HCJ 4541/94

Alice Miller

v.

1. Minister of Defence

2. Chief of Staff, IDF

3. Head of Manpower Department, IDF

4. Chief Officer of Women's Corps, IDF

The Supreme Court sitting as the High Court of Justice

[8 November 1995]

Before Justices E. Mazza, Y. Kedmi, T. Strasberg-Cohen, Ts. E. Tal, D. Dorner

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The petitioner asked the army to assign her to the air force for training as a pilot. The army refused, since it was established policy not to train women as pilots. The army's reasoning was based on the length of service: by law, men are obliged to serve until the age of 54, whereas women are only obliged to serve until the age of 38, and they are exempt if they are pregnant or have children. Consequently, the army argued, the huge investment involved in training a pilot could not be justified for women, and planning for the deployment of pilots in the air force units would be complicated by the integration of women pilots who could be expected to be absent for significant periods of time because of pregnancy and childbirth.

Held: The majority held that the budgetary and planning considerations did not justify a general policy of rejecting all women from aviation courses. The minority held that intervention of the High Court of Justice was not justified in view of these considerations.

Petition granted by majority decision (Justices E. Mazza, T. Strasberg-Cohen, D. Dorner), Justices Y. Kedmi, Ts. E. Tal dissenting.

Basic Laws cited:

Basic Law: Freedom of Occupation, 5754-1994, ss. 1, 3.

Basic Law: Human Dignity and Liberty, 5752-1992, ss. 1, 2, 3, 4, 8, 10, 11.

Statutes cited:

Defence Service (Volunteering for Defence Service) Regulations, 5734-1974.

Defence Service (Women's Jobs in Compulsory Service) Regulations, 5712-1952.

Defence Service Law (Amendment no. 2), 5747-1987.

Defence Service Law (Amendment no. 7 and Temporary Provisions) (Police Service and Recognized Service), 5755-1995, s. 4.

Defence Service Law [Consolidated Version], 5719-1959, s. 16(b).

Defence Service Law [Consolidated Version], 5746-1986, ss. 1, 12, 15, 16, 17, 17(e), 21(b), 24, 29, 34, 39.

Defence Service Law, 5709-1949, s. 6(f).

Discharged Soldiers (Return to Work) Law, 5709-1949.

Equal Employment Opportunities Law, 5748-1988, s. 2(a).

Equal Remuneration for Female and Male Employees Law, 5724-1964, s. 1.

Government Corporations Law, 5735-1975, s. 18A.

Work and Rest Hours Law, 5711-1951, s. 9(c).

Women's Employment Law, 5714-1954, ss. 6(a), 7(c)(1), 7(d)(1).

Women's Equal Rights Law, 5711-1951, s. 1.

Regulations cited:

Employment of War Invalids Regulations, 5711-1951.

Israeli Supreme Court cases cited:

[1] FH 10/69 *Boronovski v. Chief Rabbis* [1971] IsrSC 25(1) 7.

[2] HCJ 720/82 *Elitzur Religious Sports Association, Nahariya Branch v. Nahariyah Municipality* [1983] IsrSC 37(3) 17.

[3] HCJ 721/94 *El-Al Israel Airways Ltd v. Danielowitz* [1994] IsrSC 48(5) 749; [1992-4] IsrLR 478.

[4] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; IsrSJ 8 13.

[5] HCJ 5394/92 *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [1994] IsrSC 48(3) 353.

[6] HCJ 453/94 *Israeli Women's Network v. Government of Israel* [1994] IsrSC 48(5) 501; [1992-4] IsrLR 425.

[7] CrimA 5/51 *Steinberg v. Attorney-General* [1951] IsrSC 5 1061.

[8] HCJ 3627/92 *Israel Fruit Growers Organization Ltd v. Government of Israel* [1993] IsrSC 47(3) 387.

[9] HCJ 734/83 *Shine v. Minister of Defence* [1984] IsrSC 38(3) 393.
[10] HCJ 329/87 *Sorko-Ram v. Minister of Defence* [1992] IsrSC 46(5) 301.
[11] HCJ 3246/92 *Har-Oz v. Minister of Defence* [1992] IsrSC 43(4) 873.
[12] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv* [1988] IsrSC 42(2) 309.
[13] HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(3) 393; IsrSJ 7 109.
[14] HCJ 987/84 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [1994] IsrSC 48(5) 441.
[15] HCJ 1255/94 *Bezeq, the Israel Telecommunication Corporation Ltd v. Minister of Communications* [1995] IsrSC 49(3) 66.
[16] HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [1994] IsrSC 48(5) 441.
[17] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [1988] IsrSC 42(2) 221; IsrSJ 8 186.
[18] HCJ 104/87 *Nevo v. National Labour Court* [1990] IsrSC 44(4) 749; IsrSJ 10 136.
[19] FH 36/84 *Teichner v. Air France Airways* [1987] IsrSC 41(1) 589.
[20] HCJ 637/89 *'Constitution for the State of Israel' v. Minister of Finance* [1992] IsrSC 46(1) 191.
[21] HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [1981] IsrSC 35(4) 1; IsrSJ 8 21.
[22] HCJ 141/82 *Rubinstein v. Knesset Speaker* [1983] IsrSC 37(3) 141; IsrSJ 8 60.
[23] HCJ 142/89 *Laor Movement v. Knesset Speaker* [1990] IsrSC 44(3) 429.
[24] HCJ 200/57 *Bernstein v. Bet-Shemesh Local Council* [1958] IsrSC 12 264.
[25] HCJ 337/81 *Miterani v. Minister of Transport* [1983] IsrSC 37(3) 337.
[26] CA 732/74 *HaAretz Newspaper Publishing Ltd v. Israel Electricity Co. Ltd* [1977] IsrSC 31(2) 281; IsrSJ 5 30
[27] HCJ 301/63 *Streit v. Chief Rabbi* [1964] IsrSC 18(1) 598.
[28] CrimApp 537/95 *Ganimat v. State of Israel* [1995] IsrSC 49(3) 355.
[29] CrimApp 4595/94 (unreported).
[30] CApp 4459/94 *Salomonov v. Sharabani* [1995] IsrSC 49(3) 479.
[31] HCJFH 3229/93 *Wechselbaum v. Minister of Defence* [1995] IsrSC 49(2) 195.
[32] CrimApp 2169/92 *Suissa v. State of Israel* [1992] IsrSC 46(3) 338.
[33] HCJ 389/90 *Golden Pages Ltd v. Broadcasting Authority* [1981] IsrSC 35(1) 421.
[34] HCJ 4422/92 *Efran v. Israel Lands Administration* [1993] IsrSC 47(3) 853.

[35] HCJ 231/63 *Ratef Food Supply Ltd v. Ministry of Trade and Industry* IsrSC 17 2730.
[36] HCJ 5510/92 *Torkeman v. Minister of Defence* IsrSC 48(1) 217.
[37] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1.
[38] HCJ 399/85 *Kahana v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.
[39] HCJ 1452/93 *Igloo Plumbing Works, Building & Development Contracting Co. Ltd v. Minister of Industry and Trade* [1993] IsrSC 47(5) 610.
[40] HCJ 80/70 *Elitzur v. Broadcasting Authority* [1970] IsrSC 24(2) 649.

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[41] *Faulkner v. Jones* 10 F. 3d 226 (1993).
[42] *Faulkner v. Jones* 51 F. 3d 440 (1995).
[43] *Bradwell v. The State* 83 U.S. 130 (1872).
[44] *Brown v. Board of Education* 347 U.S. 483 (1954).
[45] *Frontiero v. Richardson* 411 U.S. 677 (1986).
[46] *Muller v. Oregon* 208 U.S. 412 (1908).
[47] *Hoyt v. Florida* 368 U.S. 57 (1961).
[48] *Rostker v. Goldberg* 453 U.S. 57 (1981).
[49] *Getz v. Con. of Pa., Dept of Public Welfare* 802 F. 2d 772 (1986).
[50] *Shapiro-Gordon v. MCI Telecommunications Corp.* 810 F. Supp. 574 (1993).
[51] *Railway Express Agency v. New York* 336 U.S. 106 (1949).
[52] *Massachusetts Board of Retirement v. Murgia* 427 U.S. 307 (1976).
[53] *Korematsu v. United States* 323 U.S. 214 (1944).
[54] *Craig v. Boren* 429 U.S. 190 (1976).
[55] *Mississippi Univ. v. Hogan* 102 S. Ct. 3331 (1982).

Canadian cases cited:

[56] *Gauthier & an. v. Canadian Armed Forces* — unreported.
[57] *Re Blainey and O.H.A.* (1986) 54 O.R. 2d 513.
[58] *R. v. Oakes* [1986] 1 S.C.R. 108.
[59] *Singh v. M.E.I.* [1985] 1 S.C.R. 177.
[60] *R. v. Lee* [1989] 2 S.C.R. 1384.

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[61] Psalms 45, 14.

For the petitioner — N. Ziv, R. Benziman.

For the respondents — U. Fogelman, senior assistant and director of the High Court of Justice Department at the State Attorney's Office.

JUDGMENT

Justice E. Mazza

1. At the heart of this petition lies the question whether the policy adopted by the IDF, not to recruit women soldiers to the profession of aviation, should not be disqualified because it is tainted by improper discrimination on the basis of the sex of the candidates. When the petition was filed, an order was made, ordering the respondents to show cause why they should not summon the petitioner for aptitude tests for an aviation course, and why they should not allow her to participate in the aviation course if she is found suitable for it.

The facts

2. The petitioner (an Israeli citizen, born on 23 January 1972), was born and grew up in South Africa. Since her youth, in South Africa, she showed great interest in aviation. She trained for this and received a pilot's license, which is recognized as valid in many countries, but she has not yet completed the requirements for receiving a civil aviation licence in Israel. On 13 December 1990 the petitioner was enlisted in the IDF. Her enlistment took place within the framework of the academic reserves, and the beginning of her service was postponed. For four years the petitioner studied aeronautic engineering at the Technion in Haifa. She successfully completed her studies and on 1 January 1995 she reported for active service.

In November 1993 (more than a year before the beginning of her military service) the petitioner informed the commander of the academic reserves that she wanted to volunteer for service in the air crew professions and she asked to be summoned to aptitude tests for an aviation course. The petitioner thought that she had promising basic qualifications for succeeding in the role of pilot; but her request was denied. In her letter to the petitioner (dated 15 December 1993), the commander of the reserves wrote that according to the directives of the high command, women were not to be assigned to 'combat professions'; and since aviation was classified as a combat profession, the army does not

accept women for aviation courses. The petitioner gave notice that she challenged the legality of the refusal and gave her reasons. As a result, she was invited to a meeting with the Commander of the Air Force. However, this meeting too, which took place in December 1993, did not further her cause; on 15 May 1994 the army once again informed her that in view of established policy 'not to assign women to combat professions', there was no basis for assessing her aptitude for an aviation course.

This was the background to the petitioner filing (in August 1994) the petition before us. It should be noted that prior to the date of hearing the objection to the show cause order (which took place on 21 June 1995), the petitioner successfully completed an officers' course and was given the rank of an officer, but her desire to be accepted to an aviation course and to serve as a pilot remained as strong as ever.

The legal framework

3. The Defence Service Law [Consolidated Version], 5746-1986, regulates compulsory service in the IDF. In three main areas relating to the scope of compulsory service, the law makes a different provision for men and women. The most noticeable differences relating to the sex of young persons being enlisted — as can be seen from the law alone, without taking into account additional arrangements prescribed in subordinate legislation and in army regulations — are as follows:

(a) *Duration of regular service:* Men are liable for thirty months of service, whereas women are liable for compulsory service for a period of only twenty-four months (ss. 15 and 16 of the law);

(b) *Reserve duty:* Men who are not in compulsory service are liable for reserve duty until the age of 54, whereas women are only liable until the age of 38 (see section 29 of the law and the definition of 'person of military age' in section 1 of the law);

(c) *Exemption from defence service:* In addition to the grounds for exemption from security service available to men, married woman are entitled to an exemption from compulsory service and pregnant women and mothers are also exempt from reserve duty (s. 39 of the law).

4. Alongside the provisions with regard to compulsory defence service, the law also makes it possible (in section 17) to volunteer for service (with the approval of the Minister of Defence). The possible volunteer tracks are for 'compulsory' service, by those who are not liable for such service; for additional 'compulsory' service ('permanent service'), beyond the period of

compulsory service; and for reserve service, by those who not liable for such service, or beyond the amount for which a person is liable. From the provisions of section 17(e) of the law it appears that volunteering for 'compulsory' service imposes an obligation to serve until the end of the period stipulated in the declaration of voluntary service, and the Minister of Defence has the authority to shorten the period, but someone who volunteers for reserve duty will be discharged even before the end of the period stipulated in the declaration, if he submits a written notice of his desire to be discharged (at the times stipulated in the Defence Service (Volunteering for Defence Service) Regulations, 5734-1974).

5. With regard to the kinds of jobs that can be imposed on soldiers, the law no longer distinguishes between men and women. However, such a distinction — which serves as the guideline for the army authorities — is found in the High Command Regulations which regulate the service of women soldiers. In sections 4 and 5, which are entitled 'Jobs', the regulations state as follows:

> '4. Women soldiers in the IDF shall be employed in all military professions that are defined in the list of military professions as professions to which women may be assigned, with the exception of field, combat professions, taking into account their credentials, capabilities and their special service conditions as women.
>
> 5. A woman soldier may volunteer for jobs that are outside the framework of the definition in section 4 above, after she signs a suitable declaration to volunteer, and her voluntary service for the job is approved by the Chief Officer of the Women's Corps and the Head of the Manpower Division.'

It should be noted that in the past, women's jobs were determined by the Defence Minister, in the Defence Service (Women's Jobs in Compulsory Service) Regulations, 5712-1952. These regulations list the jobs to which the army may assign women. The list, which specifies twenty-five different possible jobs, does not include jobs in the sphere of combat professions, and assigning a woman to a job that is not mentioned in the list was permitted under the regulations only 'if the woman consented thereto in a written declaration'. The regulations still appear in the statute book, but the legal basis for enacting them was removed by the repeal (within the framework of the Defence Service Law (Amendment no. 2), 5747-1987) of section 21(b) of the law, which by virtue of its parallels in previous wordings of the law (s. 6(f) of the Defence Service Law, 5709-1949, and section 16(b) of the Defence

Service Law [Consolidated Version], 5719-1959) gave the Minister of Defence authority to enact regulations in this respect. It appears that the only distinction between men's jobs and women's jobs that the law left intact was in section 24, in which the Minister of Defence was authorized, in consultation with the Minister of the Police or someone authorized by him, to direct in an order that men of military age who have certain qualifications may serve in the Border Patrol of the Israeli Police. But recently the legislator repealed even this distinction (see section 4 of the Defence Service Law (Amendment no. 7 and Temporary Provisions) (Police Service and Recognized Service), 5755-1995).

