiva students be deferred. At the time, there was a fixed quota of Yeshiva students whose service was deferred, not exceeding about four hundred (400) Yeshiva students a year. This was the number of deferrals granted until 1970. From that year onwards the arrangement was altered to remove the limitation on the number of deferrals that could be granted. Hence, the number of Yeshiva students granted deferrals increased. In 1975, a yearly quota of 800 was established for the number of Yeshiva students who would obtain service deferral. Following the coalition agreement of 1977, the quota was abolished altogether, increasing the number of potential service deferrers. These deferrers came to include the newly penitent, teachers in the

independent educational system, and graduates of religious technical schools. The conditions for authorizing a deferral were similarly relaxed, as were the requirements which the deferrers had to meet. For example, Yeshiva students over the age of thirty were allowed to give lessons in Judaic studies and receive modest scholarships in consideration thereof. It would seem that at that time there was also a change in the rationale underlying the arrangement. The arrangement originated as a result of the destruction of the European Yeshivas during the Holocaust and the desire to avoid having to close Yeshivas in Israel pursuant to the enlistment of their students. Today, this reasoning no longer holds. Israeli Yeshivas are thriving and there is no real danger that drafting Yeshiva students within any particular framework would lead to the disappearance of these institutions. The arrangement today is, on the one hand, based on the desire to enable Yeshiva students to continue studying, while on the other hand, there is the perception that the effectiveness of these students' military service is questionable, due to the difficulties they would encounter in adjusting to the Military and the difficulties that the Military would have adjusting to them.

2. The arrangement introduced by David Ben-Gurion and adopted by all subsequent defense ministers, sparked broad public controversy. The Knesset debated it on a number of occasions. *See Ressler* [1] at 450. In effect, numerous efforts were made to petition the Supreme Court with regard to this matter. *Id.* at 453. These efforts failed, given the Supreme Court's original view that the petitioners had no legal standing and that the issue itself was non-justiciable. The Supreme Court subsequently changed its position in *Ressler* [1] noting that the petitioner had standing before the Court and that his petition was in fact justiciable (both normatively and institutionally). Regarding the petition itself, the Court held that the deferral of military service for full-time Yeshiva students was within the Defense Minister's authority and did not exceed the zone of reasonableness. Even so, it held that "if the number of those whose service is deferred due to Torah studies continues to increase, to the extent of it comprising a significant portion of candidates for military service, thereby harming Israel's security, there will definitely come a point at which we

will say that the decision to defer enlistment is unreasonable and must be struck down." *Ressler* [1] at 512. The Court emphasized that the Defense Minister's discretion was ongoing, as was the obligation to exercise it. President Shamgar stressed this point, noting:

> …this matter cannot be examined exclusively on the basis of its external manifestation, in light of its development since the establishment of the State to the present time; it must equally be examined according to its ongoing nature, its impact and its attendant consequences, year in and year out, for the foreseeable future. This means that our ruling today regarding the arrangement's legality, after subjecting this arrangement to the relevant judicial review for the first time, does not exempt the Executive Branch from the obligation of periodically examining and reexamining the implications of granting exemptions to growing numbers of men of military age ... thus, we are not speaking of fixed data but rather of facts that change from one year to the next. This means that the empowered authority is obliged annually to reassess the data and to consider its connection with other background factors.

Id. at 524-25.

3. Public discussion of the issue of deferring the enlistment of full-time Yeshiva students persisted after the *Ressler* [1] case was decided. Immediately thereafter (August 1988), a report of the Knesset sub-committee of the Foreign Affairs and Security Committee was published. The committee opined that the arrangement regarding the deferred enlistment of Yeshiva students must be changed by establishing frameworks which combined military service with the study of Torah. Particular attention was given to the model of the "Hesder Yeshivas" [combined religious study and military training – ed.]. It further recommended exempting 200 outstanding students from military service. The other Yeshiva students would be enlisted upon reaching the age of 24.

They would undergo a short period of training and a shortened service period of one year. In the sub-committee's view, the Knesset was obliged to adopt a definite position on the issue of service deferral for Yeshiva students. The sub-committee called upon the Defense Minister to "promptly initiate a bill for regulating the military service of Yeshiva students," in the spirit of the committee's conclusions and recommendation. Report of the Standing Committee for the Renewed Examination of the Enlistment Exemption for Yeshiva Students [98] at 42.

4. The State Comptroller's Annual Report (No. 39) (1988 and Accounts for the 1987 Fiscal Year) [99] addressed the conditions for deferring Yeshiva students' military service. The examination indicates the lack of adequate supervision as to whether the arrangement's conditions are properly complied with. Indeed, there is no ongoing, comprehensive, and organized data regarding Yeshiva students who transfer from one Yeshiva to another, nor is there efficient monitoring regarding whether the Yeshiva students benefiting from the arrangement are not in fact engaged in other remunerative work. Furthermore, there is insufficient military enforcement of the students' obligation to report at specific times for renewal of their service deferral. According to the report, there was no justification for leniency regarding contempt for the requirements of timely reporting for service deferral. Annual Report No. 39 [99] at 908. The report adopted the view that the subject ought to be re-examined and "debated in the Knesset, in recognition of its immense public importance." *Id*. In April of 1991, the Committee on Matters Related to the State Comptroller discussed the Report, criticizing the defects revealed in the Enlistment Board's supervision of the maintenance of the enlistment deferral arrangement for Yeshiva students. It was the Committee's opinion that, "given the State of Israel's critical security needs and the heavy burden born by its citizens in the area of military service, there is no justification for a situation in which tens of thousands of citizens receive prolonged deferrals of military service, the practical meaning of which, in most cases, is a total exemption from military service."

5. On July 24th, 1992 the Defense Minister appointed a committee to examine the deferral of military service for full-time Yeshiva students. The committee, chaired by the Defense Minister's assistant and Director General of the Ministry of Defense, Mr. Haim Yisraeli, was asked to examine the procedures, criteria and manner of supervising the arrangement for the enlistment deferral of full-time Yeshiva students. The committee, which submitted recommendations to the Defense Minister in August of 1995, suggested methods for supervising the arrangement's proper enforcement. *Inter alia*, the Yisraeli committee suggested shortening the deferral period for Yeshiva students to six months, until they reach the age of 25. This would mean that they would have to report to the enlistment bureau twice a year. It further recommended establishing a permanent formula, according to which the heads of the Yeshivas would report to the I.D.F. twice a year, in addition to a procedure for revoking recognition of those Yeshivas which fail to comply with the conditions of the arrangement. Moreover, the committee suggested improving the enforcement measures by conveying all the relevant data to the police and the State Attorney's office, who would deal with students who violate the rules of the arrangement.

6. In the Annual Report (No.48) (State Comptroller - 48th Annual Report for 1997 and Accounts for 1996 Fiscal Year) [100], the State Comptroller once again addressed the arrangements for enlistment deferral of Yeshiva Students into the Defense Service. At that time, the number of Yeshiva students whose enlistment had been deferred was 28,772, which constituted 7.4% of the total number of enlistees in 1996. The report emphasized that there was no comprehensive and continuous supervision of compliance with the requirements established for full-time Torah students. According to the State Comptroller, so long as this situation prevailed, it would be impossible to accurately establish whether there were individuals purporting to be full-time students who were in fact not studying at all, and what proportion of the deferrees they constituted. All that could be determined was that, as of March 1997, of all the Yeshiva students whose enlistment had been deferred (28,547), only 2.8% of them enlisted in the I.D.F in 1996. Furthermore, there had not been an attempt

to ascertain how many full-time Yeshiva students, barred by the arrangement from working or pursuing any occupation save learning, were in fact not working or earning money. The Report also emphasized that the Defense establishment had failed to conduct any systematic ongoing discussion regarding the steady increase of eligible enlistees who were full-time Yeshiva Students. Prior to concluding, the Report noted that "in view of the findings of the follow-up report and [Israel's] present security needs ... the summary of the previous report has not merely retained its validity but has been bolstered ... and these findings strengthen the recommendation to conduct an in-depth inquiry into the subject of enlistment deferral for full-time Yeshiva students." *Id.* [100] at 1011.

7. The Knesset plenary discussed the enlistment deferral for full-time Yeshiva students on a number of occasions. On March 11th, 1992, the Knesset debated eight private bills proposed by members for amending the Defense Service (Amendment) Law [Consolidated Version] 1986. The bills attempted to limit the duration of the deferral that the Defense Minister was empowered to grant, as well as the number of those being granted deferrals. There was also a bill to adopt a service framework for full-time Yeshiva students, similar to that of the *Hesder* students. All of these bills were stricken from the agenda. In November of 1993, the Knesset debated a bill to amend the Basic Law: The Knesset. The bill made the right to vote and be elected conditional upon having fulfilled the duty of national service, while restricting to a minimum those Yeshiva students who would be exempted from military service. This bill, too, was stricken from the agenda. Eight private bills were submitted before the fourteenth Knesset regarding the issue of granting deferrals to full-time Yeshiva students. The bills attempted to set quotas on the number of those whose service would be deferred, place restrictions on the duration of the deferral, and impose an obligation of full reserve duty for those whose service had been deferred. Three of these bills were stricken from the Knesset's agenda.

The Current Situation

8. As it now stands, deferrals of defense service are granted to full-time Yeshiva students (those for whom "Torah is their calling"). Joining this category is contingent on the enlistee having studied continuously in a Yeshiva High School, be it regular or vocational, since the age of 16. This category is also open to those who studied in a religious high school and whose matriculation exams included Talmud at the level of five units. The category of full-time Yeshiva students also includes the newly religious. The deferral is contingent on the following condition: anyone included in the category of "full-time Yeshiva student" cannot be engaged in any form of work or occupation that is ordinarily remunerative. An exception to this rule was recognized for Yeshiva students employed in a formal role as teachers in the schools of the various streams of the Ultra-Orthodox educational system; they are entitled to remuneration. The same applies to Yeshiva students over the age of 29 who teach children through the age of 13 in parochial primary schools. The final category also includes teachers of at least 29 years of age who teach in Yeshivas for students between the ages of 13 and 17 or in Yeshivas for students 18 years and older. When the service deferral is terminated, the candidate for military duty who is a full-time Yeshiva student receives an exemption if he is at least 35 and has four children, or upon reaching the age of 41. The most recent data indicates that there are presently over 28,000 enlistees from among the service candidates of all of the years whose enlistment is currently being deferred. This data indicates a rise in the extent of the enlistment deferral. Hence, in 1995, the number of Yeshiva students whose enlistment had been deferred stood at 26,262 - in 1996 (according to the data as of March 31st, 1997) there were 28,547 persons. In 1995 the percentage of those joining the arrangement was about 6.4% out of the entire year of enlistment candidates; in 1996 the percentage was 7.4%; and in 1997 it stood at 8% of the enlistment candidates of that year.

9. A Yeshiva student registered for military service and included under the category of "full-time Yeshiva student," who no longer qualifies for this particular exemption, whether of his own accord or pursuant to the enlistment officer's decision, will have the duration of his military service determined in accordance with his age and family situation. Thus, the

number of those included in the arrangement is not static. During the entire year there is a constant ebb and flow of those entering and leaving the above category. Out of those born in 1973, for instance, in 1991 (when they reached enlistment age), the percentage of those included in the arrangement stood at 6%. For those born in 1973 and reaching the age of about 21 (in 1994) the number of those included in the arrangement stood at 4.8%.

10. According to the current arrangement, the enlistment bureau commander approves the granting of full-time Yeshiva student status to those candidates who have, at one time, studied at one of the Yeshivas recognized by the Committee of Yeshivas in Israel. Acceptance is conditional on having completed the enlistment procedures and having declared oneself a "full-time Yeshiva student" who is not engaged in any work or occupation, remunerative or not, save Yeshiva studies. Thus, a candidate for defense service undertakes that if at any time during the period covered by the service deferral, any of the qualifying conditions is not fulfilled, he will immediately report to the enlistment bureau and give notice thereof. He also undertakes to notify the enlistment bureau if ever he transfers to study in another Yeshiva. In addition, the head of the Yeshiva in which the candidate is purporting to study must sign a declaration of his own on the back of the student's declaration form (which must itself be renewed on a yearly basis) in which he undertakes to notify the secretary of the Committee for Yeshivas in Israel within thirty days if the student in question terminates his studies during the course of the year. The secretary of the Committee for Yeshivas, for his part, must confirm that the candidate fulfills the requirements for being included in the category of "full-time Yeshiva students" and must further declare that, "if we receive notification that the aforementioned has discontinued his studies in the Yeshiva, during the course of the year, I undertake to immediately inform the commander of the enlistment bureau." The candidate for defense service receives an annual enlistment deferral. On an annual basis, he is required to renew his status and apply for an additional year of deferred service. The candidate is required to produce a valid current certification from both the head of the Yeshiva and the secretary of the Committee of

Yeshivas attesting to his continued studies and must once again undertake to comply with all the requisite conditions for full-time Yeshiva students.

The Petitions

11. Before us are two petitions. The first is the petition submitted by Member of Knesset Amnon Rubinstein, Member of Knesset Chaim Oron, and others (HC 3267/97). The second is that of Major Ressler (Res.) *et al*. (HC 715/98). The first petition asks that the Defense Minister to show cause why he should not establish a maximum reasonable quota of Yeshiva students who are granted a deferral of military service. The second petition asks the Minister to show cause why he does not lack the authority to defer Yeshiva students' enlistment into regular military service. Both petitions describe the situation regarding the deferral of service for full-time Yeshiva students in the present and the past. Both claim that the existing arrangement violates the principle of equality, deviates from the boundaries of reasonableness, and is disproportionate. Moreover, the second petition claims that the Minister of Defense does not have the authority to regulate the matter through administrative regulations and that the entire issue ought to be regulated through legislation.

