HCJ 1993/03

The Movement for Quality Government in Israel

v.

1. **The Prime Minister, Mr. Ariel Sharon**
2. **The Attorney-General, Mr. Elyakim Rubenstein**
3. **The Minister for Public Security, Mr. Tzahi Hanegbi**

The Supreme Court Sitting as the High Court of Justice
[October 9, 2003]
Before Vice-President T. Or, Justices E. Mazza, M. Cheshin, D. Dorner, J. Türkel, D. Beinish, and E. Rivlin

Objection to an *order nisi*.

Facts: The Prime Minister appointed respondent 3 to the position of Minister of Public Security. Petitioner asks that the High Court of Justice order the Prime Minister to refrain from making the appointment.

Held: The Court, by majority vote, held that it would not intervene in the Prime Minister's decision to appoint respondent 3 to the position of Minister of Public Security.

Basic Laws Cited:
Basic Law: The Government, 2001
Basic Law: The Government, 1992
Basic Law: The Government, 1968

Statutes Cited:
Police Ordinance (New Version), 1971, § 7
Criminal Register and Rehabilitation of Offenders Law, 1981, §§ 14, 16
Knesset Members Immunity Law (Rights and Duties), 1951

Israeli Supreme Court Cases Cited:
[1] HCJ 3846/91 *Maoz v. The Attorney-General*, IsrSC 46(5) 423
[2] HCJ 2534/97 *MK Yona Yahav v. State Attorney*, IsrSC 51(3) 1

[3] HCJ 2533/97 *The Movement for Quality Government in Israel v. The Government of Israel*, IsrSC 51(3) 46
[4] HCJ 2624/97, 2827/97, 2830/97 *Yedid Ronal, Adv. v. The Government of Israel*, IsrSC 51(3) 71
[5] HCJ 4267/93, 4287/93 and 4634/93 *Amitai – Citizens for Sound Administration* and *Moral Integrity v. Yitzhak Rabin, Prime Minister of Israel*, IsrSC 47(5) 441
[6] HCJ 6163/92 *Eisenberg v. Minister of Construction & Housing*, IsrSC 47(2) 229
[7] HCJ 727/88 *Awad v. The Minister of Religious Affairs*, IsrSC 42(4) 487
[8] HCJ 5167/00 *Weiss v. The Prime Minister of Israel*, IsrSC 55(2) 455
[9] HCJ 325/85 *MK Muhammad Miari v. Knesset Speaker Shlomo Hillel*, IsrSC 39(3) 122
[10] HCJ 1843/93 *Pinhasi v. Knesset Israel*, IsrSC 49(1) 661
[11] 428/86 *Barzilai v. The Government of Israel*, IsrSC 40(3) 505
[12] HCJ 73/85 *Kach Faction v.The Knesset Speaker*, IsrSC 39(3) 141
[13] HCJ 306/81 *Platto-Sharon v. Knesset Committee*, IsrSC 35(4) 118
[14] HCJ 403/71 *Alcourdi v. The National Labor Court*, IsrSC 26(2) 66
[15] HCJ 222/68 *Chugim Le'umiyim Agudah Reshuma v. Police Minister*, IsrSC 24(2) 141
[16] HCJ 758/88 *Kendel v. The Minister of Internal Affairs*, IsrSC 46(4) 505
[17] HCJ 9070/00 *MK Livnat v. Chairman of the Constitution, Law and Justice Committee*, IsrSC 55(4) 800
[18] HCJ 971/99 *The Movement for Quality Government in Israel v. The Knesset Committee*, IsrSC 56(6) 117
[19] HCJ 652/81 *MK Yossi Sarid v. Knesset Speaker Menachem Svidor*, IsrSC 36(2) 197
[20] HCJ 2136/95 *Gutman v. Knesset Speaker Prof. Shevach Weiss*, IsrSC 49(4) 845
[21] HCJ 3872/93 *Mitrael Ltd. v. The Prime Minister and Minister of Religious Affairs*, IsrSC 47(5) 485
[22] HCJ 935/89 *Uri Ganor, Adv. v. Attorney-General*, IsrSC 44(2) 485
[23] HCJ 4140/95 *Superpharm (Israel) Ltd. v. Customs and Excise Administration*, IsrSC 54(1) 49
[24] HCJ 620/85 *Miari v. Knesset Speaker Shlomo Hillel*, IsrSC 41(4) 169
[25] CA 6821/93 *United Mizrahi Bank v. Migdal Agricultural Cooperative*, IsrSC 49(4) 221
[26] HCJ 3434/96 *Dr. Menachem Hoffnung v. The Knesset Speaker*, IsrSC 50(3) 57

[27] HCJ 7111/95 The *Center for Local Government v. The Knesset*, IsrSC 50(3) 485
[28] CA 492/73 *Schpeizer v. Israeli Sports Betting Council*, IsrSC 29(1) 22
[29] HCJ 162/72 *Dr. Kinross v. The State of Israel*, IsrSC 27(1) 238
[30] APP 7440/97, LCA 6172 *State of Israel v. Golan*, IsrSC 52(1) 1
[31] RAP 1088/86 *Mahmud v. Local Council for the Planning and Construction of the Eastern Galilee*, IsrSC 44(2) 417
[32] HCJ 98/54 *Lazerovitz v. Food Inspector, Jerusalem*, IsrSC 10 40
[33] HCJ 4769/90 *Zidan v. The Minister of Labor and Social –Welfare*, IsrSC 47(2) 147
[34] CA 184/80 *Eigler v. Magen Insurance Company*, IsrSC 35(3) 518
[35] HCJ 3687/00 *Ashkenazi v. Prime Minister Ehud Barak*, IsrSC (unreported decision)
[36] HCJ 6029/99 *Jonathan Pollard v. Prime Minister and Defense Minister Ehud Barak*, IsrSC 54(1) 241
[37] HCJ 4769/95 *Ron Menachem v. The Minister of Transportation*, IsrSC
[38] HCJ 561/75 *Ashkenazi v. The Minister of Defense*, IsrSC 30(3) 309
[39] HCJ 4354/92 *Temple Mount Faithful v. The Prime Minister*, IsrSC 47(1) 37
[40] HCJ 8666/99 *Temple Mount Faithful Movement v. The Attorney-General*, IsrSC 54(1) 199
[41] HCJ 46/00 *Ayalon Jordan, Adv. v. The Prime Minister*, (unreported decision)
[42] HCJ 6057/99 *Victims of Terror Staff v. The Government of Israel* (unreported decision)
[43] HCJ 7307/98 *Pollack v. The Government of Israel* (unreported decision)
[44] HCJ 2455/94 "*B'tzedek*" *Organization v. The Government of Israel* (unreported decision)
[45] HCJ 4877/93 *Victims of Arab Terror v. State of Israel* (unreported decision)
[46] HCJ 65/51 *Jabotinsky v. The President of Israel* 5 801
[47] 3094/93 *Movement for Quality in Government in Israel v. State of Israel*, IsrSC 47(5) 404
[48] HCJ 194/93 *MK Gonen Segev v. Minister of Foreign Affairs*, IsrSC 49(5) 57
[49] HCJ 251/88 *Wajia Udeh v. The Head of the Jaljulia Local Council*, IsrSC 42(4) 837
[50] Dis.App. 4123/95 *Or v. State of Israel – Civil Service Commissioner*, IsrSC 49(5) 184

[51] HCJ 7367/97 *The Movement for Quality Government in Israel v. Attorney-General*, IsrSC 52(4) 547
[52] CA 6763/98 *Ram Carmi v. State of Israel*, IsrSC 55(1) 418
[53] HCJ 531/79 *Likud Faction of Petah Tikva v. City Council of Petah Tikva*, IsrSC 34(2) 566
[54] HCJ 244/86 *Revivo v. The Head of the Ofakim Local Council*, IsrSC 42(3) 183
[55] CA 6983/94 *Shimon Pachima v. Michael Peretz*, IsrSC 51(5) 829
[56] HCJ 7805/00 *Roni Aloni v. Comptroller of the Jerusalem Municipality*, IsrSC 57(4) 577
[57] HCJ 3975/95 *Prof. Shmuel Caniel v. The Government of Israel*, IsrSC 53(5) 459
[58] HCJ 4566/90 *Dekel v. Minister of Finance*, IsrSC 45(1) 28
[59] HCJ 6673/01 *The Movement for Quality Government v. The Minister of Transportation*, IsrSC 56(1) 799
[60] HCJ 142/70 *Shapira v. Local Committee of Chamber of Advocates*, IsrSC 25(1) 325
[61] HCJ 2671/98 *Women's Lobby v. The Minister of Labor and Welfare*, IsrSC 52(3) 630
[62] HCJ 103/96 *Pinchas Cohen, Adv. v. The Attorney-General*, IsrSC 50(4) 309
[63] HCJ 7256/95 *Fishler v. The Inspector General of the Israel Police*, IsrSC 50(5) 1
[64] HCJ 2682/98 *Appel v. The State Attorney*, IsrSC 55(3) 134
[65] HCJ 4539/92 *Kablero v. The Attorney-General*, IsrSC 50(3) 50
[66] HCJ 442/71 *Lanski v. Minister of the Interior*, IsrSC 26(2) 337
[67] CA 5709/95 *Ben-Shlomo v. Director of The Value Added Tax Authority*, IsrSC 52(4) 241
[68] HCJ 164/97 *Kontram Ltd. v. Ministry of Finance*, IsrSC 52(1) 289
[69] HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications*, IsrSC 48(5) 412
[70] HCJ 1227/98 *Malevsky v. Minister of the Interior*, IsrSC 52(4) 690
[71] HCJ 932/99 *The Movement for Quality Government in Israel v. Chairman of the Committee for the Examination of Appointments*, IsrSC 53(3) 769
[72] HCJ 4668/01 *MK Yossi Sarid v. Prime Minister Ariel Sharon*, IsrSC 56(2) 265
[73] HCJ 5795/97 *MK Yossi Sarid v. Minister of Defense*, IsrSC 51(4) 799
[74] HCJ 1635/90 *Zersevsky v The Prime Minister*, IsrSC 45(1) 749
[75] HCJ 5364/94 *Velner v. Chairman of the Israeli Labor Party*, IsrSC 49(1) 758

[76] CA 4012/96 *Benny Shachaf Freights and Investments (1976) Ltd v. First International Bank of Israel*, IsrSC 55(1) 492
[77] CA 3602/97 *Income Tax and Property Tax Commissioner, Minister of Finance, State of Israel v. Daniel Shachar*, IsrSC 56(2) 297
[78] HCJ 7279/98 *MK Sarid v. The Government of Israel*, IsrSC 55(1) 740
[79] HCJ 595/89 *Shimon v. Appointee of Ministry of the Interior, Southern District*, IsrSC 44(1) 409
[80] HCJ 1715/97 *The Israel Association of Investment Managers v. The Minister of Finance*, IsrSC 51(4) 367
[81] HCJ 288/00 *Israel Union for Environmental Defense v. Minister of the Interior*, IsrSC 55(5) 673
[82] CrimA *State of Israel v. Zeguri*, IsrSC 56(4) 401
[83] CrimA 6251/94 *Ben-Ari v. State of Israel*, IsrSC 49(3) 45
[84] HCJ 3679/94 *National Association of Directors and Authorized Signatories of the First International Bank of Israel v. Tel Aviv-Jaffa District Labor Court*, IsrSC 49(1) 573
[85] HCJ 279/60 *Gil Theaters v. Ya'ari*, IsrSC 15 673
[86] HCJ 6499/99 *The National Religious Party v. Rabbi Shlomo Ben-Ezra*, IsrSC 53(5) 606
[87] CrimA 2831/95 *Elba v. The State of Israel*, IsrSC 50(5) 221
[88] HCJ 320/96 *Yael German v. The Municipal Council of Herzliya*, IsrSC 52(2) 222
[89] CrimApp 8087/95 *Za'ada v. The State of Israel*, IsrSC 50(2) 133
[90] HCJ 3132/92 *Mushlav v. The District Committee for Planning and Building, Northern District*, IsrSC 47(3) 741

United States Cases:
[91] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)
[92] *Rostker v. Goldberg*, 453 U.S. 57 (1981)
[93] *INS v. Chadha*, 462 U.S. 919 (1983)

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[94] Aharon Barak, *Interpretation in Law – Statutory Interpretation* (1995)
[95] I Itzchak Zamir, Administrative Authority (1996)
[96] Aharon Barak, *Interpretation in Law – Constitutional Interpretation* (1995)
[97] II Amnon Rubinstein, *Constitutional Law in the State of Israel* 687 (5th ed. 1997)

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[98] Aharon Barak, *Judicial Review of the Constitutionality of Law*, 3 Mishpat Umimshal 408 (1996)
[99] Aharon Barak, *Judicial Review of Regulations* , 21 HaPraklit 463 (1965)
[100] Itzchak Zamir, Law and Politics, *in* Klinghoffer, Public Law 209 (1993)
[101] Itzchak Zamir, *Political Appointments*, 20 Mishpatim 23 (1990)
[102] Avigdor Klagsbald, *Public Duty, 'Criminal Past' and Administrative Evidence*, 2 HaMishpat 93 (1995)
[103] Daphne Barak-Erez, *The High Court of Justice as Attorney-General*, 5(2) Plilim 219 (1997)
[104] Aharon Barak, *On Power* and *Values in Israel*, *in* I A Collection of Writings 382 (H. H. Cohen & Y. Zamir ed. 2000)
[105] Aharon Barak, *Conflict of Interest in the Performance of Office*, 10 Mishpatim 11 (1980)
[106] Itzchak Zamir, *Ethics in Politics*, 17 *Mishpatim* 255-58 (1988)

Foreign Books Cited:
[107] Glanville Williams, Criminal Law 22 (2d ed. 1961)

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[108] Babylonian Talmud, Tractate *Shabbat* 114A
[109] Maimonides, *Laws of the Sanhedrin*, 10:1
[110] Exodus 31:2, 35:30
[111] Babylonian Talmud, Tractate Berakhot 55a
[112] Shulkhan Arukh, Choshen Hamishpat, 3:4
[113] Arukh Hashulkhan, Choshen Hamishpat, 3:8
[114] Ribash, Responsa 271
[115] Rabbi A.Y. Kook, Be'er Eliyahu
[116] Babylonian Talmud, Tractate Sanhedrin 7b
[117] Maimonides, Laws of Temple Vessels, 4:21
[118] Maimonides Reponsa, Chapter 111
[119] Shulkhan Arukh, Chosen Hamishpat, 53:25
[120] Zaken Abraham Responsa, Yoreh Deah, 30

JUDGMENT

Justice E. Rivlin

1. This petition was submitted by the Movement for Quality Government in Israel. Petitioner seeks to prevent the appointment of respondent 3, Mr. Tzahi Hanegbi, to the office of Minister of Public Security. Petitioner's central assertion is that, because of his connection to four specific affairs, Hanegbi is unfit to serve in this capacity. The details of these affairs are described below.

The Facts and the Petition

2. The elections to the Sixteenth Knesset took place at the beginning of 2003. After the elections, respondent 1, in his capacity as Prime Minister, was charged by the President with the task of forming a new government. Respondent 1 decided to appoint respondent 3 as Minister of Public Security. Once the intentions of respondent 1 were made public, but before the new government had been sworn in, this petition was submitted. The petition asked that we order the Prime Minister not to appoint respondent 3. Petitioner further sought an interim order against this appointment.

The petition details several affairs in which respondent 3 was involved and which, it is asserted, make him unfit to serve as Minister of Public Security.

The first affair occurred in 1982. The affair culminated in the filing of an indictment against Hanegbi, who was subsequently convicted. At the time, Hanegbi was a student at the Hebrew University of Jerusalem and was involved in an altercation on campus. The Magistrate Court convicted Hanegbi of brawling in a public place, and imposed a suspended prison sentence and a fine.

The details of the second affair were described at length in HCJ 3846/91 *Pinchas Maoz v. The Attorney-General* [1], at 423. In 1982, Hanegbi, together with three others, filed a complaint with the police. The complaint alleged that several members of the Student Union and the International Israel Youth and Student Travel Company (ISTA) had carried out "the greatest fraud in the history of Israeli

aviation." After the police investigation, a number of people were criminally charged, including Pinchas Maoz, who had been serving as external legal advisor to ISTA. Maoz was subsequently acquitted by the Magistrate Court. Hanegbi had been a witness in the case and, according to the court's opinion, "factual truth was not always a guiding light" in his testimony. The court noted that "the witness did not provide precise answers and avoided topics that did not square with his version of the events." After this court case, Maoz and others attempted to have Hanegbi indicted for perjury, relaying misleading information, or presenting conflicting testimonies. The Attorney-General decided that the chance of conviction was too small to warrant an indictment. Similarly, this Court decided, "after a great deal of hesitation – literally by a hairsbreadth," that it would not intervene in the decision of the Attorney-General.

The third affair concerns Hanegbi's appointment of Roni Bar-On to the office of Attorney-General. At the time, Hanegbi was serving as Minister of Justice. It was alleged that Hanegbi had misled the Government and the Prime Minister about the opinion of the President of the Supreme Court regarding the appointment. The police recommended that Hanegbi be prosecuted for fraud and breach of trust. However, the Attorney-General decided to close the case for lack of evidence. A memorandum of the State Attorney's Office criticized Hanegbi's conduct and characterized it as "a deviation from acceptable standards of behavior." The State Attorney's Office, however, did not believe that Hanegbi's actions amounted to a criminal offense. For a more extensive treatment of this affair and its ramifications, *see* HCJ 2534/97 *MK Yona Yahav v. The State Attorney's Office* [2], at 1; HCJ 2533/97 *The Movement for Quality Government in Israel v. The Government of Israel* [hereinafter – *Bar-On* [3]], at 46; HCJ 2624/97, 2827/97, and 2830/97 *Yedid Ronal, Adv. v. The Government of Israel* [4], at 71.

At this point it is important to mention that, in *Bar-On* [3], petitioner requested that Hanegbi be removed from his position as Minister of Justice. That petition made claims that are very similar to those asserted here. That petition was rejected, and we shall expand

on the significance of that case and its ramifications for the current petition.

Finally, we come to the fourth affair, and the most important. It constitutes the chief addition to the facts already laid out in *Bar-On* [3]. The affair involved the actions of Hanegbi who, at the time, was serving as the head of the "Derech Tzleha" association. As in the previous affairs, here, too, a decision was made not to indict Hanegbi. The Attorney-General, however, saw fit to publish a "public report" on the issue detailing the findings of the police investigation. It described how, in 1994, Hanegbi and MK Avraham Burg prepared a private bill in the Knesset, entitled "The National Campaign Against Traffic Accidents Bill." The purpose of the draft legislation was to improve road safety and, to further this goal, government body would be established to spearhead the campaign against traffic accidents. The bill was placed before the Knesset and passed a preliminary reading. It was then transferred to the Knesset Finance Committee for consideration. The Committee established a subcommittee, with Hanegbi at its head, with the task of preparing the bill for the next stages of legislation.

While he worked for the enactment of the National Campaign Against Traffic Accidents Bill, Hanegbi founded a non-profit organization called Derech Tzleha. At first he served as chairman of the organization, and later he became its director-general. He received a salary and benefits for his work. According to the police findings detailed in the report, "MK Hanegbi received from the organization, directly or indirectly, the vast majority of the sum [raised by the organization – amounting to approximately NIS 375,000] in the form of his salary, a company car, reimbursement of expenses, a cellular phone, as well as in the form of a notice of support which was published three days before the Likud primaries." After his appointment to the office of Health Minister in 1996, Hanegbi resigned as director-general of the organization.

Hanegbi was examined by the Knesset Ethics Committee regarding his involvement in the Derech Tzleha affair. The

Committee concluded that Hanegbi had placed himself in a situation involving a conflict of interests, and had benefited from work performed outside of his work at the Knesset. Hanegbi was censured by the Committee and his pay docked for two months.

3. Hanegbi's actions in the Derech Tzleha affair were fully investigated by the police. The police recommended prosecuting Hanegbi for accepting a bribe, fraud, breach of trust, and other offenses. Even the State Attorney's Office held initially that, while Hanegbi could not be indicted for accepting a bribe, he could be indicted for fraud and breach of trust, fraud and breach of trust by a corporation, obtaining by fraud, and falsifying corporate documents. A hearing was held and, following a chain of events not relevant to this case, the Attorney-General decided that, lack of evidence, and in line with the opinion of the State Attorney, no indictment could be filed against Hanegbi. In the report, the Attorney-General summarized his opinion:

> In summary, we believed that the circumstances warranted an investigation, and we even considered filing an indictment. However, there must be a reasonable likelihood of a conviction, and this requirement, with the final preparation of the file, was ultimately not satisfied.

The Attorney-General became aware of Hanegbi's possible appointment to the post of Minister of Public Security. At this point, he presented his opinion to the Prime Minister:

> Although according to statute and judicial precedent there appears to be no legal impediment to the appointment, the appointment itself is *prima facie* problematic from a civic perspective.

Despite the Attorney-General's counsel, the Prime Minister decided to follow through with Hanegbi's appointment to the office of Minister of Public Security. It should be noted that, during his previous term as Prime Minister, after the elections to the Fifteenth

Knesset, Sharon had resolved not to appoint Hanegbi to serve as a minister in any office responsible for law enforcement. This was in accordance with "advice mainly from a civic perspective," which he had received from the Attorney-General.

4. Petitioner asserts that, in all of the above affairs, as well as in other situations of lesser significance, Hanegbi fell afoul of the law and of ethical principles. It is true that, aside from the brawling affair in 1982, Hanegbi was never actually served with an indictment. However, petitioner believes that Hanegbi's involvement in each of the above affairs, certainly when these are viewed in aggregate, makes the Prime Minister's decision to appoint him to the office of Minister of Public Security unreasonable in the extreme. In this context, it is necessary to give added weight to the decision of the Ethics Committee regarding Hanegbi and the reports published by the State Attorney's Office and the Attorney-General regarding the role Hanegbi played in the Bar-On and Derech Tzleha affairs. Petitioner argues that the facts that emerge from all the above affairs establish grounds for intervening in the decision of the Prime Minister in keeping with the "rule of administrative evidence." In relation to Hanegbi's appointment to the position of Minister of Public Security, the provisions of criminal law are not the only parameter. Petitioner further argues that Hanegbi's appointment would damage the effectiveness of the police and its public image.

Petitioner further argued that Hanegbi was investigated on more than one occasion by the police, who recommended that he be served with an indictment. This being the case, petitioner alleges, it is reasonable to expect that "innumerable situations involving a conflict of interest will arise should Hanegbi serve in that capacity." In particular, a conflict of interest would undoubtedly arise in considerations of promotion for any police officers responsible for investigating him in the past, or when setting budgets for various divisions of the police.

5. Respondents, by contrast, are of the opinion that there are no grounds for interfering with the Prime Minister's decision to appoint

Hanegbi to the office of Minister of Public Security. The Prime Minister acted within the parameters of his authority, and the affairs raised by petitioner do not establish that his decision was unreasonable in the extreme. The Prime Minister, they point out, diligently weighed all of the pertinent issues. He considered Hanegbi's professional abilities, his vast experience, his suitability for the job, as well as the view of the Attorney-General concerning the appointment. The Prime Minister also took into account parliamentary and political factors relating to the formation of the government. Respondents argued that the balance struck by the Prime Minister among these various considerations does not deviate from the decisions of this Court.

Respondents emphasize the wide "range of reasonableness" afforded by the courts to a decision of the Prime Minister in a case of this sort. They point out that, as opposed to earlier cases where this Court did order the Prime Minister to remove a minister or deputy-minister from office, in our case no indictment has been filed against Hanegbi since 1982. With regards to the Derech Tzleha affair, as with the other affairs in *Bar-On* [3], the case was closed for lack of evidence. Therefore, Respondent 3 is presumed innocent until proven guilty. In any event, there is no justification for arriving at a conclusion different than the one reached by the Court in *Bar-On* [3]. This is especially pertinent in light of the fact that the current version of Basic Law: The Government, as opposed to the previous version of that law, contains an explicit provision for terminating the office of a minister convicted of an offense involving moral turpitude. The respondents further point out that the decision to appoint Hanegbi as Minister of Public Security was approved by a vote of confidence in the Knesset.

Regarding the petitioner's concerns that the appointment will raise a conflict of interest concerning the police officers who investigated him, Hanegbi stresses that he bears no grudge against those officers. Respondents maintain that there are no conflicting interests whatsoever. It cannot be claimed that the hypothetical fear of negative sentiments between Hanegbi and his investigators

warrants intervention in a decision of the Prime Minister. Furthermore, Israel Police is an autonomous body, and the decisions of the minister regarding the appointment of senior officers are subject to the rules of administrative law.

The petition asks us to order the Prime Minister not to appoint respondent 3 to the office of Minister of Public Security. Petitioner requested an injunction to prevent Hanegbi from serving in this capacity. This was rejected. The petition concentrates on his eligibility for such appointment. However, since Hanegbi has been serving in this function for some time now, the petition actually focuses on whether he should continue to hold the office. There is a difference between appointment and termination of office. However, this difference is in fact irrelevant when examining the Prime Minister's discretion, as we shall explain. *See also* HCJ 4267/93, 4287/93 and 4634/93 *Amitai – Citizens for Sound Administration* and *Moral Integrity v. Yitzhak Rabin, Prime Minister of Israel* [hereinafter – *Pinhasi*], [5] at 469.

On March 10, 2003, a panel of three judges heard the parties' arguments and an *order nisi* was issued against the Prime Minister. On August 11, 2003 we decided to expand the panel hearing the case, and final arguments were heard by the expanded bench on August 26, 2003.