The petitioner's arguments

6. The petitioner claims that the respondents' position, which is based on a policy of an absolute disqualification of women for the profession of aviation, violates the basic right of equality between the sexes. The admission of men to an aviation course is considered, subject to the requirements of the army, on the basis of the personal details and qualifications of the candidates. A soldier who volunteers to serve on an air crew and who complies with the minimum requirements is referred for aptitude tests. If he is found to be suitable, he is accepted into an aviation course; and if he successfully completes the aviation course he will be assigned (according to his talents and the degree of his success) to one of the air crew professions. But women are denied the opportunity and the right at the outset. They are disqualified because they are women. The question of their talents and suitability does not interest the army. For this reason the army refuses to test the level of the personal qualifications of any woman candidate.

The petitioner claims that this policy is a discriminatory one. Its implementation violates her right (and the right of all women) to equality. This violation is expressed, first and foremost, in denying a woman the equal right and opportunity to serve in the army as a pilot, if she is found to have the requisite qualifications, and thereby to make her contribution to the defence of the State, to achieve her aspirations and to make the most of her potential. But denying the possibility of serving as a pilot has additional ramifications. The disqualification *in limine* of women for positions, even when they are suitable and have the necessary qualifications, harms their social image. It also blocks their prospects of promotion to senior positions in the air force and in the army as a whole. Being in a combat unit is, usually, a precondition for promotion in the army. For this reason, most positions of senior staff officers in the IDF are, *de facto*, closed to women. But this is not all: it is usual in Israel that having a

professional position in the army constitutes a springboard for obtaining employment in the civil sector. This is especially obvious for pilots, since obtaining a job as a pilot for the El-Al company is *de facto* conditional upon serving as a pilot in the air force; by denying the petitioner an equal opportunity to serve as a pilot in the air force, she is also, *de facto*, being denied the equal opportunity to work and make the most of her talents as a civil pilot.

7. The petitioner is aware that the exclusion of women from combat professions may be based on relevant considerations. Thus, for example, she is prepared to assume that in many combat roles in the field corps, there is no practical possibility of integrating women. Therefore she does not argue that the existing restrictions on the recruitment of women for combat units should be cancelled entirely. Nonetheless, the petitioner argues that an all-embracing disqualification of the integration of women in combat positions is an unacceptable position. Experience, both generally and in the army, shows that it is possible to integrate women in some combat positions. Aviation professions are an obvious example of this. This has been done, with great success, in the armies of other countries, and even in the IDF several women pilots have served in the past. Therefore the petitioner argues that the policy of the army with regard to the integration of women in combat positions should be an all-embracing one, but it should consider, on an individual basis, the nature of the position, the combat unit and the corps in the relevant case. This approach is mandated by the principle of equality. As long as there is no objective and relevant reason for distinguishing between men and women for the purpose of carrying out a particular job, both sexes should be treated according to the same criterion. The law does indeed distinguish, in some matters, between men and women soldiers, but the distinctions of the law are not relevant for the purpose of the jobs which it is permitted and possible to assign to women. Moreover, the aforesaid regulations of the High Command, which were the basis for rejecting her application to volunteer for an air crew, allow a woman soldier to volunteer for tasks that are not included among the jobs that the army may impose on her. It follows that neither the law nor army regulations place an obstacle in the way of implementing a policy of selection and assignment that respects the right of women soldiers to equality.

The position of the respondents

8. In the affidavit in reply to the petition, which was submitted by the Air Force Commander, General Herzl Bodinger, the reasons of the respondents that justify the policy of the army with regard to the military service of women

and the question of integrating them in combat positions are set out — at great length. From the affidavit it emerges that the basis for this policy lies in the distinction that the law makes between men and women with regard to the extent of their duty to serve. On the basis of this distinction it is argued that the service conditions for women, as dictated by law, have implications for the nature of their service, both in the regular forces and the reserve forces. Because of the difference in the relevant characteristics of men and women, the principle of equality does not apply. The different treatment of the service of women is based on relevant differences in their personal details, and therefore it is not an improper discrimination but a permitted distinction.

9. A preliminary comment should be made regarding the scope of the dispute.

In his reasons for disqualifying the integration of women in combat professions in the wider sense, the deponent discussed, *inter alia*, the socio-ethical aspect. This is what he said:

> 'The question of integrating women into combat professions is problematic, and ultimately it is also a social, cultural and ethical question that has been pondered in many countries. It also arises from time to time in Israel and the solution to it is not merely in the hands of the defence establishment.
>
> Until now it was accepted, in the security situation prevailing in Israel, that men are the ones who go to the front, in view of the element of danger involved in the combat professions, the risk of combat against the enemy and the danger of falling into captivity. Obviously weight was given to public opinion on this matter, since the decision is one of life and death in view of the dangers prevailing in the daily security reality, which even with the passage of time have not yet disappeared.'

However, at the beginning of the hearing before us, counsel for the State, Mr U. Fogelman, declared that the respondents wished to rely, in their opposition to the petition, only on the considerations because of which the army decided — within the framework of section 5 of the aforesaid High Command regulations — to reject the petitioner's request to volunteer for an air crew. It soon became clear that the respondents' position in this respect relied mainly on what in his affidavit the Air Force Commander referred to as 'planning considerations'. To remove all possible doubt regarding the decision we are asked to make in this petition, Mr Fogelman reiterated and emphasized

the following two points: first, that the respondents limit their opposition to the specific issue raised by the petition — i.e., the integration of women as pilots in the air force — without including this as part of their approach to the general question of principle with regard to the possibility of integrating women in other combat professions; second, that even though with regard to the integration of women pilots the respondents are not unaware of the (in his words) 'paternalistic' aspect — i.e., the social approach that holds that women should not be exposed to the risks of combat against the enemy and falling into captivity — it was not this criterion that led to the decision in the case of the petitioner, and the question of whether this approach is correct, and to what degree, is not what requires clarification and elucidation from us. It follows that the petitioner was rejected on the basis of the 'planning considerations'; we only need to consider whether these are justified, and we only need to give a decision on this point.

10. I will therefore return to the affidavit-in-reply, in order to ascertain and clarify the nature and scope of the planning reasons, on which basis the respondents wish to justify an all-embracing and absolute disqualification of all women soldiers from the aviation courses of the air force. I will first say that that not everything that has been brought to our attention in this sphere can be revealed within the framework of the judgment. The information submitted to us concerns, to no small degree, the structure of the air force's deployment for operations and training, the financial costs of training pilots, the average service periods of pilots in the regular army and in reserve duty, the standard call-up of pilots for active reserve duty and its frequency and other matters. Obviously, since all these constitute fragments of information about the planning of the air force, the less said the better. In submitting them to us — partly in an additional (privileged) affidavit from the Air Force Commander, partly in explanations given orally, *in camera*, by the Head of the Manpower Division at Air Force Headquarters — the respondents wanted to put before us the factual basis needed to appraise the validity of the considerations that led to the rejection of the petitioner's request without considering her suitability and her qualifications. Only those considerations which the respondents stated publicly may be mentioned by us, for the planning considerations relevant to the rejection of the petitioner's request are not part of the planning, but considerations based on the planning.

11. What, then, are the planning considerations? From the affidavit-in-reply it transpires that these concern considerations of overall viability and also organizational limitations involved in the integration of women into the air

combat alignment of the air force. In fact, these reasons form the basis for the policy of disqualifying the integration of women in many other combat professions as well. However, in the opinion of the Air Force Commander, these reasons are particularly valid for justifying the viewpoint that women should not be trained as pilots.

The training of a pilot is a lengthy process, and the financial investment in funding it is huge. The training of a pilot therefore looks towards the future. It is based on the assumption that the candidate will serve for a long period, beginning with compulsory service and thereafter in reserve duty. Because of this, army regulations provide additional age limits and preconditions for accepting a candidate for an aviation course. The length of compulsory service for women, the limited obligations for reserve duty imposed upon them and their entitlement to an exemption from defence service as a result of marriage, pregnancy and childbirth make it impossible to integrate them in an aviation course and for them to serve in an air crew. Even volunteering for additional regular service and reserve duty by those women wishing to serve as pilots provides only a partial solution to the problem, both because of the statutory distinction between a volunteer who is liable to serve and a volunteer who is not liable to serve and also because of the reduced capacity to continue to serve in situations of pregnancy and childbirth.

Indeed, in the course of argument before us, Mr Fogelman conceded that with respect to an undertaking for additional regular service, there is no real basis for distinguishing between women and men, since a woman candidate for an aviation course who commits herself (in the same way as male candidates) to additional regular service, would be obliged to complete her term of service in full, even if she marries, becomes pregnant or gives birth during the period of service. This is not the case with respect to the obligation of reserve duty for a woman pilot, who has completed her term of additional regular service to which she committed herself. She is bound by this obligation only until she becomes pregnant, gives birth or reaches the age of 38, whichever is the earliest. Even if she volunteers for reserve duty for which she is not liable (such as because of pregnancy or childbirth), she can at any time retract her volunteering for reserve duty, and the army will be bound to release her. Counsel for the respondents argues that the selection of candidates for assignment to any military function must be based solely on army needs, and the assignment of women to positions as pilots is inconsistent with those needs. Even if a woman pilot is able and willing to carry out all her obligations, her temporary absence from service, due to pregnancy for

example, could disrupt the viability of her unit. As a result, planning and operational capacity will be compromised. And if the planning considerations are insufficient to tip the scales, they are supplemented by budgetary and logistic considerations. These involve the necessity of adapting existing military facilities for the inclusion of women.

It should be noted that the Air Force Commander (as can be seen from his affidavit) does not dispute that a woman may have all the qualifications required for success as a pilot. In his affidavit, he also addresses the fact that in some other armies several combat professions (including aviation) have been opened up to women. However, in his opinion, one cannot use the experience of other armies to draw conclusions for the IDF, both because of the unique emergency conditions under which the IDF is required to act, and also because of the difference in the service conditions of women between the IDF and other armies. In conclusion, with regard to the rejection of the petitioner's request, the Air Force Commander says:

> 'The petitioner's request to volunteer for an aviation course was rejected despite her excellent and admirable qualifications, not because she is a woman, but mainly because her anticipated length of service (placing an emphasis on reserve duty) is inconsistent with the army's preconditions for the training of a member of an air crew.'

Relevant difference and improper discrimination

12. The petitioner's position relies on the principle of equality. Her argument is that her rejection as a candidate for an aviation course, merely because she is a woman, discriminates against her in relation to men soldiers. This discrimination violates her right to equality of the sexes, and the decision must therefore be disqualified. In replying to this argument, counsel for the respondents hoped to persuade us that in our case, the question of violation of the principle of equality does not arise at all. In his opinion, this is a necessary implication of the provisions of the law which, in so far as the extent of the obligation to serve and the conditions of service are concerned, clearly distinguish between men and women. This means that the legislator recognized that the difference between the sexes is relevant with respect to their military service. It follows that this difference is relevant also in determining the nature of the military jobs and professions that the army assigns to men and women soldiers.

13. I cannot accept this position. It is true that a relevant difference may justify a distinction. This indeed is the root of the difference between improper discrimination and a proper distinction. In the words of Justice Agranat in FH 10/69 *Boronovski v. Chief Rabbis* [1], at p. 35:

> 'The principle of equality, which is merely the opposite of discrimination and which, for reasons of justice and fairness, the law of every democratic country aspires to achieve, means that people must be treated equally for a particular purpose, when no real differences that are relevant to this purpose exist between them. If they are not treated equally, we have a case of discrimination. However, if the difference or differences between different people are relevant for the purpose under discussion, it is a permitted distinction to treat them differently for that purpose, provided that those differences justify this.'

However, as a condition for achieving real equality, we must determine that the relevance of the difference, and its degree, should be examined, in every case, in view of the specific purpose that the distinction is intended to achieve. In other words, the relationship required between the special characteristics possessed by one person and not by another, and the purpose for which it is permitted to prefer one person to another, must be direct and concrete (*vid. et cf.* the remarks of Justice Netanyahu in HCJ 720/82 *Elitzur Religious Sports Association, Nahariya Branch v. Nahariya Municipality* [2], at p. 21). The mere existence of a difference between two people does not justify a distinction. Compare HCJ 721/94 *El-Al Israel Airways Ltd v. Danielowitz* [3], the remarks of Vice-President Barak, at pp. 760-764 {488-494}, and the remarks of Justice Dorner, at pp. 782-783 {519-520}. On the contrary; wherever possible, even different people should be treated equally, while taking into account their being different.

14. In establishing the duty of service and the conditions of service, the law distinguished between men and women. Does this not imply that there is a difference between the two sexes that is relevant for the absolute disqualification of all women soldiers from fulfilling various jobs? The answer must be no. The statutory distinction between men and women with regard to the duty of service and conditions of service was intended as a concession to women, presumably in view of the biological differences between the sexes. This concession regarding the service conditions of women constitutes a factor to be considered by the army when planning its manpower arrangement; but it cannot be a reason for permitting discriminatory treatment of women soldiers.

Note that the law says nothing about assigning certain jobs to women, or their disqualification for other jobs; even the provision that used to be in the law, which authorized the Minister of Defence to enact regulations about what jobs the army could assign to women soldiers, was repealed and no longer exists (see paragraph 5 above). In these circumstances, and in the absence of any contrary indication in the language or purpose of the law, the presumption is that the law should be construed in a way that is consistent with respect for the right to equality between the sexes and that it is intended to achieve it (see A. Barak, *Judicial Interpretation*, vol. 2, *Statutory Interpretation*, Nevo, 1993, at pp. 435-436). This approach is even more compelling when we acknowledge that, since the enactment of the Basic Law: Human Dignity and Liberty, the normative status of the principle of equality — which had already been described as 'the heart and soul of our constitutional regime…' (Justice Landau in HCJ 98/69 *Bergman v. Finance Minister* [4], at p. 698 {17}) — has become elevated and has become 'a principle with constitutional, super-legislative status' (in the words of Justice Or in HCJ 5394/92 *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [5], at p. 363. See also: Barak, *supra*, at pp. 565-566; HCJ 453/94 *Israel Women's Network v. Government of Israel* [6], at pp. 525-526 {451-454}).