12. In his response, the Defense Minister noted that he had re-examined the legal framework established in *Ressler* [1] respecting the exercise of his discretion in deferring full-time Yeshiva students' service. He opined that the considerations that had motivated his predecessors in exercising their discretion were still valid today, highlighting the following considerations, cited in *Ressler* [1] which formed the basis for the Defense Minister's response in that case:

a. The fact that the Yeshiva students lead an ultra-Orthodox lifestyle, which makes induction into the military difficult, causing them serious problems in adapting to a society and culture, which are foreign to them, and creating difficulties in respecting strict observance of religious precepts. Thus, for example, the ultra-Orthodox do not recognize the Chief

Rabbinate of Israel's certification that food is kosher, while they themselves disagree over recognition of a number of special kosher certifications by various rabbis. Similarly, other daily practices of theirs are likely to give rise to many difficulties in the I.D.F.'s ability to integrate them.

b. The fact that the entire effectiveness of their military service is placed into doubt, given the psychological difficulties they experience as a result of neglecting their religious studies, and given their special education and lifestyle.

c. No one can foresee whether the enlistment of thousands of Yeshiva students, who view their enlistment in the military as a blow to the foundations of their faith, which holds that the study of Torah takes precedence over the obligation to serve in the military, will add to the I.D.F.'s fighting power or, heaven forbid, impair its ability. It is by no means certain that enlisting these individuals, even if it serves to increase the military's power numerically, will not have far-reaching implications for the State's internal and external strength. *See* HC 448/81 *Ressler v. Miister of Defense* 36(1) IsrSC 81, 86.

d. Respect for the spiritual and historical commitment of students and teachers engaged in full-time religious studies to uphold the value of studying Torah.

e. The desire not to violate the stated principle which is transcendent and holy to a segment of the population in Israel and in the Diaspora.

f. Recognition of the deep public sensitivity toward the topic which has embroiled the Israeli public in an ideological debate and of the need for a careful balancing with respect to a dispute of this nature.

Further on in his response, the Defense Minister noted that having considered the entirety of factors and information within the parameters determined in *Ressler* [1] with military interests constituting the dominant consideration, and having consulted with the Prime Minister, he had concluded that, in view of the aforementioned considerations, the existing situation did not seriously impair Israel's security needs. In the Defense Minister's view, absent national consensus, and in the absence of clarity over whether it would benefit national security, as noted above, the military should not take steps which are liable to have harsh consequences both on the private level and on the military's organization.

13. In his examination of the issue, the Defense Minister considered the question that had been raised in the *first* of the two petitions before us (HC 3267/97), namely, whether there should be a yearly quota limiting those permitted to enter this arrangement. In his view, at this stage, the current arrangement did not substantially impair security needs and therefore did not need to be replaced by a yearly quota. To this effect, the Defense Minister submitted that setting a quota would, *inter alia*, entail the establishment of criteria for distinguishing between those worthy of being included in the arrangement and those who are not and who would therefore be drafted in the I.D.F via ordinary enlistment. In view of the considerations underlying the arrangement itself, the Minister felt that prescribing criteria of this nature would raise serious legal and social problems. This being the case, he felt that such a step should not be taken at this stage.

14. In his response, the Minister undertook to adopt and implement the Yisraeli Commission's recommendations. To this end, he instructed the various bodies in the Ministry of Defense and the military to work towards subjecting the arrangement to proper supervision, in order to ensure that the deferment was not improperly exploited. In this context, the Minister appointed a team for the implementation of recommendations, which would include the incorporation of the main elements of the arrangement into administrative regulations; the regulation of the undertakings of the heads of the Yeshivas to the I.D.F; submission of affidavits by Yeshiva

students; establishment of criteria for recognition of Yeshivas and Adult Studies Institutions (Kollel); increasing the number of reporting dates for young students (ages 18-20) to twice a year and increasing the sanctions against those who breached the arrangement, both by indicting those in breach and by establishing a procedure for revoking the recognition of those Yeshivas failing to comply with the conditions set forth by the arrangement. The Defense Minister stated that following the regulations' actual implementation, their influence on the number of those joining the arrangement would be reviewed. The Minister further added that the security establishment would continue to keep track of the changes in the number of those included in the arrangement and the various implications of the arrangement, thereby permitting the security establishment to weigh the matter's influence on state security, and the potential need for establishing a maximum annual quota of those who can benefit from the arrangement.

15. In their oral pleadings, the attorneys for the sides repeated their basic positions respectively. Ad*v.* Fogelman, who pleaded on the Defense Minister's behalf, emphasized that his client was chiefly concerned with security. It was in the context of outlining this point that counsel indicated how ineffective imposing military service on full-time Yeshiva students would be. This consideration had figured in the rationale originally underlying the arrangement's institution, and it remained relevant for the newer reasons justifying the arrangement. At this juncture, Mr. Fogelman mentioned that the Prime Minister had asked that a public commission, headed by Supreme Court Justice (Ret.) Tzvi Tal, convene in order to re-examine the arrangement. Due to the reservations of certain segments of the Ultra-Orthodox community, the proposal was not implemented. We asked Mr. Fogelman whether it would have been appropriate for bodies representing the Ultra-Orthodox population to be represented before us. He responded that the Ultra-Orthodox circles, in general, and the Committee of Yeshivas in Israel, were aware that the petitions were being deliberated, and that had they wished to do so, they could have asked to join the proceedings at bar. The Court asked Mr. Fogelman to call their attention to the pending petition and he undertook to do so.

16. In his pleadings before this Court, Ad*v.* Har-Zahav (who pleaded on the petitioners' behalf in HC 3267/97) emphasized that no empirical analysis had been conducted to substantiate the claim that the Yeshiva students' military service would not be effective. He argued that the population included in the arrangement was not homogenous and that there was no reason why many of them could not serve effectively. Ad*v.* Har-Zahav further noted that the Defense Minister's position highlighted that the present situation did not pose any significant risk to Israel's security needs. From this, Ad*v.* Har-Zahav inferred that, according to the Defense Minister's own opinion, the arrangement does harms security needs, in a way that is not significant. Such insignificant harm is sufficient to justify establishing a quota, as the petition requests. This having been said, Ad*v.* Har-Zahav noted the petitioners' position that the current arrangement does indeed significantly jeopardize security needs.

He contends that the feeling of national solidarity is in fact part of the security ethos. This feeling is deeply wounded by the present arrangement's discriminatory nature. Ad*v.* Ressler (who pleaded on the appellant's behalf in HC 715/98), for his part, similarly highlighted the arrangement's discriminatory character. He argued that the Defense Minister was by no means authorized to grant draft deferrals to full-time Yeshiva students, and that the existence of a quota was immaterial. He also maintained that, the implication of the Defense Minister's position is the arrangement does infringe on security needs in a way that is not significant. In his opinion, the Defense Minister bears the burden of proving that the arrangement does not impair security needs. Mr. Ressler once again emphasized that, in his opinion, the arrangement as a whole ought to be enshrined in legislation and not by way of exemptions granted by the Defense Minister. He also noted that this had been the recommendation of the sub-committee of the Foreign Affairs and Security Committee.

The Ressler Case

17. In *Ressler* [1] the Court, after establishing that the petition was (both normatively and institutionally) justiciable, held that deferring the enlistment of full-time Yeshiva students was legal. This decision was the product of three interim decisions that the Court had rendered. Each of these "interim decisions" was a necessary link in the chain leading to the conclusion that the Defense Minister's decision was legal. The first "interim decision" provided that, in principle, all of the arrangements (primary and secondary) relating to the deferral of full-time Yeshiva students' enlistment could be promulgated via administrative regulations. It was therefore not legally necessary to anchor regulation of this matter in legislation, nor was it legally necessary to anchor these primary arrangements in legislation. The second interim decision was that section 36 of the Defense Services Law constituted a legal source for the regulation of the enlistment deferral for Yeshiva Students. The language of section 36 of the Defense Services Law is as follows:

Authority to exempt or to defer

36. The Minister of Defense may, if he sees fit to do so for reasons related to the size of the regular forces or reserve service forces of the Israel Defense Forces or for reasons related to the requirements of education, security settlement or the national economy or for family or other reasons do the following, by order:

(1) exempt a person of military age from regular service duties or reduce the period of his service;

(2) exempt a person of military age from reserve duties for a specific period or absolutely;

(3) by virtue of an application made by a person of draft age or a person designated for defense

> service other than a person of draft age, defer by order for a period prescribed therein, the date of reporting prescribed for that person, under this Law or regulations hereunder, for registration, medical examination, defense service or, if he has already begun to serve in the defense service, the continuance thereof.

In the second interim decision, the Court held that the enlistment of Yeshiva students was being deferred for both religious and security related reasons, namely, "for reasons related to the size of the regular forces or reserve forces ... or for reasons related to education requirements ... or other reasons." The third and final interim decision examined the Defense Minister's discretion in exercising his authority. The Court held that the exercise of the Minister's discretionary powers was "reasonable" and that the balance between the security interest (the dominant interest) and the religious (external to security) interest was reasonable. Each of these three interim decisions was based on a particular social and security reality, as they were presented to the Court. Indeed, the Court itself repeatedly emphasized that its decision was the product of that reality and that a change in the situation could engender a change in the legal conclusions drawn. In my opinion, I stressed that "at the end of the day, there is significance to the number of Yeshiva students whose service is deferred. There is a limit that no reasonable Defense Minister may exceed. Quantity makes a qualitative difference." *Ressler* [1] at 505. We have now been presented with a new reality. As we have seen, there has been a significant increase in the number of Yeshiva students whose service has been deferred by reason of their being full-time students (in 1987 they totaled 17,997 whereas in 1997 they numbered 28,772). The percentage of enlistees who had their service deferred in that year was 5.4%. In 1997, they constituted 8% of the number of enlistees in that year. Opposition to

the arrangement has continually increased. There is ever increasing antagonism between the population whose sons serve in the military and those whose sons are granted a deferral which ultimately becomes an exemption from service. It is against this backdrop that old questions reawaken to be examined anew. Is it possible to continue regulating the enlistment deferrals granted to full-time Yeshiva students by way of primary arrangements, which are not based on legislation? Does the authorization stipulated in section 36 of the Defense Services Law constitute a sufficient legal basis for granting deferrals to Yeshiva students? In view of today's reality, is the decision to grant service deferrals to full-time Yeshiva students still a reasonable one? Each of these issues engenders a host of difficult legal questions. In light of the conclusion I have reached in this case regarding the *first* issue, namely whether the arrangement to defer the enlistment of full-time Yeshiva students must be enshrined in legislation, I may leave the other two questions to be decided at a more opportune time. Having said this, I will now proceed to examine the critical question at bar.

Statutory Enshrinement of Primary Arrangements Regarding Enlistment Deferrals

18. May the entire arrangement regarding enlistment deferrals granted to full-time Yeshiva students ("for whom Torah is their calling") be premised on the Defense Minister's general prerogative, by virtue of the Defense Services Law, without specifying the principles and scope for the regulation of such a deferral in the statute itself? Can the Defense Minister be endowed with the authority to decide this matter, without the Knesset having addressed the issue (beyond the general authorization provided under section 36 of the Defense Services Law to defer service for "other reasons")? As noted, this issue arose in *Ressler* [1] where I stated:

> …by virtue of the Rule of Law, it is proper that 'primary arrangements' be set forth explicitly in legislation and that the administrative agency not be endowed with the general authority independently to determine primary arrangements.

Ressler [1] at 502.

To this I added:

> …it is desirable, pursuant to the principles of a "true, democratic, parliamentary regime" that the Knesset adopt an explicit position regarding the issue of draft deferrals granted to Yeshiva students, and not satisfy itself with the Defense Minister's general and sweeping empowerment to grant service deferrals "for other reasons" …

Id.

Even so, I averred to the fact that it could not be said "that the Knesset's abstention from setting forth primary arrangements and from imposing supervision on the Defense Minister's arrangements invalidates [the Defense Minister's] general empowerment to this effect…" (*Id.*). I was confident that "having determined that 'other reasons' may serve as grounds for deferral of defense service, the Legislature by this very fact empowered the Defense Minister to determine what those other reasons are" (*Id.*). Do these conclusions retain their validity in view of a new reality? In order to answer these questions, consideration must be given to the legal principle regarding the establishment of primary arrangements in legislation. In light of the scope and power of this principle, its application must be examined with respect to the issue of granting draft deferrals to full-time Yeshiva students. We will now proceed to examine each one of these issues.

Establishment of Primary Arrangements in Legislation

19. A basic rule of public law in Israel provides that where governmental action is enshrined in a regulation or an administrative guideline, then the general policies and basic criteria constituting the basis of the action must be established in legislation, pursuant to which the regulation was enacted or the administrative decision adopted. In more

"technical language," - under this basic rule, "primary arrangements" that determine general policy and the guiding principles, must be enshrined in statute (Knesset Legislation), whereas regulations or administrative guidelines must only determine "secondary arrangements." *See* I. Zamir, *Chakika Minhalit: Michir Hayieelut [Administrative Legislation: Price of Efficiency* (hereinafter – Zamir, "Administrative Legislation" [78]); 2 A. Rubinstein, *Hamishpat Haconstitutzioni shel Midinat Yisrael [Israeli Constitutional Law]* (hereinafter - Rubinstein [72]) at 803. Professor Klinghoffer also made this point:

> ... every administrative act, whether by force of administrative regulations, or even an individual act, must, as far as its basic contents are concerned, be prescribed by a statutory norm. In this sense, it can be said that in a state governed by the Rule of Law, the authority to set forth primary arrangements rests with the Legislature, whereas the administrative agencies are entitled to prescribe secondary arrangements alone, within the statutory framework.