In my opinion, the petition should be denied.

The Normative Framework

6. The Government is composed of a Prime Minister and other ministers – section 5(a) of Basic Law: The Government. Section 7(a) of the Basic Law sets down that:

> When a new Government has to be constituted, the President of the State shall, after consultation with representatives of party groups in the Knesset, assign the task of forming a Government to a Knesset Member who has notified him that he is prepared to accept the task.

Once the Government has been formed, it presents itself to the Knesset, announces the basic lines of its policy, its composition and the distribution of functions among the ministers, and asks for a vote of confidence from the Knesset. After the vote of confidence, the Government has been formed, and the ministers assume office. Section 13(d) of the Basic Law. The Knesset Member who formed the Government becomes its head. Section 13(c) of the Basic Law.

We see from here that the task of forming the Government is assigned by the President to the Knesset Member who is the designated Prime Minister. We further see that the Government is formed once the Knesset approves it.

The Basic Law adds that the Government may appoint an additional minister. The Government must notify the Knesset of this and, upon receiving the approval of the Knesset, the additional minister assumes office. Section 15 of the Basic Law. The Prime Minister is further authorized to remove a minister from his post, as stated in section 22(b) of the Basic Law:

> The Prime Minister may, after notifying the Government of his intention to do so, remove a minister from his post.

7. Section 6 of the Basic Law lists a number of criteria for ministers to be considered fit to hold office. These include:

> (c)(1) A person who was convicted of an offense and sentenced to imprisonment, and seven years have not yet passed since the day on which he finished serving his term of imprisonment or since the handing down of his sentence – whichever was later, shall not be appointed minister, unless the Chairman of the Central Elections Committee rules that the circumstances of the offense do not involve moral turpitude.
>
> (2) The Chairman of the Central Elections Committee shall

> not so rule if a court has determined that the offense involved moral turpitude.

Likewise, we find in section 23(b):

> Should a minister be convicted by a court, it shall state in its verdict whether the offense involves moral turpitude; should the court so state, the minister's tenure shall cease on the date of such verdict.

We find a similar provision for the service of a deputy-minister in section 27 of the Basic Law. It should be noted that section 16(b) of the 1992 version of the Basic Law: The Government, provided that:

> A person convicted of an offense involving moral turpitude, and ten years not having passed since the date on which he finished serving his period of imprisonment, may not be appointed as a minister.

However, the 1992 Basic Law contained no provision requiring the removal of a minister convicted of an offense involving moral turpitude.

A careful examination of the provisions of the Basic Law reveals, therefore, that the Prime Minister is given the principal authority in the formation of the Government. He has the responsibility of choosing the Government's ministers, of adding ministers and removing them. Nonetheless, the ministers assume their offices only after an expression of confidence in the Government. A conviction may prevent the appointment of a minister, or his continuation in office, as per sections 6(c) and 23(b) of the Basic Law, as detailed above.

Returning to the case at hand, no one disputes that none of the criteria that would render Hanegbi unfit for office, set out in sections 6(c) and 23(b), have been met. These criteria, as we have seen, deal

with a person who has been convicted of a crime. Hanegbi, however, was never convicted – or even indicted – except for the brawling affair in 1982. This affair does not constitute an impediment to assuming office according to the Basic Law. As such no issue of authority or "statutory eligibility" is at stake here. The only issue is Prime Ministerial discretion: Was there a flaw in the Prime Minister's decision to appoint Hanegbi as Minister of Public Security which warrants the intervention of this Court? On this question this Court has previously ruled:

> We must distinguish between questions of competence, (or authority), and questions of discretion. The absence of an express statutory provision regarding the fitness of someone with a criminal past establishes the candidate's *competence*. However, it does not preclude the possibility of considering his past within the framework of exercising the administrative discretion given to the authority making the appointment. Indeed, the criminal past of a candidate for public office is a relevant consideration, which the authority making the appointment is entitled and even obligated to take into account before making the appointment.

See HCJ 6163/92 *Eisenberg v. Minister of Construction & Housing* [6], at 256-57.

8. As such, even though there is no legal impediment to the appointment of Hanegbi as Minister of Public Security, this alone does not render superfluous the need to examine the Prime Minister's discretion to choose Hanegbi. "Fitness is one issue; discretion quite another." *See Pinhasi* [5], at 457; *see also* HCJ 727/88 *Awad v. The Minister of Religious Affairs* [7], at 491, and HCJ 5167/00 *Weiss v. The Prime Minister of Israel* [8], at 477. Nevertheless, it is appropriate to note that the criteria for eligibility laid down by the legislature are not irrelevant to the discretion granted to the Prime Minister. The more we depart from the statutory criteria, the more difficult it will be to find justification for interfering with the Prime

Minister's discretion. Indeed, the legislature has established that it is specifically the *conviction* of a minister of an offense involving moral turpitude which renders him unfit to continue in office. It would not be a simple matter, therefore, for the Court to rule that the minister should also be rendered unfit in situations where he was *acquitted* of wrongdoing, or when it was even decided not to *indict* him. We shall return to this point later.

The petition calls for an examination of the Prime Minister's judgment in appointing Hanegbi to the position of Minister of Public Security. However, before undertaking this examination, we must first delineate the criteria for judicial review of such decisions.

Judicial Review

9. All organs of government are subject to judicial review. *See* HCJ 325/85 *MK Muhammad Miari v. Knesset Speaker Shlomo Hillel* [9], at 127-28. The power of judicial review over decisions of the Knesset, the Government, and the other governing institutions is the cornerstone of a democracy which upholds the rule of law. It reflects the formal rule of law, meaning that all of the organs of government are subordinate to the law. It also means that everything is subject to judicial review, which is intended to guarantee that the law is kept. *See* HCJ 1843/93 *Pinhasi v. Knesset Israel* [10], at 698. The law governs all matters. "The reach of Government is high, but the law reaches higher than all." 428/86 *Barzilai v. The Government of Israel* [11], at 585. The rule of law prevails, not the rule of man. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) [91]. The rule of law requires us to balance the diverse values, principles, and interests of a democratic society. The government is empowered to exercise its discretion in a manner that ensures a just balance of the appropriate considerations. *See Eisenberg* [6].

This perception of the purpose of judicial review is reflected in the ideal relationship between the three branches of government. Each branch is separate and enjoys freedom to fulfill its role. However, each branch is also framed by – and subordinate to – the

constitution and the law.

> The function of the judicial branch is to ensure that none of the other branches overstep their bounds, and that they act in accordance with the normative provisions by which they are bound.

See HCJ 1843/93, [10] at 699; HCJ 73/85 *Kach Faction v.The Knesset Speaker* [12], at 141.

> The doctrine of the separation of powers does not imply that each branch may act as it wishes. Separation of powers means that each branch is independent in dealing with its own affairs, so long as it operates within the bounds of its authority.

Aharon Barak, *Judicial Review of the Constitutionality of Law*, 3 Mishpat Umimshal 408 (1996) [98]. *See also* II Aharon Barak, Interpretation in Law: Constitutional Interpretation 256-57 (1993) [96]; HCJ 306/81 *Platto-Sharon v. Knesset Committee* [13], at 141. The Court's power to review other government bodies is a corollary of the fact that it is the branch responsible for the interpretation of the law, see *Kach* [12], at 152.

All of these principles – the rule of law, the separation of powers, the checks and balances that accompany this separation, the power of judicial review, and the other mechanisms of democracy – form the central pillars of a democratic society. They constitute the essential conditions for the preservation of human rights. They form the nucleus of any democratic society that strives to promote human welfare.

In light of the above, it has been stated on more than one occasion that this Court is charged with overseeing the legality and reasonableness of the activities of the State. *See* HCJ 403/71 *Alcourdi v. The National Labor Court* [14], at 72. The Court's powers of judgment and judicial review of government authorities constitute

"an integral part of a truly democratic society, and anyone undermining this is liable to topple one of the pillars of the state." HCJ 222/68 *Chugim Le'umiyim Agudah Reshuma v. Police Minister* [15], at 172. This is because:

> Absolutism, however benevolent, is the enemy of freedom. We are free people, and one who is born free or knows freedom will subjugate himself neither to another person nor to an absolute opinion.

See HCJ 758/88 *Kendel v. The Minister of Internal Affairs* [16], at 528 (Cheshin, J).

10. At the same time, care must be taken to distinguish between the power of the Court to exercise judicial review over other branches of the government – a power which, as stated above, is extremely broad in nature – and the Court's readiness to interfere with the decisions of the other branches within the spheres of their authority. The question of the actual existence of judicial review is separate from the issue of when judicial review should be exercised. *See Miari* [9], at 128; HCJ 9070/00 *MK Livnat v. Chairman of the Constitution, Law and Justice Committee* [17], at 809. This Court has adopted different principles in a variety of cases pertaining to the judicial review of actions and decisions of government authorities. The common denominator among these principles is an attempt to exhibit judicial self-restraint. Among these principles we may specify the "range of reasonableness," the "presumption of suitability," the "presumption of lawfulness," the principle that the Court will not overrule the discretion of one branch of government, and the limits set by administrative law. These principles are not mere lip service to the limitations on judicial review. Rather, they are an indivisible and necessary part of it. Their application depends on the type of body under review and the power that has been exercised.

11. To be sure, the decision whether to exercise judicial review will depend on an examination of the authority being reviewed. *See Livnat* [17], at 809. To this end one must take into account the status

of the body in question, its position in the system of government, the extent and nature of the powers granted to it, whether the body was elected or appointed, and other similar factors. Thus, for example, when the Court proceeds to review decisions of the Knesset, it takes into account the special status of this body, and acts with the required caution and self-restraint necessitated by this status. After all, the Knesset is the elected body of the State. It is elected by the citizens of the State, and it has the power to legislate laws and enact a constitution for the State. *See* HCJ 971/99 *The Movement for Quality Government in Israel v. The Knesset Committee* [18], at 548; and HCJ 652/81 *MK Yossi Sarid v. Knesset Speaker Menachem Svidor* [19], at 197.

> The special status of the Knesset, as set forth in the Basic Laws and in the structure of our democracy, requires that the Court exercise its discretion in performing judicial review of its actions with caution and self-restraint.

See Livnat [17], at 809. *See also* 2136/95 *Gutman v. Knesset Speaker Prof. Shevach Weiss* [20], at 851. Similar sentiments have been voiced regarding decisions of the Government:

> The status of the Government as the executive branch of the State is special, for it executes the will of the State, as provided in section 1 of Basic Law: The Government.

See HCJ 3872/93 *Mitrael Ltd. v. The Prime Minister and Minister of Religious Affairs* [21], at 497.

12. The criteria for the exercise of judicial review are derived not only from the identity of the body subject to review. They are also derived from the character of the *decision* under scrutiny. *See Livnat* [17], at 809. The nature of the power which was or was not exercised is especially significant for setting the limits of judicial review. *See Sarid* [19], at 201. In one case, Justice Zamir expanded on this:

> The question of whether an administrative decision is

> unreasonable in the extreme depends on the limits of the range of reasonableness. This delineates the extent to which the administrative authority may employ its discretion for the purpose of making decisions. The range of reasonableness of every administrative authority depends on the nature of its power, the language and purpose of its authorizing law, the identity of the authorized body, the issue addressed by the power, and whether the power is exercised mainly on the basis of factual considerations, policy considerations, or professional criteria, such as medical or engineering evaluations. The range of reasonableness varies according to these factors: it may widen or narrow depending on the circumstances.

Bar-On [3], at 57. Similar sentiments were expressed by Vice-President (then Justice) Or:

> The range of reasonableness delineates the area within which the decisions of an authority are reasonable, meaning that there are no grounds for the intervention of the Court. Yet this area is not uniform in all cases. It may change in accordance with the circumstances of the specific case. It is derived from the nature of the subject being judged. It is derived from the nature of the relevant values in any given matter.

See Yahav [2], at 28.

In other words, the "range of reasonableness" is influenced by the "bounds of deference." Reasonableness is a *normative* concept. It may be defined as the identification of the relevant considerations and the balance which is struck between these considerations according to their weight. *See* HCJ 935/89 *Uri Ganor, Adv. v. Attorney-General* [22], at 513. When reviewing an act of the executive branch, the Court determines whether a reasonable authority would have been permitted to act in a similar manner. Often

enough there is more than one decision which a reasonable authority could make. In these circumstances, the authority may act within the "range of reasonableness." Any decision that comes within the range of reasonableness will not be subject to the Court's intervention. The Court may only intervene in those decisions which deviate in an extreme manner from the range of reasonableness. *Ganor* [22], at 514.

Deference, by contrast, is an *institutional* concept. Deference means that, in examining decisions of other authorities acting within the boundaries of their authority, the Court will not evaluate the wisdom of these decisions or overrule their discretion. The Court does not regard itself as a supra-governing body. *See* 1843/93 [10], at 499; *see also Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) [92]; *INS v. Chadha*, 462 U.S. 919, 944 (1983) [93]. This Court recognizes the fact that:

> The Knesset and the Government were elected by the public. They were allocated certain areas within which they are empowered to act in the name of the public. The Court recognizes that these areas were allocated to the Knesset and the Government, and not to the Court. It is also cognizant of the fact that in these areas preference was given to the Knesset and the Government over the Court. The body entrusted with the promulgation of laws is the Knesset. Likewise, the authority to determine social and economic policies, as well as the authority to execute laws, was given to the Government. The underlying principles of democracy, among them the separation of powers, require that the Court not trespass the boundaries of the Knesset and the Government.

See I Itzchak Zamir, Administrative Authority 89-90 (1996) [95].

13. Judicial review thus requires striking a balance between respecting decisions of government authorities within their area of power and the need to preserve the rule of law and protect human

rights. This is one of the axioms of democracy. This balance is not static, but changes according to the character of the power under discussion.

> While the Court has determined that it holds the power to scrutinize the legality of the decisions of the Knesset, it has itself curtailed this power: It does not intervene in the decisions of the Knesset, even when these run contrary to law, unless they are capable of harming the fabric of parliamentary life or the foundations of the constitution. Likewise, the Court is generally reluctant to substitute its own discretion for the discretion of the Government or any other administrative authority. For the most part, the Court refrains from intervening in matters of policy. This includes not only foreign policy, but also social and economic policy. Only in extreme circumstances is the Court willing to invalidate administrative decisions due to a lack of reasonableness.

See [95], at 90. *See also* HCJ 4140/95 *Superpharm (Israel) Ltd. v. Customs and Excise Administration* [23], at 69.

Based on the above, this Court held, in HCJ 971/99 [18] that, in determining the character of judicial review, a thorough analysis of the act of government under review should be undertaken. In that judgment we dealt with the judicial review of Knesset decisions. We defined three broad categories of decisions: completed acts of legislation; intra-parliamentary processes; and quasi-judicial decisions. The Court held that, when dealing with quasi-judicial activity of the Knesset, its judicial review will be "ordinary." In such situations, the Knesset does not differ from any other quasi-judicial body. *See* HCJ 1843/93, [10] at 701; HCJ 652/81, [19] at 202; HCJ 620/85 *Miari v. Knesset Speaker Shlomo Hillel* [24], at 195. In quasi-judicial decisions, the Knesset is involved neither in "political" activity nor in its own internal legislative processes, and the need to preserve the basic fairness of the parliamentary process prevails.

The situation is different when we review intra-parliamentary processes of the Knesset – decisions affecting the Knesset's own internal guidelines and working procedures. Judicial review may be exercised here only with caution. A balance must be struck between the rule of law, which requires every political entity to respect the law, and the principle that the internal workings of the Knesset are its own affairs, that "belong to the legislative authority under the separation of powers doctrine." *See Sarid* [19], at 202-03. Therefore, the Court will intervene in such decisions only where significant harm is caused to the fabric of parliamentary life and the foundations of the constitution. HCJ 652/81 [19] at 204; HCJ 1843/93, [10], at 700.

In reviewing the constitutionality of a law passed by the Knesset, however, additional principles also come into play. Ordinary legislation must respect those human rights enshrined in the Basic Laws, and may not violate these except according to the guidelines of those Basic Laws. Legislation will be presumed to be constitutional; this is a consequence of the requirement not to blur the boundaries between the authorities. *See* CA 6821/93 *United Mizrahi Bank v. Migdal Agricultural Cooperative*, [25] at 574. This presumption of constitutionality, however, does not apply to the issue of whether a law that does infringe a constitutional right fulfills the requirements of the Limitations Clause. *See* Aharon Barak, *Interpretation in Law – Constitutional Interpretation* (1995) [96]. This Court must respect the law, as an expression of the will of the people. Therefore, before this Court strikes down a law, it must thoroughly scrutinize its language as well as its purpose. It must be stringent and must be completely convinced that the law is irreparably flawed. *See* HCJ 3434/96 *Dr. Menachem Hoffnung v. The Knesset Speaker* [26], at 57. This Court will only strike down a law in a clear case of significant damage to fundamental rights or values. *See* HCJ 7111/95 The *Center for Local Government v. The Knesset* [27], at 485.

Therefore, when reviewing the decisions of other government authorities, this Court takes into account the status and function of the body under review, along with the character of its decision.

These, in turn, influence how we exercise judicial review and the criteria that guide it. Our statements in HCJ 971/99 [18] regarding the Knesset and its committees can also be applied to decisions of the executive branch and the Prime Minister.

14. *Judicial Review of Decisions of the Government and the Prime Minister*

> Any government is subject to judicial review… Therefore the Court must ask itself – when reviewing the reasonableness and proportionality of the government's decisions – whether the decision is one that a reasonable government would be permitted to make. The Court should not ask itself what decision it would have made had it been in the government's place.

See Weiss [8], at 470.

We review decisions of the government and the Prime Minister, just as we review decisions of any other administrative body.

> The government's discretion, like the discretion of any minister within the government or any other authority, is constrained by legal guidelines, and the Court is charged with upholding these guidelines. Among other things, the government must exercise its authority based on relevant considerations, not on external factors. These must fall within the range of reasonableness and proportionality.

Id, at 477-78. Any authority may at some point make a decision which is not reasonable or is not in line with administrative law. The government is no exception. *See* CA 492/73 *Schpeizer v. Israeli Sports Betting Council* [28], at 22, 26.

Much authority is vested in the hands of the government. The exercise of its powers is examined by the Court, pursuant to the principles of administrative and public law. As with the legislature, here too the extent of our review depends both on the status of the

body under review as well as on the character of the decision being scrutinized.

With regard to the status of the body under review: This Court must be mindful of the status of the government. This is especially true when speaking of the "core" meaning of the term "government" – "government in the sense of 'Cabinet,' or group of ministers; the body that is responsible for defining the policy of the executive branch." *See* II Amnon Rubinstein, *Constitutional Law in the State of Israel* 687 (5th ed. 1997) [97]. The government is the executive arm of the State. *See* section 1 of Basic Law: The Government. In examining the discretion of the government, the Prime Minister, and other ministers, this Court must consider their status at the highest tier of the executive branch. *See Mitrael* [21], at 497; HCJ 162/72 *Dr. Kinross v. The State of Israel* [29], at 238. Similarly, this Court must delve deeply into the nature of the action or decision under judicial review. The bounds of the "range of reasonableness" regarding decisions of the government or any of its members widen or narrow depending on the type of the power exercised. See APP 7440/97, LCA 6172 *State of Israel v. Golan* [30], at 17-18. Indeed, at the outset of any judicial review of decisions or actions of the government, this Court adjusts its sights according to the act. Hence, in certain contexts, the power of judicial review is exercised with great caution.

Thus, for example, all governmental acts enjoy a presumption of legality, *see* RAP 1088/86 *Mahmud v. Local Council for the Planning and Construction of the Eastern Galilee* [31], at 417. This assumption applies with even greater force to regulations. *See* HCJ 98/54 *Lazerovitz v. Food Inspector, Jerusalem* [32], at 48; *compare* Aharon Barak, *Judicial Review of Regulations* , 21 HaPraklit 463 (1965) [99]. The courts have developed different principles for review.

> The purpose of these principles, at the heart of judicial policy, is to protect the constitutional standards laid down by an administrative authority. Their purpose is also to

> protect the expectations of the general public which created these standards.

See HCJ 4769/90 *Zidan v. The Minister of Labor and Social – Welfare* [33], at 171-2.

The Court will not rush to strike down regulations as unreasonable, and will not usurp the place of another authority. Therefore, this Court will strike down regulations only if they are found to be totally unreasonable. *Id. See also* CA 184/80 *Eigler v. Magen Insurance Company* [34], at 523; *Kinross* [29].

On another level, when this Court examines the working methods of the government and its committees, it must act similar to when it reviews the Knesset's intra-parliamentary processes. Regarding the working methods of the government, see section 31(e) and (f) of the Basic Law. *See also* Rubinstein, [99] at 720-24. This being an internal matter of the government, and in light of the political implications that the issue may have, this Court only exercises judicial review with the utmost caution.

15. Such caution is also employed when dealing with basic matters of policy. The Court is not accustomed to intervening in "patently political matters." *See* HCJ 3687/00 *Ashkenazi v. Prime Minister Ehud Barak* [35], at 1040. The Court is not a part of the government, and it will not manage its affairs. *See* HCJ 6029/99 *Jonathan Pollard v. Prime Minister and Defense Minister Ehud Barak* [36], at 241. This is especially true concerning the power of the government to manage foreign policy and the security of the State.

> The strength of the government's authority, and the nature of the issue at hand – foreign relations and security, war and peace – imply that the judiciary must grant the government wide latitude in such areas. Within that range the Court will not substitute the government's discretion with its own.

See Weiss [8], at 471-72.

With respect to decisions on political matters, or decisions pertaining to economic policy, the Court will intervene only in very exceptional circumstances. For the most part it will leave these matters to the political arena.

> The choice between different policies is a matter for the government, and policy is clearly the Knesset's domain. A choice which falls within the range of reasonableness is not a matter for the Court .

See Weiss [8]. Therefore,

> The Court will not instruct the Prime Minister or the members of his government to adopt a policy of privatization or nationalization. A matter that lies within the government's power is a matter for the government and its ministers to decide, not for the Court.

Id. See HCJ 4769/95 *Ron Menachem v. The Minister of Transportation* [37], at 235; HCJ 561/75 *Ashkenazi v. The Minister of Defense* [38], at 309; HCJ 4354/92 *Temple Mount Faithful v. The Prime Minister* [39], at 37; HCJ 8666/99 *Temple Mount Faithful Movement v. The Attorney-General* [40], at 199; HCJ 46/00 *Ayalon Jordan, Adv. v. The Prime Minister* [41], at 5; HCJ 6057/99 *Victims of Terror Staff v. The Government of Israel* [42], at 284; HCJ 7307/98 *Pollack v. The Government of Israel* [43], at 424; HCJ 2455/94 "*B'tzedek*" *Organization v. The Government of Israel* [44], at 292; HCJ 4877/93 *Victims of Arab Terror v. State of Israel* [45], at 257; Itzchak Zamir, "Law and Politics," in Klinghoffer's work on Public Law 209 (1993) [100].

16. This brings us to another matter, where this Court has only limited powers of intervention. I refer to the formation of a government. This includes the building of a coalition, the appointment of ministers and deputy-ministers, the addition and removal of ministers, the distribution of tasks among the ministers,

the transfer of power from one minister to another, the consolidation, division, termination and formation of ministries, and the transfer of responsibilities from one ministry to another. *See* section 31 of the Basic Law. *Compare* HCJ 65/51 *Jabotinsky v. The President of Israel* [46], at 814 (Smoira, J.). We will focus on one of these powers – the power of the Prime Minister to choose ministers and assign them roles.

Judicial Review of Decisions Relating to the Formation of the Government

17. The discretion of the Prime Minister regarding the appointment of a minister is certainly subject to the review of this Court. This applies to any kind of appointment. In terms of the fundamental power of judicial review, the selection of a minister is no different from any decision made by the Prime Minister, or any other minister or public authority. All these decisions are examined in light of the principles of administrative law. It should be noted that:

> Not only the exercise of authority in unreasonable circumstances, but also the failure to exercise a discretionary power due to unreasonable considerations, can lead to the conclusion that the decision is invalid.

See 3094/93 *Movement for Quality in Government in Israel v. State of Israel* [hereinafter: *Deri* [47]], at 419-20. Therefore, both the Prime Minister's decision to appoint a person and his decision not to remove one from office are subject to the accepted standards of reasonableness, integrity, proportionality, good faith, and the absence of arbitrariness or discrimination.

The importance of judicial review in this context stems from the fact that the Prime Minister's decision that a particular individual shall serve in a particular position, or that one person shall replace another, may have a large influence both on the functioning of a public authority and the public's confidence in that authority. With respect to the latter, it has already been held that:

> The key to the existence of a public service worthy of the title is the public's confidence in its integrity… Public confidence is the backbone of public authorities, and it enables them to fulfill their function.

See Eisenberg [6], at 261 (Barak, P.); *see also* Itzchak Zamir, *Political Appointments*, 20 Mishpatim 23 (1990) [101]. It was therefore held that:

> The appointment of a person with a criminal past – especially a serious criminal past, such as a person who committed an offense involving moral turpitude – harms the essential interests of the public service. It undermines its proper functioning. It undermines the moral and personal authority of the office holder and his ability to convince and lead. It undermines the confidence that the general public has for the organs of government.

See Eisenberg [6], at 261. It is therefore clear that a person's criminal past is an important consideration concerning his suitability for public office. *Eisenberg* [6] addressed the government's decision to appoint Yosef Ginosar as director-general of the Ministry of Construction & Housing, despite his involvement in the "Bus 300" and Nafso affairs. The judgment referred to the trustee status of public authorities, and their duty to consider the criminal past of a potential public servant.