15. In the affidavit-in-reply it was hinted that the fact that the petitioner does not argue that women should be submitted to the same duties of military service that the existing law imposes only on men, is tantamount to seeking a privilege for women. Counsel for the respondents did well not to repeat this argument during the hearing before us. There are some who see in the law a defect of discrimination against men (see Dr C. Shalev, 'On Equality, Difference and Sex Discrimination', *The Landau Book*, Boursi, vol. 2, ed. A. Barak and A. Mazoz, 1995, 893, at pp. 900-902, and what is stated in footnote 42); this is certainly the opposite of the approach that holds that the distinction in the law between men and women is justified since it is based upon a relevant difference between the sexes (see the remarks of Justice Sussman in CrimA 5/51 *Steinberg v. Attorney-General* [7], at pp. 1067-1068). However, even if we do not stick to the traditional view and assume that the law is indeed defective to some extent in discriminating against men, I do not see how this argument can be used specifically against the petitioner who is seeking for herself the right to take upon herself a burden that according to the approach of those making this argument was designated only for men.

16. Therefore the construction of the law in accordance with its language and purpose leads to the conclusion that the law does not permit the total

disqualification of women, because of their sex, from holding any particular job in the army. To remove doubt, I wish to add that even under the Defence Service (Women's Jobs in Compulsory Service) Regulations — which after the repeal of the section in the law authorizing the regulations are no longer valid — it was not possible to reach a different conclusion. Even in the regulations there was a possibility for women soldiers to volunteer for jobs not included in the list of jobs that the army was allowed to assign to women. The same is also true under the aforesaid regulation of the Supreme Command, according to which the army continues to direct itself in assigning the jobs of women soldiers; even this, like the regulations when they were valid, leaves an opening for women to volunteer for jobs outside the scope of the jobs that the army normally assigns to women. Note that this does not mean that the difference between the sexes is never relevant with regard to the suitability of a woman soldier for a specific job. Even I think that it is indeed possible that a woman soldier will be disqualified, because of her sex, from holding various jobs, but a disqualification for this reason is permitted only where the sex of the candidate creates a difference that is relevant to her holding the specific job.

Women as Pilots

17. No-one disputes that the capabilities required for operating military aircraft may be found equally among men and women. Much material has been submitted to us with regard to the successful integration of women pilots in the air forces of other countries. Admittedly, the practical experience in the air units of the United States Air Force (from 1942 onwards) was based mainly on the use of women pilots in reconnaissance, training and indirect assistance only (see the chapter 'Women in Aviation' in J. Ebbert & M. Hall, *Crossed Currents: Navy Women from WWI to Tailhook,* Brassey's, 1993, at pp. 241-327). However, there is evidence that in the Red Army, during the Second World War, woman pilots were used with great success even in combat operations against enemy planes (see J. Holm, *Women in the Military — An Unfinished Revolution*, Presidio, 1982, at p. 315). In fact, no-one any longer disputes that women are capable of operating successfully in air crews to the same degree as men. It should be noted that the question of integrating women pilots in the United States Army in combat operations was recently examined by a presidential commission that was appointed to examine all the questions arising from the participation of women in combat units, including issues relating to the pregnancy and childbirth of women in active military service. The commission, whose investigations also included the lesson learned from

the participation of women in the Gulf War, recommended (by a majority of eight to seven) not to allow women to participate in combat aviation (see the Commission's report: The Presidential Commission on the Assignment of Women in the Armed Forces, *Report to the President: Women in Combat*, Brassey's, 1992). But it appears that on this issue it was precisely the minority opinion of seven of the commission's members (see, *ibid.,* p. 80-83) that prevailed: the Secretary of Defence at that time, Les Aspin, decided to adopt the minority opinion, and in April 1993 he ordered the restriction against the participation of women in combat operations of the airborne units of all forces to be lifted. The active integration of women as pilots is today common in the air forces of other countries. It seems that the prominent examples in this field from our viewpoint are Canada and Australia, where openness on this subject increased and received an impetus as a result of the constitutional development of human rights and the prevention of discrimination against women (in this respect, see the research of A. Ayalon, *Women in Combat Positions — A Theoretical Comparative Survey*, The Israel Institute for Democracy, 1994, at pp. 21-28).

18. But why should we search so far away? The material submitted to us shows that at least in the first decade of the air force's existence several women pilots were integrated into its ranks. Before and during the Kadesh operation, women received assignments as pilots of transport aircraft. But in subsequent years the army stopped accepting woman for aviation courses. The change in policy is attributed to budgetary considerations: the training of women as fighter pilots in order to be assigned merely as transport pilots, for a relatively short period, was considered to be cost-ineffective. In one exceptional case, during the seventies, several women were accepted as cadets for an aviation course. But since then the doors of the course were closed once again to women soldiers (on this issue, see N. L. Goldman & K. L. Wiegand, 'The Israeli Woman in Combat', *The Military, Militarism and the Polity,* The Free Press, N.Y., 1984, at pp. 220-221). It should be noted that not all professionals accepted this approach. In support of her petition, the petitioner submitted, *inter alia*, also an affidavit of Col. (Res.) Ze'ev Raz who served in the air force as a combat pilot, and during the years 1986-1989 served as Commander of the Aviation School. The deponent testified that, subject to the difficulty that he sees in the participation of women in combat operations (which he attributes to the difficulty that exists in the attitude of the public to the possibility of women falling into captivity), he supports the integration of women in an aviation course; moreover, even when he was in active service he tried to change the army's policy in this matter. In his opinion, women can be

integrated in flying Boeing transport aircraft and in service flights in Skyhawk aircraft. Women can serve as pilots both in compulsory service and also (on a voluntary basis) in reserve duty, as is the case with men pilots. In his estimation, the integration of women in a flight course and in the units will not only not impair the ability of the units to carry out the missions which they are assigned, but will even make a positive contribution in this direction. Moreover, he does not expect the integration of women to create difficulties in logistic and organizational deployment that are insurmountable. Support for the integration of women in aviation courses is expressed also in the affidavit of Major-General (Res.) Amira Dotan, who served as the Chief Officer of the Women's Forces during the years 1982-1987. The deponent testified to the successful integration of women soldiers in units that operated beyond the borders of the State (such as in Lebanon in Operation Peace for Galilee) and to a positive development taking place in the IDF in recent years, whereby jobs and service tracks that in the past were considered the sole prerogative of men soldiers have been opened up to women. It is not redundant to point out that confirmation of the existence of this new approach in army deployment can be found also in the affidavit of the Air Force Commander, but in his opinion what is desirable in other army professions cannot apply to the profession of aviation.

Counter-arguments: planning, logistics and budget

19. The respondents, as stated, do not dispute that from the viewpoint of the qualifications that are prerequisites for suitability for an aviation course, there is no difference between women and men. Both of these alike may be suitable or unsuitable for the profession of aviation; the sex of the candidates and the talents required for their suitability are totally unconnected. Nonetheless the respondents are adamant in their refusal to train women for aviation and to integrate them as pilots in air force units. Their argument is that there is nonetheless a difference between the two sexes which is relevant in making their decision. This difference is what leads to the distinction underlying the army's policy that only men are accepted for aviation courses and jobs as pilots.

The respondent's position remains unchanged. But we should mention once again that there has been a change in their reasoning. It will be remembered that the petitioner's request was rejected on the basis of the regulation of the High Command that women are not to be assigned to combat professions; and since aviation is classified as a combat profession, the army does not accept women for aviation courses. In the Air Force Commander's affidavit-in-reply,

the socio-ethical aspects of the participation of women in combat missions was also addressed (and cited above in full). But in oral argument counsel for the respondents limited the reasons for his opposition to practical considerations relating to the deployment of the air force for carrying out its missions. In defining the obstacle to accepting women as pilots, the emphasis has now been placed on planning considerations, but 'logistic' and 'budgetary' considerations were also mentioned. I do not think that I need to dwell on these additional reasons, which have in common the unsurprising revelation that the absorption of women will necessitate the investment of additional financial resources. This is not because no approximate valuation of the size of the additional investment required was appended to this argument; nor even because budgetary considerations, in themselves, are unimportant; but because the relative weight of such considerations, in making an executive decision, is measured and determined when balanced against other considerations (see HCJ 3627/92 *Israel Fruit Growers Organization Ltd v. Government of Israel* [8], at pp. 391-392, and the references cited there). In any event, when we are concerned with a claim to exercise a basic right — and such is the case before us — the relative weight of the budgetary considerations cannot be great, since:

> 'The rhetoric of human rights must be founded on a reality that sets these rights on the top level of the scale of national priorities. The protection of human rights costs money, and a society that respects human rights must be prepared to bear the financial burden' (Barak, in his book *supra*, vol. 3, *Constitutional Interpretation*, Nevo, 1994, at p. 528).

See also: P. W. Hogg, *Constitutional Law of Canada*, Toronto, 3rd ed., 1992, at p. 873. Indeed, even counsel for the respondents conceded that not much weight should be attached to these considerations, and he preferred to concentrate his arguments almost exclusively on the reasons that the Air Force Commander stated in his affidavit as the main reasons. These, as we have already said, are the planning considerations.

20. The planning considerations which we have already discussed (in paragraph 11, *supra*) were intended to persuade us that the integration of women in the active planning framework of air crews is impracticable. The huge investment in training pilots is based on a long-term projection. The candidates for aviation courses commit themselves to serving in the regular army for a number of years (which is determined and stipulated in advance) from the date that they qualify as pilots. They also commit themselves

(voluntarily) to annual amounts of reserve duty that in most cases exceed the statutory requirement and comply with requirements determined by the air force according to its needs and the types of activity required. The statutory arrangements with respect to the extent of women's compulsory service — and mainly their limited obligation for reserve duty, which is also subject to clear grounds for an absolute exemption as a result of pregnancy or childbirth — make it impossible to integrate them within this planning framework. Admittedly a woman candidate for an aviation course can be required to do additional 'compulsory' service, as is usual with regard to men candidates, and she can also be required to undertake voluntarily to do reserve duty for which she is not liable. But even these cannot ensure the regularity and continuity of her service. Even a temporary absence of a woman pilot during her compulsory service, as a result of pregnancy or childbirth, can disrupt the planned daily activity of the whole airborne unit. And perhaps the main difficulty lies in the inability to rely on her undertaking to continue the reserve duty for which she is not liable, since, if she becomes pregnant or gives birth, and gives notice that she retracts her commitment to volunteer, there will be no legal possibility of compelling her to serve.

21. I doubt whether these fears have a solid basis. The premise is that women who offer themselves as candidates for an aviation course will, like men candidates, be required to make commitments both for 'compulsory' service and for reserve duty. As a rule, it is correct to assume that someone who commits himself to such an undertaking will want and be able to perform it. Even if the assumption is that the average total contribution of a woman pilot — in terms of the length and continuity of service — will be less than that of men pilots, this is a difference resulting from her being a woman. This difference, which should not be held against her, can be taken into account within the framework of planning. The army can learn, in this respect, from its rich experience with regard to its personnel in permanent service. There are doubtless cases in which soldiers ask, for a variety of reasons, to be released from their commitments for continued service. With respect to the scope of this phenomenon, among men and women, figures must be available, and it stands to reason that in planning its activity the army also takes these figures into account. The air force can also rely, at least to some extent, on its experience with reserve pilots. It may be assumed that the majority of pilots indeed carry out the extra amounts of service, in excess of the statutory requirement, and continue to do so throughout the whole period of their undertaking with hardly any interruption. But even in this group there are certainly cases of prolonged absence from reserve duty, for personal reasons, long periods spent overseas

and similar circumstances; even the figures relating to this phenomenon, the extent of which is certainly well-known, can be assumed to be taken into account by the air force in planning its missions. Is there any reason to suppose that, with respect to the proper discharge of compulsory service and the voluntary reserve duty, the distribution among women pilots will be significantly different from that among women soldiers who serve in other professions and among men pilots in the reserves? In so far as we can learn from the experience of air forces in countries like the United States and Canada, the effect of specific factors, such as pregnancy and childbirth, as a disturbance to the regularity of service of women pilots is not significant. Can we not learn anything from this? The respondents' reply to this is that the successful absorption of women pilots in the air forces of other countries is no evidence of the anticipated success of a similar process in Israel. The conditions of service are different, the conditions on the ground are different and the conditions of permanent readiness are also different. All of these are likely to have an effect.

The main and striking weakness in this argument is that it is entirely based on theories and hypothetical assessments and not on lessons learned from accumulated practical experience. It is true that most women pilots in the air forces of other countries regard military aviation as their profession and choose a military 'career'. But who can say that the integration of women in the profession of aviation in the IDF will not lead also to a similar tendency in Israel, among most of the women seeking this special job? It should be noted that in the air forces of other countries the process of integrating women was carried out gradually. In the judgment of the Canadian Court of Human Rights in *Gauthier & an v. Canadian Armed Forces* [56] — a transcript of which was submitted to us by the petitioner — there was a survey of the absorption processes of women in combat positions in the various parts of the army (and it should be noted that one of the several claims considered in that judgment was of a qualified civil pilot whose candidacy for the position of pilot in the air force was rejected because of her sex). From the survey it emerges that the question of the suitability of women for integration into combat roles was examined very carefully. After the Royal Commission, which examined the issues relating to this, submitted its recommendations, five whole years were devoted to conducting practical tests. With the help of these tests — which were named, for short, 'SWINTER' (Service Women in Non Traditional Environments and Roles) — the implications of the integration of women in roles that previously were not open to them were examined. In order not to prejudice defence preparedness even to a small degree, the army allowed, at

the beginning of the process, the absorption of women in a limited and controlled fashion. The tests referred to groups of women who were absorbed, in the various professions, in this format. The tests conducted in the air force proved that women who were admitted into the roles of pilots integrated successfully in the units, performed their duties well and were respected both by their commanders and by the members of their crews. These conclusions led to the cancellation of the restrictions on the enlistment of women to combat aviation roles. When the women were admitted, rules were established for regulating various issues, including absence from flying as a result of pregnancy and childbirth.