Y.H. Klinghoffer, *Shilton Hachok Vichakikat Mishneh [Rule of Law and Administrative Regulations* (hereinafter - Klinghoffer [79]) at 108.

Acting President, Justice Shamgar, cited these comments, adding:

> In terms of the desired legislative policy for the division between the legislature and the administrative agency, I concur with Prof. H. Klinghoffer's position ...

HC 337/81 *Miterani v. Minister of Transportation* (hereinafter - *Miterani* [2]) at 357.

In this spirit, the Courts repeatedly emphasized that primary arrangements must be determined by the Knesset whereas the administrative agency must, for its part, deal with secondary arrangements. *See* HC 266/68 *Municipality of Petach Tikvah v. Minister of Agriculture* (hereinafter – *Petach Tikvah* [3]); CA 524/88 "*Pri Ha'Emek" Cooperative Agricultural Society Ltd. v. Sdeh Ya'akov*

Workers' Village of HaPoel Mizrachi, Agricultural Cooperative Settlement (hereinafter – *Pri Ha'Emek* [4]), at 552. My colleague, Justice Cheshin, similarly noted:

> "Primary arrangements" must find their place in statute (Knesset Legislation) ... regulations are not, in principle, designed for anything other than the implementing statutes. This is the pillar of fire, this is the pillar of smoke that illuminate our path by night and by day, and by its lead we shall follow.

HC 2740/96 *Shansi v. Diamond Comptroller,* (hereinafter - *Shansi* [5]) at 504.

In the same vein, I commented in another case:

> [I]t is also appropriate ... that the legislature establish primary arrangements and leave secondary determinations to administrative authorities … this is how a constitutional democracy operates …

HC 5016/96 *Horev v. Minister of Transportation* (hereinafter - *Horev* [6]) at 75-76 {[1997] IsrLR 149, 233)}.

We will refer to this as the basic rule regarding primary arrangements.

20. The reasons underlying this basic rule are threefold: the first is enshrined in the doctrine of Separation of Powers. *See* B. Schwartz *Administrative Law* (1989) (hereinafter- Schwartz [90]), at 43; *Mistretta v. United States* [54] at 371. According to this doctrine, the enactment of statutes is the province of the legislative branch. "There is no legislature other than The legislature, exclusively endowed with the power to legislate" (as per Justice Silberg, CrimA 53/54 *Eshed, Temporary Transportation Center v. Attorney General* [7] at 819).

In Israel, this principle has found expression in the Basic Law: The Knesset, which provides that "the Knesset is the House of Representatives of the State" (sec. 1). It is "the Legislature" (sec.1 of the Transition Law, 1949) and the "Legislative Branch" (sec.7(a) of the Government and Judiciary Ordinance, 1948). HC 3806/93 *Manning v. Minister of Justice* [8] at 425. It is by virtue of this principle that the power to legislate is vested in the Knesset. Indeed, a strict understanding of this principle would necessarily mean that the Knesset cannot delegate any kind of legislative power to the executive branch. This, in fact, was the United States Supreme Court's position in the nineteenth century, holding that the legislature had received its mandate to legislate from the people and was therefore not authorized to delegate that mandate to anyone else. Schwartz [90] at 43. This strict approach is no longer accepted in the United States or in Israel, for that matter. Modern reality, particularly that of the welfare state, required broad delegation to the executive authority for the performance of legislative acts. *See* President Shamgar's remarks in CA 825/88 *Association of Israeli Soccer Players v. Israel Soccer Association* [9] at 105. This also fostered flexibility in such arrangements and allowed for the possibility of introducing changes according to the needs of the time and the place. *See* 1 B. Bracha *Mishpat Minhali [Administrative Law]* (hereinafter – Bracha, *Administrative Law* [73]) at 82.

Thus, Professor Zamir correctly pointed out that "the legislative branch … is incapable of legislating all of the legislation required for implementing the duties that it imposes on the executive branch with the requisite speed and expertise. This is especially true in Israel, where there are exceptional requirements relating to national security, immigrant absorption and building the national economy. The public good necessitates exceptional powers for all of these." 1 I. Zamir, *Hasamchut Haminhalit [Administrative Authority]* (hereinafter – Zamir *Administrative Authority* [74]) at 68. The doctrine of separation of powers is thereby faced with the "dilemma between the desire to restrict the power of the administration and the need to allow it to exercise such power in order to achieve social goals as efficiently as possible." Y. Dotan, *Hanchayot Minhaliot [Administrative Guidelines]* [75] at 310. The solution is found

in many and varied avenues. Within these, we find the notion that in order to maintain the authority for administrative regulations in the hands of the executive, we must not relate to [this authority] "as to an evil that must be combated, or even as a necessary evil, but rather as a positive phenomenon that helps society advance." Zamir, "Administrative Legislation" [78] at 65. Some of those measures do not relate to the petitions before us, but rather to the approach that requires Knesset ratification of administrative regulations. *See* B. Bracha, *Chakikat Mishneh [Administrative Regulations]* [80] at 413; B. Bracha, *Likrat Pikuach Parliamentary al Chakikat Mishneh [Parliamentary Supervision of Administrative Regulations]* (hereinafter – Bracha, "Parliamentary Supervision" [81]) at 392. *See also*, on the broadening of the bases for judicial review of administrative regulations, A. Barak, *Pikuah Batei Hamishpat al Tichikat Mishneh [Judicial Supervision Administrative Regulations]* [82] at 465. One of the means found to be appropriate for this purpose allows for administrative legislation, while increasing the legislative branch's supervision by way of its own legislation regarding administrative regulations enacted by the executive branch. It is within this framework that an approach developed by which the vesting of legislative authority in the executive branch is permitted, provided that the legislative branch itself establishes the fundamental parameters within which the executive authority can legislate. This point was made by Justice Rehnquist who stated:

> ... the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill the blanks" or apply the standards to particular cases.

Industrial Union Dept. v. American Petrol. Inst. (1980) [55] at 675.

From this derives the rationale – enshrined in the modern understanding of the doctrine of separation of powers – which lies at the heart of the rule according to which legislation empowering the executive branch to

perform legislative or administrative acts must establish the primary arrangements by virtue of which the administrative agencies act. "[I]f the Knesset is indeed the 'legislative branch' then empowerment for administrative regulations which implement the basic principles and guidelines (primary arrangements) established in the legislation, is consistent with this principle." 2 A. Barak, *Parshanut Bimishpat [Interpretation in Law]* (hereinafter – Barak, *Interpretation in Law* [76]) at 528. On the other hand, if the legislation empowers the administrative agency to establish primary arrangements without any directives or guidance, the doctrine of separation of powers is violated. "When the Knesset is divested of its legislative cloak and transfers it to the expertise of the public administration, it severely undermines the principle of the separation of powers." Bracha, "Parliamentary Supervision" [81] at 395. To this effect, the Constitutional Court of Germany expressed itself in a similar vein:

> If [a statute] does not adequately define executive powers, then the executive branch will no longer implement the law and act within legislative guidelines, but will substitute its own decisions for those of the legislature. This violates the principle of the separation of powers.

8 BverfGE 274 (1958) [67] (trans. D.P. Kommers) in *The Constitutional Jurisprudence of the Federal Republic of Germany* (hereinafter – *Kommers* [91]) at 138.

21. The *second* reason for the basic rule regarding primary arrangements is rooted in the Rule of Law. This principle is a complex one, with many different aspects. *See* Rubinstein [72] at 227. One of its numerous dictates is that legislation must establish guidelines and principles according to which the executive branch must act. Legislation must establish primary arrangements, and administrative regulations and individual acts must deal with implementation. This point was made by Professor Klinghoffer, who wrote:

> We must distinguish between the concept of administrative legality, which is satisfied by formally binding the administration to the law, and the concept of specific legality, necessary for the realization of the Rule of Law. This latter concept signifies the maximum binding of the administration through the law ...
>
> [T]he Rule of Law ... does not permit the Legislature to waive its power to establish primary arrangements in favor of the administration - in other words to delegate this power. Any transfer of that power to an administrative authority conflicts with the Rule of Law. Where the Rule of Law reigns, the Legislature is not at liberty to choose between options, in other words to personally bind the administration by establishing primary arrangements or to empower the administration to perform this legislative work in its stead. It is incumbent upon the Legislature to establish these arrangements itself. The Rule of Law dictates that the principle elements of any administrative act be anchored in primary arrangements set forth in the formal statute, and that the determination of those arrangements is within the exclusive authority of the legislature and cannot be transferred to administrative agencies.

Klinghoffer [79] at 108.

Prof. Zamir made similar comments:

> [T]he Rule of Law requires that the legislature itself establish principles, primary arrangements, whereas the administration is only empowered to legislate the details for implementing the primary arrangements.

Zamir, "Administrative Legislation" [78] at 70.

This approach is not restricted to academia. It has been adopted by the case law. Hence, my colleague, Justice Cheshin noted:

> The Rule of Law, in its substantive sense, instructs us that primary arrangements must find their place in the laws of the Knesset; regulations are in principle intended for the implementation of the laws only.

Shansi [5] at 504.

I too made this point in one of the cases:

> "[T]he Rule of Law, in its substantive sense … means, *inter alia*, that legislative arrangements will ensure an appropriate balance between individual rights and public needs. In the realm of administrative regulations, this justifies the legislation being established by the legislature, not by the secondary legislature ..." *Pri Ha'Emek* [4] at 553.

This approach is not a new one. It is part of the fabric of Supreme Court rulings since the establishment of the State. Justice Olshan's famous comments in this respect are well known:

> [W]ere we to turn down the petitioner's request we would become accomplices in rendering the Rule of Law governing the state a dead letter. The fundamental meaning of [the Rule of Law] is that restrictions ... whose imposition on individual freedom is unavoidable as a means of ensuring that individual freedom does not violate the freedom of others or the interests of society ... must be established by the Legislature, in other words, by the society that expresses its views in the statutes enacted by the legislature that represents it, and not by the administrative agency, whose task is limited to the implementation of these restrictions, in accordance with the said statutes.

HC 144/50 *Sheave v. Defense Minister* [10] at 411.

In another case, Justice Olshan emphasized:

> [A]ccording to the principle of the 'Rule of Law,' it is incumbent on the Legislature himself to determine and specify in the law, those cases in which licenses are to be granted or refused, while it is for the executive branch only to ensure the execution of those legal provisions. Accordingly, the legislative task must be discharged so that the citizen can find the answer in the law itself as to what is permitted and what is forbidden, and without being dependent on the discretion of the executive branch. However, as a result of the change of the social order in our generation and state intervention in all areas of life, not only in our state, the legislature is unable to foretell each and every case and to enact provisions in the law for each specific case. Consequently, the legislature satisfies itself with the determination of the general principles (though this is not always done). The details and the modes of implementation of the general principles in each particular case are transferred to the discretion of the empowered branch; in other words, the Legislature confers the empowered branch with the authority to supplement that which was left out by the Legislature …

HC 113/52 *Zaks v. Minister of Trade and Industry* [11] at 702.

Thus, the Rule of Law signifies that primary arrangements and standards will be provided by statute, whereas the administration's role is to implement these primary arrangements by establishing secondary arrangements and methods of implementation. In the words of the New York Supreme Court:

> Without such standards, there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities.

Rapp v. Carey (1976) [56].

The Constitutional Court of Germany also made this point, stating:

> "The basic tenets of the rule of law require that an empowering statute adequately limit and define executive authorization to issue burdensome administrative orders according to content, subject matter, purpose and scope ... so that official action [will] be comprehensible and to a certain extent predictable for the citizen."

8 BVergGE 274 (1958) [67] in Kommers [91] at 138.

22. The *third* reason for the basic rule targeting primary arrangements is rooted in the notion of democracy itself. *See* D. Schoenbrod *Power Without Responsibility* [92] at 14. Justice Cheshin wrote that "the democratic principle as such permeates the entire Israeli legal system, becoming part of the genetic code of all of the binding norms in Israel." HC 7351/95 *Nevuani v. Minister of Religious Affairs* (hereinafter-*Nevuani* [12]) at 121. This reason essentially parallels the first and second reasons, both of which also derive their vitality from the nature of democracy; however, it also emphasizes an additional aspect. This is the aspect of democracy itself. Democracy is a complex concept, based on two central tenets: the will of the people as expressed in the principle of representation and basic values such as the Rule of Law and the Separation of Powers. At the center of these values lies the idea of human rights. Indeed, "democracy is not merely formal democracy ... in which decisions are adopted according to majority will. Democracy is also substantive democracy ... in which the majority cannot suppress human rights." *Horev* [6] at 45. The basic rule regarding primary arrangements derives its vitality from both these tenets of democracy. According to the first, democracy signifies the rule of the people. In a representative

democracy, the nation chooses its representatives, who act within the context of its parliament. *See* C. Klein, *Al Hahagdara Hamishpatit shel Hamishtar Haparliamentary vi'al Haparliamentarism Hayisraeli [Legal Definition of Parliamentary Regime]* [83]. The people's elected representatives must adopt substantive decisions regarding State policies. This body is elected by the nation to pass its laws, and therefore benefits from social legitimacy when discharging this function. *See* B. Aktzin, *Torat Hamishtarim [Theories of Government*[77] at 239, 244. Hence, one of the tenets of democracy is that decisions fundamental to citizens' lives must be adopted by the legislative body which the people elected to make these decisions. Society's policies must be adopted by the legislative body, as echoed by Justices Sussman and Witkon, who wrote:

> Administrative regulations regarding principled, cardinal matters, by force of an empowering law, is liable to lead us to a formal democracy only. A real parliamentary democracy requires that legislation be promulgated in the Legislature.