> A public authority is a trustee and it has a duty to consider the criminal past of a candidate before making an appointment. The appointment of a public servant with a criminal past affects the functioning of a public authority and the attitude of the public to it. It has both direct and indirect ramifications on the public's confidence in the authority. The authority making the appointment must take these considerations into account … A public authority does not run like a business, and it has a duty of trust to the public. It may employ workers with a criminal past, and

> the consideration of rehabilitating the criminal should be taken into account. Nonetheless, it is not the only consideration. The public authority must review an intricate and complex array of considerations, including the consideration relating to the effect of the appointment on the civil service and the public's confidence in it.

Id. at 258 (Barak, P). In another case, which dealt with the appointment of Itamar Rabinovitz as Israeli ambassador to the United States, the Court ruled:

> A criminal past does not disqualify the candidate. It merely influences the decision of the appointing authority. *See* HCJ 727/88 *Awad v. Minister of Religious Affairs* [7], at 491. When exercising its discretion, the appointing authority – the Prime Minister in the present case – must take into account a host of factors. Assuming that the candidate is fit for the post in all other respects, the appointing authority must also give weight to the criminal past of the candidate.
>
> The weight given to a criminal past is not set in stone. It varies according to the nature of the criminal past and its circumstances on the one hand, and the nature of the office and its essential objectives on the other. When the different considerations point in different directions, balance must be sought according to the basic axioms of Israeli law… Sometimes the case is a borderline one. The criminal past is weighed against all the other considerations. In such cases, any decision made by the appointing authority is legitimate, and this Court will not substitute the discretion of the public authority with its own.

See HCJ 194/93 *MK Gonen Segev v. Minister of Foreign Affairs* [48], at 61-62.

18. The same applies when considering the candidacy of an publicly elected official for the office of minister or deputy-minister.

There, too, the Prime Minister is entitled – and at times even required – to take into account the candidate's involvement in criminal proceedings. This was noted in *Pinhasi* [5]:

> We accept that an elected public official is not the same as a civil servant. The elected official is chosen by the people and is subject to their evaluation. The civil servant is chosen by the people's representatives and is subject to their evaluation. However, this does not mean that the elected official is accountable to the voter alone and is not bound by the law. The opinion of the voters does not influence the evaluation of the courts, and it is unable to change this evaluation. The very fact that he is chosen by the people requires him to act in a more exacting and ethical manner than a 'regular' civil servant. Someone elected by the people must be a model citizen. He must be accountable to the public and deserving of the trust the people place in him. Therefore, when a government authority is granted the power to terminate an office, it must exercise this power where the official undermines the public's trust in the authority. This applies whether the official is elected – as in a Member of Knesset serving as a deputy-minister – or is a public servant who may be dismissed by a minister.

Id. at 470 (Barak, P). Therefore:

> The differentiation between an elected official and a public servant, though important, does not grant the elected official immunity against the termination of his tenure if he is suspected of committing serious crimes.

Id. at 472. The efficient functioning of the government, the integrity of its members, and the confidence of the public in them, are all cornerstones of Israel's system of governance.

> In an enlightened democratic society, public officials, who are elected by the people and enjoy the confidence of the

> people, are required to conform to a high standard of ethical behavior – both on the personal and public planes – to enable them to continue to serve in office.

See HCJ 251/88 *Wajia Udeh v. The Head of the Jaljulia Local Council* [49], at 839. These fundamental concepts also received expression in the words of President Shamgar, regarding the objectives of the version of the Basic Law: The Government which was current at that time, which granted the Prime Minister the power to remove a minister from office.

> The provisions of the said law are also intended to facilitate a proper response – through removal from office – to a serious affair in which the minister was involved. This applies when the incident, being an act or a failure to act, has ramifications for the status of the government or the public's perception of it. It also applies if the affair undermines the government's ability to lead and serve as an example, or its ability to instill fitting modes of conduct. Most importantly, the provisions apply when the affair has ramifications for the public's trust in the system of governance and law, its values, and the duties which the average citizen must fulfill as a result.

See Deri [47], at 404.

The powers granted to the Prime Minister to appoint and dismiss ministers thus serve to improve the government's image and functioning, and public confidence in it. A radical deviation from the range of reasonableness in the exercise or non-exercise of these powers constitutes grounds for judicial intervention.

19. There is no doubt that the range of reasonableness afforded to Prime Minister when determining the composition of his government is very wide. This is due both to the status of the Prime Minister as head of the executive branch and the nature of the power with which we are dealing. The wide leeway afforded to the Prime Minister in this regard is a direct result of the lack of legal principles which are

effective tools in the administration of the executive branches in the modern state.

The power of the Prime Minister to determine the composition of his government is a:

> [S]pecial type of power, due to both the Prime Minister's role in the formation of the government and to the political character of the government. It encompasses a vast array of considerations and spans a wide range of reasonableness.

Bar-On [3] at 58 (Zamir, J.). After all, who could be better placed than the Prime Minister to divide up the appointments in the government he is forming? Who other than the Prime Minister could take into account all the delicate balances and differing needs of forming a government? Who other than the Prime Minister could weigh all the parliamentary, political, and factional considerations which are an inextricable part of the process? On the last question, it has been remarked:

> Parliamentary and political considerations may be legitimate under certain circumstances, though they must be examined as part of a proper balance of the other considerations.

Deri [47], at 423 (Shamgar, P). To these words, Justice Levin added:

> When the Prime Minister is required to exercise his discretion [regarding the dismissal of a minister – E.R.], he may consider parliamentary and political aspects. As stated above, the function of a minister is both political and administrative. I consider it natural and self-evident that the Prime Minister will seek to preserve his government from disintegration. For the sake of this vital aim he may, in an appropriate case, overlook 'deviations' in the conduct of his ministers, such as outbursts against the binding decisions of the government and even antagonism towards such decisions. These things are a function of politics

> whose credibility is examined by the Knesset and the voter.

Id. at 427. In the same case it was noted:

> As distinct from civil servants, who are subject to the State Service Law (Appointments), 1959, ministers and deputy-ministers are not appointed solely on the basis of their abilities, talents and personal qualities. Rather, party and coalition interests are at the basis of these appointments. The structure of public life is not weakened by the appointment of a minister or deputy-minister who is not endowed with especially superior character traits, or who is not appropriate for the position.

Id. at 428 (Goldberg, J). In a similar vein:

> The discretion granted in the Basic Law: The Government regarding the dismissal of a deputy-minister is extremely wide. Among other considerations, the authority holder is permitted, and even obligated, to consider the deputy-minister's performance and success in the job. "Political" considerations, which may be invalid in other contexts, are appropriate reasons for dismissing a deputy-minister. The need to form a coalition and to guarantee the continuing confidence of the Knesset is certainly a pertinent consideration.

See Pinhasi [5], at 463 (Barak, P).

20. The Prime Minister is thus empowered with the authority to form the government. This is the law, as evidenced clearly by sections 7, 13 and 22 of the Basic Law, and it is also the natural state of affairs. The power to appoint and dismiss ministers is a discretionary one. This discretion is wide, as it encompasses a host of considerations and a significant political dimension. It is regarding such discretion that the Court recognizes a wide "range of deference."

Accordingly, the Court must set itself a narrow range of intervention regarding the Prime Minister's decisions on the formation of his government, and exercise its powers of judicial review with caution.

> The balance necessitates that this Court's intervention in the discretion of those authorized to remove a minister or deputy-minister from office should be sparing and limited to those situations where the gravity of the offense cannot be reconciled with his continued service.

See Deri [47], at 429 (Goldberg, J.). This is how the appropriateness of intervention should be decided. The Prime Minister's discretion, so long as there is no radical deviation from the standard of reasonableness, should not be scrutinized by the Court. The public should examine the Prime Minister's discretion using the means available to it in a democratic society, as should the Knesset, via the powers granted it by law. Justice Zamir noted this in *Bar-On* [3]:

> The section which grants the Prime Minister the power to remove a minister from office is intended mainly to prevent "corruption" in the government. For this purpose the law has afforded the Prime Minister discretion so wide that any decision to dismiss a minister whose conduct has deviated from the norm will fall, generally speaking, within the range of reasonableness. The Court will not intervene in such a decision. Similarly, the Prime Minister's decision not to remove a minister from office will also generally fall within the range of reasonableness. In such cases the Court will also not intervene in this decision. Both of these decisions were entrusted by law to the Prime Minister, and not to the Court. The Prime Minister will be held accountable for his decision by the Knesset and by the public, and they may respond, should they so desire, via avenues which the law opens to them.

Id. at 59-60.

It should be emphasized that appointments of government ministers must be approved by the Knesset, as provided in section 13(d) of the Basic Law. This states that:

> The government is constituted when the Knesset has expressed confidence in it, and the ministers shall then assume office.

The fact that every minister's appointment has received parliamentary approval should not be discounted.

Improper Conduct of a Minister

21. We stated above that the range of prime ministerial discretion with regard to the formation of a government is wide. In contrast, the place for judicial intervention in this discretion is narrow. Nevertheless, the Court's powers of intervention in a decision of the Prime Minister to appoint or dismiss a minister whose conduct has been improper are not limited to a case where the minister has actually been convicted of an offense. Nor are they limited to cases where an indictment was filed against the minister or where he was the subject of a police investigation. The Court has held:

> The possibility cannot be ruled out that the conduct of a minister or deputy-minister in a specific case may be so serious that it would be extremely unreasonable to permit him to continue his tenure. This could apply even in cases when no criminal offense was actually committed.

Bar-On [3], at 64. However, it is clear that a conviction of a serious crime cannot be compared to a conviction of a minor crime. It is also clear that being convicted is not the same as being indicted, and being indicted is not the same as being investigated by the police. Finally, none of these are comparable to situations in which it is found that no grounds exist for prosecuting an individual, or where the actions attributed to that individual are within public ethical norms. The balance between the various considerations depends on the severity of the acts attributed to the candidate, and whether the

suspicion is sufficient to warrant a charge or conviction. As was noted in *Eisenberg* [6]:

> Someone who committed an offense in his childhood cannot be compared with someone who committed an offense as an adult; someone who committed one offense cannot be compared with someone who committed many offenses; someone who committed a minor offense cannot be compared with someone who committed a serious offense; someone who committed an offense in mitigating circumstances cannot be compared with someone who committed an offense in aggravating circumstances; someone who committed an offense and expressed regret cannot be compared with someone who committed an offense and did not express any regret for it; someone who committed a 'technical' offense cannot be compared with someone who committed an offense involving moral turpitude; someone who committed an offense many years ago cannot be compared with someone who committed an offense only recently; someone who committed an offense in order to further his own agenda cannot be compared with someone who committed an offense in the service of the State.

Id. at 261 (Barak, P.). In the two cases where this Court determined that the Prime Minister had an obligation to dismiss a minister or deputy-minister, an indictment alleging serious crimes had been filed against that minister or deputy-minister. Thus, in *Deri* [47], it was determined that the Prime Minister's failure to remove Arye Deri from the post of Minister of the Interior constituted extreme unreasonableness. An indictment had in fact been filed against Deri, accusing him of corruption which was "extremely severe." In that case, the Court noted that a guilty verdict had not yet been handed down against Deri.

> An indictment is not a judgment. It only reflects the *prima facie* evidence collated by the prosecution. However, as far

> as continued office in the government is concerned, even the *prima facie* evidence collated in the indictment, which has now become public knowledge, is of significance. There are circumstances which are significant in terms of the reasonableness [of continuing office], not just a conclusive judicial ruling but also the nature of the actions attributed to someone, since they wear the official dress of an accusation ready for presentation to the court.
>
> [I]f a minister who is charged with receiving hundreds of thousands of shekels in bribes, and other forms of abuse of public office, continues to serve in the government, this could have serious ramifications for the image of government in Israel, and for its good faith and integrity. This has a direct effect on the question of reasonableness pursuant to the provisions of law.

Id. at 422-23. Justice Levin commented on this issue:

> There are situations in which, due to the nature of the offense and the circumstances in which it was committed, it must be asked whether [the minister] should continue serving in his position.
>
> I do not suggest that we lay down any hard and fast rules on this subject and decide in a sweeping manner when and how conclusions should be drawn. For, first and foremost, it is the political system which must react, within the framework of the proper political-democratic process. But there may be exceptional situations, such as the one before us, when our intervention is required, in order to lay down specific standards of conduct.
>
> It seems to me, for example, that if, heaven forbid, an indictment based on *prima facie* evidence is brought against a minister, indicating that he is suspected of serious offenses ignominious in nature and circumstance – such as, purely for illustration purposes, if a minister is charged

> with accepting bribes, with fraud, with cheating state authorities, with lying or with making falsifying documents – then it would not be proper or reasonable for him to continue in office.

Id. at 426-27.

22. The *Pinhasi* case [5] also concerned the continuation of tenure of a deputy-minister who was indicted for allegedly making false entries in corporate documents, false testimony, and an attempt to receive goods by fraud. The Court related to the impact of an indictment upon the discretion of the Prime Minister:

> Clearly a public servant who has been convicted of an offense is not the same as one who has only been indicted. The difference is expressed in the weight to be attached to considerations of public confidence, but not in the actual requirement to take such a consideration into account.

Id. at 462 (Barak, P). Furthermore:

> Weight must be attached to the consideration of the public's confidence in the public authorities when a public servant is convicted or confesses to the deeds attributed to him. But this differs from the weight attached when the issue is merely the filing of an indictment in a case where the accused insists on his innocence. Nonetheless, this should not be the deciding consideration. The issue at hand concerns the act of termination of office by the government authority. No criminal conviction is necessary to substantiate this act. The pressumption of innocence granted to every accused does not prevent the termination of tenure of a government official. The only condition is that the government authority making the decision must have evidence which, in light of the circumstances, is such that "any reasonable person would see its probative value and would rely on it."

Id. at 467-68. Indeed, in that case, it was determined that the offenses allegedly committed by the deputy-minister indicated a "moral defect" in his conduct. Therefore, it was held, the offenses could be classified as "offenses of moral turpitude in the particular circumstances." In light of this, it was concluded that for the deputy-minister to continue in his tenure, after being charged with such serious offenses, would harm both the respect that the citizen feels towards the government and the public's confidence in the government authorities. The government's paradigm of leadership would be undermined, and the credibility of the deputy-minister would be significantly damaged. The Court therefore determined that the only reasonable recourse was to terminate the deputy-minister's tenure. *Id.* at 469. *See also* Avigdor Klagsbald, *Public Duty, 'Criminal Past' and Administrative Evidence*, 2 HaMishpat 93 (1995) [102].

The conclusion which follows from all this is that, even though an indictment carries less weight than a conviction, indictment for a serious offense may obligate the Prime Minister to dismiss a minister or deputy-minister. *Deri* and *Pinhasi* show that the existence of an indictment alleging serious offenses, based on *prima facie* evidence, is sufficient to harm the public's trust and the integrity of the public service and, as such, necessitates the dismissal of the minister or deputy-minister.

23. What, therefore, would the law be in those cases in which *no* indictment was filed? This Court could be required to review the Prime Minister's discretion concerning the tenure of an individual guilty of unacceptable, but not criminal, conduct. Before us we have a case in which the law enforcement authorities have decided *not* to press charges against a minister due to the lack of a reasonable chance of a conviction. To the best of their professional knowledge, the defendant would be acquitted in court if there was an indictment. In such cases, I am of the opinion that it would require truly extreme and exceptional circumstances in order for the Court to obligate the Prime Minister to refrain from making an appointment or to terminate one.

It is worth pointing out here that, as we have already detailed, the Basic Law: The Government outlines, in subsections 6(c) and 23(b), the concerning the appointment and dismissal of a minister. These sections explicitly provide the ramifications of a minister's conviction of an offense. The *Deri* and *Pinhasi* cases also set out the law governing the termination of tenure. When those cases were decided, the 1997 version of the Basic Law, which contained no provision requiring the dismissal of a minister convicted of a crime involving moral turpitude, was in effect. The Court, in making these rulings, acted without recourse to any of the statutory criteria which now exist. Sections 6(c) and 23(b) of the Basic Law of 2001 pertain to the *fitness* of a minister to serve. As we have seen, these sections do not rule out judicial review of the Prime Minister's *discretion* even in cases that do not fall within the categories mentioned. Therefore, the precedents of *Deri* and *Pinhasi* still stand.

In this manner, the court has created a fine balance between the obligation of deference which applies to situations such as these, and the other considerations with which this Court is charged. However, the further we depart from the statutory criteria of fitness, the harder it will be, according to the existing law, to regard the appointment of a minister, or the non-termination of his tenure, as an extreme deviation from the range of reasonableness. The loss inherent to expanding the limits of the precedents set by this Court is liable to be greater than the gain.

24. In examining the Prime Minister's discretion to appoint a minister who was investigated but not indicted, we need not look far for a precedent. Respondent 3, Mr. Tzahi Hanegbi, was himself the subject of a ruling of this Court approximately six years ago, in *Bar-On* [3]. At that time, the same petitioner requested that we order the Prime Minister to dismiss Hanegbi from the post of Minister of Justice. As explained above, Hanegbi's name was at that time linked to three out of the four affairs which petitioner brings against him today, namely: the "brawling affair" of 1982; the ISTA affair, which lasted from 1982 to 1992; and the Bar-On affair of 1997. No one argues that there is any material difference between the Ministry of

Justice, which Hanegbi led during *Bar-On* [3], and the Ministry of Public Security, which he now heads. Therefore we can shed light on the case at hand using the previous ruling.

In *Bar-On* [3] this Court determined that:

> There never was and never will be a situation in which a sullied reputation is enough to obligate the Prime Minister by law to remove a minister from his position.

Id. at 57 (Zamir, J.). The Court further expounded:

> There is no doubt that it is legitimate to demonstrate disapproval of a minister's conduct if it diverges from the standards of what is right and proper. The public expects that every minister, as a leader of the public, shall set an example of proper conduct. This applies even more to the public's expectations of the Minister of Justice.

Id. at 59 (Zamir, J.). As emphasized by Justice Zamir, the power to appoint ministers belongs to the Prime Minister and it is an undeniably broad power. The Prime Minister may decide to dismiss a minister whose conduct diverges from acceptable standards, or he may decide to retain such a minister. Both decisions will generally be within the range of reasonableness.

> The responsibility for either of these decisions was entrusted by the law to the Prime Minister, and not to the Court. The Prime Minister is held accountable for his decisions by the Knesset and by the public, and these bodies may respond, if they so desire, using the means provided by law.

Id. at 60. Moreover:

> The Court may refrain from intervening in the Prime Minister's decision on whether or not to remove a minister on account of unacceptable conduct. However, by so doing

> the Court does not imply that the Prime Minister's decision is correct and appropriate, any more than it implies that the minister's conduct itself is appropriate. The Court merely affirms that the Prime Minister's decision and the minister's conduct have not broken the law. It does not mean that they are not unethical. It is certainly possible that were the Court in the Prime Minister's shoes, it would made a different decision, and it is also possible that the Court does not approve of the minister's conduct. However, the ethical responsibility for the administrative authority, as well as the responsibility for its efficiency and wisdom, as distinct from its legal responsibility, is not entrusted to the Court.

Id. at 61 (Zamir, J.). Furthermore:

> The court system aspires, by means of legislation and precedent, to raise the ethical standards of society, and also improve the conduct of the public administration. This is its purpose. It is a worthwhile purpose and one it performs well. It has succeeded in promoting values and inculcating the standards of a civilized society.
>
> However, the law cannot and should not replace ethics – except to a limited extent, on a case-by-case basis, in a controlled and cautious manner…
>
> The same applies regarding the conduct of publicly elected officials. The law does not respond to the conduct of elected public officials except in very serious situations, where unethical conduct is likely to become illegal conduct…
>
> The Court's decision that a minister or deputy-minister is unfit for service creates tension between the law and the democratic system. The law is built, to a large extent, on values, whereas democracy is built, first and foremost, on representation… The Court is required to achieve a

> balance between these two interests.

Id. at 62-63. In a different context Justice Zamir emphasized:

> The Court must also take into account the fact that every so often the public desires to be represented by an individual who is known not to be of sterling character.

See Dis.App. 4123/95 *Or v. State of Israel – Civil Service Commissioner* [50], at 190.

25. Similar sentiments were expressed by Justice Dorner, in a separate case concerning the eligibility of MK Pinhasi to serve as chairman of the Knesset Committee. Pinhasi had been convicted of crimes involving moral turpitude. Justice Dorner pointed out that:

> It is indeed legitimate for there to be a review of the reasons why respondent, who has been convicted of crimes involving moral turpitude, was elected chairman of a committee which possesses quasi-judicial powers.
>
> It is possible that this choice carries an undesirable message. But this is a matter of taste, which is given over to the discretion of the Knesset Committee. And when the time comes this discretion will be subject to the public's approval.

See HCJ 7367/97 *The Movement for Quality Government in Israel v. Attorney-General* [51], at 557-58. It was also noted:

> The issue is not whether the Knesset Committee's decision to appoint MK Pinhasi as its chairman was a good one or not. This is a matter of rights and obligations, authorities and powers. It is true that the Knesset Committee's decision sent shockwaves beyond the realm of the Knesset; but these shockwaves are still too weak to require the exercise of power in the judicial realm.

Id. at 562-63 (Cheshin, J).

26. It is clearly no simple matter for the law to deal with conduct that is improper but not illegal. It is even more of a stretch to impose an obligation on the Prime Minister, on grounds of reasonableness, to remove a minister accused of such conduct from office. As Justice Zamir pointed out in *Bar-On* [3], the balance that must be struck is substantive and not mechanical in nature. Therefore, we must not ignore the possibility – albeit a remote one in my eyes – that even conduct of a minister or deputy-minister that does not amount to a criminal offense, can obligate the Prime Minister to remove him from office. However, in order for this Court to rule in this manner, the conduct of this minister must be

> [S]o extremely severe as to be extremely unreasonable to permit him to continue in office.

Id. at 63-64. In order for the Court to conclude that it must order the Prime Minister to remove a minister from office, despite the fact that the latter has not been convicted or even indicted, the circumstances must be exceptional and extreme.

> There exists a vast difference between an extreme situation like this, which forms an exception to the law, and a broad ruling which would render unfit any minister or deputy-minister whose conduct deviates from acceptable standards. The proposal to expand the existing ruling so that such conduct would obligate the Prime Minister to dismiss the minister or deputy-minister, even though it has good intentions, is not appropriate. It is likely to do more harm than good.

Id. And in the same case, it was also noted:

> Only in the most extreme cases would the Court require the Prime Minister to exercise his power [to remove a minister from his position]. These cases would involve the existence of administrative evidence of serious criminal

> offenses. Such a situation would constitute a serious risk to public confidence in the government authorities. To this might also be added cases of extreme deviation from the integrity required of individuals in the high office of minister.

Id. at 68 (Or, V.P.).

Do Tzahi Hanegbi's actions constitute such extreme circumstances?

Hanegbi's Actions

27. I have repeated dicta from *Bar-On* [3] concerning the Prime Minister's decision to retain Hanegbi as Minister of Justice. I did so because I believe that there is no alternative other than to reach a similar conclusion in the case at hand.

As stated above, four affairs have been cited to discredit Hanegbi. The brawling affair resulted in Hanegbi's conviction in 1982 for brawling in a public place, for which he received a suspended prison sentence and a fine. There is no doubt that for our purposes this is a trivial and ancient affair. The events at the basis of the "ISTA affair" also occurred more than twenty years ago, and culminated in the Attorney-General's decision not to prosecute Hanegbi. The Court did not see fit to intervene in this decision. *See Maoz* [1], at 423. With regard to these two affairs, the words of President Barak in *Eisenberg* [6] are enlightening:

> The lapse of time between the offense and the proposed appointment is an important factor. The more years that have passed, the weaker the link between the person and his crime. His appointment to public office will therefore not harm its functioning and the public's confidence in him and the civil service. Indeed, a criminal past, even with regard to a serious offense, is not an absolute bar to appointment to public office. This applies even to a senior position. Time heals wounds. The candidate is

> rehabilitated. The "enlightened public" will no longer feel that his appointment harms the integrity of the service and its ability to function, but rather [that his disqualification is] a vindictive and inappropriate execution of "judgment." In such circumstances, there can be no basis for regarding the appointment of such a candidate to public office as unreasonable. The period of time that must pass between the crime and serving the sentence and the appointment varies according to the circumstances.

Id. at 267. The third affair, the Bar-On affair, also did not culminate in an indictment against Hanegbi, due to lack of evidence. The State Attorney's Office published its opinion, in which it condemned Hanegbi's behavior, calling it "a deviation from the accepted standards of conduct." Nonetheless, it concluded that such conduct did not amount to a criminal offense.

The point is that all three affairs were presented to the Court in *Bar-On* [3]. Yet the Court concluded that there was no reason to intervene in the Prime Minister's decision not to remove Hanegbi from the office of Minister of Justice.

28. This leaves us with the fourth affair, the "Derech Tzleha" affair. We should recall that Hanegbi faced a Knesset Ethics Committee hearing on this matter, and as a result he was censured and his pay docked for two months. In terms of the criminal investigation, it was decided not to prosecute Hanegbi since the Attorney-General believed that there was no reasonable chance of a conviction, not even for breach of trust. In his report, the Attorney-General revealed that:

> The scenario did, in our opinion, justify an inquiry, and we even considered that grounds existed for an indictment. However, there had to be a reasonable likelihood of a conviction, which, with the completion of the file, was ultimately not the case.