Such an experiment, or something similar, has not yet been conducted in the IDF; in my opinion, it should be conducted. It is indeed possible — as the respondents claim — that the encouraging experience of other armies does not constitute evidence as to the success of a similar plan in our air force. But as long as the air force does not allow the experimental integration of women into a track of the aviation profession, and as long as it does not carry out a systematic and intelligent assessment of their functioning in the course and in the units, we will never be able to know whether, in the special conditions that prevail in Israel, women may be integrated in the air crews. Indeed, preserving the readiness and deployment of the air force is an important and essential asset. But what is required for readiness and deployment is likely to be given the full attention of the professional personnel at air force headquarters, even if air crews include a few women who are absorbed in an experimental and controlled manner, and an assessment is made that will lead in the end to lessons being learned and conclusions being drawn for the future. Such experience can be based on a small number of women candidates who would be taken in gradually over a sufficiently long period that will allow conclusions to be drawn with regard to the degree of success in standing units and reserve units. It can be assumed that demand — at least in the beginning —will not be great. But within the framework of the experimental integration of women into the aviation course I would not consider it a defect if quotas were set for women candidates. Setting quotas is by definition unequal. This is not the case when they are set within the framework of an experiment whose purpose it to promote equality, without prejudicing thereby an essential security interest.

Intervention in the assignment policy of the army

22. This court does not tend to intervene in professional-planning decisions of the army authorities. In the words of Vice-President Elon in HCJ 734/83 *Shine v. Minister of Defence* [9], at p. 399:

> 'It is a rule of case-law that this court does not put its discretion in place of the discretion of the competent authority, and this rule applies especially when it concerns this court's review of professional-planning decisions of the army authorities.'

See also: HCJ 329/87 *Sorko-Ram v. Minister of Defence* [10], at p. 879, and also the remarks of Justice Goldberg in HCJ 3246/92 *Har-Oz v. Minister of Defence* [11], at p. 307, regarding '… the power of the IDF to exercise its authority in assigning each soldier in accordance with its own considerations and the needs of the army', since 'the assignment naturally relates to the structure of the army and its military deployment'. But there has never been any doubt, and counsel for the respondents conceded this unhesitatingly, that army decisions and army regulations, which reflect the policy of the IDF, are subject to the judicial review of this court. Personally, I see no basis for doubting that a policy involving a violation of a basic right gives rise to proper grounds for the intervention of the court. A violation of equality, because of discrimination on the basis of sex, is a typical example of a case that justifies and requires intervention. Such is the case before us. The IDF cannot succeed with an argument that women are disqualified for a specific job because they are women. The argument that the training of women for jobs as pilots is not cost-effective, notwithstanding their having suitable qualifications for this, is an outrageous argument. Declarations supporting equality of the sexes are insufficient, for the real test of equality lies in its realization, *de facto*, as an accepted social norm (cf. *Israel Women's Network v. Government of Israel* [6]). This normative obligation also applies to the IDF. It is well-known that the policies of the army have a very major effect on our life styles. In strengthening the recognition of the importance of basic rights, the IDF cannot be left out of the picture. It too must make its contribution.

23. I propose to my esteemed colleagues that an absolute order is made in this petition. This order will require the respondents to summon the petitioner for aviation aptitude examinations. If she is found to be suitable, and meets all the other usual preconditions for men candidates, she will be allowed to participate in an aviation course. In this way the air force will begin an experimental procedure, and it can be presumed to determine the remaining aspects and details professionally and fairly, after taking into account the requirements of deployment and vigilance on the one hand, and the criteria

required for deriving fair conclusions from the experiment on the other. As a result of the decision, the respondents will be liable to pay the petitioner the costs of the petition in a sum of NIS 10,000.

Justice Y. Kedmi

1. I regret that I am unable to add my voice to the opinion of my colleague, Justice Mazza, as it stands; the following, in brief, are my main reasons:

(a) In my opinion, we should attribute to policy decisions made by those responsible for national security, in so far as these concern security requirements and the methods of achieving the proper level of security, a high level of reasonableness, such that those challenging this bear a heavy burden of persuasion, equivalent to the burden borne by someone who wishes to rebut a presumption of law.

(b) I would hesitate before intervening in such decisions, as long as I am not convinced that they are tainted by extreme unreasonableness, arbitrariness, a lack of good faith and unclean hands. As stated, my premise is that this is not the case, and that the persons making decisions of this kind can be presumed to have carried out all the necessary investigations and considered all the relevant factors, and to have acted conscientiously throughout, consonant with their positions and the powers granted to them.

(c) In our case, the representative of the air force concentrated his argument on the needs of national security, putting the emphasis on the extended and intensive service expected of a combat pilot in the air force, against the background of the cost of his basic training, and in view of the continued effort required for ensuring the level of his operative ability. The working assumption of the security authorities charged with this function is that in the prevailing circumstances, it is almost certain that a woman pilot will be unable to comply in full with these expectations as to the length of service, and will have great difficulty in bearing the burden of maintaining operative ability over the years; between the lines I believe that I can hear the argument that it will also not be right to put her in a position of having to choose between continuing her service and ensuring operative capacity and the demands that she will surely make of herself when the time comes with respect to starting and caring for a family. It seems to me that this outlook, *inter alia*, underlies the distinction between men and women with respect to reserve duty; and I do not think that it is outdated.

In any case, I do not think that I have the tools — and more importantly, the expertise — required to examine the 'reasonableness' of the said working assumption; moreover, I am not prepared to lighten the heavy burden of responsibility borne by air force headquarters in its commitment to national security and to impose upon it a pattern of behaviour which conflicts with its own outlook.

(d) I fear that the attempt to learn from the experience of other countries in this sphere will not succeed, for a simple reason: our security situation is entirely different from the security situation prevailing in those countries; the situation in which we find ourselves requires readiness for risks that are entirely different from the risks expected there, and a 'mistake' made by us in this respect could well have far-reaching ramifications.

(e) I do not believe, as does my esteemed colleague, Justice Mazza, that the decision not to train women combat pilots, at this stage, contains a hint of illegitimate discrimination. What emerges from my remarks above is that there is no 'discrimination' here, but rather a 'distinction' based on the continuing requirements of national security.

One cannot speak of improper 'discrimination' when the 'choice' between equals is based on essential needs of national security. A difference deriving from these needs — when speaking, of course, about genuine needs — not only does not indicate any 'discrimination', but also contains an expression of the 'equality' of the requirement made of each of us to contribute what that person is able to contribute to the security of the nation; and the 'ability' of the man in this context — according to the working assumption of the air force — is different from the 'ability' of the woman.

2. Nonetheless, I agree with the position of my esteemed colleague, Justice Mazza, that the fears on which the outlook of the security authorities in this matter is based ought to be put to a real test; and that it is proper to take the first step in this direction soon, in so far as security considerations allow. However, I would leave it to the Air Force Command to decide when and how security requirements make it possible to conduct this test; I would not 'dictate' to them the date when it should be held, as long as they are not convinced that it would not harm the current needs of national security.

Justice T. Strasberg-Cohen

In the disagreement between my colleagues, I agree with the opinion of my colleague Justice Mazza, and wish to shed some more light on the subject from my own perspective.

1. The Defence Service Law [Consolidated Version] of 1986 (hereafter — the law) (which replaced the Defence Service Law [Consolidated Version] of 1959) created a distinction between men and women that makes the service conditions of women more lenient. The distinction finds expression in the length of compulsory service and reserve duty for women which is shorter than that for men, in exempting married women from compulsory service and in exempting pregnant women and mothers from reserve duty, all of which as set out by my colleague, Justice Mazza (hereafter — service conditions).

2. The law does not contain any provision directly violating the equality of men and women soldiers with respect to the nature of the jobs to which they can be assigned, but as a result of the distinction that the law created in the service conditions, there arose — as a matter of policy — an inequality which, for our purposes, is the refusal to accept women for an aviation course. In my opinion, the distinction created by the law should not be perpetuated by discrimination built on its foundations.

The sources for the distinction that the law created in service conditions derive, apparently, from an outlook on the biological difference between women and men and the legislator's opinion of the different roles of women and men in the family, society and the army. There are some who see the provisions of the law as a paternalistic attitude towards women, who are perceived as weaker, more fragile and in need of protection, and whose purpose is to create and care for a family. Others believe that the law benefited women by being lenient with regard to their service conditions. Whatever the historical, psychological and sociological reasons for the outlook underlying the distinction created by the law, the distinction created by the law should be accepted as a fact that we are not required to review, since the law itself is not challenged on the grounds of illegality. Its provisions, which create the said distinction, are a given factual premise, as a result of which a policy not to accept women for aviation was formulated. The petitioner has sharply contested this policy by alleging discrimination and violation of the principle of equality. The respondents, in reply, concentrate on the argument that the law created a distinction between men and women with regard to service conditions, that this distinction creates a difference between them, that the difference is relevant with regard to the assignment of women to aviation and

that when the difference is relevant, we are not faced with improper discrimination between equals but with a valid distinction between those who are different.

We must examine this policy with the tools that are available to us for examining the policy of any government authority. As I will clarify below, this policy does not pass the test and it should not be given legal force.

3. The respondents' position is unacceptable to my colleague, Justice Mazza, for the reasons that the difference in this case is irrelevant and therefore the discrimination is improper.

I too am of the opinion that the aviation course ought to be opened up to women, but I do not think — as does my colleague Justice Mazza — that the difference between women and men regarding the service conditions is irrelevant. In my opinion, *the difference between the service conditions* of men and the service conditions of women, as stipulated in the law, creates a real and difficult problem for the training and service of women as pilots. The continuity of a woman pilot's military service may be affected and her military service is liable to end if she marries, becomes pregnant or becomes a mother, and she can be released from reserve duty at the age of 38 (a man – at the age of 54), by giving unilateral notice, even if she volunteers for such service above that age. I think therefore that this difference, created by the law, is indeed relevant for the acceptance of women for aviation and the reasons for not admitting them are objective and not arbitrary. Therefore — *prima facie* — the distinction does not create improper discrimination; but in my view this is only the case *prima facie*, because in my view *it is not sufficient for a difference to be relevant in order to rebut a claim of discrimination, since a relevant difference that can be amended or neutralized in order to achieve equality should be amended or neutralized,* although not at any price.

4. Differences for the purpose of discrimination have been divided into two categories: a relevant difference that does not create discrimination and an irrelevant difference that does (see HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [12], at p. 332; *El-Al Israel Airlines Ltd v. Danielowitz* [3]). As with any classification into groups, there are no two groups that fit the whole spectrum of cases between the two extremes. There are cases that clearly fall into one of the groups and it can be clearly established whether or not there is discrimination. However, there are cases where ascribing them to one of the two groups is not self-evident and is insufficient. Such cases require a sub-classification. It seems to me that the category of cases where the difference is relevant should be divided into two subgroups: first, a group where the

relevant difference cannot be, or should not be, neutralized; second, a group in which the relevant difference can and should be neutralized in order to achieve equality.

In this classification we are not dealing with affirmative action in its classic sense, where a particular field is opened up to a group for which it was previously closed, even if the members of that group are less suited than others to function in that field. This method is used to correct an historic aberration, a social stigma, prejudice and the like. Such affirmative action is often carried out through legislation and through case-law (see, for example: the Employment of War Invalids Regulations, 5711-1951; the Discharged Soldiers (Return to Work) Law, 5709-1949; section 18A of the Government Corporations Law, 5735-1975 as applied in *Israel Women's Network v. Government of Israel* [6]. With regard to affirmative action, see also: F. Raday, 'On Equality', *The Status of Women in Society and Law*, Shoken, ed. F. Raday, C. Shalev, M. Liben-Koby, 1995, at pp. 19, 36-39).

Affirmative action requires the avoidance of a distinction between persons who are not equal in their qualifications or in their suitability and treating them equally, in order to rectify an historic aberration. My position — with respect to the facts before us — is different in that it makes a demand to neutralize the difference between persons with equal qualifications by allocating resources that will create conditions that establish an equal starting point for two persons who are equally suitable for the same job, but factors that are irrelevant to the job block the path of one of them. Our case falls into the second category, in which the relevant difference can be neutralized and it ought to be remedied.

How is this to be done?

6. If, for example, it is found that dark-skinned or blue-eyed persons are not accepted for a certain job, when the colour of the skin or the colour of the eyes has no connection with the job, it will be absolutely clear that this is an irrelevant difference that creates improper discrimination. This is the case for every arbitrary distinction based upon differences of race, religion, sex and the like, where the distinction is arbitrary and irrelevant. If, however, a certain job requires tall people or people with academic education or people in good health, it will not be improper discrimination if short people, uneducated people and people in poor health are not accepted for those tasks. If the path to a specific job was closed to women, and it is opened up to them, either by case-law or statute, even if their experience and qualifications are less than

those of the men competing for the same job, this would constitute affirmative action.

What is the law when the qualifications are equal, but there is a difference and the difference is albeit relevant, but it can be and should be neutralized in order to achieve equality? If, for example, a disabled person in a wheelchair wants to be accepted for work in a public institution, and his qualifications fulfil the requirements of the job, but the access to the office is by way of stairs; the restriction in the physical conditions allowing access to the place of work creates a relevant difference, but it can be neutralized at a reasonable price, and it should be remedied in order to achieve equality of opportunities. Therefore we would require an investment of resources in order to neutralize the difference and remedy it by means of an elevator or in some other way that will allow the disabled person to reach that office.

It seems to me, therefore, that a difference that causes relevant and genuine difficulties in applying the value of equality, such as physical, economic, logistic and similar difficulties, is a relevant difference. Nonetheless, in those cases where it can be neutralized at a reasonable price, it should be remedied and neutralized in order to achieve equality.

7. Establishing a requirement for neutralizing a difference in order to achieve equality is not foreign to Israeli law. More than once the legislator has shown that he is aware of the need to prevent discrimination as a result of a difference between persons who are suitable for carrying out a job, where external factors create a distinction between them and lead to the preference of one group over another or one person over another because of differences which have economic, budgetary and organizational implications, particularly in the workplace. In such cases, the legislator has on several occasions seen fit to impose duties, mainly on employers, which were designed to neutralize or remedy a difference, in order to achieve equality of opportunity. An example of this can be found in the Women's Employment Law, 5714-1954, and the various regulations enacted thereunder; the Equal Employment Opportunities Law, 5748-1988; in these laws, factors and characteristics that created differences between people were taken into account, and the laws were designed to achieve equality notwithstanding the differences. The legislator imposed economic burdens upon various public sectors in order to create equality, including equality of opportunity, not because there was previously no relevant difference, but because even though there was a difference, the legislator saw fit to remedy it by spreading the burden amongst different sectors of the economy. With regard to equality of the sexes, F. Raday says in

her article 'Labour Law and Labour Relations — Trends and Changes in 1988', *Labour Law Annual* Vol. 1, 1990, 161, 172, on the subject of equal opportunities for women:

> 'The biological difference between the sexes with respect to pregnancy, childbirth or nursing *is a difference that may be a relevant difference in the workplace*. The possibility of certain absences is required in order to allow the working woman to function not only as an employee but also as a mother of a newborn. "Equality" that does not take into account the need for the integration of these roles is not real equality and is mere lip service' (emphasis added).