Petach Tikvah [3] at 831.

In this vein, Justice Brennan similarly noted:

> Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent the Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.

United States v. Robel (1967) [57] at 276.

A similar approach was taken by Justice Rehnquist who explained that in the United States, the delegation of legislative power to the executive branch was contingent on the standards being set out in legislation,

because this requirement "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Industrial Union Dept.* [55] at 685; *See also American Textile Mfrs. Inst. v. Donovan* (1981) [58] at 543.

Professor Tribe expressed the same idea:

> [B]road delegations are politically objectionable because, by enabling Congress to pass the buck on hard choices, and to leave such choices to administrative or executive processes less open to inputs from affected groups, such delegations may short-circuit the pluralist process of interest accommodation usually structuring legislative decision making.

L.H. Tribe, *American Constitutional Law* [93] at 365.

The Constitutional Court of Germany adopted a similar approach, noting that it is the legislature that must decide which interests justify the violation of individual freedoms. The Court added:

> The democratic legislature may not abdicate this responsibility at its pleasure. In a governmental system in which the people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining the public will by weighing the various and sometimes conflicting interests.

33 BVerfGE 125 (1972) [68] in D.P. Currie, *The Constitution of the Federal Republic of Germany* (hereinafter- Currie [94]) at 132.

In another case, the Court wrote:

> In a free democratic and constitutional system, [P]arliament has the constitutional task of enacting laws. Only Parliament

> possesses the democratic legitimacy to make fundamental political decisions. To be sure, the Basic Law approves of a 'delegated' legislation by the executive. However, the executive can legislate only within limits that the legislature prescribes. Parliament cannot neglect its responsibility as a legislative body by delegating part of its legislative authority to the executive without beforehand reflecting upon and determining the limitations of those delegated powers. If the legislature does not satisfy this requirement, then [it] will shift unfavorably the balance of powers presupposed by the basic law in the area of legislation.

34 BVerfGE 52 (1972) [69] in Kommers [91] at 145, 147.

Thus, the nature of representative democracy clearly demands that administrative regulations and administrative provisions of the executive branch be rooted, both formally and substantively, in legislation, enacted by the legislature. Indeed, the Legislature cannot transfer fateful and difficult decisions to the executive authority without first guiding its path. Even if elected directly by the people, as is the case here of the Prime Minister, the role of the executive, as indicated by its appellation – is to execute. Prof. Zamir was correct in writing that:

> As a matter of principle, it is preferable that, where the circumstances permit, the Legislature set forth the general principles and primary arrangements itself, and not leave this to the enactor of regulations. The democratic regime, according to its very essence, requires that the general principles that determine the people's lifestyle be determined as a rule in legislation, by the Parliament and not through administrative regulations enacted by the public administration.

I. Zamir, *Hanchayot Hayoetz Hamishpati Lamemshala – Chakikat Mishneh, Nohel Vihanchaya [Attorney General Guidelines]* (hereinafter – Zamir, "The Attorney General's Guidelines" [84]) at 345.

In another place, he writes:

> [T]he Knesset is not able and probably should not deal with the details regarding the implementation of general principles, especially when setting forth such details requires special expertise, [when these details may be] subject to frequent changes, or when they must be established with relative speed. However, the Knesset can, and indeed must, discharge its central function, in the absence of which it loses its *raison d'etre*. This is the role of establishing general principles by way of statute. If the Legislature for any reason abdicates this task, it betrays its duty, undermines its very existence and furthermore, removes the basis for the regime's democratic character. A regime in which the legislative branch transfers its legislative role in establishing general principles to the public administration remains a democracy in name and image only, and not in practice.

Zamir, "Administrative Legislation" [78] at 70.

This is an approach that attempts to preserve the status of the Knesset and the status of the democratic principle of representation upon which it is based. It is not restricted exclusively to the requirement that primary arrangements be determined via legislation. The desire to preserve the elevated status of the Knesset is of general application. "… we are duty-bound to take care not to overstep our bounds and enter the Knesset's territory. We must take heed that our behavior be commensurate with democratic theory." *See* Justice H. Cohn in *Petach Tikvah* [3] at 833. Hence this Court ruled, per Justice S. Levin, in respect of Emergency Regulations, that "where there is a possibility of regular, prompt legislation by the Knesset, then the legislative authority of the executive branch is usurped, because, as a matter of principle, the authority to enact emergency regulations should be used only where there is no possibility of waiting for the regular legislative procedures of the Knesset." HC 2994/90

Poraz v. Government of Israel [13] at 322. Similarly, regarding the legality of raising pigs in Israel, Justice Berenson wrote:

> Conceivably, attaining this goal is politically and nationally desirable as its advantages, from that perspective, outweigh the purely economic disadvantages presented by the petitioners. However, there are doubtless many who regard the government's actions as religious coercion, at least indirectly. Either way, it is not for us to express an opinion on the matter. Nor is it the respondent's task to resolve religious national dilemmas using administrative tools conferred upon it for entirely different purposes and goals ... the problem is a national problem and not a local one, the solution to which is in the hands of the Legislature which is empowered, if it deems it necessary, to restrict individual freedom…

HC 98/54 *Lazarovitz v. Food Supervisor of Jerusalem* [14] at 56.

Similarly, it was determined that restrictions or prohibitions on freedom of religion or freedom from religion of citizens of the State must be anchored in legislation. In this matter, my colleague, Justice Or, wrote as follows:

> The issue is the possibility of violating rights included in the charter of the most fundamental and sensitive of basic rights, the rights to freedom of religion and conscience. It is therefore proper that the Legislature decide them. The reason for this is that only the Legislature can express the optimal consensus that accommodates the coexistence of people of different religions and different beliefs.

HC 3872/93 *Mitral Ltd.* v. *Prime Minister and Minister of Religious Affairs* (hereinafter – *Mitral* [15] at 498.

In the same vein, my colleague Justice Cheshin, wrote in that case:

> [R]eligious commandments cannot be forced upon those who are not observant and those who are not interested in fulfilling religious commandments; no coercion, either direct or indirect, is possible, except according to statutes enacted by the legislature, the Knesset. The doctrine of separation of religion and state is part and parcel of the legal system. It is only by way of Knesset statute - on the national level, that the fulfillment of religious commandments can be imposed ...

Id. at 507.

Although the case at bar is unrelated to emergency regulations and does not regard matters that have been discussed in the judgments cited, the common denominator of all these cases is the understanding that there are certain issues that can be determined by the legislative branch alone. It represents the people, is elected by them for that purpose, and therefore has the power to choose the most appropriate alternative to advance, among the various paths available.

23. The *second* tenet on which democracy is based (in the substantive sense) is a regime of values, including the doctrine of Separation of Powers and the Rule of Law, as noted above. There is also a third and central value, namely human rights. These three tenets are closely interrelated. Separation of powers is not a value in its own right, nor is it intended to ensure efficiency. The aim of the separation of powers is to increase freedom and prevent the concentration of power in one sovereign authority in a manner liable to violate individual freedom. To this effect, Justice Brandeis noted:

> The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. United States (1926) [59] at 293.

The same can be said for the Rule of Law. This principle is not only intended to ensure the administration's legality; it seeks to protect individual liberty, as Prof. Klinghoffer elucidates:

> In view of the Rule of Law's historical development, democracy was not its chief aim, but rather a means of achieving another principle aim - ensuring individual liberty.

Klinghoffer [79] at 107.

Hence, human rights form the central tenet of democracy. There can be no democracy without human rights. There is no democracy where the majority illegally deprives the minority of its rights. Obviously, human rights are not absolute. A democracy (in the substantive sense) is entitled to violate human rights in order to attain its objectives, provided that the violation is prescribed by law; promotes the values of the state; is for a worthy purpose and does not exceed that which is necessary. *See* sec. 8 of the Basic Law: Human Dignity and Liberty); sec.4 of the Basic Law: Freedom of Occupation, and also CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* (hereinafter – *United Mizrahi Bank* [16]). This sensitivity to human rights leads to the conclusion that the violation of human rights, even when it promotes the values of the state, is for a worthy purpose and does not exceed that which is necessary, must be prescribed by a law specifying the primary arrangements. Indeed, one cannot be satisfied with the formal delegation of legislative authority to the executive branch. Hence, the requirement that primary arrangements be set forth in legislation and administrative regulations, or administrative orders concerning implementation, is anchored in the need to protect individual liberty. Indeed, in a democracy, it happens that the violation of individual rights is [at times] necessary for the realization of the general interest. Even so, the requirement is that this violation, even if justified, must be enshrined in legislation and not delegated to the executive branch itself. *See* Schwartz [90] at 61. One American case considered a statute that allowed the executive branch to issue or refuse to issue a passport to a citizen. The Court held that this constituted a violation of individual

freedom. Such a violation was possible only if the violating statute, and not the executive power, established the basic criteria for exercising that authority. Justice Douglas wrote the following:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment ... If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress ... And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests.

Kent v. Dulles (1958) [60] at 125, 129; *See also Shuttlesworth v. Birmingham* (1969) [61].

The Canadian Supreme Court adopted a similar approach. According to the Canadian Charter of Rights and Freedoms, protected human rights may be violated only where the conditions prescribed by the Canadian limitation clause (sec. 1 of the Charter) are met. Among these is the condition that the restriction be "prescribed by law." It was held that the import of this provision is that the fundamental and basic criteria must be set forth by statute. *See* P.W. Hogg, *Constitutional Law of Canada* [95] at 862. The upshot is that conferring authority to violate a protected human right is permitted, provided that this is done within the framework of the criteria established in the legislation. To this effect, Justices Dickson, Lamer, and Wilson wrote the following:

> Where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no limit "prescribed by law."

Irwin Toy Ltd. v. Quebec (1989) [71] at 982.

A similar approach was taken by the European Court of Human Rights. *The Sunday Times v. The United Kingdom* (1979) [64] at 270; *Malone v. United Kingdom* (1984) [65] at 40; *Leander v. Sweden* (1987)

[66]. This was also the path taken by the German Constitutional Court. *See* Currie [94] at 132. In the Constitutional Court's own words:

> Today it is firmly established by the decisions that, without regard to any requirement of an incursion [into individual freedom] in basic normative areas, and especially when the exercise of basic rights is at stake, the legislature is required ... to make all essential decisions itself.

49 BVerfGE 39 (1978) [70] at 126-127.

It is therefore clear that the democratic principle in all of its aspects, both in terms of representation and in terms of values, means that fundamental criteria (the primary arrangements) must be enshrined in legislation. Administrative regulations and the individual acts of an administrative agency (secondary arrangements) must implement the fundamental criteria established in the legislation. What are these primary arrangements and how are they determined? We shall now proceed to examine that question.

Primary Arrangements Defined

24. The basic rule regarding primary arrangements, as we have seen, is that administrative regulations or individual administrative acts, based upon legislation (secondary arrangements), must set forth the manner in which statutes are to be implemented, whereas general policy and fundamental criteria (primary arrangements) must be prescribed in the principle legislation (statute). The reasons supporting the distinction between primary and secondary arrangements also determine the scope of each. Considerations of the Separation of Powers, the Rule of Law and Democracy (in both the formal, representative sense and the substantive sense), means that it is appropriate that legislation, which delegates the establishment of administrative regulations or administrative orders to the executive authority, determine the general plan, so that administrative regulations and implementing provisions can realize that which was set out

in principle in legislation. The guidelines for the resolution of crucial issues, which are fundamental to the life of the individual, must be prescribed by statute. Hence, a primary arrangement exists where, on the basis of the law itself, in accordance with its interpretation by accepted interpretative methods, it is possible to infer the parameters within which the executive branch may act, as well as the direction, principles, or purpose that are supposed to guide the executive authority in its actions. To the extent that the regulation of a particular area requires that fundamental decisions which substantially affect the lives of individuals and society be taken, it is appropriate that such decisions be made within the confines of the statute itself. Hence, a primary arrangement exists where the statute itself sets out the principles or standards on a higher level, which must be brought to fruition at a lower level. The level of abstraction of the primary arrangement will change from issue to issue. As far as, and to the extent that the issue is one in which individual freedom is violated, so too the level of abstraction cannot be too high and an arrangement that establishes the nature of the violation and the extent of the violation of freedom enshrined in the legislation will be required. When the object of the regulation is a complex one, requiring considerable expertise, it is quite often possible to satisfy oneself with a very high level of abstraction. *See* Currie [94] at 42; U. Kischel, "Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law" (hereinafter – Kischel [97]).

25. At this juncture, two comments should be made. *First*, the distinction between primary and secondary arrangements is not a sharp one. There is much ambiguity regarding where to draw the line between the two kinds of arrangements. As far back as 1825, the Chief Justice of the United States Supreme Court at the time, Chief Justice Marshall, wrote:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made and power given to those

> who are to act under such general provisions, to fill up the details.

Wayman v. Southard (1825) [62] at 19.

In a similar vein, Prof. Klinghoffer wrote:

> [T]he conceptual border distinguishing a primary arragenment from a secondary arrangement cannot be defined in the general, abstract sense. It depends on the nature and specific nature of the topic being regulated. Hence, the determination of whether a specific arrangement is primary or secondary can only be the product of induction, in accordance with common sense and logic.