It should also be noted that the Derech Tzleha investigation of Hanegbi took place while he was still Minister of Justice. For our purposes, the major differences between then and now are the final decision not to prosecute Hanegbi and the passage of time since the affair.

Under these circumstances, I believe that there is no justification whatsoever for differing from the conclusions of *Bar-On* [3]. It is true that the Derech Tzleha affair occurred since then, but this affair, like the Bar-On affair, did not culminate in an indictment. It may therefore be stated that the only thing that has changed since the ruling on *Bar-On* [3], is that once again the decision was made not to indict Hanegbi. This fact alone, based on the previous judgment concerning Hanegbi, is not sufficient to render a candidate unfit to serve as a minister. It seems to me, therefore, that if we are to follow the course charted by this Court – not so long ago and in a case pertaining to Hanegbi himself – in this case we must not intervene in the Prime Minister's decision.

The Derech Tzleha affair concluded with a "public report" published by the Attorney-General. The question must be asked: How else should the conclusions of the public report be acted upon, if not through the voter's discretion in casting his vote, and the Prime Minister's discretion to appoint the members of his government? The Derech Tzleha affair did not culminate in an indictment. It is therefore fitting that Hanegbi's involvement in it should be resolved on the political level.

In any event, this affair does not constitute the necessary "extreme and exceptional circumstances" which would obligate the Court to intervene and order the Prime Minister to remove the minister. It should be emphasized that we do not turn a blind eye to the affairs in which Hanegbi has been involved. Not everything that we have seen pleases us. However, we must always remember that the public is also watching. Hanegbi's actions, and the Prime Minister's decisions regarding these, are under public scrutiny. The public will ultimately have its say about all it has seen.

29. Petitioner alleges that the *cumulative force* of these affairs is enough to push the Prime Minister's decision regarding Hanegbi outside the range of reasonableness. This claim raises the question – what is this "cumulative force" which can topple the appointment of a minister? The cumulative force of the brawling affair, the ISTA affair and the Bar-On affair was not enough to render Hanegbi unfit to serve as Minister of Justice. Why then, when the weight of the Derech Tzleha affair is added, are the scales tipped towards the invalidation of Hanegbi's appointment as Minister of Public Security? No one can claim that this fine line is clearly demarcated. And it is apparent that in such cases we should aspire to find a guiding line. This line should, on the one hand, be flexible and enable a substantive examination of cases which arise in the future. On the other hand, its criteria must be as clear as possible, so that they may be applied in the future and acted upon accordingly. It is wrong to send a message which is unclear. Rather we ought to strive for a general precedent which will pave the way for future rulings. Therefore, we must be fully convinced that the situation requires the candidate be disqualified in order to interfere with the Prime Minister's power to appoint ministers. The Court is not required to give its stamp of approval to the appointment of every public official who has behaved improperly or is suspected of such conduct. Nor is the candidate required to seek this approval before assuming the office designated by the Prime Minister.

30. It is noteworthy that the circumstances of Hanegbi's involvement in the Derech Tzleha affair, as well as the Attorney-General's opinion regarding his appointment as a minister, were brought to the Prime Minister's attention after the elections for the Fifteenth Knesset. At that time the Prime Minister accepted the Attorney-General's counsel – "counsel which was mainly from a civic perspective" – and refrained from appointing Hanegbi as a minister in any ministry responsible for law enforcement. After the elections for the Sixteenth Knesset, the Attorney-General once again offered his opinion to the Prime Minister. He stated that even though there existed no legal impediment to the appointment of Hanegbi as Minister of Public Security, from a civic perspective, "the

appointment itself is *prima facie* problematic." After weighing all the considerations, the Prime Minister did decide to appoint Hanegbi to that office, and the reasons for his decision are detailed in his affidavit. The Prime Minister believed that Hanegbi had a number of points in his favor, including natural talents, vast knowledge and experience amassed during many years in senior public and state positions, and professional accomplishments. Additionally, the Prime Minister believed that Hanegbi's personal philosophy and the nature of the position, besides the political and coalition considerations, made him the preferred candidate for Minister of Public Security.

The Prime Minister explained that he considered the various affairs to which Hanegbi's name was linked, as well as allegations of the danger of a conflict of interest were Hanegbi to serve as Minister of Public Security. According to his affidavit, the Prime Minister also considered the Attorney-General's position regarding the *prima facie* problem with the appointment. According to the Attorney-General, this problem remains from a civic perspective. *Compare* Daphne Barak-Erez, *The High Court of Justice as Attorney-General*, 5(2) Plilim 219 (1997) [103]. According to the Prime Minister, the scales were ultimately tipped in favor of appointing Hanegbi as Minister of Public Security. The appointment was then approved by the Knesset, as provided in section 13(d) of Basic Law: The Government.

31. It is true, of course, that that the Court's scales could have tipped the other way. The weight attached by the Court to the various considerations taken into account by the Prime Minister could have been different. But this Court is not a "supra-prime minister." It is not for the Court to decide those matters which the Prime Minister is authorized to decide. The Court will not substitute its own discretion for that of the authorized power. The Court will not ask itself whether it would have acted in the same manner if the power were in its hands. The Court does not scrutinize the wisdom of the other government authorities, only the legality of their actions. *See also* Aharon Barak, *On Power* and *Values in Israel*, *in* I A Collection of Writings 382 (H. H. Cohen & Y. Zamir ed. 2000) [104]. When the Court examines the reasonableness of the Prime Minister's decisions

regarding the formation of his government, it recognizes that only in exceptional and rare cases should the Prime Minister's discretion be replaced by that of the Court. The case at hand does not fall into that category.

32. Petitioner focuses on two reasons why Hanegbi should be dismissed: first, the possible damage to public confidence as a result of his appointment as minister in charge of public security and the police; and second, the risk of a conflict of interest in performing certain duties of the minister. With regard to the first reason, this is not enough to constitute grounds for intervention in the Prime Minister's decision. We related to this above, and we would only add here that petitioner takes issue *specifically* with Hanegbi's appointment as Minister of Public Security. As far as this line of reasoning is concerned, there is nothing to stop Hanegbi from being appointed as a minister in a different ministry – except, perhaps, the Ministry of Justice. This position raises a difficulty. It is hard to imagine that an individual whose appointment as Minister of Public Security would cause such severe damage to the public's trust that we must strike down the Prime Minister's decision to appoint him, would be able to head another ministry – such as the Ministry of Education or the Finance Ministry. It is difficult to accept that an individual who is so patently unfit to serve in a ministry responsible for law enforcement could, without any hindrance, serve in a ministry entrusted with the state's foreign policy or its security.

We thus come to the second part of this petition, the concern regarding a conflict of interest. We shall assume that petitioner's only claim against Hanegbi's appointment specifically as Minister of Public Security is the fear of a conflict of interest in context of the minister's role. Petitioner takes issue with Hanegbi's ability to function as Minister of Public Security in light of his drastic change in status – from being interrogated by the police to leading the police as Minister of Public Security. Petitioner is of the opinion that ill will may remain between Hanegbi and those who investigated him. This being the case, the appointment of Hanegbi as overseer of his investigators may do irreparable harm to the functioning of the

police, along with the public's faith in it. Petitioner raises the possibility of a conflict of interest if and when the minister exercises his power regarding senior appointments in the Investigations Branch, as pursuant to section 7 of the Police Ordinance (New Version), 1971.

33. We would first state that respondents have raised doubts as to whether petitioner's claim actually constitutes a conflict of interest. Indeed, this category is usually reserved for cases in which an individual has been entrusted with a certain interest, and there exists a substantial possibility of conflict between this interest and another. This could be either a proprietary or personal interest of his own, or another interest with which he has been entrusted. *See* CA 6763/98 *Ram Carmi v. State of Israel* [52], at 427-28; HCJ 531/79 *Likud Faction of Petah Tikva v. City Council of Petah Tikva* [53], at 566; Aharon Barak, *Conflict of interest in the Performance of Office*, 10 Mishpatim 11 (1980) [105].

The principle regarding conflicts of interest, as interpreted by the courts, prohibits a public servant from being in a situation of conflict between a government interest and a personal interest, or between two different government interests. *See* HCJ 244/86 *Revivo v. The Head of the Ofakim Local Council* [54], at 183. Apparently, in our case, petitioner's allegation does not relate to an interest in conflict with the minister's public duty. Rather, it relates to the possibility that Hanegbi may harbor a grudge against his investigators. Such feelings might influence decisions made by him concerning those investigators.

It should be made clear that the prohibition against conflicts of interest is intended to prevent decisions which are influenced by conflicting interests:

> The fundamental purpose of the prohibition of conflict of interest is to guarantee public duty's are fulfilled out of relevant considerations of the public good alone, and not out of outside influences and considerations. It also aims to

> ensure that the public's confidence in the public authority is not damaged because the latter's actions are liable to be influenced by outside considerations.

CA 6983/94 *Shimon Pachima v. Michael Peretz* [55], at 835. The following explains the reasoning behind the rule concerning conflicting interests:

> First of all, there is a pragmatic reason. The public servant who has been entrusted with a certain power is required to exercise that power after reviewing all relevant considerations – and only these considerations. When the public servant is put into a situation of a conflict of interest, there is a concern that he may also take into account the conflicting interest when exercising his power. This may result in an improper use of the power. The law is designed to prevent this risk. Secondly, there is a matter of values. The existence of an orderly, fair and responsible public service requires the public's faith that decisions taken by civil servants are germane and honest. A civil servant found in a situation of conflicting interests damages the public's faith in the system of governance. The public begins to suspect that outside considerations are influencing civil servants and his faith in the system of governance is shaken. The law is designed to prevent this.

See Likud [53] at 571. It is clear that there exists a link between a conflict of interests and outside considerations.

> When a public official is involved in a conflict of interest, the concern is raised that outside considerations may be guiding him. These outside considerations are likely to influence the functioning of the body he leads; to sway his decisions through irrelevant considerations; and cause him to stray from the path of proper administration.

HCJ 7805/00 *Roni Aloni v. Comptroller of the Jerusalem Municipality* [56], at 1121. The prohibition against conflicting

interests comes, in other words, to prevent the damage caused by outside considerations, which stem from the conflicting interest. Situations of possible conflicts of interests are frequently examined, and when there exists a reasonable concern of such a conflict, the result tends to be termination of office. "The goal is to prevent the trouble before it occurs." *See Likud* [53], at 572.

On the other hand, there are situations where there is no concern of a conflict of interests, but only of an outside consideration which does not flow from a conflicting interest. In such cases, a *post factum* check will be performed. In general, we do not speak of a "concern (in advance) of outside considerations," but rather of a *post factum* examination of whether the considerations behind the decision or action were appropriate or extraneous. *See, Ron Menachem* [37], at 235; HCJ 3975/95 *Prof. Shmuel Caniel v. The Government of Israel* [57], at 459. Regarding appointments to the civil service the Court has stated:

> When a public official appoints a civil servant out of extraneous considerations of party-political interests, this appointment is invalid. It constitutes a betrayal of the public which authorized the appointing power.

HCJ 4566/90 *Dekel v. Minister of Finance* [58], at 35; *see also* HCJ 6673/01 *The Movement for Quality Government v. The Minister of Transportation* [59], at 808-9. The same applies with respect to outside considerations of vengefulness or grudges. There exists a dichotomy between the prevention of conflicting interests and the *post factum* inquiry into extraneous considerations. And the case at hand would apparently fall into the category of extraneous considerations.

However, regardless of whether we classify the case before us as a conflict of interests or a more general concern for outside considerations influencing the decisions of a minister – the end result will be the same. This is because it is clear to us that, in this case, petitioner's claim does not carry the required weight to render the

Prime Minister's decision unreasonable.

We are not saying that vengefulness or a personal grudge, which influences the decision of an authority to appoint an individual to a particular position, does not constitute an extraneous consideration. It certainly is an extraneous consideration, and may thus cause the decision to be struck down. It is true that Hanegbi was investigated in the past by the police, who recommended he be tried. However, it is also true that the Attorney-General did not adopt the recommendation because he concluded that there was no reasonable chance of a conviction. This being the case, the facts are unable to substantiate a genuine concern – which is not merely theoretical – of any outside considerations guiding Hanegbi's actions. We are not entitled to assume the existence of such a concern, which would render the Prime Minister's decision unreasonable in the extreme.

A person's anger can fester into a grudge, and a grudge into to feelings of vengefulness towards the object of the anger. By the same token, satisfaction with the conduct of a person or body can result in gratitude, which could lead to partiality and favoritism. But this is a mere possibility, and not a certainty. We have determined that the circumstances of this petition are not substantial enough to establish a factual presumption of any real concern that future actions of respondent 3 , will be tainted by extraneous considerations. In the absence of any evidence to substantiate the petitioner's concern, there is no reason for this Court's intervention.

Respondent 3 wishes to reinforce this conclusion with a theoretical example. Assume that the police investigated a case and reach the conclusion that there was nothing untoward in the actions of the individual under investigation. It would be ludicrous to argue, claims Hanegbi, that this person should not be appointed as the minister in charge of his former investigators, due to the concern that he might show partiality towards them. This example is somewhat divorced from the case at hand. It could be more closely likened to a case where an individual was prosecuted by the Public Prosecutor and was acquitted. The appointment of the acquitted individual to the

position of Minister of Justice, the minister in charge of the Public Prosecutor, is not merely a theoretical example. It has happened. And no one claimed that the appointment could not stand.

Hanegbi was not prosecuted. The reason for this was that the Attorney-General believed that he would have been acquitted. He notified the Prime Minister of his opinion. He also informed the Prime Minister that there was no legal impediment to the appointment of Hanegbi to the position of Minister of Public Security. The Prime Minister refused to adopt the Attorney-General's "civic" recommendation. This was his prerogative and does not constitute a cause for intervention under the circumstances.

We have already stated that the considerations which play a part in the decision to appoint a minister to a particular governmental position are many and varied. A sizeable portion of these are political considerations. The Court does not put itself in the Prime Minister's shoes. It does not scrutinize the wisdom of the decision, it merely reviews its legality. In the circumstances of the case at hand, pursuant to the law as interpreted in previous rulings, we find it difficult to point to any illegality.

34. This decision also takes into account the nature of the minister's powers in the matter at hand. We must not demean or belittle the importance of these powers. However, the Minister of Public Security is not a "supra-director-general," and in the context relevant to this case he has powers of supervision, authorization and the determination of policy. In its response to the petition, the state points out that with regard to the process of appointing high-ranking police officers, the minister's exercise of his power is:

> [S]ubject to the principles of administrative law. As such it is contingent on obligatory consultation, and consideration of the opinion the inspector-general of the police and additional professional bodies, prior to the appointment. As a rule, it is the police inspector-general who makes recommendations to the minister with respect to the

candidates for each and every position. This is because the inspector-general, as the head of the police system, will need to work with the officer who is appointed. The minister may only reject the inspector-general's candidate, or the appointment of an individual to a position against the inspector-general's recommendation, for very serious reasons. Such reasons are subject to judicial review.

It goes without saying that if, in the future, anyone should feel that a certain decision of Hanegbi regarding a particular officer was tainted by an administrative defect, such as a conflict of interest, partiality, or extraneous considerations, the doors of this Court are open to him.

35. In conclusion, we have not been convinced that the Prime Minister's decision regarding Hanegbi's appointment as Minister of Public Security was extremely unreasonable to a degree that would warrant the Court's intervention. As a result, we have no choice but to reject the petition. Under the circumstances, I would make no order for costs.

Vice-President T. Or

I have studied the opinion of my colleague, Justice Rivlin, in depth, and I concur with his conclusion. My colleague set forth a broad thesis addressing the principles guiding the exercise of judicial review over administrative bodies. I agree with the majority of his findings. However, I wish to condense the scope of his thesis and apply it to the case at hand.

1. The petition before us was filed by the Movement for Quality Government in Israel. The petition is directed against the decision of respondent 1, the Prime Minster, to appoint respondent 3, Mr. Tzahi Hanegbi, to the position of Minister of Public Security in the government formed after the elections for the Sixteenth Knesset. The central question of the petition is whether this Court should intervene in the Prime Minister's decision and annul the appointment. It should be emphasized that the key word here is "intervention." Our purpose

here is not to decide whether the appointment of Hanegbi as Minister of Public Security was appropriate. That role is entrusted by law to the Prime Minister. Our task is to decide whether the appointment was flawed, in which case we have no choice other than to intervene and revoke it.

Factual Basis and Essence of the Petition

2. The facts as the basis of the petition have been detailed in the opinion of my colleague, Justice Rivlin. For sake of convenience, I shall briefly review these. Petitioner alleges that Hanegbi's involvement in the four main affairs described in the petition makes him unfit to serve as Minister of Public Security.

The first affair occurred in 1979. Respondent 3 was involved in a skirmish between students, as a result of which he was convicted, in 1982, of brawling in a public place. Hanegbi was fined and given a suspended prison sentence.

The second affair pertains to a complaint filed with the police in 1982 by Hanegbi and others. The complaint alleged that a number of leaders of the Student's Union and of the International Israel Youth and Student Travel Company (ISTA) had perpetrated an act of fraud. As a result, a number of individuals were prosecuted, among them advocate Pinchas Maoz, who at the time served as external legal advisor to ISTA. Maoz was acquitted of all charges. In its judgment, the court related to the lack of credibility of Hanegbi's testimony. As a result, Maoz and others asked that respondent 3 be charged with perjury. The Attorney-General decided not to file an indictment due to the small chance of a conviction. A petition against this decision was dismissed by this Court "after a great deal of hesitation – literally by a hairsbreadth." *See* HCJ 3846/91 *Maoz v. The Attorney-General* [1], at 439.

The third affair relates to the appointment of advocate Roni Bar-On to the position of Attorney-General. Respondent served at the time as Minster of Justice. As a result of allegations against Hanegbi regarding his involvement in this appointment, the police

recommended that that Hanegbi be prosecuted for fraud and breach of trust. The Attorney-General decided to close the file for lack of evidence. The State Attorney's Office issued a public report on the matter, criticizing respondent's conduct. Nevertheless, it too maintained that his actions did not constitute a criminal offense. As a result of this affair, petitioner petitioned this Court requesting respondent's removal from his position as Minister of Justice. The petition was rejected. *See HCJ 2533/97 Movement for Quality Government in Israel v. Government of Israel* [*Bar-On* [3]], at 46.

The fourth affair focuses on a non-profit organization by the name of Derech Tzleha which was headed by respondent. In a public report, the Attorney-General summarized the affair as follows: In 1994, respondent and MK Avraham Burg prepared a private bill aiming to enhance road safety. The draft legislation was placed before the Knesset and passed a preliminary reading, and was then transferred to the Finance Committee for deliberation. The committee put together a sub-committee, headed by Hanegbi, to work on the bill. While working to enact the National Campaign Against Traffic Accidents Law, respondent established Derech Tzleha, which also promoted road safety. Initially, respondent served as chairman of the organization and at later became its director-general. For this he received a salary and other benefits from the organization. Directly and indirectly he ultimately pocketed most of the funds it had raised – some NIS 375,000. Hanegbi's conduct in this matter was the subject of a hearing by the Knesset Ethics Committee. The committee decided that respondent had placed himself in a situation of conflicting interests and had benefited from work outside the Knesset while serving as an MK. Hanegbi was accordingly censured and his salary was frozen for two months.

Respondent's actions were also investigated by the police, who recommended Hanegbi be indicted on several counts. Initially, the Attorney-General and the State Attorney maintained that respondent should be prosecuted for other offenses as well. However, following a further chain of events, the Attorney-General decided, with the consent of the State Attorney, not to file an indictment due to a lack

of evidence.

In an amendment to its petition, petitioner detailed two further affairs in which the respondent was allegedly involved. One pertained to an advertisement in a propaganda newspaper disseminated to members of the Likud Party in the run-up to the elections for the Sixteenth Knesset. The ad praised Hanegbi's efforts to appoint members of the Likud Party and Likud Central Committee to senior positions in the Ministry of the Environment. The other affair concerned a proposal which respondent brought before the government, while serving as Minister of Justice, regarding the appointment of members of the National Estates Commission. This proposal was adopted by the government. Petitioner maintains that respondent concealed the fact that those candidates had been declared unfit by the Appointments Review Committee. No *order nisi* was issued in either of the above two affairs. Furthermore, the factual basis that was presented before us was not sufficient to justify a detailed examination of the affairs.

3. Based on the above affairs, petitioner makes two central arguments against respondent's appointment to the office of Minister of Public Security. Its first claim is that through his involvement in these affairs, respondent violated principles of ethics and sound administration, and therefore the Prime Minister's decision to appoint him as Minister of Public Security was extremely unreasonable. Petitioner points to the affairs as a whole, alleging that their cumulative weight attests to respondent's unfitness for the post of Minister of Public Security.

Its second claim is that as Minister of Public Security, respondent may find himself in a conflict of interest. He was investigated on more than one occasion by the police, who actually recommended that he be prosecuted – though this recommendation was not adopted by the Attorney-General. A conflict could arise if the minister were to find himself deciding the question of promotion for any of his former investigators. It would also arise when he has to allocate funds to various police departments and divisions under the charge of

his investigators.

The Normative Framework

4. The normative framework for evaluating petitioner's claims has been elucidated by my colleague, Justice Rivlin. In this matter too, I do not intend to repeat all that has been said, but only the essential parts necessary for a decision in this matter.

The task of forming a government is assigned by the President to the Member of Knesset who is the designated Prime Minister. The constitution of the government and the assumption of office by the ministers take effect when the Knesset expresses its confidence in the government. *See* sections 7(a), 13(c) and, 13(d) of Basic Law: The Government. Section 6 of Basic Law: The Government lists a number of criteria for the eligibility of ministers. *See also* section 23(b). None of the criteria for unfitness provided by the law have been found to apply to respondent. Nevertheless, the statutory criteria provided by law do not constitute an exhaustive list of causes for rendering a person unfit to be a minister. The appointing body must take into account a candidate's criminal history and past conduct when considering whether or not to appoint them as minister, or to any other public position. *See* HCJ 6177, 6163/92 *Eisenberg v. Minister of Construction and Housing* [6], at 261-67. Should the appointing body ignore the relevant considerations, or ascribe inappropriate weight to all or some of them, this may be indicative of extreme unreasonableness, and the decision may be struck down by the Court on grounds of unlawfulness.

Whether the Court intervenes in an administrative decision or refrains from such intervention depends on the status and role of the body under review. The nature of the decision under scrutiny is also a consideration. The Court addressed this in *Bar-On* [3], where it stated:

> The range of reasonableness of every administrative authority depends on the nature of its power, the language and purpose of its authorizing law, the identity of the

> authorized body, the issue addressed by the power, and whether the power is exercised mainly on the basis of factual considerations, policy considerations, or professional criteria, such as medical or engineering evaluations. The range of reasonableness varies according to these factors: it may widen or narrow depending on the circumstances. In accordance with this the judicial review varies as well. Even though the principle of reasonableness which governs the exercise of judicial review is the same with respect to each and every authority, the application of the principle may vary from authority to authority, depending on the range of reasonableness. The wider the range of reasonableness, the more limited will be the review.

Id. at 57; *see also* HCJ 2534/97 *MK Yona Yahav v. State Attorney* [2], at 28-32; HCJ 2624/97 *Ronel Yedid. v. State of Israel* [4], at 71.

5. No one disputes that the Prime Minister's authority to form a government is discretionary in character and thus subject to the review of this Court. *See* HCJ 4267/93 *Amitai – Citizens for Sound Administration and Moral Integrity v. Yitzhak Rabin, Prime Minister of Israel*, at 441 [*Pinhasi* [5]]; *HCJ 3094/93 The Movement for Quality Government in Israel v. The Government of Israel* [*Deri* [47]], at 404. However, there is also no dispute that when the Prime Minister exercises his discretion to appoint a minister, there exists an extremely wide range of reasonableness within which the Court will not intervene. This is due both to the Prime Minister's status as a publicly elected official and the head of the executive body, and the nature of this authority.

The unique character of a prime ministerial decision on the makeup of the government and its ramifications for the scope of judicial review were discussed in *Bar-On* [3] in connection to the dismissal of a minister. That case determined that the Prime Minister's authority is one-of-a-kind, both due to the status of the Prime Minister in forming the government and the political character

of the government. When exercising this authority, a plethora of considerations are taken into account. *Id*. 58-59. *See also Yahav* [2], at 28-32; and *Deri* [47] (Shamgar, P. and Levine, J.).

We further note that, in the present case, the appointing authority was elected by the public and stands on the top rung of executive ladder. Additionally, his appointment of a minister requires the approval of the Knesset. In the case at hand, the Knesset expressed confidence in the government and caused the appointment to take effect. The judicial review is thus applied to a decision of the Prime Minister that has received the approval of the Knesset. As a result, the scope of the judicial review of this decision is narrow and restricted. Nonetheless, in cases where this Court is convinced that the Prime Minister's decision showed extreme lack of reasonableness, it will not hesitate to exercise its powers of review.

Moving from the general to the specific, we will first evaluate the reasonableness of the Prime Minister's decision in light of the past affairs in which respondent 3 was involved. We will then discuss the claim that respondent could find himself in a conflict of interest while occupying the position of Minister of Public Security.

Reasonableness of the Decision – Previous Affairs

7. In order to evaluate the reasonableness of the decision in the case at hand, we will first present the Prime Minister's reasons for appointing Hanegbi as Minister of Public Security. These considerations, detailed in his affadavit, were as follows:

> 16. My decision to appoint Minister Hanegbi to the office of Minister of Public Security was made after I had evaluated all the relevant considerations, *including the advice of the Attorney-General and the basis of this advice*... and I struck a proper balance among these considerations. Among other factors, I took into account the minister's many talents, his many years of experience in various demanding public and state offices, the gravity of the role of head of the Ministry of Public Security, as

well as other coalition-related considerations, all of which are now detailed.