See also F. Raday, 'Women in the Work Force', *The Status of Women in Society and Law, supra*, at p. 64.

8. The respondents do not dispute the ability of women to fulfil the role of a pilot. From their affidavits and pleadings it emerges that the considerations guiding the policy-makers in not recruiting women for aviation do not derive from a belief that women are inferior or from archaic concepts that a woman's place is in the home and that she is not suited for 'men's' professions such as aviation. From what they say it appears that their considerations are sincere and relevant, and that they are motivated by the army's interests and needs. I accept the respondents' contention that the difference created by the law in service conditions and the resulting restrictions make it difficult for the air force to recruit women as pilots. The respondents claim, as can be seen in the affidavit of the Air Force Commander, General Bodinger, that the difference between men and woman in the law is based on strong statutory language, an unwavering statutory history and a particular statutory purpose, which is the realization of the needs of the army that require different rules to be created for the service of men and women. According to him, the refusal to integrate women into aviation courses derives from planning, logistic, strategic and economic considerations, according to which the needs of the army would be prejudiced if it is compelled to assign women for aviation.

The IDF places the 'blame' for closing the aviation course to women on the legislator, who created the difference in service conditions, and so it feels itself justified in creating discrimination. I do not think that this position should be legitimized. The IDF, as one of the organs of State, is not entitled to shirk its responsibility and the obligation to close the gap between the factors determined by the law and what is needed to achieve equality. This requires a sacrifice. The IDF and the various organs of State must pay this price,

provided that it is not too high and is not unreasonable, and this is really not so in the present case.

9. General Bodinger recognizes that even though the issue of integrating women in combat professions is problematic, it is ultimately also a socio-cultural and ethical question. *Indeed, we are dealing with an issue that is first and foremost socio-cultural and ethical.* It is difficult to exaggerate the importance and stature of the principle of equality in any free, democratic and enlightened society. The supreme status of the principle of equality as a supreme value in Israeli society finds expression and a place of honour in case-law and law books. A society that respects its basic values and the basic rights of its members must be prepared to pay a reasonable price so that that the value of equality does not remain an empty shell, but is given expression and applied in practice.

10. Confronting the problem of discrimination in general, and with regard to differences between the sexes in particular, is not only our concern. It concerns every free society where the principle of equality is one of its foundations. Discrimination derives from a perception that was accepted in human society as part of an outlook that for generations regarded the status of women as inferior and without rights. The development of granting women rights has progressed little by little. It received impetus and strength in this century as part of the ideological and practical renaissance aimed at eradicating discrimination between people. This struggle to eradicate discrimination against women because of their sex is fought on various battlefields and with a wide range of weapons. It occupies a place of honour in literature, philosophy, articles, the media, political frameworks and various public fora. I refrain from expanding on this topic, for which this platform is too narrow, and elaboration is not needed to decide this case. I will satisfy myself by referring to several cases considered in American and Canadian case-law.

The issue of discrimination against women — for the purpose of admission to a military academy where only men studied — was recently considered in the United States in the case of a petitioner who wanted to be admitted as a cadet into the South Carolina Military Academy where only men studied, and who was rejected because she was a woman. The Federal Court considered the matter in two stages. In the first stage, a temporary order was issued ordering the authorities to prepare a parallel study program for women cadets, and in the interim, the woman cadet could be integrated in the studies on a partial basis (within the framework of day studies) (*Faulkner v. Jones* (1993) [41]).

Two years later, when the program outlined was not put into practice — *inter alia* because of considerations relating to the economic costs —the court ordered the full integration of the petitioner in the military program. The Federal Court recognized the existence of relevant differences between men and women even with respect to methods of education in military institutions, but it limited the expression that could be attached to such differences and subordinated it to the principle of equality. The court did not ignore the complexity and difficulties that applying the principle of equality sets before society at times, and it dealt with these difficulties one by one. It set against them the importance and supremacy of the principle of equality and the duty of society to uphold it in practice, even if this involves difficulties and expense. In weighing all the considerations against the principle of equality it reached a conclusion that lead to the result of issuing an order that the petitioner should be fully integrated into the military program (*Faulkner v. Jones* (1995) [42]).

In Canada, a judgment was given with regard to the same issue; in it the court found that the balance that was made between the purpose of giving sports training and the means chosen to do this — the existence of men-only sports associations — was an improper balance and was disproportionate to the damage caused by shutting women out of the association. In that case, a girl was prevented from taking part in the sporting activity of an ice hockey association, because of her sex, and irrespective of the specific talents required for such participation. The court was required to interpret the sport regulations and it abolished the said discrimination (*Re Blainey and O. H. A.* (1986) [57]).

Now let us return to our case.

11. Not recruiting women for aviation violates the principle of equality between the sexes. The problem is that this is not the only principle involved. There are two conflicting principles involved: one is equality and the other is public security as a result of military needs. In a conflict between two values, the conflicting values must be given the proper weight and a balance made between them. There are cases where such a conflict occurs between values of equal status, and there are cases where this occurs between unequal values where one of them is more important than, and has preference over, the other (on the difference between the two kinds of conflicts and the status of the conflicting values, and on the method of balancing them, see: Barak, in his book *supra,* vol. 3, p. 220; vol. 2, pp. 688-693 and the references cited there).

12. With regard to a conflict between public safety and the freedom of speech, Prof. Barak says in his book, *supra*, vol. 2, at p. 693:

> 'It follows that the central problem confronting us is this: in what circumstances and according to what criteria is it permissible to limit the freedom of speech in a society that respects human rights, in order to protect and maintain public safety? What is the "balancing formula" in the conflict between public safety and the freedom of speech? In this context, two main questions were before the Supreme Court: *first*, the anticipated degree of harm to public security that can justify a violation of the freedom of speech; *second*, (emphasis in the original) the likelihood that an infringement of public safety will occur if freedom of speech is not limited. The Supreme Court's reply to these two questions is this: *freedom of speech gives way to public safety only if the harm to public safety is severe, serious and critical, and only if it almost certain that allowing the freedom of speech will result in this harm…*' (emphasis added).

These comments are appropriate in this case.

In the conflict between the value of equality and the value of national security as the result of military requirements, national security may be regarded as the preferred value and of a higher status than the value of equality, notwithstanding the importance of equality. But national security is not a magic word; it does not have preference in every case and in all circumstances, nor is it equal for every level of security and for every harm thereto. The balancing formula between conflicting values that are not of equal status is not uniform and it varies significantly according to the status of the values and the relationship between them. There are cases where a reasonable possibility of real harm to the preferred value is sufficient, and there are cases where a near certainty and a real danger of harm are required.

In our case, the higher value (military and security requirements) prevails over the lower value (equality), only if there is *near certainty* of real harm and real damage to national security. The policy of the air force with respect to the recruitment of women for aviation does not pass these tests. It does not even stand up to a more lenient balancing formula, which is *a reasonable possibility* of real harm. The difficulties indicated by the respondents under the title of logistic and deployment difficulties are partly economic and partly based on speculations as to the future. The IDF authorities have no prior experience that confirms their fears — neither with respect to the ability of the air force to absorb women pilots, nor with respect to the number of applications that will be received for an aviation course or with respect to the

number of persons completing it successfully, nor with respect to the anticipated damage if the aviation course is opened up to women. Moreover, in examining the anticipated damage, we must examine whether, when this is offset against the chance that it will not take place, the violation of the citizen's right is still justified in order to prevent the danger. In our case, there is a reasonable chance that there will be no harm at all.

13. If this is insufficient, I would point out that even when there is a near certainty of damage and real harm, the work of examination and balancing is not finished. 'In all these cases, we must ascertain and examine the existence of alternative measures that could prevent the near certainty of the serious danger, without violating the freedom of speech' (Barak, *ibid.*). Indeed —

> '… When we are dealing with a lawful denial or restriction of a person's basic right, the government must choose — from among all the measures that can be adopted to protect national security — that restrictive measure that violates the basic right to the smallest degree. Of all the drastic measures, the least drastic should be chosen…' (HCJ 153/83 *Levy v. Southern District Commissioner of Police* [13], at p. 412 {127}).

I would reach the same conclusion with the principle of proportionality, which is accepted as an important principle in Western legal systems and our own system. According to this principle, when a basic right is violated, we must demand that the violation is of a proper degree and is not excessive. This requirement reflects the proper relationship between the measure and the goal (see the remarks of Justice Zamir in HCJ 987/84 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [14]).

One can draw an analogy in our case from the ruling made with regard to the freedom of occupation, whereby one should regard with particular severity a restriction on *entry* into an occupation, as opposed to *imposing restrictions* on the methods of realizing this freedom (see HCJ 1255/94 *Bezeq, the Israel Telecommunication Corporation Ltd v. Minister of Communications* [15], at pp. 686-687; HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [16], at pp. 484-485; Barak, *supra*, vol. 3, at p. 657).

14. Does the case before us comply with the balancing standards and emerge from them unscathed? I think this is not the case. From the affidavits submitted, it would appear that the defence establishment itself does not believe in a near certainty of real harm to security and of real damage, nor even a reasonable possibility of real harm. Admittedly, the deponents indicated

difficulties — including economic ones — that the air force will face if it is compelled to integrate women in aviation; but it would seem that opening up the aviation course to women in a controlled and limited manner for an appropriate number of women pilots, while examining the ramifications that this has on the requirements of the air force and the assignment of women pilots to jobs that they can fulfil over a long period of years, will significantly reduce the risk of harm and damage, if these are not entirely cancelled. Instead of blocking the path of women to aviation courses, it is possible — in the first stage —to adopt less drastic restrictive measures as stated, and to follow the path of trial and error.

15. The petitioner before us declares that she is prepared to undertake any service for any period of time required by the air force, similar to the service of any other pilot. There is no reason to assume *ab initio* that she will not honour her undertaking. There is no reason to suspect that her declarations are not genuine. If, notwithstanding all this, it happens in the future that she is unable, for personal reasons, to fulfil those undertakings, her situation will be similar to those cases in which men pilots are unable, for various reasons, to fulfil their undertakings over the years. In the words of my colleague, Justice Mazza, from a planning perspective, the IDF authorities must take into account such possibilities and prepare accordingly; and, as the Air Force Commander said, the problem is one of society as a whole, not merely of the defence establishment. If financial resources are required for this, the State must provide them, within reason.

16. Before concluding, I would like to quote the words of the American philosopher, Ruth Bleier:

> 'Though there are biologically based gender differences, they do not imply superiority or inferiority not do they justify inequities in social, economic, and political policy and practice. Rather they call for public education and reform of sexist policies, laws and practices… In the absence of clear paths to truth and social justice, the one hope for bringing about change for the better lies in the capacities of the human brain to make it possible to break out of the cultural constraints that some human beings have constructed to the detriment of others' (Ruth Bleier, 'Science and Gender: A Critique of Biology and its Theories On Women,' in Sneja Gunew (ed.), *A Reader in Feminist Knowledge*, Routledge, 1991, 249).

17. In conclusion, the aviation course should be opened up to women who have the requisite talents, in order to allow women to realize their basic right to equality between themselves and men in this field also. I therefore add my voice to the voice of Justice Mazza, and I too am of the opinion that the show cause order should be made absolute.

18. After writing my opinion, I received the illuminating opinion of my colleague, Justice Dorner. Her survey of the roots of discrimination against women on the basis of their sex and of the obligation of every enlightened society to recognize the basic right of every person to dignity and equality and to implement this recognition in practice is a work of art. But to do justice to the respondents it should be noted that, according to their position as presented to us — and there is no reason to regard this as mere lip service — they espouse these very same principles, and even they — as a mouthpiece of the State of Israel — do not dispute the right of women to equality and dignity and the duty of the State to implement these principles in practice. Not only this; they also agree that there is no difference between men and women from the perspective of the talents required to be accepted into an aviation course and that among women, as among men, there are those who are suitable for this. The difficulty that confronts them is the law that provided special service conditions for women, which results in logistic and deployment difficulties which will affect the preparedness and strength of the air force. In this respect, the position of the respondents was unacceptable to me and to my colleagues Justice Mazza and Justice Dorner, and therefore I am pleased that we have reached, by a majority, the result that the petition should be granted.

Justice Ts. E. Tal:

I agree with the opinion of my colleague, Justice Kedmi, and I would like to add to it. We still hold by the rule that discrimination because of a relevant difference is not discrimination. This rule leads me to think that the petitioner's petition should not be granted, for we are concerned with a distinction and not discrimination. There are two reasons for this: the budgetary consideration and the planning consideration.

The budgetary consideration

The difference, created by the law, between men and women soldiers is in the length of their service, and the emphasis is on reserve duty. The cost of preparing and training a pilot is huge. However short a pilot's period of service is, we pay the same cost for his training, but we receive less in return.

If the IDF had an unlimited budget at its disposal, we could rule that we should pay the price for the value of equality between men and women. My colleague, Justice Mazza, cites the remarks of Prof. Barak:

> 'The protection of human rights costs money, and a society that respects human rights must be prepared to bear the financial burden' (Barak, in his book *supra*, vol. 3, at p. 528).

Indeed, when the considerations are only financial, then it can be said that society must pay the price, in the words of Prof. Barak:

> 'Administrative convenience or financial economy are not, *in themselves*, social goals justifying a restriction or violation of a human right' (*ibid.*, at p. 528) (emphasis added).

It is also worth mentioning the example brought by Prof. Barak, *ibid.*:

> 'In one case, the question arose whether an oral hearing should be granted to everyone arriving in Canada, claiming to be a refugee. The Canadian Attorney-General argued that granting the right of an oral hearing would involve heavy financial costs and therefore this (natural) right should be waived. The Supreme Court of Canada rejected this argument.'

These remarks are apposite in such cases, where the only consideration standing against equality is the financial consideration. That is not so in the case before us.