Klinghoffer [79] at 122.

Prof. Zamir also dealt with this issue, stating:

> It is difficult to establish the distinction or border between primary and secondary arrangements. To a certain extent, the two realms merge. Being overly strict about the distinction between these two realms is liable to disrupt administrative action and be detrimental to the public welfare. Hence, in borderline cases, the question must be answered primarily on the basis of the balance between the administrative needs and public welfare and the degree of violation of the Rule of Law.

Zamir, "The Attorney General's Guidelines" [84] at 354.

Thus, the nature of the arrangement, its social implications, and the degree of violation of individual freedom are all factors that influence the scope of the primary arrangement and the degree of specification required thereof. Furthermore, the dictates of today's reality necessitate compromising between principles and the imperatives of everyday life. In a modern democratic regime, it is difficult to fully realize the principles enshrined in primary arrangements. Quite often, compromise is required

for reasons of administrative efficiency, in order to ensure public welfare. Even so, as a matter of principle, this does not detract from the power and the validity of the basic rule. Practically speaking, too, there are limits to the permissible compromise. In certain extreme cases the basic rule may prevail over considerations of efficiency, and it is appropriate to invalidate secondary arrangements that lack a statutory foundation (primary arrangements).

26. *Second*, in determining the fundamental standards and lines of general policy, cognizance must also be had for leaving the legislature wide room to maneuver. As we have observed, the distinction between primary and secondary arrangements cannot be precisely drawn, because it varies from issue to issue. The reality of life often necessitates a compromise between the basic rule and other considerations, primarily considerations of efficiency. Indeed, the legislature is familiar with the material, as well as with the extent of its capacity to deal with the material within the temporal confines within which it operates. It also understands the need to delegate the establishment of arrangements that require expertise and professionalism to the executive branch. One cannot be overly strict with the Legislature in this matter. Occasionally, it is sufficient that the Legislature provide instructions at a high level of abstraction, in which the degree of guidance provided is limited. Such instructions, too, are capable of satisfying the requirements of the basic rule. *See* A.C. Aman and W.T. Mayton, *Administrative Law* [96] at 9; Schwartz [90] at 42. The basic rule regarding the establishment of primary arrangements is not primarily designed to negate the authority to delegate power to the executive branch due to the failure to comply with requirements to specify primary arrangements in legislation. The main function of the basic rule regarding primary arrangements is to give a limited interpretation to the delegation prescribed by the legislation. *See* Kischel [97] at 220-23. Thus, the main function of legal systems in recognizing the cardinal rule regarding primary arrangements is interpretative, as a means of narrowing the scope of authority conferred upon the executive branch. The primary rule is therefore of limited

applicability as a constitutional rule that can invalidate statutes authorizing the administrative authority to establish primary arrangements.

The Basic Rule's Legal Status in Israel

27. What is the legal status of the basic rule regarding primary arrangements in Israeli law? In this respect, a distinction must be drawn between two periods. The *first* period, until the enactment of the Basic Laws regarding human rights and their interpretation by this Court in *United Mizrahi Bank* [16] and the *second* period, subsequent to the enactment of these laws, as the Court interpreted them in that case.

28. During the *first* period, the basic rule regarding primary arrangements was one of the rules of Israeli public law. It formed part of the common law, "Israeli style." It was first and foremost an interpretative rule. Accordingly, there was an interpretative presumption that delegation of power to enact administrative regulations or orders was delegation exclusively for the establishment of secondary arrangements. *See* Rubinstein [72] at 361. It was in relation to this interpretative presumption that I wrote:

> [W]here power to enact administrative regulations has been delegated to the executive branch, we must presume that this power is intended for implementing those arrangements set out in the legislation. There is therefore a presumption that the power to enact administrative regulations is the power to enact implementing regulations (*secundum legem*). It cannot be assumed that the purpose of delegating authority for administrative regulations was to empower the administration to enact administrative regulations "external to the law" (*praeter legem*) or administrative regulations that goes "against the law" (*contra legem*). Thus, if the Knesset is the legislative branch, only a delegation of the power to enact administrative regulations that implements the basic principles and standards (primary arrangements) established

> in the legislation is consistent with this principle. Thus, the legislature will be presumed to have authorized the administrative agency to establish principles and standards that are prescribed in the legislation ("secondary arrangements") only. Needless to say, this is a presumption that may be rebutted.

Barak, *Interpretation in Law* [76] at 528.

This having been said, a concrete expression of this presumption can be found in those cases in which the Court interprets the language of the law against the backdrop of the legal system's basic principles. These principles include, *inter alia*, the doctrine of the separation of powers, distinguishing between the power of the Knesset as expressed in the Basic Law: The Government, the Rule of Law and democracy (both formal and substantive). All of these form the statute's "general purpose," which was given interpretative weight by the Court. *See* HC 693/91 *Efrat v. Director of Population Registrar of the Ministry of the Interior* [17] at 769. Even so, this general purpose may be overridden when it conflicts with a particular, conflicting purpose. *See* HC 953/87 *Poraz v. Mayor of Tel Aviv-Jaffa* (hereinafter- Poraz [18]), at 329. The Knesset was therefore entitled not to take the basic rule into account, and to reject it. It was authorized to grant the executive branch the power to enact primary arrangements. Thus, Prof. Klinghoffer was correct in stating:

> [I]n the absence of a constitution, the Legislature is omnipotent and therefore entitled to delegate the authority to enact administrative regulations to the administration at its own discretion. Legally speaking, there is no obstacle in the path of formal delegations. It is sufficient that the law itself specify certain matters, empowering the administration to legally regulate them, without the statute itself taking any pain concerning their regulation. This path is legally acceptable.

Klinghoffer [79] at 117.

In fact, together with the basic rule regarding primary arrangements, the Court also ruled that the Knesset was entitled to delegate the power to determine primary arrangements to the administration. *See e.g.* HC 122/54 *Aksel v. Mayor, Councilors and Residents of the Municipality of Netanya* (hereinafter – *Aksel* [19]) at 1531; *Petach Tikvah* [3] at 831. Deputy President Justice Shamgar discussed this point, writing that:

> "…[T]he boundary that is supposed to limit the administrative agency to setting out secondary arrangements alone is not always adhered to by the legislature itself. However, even though this phenomenon is undesirable with respect to the existence of a substantive rule of law, it does not invalidate the administrative regulations in question *per se*. The standard for ascertaining the validity of the administrative regulations is prescribed by the legislation, which sets out the areas in which the administrative agency may act, by specifically authorizing acts of administrative regulations in defined areas…" *Miterani* [2] at 357.

Thus, the Legislature is entitled to ignore the basic rule. It is permitted to empower the executive branch to establish primary arrangements in administrative regulations or in administrative orders. Indeed, an examination of the statutes indicates that there are numerous delegations made by the Legislature to the executive branch for the purpose of determining primary arrangements. *See* Zamir, "Administrative Legislation" [78] at 70; Bracha, *Administrative Law* [73] at 94. *See also* A. Barak, "Subordinate Legislation" [85]. As a result, the interpretative presumption is one that may be refuted. In effect, it was refuted in all those cases in which the interpretation of the empowering law, in light of its special purposes and other interpretative presumptions, led the Court to conclude that the statute's overall intention was to empower the executive branch to prescribe the primary arrangements. It was during this *first* period that the legal consultants of the Government were instructed by the Attorney General to word the bills in a manner that would include the primary arrangements so that the executive branch's power would be

limited to the authority to establish arrangements for implementing the relevant statutes. This point was made by the Attorney General at the time (Prof. Zamir) in a guideline that he issued, stating *inter alia*:

> "It is appropriate that the authors of various bills in the government offices be aware, with respect to any bill, of the proper relationship between legislation and administrative regulations. In this context, the guiding principle is that it is appropriate that the statute itself establish primary arrangements, to the extent that it is possible in accordance with the nature of the subject and under the circumstances, whereas the enactor of the regulations is empowered to establish only secondary arrangements via regulations (in other words – regulations for the purpose of implementation." Zamir, "Attorney General's Guidelines" [84] at 346.

Even so, these were guidelines from which the Knesset was entitled to deviate.

29. So, during the first period, the main question that arose was not whether the Legislature was entitled to empower the executive authority to enact primary arrangements. The clear answer to this question was in the affirmative. During that time, the decisive question was whether the legislature had in fact empowered the executive branch to establish primary arrangements. The answer to this question was found by interpreting the empowering statute. In this context, the crux of the matter was the power of the presumption that the legislature had not empowered the subordinate authority to establish primary arrangements. The key question was therefore, in which cases can one rebut the presumption that primary arrangements must be set out by the Knesset.

30. The case law did not provide a complete answer to this question. A distinction between administrative regulations and administrative orders that do and do not violate human rights emerged. For administrative regulations and orders belonging to the first category, the presumption

regarding primary arrangements was quite weak. This, however, was not the case with respect to administrative regulations and orders that do violate human rights. Here, there emerged a clear position in the case law, which held that where a legislative arrangement violates individual liberty, generally speaking, the empowerment in the legislation must be clear, specific, and unequivocal. This point was made by Deputy President Justice Shamgar with respect to legislation that empowered the administrative agency to violate freedom of occupation:

> … empowerment in this context means "*express* empowerment" and my intention here is only to cases in which the Legislature clearly states that it has empowered the administrative agency to enact regulations that set out prohibitions or restrictions on engaging in a particular profession ...
>
> ...
>
> ... in the absence of a constitution establishing the legal status of basic civil rights, there is no restriction on the provisions which may be prescribed by *statute* (ordinary *legislation*) (with the exception of a few areas. *See e.g.* sec. 4 of the Basic Law: The Knesset. *Administrative regulations* on the other hand, derive their validity exclusively from the empowerment conferred by the legislature. Thus, when the issue relates to imposing restrictions on basic rights, the administrative agency has no authority to act, in my opinion, in those areas except if specifically and expressly authorized by the Legislature to act in the said area *by way of restriction or prohibition,* respectively ...

Miterani [2] at 358-59.

This approach is not strictly limited to legislation empowering an administrative agency to violate the freedom of occupation. As was held in the *Miterani* [2] case, this approach is a general one, applicable to any case in which the empowerment violates basic human rights. *See Aksel*

[19] at 1531; HC 200/57 *Bernstein v. Beth Shemesh Local Council* [20] at 268; HC 124/70 *Shemesh v. Companies Registrar* [21] at 513; HC 144/72 *Lipabski- Halipi v. Minister of Justice* [22] at 723*;* HC 333/85 *Aviel v. Minister of Labor and Welfare* (hereinafter – *Aviel* [23]), at 600; *Pri Ha'Emek* [4] at 561. Thus, the approach that required specific, clear, and unequivocal authorization in order to empower the executive authority to violate individual freedom was also applied to freedom of expression (CA 723/74 "*Ha'aretz" Newspaper Publishing Co. v. Israel Electric Co.* [24] at 295; FH 9/77 *Israel Electric Co. v. "Ha'aretz" Newspaper Publishing Co*. [25] p. 359), to the right to equality (HC 301/63 *Streit v. Israeli Chief Rabbinate* [26] at 639) and to property rights (HC 249/64 *Baruch v. Customs and Duty Supervisor* [27] at 489; *Aviel* [23] at 595). This line of case law led to increased protection of individual freedom. The legislature's empowerment was generally interpreted as permitting the violation of individual freedom only if its expression was specific, clear and unequivocal, i.e. where the legislation determined that the administrative agency was entitled to restrict a particular occupation. This was interpreted as empowerment for administrative regulations that also included the power to establish primary arrangements. *See Miterani* [2] at 358-59.

31. The *second* period began with the promulgation of the Basic Laws regarding human rights and their interpretation in the *United Mizrahi Bank* case [16]. In fact, with the enactment of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, there was a substantial change in the status of the human rights that were entrenched in these laws. They received a super-legal constitutional status. *United Mizrahi Bank* [16]; HC 3914/92 *Lev v. Tel-Aviv-Jaffa Regional Rabbinical Court* [28] at 503; HC 453/94 *Israeli Women's Network v. Government of Israel* [29] at 526; HC 5394/92 *Hopert v. "Yad Vashem," Holocaust Memorial Authority* [30] at 363; HC 726/94 *Klal Insurance Company. v. Finance Minister* [31] at 465; HC 1255/94 "*Bezeq," Israeli Telecommunications Company*, *v. Communications Minister* [32] at 680; HC 5319/97 *Cogan v. Chief Military Attorney* [33]; HC 1064/94 *Computest Rishon LeTzion (1986) Ltd. v. Minister of Transportation* [34]

at 814; CA 239/92 "*Egged" Transportation Cooperative Society v. Mashiach* [35] at 71; HC 4541/94 *Miller v. Defense Minister* [36] at 110, 131. In fact, following the adoption of the two Basic Laws regarding basic rights and the meaning given to them in *United Mizrahi Bank* [16] Israeli law was constitutionalized. *See* F. Raday, *Chukatizatzia shel Dinei Haavodah [Constitutionalization of Labor Law]* [86]; R. Ben-Israel, *Hashlachot Chukei Hayesod al Mishpat Haavodah Vimaarechet Yachasei Haavodah [Implications of Basic Laws for Labor Law]* [87]; A Yuran, *Hamahapacha Hachukatit Bimisoi Biyisrael [Constitutional Revolution of Tax]* [88]; A. Barak, *Hakonstitutzionilazatzia shel Maarechet Hamishpat Biakvut Chukei Hayesod Vihashlachoteha al Hamishpat Haplili [Constitutionalization of the Legal System – Criminal Law]* [89]. Constitutional rights are reflected (directly or indirectly) in all areas of law. *See Lev* [28] at 503. In one case, I addressed the meaning of the term "constitutionalization":

> The significance of constitutionalization is that every branch of law and every legal norm is influenced by the constitutional arrangements regarding human rights. The constitutional human rights are reflected in all branches of law and influence every legal norm.