17. Minister Tzahi Hanegbi has served, over a continuous period of many years, in a number of high-ranking and demanding public and governmental offices. These have included: Director-General of the Prime Minister's Office; Minister of Health; Minister of the Environment; Minister of Transportation; Member of the Twelfth through Sixteenth Knessets inclusive; Chairman of the Knesset Finance Committee; Member of the Foreign Affairs and Defense Committee; and Member of the Constitution, Law and Justice Committee.

In addition, for a period of approximately three years, between 1996 and 1999, Hanegbi served as Minister of Justice, within which framework he served as a member of the Ministerial Committee for National Security Affairs – the so-called "State Security Cabinet"; as Chairman of the Ministerial Committee for Legislation and Law Enforcement; as Chairman of the Committee for the Selection of Judges; as a Member of the Committee for the Selection of Military Judges; and as a Member of the Ministerial Committee for Privatization.

Over the last two decades, I have become personally acquainted with the abilities and talents of Minister Hanegbi. In view of Hanegbi's many professional achievements in all of the offices in which he served as minister, I have chosen him to serve as the Minister of Public Security, an office which currently faces unique and extremely important challenges.

Minister Hanegbi has a broad national perspective, which was expressed during his years as Minister of Justice, notwithstanding his investigation during that term regarding the Derech Tzleha affair. He has a wealth of

experience in the management of complex ministries; and a broad knowledge in the field of security, which he gained in a variety of public roles, as listed above. It is my belief that all this qualifies him to successfully run the Ministry of Public Security.

In my view, the nature of the position offered to Minister Hanegbi and the particular powers exercised by the Minister of Public Security do not create any significant concern of conflicts of interest which might affect the minister's conduct or impair his professionalism and the integrity of his discretion when exercising his authority … We need to remember that the Minister of Public Security is not a "supra-Inspector-General" who wields direct control over all matters pertaining to Israel Police, and this is true especially insofar as the Investigations Branch is concerned…

…

At the time of making the decision, I considered the position of the Attorney-General with respect to the Derech Tzleha affair. The Attorney-General regarded Hanegbi's appointment as being *prima facie* problematic from a civic perspective, though from the strictly legal standpoint, according to statutes and case law, there appears to be no legal impediment to the appointment.

In this regard, it should be noted that the actions attributed to Minister Hanegbi occurred between 1994 and the beginning of 1996. When Minister Hanegbi was interrogated, he did not take advantage of his right to silence. Rather he cooperated in full with his investigators. In my view, these facts were significant to the decision not to indict Hanegbi and for public confidence in him.

18. I have taken into account all of the relevant considerations, which include the qualifications and

> *abilities required of the Minister of Public Security, the Attorney-General's position, and Minister Hanegbi's actions in the Derech Tzleha affair and the other affairs, Hanegbi's capabilities and his experience, as well as political and coalition considerations. After giving these considerations their appropriate weight,, it cannot be said that the decision to appoint Hanegbi deviates in an extreme manner from the standard of reasonableness* (emphasis not in the original).

As such, we see that the Prime Minister did not ignore respondent's involvement in the various affairs cited by petitioner, including the Derech Tzleha affair. However, after he weighed respondent's role in these affairs against other considerations, which included respondent's qualifications, coalition-related needs, and other considerations mentioned by him, he decided to appoint respondent.

8. Among the considerations that an administrative authority, including the Prime Minister, must take into account when appointing a public official is the candidate's criminal past. Clearly a criminal conviction is not required in order to justify a decision not to appoint a particular person. Convincing administrative evidence of serious crimes which pose a genuine risk to public confidence is all that is required. Moreover, an administrative authority must also consider behavior of the candidate that deviates from the norms of sound administration and ethics, even if these do not amount to a criminal offense. Nonetheless, the existence of administrative evidence of a crime, or of conduct that deviates from public norms or ethical principles, is not necessarily enough to force the administrative authority to not to make the appointment. The authority must consider the nature and severity of the acts attributed to the candidate and balance this against other considerations, such as the abilities of the candidate and his suitability for the position. *See* para. 17 of the decision of my colleague, Justice Rivlin.

There may be situations in which evidence exists of serious

criminal offenses committed by a candidate and, as a result, his abilities or qualifications, manifold as these may be, do not justify his appointment as a minister. Therefore, the central question in this case is whether, in light of the evidence submitted by petitioner regarding the conduct of respondent 3, the Prime Minister's decision to appoint him as Minister of Public Security is marred by an extreme lack of reasonableness and requires our intervention.

My answer to this is negative. I will now examine each piece of evidence adduced by petitioner. Later I will examine whether the cumulative weight of all the evidence should have caused the Prime Minister to decide against the appointment.

9. With respect to the decision of conviction in the brawling affair, I concur with the conclusion of my colleague, Justice Rivlin, that it is an "ancient and trivial affair." The crime which respondent was convicted of took place 24 years ago and he has served his sentence. The offense did not involve moral turpitude or lack of integrity. This conviction has been erased from legal memory. *See* sections 14 and 16 of the Criminal Register and Rehabilitation of Offenders Law, 1981.

Similarly, more than twenty years have elapsed since the ISTA affair, and it has been relegated to the history books. As stated above, the Attorney-General decided at the time not to prosecute respondent over the affair, and we did not see fit to intervene with his decision. In light of more than two decades of wide and varied public activity by respondent since then, including his appointment as Minister of Justice, I believe that the affair does not invalidate respondent's appointment as Minister of Public Security.

10. We now consider the Bar-On affair. As was stated above, due to respondent's involvement in this affair the police recommended that Hanegbi be charged with fraud and breach of trust. Ultimately the Attorney-General decided not to indict respondent. The State Attorney issued an opinion on the matter, noting that "even among us [in the State Attorney's Office] there were those who maintained that

there were grounds for prosecuting the Minister of Justice." However, in the end, after evaluating the evidence, the final conclusion was that "respondent's conduct did not amount to a criminal offense." Nevertheless, the State Attorney saw fit to express her own opinion regarding one of the affairs examined, saying that it was not a crime "even though it was a deviation from the norms of proper conduct."

All of the evidence presented by petitioner in the case at hand was examined by this Court in *Bar-On* [3]. Yet, the Court decided, in light of the circumstances, that the Prime Minister's decision not to dismiss respondent as Minister of Justice did not deviate from the range of reasonableness, and did not justify intervention.

As an interim conclusion, we note that none of the three affairs discussed until this point, whether viewed individually or cumulatively, disqualify respondent from service as a minister, not even as Minister of Justice or Public Security. This is clear in light of this Court's decision in *Bar-On* [3].

We have yet to evaluate the fourth affair, the Derech Tzleha affair. This affair is most relevant to the case at hand, being the only addition to the factual basis which was previously presented to this Court in *Bar-On* [3]. Regarding this affair, petitioner adduces two pieces of administrative evidence which the Prime Minister should have considered when evaluating respondent's candidacy for a ministerial position in his government. These are the opinion of the Attorney-General and the decision of the Knesset Ethics Committee. Is this evidence sufficient to justify respondent's removal from the office of Minister of Public Security? We shall first consider the opinion of the Attorney-General.

12. At a certain point during the Derech Tzleha affair, the relevant bodies maintained that grounds existed for indicting respondent. The police recommended that respondent be charged with taking bribes, fraud, breach of trust, and other offenses. The evidence was examined by the State Attorney who decided to

prosecute respondent for the offenses of fraud and breach of trust, fraud and breach of trust by a corporation, and falsifying corporate documents. After hearing respondent's version of events, the Attorney-General, with the State Attorney's consent, decided to prosecute respondent for fraud and breach of trust, as well as other offenses. The file was transferred to the Jerusalem District Attorney for the final preparation of the charge sheet. At this point, difficulties arose in proving the various elements of the crime and a decision was made not to prosecute respondent. In the report written by the Attorney-General on this matter, he summarizes his opinion as follows:

> 13. *At the end of the day, the evidence was insufficient to prove to the degree required in a criminal case, that the conflict of interest was strong enough to amount to a "corrupt" breach of trust which damages public confidence according to the criteria provided in the clause on the need for proof of suspected crimes. This is especially true regarding proof of the criminal intent required in these offenses, that MK Hanegbi was aware that he was acting in a corrupt manner which was detrimental to the public.*
>
> 14. *These evidentiary difficulties are primarily the result of the fact that the organization from which Hanegbi received benefit, which he had established with the aid of his friends and long-time associates, had no interests independent of his own, and certainly none which conflicted with his own.* During the period of its operations, Hanegbi served as its chairman and subsequently as its director-general, and he dictated the agenda. Similarly, there is no evidence at all which indicates that the organization ever pressured Hanegbi regarding his activities as an MK nor was there even a suspicion of such pressure, which could have indicated the existence of a corrupt conflict of interest. On the contrary, it was MK Hanegbi who directed the other members of the organization in different activities.

15. *In particular, an evidential doubt still remains regarding the criminal intent. The question is whether, by receiving benefits from the organization, Hanegbi was aware that he was placing himself in a conflict of interest which amounted to a corrupt breach of trust, in connection with the Campaign Against Traffic Accidents Law, which Hanegbi initiated and promoted over a long period of time.* Furthermore, assuming that the suspicion is that Hanegbi had "bribed himself" using the organization, it is impossible to prove beyond all reasonable doubt that it fulfills the criteria of a crime by an MK in a matter related to advancing legislation in the Knesset. There is evidence of breach of trust, but it is weak…

19. All of the above deals with suspicions against MK Hanegbi even though the evidence was insufficient to substantiate a blatant conflict of interest – a criminal conflict of interest – in order to prove the crimes of fraud and breach of trust. An MK established an organization for an important public cause. He raised money which, as director-general of the organization, he was supposed to channel towards that public cause. Instead, with the consent of the organization's members – who are his friends – he used most of the funds raised by the organization for his own benefit, in order to fund activities he performed in his capacity as an MK… *Even so, regarding the aspect of intent of the offense, this was not the only organization that served as a tool for earning salary or benefits in the public sector. Moreover, MK Hanegbi reported his income from the organization to both the Knesset Speaker and the Knesset legal advisor, and this creates difficulties in proving the necessary criminal intent.*

20. It should be noted that at that time, pursuant to the Knesset Members Immunity Law (Rights and Duties),

> 1951, a Knesset Member was permitted to receive a salary for "an additional occupation" provided that it did not exceed half of his salary as an MK. The law stipulated that such payment should not engender "a potential conflict of interest between the additional occupation and his role as an MK." In 1998, the section was amended and today it is prohibited for an MK to engage in any additional occupation for remuneration.
>
> 21. In summary, we believed that the circumstances warranted an investigation, and we even considered filing an indictment. *However, there must be a reasonable likelihood of a conviction, and this requirement, with the final preparation of the file, was ultimately not satisfied.* (emphasis not in the original).

The facts of the affair demonstrate the shifting position of the prosecution regarding whether to prosecute respondent 3 for his involvement in the Derech Tzleha affair. This indicates that the case was reviewed and reconsidered by the prosecuting bodies. No doubt it was a difficult decision. But at the end of the day it was decided not to indict respondent. Petitioner is not challenging this decision –not even indirectly. Nor is petitioner arguing that, the Prime Minister, based on the facts he was presented, should have concluded that respondent had committed crimes during this affair. In any event, it is not likely that the Court would accept a claim that the Prime Minister should have reached a conclusion different from the Attorney-General. After all, the Prime Minister is not expected to study all of the complex investigative material in order to reach an independent conclusion in this matter. He was entitled to rely on the opinion of the Attorney-General, who possesses the authority and the appropriate tools to analyze the evidence and draw the necessary legal conclusions. The Attorney-General's report indicates that the difficulty in proving that a crime was committed stemmed primarily from the need to show criminal intent. It is presumed that the Attorney-General's decision not to prosecute respondent was grounded in the evidence – which he reviewed in full, unlike this

Court. Under those circumstances he decided that the small chance of proving criminal intent meant that an indictment was unjustified.

It seems to me, therefore, that based on the facts before us we must assume that respondent committed no crime in the Derech Tzleha affair. Petitioner does not claim otherwise. But this does not mean the case is closed. Petitioner claims that the conduct attributed to respondent in the Derech Tzleha affair, as reflected in the Attorney-General's public report and in the decision of the Knesset Ethics Committee, violated the principles of sound administration and ethics. Despite this, the Prime Minister maintained that respondent was fit for office. In my opinion, this conclusion does not warrant the Court's intervention. I shall now explain why.

13. The case at hand is similar to *Pinhasi* [5] and *Deri* [47]. All these cases deal with setting the boundaries between law and ethics. In this matter I refer to *Bar-On* [3] which explained that "the law cannot and need not replace ethics, except in part, on a case by case basis, in a cautious and controlled way." *Id.* at 62 (Zamir, J.). The same applies to the conduct of publicly elected officials. A judicial decision whether to intervene in the discretion of a public body depends on the balance between the interest of representation – allowing the public to be represented as it wishes – and the ethical interest of preserving appropriate ethical standards among elected officials. *See Or v. State of Israel – Civil Service Commissioner* [50], at 191. This balance is not technical but rather substantive in nature. *See Bar-On* [3], at 63; *Pinhasi* [5], at 474 (Barak, J.).

In *Bar-On*, it was added:

> Because the test is substantive and not merely formalistic in nature, it cannot be stated categorically that that only an indictment for a serious crime, or at least an investigation into such a crime, will justify termination of office. The possibility cannot be ruled out that the conduct of a minister or deputy-minister in a specific case, even if it does not amount to a criminal offense, may be so very

> severe that it would be extremely unreasonable to allow him to remain in office. However it is still a long way between an extreme case of this sort, which would be exceptional, and a comprehensive rule which rendered unfit any minister or deputy-minister in case of conduct that deviated from proper behavioral norms. The proposal to expand the existing law, so that such conduct would obligate the Prime Minister to dismiss a minister or deputy-minister, although well-intentioned, is inappropriate and liable to do more harm than good.

Id. at 63-64 (Zamir, J.).

14. It is true that when deciding whether or not to appoint respondent as Minister of Public Security the Prime Minister should have considered respondent's conduct in the Derech Tzleha affair, even if it did not amount to a criminal offense. However, in my opinion, the conduct was not severe enough for us to declare the Prime Minister's decision to appoint respondent as Minister of Public Security extremely unreasonable, and strike it down. It should be recalled that the Attorney-General's report determined: "At the end of the day, the evidence was insufficient to prove, to the degree required in a criminal case, that the conflict of interest was strong enough to amount to a 'corrupt' breach of trust which damages public confidence according to the criteria provided in the clause on the need for proof of suspected crimes." *See* para. 13.

Furthermore, the Attorney-General makes it clear that respondent, in his capacity as MK, had no conflicting interest, and certainly none that conflicted with the interests of the organization which he headed. It was also noted that respondent reported his activities and income to the relevant authorities. The Attorney-General also emphasized that, at that time, a Member of Knesset was not barred from having an additional occupation. In terms of this report, it cannot be concluded that respondent's conduct was severe enough to render him unfit, to assume the office of Minister of Public Security. There may be pros and cons regarding a particular

individual's appointment as minister. However, unless, that appointment deviates from the range of reasonableness in an extreme way, the decision is left to the Prime Minister, and the Court should not intervene. Only in extreme cases is it appropriate for the Court to intervene in the Prime Minister's task of forming a government.

15. To this we add that the reasonableness of the Prime Minister's decision is supported by the position presented to him by the Attorney-General prior to respondent's appointment. It was the Attorney-General's opinion that "despite the fact that according to statute and case law there appears to be no legal impediment to the appointment, the appointment is still problematic from a civic perspective..." *See* para. 15 of the Prime Minister's affidavit. This may be understood to mean that, legally speaking, there is no impediment to respondent's appointment, even though his conduct warrants criticism. The point is that the Attorney-General informed the Prime Minister that, in terms of the law, the appointment was legitimate. The Attorney-General reiterated this stance before the Court. The Prime Minister ultimately relied on the Attorney-General's opinion, regarding both the lack of "sufficient evidence of a criminal offense by respondent in the Derech Tzleha affair," and the legality of respondent's appointment in light of his conduct. Obviously if we were to conclude that the Attorney-General's opinion was inappropriate and without basis, things would be different. However this is not our position.

16. The Knesset Ethics Committee addressed this case as follows:

> 20.A. MK Hanegbi served simultaneously as chairman, and subsequently director-general, of the Derech Tzleha organization and as Chairman of the Economics Committee. This created the possibility of a conflict of interest between the additional occupation and the his role as a Knesset Member, in violation of the provisions of section 13A(a)(3) of the Knesset Members Immunity (Rights and Obligations) Law, 1951, as worded at that

time.

B. MK Hanegbi received material benefit as chairman, and subsequently director-general, of Derech Tzleha, which had as one of its principle objectives the advancement of a law which Hanegbi himself had initiated. In doing so, he violated section 4 of the Rules of Ethics for Knesset Members, which prohibits a Member of Knesset from receiving any material benefit for an activities performed outside of the Knesset in his capacity as Knesset Member.

C. Towards the end of the term of the Thirteenth Knesset, MK Hanegbi returned to his position as Chairman of the Finance Committee. As such, a potential conflict of interest was created relating to the Fuel Economy Law, since MK Hanegbi was receiving benefits from Derech Tzleha, which had accepted contributions from major fuel corporations. In this situation, MK Hanegbi should have transferred the bill to another MK and, by failing to do so, violated the provisions of section 13A(a)(3) of the Immunity Law, as worded at that time.

D. As a result of the above, the Ethics Committee reprimands MK Tzahi Hanegbi and deprives him of his salary for a period of two months…

See The Decision of the Knesset Ethics Committee regarding the complaints of MKs Eli Goldschmidt and Haim Oron, and regarding the complaint of Justice Minister Tzahi Hanegbi against MK Eli Goldschmidt, dated May 24, 1999.

It is my opinion that the above decision does not justify our intervention in the Prime Minister's decision. This decision concerns the realm of ethics. Respondent's conduct as described by the Ethics Committee is clearly unsatisfactory and deserving of criticism. However, it does not constitute the kind of severe deviation that would justify the intervention of this Court in the respondent's appointment as Minister of Public Security.

17. Does the cumulative weight of the four affairs involving Hanegbi render the Prime Minister's decision extremely unreasonable, even though no affair on its own is sufficient? Petitioner asserts that respondent's conduct, as reflected in all the affairs put together, shows that he is unfit to serve as Minister of Public Security.

It is true that when an administrative authority considers a public appointment, it must weigh not only each individual piece of administrative evidence that the candidate committed a crime, but also the cumulative weight of the evidence. It is possible in certain cases that the sum total of the evidence will be greater than its parts. The appointing authority must take this extra weight into account during its deliberations. The Court will intervene in an authority's decision only if the cumulative weight of all of the evidence undoubtedly has extra weight which, if ignored, renders its decision extremely unreasonable. This is not true of the present case. The brawling and ISTA affairs were too long ago to have any bearing on the later affairs. Regarding the Bar-On affair, this Court has already decided that it is no impediment to respondent's remaining in the position of Minister of Justice. In my opinion, the cumulative evidence in the Derech Tzleha affair does not justify the intervention of the Court in the Prime Minister's decision under the stated criteria for such intervention. I reiterate that the key term in this case is "intervention." The question is not what the Court would have done in the Prime Minister's stead. Rather it is whether the Court is obligated to intervene in the Prime Minister's decision to appoint respondent as Minister of Public Security in light of the four affairs. Under the circumstance, my answer is no.

Claim of Conflict of Interest

18. As stated above, petitioner claims that respondent should not be appointed as Minister of Public Security for the additional reason that his appointment will create a potential conflict of interest. The source of this claim is that respondent was investigated by the police regarding the Bar-On affair and the Derech Tzleha affair. In both of

these cases, the police recommended that Hanegbi be prosecuted, though this course was not adopted by the Attorney-General. In petitioner's opinion, a conflict of interest is liable to arise with respect to promotions for high-ranking police officers who have previously investigated him. A conflict may also arise when the minister allocates budgets to police departments under the charge of his former investigators. In other words, petitioner claims that respondent may not handle certain promotions or budgets objectively. He may not base his decisions only on the relevant and legitimate considerations and the best interests of the police. Instead he is liable to be swayed by his own personal "interest" which is to "get even" with his former investigators and to avenge himself on them.

Before we evaluate this claim, we note that respondents raised doubts as to the correct classification of this claim. They say that there is no conflict of interest since a "desire for revenge" does not constitute an interest that conflicts with Hanegbi's public duties as minister. The concern is rather that extraneous considerations will play a part in Hanegbi's decisions. On the other hand, it could be argued that if a minister wishes to get even with his investigators this can be construed as an interest in the broad sense of the word. Anyone serving in a public office is forbidden to enter a situation involving potential conflict of interest. This is to ensure that the official will be able to fulfill his duties according to those considerations and interests which are relevant to his role. He must not be influenced by potentially conflicting considerations, such as personal interests or those pertaining to another public post occupied by him. Therefore, a conflict of interest could arise where the official is prejudiced against certain people, where there exists a genuine risk that he will act on this prejudice, and where this conflicts with the interest of fulfilling his role properly. This would be a known and foreseeable risk that the official will be unable to ignore extraneous considerations in certain situations.

Returning to our case, at issue here is whether there is a genuine risk that respondent will find himself in a conflict of interest as

Minister of Public Security. The person who fills this role wields considerable power over police appointments and budgets. Is a genuine risk posed by the fact that he was investigated by the police and his investigators recommended he be prosecuted? Is there a real concern that his decisions will not be based exclusively on relevant considerations, since they will directly affect his investigators?

19. My answer to this is no. Generally speaking, investigators do not embark on "crusades" against their subjects. They are not interested in harming them. Investigators do not deliberately choose, for non-material reasons, to investigate any particular individual. While conducting their investigation they perform their duties pursuant to the law. They exercise their professional discretion. In general, if they recommend that a suspect be prosecuted this stems not from their desire to unjustly or cruelly maltreat him, but to exercise their professional judgment to the best of their ability. Everyone, including respondent, presumably understands this situation. A suspect is presumed to understand that his investigators are just doing their job, and are fulfilling duties which must be performed. Therefore, the concern that a suspect will bear a grudge against his investigators is remote and weak. It does not justify the disqualification of the appointment.

Needless to say, the situation could be different if, during the investigation of the potential Minister of Public Security, the suspect had developed animosity towards his investigators. Such a case could be if the suspect claimed, during or following the investigation, that his investigators treated him in an unlawful manner or harassed him, or other similar claims. Under such circumstances, the risk of a conflict of interest is real, and various solutions would have to be considered for neutralizing that concern.

According to the evidence before us, this is not the case with respect to respondent. Despite the passage of years since his investigation, no such claim was ever made by him against his investigators, either prior to or following his appointment as Minister of Public Security. On the contrary, respondent states the following

in his affidavit:

> 4. The concern that I might interfere with the appointment of one of my investigators, impede his advancement, or plot against him, is spurious. I have made it clear on more than one occasion, including to my investigators themselves, that I have no complaints about them, and that I respect their duty to fully investigate every case. This is certainly true since the Attorney-General instructed the police to open an investigation. Moreover, my investigators treated me in a sensitive and respectful manner.
>
> 5. The concern that due to a conflict of interest I will deprive any particular division of the Ministry of Public Security of its budget is neither reasonable nor realistic. The budget proposal is prepared by the ministry's planning department, in conjunction with National Headquarters, under the supervision of the Police Inspector-General and in coordination with the Budgets Division of the Finance Ministry. The ministry's budget requires the approval of the government, the Finance Committee and the Knesset plenum. Therefore, there is no basis for the concern that I might use the budget in order to "get even" with one division or other. Neither could I consider any extraneous factors whatsoever in connection with the ministry's budget, whose preparation, approval, and execution are handled by so many bodies.

Petitioner fails to bring any evidence whatsoever to refute this claim, or to point to any action or statement of respondent that contradicts his stated position. Under these circumstances, there is no cause for intervention in the Prime Minister's decision to appoint respondent as Minister of Public Security. No genuine concern of a conflict of interest or extraneous considerations can be inferred solely from the fact that he was investigated in the past by the police.

In conclusion, I concur with the position of my colleague, Justice

Rivlin, according to which the petition is denied.

Justice M. Cheshin

1. I have read the opinions of my colleagues Justice Rivlin and Vice President Or. The comprehensive opinion of my colleague, Justice Rivlin, elucidates the basic principles governing the relationship between the judicial branch, the legislative branch, and the executive branch. It focuses on judicial intervention – specifically that of the High Court of Justice – in acts of the Knesset and the government. My description of some of these principles might have been structured differently, but on the substantive level I concur with my colleague and my reservations are secondary. Apparently, this was also the position of my colleague, the Vice President. However, I was unable to concur with my colleagues' application of these principles to the case before us, and I therefore decided to write my own opinion.

2. This petition seeks to prevent the appointment of respondent 3, Mr. Tzahi Hanegbi, to the office of Minister of Public Security, due to his involvement in four separate affairs, especially the Derech Tzleha affair. Hanegbi was indicted in only one of these four affairs, the earliest and the least serious of the four. Petitioner claims, however, that the effect of the cases must be considered cumulatively and points out that, as Minister of Public Security, Hanegbi will be in charge of the police officers who investigated his involvement and who recommended his indictment. They also note that the Attorney-General recommended that the Prime Minister withhold the appointment. All of these factors create a "critical mass" that render Hanegbi unfit to serve as minister in charge of the system of investigation and law enforcement in Israel. Petitioner therefore requests that we order the Prime Minister to not appoint Hanegbi to the position of Minister of Public Security.