The reality is that the defence budget is finite and limited. Within the limited framework of the budget, any huge expense made for the value of equality must come at the expense of other essential security needs. The protection of life is also one of the basic values (s. 4 of the Basic Law: Human Dignity and Liberty), and as such it can prevail over the value of equality.

If one argues that the value of equality cannot be overridden by any other value, however important it is, this undermines first principles and cancels the doctrine of a relevant difference. The result would be that in any case of a relevant difference it would be possible to say that the difference has ceased to be relevant, because we have set ourselves a goal of implementing the value of equality, in view of which a difference no longer has any importance.

Take, for example, the issue of equal work opportunities. There are jobs where the difference is characteristic. An advertisement seeking only women candidates for a job in a public bath house for women will not be improper. Equal work opportunities are overridden by the value of the privacy of the

women bathing there. In the same way the value of equality is overridden by the value of personal and national security.

It therefore seems to me that the budgetary consideration is also a reasonable consideration of relevant difference. This is true even if we assume that a woman will serve full reserve duty until the age of 38.

But there is a significant possibility that the reserve duty of a woman will be reduced considerably on account of pregnancy and childbirth. This means that all of the huge investment in training a woman as a pilot will only bear fruit for a very short time, and, in practice, the investment will be, for the most part, lost.

Planning

The army claims that it is very difficult to plan for units when some of its members are likely to be neutralized at different times and for different periods of time as a result of marriage, pregnancy and birth. This is an important and pivotal consideration. Even in units comprised of men, planning must take account of periods of temporary incapacity (sickness, travel overseas). But if women are to be assigned to these units, the army will need to take into account — throughout their service which is in any event a short one — incapacity for long periods as a result of pregnancy and childbirth.

Appendix Res/3 of the affidavit-in-reply is a report of the Presidential Commission on the Assignment of Women in the Armed Forces, *supra*, that was submitted to the President of the United States. On pp. 19-20 of the report, medical limitations resulting from pregnancy and childbirth are stated. According to this report, the period of time during which woman cannot be assigned for readiness and operational deployment because of various factors, including pregnancy and childbirth, is *four times* greater than the period of time during which men cannot be assigned to these tasks (section 44 of the affidavit-in-reply).

My colleague, Justice Mazza, believes that this argument cannot succeed because —

> 'It is entirely based on theories and hypothetical assessments and not on lessons learned from accumulated practical experience.'

I do not agree. A statistical fact based on a reasonable and logical assessments and which is also based on the said *report of the Commission* is not a mere speculation but rather a fact that should ideally be taken into account.

With regard to the case before us: if the petitioner is trained as a pilot in the air force, she will serve — as a volunteer in regular and permanent service — for five years, and she will be discharged from the IDF at the age of 29. She will then have only nine years to be integrated into the reserves, and during these nine years we must take into account periods of incapacity as a result of pregnancies and childbirths.

Even volunteering for additional service will not overcome the natural limitations of pregnancies and childbirths.

It follows that we are not concerned with discrimination between equals but with a distinction between persons who are not equal. Therefore I would recommend that the petition is denied. Like my colleague, Justice Kedmi, I would allow the Air Force Command to decide how to the conduct the experiment of integrating women as pilots at such time and in such circumstances as in their discretion will not harm the needs of national security.

Justice D. Dorner

1. 'Man kann von einem Ding nicht aussagen, es sei 1 m lang, noch, es sei nicht 1 m lang, und das ist das Urmeter in Paris' (L. Wittgenstein, *Tractatus Logico-philosophicus — Philosophische Untersuchungen*, 1960, 316).

   ('There is one thing of which it cannot be said that its length is one metre, or that its length is not one metre, and that is the original metre in Paris').

Indeed, many criteria are accepted by society as absolute, but they are in fact arbitrary. But it is not decreed that all criteria must be arbitrary, like the original metre mentioned by Witgensttein. There are matters where it is possible —and if it is possible then it is also proper — to endeavour to establish just criteria.

The petition before us concerns criteria for translating the difference between men and women into legal norms. These criteria can and should be just.

2. Women are different from men. In general their physical strength is weaker than that of men. They are restricted by the necessity of their natural roles — pregnancy, childbirth and nursing. These differences were, apparently, the basis for the division of roles between the sexes in primitive human society,

which gave birth to the patriarchal family. The man, who was both stronger and also free from the restrictions involved in childbirth, took charge of providing food and defending the family.

This division of roles remained unchanged even when, as a result of economic and technological developments, it no longer had an objective basis. In the entry for 'Woman', the Hebrew Encyclopaedia says as follows:

> 'Combat remained within the sphere of men's activity even when exhausting and prolonged guard duty replaced the outburst of a reckless operation, and the dropping of bombs by pressing a button or dialling numbers on a control panel replaced the throwing of the spear or a face-to-face battle of swords… it should also be noted that a woman's strength, stamina and ability to exert herself are usually assessed by the abilities of the woman who is pregnant, nursing and caring for her children; whereas the abilities of young women, on the one hand, and women after menopause, on the other hand, are also determined according to the weakness and cumbersomeness of the woman during her period of fertility. The criterion for assessing the strength of men, however, is the ability of the young, model fighter, i.e., of the young and unmarried man. It can be said that many of our professional ideals are determined for a man in accordance with his role as a man and not as a father, whereas for a woman — in accordance with her role as a mother, and not as a woman' (*Hebrew Encyclopaedia*, the Encyclopaedia Publishing Co., vol. 7, 1954, at pp. 341-342).

In the patriarchal family, the family property belonged to the husband-father. A married woman could not own property and her status was like that of a minor. The woman had no right to vote or to be elected, and she was even forbidden from holding any position outside her home. Involvement in war and politics was considered to be contrary to the nature of women. See J. S. Mill, *The Subjection of Women*, New York, 1986, at pp. 8, 33; S. De Beauvoir, *Le Deuxième Sexe*, vol. 1, 1976, at pp. 164-165; D. L. Rhode, *Justice and Gender*, Cambridge, 1989, at pp. 9-28).

In our own sources it is said of the woman that 'the honour of a king's daughter is inward' (Psalms 45, 14 [61]).

As recently as the end of the nineteenth century, the English poet Alfred Tennyson wrote a sonnet that reflects the accepted social norms of that time:

'Man for the field and woman for the hearth;
Man for the sword, and for the needle she;
Man with the head and woman with the heart;
Man to command and woman to obey.
All else confusion.'
(A. Tennyson, *The Princess,* 2nd song, 5, 427).

These norms were also expressed in the constitutional case-law of the United States. Thus, for example, in a judgment given at the end of the nineteenth century it was held that that a woman has no constitutional right to be a lawyer. The Supreme Court held, in the opinion of Justice Bradley, as follows:

> 'The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood… [and] is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband' (*Bradwell v. The State* (1872) [43], at 141).

3. All of this has changed greatly. In the State of Israel, as in other democratic states, the rule forbidding discrimination against women because of their sex is continually winning ground as a basic legal principle, and the legal rhetoric is continually being translated into reality.

In the declaration of the establishment of the State of Israel ('the Declaration of Independence') it was stated that 'the State of Israel will uphold complete equality of social and political rights for all its citizens irrespective of… sex.' In the Women's Equal Rights Law, 5711-1951, section 1 provides that 'There shall be one law for men and women for every legal act; and any provision of law that discriminates against women as women, for any legal act, shall not be followed'. In the Equal Remuneration for Female and Male Employees Law, 5724-1964, section 1 provides that 'An employer shall pay a woman employee remuneration that is equal to the remuneration of an employee who is a man at the same place of employment for the same work.' In the Equal Employment Opportunities Law, section 2(a) provides, *inter alia*, that 'An employer shall not discriminate between his employees, or between

candidates for employment on the basis of their sex…'. Case-law has played its part in establishing a substantive-interpretative principle, according to which, in the absence of any contrary statutory provision, the authorities (and in certain cases, even private individuals and bodies) are prohibited from discriminating against women because of their sex, and that statutes will be construed — in so far as possible — as consistent with this prohibition. See, for example, HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [17]; *Poraz v. Mayor of Tel-Aviv-Jaffa* [12]; HCJ 104/87 *Nevo v. National Labour Court* [18].

4. The Basic Law: Human Dignity and Liberty (hereinafter – the Basic Law) gave a constitutional, super-legislative status to the prohibition of discrimination against women. This status derives from both of the following:

First, section 1 of the Basic Law (which also appears as section 1 of the Basic Law: Freedom of Occupation) provides:

> 'Basic human rights in Israel are founded on the recognition of the worth of man, the sanctity of his life and his being free, and they shall be respected in the spirit of the principles in the Declaration of the Establishment of the State of Israel.'

This section provides, at least, that *basic rights* are to be upheld in the spirit of the principles of the Declaration of Independence, including the equality of citizens irrespective of sex. Therefore, for example, there can be no discrimination of women with respect to their right to property (a right enshrined in section 3 of the Basic Law) or in respect of their freedom of occupation (a right enshrined in section 3 of the Basic Law: Freedom of Occupation).

Second, the prohibition of discrimination against women is included in the right to dignity enshrined in sections 2 and 4 of the Basic Law.

The question whether the principle of equality in its entirety is encompassed in the right to dignity, within the meaning thereof in the Basic Law, has been discussed in several *obiter dicta* in the rulings of this Court. See, on the one hand, the remarks of Justice Or in HCJ 5394/95 [5], at pp. 360-363; the remarks of Vice-President Barak in *El-Al Israel Airlines v. Danielowitz* [3], at p. 760 {488}; and the remarks of Justice Mazza in *Israel Women's Network v. Government of Israel* [6], at pp. 521-523 {447-449}. On the other hand, see the remarks of Justice Zamir in *Israel Women's Network v. Government of Israel* [6], *ibid*.. See also: F. Raday, 'On Equality', 24 *Mishpatim*, 1994, 241, 254; Y. Karp, 'Basic Law: Human Dignity and

Freedom — A Biography of Power Struggles', 1 *Law and Government*, 1992, 323, 345-361.

The legislative history of the Basic Law indicates that the omission of the general principle of equality was intentional. In the Knesset debate on the draft Basic Law, MK Shulamit Aloni and MK Moshe Shahal argued against the omission in the Basic Law of a section about the right of equality (see *Knesset Proceedings* vol. 123, 1992, at pp. 1241, 1244). In reply to these arguments, (*ibid.*, at p. 1532) MK Amnon Rubinstein, who proposed the Basic Law, said the following:

> 'There is no section about general equality, that is correct, because that section of general equality was a stumbling block, an obstacle that prevented the passing of the comprehensive draft proposal.'

See also Karp, in her article, *supra*, at pp. 345-346.

In view of this background, I doubt whether it is possible — or at least, whether it is proper — to hold by means of construction that the purpose of the Basic Law is to provide constitutional protection to the principle of general equality. The clear intention of the legislator, as can be seen from the drafts versions, was precisely not to enshrine this general principle in the Basic Law. The draft versions of a law are a factor in determining its purpose. See the remarks of Justice Barak in FH 36/84 *Teichner v. Air France Airways* [19], at p. 619; Barak, in his book, *supra*, vol. 2, at pp. 191, 215. Admittedly, the significance of the draft versions — which reveal the intentions of the members of the Knesset who enacted the Law — decreases with the passage of time since the legislation was passed, and the occurrence of political, social or legal changes that may justify a deviation from these intentions. But only a few years have passed since the enactment of the Basic Law, and *prima facie* the Basic Law should not be construed in a way that conflicts with its purpose as can be seen from the draft versions.

Notwithstanding, there can be no doubt that the purpose of the Basic Law was to protect people from degradation. The degradation of a human being violates his dignity. There is no reasonable way of construing the right to dignity, as stated in the Basic Law, such that the degradation of a human being will not be considered a violation of that right.

Indeed, not every violation of equality amounts to degradation, and therefore not every violation of equality violates the right to dignity. Thus, for example, it was held that discrimination against small political parties as

opposed to large parties, or against new parties as opposed to old parties, violates the principle of equality. See, for example: HCJ 637/89 *'Constitution for the State of Israel' v. Minister of Finance* [20]; HCJ 98/69 [4], at p. 698; HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [21], at pp. 13, 15, 21 {32, 34, 41}; HCJ 141/82 *Rubinstein v. Chairman of the Knesset* [22]; HCJ 142/89 *Laor Movement v. Knesset Speaker* [23]. Notwithstanding, such infringements of the principle of equality, which have even led to the disqualification of Knesset laws, did not constitute a degradation, and so they also did not involve a violation of human dignity.

This is not the case with certain types of discrimination against groups, including sex discrimination, and also racial discrimination. Such discrimination is based on attributing an inferior status to the victim of discrimination, a status that is a consequence of his supposedly inferior nature. Thus, for example, in the famous judgment of the United States Supreme Court in the case of *Brown v. Board of Education* (1954) [44], at p. 494, the approach that had been accepted until that time with regard to separate and equal education was rejected. With regard to the influence of separate education, Chief Justice Warren wrote as follows:

> 'To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'

And in the judgment in *Frontiero v. Richardson* (1973) [45], at pp. 686-687, when discussing the influence of different treatment of women in legislation, Justice Brennan wrote:

> '… Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth… the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.'

Closing a profession or a position to a person because of his sex, race or the like sends a message that the group to which he belongs is inferior, and this creates a perception of the inferiority of the men and women in the group. This creates a vicious cycle that perpetuates the discrimination. The perception of inferiority, which is based on the biological or racial difference, causes

discrimination, and the discrimination strengthens the deprecating stereotypes of the inferiority of the victim of discrimination. Therefore the main element in discrimination because of sex, race or the like is the degradation of the victim.

My opinion is therefore that the Basic Law protects against a violation of the principle of equality when the violation causes degradation, i.e., an insult to the dignity of a human being as a human being. The same is true when a woman is a victim of discrimination because of her sex.

5. Enshrining the prohibition against discrimination of women in the Basic Law has two consequences, which are mutually connected: first, inclusion in a Basic Law has significance for the definition of the right, and especially for the distinction between the definition of the right and the definition of the conditions in which it is permitted — if at all — to violate it; second, in exercising executive discretion — including discretion enshrined in a law that existed before the Basic Law came into effect — extra weight should be given to a right enshrined in the Basic Law.

6. The classic definition of equality was coined by Aristotle. According to this definition, equality means equal treatment of equals and different treatment of those who are different according to the extent of their difference (Aristotle, *The Nicomachean Ethics*, book 5, par. 1131). In my opinion, this definition, which has been incorporated in our case-law (see, for example, *Boronovski v. Chief Rabbis* [1], at p. 35), borders on tautology.