CrimApp 537/95 *Ganimat v. State of Israel* [37] at 421.

And in the *United Mizrahi Bank* case [16] I stated:

> Israeli law has been constitutionalized, and human rights are reflected in all branches of law (public and private) and influence their substance. Whereas in the past human rights were derived from the arrangements extant in the various areas of the law, now the same areas of law are derivatives of the constitutional human rights.

Id. at 447.

These changes affect the legal status of the "basic rule," according to which primary arrangements must be set out in legislation. For the purposes of the

case at bar we need not dwell on the entire scope of these changes, for the Defense Minister's authority at issue is based upon legislation that preceded the constitutional changes, the validity of which is maintained as part of the old law. Hence, we have no need to adopt a position regarding the relationship between the exercise of the Defense Minister's authority and the rights entrenched in the Basic Laws. Suffice it to note that the constitutional laws respecting human rights fortify the basic rule. This fortification is expressed by an interpretative presumption that the law did not intend to vest the executive branch with additional power to establish primary arrangements. Hence, the statutory power to prescribe primary arrangements in administrative regulations remains in force and its validity is not impaired. New Basic Laws, according to their interpretation in the *United Mizrahi Bank* case [16] cannot detract from the validity of existing legislation. Even so, in the absence of any contradictory provision, an interpretative effort must be made, where possible, to give this empowerment a restricted interpretation, so that it will be exercised, wherever possible, in a manner consistent with the basic rule governing primary arrangements. In this vein, there are cases in which the executive branch must refrain from making substantive decisions on basic social issues which are the subject of sharp public controversy. It must leave these decisions to the Legislature. For example, the matter of deferring the enlistment of women whose service during a particular year is not required is left to the Defense Minister's discretion. The decision will be a pragmatic one, based on the needs of a particular year, as such a decision will not seek to resolve the fundamental issue of the nature of women's service in the military, which is the subject of a fierce public controversy. Thus, the Minister is not empowered to adopt a decision by virtue of which women as such, or married women, or women whose religious convictions prevent them from serving in the defense service, are to be exempted from serving in the military. This is a matter for the Knesset, which must determine, as part of the social resolutions that it is charged with, the State's position on that matter. Indeed, the Knesset adopted this path regarding the exemption of married women (sec. 39 of the Defense Services Law) and that of women requesting an exemption for reasons of religious convictions (sec. 40). The same applies to deferral of service for men. Where the considerations [underlying a particular decision] are practical – pragmatic, dynamic – the Defense Minister can make such a decision. However, when the consideration is one relating to resolving a sharply disputed

general social issue, the matter must be dealt with via a primary arrangement in legislation. More specifically, the position we are adopting does not preclude the executive authority from determining general policies regarding the exercise of its powers. Generally speaking, it is both permissible and desirable that the executive branch set out general guidelines. Our position is simply that there are certain, special issues regarding which the executive authority is not endowed with the power to adopt fundamental decisions on fundamental issues that divide society. There are matters that the Knesset must resolve. Regarding these matters, the executive must be satisfied with determining the policy for implementation. Practically speaking, this means that, in general, the Court will give a limited construction to the powers that the law grants the executive branch. This has been the practice of the Courts in those legal systems in which this basic rule has constitutional status and not just interpretative status. Regarding the approach adopted in the United States, Kischel wrote the following:

> The question whether a delegation is so broad that its constitutionality becomes doubtful, depends first on an interpretation of the exact scope of the statutorily conferred powers. Here it is of course possible for a court to accept a very broad interpretation, and to then declare even this maximum to be constitutional. Today, however, the Court takes the opposite path. The Court circumvents possible delegation problems by making a narrow interpretation of statutory language, thus using the delegation doctrine as an *Ashwander* like principle.

Kischel [97] at 222.

The Courts in Germany adopted a similar approach. *Id.* at 232. We, too, have followed this approach, incorporating the law established in *Ashwander v. Tennessee Valley Authority* (1936) [63]. Accordingly, all legitimate interpretative efforts must be made to avoid a law's invalidation. This rule was cited by President Shamgar in *United Mizrahi Bank* [16] at 350, stating that "when the validity of a law … is being adjudicated, even where there is serious doubt as to its legality, the central guiding rule is

that the Court must first examine the possibility of a reasonable interpretation, by which it can avoid having to decide the question." This Court has practiced this interpretative approach of statutory construction. HC 4562/92 *Zandberg v. Broadcasting Authority* [38] at 810, 814, 815; HC 7111/95 *Center of Local Government v. The Knesset* [39] at 496; HC 5503/94 *Hofnung v. Speaker of Knesset* [40] at 67; HC 5503/94 *Segal v. Speaker of Knesset* [41]; HC 450/97 *Tenufa Manpower and Maintenance Services Ltd. v. Minister of Labor and Welfare* [42]. Needless to say, this approach is possible only where the statute's language permits such a narrow construction. The statute's text cannot be forced, nor can interpretative rules be distorted. However, within the framework of accepted interpretative principles, the interpretative option that is consistent with the basic rule regarding primary arrangements should be selected.

From the General to the Specific

The Defense Services Law sets forth the duty of defense service (regular service or reserve service). It establishes the duty's scope and the modes of fulfilling it. Together with these provisions, it also establishes the Defense Minister's authority to defer service or grant an exemption. He may do so:

> [F]or reasons related to the size of the regular forces or reserve forces of the Israel Defense Forces or for reasons related to the requirements of education, security settlement, or the national economy or for family or other reasons…

Sec. 36 of the Defense Services Law.

Is the Defense Minister authorized to exercise his authority and grant a deferral to full-time Yeshiva students of the dimension and scope which such deferrals have reached today? This question turns on the division of powers between the legislative and executive branches. It goes to the issue

of whether establishing principles and criteria respecting the social issue of service deferral for full-time Yeshiva students is the Legislature's exclusive province, a matter that it alone should determine as part of the primary arrangements that it must establish.

33. The question is not a new one for us. President Landau dealt with it in the petition concerning service deferral for full-time Yeshiva students preceding the *Ressler* [1] case. In dealing with a request for a further hearing, President Landau raised the issue of "whether the matter required … a specific statutory resolution, pursuant to a comprehensive debate in the Knesset, precluding its resolution in an administrative decision of the Defense Minister, or by way of a government decision in its executive capacity as part of implementation of a coalition agreement." He noted that "this is an argument … that, to my mind, is worthy of being heard." FH 2/82 *Ressler v. Defense Minister* [43] at 711-12. This having been said, he did not rule on the issue, for it had not been discussed in the judgment regarding which the petition for a further hearing had been filed, nor was it included in the petition for a further hearing.

34. *Ressler* [1] discussed this question. In my judgment, I mentioned that the Rule of Law dictated that "primary arrangements" ought to be specifically prescribed by statute, and that the executive branch should not be endowed with general empowerment to independently establish primary arrangements. *Ressler* [1] at 502. I added that:

> [I]t is desirable that by force of the principles underlying a "true parliamentary democracy," the Knesset should adopt a specific position regarding the issue of deferring the enlistment of Yeshiva students, and not be satisfied with the general, across the board, empowerment of the Defense Minister to grant enlistment deferrals "for other reasons" …

Id. at 502.

This having been said, I emphasized that "I am not convinced that the Knesset's failure to establish primary arrangements and its failure to

supervise the arrangements established by the Defense Minister means that such general empowerment is invalid." *Id.* I noted that the "other reasons" need not necessarily be security-related, and they extend to non-security based considerations, which in my opinion also include religious reasons. *Id.* at 502-03. In a later judgment, I cited *Ressler* [1], stating:

> Our lives are replete with issues that in the past were anchored in administrative regulations but ought to be regulated by legislation. Suffice it to mention the issue of the Yeshiva students' enlistment in the military. It was argued before us that the latter issue, being an important one, ought to be regulated in legislation. Even so, we held that the absence of primary arrangements in legislation does not invalidate the administrative regulations in this matter.

Horev [6] at 76.

Thus, there is already a previous ruling in this matter. The question before us is whether the new circumstances, both factual (relating to the increase of the number of Yeshiva students whose enlistment was deferred and the broadened scope of those entitled to a deferral) and legal (the strengthening of the interpretative power of the basic rule), justify reaching a different conclusion. In *Ressler* [1], the Court stressed that "quantity becomes quality." *Id.* at 505. How do all of these affect the question currently confronting us? I will now proceed to examine this issue.

35. My point of departure is that, following the *Ressler* [1] case, the power granted to the Defense Minister to defer military service for "other reasons" also included the power to defer full-time Yeshiva students' defense service. Admittedly, the Defense Services Law does not set forth any criteria regarding how that power is to be exercised. We are therefore confronted with an extreme case of delegation of power to the executive branch, without the legislation containing guidelines for the Defense Minister with respect to the primary arrangements. In interpreting this provision today, I accept that, as a matter of principle, the Defense Minister is entitled to defer the defense service of full-time Yeshiva

students. Even so, the exercise of discretion must be done with cognizance of the basic rule concerning primary arrangements. This is an interpretative principle that affects the considerations to be taken into account by the Defense Minister. The interpretative conclusion dictated thereby is that the scope of the Defense Minister's discretion is within the framework of the basic rule. He is authorized to grant a service deferral to full-time Yeshiva students, but this decision must be part of a national decision adopted by the Knesset, relating to the State of Israel's position regarding the disputed social issue of granting service deferrals to full-time Yeshiva students. A fundamental decision of this nature must be a parliamentary decision, not just a decision made by the Defense Minister. The Defense Minister's discretion must be exercised regarding these particular issues, within the context of a fundamental Knesset decision.

The National Decision

36. Granting enlistment deferrals to full-time Yeshiva students is a subject of controversy in Israel, and there is no national consensus on the matter. The dispute is not just between the observant and the non-observant. Within the religious camp itself there are many and varied views. I referred to this in *Ressler* [1]:

> There are those who maintain that the State could not exist without deferring their enlistment and those who maintain that the State cannot exist without their enlistment. Some see the deferral of their service as a noble act while others perceive it as vile. There is no social consensus on the matter.

Id. at 505.

Far from being exclusively ideological, the rift in question involves a clash between various human rights. On the one hand, there is the ideal of equality, dictating that all of the members of society must contribute equally to its security. The current situation, in which a significant portion

of these individuals of service age do not risk their lives for the security of the State is very discriminatory, engendering deep feelings of exploitation amongst those who serve. Indeed, equality is "the very soul of our entire constitutional regime." *See* Justice Landau's comments in HC 98/09 *Bergman v. Finance Minister* [44] at 698. It is a principle "that pervades our legal thinking, forming an integral part thereof." HC 114/78 *Borkan v. Finance Minister* [45] at 806 (Justice Shamgar's opinion). Thus, Deputy President Elon was correct in stating:

> [T]he principle of equal rights and obligations for all of the State of Israel's citizens is part of the State of Israel's very essence.

EA 2/88 *Ben Shalom v. Central Elections Committee for the Twelfth Knesset* [46] at 272; *See also* his opinion in HC 153/87 *Shakdiel v. Minister of Religious Affairs* [47].

In another case, I noted:

> [E]quality is a basic value in any democratic society, 'which the law of any democratic society attempts to realize, for reasons of justice and fairness …' The individual becomes part of the entire social fabric; he or she shares in building the society, in the knowledge that others, too, are acting as he does. The need to ensure equality is endemic to human beings; it is based on considerations of justice and fairness. A person desiring the recognition of his or her rights must recognize the rights of others to seek similar recognition. The need to maintain equality is critical for society and for the social agreement upon which it is based. Equality protects the government from caprice. In fact, there is no factor more destructive to a society than the feelings of its members that they are being dealt with unfairly. The feeling of inequality is a particularly harsh one. It undermines the unifying forces of the society. It damages the personal identity of a human being.

Poraz [18] at 332.

On the other hand, we have the rights relating to freedom of religion. This freedom includes, *inter alia,* the right to fulfill religious commandments and requirements. It has been argued that the forced enlistment of full-time Yeshiva students may violate their freedom of religion and is liable to offend their religious feelings, which must also be taken into account. *See Horev* [6].

37. The issue of enlisting full-time Yeshiva students is not merely an ideological one, in which human rights clash with each other. In Israel, it has become a major social problem. Full-time Yeshiva students whose enlistment has been deferred are not permitted to work. The material opportunities at their disposal and at their family's disposal are meager, and poverty is their fate. They are not absorbed into the work force. Even those who leave the arrangement are not absorbed into the workforce, for fear of being drafted into the military, and idleness is the mother of all sin. This creates an entire population, which is not incorporated into the work force, with the subsequent increase in poverty and reliance upon allocations both from the State and private sources. A social problem of the first degree has thus arisen.

38. The enlistment of full-time Yeshiva students also creates a complex social-military problem. This problem regards military considerations relating to the integration of these enlistees. Is it desirable for the military to enlist these Yeshiva students? Is it efficient to enlist them? Would it be efficient to enlist some of them, for example those found fit for military service, or those who do not remain in the Yeshiva framework? If we decide that their enlistment is not efficient, then what weight attaches to that consideration when compared with the other considerations, which we dealt with? Quite frequently, the military enlists draft candidates despite the fact that the expected effectiveness of enlisting them is low, and even particularly low. It does so for a variety of reasons. Should a similar approach be adopted for the issue at bar? Is there any

possibility of increasing the effectiveness of their service by preparing special structures for Yeshiva students? Is that effort worth it, in light of the Yeshiva students' life style?