The Principal Facts

3. Following the election of the Sixteenth Knesset on 28

January, 2003, and pursuant to section 7 of Basic Law: The Government, 2001, the President charged the incumbent Prime Minister and Knesset Member, Ariel Sharon, with the formation of a government. Once the ministers of the new government had been designated, the public was informed that Hanegbi, who had served as the Minister of Justice between 1996 and 1999, and as the Minister of the Environment in the previous government, was to be Minister of Public Security – the minister in charge of the Israeli Police.

4. When the planned appointment of respondent as Minister of Public Security became public knowledge – prior to the establishment of the government – this petition was filed. Petitioners requested this Court to issue an *order nisi* and an injunction instructing the Prime Minister to abstain from making the appointment. Petitioner further requested an order instructing the Attorney-General to direct the Prime Minister not to make the appointment. The Court did not issue an injunction but, on March 10, 2003, several days after the formation of the government and Hanegbi's induction as Minister of Public Security, the Court issued an *order nisi* against the Prime Minister instructing him to justify Hanegbi's appointment. No order was issued against the Attorney-General.

5. Petitioner argues that Hanegbi is not fit to serve as Minister of Public Security, primarily due to his involvement in four separate affairs. Petitioner also cites two additional dealings that came to light while the respondent was serving as Minister of Justice and as Minister of the Environment. Neither had criminal implications. These are of secondary importance, however, and we will not lump them together with the other four affairs upon which we now focus.

6. The first affair takes us back to 1982, when respondent stood trial and was convicted of brawling in a public place following a fight that he was involved in as a student. The Court imposed a suspended prison sentence and a fine. Today, the case is of marginal importance, due to both the passage of time as well Hanegbi's age at the time of the offense. Notably, this is the only case in which Hanegbi stood

trial and was convicted or sentenced.

7. The second case, known as the "ISTA Affair," began in 1980 and continued until 1992. It is described at length in HCJ 3846/91 *Pinchas Maoz v. The Attorney-General* [1], at 423. For our purposes, these are the relevant facts: Respondent and others filed a complaint with the police that certain leaders of the Students Union and of the International Israel Youth and Student Travel Company (ISTA) had committed "the greatest act of fraud in the history of Israeli aviation." [1], at 426. The complaint led to a police investigation, which culminated in the indictment of seven people, including Pinchas Maoz, an experienced advocate and law lecturer who also served as the external legal advisor to ISTA at the time. Maoz was acquitted of all charges by the Magistrate's Court, and in its judgment the court noted with regard to Hanegbi that "factual truth was not always a guiding light in his testimony … the witness did not provide precise answers and avoided topics that did not square with his version of the events." [1], at 428. Advocate Maoz then asked the Attorney-General to indict Hanegbi for lying under oath, for relaying misleading information, and for presenting contradictory testimonies, but the Attorney-General decided that the chances of conviction were too low to warrant a trial. Maoz petitioned the decision of the Attorney-General to the High Court of Justice. On December 7, 1992, the Court ruled "after a great deal of hesitation – literally by a hairsbreadth" that while an indictment could reasonably have been filed against respondent, it would not intervene in the Attorney General's decision:

> The Attorney-General weighed all of the facts and, in deciding whether or not to indict Hanegbi, and concluded that the small chance of a conviction did not warrant an indictment. On the basis of our comments above, it is easy to form the impression that, had he decided to indict Hanegbi, we would have regarded this as reasonable. But the question before us is not what this Court, or any of its judges, would have decided in the Attorney-General's place.

Id. at 439 (Or, J).

8. The third affair, known as the "Bar-On affair," concerned the appointment of Advocate Roni Bar-On to the position of Attorney-General. It is alleged that respondent, then Minister of Justice, behaved unlawfully during the appointment process, and even misled the government and the Prime Minister regarding the position of the President of the Supreme Court on the appointment. The facts of the case were described at length in three Supreme Court judgments. *See* HCJ 2534/97 *MK Yona Yahav v. State Attorney* [2]; HCJ 2533/97 *The Movement for Quality Government in Israel v. The Israeli Government* [hereinafter: *Bar-on* [3]]; HCJ 2624/97 *Ronal v. The Government of Israel* [4].

For our purposes we will content ourselves with a brief account of the principal elements. Respondent was suspected of fraud and breach of trust. The police recommended that an indictment be filed against him. The Attorney-General, however, with the consent of the State Attorney, recommended that the investigation file be closed for lack of evidence. The affair also dealt with the appointment of Bar-On as Attorney-General, and we shall now cite part of the State Attorney's opinion on this matter, as quoted in *Bar-on* [3]:

> The Minister of Justice [the respondent here] was aware that Bar-On's name had been mentioned in the Prime Minister's Office, prior to Michael Ben-Yair's [the previous Attorney-General] notice of resignation. The Minister of Justice also knew that, within the Prime Minister's Office, Bar-on was not considered the natural candidate, due his factional affiliation in the Likud.
>
> No doubt the Minister of Justice had an interest in the appointment of Bar-On, who was his mentor and friend. Hanegbi also claims that, in his opinion, Bar-On was qualified for the position.
>
> The Minister of Justice's engineering of Bar-On's

> appointment was concealed from the public eye at the time. Government ministers were apprised of it at a cabinet meeting, leaving them no time to conduct any discussions or investigation. The Minister of Justice repeatedly emphasized that, in the past, Attorney-Generals had been appointed in a similar manner, without the name of the candidate being presented to the cabinet.
>
> The Minister of Justice received information from the President of the Supreme Court, A. Barak, that could have disqualified Bar-On, information that required consideration. He failed to present the true significance of these comments to the Prime Minister and merely informed the cabinet that President Barak was aware of the appointment. His manner of mentioning the subject could have led to the conclusion that President Barak had nothing to say about the appointment, and perhaps even assented to it. The truth, of course, was otherwise.

Id. at 50-51. It was further noted:

> In our case, the Minister of Justice [the respondent here] failed to inform the cabinet of the Supreme Court President's negative view of the appointment of Bar-On as Attorney-General. In this context, the State Attorney stated:
>
> > "During the Cabinet meeting, Minister Kahalani asked the Minister of Justice whether the Prime Minister had approved the appointment. Hanegbi replied, saying: 'Yes. I also brought it to the attention of the President of the Supreme Court, and, naturally, also to the Attorney-General, who gave his approval'
> >
> > Minister David Levi was asked how he had understood these words. He reported that his understanding was that the Minister of Justice

> had mentioned the names of Barak and Ben-Yair in order to show that the appointment had passed through conventional channels.
>
> Considering what President Barak actually said about Bar-On's appointment, merely mentioning that Barak had been informed of it, without reporting what he had actually said about it, is problematic. This statement creates the impression that President Barak had nothing to say about the appointment, or at least that he did not say anything which mattered one way or another."

Id. at 65-66 (Goldberg, J.). As stated, the Attorney-General and the State Attorney decided that this evidence was insufficient to charge respondent with a criminal offense. But, at the same time, the State Attorney criticized respondent's conduct, writing that this constituted a "deviation from appropriate norms of conduct" and that it was not "above criticism." *Id.* at 52. Nonetheless, the State Attorney did not believe that respondent's conduct amounted to a criminal offense.

These harsh words triggered a public outcry, which led to the filing of three petitions with the High Court of Justice. We will complete our review of the Bar-On affair by noting that the arguments made in *Bar-On* [3] – a petition which sought to remove respondent from the office of Minister of Justice – bear a striking resemblance to the arguments raised in the petition before us. The main difference lies in the addition of the Derech Tzleha affair to the previous three affairs.

9. The Derech Tzleha affair began in July 1997. The case concerned respondent's actions as the head of the non-profit organization known as Derech Tzleha. The facts were detailed at length in an opinion of the Attorney-General, which was published on March 6, 2001, following his decision not to indict respondent. We will present some of the comments stated in the report:

The Findings of the Investigation

h. In 1994, MK Hanegbi and MK Abraham Burg prepared a private bill in the Knesset entitled "The National Campaign Against Traffic Accidents Law." The purpose of the draft legislation was to improve road safety, particularly by the establishment of a government body, which would consolidate all of the authorities, units and governmental bodies involved in the battle against traffic accidents. The bill was placed before the Knesset on July 25, 1994 and, on October 12, 1994, it passed a preliminary reading. It was then transferred to the Finance Committee for deliberation. A sub-committee was established, with Hanegbi as its chairman, with the task of preparing the bill for the next stages.

i. Concurrently, and in the framework of his public activities for the enactment of the Campaign Against Traffic Accidents Law, MK Hanegbi established Derech Tzleha, which he and his colleagues registered as a non-profit organization on October 12, 1994. The object of the organization, according to its by-laws, was to reduce the carnage on the roads through education, public activism, and legislation. In practice, its principal and perhaps chief object was the promotion of the Traffic Accidents Law by public activism and enlisting the support of Knesset Members and ministers.

j. The organization's activities were limited, comprising the following: sending letters to MKs, cabinet ministers, council heads, and other public figures, persuading them to support the Traffic Accidents Law; the production of three advertisements in support of the law; the publication of a pamphlet which brought together the protocols of the sub-committee headed by Hanegbi, and its dissemination among the Knesset Members; one-time correspondence with a medical organization regarding the establishment of

a fund for road-accident victims; planning demonstrations; setting up a signing booth; initiating and organizing a special meeting of the Knesset Finance Committee on the Modi'in road; sending requests to hundreds of "famous" people from a number of fields, asking them to add their names to an advertisement in support of the law; and publication of a newspaper advertisement in support, after the law had passed the first reading.

The rules of the organization prohibited the distribution of profits or benefits to members, whose activities were supposed to be voluntary. Hanegbi initially served, until September 12, 1995, as chairman of the organization. On October 1, 1995, he resigned his membership of the organization, and was appointed as director, and began receiving a salary and other benefits. As a result, the vast majority of the organization's resources went to his wages, company car, and expenses, all of these being related to Hanegbi's public activities as an MK. After his appointment as Minister of Health following the elections to the Fourteenth Knesset in 1996, Hanegbi resigned from his position as director. A short time later, the organization entered into voluntary liquidation.

k. The organization raised approximately NIS 375,000. The findings of the investigation indicated that MK Hanegbi received the vast majority of this amount through his salary, company car, expenses, and cellular phone, as well as in the form of a notice of support which was published three days before the Likud primaries.

The report continues with a chapter entitled "Suspicions" where we read the following:

Suspicions

13. The investigation raised suspicions that MK Hanegbi received these benefits as payment for his activities as a

Member of the Knesset, and especially for his efforts in promoting the Traffic Accidents Law. If this was found to be true, he would have been guilty of bribery, fraud, and breach of trust, and offenses connected to the management of a corporation.

After examining the evidence, we found that, while serving as an MK, Hanegbi functioned both as the chairman of the Finance Committee of the Knesset, and as the chairman of the sub-committee that was engaged in the promotion of a law. Concurrently, he also held a central position in the organization, whose main object was the enactment of the Traffic Accidents Law. This situation created a *prima facie* conflict of interests. While he did declare his income from the organization to the Knesset Speaker, Hanegbi failed to inform the committee members that he was both one of the founders of the organization and its chief. And, as we already stated, while serving as chairman of the sub-committee charged with the advancing the Traffic Accidents Law, and in his capacity as a Member of the Knesset, he was receiving a salary and significant benefits from the organization that he had established. Nonetheless, at the end of the day, the evidence was insufficient to prove, to the degree required in a criminal case, that the conflict of interest amounted to a "corrupt" breach of trust. This is especially true regarding proof of the criminal intent required in these offenses: that MK Hanegbi was aware that he was acting in a corrupt manner which was detrimental to the public.

14. These evidentiary difficulties result primarily from the fact that the organization from which Hanegbi received benefits, which he had established with the aid of his friends and long-time associates, had no interests independent of his own, and certainly none which conflicted with his own. During the period of its operations, Hanegbi served as the organization's chairman

and subsequently as its director-general, and he dictated the agenda. Similarly, there is no evidence at all that the organization ever pressured Hanegbi regarding his activities as an MK, nor was there even a suspicion of such pressure, which could have indicated the existence of a corrupt conflict of interest. On the contrary, it was MK Hanegbi who directed the other members of the organization in its different activities.

15. In particular, an evidentiary doubt still remains regarding the criminal intent. The question is whether, by receiving benefits from the organization, Hanegbi was aware that he was placing himself in a conflict of interest which amounted to a corrupt breach of trust, in connection with the Campaign Against Traffic Accidents Law, which Hanegbi initiated and promoted over a long period of time. Furthermore, assuming that the suspicion is that Hanegbi had "bribed himself" using the organization, it is impossible to prove beyond all reasonable doubt that this fulfills the criteria of a crime by an MK in a matter related to advancing legislation in the Knesset. The case law regards the offence of "breach of trust" as a consciously corrupt conflict of interests. In the case at hand, however, there is insufficient evidence of that kind of conflicting interest. Moreover, the organization did not represent any particular, sectarian-interest group; its purpose was rather to rouse public interest in the battle against road accidents.

16. *Fuel Economy Law* – MK Hanegbi served in rotation with MK Gideon Pat as the chairman of the Knesset Finance Committee. This committee dealt, among other things, with the Fuel Economy Law. During the period in which MK Pat served as committee chairman, two months before MK Hanegbi became committee chairman, the organization received contributions from fuel companies. The sum received amounted to about 10% of the total contributions received by the organization. According to

the findings of the investigation, the overwhelming majority of the representatives of the fuel companies were unaware of Hanegbi's involvement in the organization. None of them knew that Hanegbi was receiving benefits from the association to which they were contributing. Under these circumstances, it is impossible to prove that Hanegbi felt any sense of obligation to these companies. The intensity of the conflict of interests is therefore considerably weakened. Furthermore, during the relevant period, there was no chance of promoting the enactment of the Fuel Economy Law in view of the government's opposition to that law. No evidence was found of Hanegbi having influenced the handling of the law.

17. The Knesset Ethics Committee reviewed two complaints concerning the benefits that Hanegbi received from the organization. It was alleged that the salary he received from the organization created a conflict of interest. This was in violation of the provisions of the Knesset Members Immunity Law, which forbids a Knesset Member from engaging in any occupation or additional occupation which creates a possible conflicting interests. It also contravened the Rules of Ethics for Members of the Knesset, which prohibit a Knesset Member from receiving, whether directly or indirectly, any material benefit for an act that he has performed within the framework of his duties or his status as a Member of the Knesset. On May 24, 1999, following its deliberations, the Ethics Committee found Hanegbi guilty. It ruled that the chairman of a Knesset Committee could not preside over deliberations of a particular issue while simultaneously occupying a key position in an organization whose chief aim was to promote that issue. This is true even if his duties in the organization were voluntary. The Committee further determined that the fact that MK Hanegbi was chairman and director-general of the organization while also serving as the chairman of the Finance Committee created the

possibility of a conflict of interest between his additional occupation and his role as a Knesset Member. The Ethics Committee accordingly censured Hanegbi and docked his salary for two months.

18. However, the criteria for conviction in criminal proceedings differ from those governing disciplinary proceedings. People are frequently the target of disciplinary proceedings even when the allegations against them are not overtly criminal. The findings of the Ethics Committee, in accordance with the facts upon which they were based and the additional evidence gathered by the police, are insufficient to prove the offenses of fraud and breach of trust. Here, an MK dealing with the legislative arrangement for a particular cause was simultaneously the recipient of a salary and benefits from an organization which spearheaded the same cause, albeit with the association's approval. It has long been our opinion that these facts may involve a breach of trust. However this is difficult to prove. We now confront the issue again, in view of the report given to the Knesset Speaker and his legal advisor, as detailed below.

19. The evidence against Hangebi was insufficient to substantiate a criminal conflict of interest in order to prove the crimes of fraud and breach of trust. An MK established an organization for an important public cause. He raised money for that cause which, as director-general of an organization, he was supposed to channel towards that public cause. Instead, with the consent of the organization's members – who were his friends – he used most of the funds raised for his own benefit, in order to fund activities he performs in his capacity as an MK. All of this occurred after Hanegbi had submitted a private bill, which he believed to be tremendously important, as he admitted during investigations, and while he was receiving a salary in his capacity as an MK. Even so, regarding the

> *mens rea* of the offense, this was not the only organization that served as a tool for earning salary or benefits in the public sector. Moreover, MK Hanegbi reported his income from the organization to both the Knesset Speaker and the Knesset legal advisor, and this creates difficulties in proving the necessary criminal intent.
>
> 20. It should be noted that, at that time, pursuant to the Knesset Members Immunity Law (Rights and Duties), 1951, a Knesset Member was permitted to receive salary for "an additional occupation" provided that it did not exceed half of his salary as an MK. The law stipulated that such payment should not engender "a potential conflict of interest between the additional occupation and his role as an MK." In 1998, the section was amended and today it is prohibited for an MK to engage in any additional occupation for remuneration.

10. As stated in the Attorney-General's report, respondent's actions in the Derech Tzleha affair led to disciplinary proceedings in the Knesset Ethics Committee. The committee determined that Hanegbi had placed himself in a conflict of interest, in contravention of the Ethics Rules, and therefore imposed two penalties on him: a reprimand and a two-month salary freeze. In its decision of May 24, 1999, the committee wrote:

> 20.A. MK Hanegbi served simultaneously as chairman, and subsequently as director-general, of the Derech Tzleha organization, and as chairman of the Economics Committee. This created the possibility of a conflict of interest between the additional occupation and his role as a Knesset Member, in violation of the provisions of section 13A(a)(3) of the Knesset Members Immunity (Rights and Obligations) Law, 1951.
>
> B. MK Hanegbi received material benefit as chairman, and subsequently director-general, of Derech Tzleha, which

had as one of its principle objectives the advancement of a law which Hanegbi himself had initiated. In doing so, he violated section 4 of the Rules of Ethics for Knesset Members, which prohibits a Member of Knesset from receiving any material benefit for an activities performed outside of the Knesset in his capacity as Knesset Member.

C. Towards the end of the term of the Thirteenth Knesset, MK Hanegbi returned to his position as chairman of the Finance Committee. This gave rise to a potential conflict of interest concerning the Fuel Economy Law, since MK Hanegbi was receiving benefits from Derech Tzleha, which had accepted contributions from major fuel corporations. In this situation, MK Hanegbi should have transferred the bill to another MK, and by failing to do so, violated the provisions of section 13A(a)(3) of the Immunity Law, as worded at that time.

11. Hanegbi's actions in the Derech Tzleha affair were investigated by the police. In June 1999, they recommended to the State Attorney's Office that Hanegbi be indicted for accepting a bribe, fraud, breach of trust, and related offenses. The evidentiary material gathered by the police was examined and considered by the Attorney-General and the State Attorney. At the beginning of 2000, the decision was taken to indict respondent for fraud and breach of trust, fraud and breach of trust by a corporation, and falsifying corporate documents, all subject to a preliminary hearing. The Attorney-General decided, with the consent of the State Attorney, that "after extensive legal deliberation … grounds exist to indict MK Hanegbi for fraud, breach of trust and additional offenses."

In anticipation of the proceedings to remove Hanegbi's immunity as a Member of Knesset, the file was transferred to the Jerusalem District Attorney's Office. It was here that the tables turned. In the words of the Attorney-General in his report: "At this stage of the process, difficulties arose once again regarding proof of the components of the various offenses, primarily regarding fraud and

breach of trust. In view of our doubts regarding the reasonable probability of a conviction, the State Attorney and I decided to close the file."

As such, no indictment was filed; instead, a public report was issued. This report gave a detailed account of the circumstances of the case. Its first section stated: "We would emphasize that the events, for which MK Hanegbi was both convicted and penalized by the Knesset Ethics Committee in 1999, indicated impropriety which, in our view, reached the level of an offense. However, we ultimately decided that there was no reasonable chance of obtaining a conviction." In conclusion, the Attorney-General wrote:

> In summary, we believed that the circumstances warranted an investigation, and we even considered that there ought to be an indictment. However, there must be a reasonable likelihood of a conviction, and this requirement, with the final preparation of the file, was ultimately not satisfied.

12. This concludes our review of the four cases upon which this petition is based.

13. The Attorney-General's view was that respondent's involvement in the Derech Tzleha affair made it inappropriate to appoint him as Minister of Public Security or to other positions connected with law enforcement. Accordingly, when he became aware of the intention to appoint Hanegbi as Minister of Public Security, the Attorney-General advised the Prime Minister to refrain from making the appointment, because "[a]lthough, according to statute and case law there appears to be no legal impediment to the appointment, the appointment itself is *prima facie* problematic from a civic perspective." Notwithstanding this advice, the Prime Minister decided that it was appropriate to appoint Hanegbi as Minister of Public Security. Notably, when the previous government was appointed in 2001, and in the direct aftermath of the Derech Tzleha case, the Attorney-General also advised the Prime Minister against appointing respondent to any ministry entrusted with law

enforcement. The advice was given "primarily from a civic perspective" and, on that occasion, the Prime Minister accepted the advice.

The Dispute

14. We are confronted with three principal affairs: the ISTA affair, the Bar-On affair and Derech Tzleha affair. In all of these cases, Hanegbi was suspected of criminal offenses and, in the latter two, the police recommended that he be indicted. However, he was never actually indicted and, as such, he was not convicted. The question therefore arises: Can a person be prevented from serving as a cabinet minister on account of suspected criminal offenses? If so, can Hanegbi be prevented from serving as a cabinet minister because of his involvement in these affairs? Petitioner does not contest Hanegbi's appointment as a cabinet minister *per se*. Rather, the claim is that he is unfit for service as a minister charged with law enforcement and, for our purposes, as Minister of Public Security. This, in turn, raises the following question: Assuming that Hanegbi is fit to serve as a member of the cabinet and a minister, is he nonetheless unfit to be Minister of Public Security? Is the Prime Minister's decision to appoint Hanegbi as Minister of Public Security so unreasonable as to require this Court's intervention? Even at this early stage I would state that there is no dispute between the parties regarding facts or the law. They dispute, however, the application of the law to Hanegbi.

15. Petitioner's claim, in brief, is that, under the circumstances, there is a legal impediment to Hanegbi's appointment as Minister of Public Security. Though Hanegbi was not indicted in any of the three cases, his involvement in them makes the Prime Minister's decision to appoint him as the "Police Minister" blatantly unreasonable. Petitioner argues that the appointment irreparably damage the public's confidence in the system of government and the police. Furthermore, there is also a serious chance that the appointment will cause irreversible damage to the functioning of the police, even if only because of the "bad blood" between Hanegbi and the police

officers who investigated him and recommended his indictment. Furthermore, the Police Ordinance (New Version), 1971, grants the Minister of Public Security extensive powers over the police. For example, the appointment and promotion of senior officers (section 7 of the ordinance), which includes the ability to appoint the Inspector-General of Israel Police. *See* section 8A (stating that the government appoints the Inspector-General pursuant to the recommendation of the Minister of Public Security). Respondent may frequently find himself in a serious conflict of interest when handling the promotion of those who investigated him and who recommended his indictment. The latter will fear, and rightly so, that he will take revenge even if they have discharged their duties properly. Therefore, maintains petitioner, the Prime Minister's decision to appoint Hanegbi as Minister of Public Security, is unreasonable.

16. Respondents to the petition – the Prime Minister, Mr. Hanegbi, and the Attorney-General – oppose petitioner's request. In their view, Basic Law: The Government grants the Prime Minister particularly broad discretion regarding the appointment and removal of ministers. Furthermore, there is an inverse relationship between the breadth of the Prime Minister's discretion and the constraints upon the High Court's power to instruct him how to act. It is true that, in special circumstances, the Court can order the Prime Minister to remove a minister from his post, but an examination of the case law indicates that the Court can only exercise that power in rare and exceptional cases. *See* HCJ 3094/93 *The Movement for Quality Government in Israel v. The Government of Israel*, at 404 [hereinafter: *Deri* [47]]; HCJ 4267/93 *Amitai – Citizens for Sound Administration and Moral Integrity v. Yitzhak Rabin, Prime Minister of Israel*, at 441 [hereinafter: *Pinhasi* [5]]; and *Bar-On* [3]. These are cases where indictments – indictments alleging particularly serious offenses – were filed against a minister.

The Prime Minister and Attorney-General on the one hand, and Hanegbi on the other, continue to assert, each in their own way, that this is not one of those rare cases in which the Court will intervene with the Prime Minister's discretion. How so? Hanegbi was not even

indicted and, as such, was certainly not convicted. Consequently, there are no legal grounds for preventing him serving as a cabinet minister. Hanegbi is presumed innocent until proven guilty. To prevent him from serving in any particular position without having stood trial violates the principles of justice, even if only because he has never been given the opportunity to prove his innocence (and especially since he is under no obligation to do so). The appointment may indeed be "problematic on the civic level" (in the words of the Attorney-General). However, the Prime Minister was aware of this, and having considered all of the pertinent factors, he decided that Hanegbi, with his variety of talents and experience, was the best candidate for the job. With regard to concerns over conflicting interests in relation to those police officers who interrogated him, we have Hanegbi's assurance that that he bears against them no grudge. Furthermore, adds Hanegbi, his power to intervene in the professional decisions of the police is limited. The conclusion dictated by all of the above is that the Prime Minister exercised his powers lawfully; his decision was a reasonable one, and, in any event, it does not deviate from the range of reasonableness.