The definition permits, and even necessitates, different treatment when the 'difference' is relevant, but it does not contain criteria for determining that relevance. In the absence of such criteria, there is a danger — which has frequently been realized — that the criteria applied in each case will reflect the degrading stereotypes which the prohibition of discrimination was originally intended to prevent. In our case, the prohibition against the discrimination of women is likely to be rendered meaningless by a determination — based on accepted degrading stereotypes —that the difference between women and men justifies, and even necessitates, different treatment of women. Thus, for example, in the judgments in *Muller v. Oregon* (1908) [46] at 427; *Hoyt v. Florida* (1961) [47], at 62, laws that provided for different treatment of women were upheld, for the reason that the difference was relevant in view of the woman's roles as a mother and housekeeper. For the same reason a law was approved that made only men liable for military service, notwithstanding the fact that the chiefs of staff of the American army were interested in applying the law to women also. See *Rostker v. Goldberg* (1981)[48], at p. 74. Even in Israel it was held in *Steinberg v. Attorney-General* [7], at pp. 1067-

1068, that different treatment of women, based on the duties of the married woman, falls into the category of permitted distinctions, since it is based on a relevant difference between women and men.

Moreover, the definition also obscures the distinction between the actual relevance of the difference and its proportionality, in the sense of restricting the violation of human rights to cases where it is required, or to the required degree.

The Aristotelian definition has also been criticized in legal literature. Prof. Rhode wrote the following:

> 'American equal-protection analysis has developed largely within an Aristotelian tradition that defines equality as similar treatment for those similarly situated. Under this approach, discrimination presents no legal difficulties if the groups differ in ways relevant to a valid regulatory objective… challenges to gender classifications underscored the theoretical and practical limitations of this approach… Contemporary gender-discrimination analysis has presented difficulties along several dimensions. At the most basic level, traditional approaches have failed to generate coherent or convincing definitions of difference. All too often, modern equal-protection law has treated as inherent and essential differences that are cultural and contingent. Sex-related characteristics have been both over- and undervalued. In some cases, such as those involving occupational restrictions, courts have allowed biology to dictate destiny. In other contexts, such as pregnancy discrimination, they have ignored women's special reproductive needs. The focus on whether challenged classifications track some existing differences between the sexes has obscured the disadvantages that follow from such differences.
>
> Although discourses of difference must sometimes have a place, they should begin, not end, analysis. As deconstructionists remind us, women are always already the same and different: the same in their humanity, different in their anatomy. Whichever category we privilege in our legal discourse, the other will always be waiting to disrupt it. By constantly presenting gender issues in difference-oriented frameworks, conventional legal discourse implicitly biases analysis. To pronounce women either the same or different allows men to remain the standard of analysis.

> Significant progress toward gender equality will require moving beyond the sameness-difference dilemma. We must insist not just on equal treatment but on woman's treatment as an equal' (Rhode, *supra*, at pp. 81-82)

See also Raday, in her article, *supra*, 24 *Mishpatim*, at p. 255.

In my opinion, in our case (i.e., in circumstances where a decision is based on considerations of sex or similar considerations based on belonging to a group, such as race), it is possible to overcome the difficulties raised by the Aristotelian definition — or at least some of them — by replacing this definition with a twofold test: first, is the consideration of sex relevant? Second, assuming that the consideration is relevant, is it justified to take account of it in the circumstances of the case?

In my opinion, as stated, discrimination against a person because he belongs to a group, and in our case discrimination against women, violates the right to dignity. However, like every right, the right to dignity (including the prohibition of group discrimination derived from it) is also not an absolute right but a relative one, and a balance must be struck between it and other legitimate values and interests. Therefore, in special cases a violation of women's right of equality may be justified, if it complies with criteria that reflect the proper balance between this right and other legitimate values and interests.

A good example of the application of this approach can be found in *Poraz v. Mayor of Tel-Aviv-Jaffa* [12]. This case considered a decision of the Tel-Aviv-Jaffa Municipality not to appoint women to the body that appointed the city's chief rabbi. The decision was based upon considerations recognized by the court as relevant considerations (which were called by the court 'particular considerations'), which were the fear that the participation of women on the body making the appointment would prevent suitable rabbis from presenting themselves as candidates and would make the functioning of the rabbi that would be elected more difficult. *Prima facie*, according to the Aristotelian definition — which the Court both cited and relied upon — this should have been sufficient to deny the petition and to uphold the decision of the Municipality. But the court held that the discrimination against women itself constituted a violation of the right to equality. In such a case, the court held, in the opinion of Justice Barak, that:

> '… we must balance the general principle of equality on the one hand against the particular consideration of the appointment of an

> electoral assembly that can properly carry out its office on the other' (*supra*, at p. 336).

From this we can infer that even when 'discrimination against women is a relevant consideration' (*ibid*.), the discriminatory decision violates the right of equality, and we must examine whether this violation is justified. On the other hand, according to the accepted Aristotelian definition, a statement that 'discrimination against women is a relevant consideration' is inherently contradictory, for, according to that definition, if the consideration is relevant, there is no discrimination at all.

8. The distinction between discriminatory treatment and its justification also requires a distinction regarding the burden of proof, between the woman claiming discrimination and the executive authority. A woman claiming discrimination must prove that the authority treated her differently because of her sex (or her belonging to another group). On the other hand, the burden of proof that discriminatory treatment is justified lies with the authority. Thus for example, in the United States, in lawsuits of observant Jews against their employers on the grounds that they were the victims of discrimination because they observed the Sabbath, it was held that when the plaintiffs proved the actual discriminatory treatment, the employers had to prove that they took all the reasonable measures for integrating the persons who observed the Sabbath in the work. See *Getz v. Com. of Pa., Dept. of Public Welfare* (1986) [49]; *Shapiro-Gordon v. MCI Telecommunications Corp.* (1993) [50].

The proper degree of proof is the usual one in civil law, namely, the balance of probability in favour of the contention that must be proved. Cf. *R. v. Oakes* (1986) [58], at p. 107; P. A. Joseph, *Constitutional and Administrative Law in New Zealand*, Sydney, 1993, at pp. 861-862; Hogg, *supra*, at pp. 857-858.

9. Section 11 of the Basic Law requires all Government authorities to uphold the rights enshrined therein. Notwithstanding, the section does not stipulate the criteria for upholding the rights. How then are these criteria to be determined?

In the United States, in the absence of a provision of the Constitution in this respect, the criteria for examining the constitutionality of the violation of human rights have been formulated in case-law. These criteria do not make a clear distinction between the purpose of the norm that violates a basic right and the proportionality of the violation. American case-law developed a doctrine of levels of scrutiny, which is based on an examination of the

importance of the social values at the heart of the right. The most lenient level of scrutiny in terms of the restrictions it imposes on the authorities, applies to acts (including laws) that violate economic rights. The level of scrutiny of these activities is minimal scrutiny. According to this, a violation of a right will be found to be justified if the violation is rationally related to a legitimate State interest. See: *Railway Express Agency v. New York* (1949) [51]; *Massachusetts Board of Retirement v. Murgia* (1976) [52].

The strictest level of scrutiny applies to acts that violate fundamental rights, such as freedom of speech, freedom of movement and the right to vote. This criterion also applies to the examination of the constitutionality of actions based on a suspect classification. In examining the constitutionality of such actions there is a need for strict scrutiny, which imposes a heavy burden of persuasion — substantive and probative — to justify the violation of the right. Only an essential public interest, which cannot be achieved by less discriminatory measures, may justify such a violation. See *Korematsu v. United States* (1944) [53]; *Brown v. Board of Education* [44].

Notwithstanding, the level of scrutiny of classifications based on sex was a subject of dispute. In the judgment in *Frontiero v. Richardson* [45], at pp. 682, 685, Justice Brennan, supported by Justices Douglas, White and Marshall, was of the opinion that classifications based on sex — like classifications based on race — were suspect classifications, and they should be subject to the highest level of scrutiny. He wrote:

> 'At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree…
>
> …
>
> … Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children… And although blacks were guaranteed the right to vote in 1870, women were denied even that right…'

But in a later judgment it was held that the constitutionality of classifications based on sex, which were defined as 'quasi-suspect', will be examined on the basis of an intermediate level of scrutiny (intermediate scrutiny). According to this level of scrutiny, a classification based on sex will

be considered to be justified if it has a substantial relationship to an important Government objective. See *Craig v. Boren* (1976) [54]; *Mississippi Univ. v. Hogan* (1982) [55].

In Canada, in the Charter of Rights and Freedoms, there is a limitation clause that distinguishes between the purpose of the action that violates the right and the proportionality of the violation (s. 1 of the Charter). Canadian case-law developed a standard level of scrutiny for all basic rights. It was held that legislation has a proper purpose if it is intended to realize social needs of fundamental importance, and that the violation should not be excessive for achieving the purpose. In the latter case, secondary tests were established. The following was stated in the leading judgment *R. v. Oakes* [58], at 139:

> 'There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question… Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".'

In Germany, the Constitutional Court ruled that a strict level of scrutiny is required for legislation that discriminates on the basis of sex, that only an essential purpose justifies such a discrimination, and even this on condition that the extent of the violation is not excessive. See D. P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago, 1994, at p. 328.

The principle of proportionality, which was developed in German administrative law as early as the eighteenth century, is comprised of three elements that are in principle similar to the secondary tests in the Canadian ruling in *R. v. Oakes* [58]. First, the violating measure must be appropriate (*geeignet*) for achieving the purpose. Second, the measure must be required (*erforderlich*) for achieving the purpose, in the sense that of the suitable measures, the measure chosen is the most moderate one that can achieve the purpose (the element of necessity). Third, the measure must not be excessive (*unzumutbar*) in its violation, in comparison with the benefit deriving from it. In other words, the relationship between the measure and the purpose must be proportional (Currie, in his book, *supra*, at pp. 309-310). See also Y. Zamir,

'Israeli Administrative Law in comparison with German Administrative Law', 2 *Law and Government*, 1994, at pp. 109, 131.

10. In Israel, the criteria for upholding rights, *mutatis mutandis*, should be derived from section 8 of the Basic Law (hereafter — the limitation clause). This section provides:

> 'The rights under this basic law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or under a law as stated by virtue of an express authorization therein.'

Indeed, the limitation clause applies only to powers deriving from laws passed after the enactment of the Basic Law. However, it is appropriate, by way of analogy, to apply its principles to the duty of executive authorities by virtue of section 11 of the Basic Law, which also applies to powers based upon laws that preceded the Basic Law. There are two reasons for this: first, the protection of basic rights in Israel should be carried out on the basis of similar criteria, whether the legal norm whose validity is being examined is a statute or whether it is another legal norm. Second, the arrangement provided in the limitation clause — which distinguishes, *inter alia*, between the purpose of the violation of the right and the extent of the violation — is in principle appropriate for all legal norms, and not merely statutes. The suitability of the criteria in the limitation clause for the scrutiny of the validity of legal norms that are not statutes was discussed by Vice-President Barak in *El-Al Israel Airlines v. Danielowitz* [3] (in which a discriminatory collective agreement was considered), at p. 760 {488}:

> 'Equality may be lawfully restricted if this is consistent with the values of the State of Israel, is for a proper purpose and if equality is not restricted more than necessary.'

The elements of the limitation clause are very similar to the criteria developed in case-law for a violation by an administrative authority of a basic human right.

11. The first element, which reflects the principle of legality, provides that the violation must be in a law or under a law by virtue of an express authorization therein. In this respect, in case-law laid down before the Basic Law was passed, it was held, *inter alia*:

(1) A basic human right may not be restricted without the clear authorization of the primary legislator. See, for example: the remarks of Justice Berinson in HCJ 200/57 *Bernstein v. Bet-Shemesh Local Council* [24],

at p. 268; Justice Shamgar in HCJ 337/81 *Miterani v. Minister of Transport* [25], at p. 359.

(2) Legislation that violates a basic human right must be construed narrowly, 'with the aim of giving the said right maximum application and not limiting it in any way beyond what is clearly and expressly implied by the legislation' (the remarks of Justice Shamgar in CA 732/74 *HaAretz Newspaper Publishing Ltd v. Israel Electricity Co. Ltd* [26], p. 295 {243}).

(3) Laws should be construed on the assumption that it is not their aim to violate the principle of equality. The following was written by Justice Haim Cohn in HCJ 301/63 *Streit v. Chief Rabbi* [27], at p. 612:

> '… this court will always presume that the Israeli legislator does not intend to violate, by an act of legislation, the basic principles of equality, freedom and justice…'

In another context, Justice Barak wrote in *Poraz v. Mayor of Tel-Aviv-Jaffa* [12], at p. 612:

> '… we must presume [that] the primary legislator and the secondary legislator [wished] to uphold the principle of equality… we must construe this authority in a way that the power to enact subordinate legislation is not exercised in a manner that violates the principle of equality' (square parentheses added).

The power to discriminate against women must therefore be expressly stated in a law, and a general provision giving an authority discretion is insufficient. This is because the assumption is, as stated, that the authority should exercise its powers while upholding basic human rights — including the prohibition of discriminating against women — unless it is expressly authorized not to do so.

These rules of interpretation were reinforced with the enactment of the Basic Law. It was held that even legislation that is protected by section 10 of the Basic Law against being held invalid should be interpreted in the spirit of the provisions of the Basic Law, and the same applies also to discretion exercised under legislation whose validity was protected. It was also held that there should be a re-examination of existing case-law to assess whether it was consistent with the provisions of the Basic Law. See CrimApp 537/95 *Ganimat v. State of Israel* [28], and the remarks of Vice-President Barak, at p. 419:

> '… There are rulings that were made in the past, and which are inconsistent with the new balance. These rulings can no longer be used for the construction of a new law. Moreover, these rulings should no longer be used for the construction of the old law. This law should be construed in the spirit of the new basic laws. The purpose of the old legislation and executive discretion enshrined in old legislation must be construed according to the new balance between human rights and the needs of society, provided that this new interpretation is possible."

See also: the remarks of Vice-President Barak, *ibid*., at pp. 423-424; and my own remarks, *ibid*., at p. 375; and also CrimApp 4595/94 [29]; CApp 4459/94 *Salomonov v. Sharabani* [30]; HCJFH 3299/93 *Wechselbaum v. Minister of Defence* [31].