39. The solution to these problems is by no means simple, because they raise fundamental social and military problems. Our approach is that this sort of penetrating national question must be resolved by the legislative branch, the Knesset. This is the only way of expressing "the optimal national consensus that will facilitate communal life ..." *See* the comments of my colleague, Justice Or, in *Mitral* [15] at 498. This is the only way of "… examining the issue in all its aspects, considering the different alternatives." HC 355/79 *Katalan v. Prison Authority* [48] at 303. Hence, it follows that the Knesset cannot "pass the buck" to the Defense Minister, so to speak. Instead, it must resolve the issue statutorily. This is how a legal system faithful to the doctrine of separation of powers operates, in which the Rule of Law is maintained and where the democratic principle constitutes part of the "genetic code of all of the binding norms in Israeli Law." *See* the comments of my colleague, Justice Cheshin, in *Nevuani* [12] at 121. Needless to say, we do not adopt any position regarding the substantive questions requiring answers, and the enumeration of the various social options does not constitute the adoption of any position as to their legality. Examination of that would be done in accordance with the constitutional framework within which these social arrangements are established.

40. Is our approach consistent with the Defense Minister's power to defer enlistment for "other reasons?" Here, we are confronted with an interpretative problem. We must interpret the Defense Minister's power against the backdrop of the need to bring to fruition, by way of interpretation, the basic rule regarding primary arrangements. Such interpretation leads us to the conclusion that the Defense Minister's powers ought to echo the difficult social decisions adopted by the Legislature. It is not for the Defense Minister himself to arrogate the power to make this decision. Indeed, the ideological-social problem regarding the enlistment of full-time Yeshiva students and the various

solutions thereof must be resolved through the legislative activities of the branch which, in a democratic system such as ours, deals with such problems. This is not the executive branch. In Israel, it is the legislature.

41. Is our conclusion consistent with our decision in *Ressler* [1]? It seems to me that we may answer this question in the affirmative. In *Ressler* [1] we emphasized that "quantity becomes quality." *Id.* at 505. Since rendering our decision in *Ressler* [1], the arrangement's dimensions have expanded, to the extent of becoming a national problem. It was not presented to us as such back in *Ressler* [1]. Hence, our attention then was directed primarily at the issues of standing and justiciability. The actual problem of enlisting Yeshiva students was not presented to us as a national problem of urgent importance. Since then, there has been an increase in the number of Yeshiva students whose military service has been deferred, and the trend indicates a continued rise. There is reason to assume that it will continue to increase in the future. There have also been changes in the kind of enlistees who are granted the service deferral. Hence, the arrangement has been broadened to include those who did not study in a Yeshiva High School, but rather those who studied in a regular religious high school and whose matriculation examinations included Talmud at the level of five units. The arrangement was also broadened to include the newly penitent. It was further broadened so as to include not only full-time students, but also those whose professions, which were also their livelihood, is teaching Torah. There is a point at which the large quantity of those included in broad sections of military candidates becomes a qualitatively different category. Furthermore, since our decision in *Ressler* [1], there has been a substantive change in our conception of our constitutional structure. The basic rule regarding primary arrangements has been reinforced, which in turn affects the interpretation of the power statutorily conferred on the Defense Minister by the Defense Services Law and the understanding of the case law that interpreted that power. The strength of the basic rule has increased together with the interpretative weight attaching to it when interpreting the Defense Minister's powers. All of these constitute "new circumstances," which justify a new interpretation of the old power. In any event, I am convinced that the current situation requires the Legislature to

adopt a legislative solution, in view of the increasing numbers of full-time Yeshiva students receiving a military service deferral, which ultimately leads to a full exemption. This is done against the backdrop of the rift in Israeli society over the question of the deferral of military service for full-time Yeshiva students; against the backdrop of the legal problems and the serious social and ideological problems at their base; and in view of the need to provide a comprehensive national solution. All of these necessitate parliamentary intervention in order to provide a solution to this serious problem.

42. We have concluded that the service deferrals for full-time Yeshiva students as currently granted by the Defense Minister are illegal. In view of this conclusion, it is unnecessary to adopt a position regarding the manner in which the Defense Minister's discretion is exercised. Suffice it to say that the Defense Minister's discretion, as evidenced by the factual foundation presented before us, is problematic: it is unclear whether the security consideration is the dominant one, and there is cause for concern that, due to the massive increase of those receiving service deferrals and the addition of new categories of recipients of service deferrals, the zone of reasonableness has been overstepped, in terms of the quantity making quality (*Ressler* [1] at 505) and in terms of the weight that ought to have been accorded and which was not accorded to the principle of equality. However, as stated, since we have decided that the Defense Minister is not authorized to make a fundamental decision in this matter, we need not address the question of whether he legally exercised his discretion.

The Remedy

43. Our conclusion is that, in the present situation, the Defense Minister exercises his discretion in granting service deferrals to full-time Yeshiva Students in accordance with a principled decision that should be made by the Knesset. Consequently, the current exercise of power is illegal. Accordingly, decisions adopted by the Defense Minister regarding service deferrals for Yeshiva students were illegally adopted. Even so, there is no pragmatic way, overnight, to alter a situation that has endured

for so long. The Defense Minister or the Knesset should be allowed to conduct a serious and organized discussion regarding the entire issue and all of its ramifications. Moreover, if a decision to alter the current situation is made, the necessary framework should be established. It is impossible to adopt an alternate arrangement from one day to the next. In these circumstances, there is no way of immediately ruling that the current arrangement is invalid. We must postpone the impat of our decision. With respect to our authority to do so, we mentioned in another case that:

> "Our power to postpone the date upon which the declaration of invalidity goes into effect is well founded ... in comparative law. A similar power is given to a court that declares legislation invalid…
>
> ...
>
> A similar law applies in Israel. Needless to say, this court will make use of its power to postpone only in special cases that warrant it." HC 1715/97 *Investment Managers' Bureau v. Finance Minister* [49] at 416.

The case at bar warrants the use of the said power. Having considered the period of the delay, we have reached the conclusion that the appropriate period of postponement is twelve months from the day this judgment is rendered, i.e. until December 9, 1999.

Consequently, the matter is decided as per section 43 of the judgment.

Deputy President S. Levin

I agree.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice I. Zamir

I agree.

Justice D. Dorner

I agree.

Justice J. Türkel

I agree.

Justice D. Beinisch

I agree.

Justice I. Englard

I agree.

Justice M. Cheshin

The phenomenon is as old as the State itself. It is the deferral of and exemption from military service granted to full-time Yeshiva students. This exceptional phenomenon has accompanied us over the years and is a source of dissatisfaction for many people. How is it, they ask, that part of the population bears the yoke for the collective, while another part is exempt from bearing that yoke, yet benefits from the burden that others bear on their shoulders? Is this right and appropriate in a society in which all are supposed to be responsible for each other? Many have not come to terms with this unique state of affairs, and hence, the issue has reached the High Court of Justice. The Court has addressed petitions regarding the deferral/exemption of military service for Yeshiva students on at least five occasions, each time dismissing the petitioners empty-handed.

2. In the beginning, the issue was raised in the High Court of Justice in HC 40/70 *Becker v. Defense Minister* (hereinafter- *Becker* [50]). That petition argued that 5,000 Yeshiva students had been released from military service. The petitioner requested that he, too, be released from the period of his military service equivalent to the period that had been added to his service, due to the exemption of 5,000 Yeshiva students. The Court did not even trouble the respondent's lawyer to appear before it to explain why certain things had happened and why other things had not happened. Instead, it decided to reject the petition outright, by reason of the petitioner's lack of standing and the injusticiability of the subject.

Justice Witkon characterized the petition as a "collective public petition," and for that reason, he held that that there was no cause for addressing it. Justice Witkon stated, *inter alia*, that the Court must be careful "…not to be dragged into the general, public debate which is entirely a dispute on its own merits. It is preferable that it be left in the hands of the political elements responsible for it … this clearly being a political issue, there is reason to apply a stricter application of the requirement that the petitioner have standing …." For his part, Justice Y. Kahn concurred with Justice Witkon's reasoning, adding that "it is well known that the reason given for granting service deferrals to Yeshiva students is the need to preserve the institutions in which Torah is studied, after the destruction of such learning centers during the Holocaust." *Id.* at 249.

I confess that, even when the judgment was rendered, it made no sense to me. The statement that the subject is of "a clearly political nature" and that the Court ought therefore to distance itself from it, was as difficult for me to understand then as it is today. Is serving in the I.D.F. a political issue? Did the Court think that political agreements as such could exempt the youth from serving in the I.D.F.? Furthermore, had the issue been one of an exemption for 50,000 Yeshiva students, would the Court have maintained its position? And if, in the latter case, a different answer had been given, then does the "character" of the subject change from political to non-political, purely on the basis of the number of those

benefiting from the exemption/deferral? With respect to the (additional) reasoning of Justice Y. Kahn regarding what is termed the preservation of the burning embers [preservation of tradition – ed.], I say that even if we presume that Justice Kahn was correct in assuming that we are charged with the national task of restoring and rejuvenating the Torah Study centers that were destroyed, are we not still justified in examining the propriety of benefiting so many Yeshiva students, 5,000 specifically, by granting the exemption/deferral? Would it not have been appropriate, at least, to hear the respondent's opinion on the matter? We all know that a judgment of this nature could not be handed down today, and personally, I think that even at that time, the judgment was exceptional and extreme.

3. The issue of granting exemptions/deferrals to Yeshiva students was once again presented to this Court in HC 448/81 *Ressler v. Defense Minister* [51], and, once again, the petition was rejected. The Court relied on the *Becker* [50] decision and decided to dismiss the petition for essentially the same reasons that *Becker* [50] was dismissed. To quote Deputy President Kahn: "In my opinion, the petitioners have not succeeded in establishing their right of standing, which would justify this Court actually deliberating on the petition, which on its face appears to be non-justiciable." *Id.*at 86. He added that "…the petition before us cannot be upheld, for its subject is not amongst the matters that can be adjudicated by a Court. The question of whether or not to enlist full-time Yeshiva students is one on which the Court lacks any legal standards upon which to base a judicial finding. *Id.* at 88. Deputy President Kahn added:

> …even if the petitioners were to prove with signs and wonders (and as I said, I do not think that such proof can be made) that their reserve duty would decrease as a result of the enlistment of Yeshiva students, I would not see this as providing cause for issuing an *order nisi*. The issue of whether or not to enlist Yeshiva students is essentially a public problem, the resolution of which must be left to the political elements, whose task it is to decide these issues. The arrangement of deferral of service for Yeshiva students has

> existed since the establishment of the state, and the respondent has not made any significant change in the matter.

Id.

Deputy President Kahn further said:

> The petition clearly evidences an effort to drag this Court into a public-political debate regarding a sensitive and volatile issue, regarding which there are serious differences of opinion in the public at large. The petitioners cannot succeed, due to their lack of standing, the fact that the subject is non-justiciable, and the fact that they have shown no cause for this Court's interference with the exercise of discretion that was conferred on the respondent by the legislature.

Id. at 89.

In this case, too, no one was summoned from the State Attorney's office to explain what (in my opinion) ought to have been explained. Today we know (from the information provided by the State Attorney's office) that at that time there were more than 11,500 Yeshiva students who were benefiting from the exemption/deferral.

I confess that I find this ruling particularly difficult, and I found it difficult at the time it was rendered. I am prepared to agree that the issue is a public, political one. I am also prepared to agree that the issue is sensitive and explosive. I will further agree that the matter is the subject of serious public controversy. I agree to all of these, but I still find it difficult to understand why those particular factors have the effect of locking the gates of the Court, at a time when it is claimed that the Defense Minister is making arbitrary use of his power and illegally exempting thousands of Yeshiva students from service. Is the statement that the issue is "political" a magic word that closes gates? Can this statement shelter the Defense Minister, allowing him, albeit indirectly, to systematically and sweepingly

breach the law, with none of us, the people of the law, having anything to say? Is there no real legal aspect to the Defense Minister's activities? The judgment in HC 448/81 [51] was handed down at the end of December, 1981. We all know that no more than six months later, the Yeshiva students' contemporaries went to war, some of them never to return.

4. The petitioners in HC 448/81 [51] did not give up and requested a further hearing in FH 2/82 [43]. President Landau's decision signaled a fresh approach. First of all, the President ruled that the petitioners' *locus standi* had been proved, even if only for the reason that an "entire additional division" could be created from the aggregate number of draft candidates who benefited from exemptions and deferrals from military service. Even so, President Landau denied the petition due to it not being justiciable, albeit he did so reluctantly. Finally, President Landau mentioned the claim that had been raised, that the issue of the deferral/exemption "required a specific legislative resolution, following a comprehensive Knesset debate" and that ""it could not be resolved via the Defense Minister's administrative decision nor by a Government decision in its executive capacity, seeking to implement a coalition agreement." *Id.* at 711-712. Referring to this claim, President Landau opined that in his view "it ought to be heard," but that given that there hadn't been any ruling in the case that was the subject of the further hearing, it could not serve as the foundation of the further hearing. The claim was dismissed, but the seed was planted. Years would pass until the seed would begin to mature, and now it has sprouted from the ground.

5. Ressler and his companions were not deterred. About one month after the decision in their petition for a further hearing, they filed a new petition: HC 179/82 *Ressler v. Defense Minister* [52]. However, this petition, too, was rejected due to the petitioners' lack of standing.