17. This concludes our review of the basic issues in dispute and the central claims of the parties.

The Legal Framework

18. We must first establish the legal point of reference from which to begin our investigation. We were requested to order the Prime Minister to remove respondent from his position as Minister of Public Security. Two questions present themselves in this regard. First: is the Prime Minister empowered to remove Hanegbi from acting as the Minister of Public Security? Second: if so, should the Court, under the circumstances, order the Prime Minister to remove Hanegbi from his position? These questions raise the issue of fitness to serve as a minister. We will now address the concept of "fitness" in its broadest sense.

19. The current version of Basic Law: The Government, the

2001 version, contains provisions concerning the fitness – or, more precisely the unfitness – of persons with a criminal record to serve as ministers. These provisions address a person's non-appointment as a minister, as well as their dismissal. The unfitness of a person with a criminal past is regulated by section 6(c) of the Basic Law:

> Fitness of Ministers
>
> 6. (a) …
>
> …….
>
> (c) (1) A person who was convicted of an offense and sentenced to prison, and seven years have not yet passed since the day on which he finished serving his term of imprisonment or since the handing down of his sentence – whichever was later – shall not be appointed minister, unless the Chairman of the Central Election Committee states that the circumstances of the offense do not involve moral turpitude.
>
> (2) The Chairman of the Central Elections Committee shall not so rule if a court has determined that the offense involved moral turpitude.

As such, where a person was imprisoned for a crime involving moral turpitude, and seven years have not yet passed since the completion of the sentence (or the sentencing) – the conviction will prevent his appointment as a minister. Parenthetically, we would add that this provision replaced section 16(b) of Basic Law: The Government, 1992, which was even more stringent about

membership in the cabinet.

Furthermore, pursuant to section 23(b) of the Basic Law: The Government, 2001, the office of a minister is terminated when he is convicted of an offense of moral turpitude.

Termination of the Tenure of a Minister Pursuant to an Offense	23. (a) … (b) Should a minister be convicted by the court, it shall state in its verdict whether the offense involves moral turpitude; should the court so state, the minister's tenure shall cease on the day of such verdict.

The language of the statute is unequivocal: Conviction of an offense involving moral turpitude means the termination of tenure, with no reservation or discretion. The statutory provision acts as a guillotine: once certain "objective" conditions exist, the law itself prevents the minister from continuing to serve in that capacity.

These are the explicit statutory provisions governing unfitness to serve as a minister due to criminal involvement.

20. Together with the above explicit statutory provisions, there are also provisions regulating the Prime Minister's power to terminate the tenure of a minister. Section 22(b) of Basic Law: The Government, 2001 provides:

Termination of the Tenure of a Minister	22. (a) … (b) The Prime Minister may, by way of written notification, remove a minister from his post; the removal of a minister will take effect 48 hours after the letter notifying thereof was given to the minister, unless the

> Prime Minister retracts it prior to such time.

This statutory provision, with minor differences, was also contained in section 21A of Basic Law: The Government, 1968, following its amendment of 1981, and in section 35(b) of Basic Law: The Government of 1992.

21. In light of these statutory provisions, the question is whether the unfitness provisions of sections 6(c) and 23(b) of Basic Law: The Government, 2001, limit the discretion afforded to the Prime Minister under section 22(b) of the Basic Law? In other words, with respect to a minister or ministerial candidate with a criminal past, do sections 6(c) and 23(b) of the Basic Law provide the sole and exclusive framework for the Prime Minister's authority? It could be argued, for example, that the legislature went out of its way to specify certain preconditions to disqualify a minister with a criminal past from office. Can a negative inference be drawn from this that a minister will not be regarded as unfit to serve unless the statutory preconditions for unfitness are satisfied? Also, regarding a minister's criminal past which does not fulfill the statutory conditions of unfitness specified in section 23(b) of Basic Law: The Government, 2001, does the Prime Minister have no authority to terminate a minister's tenure? If so, does it not follow that the person is a fit candidate for a ministerial post?

The above questions were discussed at length in *Deri* [47] and in *Bar-On* [3]. *Pinhasi* [5] discussed the same issues in relation to a deputy-minister. The Court's answer was clear and unequivocal: the explicit statutory provisions cited above in no way restrict the Prime Minister's discretion or the Court's discretion to review the Prime Minister's decision. It will be recalled that those cases involved the judicial review of the Prime Minister's decision not to terminate the tenure of a minister. The Court ruled as follows: the Prime Minister is vested with the power to terminate, or retain, the tenure of a minister (or deputy-minister); the statutory provisions do not restrict the Prime Minister's discretion to dismiss a minister; the additional

statutory provisions do not limit the scope of section 21A of Basic Law: The Government (1968-1981; currently section 22(b) of Basic Law: The Government, 2001); and no negative inference can be drawn from the absence of provisions governing the termination of tenure. *See Deri* [47], at 421; *Pinhasi* [5], at 456-57.

In this context the Court distinguished between unfitness for a particular office and discretion concerning an appointment to office or removal from office. Sections 6(c) and 23(b) of the Basic Law deal with "fitness" and, as such, do not restrict the Prime Minister's discretion regarding the non-appointment of a person to a particular office, or his removal:

> We must distinguish between questions of fitness (or authority), and questions of discretion. The absence of any express statutory provision regarding the unfitness of someone with a criminal past establishes the candidate's fitness. However, it does not preclude the possibility of considering his past within the framework of exercising the administrative discretion given to the authority making the appointment. Indeed, the criminal past of a candidate for public office is a relevant consideration, which the authority making the appointment is entitled and even obligated to take into account.

HCJ 6163/92, 6177 *Eisenberg v. Minister of Construction and Housing*, at 256-57 [6]. This rule was actually established prior to the enactment of section 23(b) of Basic Law: The Government, 2001. However, not only does this statutory provision not touch on the issue of discretion – the wording of the law makes clear that the termination of tenure occurs automatically under certain circumstances – but the logic behind the law sheds light on our case.

22. The general principle is, therefore, that the Prime Minister is empowered to refrain from appointing a person as a minister, or to dismiss a minister, even in cases not covered by the stringent conditions expressly stated in the law. Once it has been established

that the Prime Minister has the power to remove a minister from office, it follows automatically, as a matter of principle, that this discretion is subject to the judicial review of the High Court of Justice.

The Exercise of Discretion

The Prime Minister and Cabinet Ministers as Public Trustees

23. This brings us to the main point. There is no explicit statutory provision (not even in section 22(b) of Basic Law: The Government) that sets out criteria governing prime ministerial discretion in determining the composition of the government. This is true of both appointments and dismissals. Nor is there any statutory restriction of the Prime Minister's discretion. The discretion of the Prime Minister may therefore be based upon a variety of pertinent considerations. But, like any other legal discretion, it is constrained by the basic principles of administrative law, which form the foundation of public administration and inform it at all levels. First and foremost among these principles is the principle of trusteeship. All those empowered on behalf of the state are believed to exercise their powers for the good of all, and their status obligates them to act as trustees in the exercise of their powers. In the canonical words of Justice Cohen:

> [T]he private sector differs from the public sector, for while the former acts as it pleases, giving and taking at will, the latter exists solely for the purpose of serving the public, and possesses nothing of its own. Whatever it has it owns as a trustee, and it has no rights or obligations in addition to, or distinct from, the rights of the trusteeship or those conferred or imposed by statutory provisions.

HCJ 142/70 *Shapira v. Local Committee of Chamber of Advocates* [60], at 331. *See also Deri* [47], at 417; *Pinhasi* [5], at 461-63; *Bar-On* [3], at 55-56; HCJ 4566/90 *Dekel v. Minister of Finance* [58], at 33.

24. In other words: Those exercising authority on behalf of the state or any other public authority – in our case, the Prime Minister and the Minister of Public Security – must constantly be aware that their affairs are not their own. They are dealing with matters that concern others and are obligated to conduct themselves with fairness and integrity, in strict compliance with the principles of public administration. Within the area of private law the individual can behave with a measure of the "caprice," though such "caprice" is not what it used to be, nor should it be. But in the realm of public law – constitutional and administrative law – caprice is a terminal illness. Those who wield authority conferred on them by law, however insignificant that authority may be, must strictly scrutinize all their decisions and actions. They must never forget that all their decisions and actions are on behalf of others, not their own interests. Fortunate is the community whose leaders understand not only the prerogatives but also the limitations of their power. As the High Court recently stated:

> When acting in the domain of public law, the appointing authority operates in the capacity of a public trustee. Just as a trustee possesses nothing of his own, so too, the appointing authority possesses nothing of its own. It must conduct itself in the manner of the trustee: acting with integrity and fairness, considering only relevant factors, acting with reasonableness, equality, and without discrimination.
>
> Those with the power to appoint or decide must therefore act with integrity and fairness, without considering irrelevant factors, guided by principles of reasonableness and equality, and without discrimination. Any failure to discharge this duty opens the door to inappropriate appointments or decisions. The wrong people are appointed and the right people overlooked, and the public good is harmed. But the necessity of imposing these obligations on persons with the powers to make

> appointments or decisions relating to particular individuals extends beyond the propriety or legality of particular appointments or choices. The scourge of inappropriate appointments must be stopped, in order to preserve the very existence of the public service. Moreover, those appointed illegally are liable to adopt similarly illegal methods when they have to make appointments themselves. The fathers have eaten sour grapes and the sons who witnessed their fathers will also eat sour grapes. *Cf.* Ezekiel 18:2. And, we all know where this path leads.

HCJ 2671/98 *Women's Lobby v. The Minister of Labor and Welfare*, [61] at 649-50. These words deal with appointments to the public service (specifically the deputy director-general of the National Insurance Institute), but also they also apply, under different circumstances, to the case before us.

25. We have seen that the Prime Minister and all ministers are in fact trustees, holding their offices in trust for the public. We can further infer from this that, when considering the appointment, or the continued service, of a minister with a criminal past, the Prime Minister must conduct himself as a trustee dealing with the public's affairs. How does a trustee ensure the propriety of his conduct? My colleagues have elucidated the guiding principles, wisely and at length; adding to their comments would be superfluous. I will cite just a few of the comments made by them in this context, which will be instructive for our purposes. For example:

> The statutory provision [empowering the Prime Minister to dismiss a minister] is also intended to constitute a response, in the form of removal from office, to a serious incident involving a minister. This applies when that occurrence, whether act or omission, affects the stature of the government, its public image, its ability to lead and serve as a role model and its capacity to inculcate proper behavioral norms. It applies primarily when the incident impacts the public's confidence in our system of

> government, on the constitutive values of our system of government and law, and on the duties of the ordinary citizen which arise from them.

Deri [47], at 422 (Shamgar, P). Furthermore:

> The Prime Minister, the government, and all of its ministers are in the position of trustees. This position requires them to consider whether to terminate the tenure of a deputy-minister against whom an indictment has been filed, the offenses being particularly grave. The Attorney-General may decide that there is sufficient evidence for an indictment. Under these circumstances, the continued service of this minister is liable to diminish public confidence in the ruling authorities. The authorities must therefore consider the matter with the utmost gravity. For it must be remembered: the government's ability to rule is based on the confidence of the public. Without public confidence, the government cannot function.

Pinhasi [5], at 461 (Barak, J). Similarly:

> An elected public official is like a cantor leading the prayers. The cantor is the community's mouthpiece. He presents himself as impoverished in deeds, humble and frightened. So, too, the public servant. Like the prayer leader, he possesses nothing of his own. What he has belongs to the community he serves. Decency, honesty, and purity of heart are the hallmark of a worthy cantor, and this is the pillar of fire which guides the public servant in his path. This is the only way in which he can properly serve the community that chose him as its leader, and the only way for him to win the public's confidence. It is well known that if the nation lacks confidence in its leaders, disorder prevails and society disintegrates. The higher they ascend the ladder of leadership, the greater our demand for honesty and integrity from our leaders.

HCJ 103/96 *Pinchas Cohen, Adv. v. The Attorney-General* [62], at 326.

The same applies to the government, which enjoys a particular status and image in the public eye. It must maintain public confidence in the Israeli system of governance and in our constitutive values. There is an inherent need for the government and the administration to conduct themselves in a manner that is ethical, decent and dignified. Hence, under certain circumstances, the duty of the Prime Minister to remove a minister from office becomes a duty, a power that the Prime Minister is obligated to exercise. What then are the particular circumstances that transform the Prime Minister's power to dismiss a minister into a duty?

Indictment of a Public Trustee: Trusteeship and Public Confidence

26. In *Deri* [47], an indictment was filed against the Minister of the Interior, Aryeh Deri, for the offenses of bribery, breach of trust by a public servant, the fraudulent receipt of goods in aggravated circumstances, and falsifying corporate documents and theft by a director. *See Deri* [47], at 410. In *Pinhasi* [5] an indictment was filed against the Deputy-Minister of Religious Affairs, Raphael Pinhasi, for falsifying corporate documents, false testimony and attempting to receive goods by fraud. *See Pinhasi* [5], at 447. In both cases the Court was required to decide whether the indictments were sufficiently grave to compel the Prime Minister to remove the minister and the deputy-minister from office. The Court decided in the affirmative in both cases:

> In summary, based on the *Deri* and *Pinhasi* cases, the rule is that where an indictment for a serious offense is filed against a minister or a deputy-minister, the Prime Minister is duty-bound to remove the minister or deputy-minister from their post. Under these circumstances, the Prime Minister's refusal to discharge that duty will be regarded

> as unreasonable in the extreme. Consequently, in the event of such a refusal, the Court can order the Prime Minister to exercise his power to remove the minister or deputy-minister from his position. Today, too, the Prime Minister's refusal to remove a minister or deputy-minister who has been indicted for a serious offense will be regarded as extremely unreasonable, justifying this Court's intervention.

See Bar-On [3], at 56 (Zamir, J.). The rule is crystal clear: "The Prime Minister's refusal to remove from office a minister or deputy-minister who has been indicted for a serious offense will be regarded as extremely unreasonable, justifying this Court's intervention."

27. The duty of trusteeship owed by the Prime Minister and other ministers is inextricably linked to public confidence in the government. A trustee who behaves appropriately wins trust; a trustee who does not live up to the required standards will not enjoy the public's confidence. The government needs the trust both of the Knesset and of the public as a whole. If it behaves as a trustee should, it becomes the repository of public confidence. Where the government betrays its trusteeship, public confidence in the government is shattered, and the Court will intervene. This is what the Court did when it forced the Prime Minister to dismiss Minister Deri and Deputy-Minister Pinhasi.

One might ask: why should the Court trouble itself with the question of public confidence in the government by directing the Prime Minister to remove officials from their positions, as it did in *Deri* [47] and *Pinhasi* [5]? The public will presumably express its loss of confidence in the government at the ballot box. Why then should the Court issue orders concerning the relationship between the people and the government? Furthermore, the principle of decentralization and the relationship of respect owed by the judiciary to the executive and legislative branches, especially with respect to the internal management of these branches, obligates the Court to distance itself from the question of the composition of the

government. This is the government's exclusive domain, and it ought to remain that way, subject to the express provisions of the law.

28. This narrow conception of the relationship between the judiciary and the other authorities is one possible view – possible but undesirable. The Supreme Court rejected it – and rightly so – in *Deri* [47], *Pinhasi* [5], and *Bar-On* [3]. The Court premised its decisions on the issue of public confidence, and this too was the right path. The Court explained its position as follows:

> Without public confidence in the public authorities, the latter become an empty vessel. Public confidence is the mainstay of the public authorities and enables them to discharge their functions.

Eisenberg [6], at 262 (Barak, J.). Later, in discussing public confidence in the government, the Court dealt with past actions that may tarnish the image of a candidate to public office:

> Public confidence in the organs of government is one of the most important assets of the governing authority and of the state. When the public loses confidence in the ruling authorities, it also loses its belief in the social contract of communal life. Paramount importance ought to be given to maintaining, preserving, and promoting the feeling that public servants are not masters and that they discharge their duties for the sake of the public, honestly and incorruptibly. The purity of the service and of its members is the foundation of the civil service and the basis of our social structure …. This consideration is central and must therefore be accorded significant weight in the overall decision regarding the appointment of a candidate with a criminal past.

Id. at 262. This ruling was reaffirmed in *Deri* [47], *Pinhasi* [5], and *Bar-On* [3]. As stated in *Pinchas Cohen* [62]: "[I]t is well known that if the nation lacks confidence in its leaders, disorder prevails and

society disintegrates." Therefore, when confronted with a concern that a particular act or omission will severely impair the public's confidence in its leadership, the Court cannot stand idly by, claiming that this matter is not its concern. Judicial intervention in such cases is a form of self-defense – the self-defense of the entire state, of which the judiciary itself is part. How would this Court respond if it was accused of being silent in the face of such a travesty? This was our holding in both *Deri* [47] and *Pinhasi* [5], and we will be guided by it.

Indictment and Evidence in Support of the Indictment; Evidence without an Indictment

29. As we have already observed, the law provides that where an indictment for a serious offense is filed against a minister, the Prime Minister is obligated to remove that minister from office. By extension, his refusal to remove the minister under those circumstances is considered to be unreasonable in the extreme and warrants judicial intervention. Now, it could be asked: is this, in fact, the correct interpretation of the law?

30. An indictment is no more than a document bearing the signature of an attorney, the Attorney-General, or any other authority. The signatory affirms that to the best of his understanding, the police file contains *prima facie* evidence that the accused committed the offenses in the indictment. An indictment effectively amounts to an expert opinion of its signatory that, *prima facie*, the defendant has committed the offenses specified in the indictment. And the question necessarily arises: Is this sufficient? In other words, is the understanding of the signatory – however elevated his status may be – that a person has, *prima facie*, committed various offenses, sufficient to compel the minister or deputy-minister to step down, without giving them the chance to present their case? Were this to be provided by statute, we would accept it (subject, of course, to the basic principles of fair procedure). However, should we make this our holding: that an indictment for serious offenses obligates the Prime Minister to remove a minister and deputy-minister from

office? Was this the impact of the ruling in *Deri* [47] and *Pinhasi* [5]? It is clear to us that this is not the law and that this was not the Court's intention in those cases.

31. In our opinion, a correct understanding of those cases is that we cannot rely upon an indictment, even if it bears the signature of so exalted a personage as the Attorney-General himself. Rather, the indictment is a document that consolidates the evidence collected in the police file, evidence that *prima facie* incriminates the accused of the offenses ascribed to him. The indictment may be likened to a container with a label that attests to its contents. Its essence is the evidence gathered in the police file, and the basic assumption is that the indictment is a proper summation of that evidence. In both the *Deri* [47] and *Pinhasi* [5], the Court was careful to emphasize this point. In *Deri* [47] the Court enumerated the offenses of which Deri was suspected, declaring immediately afterward that: "The facts, which reflect the *prima facie* evidence in the hands of the prosecution, are described at length in the indictment spanning 50 pages." *Id.* at 410. The Court added:

> We described the main points of the indictment presented to the Knesset in the case at hand. The indictment includes particularly serious allegations of corruption, but it is not a judgment. It only reflects the *prima facie* evidence collected by the prosecution. But, for the purpose of continued service in the government, significance is also attached to *prima facie* evidence collected in the indictment, which has now become public knowledge. In terms of the reasonableness of certain actions, circumstances are not assessed solely in terms of their ability to generate a hard and fast judicial determination. It is also significant what type of actions have been attributed to an individual, when clad in the official dress of an indictment ready for filing before the courts.

Id. at 422-23. It was added:

> [A]nd if, heaven forbid, an indictment is filed against a minister, based on *prima facie* evidence, which ascribes to the minister serious offenses that involve moral turpitude both by definition and under the circumstances – e.g. where a minister is charged with accepting bribes, fraud, deceiving state authorities, lying, or making false reports – then it would be neither appropriate nor reasonable for him to continue in office.

Id. at 427 (Levin, J.). In both *Deri* [47] and *Pinhasi* [5], the basic assumption was that there was *prima facie* evidence in support of the accusations. The import of *Deri* [47] and *Pinhasi* [5] is that, where there is evidence in the police file in support of an indictment filed against a minister or deputy-minister for serious offenses, then such evidence may obligate the Prime Minister to remove the minister or deputy-minister from office. The salient element is not the indictment as such, but rather the *prima facie* evidence that has crystallized into an indictment.

32. This interpretation of the ruling is unavoidable. The other interpretation – that an indictment alone is sufficient to remove a minister from office – would deviate from basic legal principles of fairness and justice. Consider the case of a minister who is a candidate for removal exclusively because of the indictment filed against him for serious offenses. He wishes to argue that the indictment was based upon a mistaken understanding of the evidence collected in the police file, and that the charges against him are groundless. The most basic principles of justice require the Court to listen to his claims, and not to refer him to the criminal proceedings to assert his claims. Any other response would undermine the fundamental respect enjoyed by the Court. Furthermore, to confer on an indictment the status of a conclusive document, in terms of the termination of a minister's office, is tantamount to divesting the Court of its discretionary power, and transferring this power to the attorney who signed the indictment. Such a divestment of judicial power is unacceptable. The Court cannot divest itself of its power to adjudicate and rule in accordance with the evidence submitted to it.

Discretion in judicial proceedings belongs exclusively to the Court and the fundamental principle in that context is that the Court cannot delegate its discretion to others, be it to the Attorney-General, or to any of the attorneys in the State Attorney's Office. By extension, it will not regard an indictment as an irrefutable, conclusive document. The indictment *per se* will not determine the fate of a minister.

33. To summarize: the rule is that an indictment for serious offenses may lead to a minister's removal from office. The proper interpretation of this rule is that an indictment constitutes an expert opinion that the police file contains evidence which adequately supports the charges against the minister. It is the supporting evidence behind the indictment that weighs against the minister, and not the indictment itself. Concededly, the indictment adds a certain degree of weight to the probative power of the evidence in the police file, but it is by no means conclusive. An indictment for serious offenses, even particularly serious offenses, does not tip the scales against the minister. But, as we shall shortly observe, the reverse true is not true either – the absence of an indictment does not tip the scales in his favor.

34. We have established that the conclusive element – whether to the minister's detriment or to his advantage – is not the indictment *per se*. Consequently, we must examine the evidence itself, and assess its importance for the case at hand. And we must also discharge another duty: an examination of the reasons and circumstances that convinced the Attorney-General, or the State Attorney's Office, not to file an indictment. Consider a case in which the evidence collected justified an indictment for a particularly serious offense, but the key witness absconded from the country, as a result of which the Attorney-General refrained from filing an indictment. In that kind of case, can one say that the Court may in good conscience refuse to address the matter, and release itself from all responsibility, for the simple reason that no indictment was filed? I think not.

35. The above would also apply to a decision not to file an

indictment, and even to a decision to close a police file. It will be recalled that police files are closed for a variety of reasons, and closing a police file without filing an indictment in no way indicates that no offense was committed, or that there is no evidence attesting to guilt. Thus, for example, the category of closing a file "for lack of evidence," includes cases in which the prosecutor has evidence that connects a particular person with the commission of an offense, only that such evidence is insufficient to prove the commission of an offense beyond all reasonable doubt, the requirement in criminal law. This Court addressed this question in HCJ 7256/95 *Fishler v. The Inspector General of the Israel Police* [63]:

> [F]iles which are closed for lack of sufficient evidence also include investigations of serious and even extremely serious offenses. There are cases in which the investigative bodies have information that leads to the re-opening of a file which was previously closed. This was referred to in the memorandum on the Crime Register and Rehabilitation of Offenders (Various Amendments) Law, 1996, which wasrecently disseminated by the Ministry of Justice:
>
> > Where prosecuting authorities close a file for lack of evidence, this does not mean that they have concluded that the suspect did not commit the offense. Closing a file on those grounds may occasionally be purely the result of technical factors, such as a doubt as to whether particular evidence will constitute corroboration, or where the key witness has left the country or otherwise absconded. Accordingly, information contained in these files may still be relevant for those bodies entitled to receive information on closed files, just as information regarding files closed on other grounds is relevant to such bodies.

Id. at 9-10, (Goldberg, J.). A similar argument was expressed in a later case:

> On January 2, 1994, the State Attorney issued guidelines regarding the exercise of discretion (Guideline No. 1.3 "The Closure of Files Due to Insufficient Evidence and Due to Lack of Guilt." The Guidelines clarify the procedure of closing a file due to insufficient evidence. Within the basic framework which governs the closure of files on the statutory grounds of "insufficient evidence," the guidelines establish a secondary category – the grounds of "lack of guilt." According to the Guidelines, when a prosecuting attorney concludes "…that there is evidence in the investigation file which raises the suspicion that a person has committed a certain offense, but the evidence is not sufficient for proof of guilt, and is therefore insufficient for indictment – the file regarding that suspect will be closed on the grounds of 'insufficient evidence,' and the reason for closing the file will be recorded accordingly." (para. 2). Where, however, the attorney is convinced "that no offense was committed in the same matter, or that there is no trace of evidence as to its commission, the file will be closed due to a 'lack of guilt,' and not due to 'insufficient evidence'" (para. 6). The Guidelines clarify that the closure of a file due to a lack of guilt – a category not mentioned in the statute – is intended "to prevent the perception of there being any element of doubt as to the innocence of a person suspected of a particular matter, which would cause him unjustified harm" (para. 7). This Court adopted the distinction between a file closed due to "insufficient evidence" and a file closed due to "lack of guilt," and has ruled that it is justified to close a file for "insufficient evidence" and not "lack of guilt" when the existing evidence leaves a reasonable doubt regarding the suspect's innocence.

HCJ 2682/98 *Appel v. The State Attorney* [64], at 137-38 (Strasbourg-Cohen, J.). *Compare* HCJ 4539/92 *Kablero v. The Attorney-General* [65], at 56. As stated above: the Court will decide,

based on the evidence before it, and not merely because an indictment was filed. Similarly, the Court will examine the reason for not filing an indictment, and this reason will be an apposite consideration in its examination of the entirety of considerations, but no more than that.