12. The second element requires that the violation befits the values of the state of Israel. It may be assumed that the intention is to its values as a Jewish and democratic State, as stated in section 1 of the Basic Law. See Barak, in his book, *supra*, vol. 3, at p. 157; H. H. Cohn, 'The Values of the State of Israel as a Jewish and Democratic State — Studies in the Basic Law: Human Dignity and Liberty', 9 *HaPraklit — Jubilee Volume*, Israel Bar Association Publications, 1994, at p. 9. Even this element should be applied (subject to section 10 of the Basic Law) to all executive decisions. See the remarks of Vice-President Elon in CrimApp 2169/92 *Suissa v. State of Israel* [32], at p. 341.

13. The third requirement in the limitation clause requires that the violation of the right is for a proper purpose. The meaning of 'a proper purpose', with regard to a decision of an administrative authority, is different from its meaning with respect to a statute. While with respect to a statute we should examine whether its purpose serves a public purpose whose realization might justify a violation of a basic right, with respect to an administrative decision we should examine, first and foremost, whether its purpose is one of the general or particular purposes of the law authorizing the decision. I discussed this in *El-Al Israel Airlines v. Danielowitz* [3], at p. 782-783 {519-520}, with regard to discrimination based on sexual orientation:

> 'According to this test, no distinction should be made between homosexual couples and heterosexual couples, if the spousal relationship between the spouses of the same sex meets the criteria that realize the purpose for which the right or benefit is conferred. By contrast, when the sexual orientation is relevant to

> realizing the purpose of the benefit, for instance if the purpose is to encourage having children, withholding the benefit from a same-sex spouse will not constitute discrimination' (square parentheses added).

See also HCJ 389/90 *Golden Pages Ltd v. Broadcasting Authority* [33], at p. 435; HCJ 4422/92 *Efran v. Israel Lands Administration* [34], at p. 858.

In our case, legislation whose purpose is to protect women cannot be used as a basis for discriminating against women, if she has waived the protection (provided, of course, that the protection is not forced on her by a law whose validity is preserved under section 10 of the Basic Law). See HCJ 231/63 *Ratef Food Supply Ltd v. Ministry of Trade and Industry* [35], at p. 2733.

14. The fourth element — which, in my opinion, is the most important — is the requirement that the extent of the violation of the right is not excessive. This principle is expressed by adapting the means to the purpose, in adopting a measure that violates a basic right only as a last resort and in the absence of another reasonable measure, and in adopting a measure of violating a basic right only where the importance of the purpose of the violation ('the purpose'), and the severity of the damage that will be caused if the purpose is not realized, justify it. See: HCJ 5510/92 *Torkeman v. Minister of Defence* [36]; HCJ 987/94 [14]; HCJ *Ben-Atiya v. Minister of Education, Culture and Sport* [37]. See also Z. Segal, 'The Grounds of Disproportionality in Administrative Law', 39 *HaPraklit*, 1990, at p. 507. In the latter case, balancing formulae were established, based on the special weight of the violated human right on the one hand and the conflicting interest (in the terminology of the limitation clause — 'the purpose') on the other. These formulae are expressed in the tests that concern the extent of the violation of the basic human right and its probability. See the remarks of Justice Barak in 399/85 *Kahana v. Broadcasting Authority Management Board* [38], at p. 284. The probability formula is determined, on the one hand, in accordance with the importance of the basic right and its underlying reasons, and, on the other hand, in accordance with the importance of the conflicting interest, the realization of which is the purpose of the violation. For this latter issue, see HCJ 1452/93 *Igloo Plumbing Works, Building and Development Contracting Co. Ltd v. Minister of Industry and Trade* [39], at p. 617.

The right to dignity — which enshrines the prohibition of discrimination against women — is one of the most important basic human rights. In general, the degradation of a woman by discriminating against her merely because she is a woman is very hurtful to her. Moreover, important social interests are also

a basis for the right. In the words of Justice Bach in *Nevo v. National Labour Court* [18], at p. 760 {150}:

> 'A society that practises discrimination is not a healthy one, and a State that practises discrimination cannot be called a civilized State.'

The individual and social reasons that are the basis for the prohibition of discrimination against women require that we apply in this respect the strict test of a near certainty of serious danger.

15. In cases where the difference of women is a relevant consideration for realizing the purpose of the power, there is a spectrum of possible measures for achieving that purpose. At one extreme of the spectrum, there is the asymmetric model of the 'special protection rule'. This model holds that women have special characteristics and roles, which justify their being discriminated against in comparison with men, and *inter alia* they are prevented from being employed in various jobs. The proper purpose — which is the proper exercise of the said roles — is therefore realized by closing the door to women who wish to serve in those jobs.

At the other end of the spectrum, there is a symmetric model known as 'gender neutrality'. This model advocates equal treatment of men and women, and it assumes that both sexes have identical functional capacity. According to this approach, pregnancy is considered as a constraint equivalent to a man being sick. Adopting this model usually involves building the system according to the ability of men. In its planning, naturally account is taken of various needs that are common to all human beings, whether women or men, but no account is taken of the special needs of women. According to this model, society may close to women the door of an organization whose optimal operation is in the interests of society, if it transpires that because of the needs and characteristics of women their period of activity is expected to be shorter than the activity of men (and this also as a result of women exercising privileges that the law grants them, with regard to pregnancy, childbirth and the other roles of women). The symmetrical model is therefore likely to prevent or to reduce to a large degree the employment of women in essential organizations.

This problem raised by the 'gender neutrality' model was succinctly described by Prof. MacKinnon:

> 'Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to

> his measure; under the difference rubric, women are measured according to their lack of correspondence from man, their womanhood judged by the distance from his measure. Gender neutrality is the male standard. The special protection rule is the female standard. Masculinity or maleness is the referent for both' (C. A. MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press, 1989, at p. 221).

16. In my opinion, the solution to the difficulties raised by both of the extreme models lies in an intermediary model. According to this model, achieving equality between the sexes requires organizational planning that takes the unique needs of women into account. The interest in ensuring the dignity and status of women, on the one hand, and in the continued existence of society and the raising of children, on the other hand, makes it necessary — in so far as possible — not to deny women the possibility of realizing their abilities and ambitions merely because of their special natural functions, and thereby discriminating against them in comparison with men. Social institutions — including legal arrangements — should be adapted to the needs of women.

This intermediary model, whereby every employer must take into account that the years of a woman's activity are likely to be disrupted by pregnancy, childbirth, nursing and childcare, has been enshrined in Israel in labour law. Thus, for example, the Women's Employment Law provides that a woman has a right of maternity leave (s. 6(a)), a right of absence from work during the pregnancy if there is a medical need (s. 7(c)(1)), and a right to return to work after childbirth following an absence that does not exceed twelve months (s. 7(d)(1)).

Naturally, the implementation of the intermediary model costs money and complicates planning. These costs must be borne — sometimes with the participation of National Insurance — also by private employers. This obligation is imposed, all the more so, also on the State.

The demand to consider the special needs of women is similar to the demand to consider a person's religious belief. Such a demand is accepted in the United States. See *Getz v. Con. of Pa., Dept of Public Welfare* [49]; *Shapiro-Gordon v. MCI Telecommunications Corp.* [50]. In HCJ 80/70 *Elitzur v. Broadcasting Authority* [50], at p. 666, Justice Kister wrote that the approach of American case-law should be adopted:

> '… we may learn some things from the American approach in law and case-law:
>
> a. An approach that has maximum consideration for the religious persuasion of the employee; even if he has undertaken to work overtime, he should not be required to do this on his day of rest, and he even cannot be required to find a replacement if this is contrary to his religious belief, and the employer must adapt himself, in so far as possible, to his religious belief; I emphasize that we are speaking here of a private factory…'

It will be noted that in 1981 the Work and Rest Hours Law, 5711-1951, was amended, and in section 9(c) an employer was forbidden to refuse to accept someone for employment merely because he is not prepared to work on the weekly rest days prohibited by a precept of his religion.

17. From the general to the specific:

My colleague, Justice Mazza, set out the facts underlying the petition. As stated, the respondents rejected the petitioner's request to invite her for aptitude tests for an aviation course because of planning reasons, which were mainly considerations of organizational feasibility. The basis for these considerations is the large cost of training pilots, which makes — so the respondents argue — the training of someone whose service for many years is not guaranteed by law not worthwhile, and it also makes it necessary to train a larger number of pilots. An additional reason given by the respondents was the cost required for adapting the facilities at the camp where the flight course takes place to absorb women.

The respondents' considerations are based on the assumption that the petitioner, being a woman, can be expected to serve fewer years than a man. In this respect, they relied on the provisions of the Defence Service Law [Consolidated Version] (hereafter — the law), which obliges men to do reserve duty until the age of 54, whereas women are liable for reserve duty only until the age of 38 (s. 29), and pregnant women and mothers are exempt altogether from reserve duty (s. 34). The law does not prevent a woman volunteering for reserve duty (s. 12), nor does it even distinguish between men's jobs and women's jobs. But in the respondents' opinion, in view of the pregnancies and childbirths that can naturally be expected in the life of a woman, one cannot rely upon voluntary service from which the woman can exempt herself at any time.

As my colleague Justice Mazza mentioned, the respondents did not rely on the existence, under High Command regulations, of restrictions in assigning women to combat roles, and I will therefore assume that these regulations have no implications with regard to the rights of the petitioner.

18. I have arrived at the conclusion that the respondents' decision to reject the petitioner's request because she is a woman, discriminates against her, and this discrimination — which constitutes a violation of the petitioner's constitutional right of dignity — does not satisfy the requirements of the limitation clause in the Basic Law, and it is therefore illegal and improper.

I will consider the elements of the limitation clause in order.

19. *The first requirement — express statutory authorization*: the law distinguishes between men and women in so far as the length of compulsory service is concerned, and in this way it discriminates between the sexes. In view of the provisions of section 10 of the Basic Law regarding the preservation of laws, we are not required to consider the validity of the law in this respect. In the absence of any other argument, I too am prepared to assume — *without ruling* — that the decision was made within the framework of the power that the law gave to the respondents.

20. *The second element — befitting the values of the State*: here too, in the absence of arguments to the contrary, I will assume — *without ruling* — that the respondents' decision does not conflict with the values of the State of Israel as a Jewish and democratic state.

21. *The third element — a proper purpose*: the air force's planning considerations, which, as stated, led it to make the decision that is the subject of the petition, serve important State interests, and in this sense they constitute 'a proper purpose'. The problem is that these considerations were based on statutory provisions that were intended to protect women and grant them 'privileges'. As stated, the law is not compulsory in this respect, and the petitioner gave notice that she is prepared to waive the privileges given to her. Therefore, in rejecting the petitioner's request by relying on the protective provisions, the respondents applied considerations that were irrelevant for realizing the purpose of these provisions of law. In this sense, their considerations can therefore not be regarded as 'a proper purpose'. Notwithstanding, there still remains the consideration that a woman, because of her biological functions, is expected to do less years of reserve duty than men, something that will make her training less worthwhile, and will, so they claim, adversely affect the possibility of planning. These considerations — of

economy and facilitating planning — are relevant and legitimate, and constitute 'a proper purpose'.

22. *The fourth element — to an extent that is not excessive*: in my opinion, the measure that the respondents chose in order to realize their purposes — closing the profession of aviation to women — does not comply with this element of the limitation clause. Closing the profession of aviation to women does not comply with the requirement of proportionality. As my colleague Justice Mazza has shown, it is possible to make plans — since in any event planning takes account of interruptions and stoppages for various reasons — in a way that takes into account the differences between men and women. As stated, the obligation to take account of women's needs in planning is incumbent on all employers in the country by virtue of laws that prohibit refusing to accept a woman for employment because of her sex, and at the same time give her privileges that shorten her activities in a way liable to harm the employer. In these circumstances, where an extra financial burden is imposed on all private employers for the sake of achieving equality, considerations of budgeting and planning efficiency cannot justify a decision of the State that violates a basic right. See: *Singh v. M. E. I.* (1985) [59], at p. 218; *R. v. Lee* (1989) [60], at p. 1390; Barak, *supra*, vol. 2, at pp. 526-527.

Moreover, even if we assume that the planning consideration could justify discrimination against women, the State which seeks to justify the discrimination bears the burden of proof. But the respondents did not substantiate their arguments about the harm to planning on solid facts, but merely on a hypothesis whose correctness is not self-evident. The fact that in 1975 women soldiers were integrated into an aviation course on the respondent's initiative, indicates precisely that the planning difficulties, in so far as they exist, are not insoluble.

In addition to all the above, the damage caused by closing the aviation course to women exceeds the benefit of the planning considerations. First, closing the aviation course to women violates their dignity and degrades them. It also, albeit unintentionally, provides support for the degrading slogan: 'the best men for the air force, and the best women for its pilots'.

Second, the potential of half the population is not utilized, and this damages society. 'The best women for the air force' is also in the interests of society, and this was harmed by the respondents' decision. This was discussed by the English philosopher, John Stuart Mill, in his book, *supra*, which was written over one hundred years ago. He wrote, on p. 57:

> 'Nor is the injustice confined to [women]: it is shared by those who are in a position to benefit by their services. To ordain that any kind of persons shall not be physicians, or shall not be advocates, or shall not be members of parliament, is to injure not them only, but all who employ physicians or advocates, or elect members of parliament, and who are deprived of the stimulating effect of greater competition on the exertions of the competitors, as well as restricted to a narrower range of individual choice.'

Very recently this was explained in the United States by Justice Hall in his judgment in *Faulkner v. Jones* [42], at p. 451:

> 'Though our nation has, throughout its history, discounted the contributions and wasted the abilities of the female half of its population, it cannot continue to do so. As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.'

Indeed, the experience of history in other countries and also in Israel shows that in times of emergency, when the enemy stood at the gates, accepted norms gave way and women took part in combat, on land and even in the air.

The policy of closing the doors also does not meet the accepted criteria in our law for violation of a basic right. In this respect the respondents needed to prove the existence of a near certainty that the integration of women in aviation will seriously harm national security. The respondents did not do this, nor do common sense and experience in themselves lead to a conclusion about the existence of such a near certainty.

For these reasons, I think that the petition should be granted and the show cause order be made absolute.

Petition granted by majority decision (Justices E. Mazza, D. Dorner, T. Strasberg-Cohen), Justices Y. Kedmi, Ts. E. Tal dissenting.

15 Heshvan 5756.

8 November 1995.