6. Thus, we arrived at the next *Ressler* case, namely HC 910/86 *Ressler v. Defense Minister*, IsrSC 32(2) 441. This time, the Court held that the petitioners had standing and that the question of exempting Yeshiva students is one that should be heard on its merits. Having reached

this conclusion, the Court reviewed the Minister's discretion, and decided the two following points: First, that the Defense Minister had been statutorily endowed with the discretion to grant a deferral/exemption to Yeshiva students. Second, that the Defense Minister had not exceeded the zone of reasonableness. At the time, over 17,000 Yeshiva students benefited from the exemption/deferral. We should recall that sixteen years prior to the *Ressler* case, there were 5,000 Yeshiva students affected, and five years prior thereto, the number of those receiving the deferrals/exemptions was 11,500. Nevertheless, the Court opined that the number of those receiving releases from military service did not deviate from the statutory parameters established for the Defense Minister's discretion. Even so, Justice Barak wrote to add the following:

> In balancing the various considerations forming the basis for the Defense Minister's discretion under section 36 of the statute [the Defense Services Law [Consolidated Version] 1986] the determining consideration must be that of security. It was for that purpose that the Defense Services Law was enacted and some of the exemptions from military service are formulated in that spirit … at the end of the day, there is significance to the number of Yeshiva students whose enlistment is deferred. There is a limit that no reasonable Minister of Defense may exceed. Quantity becomes quality. In this matter the petitioners have not discharged their burden of showing that the harm to security is not minor.

Id. at 505.

And further on (at 506-07):

> …if the number of those whose service is deferred by reason of Torah study continues to increase until it includes a very large number of men of military age, to an extent that harms security, the moment will surely arrive when it will be said

> that the decision to defer enlistment is unreasonable and must be canceled.

President Shamgar added to this (at 525-26):

> … what we now determine regarding the legal validity of the arrangement, when it is subjected to substantive judicial review for the first time, does not exempt the Executive from the duty of periodically continuing to examine and reexamine the significance of granting an exemption to increasing numbers of men of military age.
>
> … therefore, we are not speaking of static data but rather of facts which change and which are updated on a yearly basis. This means that it is incumbent upon the authorized body to examine the data annually and state its opinion concerning the ramifications of the data, against the background of other considerations.

When I read the judgment at the time – a judgment that is both brilliant and unique for its addition to the doctrines of standing and justiciability – I had considerable difficulty with it. I asked myself whether an interpretation of the Law, under which the Defense Minister is authorized to exempt over 17,000 youths from military service could be appropriate. Is it appropriate that so much authority be concentrated in the hands of one person, the Defense Minister, even with the Government's consent, and indeed under its orders? Is an interpretation of the Law according to which the Defense Minister is endowed with such far-reaching powers consistent with the main principles of a parliamentary democracy, or if you prefer, of a Jewish democratic State? This question has haunted me, unceasingly, since then, perhaps even from the time of *Becker* [50].

Primary Arrangements and the Interpretation of Law

7. My colleague, the President, rules that, in a social framework governed by the Rule of Law in its substantive sense; in a society in which governmental powers and the power to coerce are divided between the legislative and executive branch; in a society in which human rights are at the pinnacle; in these social-governmental frameworks, first principles unequivocally instruct us that the broad exemption granted to Yeshiva students must be prescribed by statute. I unreservedly concur with the words of my colleague.

For my part, I will add that this conclusion, which derives from the roots of our society and government, is also mandated by virtue of the Defense Services Law, from the time of its enactment (in 1949 and in its current form, [Consolidated Version] 1986) and from the legal infrastructure upon which it rests. The Defense Services Law [Consolidated Version] rests upon two foundations. The first – the principle that those reaching military age are subject to military service, including both regular and reserve duty. The second – the principle that the Defense Minister is empowered to grant an exemption from military duty, to reduce the period of service, or to defer service. With respect to all of these, section 36 of the Defense Services Law states:

Authority to exempt from or to defer

36. The Minister of Defense may, if he sees fit to do so for reasons related to the size of the regular forces or reserve service forces of the Israel Defense Forces or for reasons related to the requirements of education, security settlement or the national economy or for family or other reasons do the following, by order:

(1) exempt a person of military age from regular service duties or reduce the period of his service;

(2) exempt a person of military age

from reserve duties for a specific period or totally;

(3) by virtue of an application made by a person of draft age or a person designated for defense service other than a person of draft age, defer by order for a period prescribed therein, the date of reporting prescribed for that person, under this Law or regulations hereunder, for registration, medical examination, defense service or, if he has already begun to serve in the defense service, the continuance thereof.

To complete the picture, I will cite section 55 of the Law, under which an order pursuant to section 36 of the law can be "personal or for a particular class," distinct from orders issued under other provisions of the law which can be general, for a particular class, or personal.

I will also mention section 54(a) (opening section) of the law under which the Defense Minister may delegate his powers under section 36 of the law to another person. The Defense Minister exercised this power and delegated his authority to exempt men of military service from regular service and to reduce or defer the service period for a long list of positions: Assistant to the Defense Minister, the Chief of the General Staff, Deputy Chief of General Staff [… ed.]. All these positions are specified in the notification of delegation of authority published in the Official Gazette No. 202 (Nov. 4, 1997).

8. We can all agree that the basic duty of men of military age to serve in the military, in regular or reserve duty, must be prescribed by statute. The duty to serve in the military is like the obligation to pay taxes, and we would never agree, nor would it even occur to anyone, to impose it

by force of administrative regulations, irrespective of how lofty the executive power creating the regulations may be (obviously this does not refer to emergency legislation). Thus, when it became clear that there was a *lacuna* respecting men of military age's duty to serve, this is to say complete regular service for a period of 36 months, the Knesset responded immediately and amended the Defense Services Law [Consolidated Version] and specified in the Law itself that the period of service was 36 months. *See* Defense Services Law [Consolidated Version] (Temporary Provision), 1995; Bill for Defense Service Law (Amendment 6) 1994; Defense Services Law [Consolidated Version] (Temporary Provision) (Amendment) 1997; A Rubinstein, *The Constitutional Law of the State of Israel* [72] at 828-29.

Personally, I have found no operative distinction between the general obligation, in principle, to serve in the military and the general exemption, in principle, from service in the military. If the general obligation, in principle, to serve in the military can only be imposed by statute, then a general exemption, in principle, from military service must also find its place in legislation. An example of this is found in section 40 of the Defense Services Law [Consolidated Version] under which an exemption is granted to a woman of military age who declares in writing that reasons of religious conviction prevent her from serving in the military service and that she observes Jewish dietary laws at home and outside and does not travel on the Sabbath. The same applies to the case at bar. The authority granted in section 36(1) of the Defense Services Law [Consolidated Version] "to exempt someone of military age from regular service, or to reduce the period of service," is no more than the authority to issue individual orders: to Rueben, to Simon, to Levi, to Yehuda. The Defense Minister was not endowed with the authority to issue a general exemption.

The Knesset signed a sovereign order establishing mandatory military service. In signing that order, in essence, the Knesset gave public notification that the cancellation of that order, either partially or

completely, was exclusively within its authority. The one who prohibits is the one who can permit [in Jewish tradition – ed.].

9. Even so, just as we cannot accept that the Knesset can establish a basic obligation of defense service whereas the Defense Minister – and not the Knesset – is endowed with the authority to abrogate that basic obligation either partially or otherwise, so too, for reasons of efficiency, it is inconceivable that the legislature be charged with issuing individual exemptions from military service. Consequently, the Knesset delegated the power to issue personal exemptions to the Defense Minister. Then, with the Knesset's approval, the Defense Minister delegated this power to various position-holders. However, a normative exemption, an exemption from service to a very large section of the population, is a power that the Knesset reserved for itself. Any other interpretation given to the law will inevitably lead us to the conclusion that all the Defense Minister's delegates also have the authority to grant a general exemption from military service. It is clear that the Defense Minister is not authorized to delegate normative power to various position-holders, and this interpretation of the law is unacceptable.

10. The current Defense Minister, like all his predecessors in successive Israeli Governments since 1977, did not take care to ensure that he acted exclusively within the parameters of his statutorily-determined authority. Instead of granting exemptions to Rueben and Simon, to Levi and Yehuda, or having his agents do so, the Defense Minister took the normative step of granting a general exemption to Yeshiva students. The Defense Minister was not authorized to do so, and neither were the Defense Ministers who preceded him. His actions were *ultra vires* with respect to his legally conferred powers.

Just as the authority to issue general orders does not include the authority to issue individual orders, so too, the authority to issue individual orders does not include the authority to issue general orders. In this context we wrote in LCrim. 1127/93 *State of Israel v. Klein* [53] at 510:

> …the power to enact regulations must be distinguished from the power to issue individual orders. An agency's power to enact regulations, as such, does not include the power to issue individual orders. This is certainly true in the reverse situation, to the extent that the power to issue individual orders does not encompass the power to enact regulations. By its very nature and essence, a regulation is a piece of [administrative – ed.] legislation with independent standing, and it is not equivalent to the sum total of individual orders that could have been legally issued during the same period of time. By its very nature, a statutory order carries more weight than any number of individual orders that may be issued from time to time. Consequently, it should be regarded as a single act, which cannot be divided into parts (i.e. individual orders). For the same reason, because the respective nature of the powers is inherently different, the power to issue statutory orders does not include the power to issue individual orders.

11. To sum up this point: upon closer examination of the exemption/deferral arrangement currently open to Yeshiva students, there can be only one inescapable conclusion: Yeshiva students are granted an *automatic* exemption/deferral provided that they are full-time students (we are not concerned here with the faulty supervision over compliance with this condition, which is the necessary and sufficient condition for the exemption/deferral). These exemptions/deferrals have the Defense Minister's blessing (supposedly) in accordance with section 36 of the Defense Services Law when, in fact, this statute does not endow him with the authority to grant the exemptions that he grants in practice. The Defense Minister has the authority to grant individual exemptions from service, but the situation at hand is one in which the Defense Minister is granting a general exemption to Yeshiva Students. In doing so, the Defense Minister exceeds his authority and the exemptions/deferrals granted are void.

Just as the Defense Minister would not have the authority to exempt "agriculturists" from regular or reserve duty, so too he does not have the authority to create the exemption – deferral for Yeshiva students – that he purports to do. Furthermore, from the arrangement as presented to us, it is clear that the Defense Minister does not consider individual applications for an exemption-deferral. Instead, the arrangement operates autonomously, without the need for anyone's assistance to implement it. In so doing, the Defense Minister greatly exceeds the authority with which he was endowed.

12. My position is therefore that a "universal," normative exemption from military service must have a statutory basis, and the Defense Services Law [Consolidated Version] does not empower the Defense Minister to exempt Yeshiva students from military service exclusively by virtue of their being Yeshiva students.

Quantity and Quality

13. My colleague, the President, states that quantity becomes quality, and the conclusion is therefore that since the last *Ressler* [1] case, we have progressed from the quantitative stage to the qualitative stage. Personally, the issue of quantity alone is sufficient for me – a small quantity, a medium quantity, and a large quantity. There are quantities that are *de minimus* and there are quantities that we cannot ignore. It is not the straw that breaks the camel's back, but rather the burden already on his back prior to that straw being placed there. It would seem that the deferrals/exemptions granted to 17,000 Yeshiva students, as presented to the Court in the last *Ressler* [1] case, were already too much. However, even if this was not our view, this is definitely the case today with respect to the 29,000 Yeshiva students receiving exemptions/deferrals.

14. Let me clarify and explain. I did not say, and I will not say, that studying in a Yeshiva is not an appropriate reason for receiving a service deferral. This was the ruling in the last *Ressler* [1] case and I accept that

view entirely. This would also be the law if it were decided to grant a service deferral in order to enable computer studies, the study of engineering or any other profession that was deemed important to the military and the State. Both of these are problematic in the case at bar (both theoretically and substantively-legally). First, there is no limit on the number of deferrals granted, whether *a priori* or *post factum*. That is how the quantity grew to its current dimensions. Second, the deferrals became, and are in fact, exemptions. Hence, for full-time Yeshiva students, *a priori*, the issue is not one of service deferral but rather of exemption from service. "Torah as a way of life" has come to mean and is coming to mean, de facto and *ex ante*, not just deferral of service but rather exemption from service. The routine has become ingrained, to the point where it has become an accepted way of life

It has reached the point where the exemption-deferral is regarded as an inseparable, integral part of the life of the society and state, as if the burden of proof lay with those claiming that the Minister of Defense acted illegally, in an *ultra vires* manner. In our view, the reverse is true.

In the Future

15. With respect to the future, administrative regulations cannot, in the normative sense, provide Yeshiva students with an exemption from military service. We all agree on this point. Personally, I will not reach the issue (which we were not asked to decide) of whether legislation passed by the Knesset could exempt Yeshiva students from military service. There are those who would argue (and I will not elaborate) that even a Knesset statute would not be sufficient. It could further be argued that even a Basic Law would not be sufficient. There are limits to the Knesset's legislative powers (see my comments in *United Bank Hamizrachi* [16]). The saving of a life overrides the prohibition on doing work on the Sabbath. *Tractate Shabbat* [a]. Some say that even when it is uncertain whether a life is at stake, the prohibition is to be overridden. Jerusalem Talmud, *Tractate*

Yoma [b]. We should remember that we are concerned with no less than saving lives.

Justice T. Strasberg-Cohen

I concur with the judgment of my colleague, President Barak, as well as with the comments of my colleague, Justice Cheshin.

Decision of the Court

The Court ruled in accordance with the judgment of President Barak.

Decided today, December 9, 1998.