36. The rule is that the power to remove a minister from office – which may occasionally become mandatory – is not restricted to cases in which an indictment was filed against the minister. As stated in *Pinhasi* [5]:

> [C]ircumstances may arise in which the mere opening of an investigation justifies the termination of tenure. By contrast, circumstances may arise in which even a conviction does not justify the termination of tenure. In this respect, the particular section under which the indictment is filed is not conclusive. The determinative factors are the circumstances surrounding the commission of the offense and the other circumstances of the case.

Id. at 474 (Barak, J.). In *Bar-On* [3] it was noted:

> Because the test is substantive and not merely formalistic in nature, it cannot be stated categorically that that only an indictment issued with respect to a serious crime, or at least an investigation with respect to the performance of such a crime, are capable of justifying termination of office. The possibility cannot be ruled out that the conduct of a minister or deputy-minister in a specific case, even if it does not amount to a criminal offense, may be so very severe, to the point that it would be extremely unreasonable to allow him to continue in office.

Id. at 63-64 (Zamir, J.). But these comments were soon qualified:

> But there exists a vast difference between an extreme situation like this, which forms an exception to the law,

> and a broad ruling which would render unfit any minister or deputy-minister whose conduct deviates from acceptable standards. The proposal to expand the existing ruling so that such conduct would obligate the Prime Minister to dismiss the minister or deputy-minister, even though that proposal is motivated by good intentions, is not appropriate. It is likely to do more harm than good.

Id. (Zamir, J.). We unreservedly concur with these comments, but every case must be determined according to its particular circumstances. We must distinguish between two different types of cases. The first is of a minister or deputy-minister "whose conduct deviates from acceptable standards." On this basis alone, he cannot be allowed to remain in office. The second is of a minister who has not been indicted due to lack of evidence, even though there exists reliable administrative evidence that he committed a particularly serious offense. The reason he was not indicted was because in the offense could not be proved beyond all reasonable doubt.

Administrative Discretion; Administrative Evidence; "Criminal Past"; Presumption of Innocence

37. Our position is that the evidence in the police file is the primary determinant of the parameters of discretion. This places us firmly in the realm of administrative discretion and judicial review of the discretion exercised by a competent authority. To avoid any suspicion of intentional disregard, we would hasten to add the following: we are aware that the procedure confronting us is not a regular administrative procedure, like the denial of a license to grow cabbage (a subject of great importance to the applicant). And yet, the guiding principles are identical, whether the case is momentous or trivial in nature. The manner of implementation may change, as we will shortly show, but the principles are the same.

38. It is well known that the rules of evidence in administrative law differ from the rules of evidence in criminal and civil law. An administrative authority is entitled, and indeed obligated, to consider

evidence that would not be admissible in a criminal or civil proceeding. For example, where a person's candidacy is being considered for an office or a job, the reasonableness of the appointment will be assessed in accordance with the rules of administrative evidence. These rules of evidence are less strict than their counterparts in civil and criminal judicial procedures. Administrative evidence is evidence which "any reasonable person would regard as having probative value and would rely upon to any particular degree." *See* HCJ 442/71 *Lanski v. Minister of the Interior* [66], at 357. The well of potential evidence is bottomless, and clearly includes evidence that is not admissible in criminal or civil judicial proceedings. *Compare Lanski* [66]; CA 5709/95 *Ben-Shlomo v. Director of The Value Added Tax Authority* [67], at 251; II Itzchak Zamir, Administrative Authority 751 (1996).

This type of framework is capable of accommodating findings in a judgment made against a third party, to which the candidate himself was not a party. *Compare* Eisenberg [6], at 272. This includes findings of a police investigation, and decisions of the State Attorney which did not crystallize into an indictment. *Compare Fishler* [63], *Kablero* [65], and *Appel* [64]. The question is whether the competent authority was presented with "sufficient evidence on which a reasonable person could rely, under the circumstances, in order to adopt the decision in question." *See* HCJ 164/97 *Kontram Ltd. v. Ministry of Finance* [68], at 332.

In the administrative realm, therefore, the litmus test is neither technical-legal nor mechanical in nature. The test is one of reasonableness, of common sense. This applies both to the selection of the information on which the authority chooses to rely, and to the weight of the various factors under consideration. This point has been noted by the Court:

> In order for an authority to rely on a particular piece of information, the latter must satisfy the test of admissibility for administrative evidence. This test is a flexible one. It allows the administrative authority to consider evidence

> that is not admissible in court, such as hearsay. Even so, not every wild rumor provides sufficient basis to substantiate a finding. The test is therefore one of reasonableness: the administrative authority is entitled to rely on information that relates to a matter on which a reasonable person (or more precisely – a reasonable authority) would rely in order to reach a decision regarding the matter in question.
>
> The relevant information, which is the information that satisfies the test of administrative evidence, becomes the foundation of the decision. This foundation must be sufficiently sturdy to support the decision. What is the meaning of "sufficiently" for this purpose? Here, too, the determination of what constitutes sufficient evidence is a question of reasonableness. In other words, the nature of the facts must be such that a reasonable authority would rely upon it in order to adopt the decision.

HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications*, [69] at 424-25 (Zamir, J.). Regarding the distinction between the filing of an indictment and a conviction, compare *Deri* [47], at 422-23, and *Pinhasi* [5], at 462.

39. The boundaries of administrative evidence also cover a person's "criminal past." As is well known, in criminal proceedings, at the crucial sentencing stage importance is often attached to the offender's past criminal convictions in order to show his "criminal past." This is not the case in administrative procedure: a person's "criminal past" can also be proven on the basis of administrative evidence, not just a judicial conviction. This point was made in *Bar-On* [3]:

> Only in the most extreme cases will the Court compel the Prime Minister to exercise this power [to remove a minister from office]. These are cases in which there is administrative evidence of the commission of serious

> criminal offenses and a threat of serious damage to public confidence in the government authorities. One could perhaps add cases of extreme deviation from the moral integrity required of a person serving as a minister.

Id. at 68 (Or, J.). The Court related to this again more recently:

> Generally, an administrative authority establishes facts on the basis of administrative evidence. Administrative evidence is evidence that a reasonable person (or reasonable administrative authority) would rely upon under the circumstances. This rule was established long ago and is now generally applied in all matters. The Court has also affirmed its application in various contexts with regard to the proving a person's criminal past or criminal conduct. The Court has affirmed its application regarding decisions of the Parole Boards to revoke a prisoner's leave pass, due to the commission of an offense; regarding the decision of a military commander to destroy a building following a murder; regarding the President's power to pardon "criminals;" and similarly regarding the appointment of a person with a criminal past to public office.

HCJ 1227/98 *Malevsky v. Minister of the Interior* [70], at 715-16.

As we have already determined, these rules fully apply to an appointment to a public office, and in this context, *ex hypothesi*, there is no room for a strict application of the "presumption of innocence." This presumption informs us that a person is presumed innocent until convicted. It applies to the criminal procedure and to the punishment of an offender in the manner set out by law. As for the administrative procedure when an authority is required to rule regarding a person's "criminal past," it can do so on the basis of administrative evidence, without a criminal conviction. This rule was dealt with at length in *Eisenberg* [6], where the Court distinguished between a criminal conviction, and a person's "criminal past" under administrative law.

The Court stated:

> A criminal past for purposes of a particular appointment is not to be identified with a criminal conviction. We are dealing with an administrative decision of the government to appoint a particular person to a public position. This is not a decision to a statutory penalty. While there can be no criminal punishment without a conviction, this does not apply to an appointment. With respect to an appointment, it is the factual picture with which the appointing authority was presented that is relevant. The relevant question is, therefore, given the facts as presented to the authority, could a reasonable authority have deduced the commission of a criminal offense? If so, this would be sufficient in order to establish "a criminal past" for purposes of deciding the reasonableness of the appointment. Of course, for purposes of determining the reasonableness of the administrative decision, the commission of the criminal offenses attributed to the candidate is the decisive factor. A criminal conviction is clearly sufficient "evidence" of this, but there are other forms of evidence, such as a confession before a competent authority.
>
> The applicable rule in the case before us is the "principle of administrative evidence." A governmental authority is permitted to base its findings upon evidence which, under the circumstances, is such that "any reasonable person would have regard to its probative value and would have relied upon it." An administrative finding may be based upon "material whose evidential value is such that reasonable people would regard it as sufficient to draw conclusions regarding the nature and occupations of the persons concerned."

Id. at 268. This ruling has embedded itself deep within Israeli law. *See* HCJ 932/99 *The Movement for Quality Government in Israel v. Chairman of the Committee for the Examination of Appointments*

[71], at 769; HCJ 4668/01 *MK Yossi Sarid v. Prime Minister Ariel Sharon* [hereinafter: *Bus 300* [72]], at 265; HCJ 5795/97 *MK Yossi Sarid v. Minister of Defense* [73], at 799. And, in accordance with *Deri* [47] and *Pinhasi* [5], this is also the rule for the examination of appointments and the tenure of ministers and deputy-ministers:

> [W]e must consider the fact that we are only concerned with an indictment prepared by the Attorney-General. Deputy-Minister Pinhasi has not been convicted, and continues to protest his innocence. The weight attached to the concern for the public's confidence in the authorities when a public figure has been convicted or admits to an offense is not the same as the weight of that consideration when there is only an indictment, and when the accused protests his innocence. Even so, this consideration should not be given conclusive weight. Our concern is with a governmental act of termination of office. In order to justify such an act, there is no need for a criminal conviction. While every accused person enjoys a presumption of innocence, that presumption does not prevent the termination of the office held by the accused. The only condition is that the governmental authority making the decision must have evidence, which under the circumstances is such that "any reasonable person would regard it as having probative weight and would rely upon it." Justice Shamgar also made this point, ruling that an administrative finding can be based on:
>
> > "[M]aterial whose evidential value is such that reasonable people would regard it as sufficient for drawing conclusions regarding the character and conduct of the persons concerned."

And Justice Sussman commented in a similar vein:

> "[T]he rule that a person is presumed innocent in the absence of evidence to the contrary, does not

> imply – and nor am I aware of any other legal principle which implies – that an administrative authority which must be convinced of a person's criminal past may only determine that he has a criminal past if he was convicted by the courts.
>
> Should we strike down the commissioner's refusal to appoint a candidate as a civil servant when such refusal was based on reasonable evidence of a criminal past, simply due to the lack of a conviction? Let us assume that this applicant desired to be accepted into the public service, and the Commissioner refused to accept him for the above reasons. Would we force the Commissioner to accept him due to the lack of a conviction?
>
> An administrative authority is empowered to make a decision regarding an individual's personal history, but is not empowered to swear in witnesses and collect evidence in the manner that it is collected in court. Therefore there it is appropriate that its decision be based on evidence which would persuade a reasonable person as to the applicant's past. This will apply even where the evidence is not admissible in a court of law, and even where it lacks significance in judicial proceedings."

I also addressed this issue in *Eisenberg*, at 268:

> "[W]hen assessing the reasonableness of a decision of an appointing governmental authority, the decisive factor is the criminal offenses attributed to the candidate. A criminal conviction is certainly an appropriate "proof," but there are other means of proof.
>
> The relevant principle in our case is the "principle of administrative evidence."

Pinhasi [5] at 467-69.

40. In this context we would do well to recall respondent's claim regarding the presumption of innocence. Respondent informs us:

> The presumption of innocence is one of the most basic rights conferred on all citizens in any democratic regime. It is intended to protect a person who has not yet been convicted from restrictions and sanctions which express his status as a criminal. The principle is well-known and well-established. Any determination regarding Hanegbi's unfitness to serve in particular positions necessarily expresses at least a limited presumption of his guilt, and diminishes the presumption of his innocence.

Moreover, respondent claims that it is an elementary human right that a person be allowed to defend himself against an accusation. Respondent claims:

> [T]his elementary right, "a person's lawful right to defend himself," was effectively denied to Minister Hanegbi due to the decision not to file an indictment or try him. Paradoxically, if petitioner's claim is accepted, the result will be that this decision was the most damaging of all, because he no longer has the legal means to prove his innocence.

Respondent here confuses two distinct issues, and hence his conclusion is mistaken. A clear distinction must be made between respondent as a private individual, and respondent as a minister. Furthermore, he is not just any minister, but the Minister for Public Security, in charge of law enforcement. The presumption of innocence resembles the right to silence. Both are granted to a person as a private individual. Consequently, as long as a person's guilt has not been proven beyond all reasonable doubt, and with due legal process, he is presumed to be innocent of any crime, and no penal sanction may be imposed upon him. But there is no connection between criminal proceedings – the object of which is the imposition

of sanctions – and a person's appointment as a public official. Is the mere fact that a person has not been indicted sufficient, in and of itself, to render him "fit" to be a minister? From the legal standpoint, surely more is required? If this is respondent's view, then it contradicts the law. "The presumption of innocence – enjoyed by every accused person – does not prevent the termination of service of a public official." *See Pinhasi* [5], at 468. Following this holding, I declare that, for our purposes, there is no requirement for evidence beyond all reasonable doubt in order to render a person unfit for service as a minister. As noted in *Bar-On*:

> It cannot be stated in an unequivocal manner that a person's removal from office can only be justified where an indictment has been filed or an investigation has begun.

Id. at 63. Even evidence of less import than that obtained in a criminal investigation may be sufficient. This is even more true in our case, especially when we consider two elements. First, the cumulative effect of the accumulated cases against respondent. Second, the fact that the Prime Minister insists that respondent not only be a minister, but specifically the Minister of Public Security, the minister in charge of the police and law enforcement.

*"Political" Consider*ati*ons; Intervention in the Prime Minister's Discretion*

41. Until now we have referred to considerations of a person's "criminal past." But these are just a small part of the whole picture that the Prime Minister must consider when making a ministerial appointment, or when considering whether to remove a person from office. We all know that a person's "criminal past" is not the only factor which the Prime Minister is permitted and obligated to consider when deciding whether a particular person will be a minister, or will be removed from office. Furthermore, in the political reality with which all are familiar, these are not even the main considerations. The parameters of the Prime Minister's discretion are very broad, and take in a wide array of considerations, among them

the candidate's suitability for the office, the best interests of the public in the broad sense, and others.

42. In this question – whether to appoint or dismiss a minister – the Prime Minister is entitled to consider a wide range of factors. Furthermore, the political context of the appointment means that the Prime Minister's considerations also include "political" considerations such as the formation of a stable and viable coalition. For our purposes, these considerations are entirely legitimate. In fact, these considerations are central to the establishment of a government and its continued existence. In this regard, Justice Barak stated the following:

> "Political" considerations – which may be illegitimate in other contexts – are appropriate when considering the removal of a deputy-minister from office. The need to maintain a coalition and to secure the continued confidence of the Knesset is certainly a relevant consideration. Similarly, weight must be given to the fact that the deputy-minister has not been convicted in court. All that there is against him is an indictment, and an indictment does not amount to a conviction.

Pinhasi [5], at 463. *See also Deri* [47], at 423, 427, 429.

43. The range of reasonableness is as broad as the power itself, and the court's power to intervene in the Prime Minister's discretion is limited to the same degree. Accordingly, deciding whether the Prime Minister deviated from the range of reasonableness is particularly difficult. In fact, it is only in rare and exceptional cases that the Court will see fit to intervene in the acts of the executive regarding cabinet appointments.

The breadth of the Prime Minister's discretion requires our special attention. His power is unique. *Compare Bar-On* [3], at 57-59. The scope of judicial intervention is inversely related to the scope of the Prime Ministerial discretion; the latter expands as the former contracts. The fact that we do not agree with the Prime Minister's

decision to appoint a particular individual as a minister or to a particular ministry is not enough to strike down the decision. It is not our role, nor is it within our power, to evaluate the merits of a decision. We must confine ourselves to the question of its legality. Accordingly, the Court may only strike down a prime ministerial decision concerning the removal or retention of a minister allegedly involved in criminal acts in unusual and exceptional circumstances.

44. It is certainly conceivable that the Court might be averse to a particular decision of the executive branch. But it is incumbent upon us to make a clear distinction between those acts and omissions which belong to the ethical realm and do not enter the realm of the law, and those that belong to both the ethical and legal realms. The latter are acts and omissions flawed by extreme unreasonableness which may thus be subject to judicial annulment. Particular acts or omissions of the executive branch may be ethically problematic, but the Court will not interfere with them unless they are also illegal. "[T]he law cannot, and should not replace ethics, except to limited extent, on a case-by-case basis, in a controlled and cautious process." *See Bar-On* [3], at 62. Hence, where a decision is unethical, but remains a matter of ethics, we are not empowered to intervene. *Compare also* Itzchak Zamir, *Ethics in Politics*, 17 *Mishpatim* 255-58 (1988) [106].

We must remember that the judicial branch is charged exclusively with upholding the law and of those ethical areas that have been incorporated into the law. *See Bar-On* [3], at 61; HCJ 1635/90 *Zersevsky v The Prime Minister* [74], at 764; HCJ 1843/93 *Pinhasi v. Knesset Israel* [10], at 698-99; HCJ 5364/94 *Velner v. Chairman of the Israeli Labor Party* [75], at 818; HCJ 7367/97 *The Movement for Quality Government in Israel v. The Attorney-General* [51], at 561.

"It's Not Done"

45. All the same, it must be remembered that the intensity and the scope of judicial intervention in acts of the executive depends on

the executive's conduct. Ideally, a government is meant to operate in compliance with the principle that "it's not done." This is essentially a concept of governmental culture as distinct from a legal concept. What it means is that there are certain things that the executive should not do simply because they are not done, according to the appropriate norms of conduct in society. A person who is act in contravention of these norms is to be condemned. As the scope of "it's not done" expands, the scope for judicial intervention contracts. Fortunate is the society whose government has internalized the culture of "it's not done." Fortunate is the Court that is not required to decide matters relating to the culture of "it's not done."

From the General to the Specific

46. This completes our discussion of the basic legal framework. Applying these principles to respondent's case, we ask ourselves the following question: was his appointment as Minister of Public Security so flawed that it must be regarded as an invalid appointment, or an appointment which should be invalidated? Was the respondent's appointment as Minister of Public Security so extreme a deviation from the range of reasonableness as to warrant a ruling that, from the legal standpoint, respondent is not worthy of continuing to hold that office?

47. This Court issued an *order nisi* directing the Prime Minister to explain his reasons for appointing respondent as Minister of Public Security despite the fact that, from a legal standpoint, the appointment was fundamentally flawed. Both the Prime Minister and respondent replied to the *order nisi*, but the Prime Minister's response is the crucial one. In our comments above we surveyed the principle factors that should govern the Prime Minister's discretion when deciding on the appointment of a minister, or on his removal from office. We will now examine the considerations that led the Prime Minister to appoint Hanegbi as Minister of Public Security, and why, in his opinion, Hanegbi is fit to continue serving in that capacity. However, instead of describing and summarizing the Prime Minister's comments, we will let the Prime Minister speak for himself, and we will simply listen. In his affidavit to the Court, the

Prime Minister informed us as follows:

> 16. My decision to appoint Minister Hanegbi to the office of Minister of Public Security was made after I had evaluated all the relevant considerations, including the advice of the Attorney-General and the basis of this advice, as detailed above, and I struck a proper balance among these considerations. Among other factors, I took into account the minister's many talents, his many years of experience in various demanding public and state offices, the gravity of the role of head of the Ministry of Public Security, as well as other coalition-related considerations, all of which are now detailed.
>
> 17. Minister Tzahi Hanegbi has served, over a continuous period of many years, in a number of high-ranking and demanding public and governmental offices. These have included: Director-General of the Prime Minister's Office; Minister of Health; Minister of the Environment; Minister of Transportation; Member of the twelfth through sixteenth Knessets inclusive; Chairman of the Knesset Finance Committee; Member of the Foreign Affairs and Defense Committee; and Member of the Constitution, Law and Justice Committee.
>
> In addition, for a period of approximately three years, between 1996 and 1999, Hanegbi served as Minister of Justice, within which framework he served as a member of the Ministerial Committee for National Security Affairs – the so-called "State Security Cabinet"; as Chairman of the Ministerial Committee for Legislation and Law Enforcement; as Chairman of the Committee for the Selection of Judges; as a member of the Committee for the Selection of Military Judges; and as a member of the Ministerial Committee for Privatization.
>
> Over the last two decades, I have become personally

acquainted with the abilities and talents of Minister Hanegbi. In view of Hanegbi's many professional achievements in all of the offices in which he served as minister, I have chosen him to serve as the Minister of Public Security, an office currently faces unique and extremely important challenges.

Minister Hanegbi has a broad national perspective, which was expressed during his years as Minister of Justice, notwithstanding his investigation during that term regarding the Derech Tzleha affair. He has a wealth of experience in the management of complex ministries; and a broad knowledge in the field of security, which he gained in a variety of public roles, as listed above. It is my belief that all this qualifies him to successfully run the Ministry of Public Security.

In my view, the nature of the position offered to Minister Hanegbi and the particular powers exercised by the Minister of Public Security do not create any significant concern of conflicts of interest which might affect the minister's conduct or impair his professionalism and the integrity of his discretion when exercising his authority … We need to remember that the Minister of Public Security is not a "supra-Inspector-General" who wields direct control over all matters pertaining to Israel Police, and this is true especially insofar as the Investigations Branch is concerned. The minister's powers consist of broad powers of supervision, approval, planning, and the provision of guidance where necessary. In discharging his duties it is essential that there be a close and ongoing connection with police bodies. The decisions and actions of the Minister of Public Security are not the product of his personal preferences; they are the product of cautious and calculated discretion, backed up by extensive data provided by the police bodies. With respect to investigations, the minister is not involved in specific cases; his concern is exclusively

with matters of policy.

> At the time of making the decision, I considered the position of the Attorney-General with respect to the Derech Tzleha affair. The Attorney-General regarded Hanegbi's appointment as being *prima facie* problematic from a civic perspective, though from the strictly legal standpoint, according to existing statutes and case law, there appears to be no legal impediment to the appointment.
>
> In this regard, it should be noted that the events relating to Minister Hanegbi occurred between 1994 and the beginning of 1996. When Minister Hanegbi was interrogated, he did not take advantage of his right to silence. Rather he cooperated in full with his investigators. In my view, these facts were significant to the decision not to indict Hanegbi and for public confidence in him.
>
> 18. I have taken into account all of the relevant considerations, which include the qualifications and abilities required of the Minister of Public Security, the Attorney-General's position, and Minister Hanegbi's actions in the Derech Tzleha affair and the other affairs, Hanegbi's capabilities and his experience, as well as political and coalition considerations. After giving these considerations their appropriate weight, it cannot be said that the decision to appoint Hanegbi deviates in an extreme manner from the standard of reasonableness.

48. The Prime Minister thus informs us that he considered Hanegbi's manifold talents, his many years of experience in demanding public and government offices, and his professional achievements in all of his roles. The Prime Minister expresses his confidence that there is no real concern of a conflict of interest in Hanegbi's duties as Minister of Public Security, and in this context he also explains that the Minister of Public Security, is not a "supra-

Inspector-General." The Prime Minister also informs us took the Derech Tzleha case into consideration, but he did not find it to be an impediment to Hanegbi's appointment as Minister of Public Security. As for the concern that Hanegbi will face a conflict of interest as Minister of Public Security, the Prime Minister refers to the numerous statutory supervisory mechanisms, and faithfully assures us that this fear has no basis. Once again, we will let the Prime Minister speak for himself:

> 21. Regarding the claim of conflicting interests: petitioner is concerned that a possible conflict of interest will arise whenever the promotion of any of Hanegbi's investigators is on the agenda, when allocating budgets for certain branches or departments, and in relation to the disciplinary powers conferred upon the minister. In this context, it should be mentioned that during the entire period of Hanegbi's service as Minister of Justice, no claim was ever made which could have substantiated the fear raised by petitioner.
>
> First, it should be made clear that ever since the 1988 Amendment to the Police Ordinance (Amendment No. 9), the Minister of Public Security does not have any powers in matters of disciplinary adjudication.
>
> It should be emphasized that, notwithstanding the minister's overall ministerial responsibility, which finds expression in various provisions of the Police Ordinance, the Israel Police and those at its helm are managerially independent. This is evidenced both in explicit provisions, such as section 9 of the Ordinance, and on a practical level – in working procedures which express the principle of the independence of the police.
>
> Regarding the appointment process, section 7 of the Police Ordinance establishes and regulates the minister's power to appoint a senior police officer, i.e. an officer from the

rank of deputy commander upwards. The manner of exercising the power is subject to the rules of administrative law, including the duty of consultation with the Inspector-General of the police and additional professional bodies, prior to making the appointment. As a rule, the Inspector-General of the police submits his own candidates to the minister for each particular role; for as head of the system, it is the Inspector-General who has to work with the particular officer who is chosen. Rejection of the Inspector-General's candidate and appointments that are made against the Inspector-General's judgment, require weighty considerations, all of which are subject to judicial review in accordance with the principles of administrative law.

Regarding the budgetary issue, section 9 of the Ordinance makes the Inspector-General responsible for all expenditures connected to the administration and operation of the police. Besides this section, the provisions of the Foundations of the Budget Law, establish the responsibility of the Minister of Public Security, like any other minister, for the budget of the ministry over which he is charged. For our purposes, this also includes responsibility for the budgets of auxiliary units – Israel Police and the Prison Services.

The Ministry of Public Security's Director-General, through the Planning, Budgeting and Inspection Department, is charged with the formulation of the ministry's budget. Before preparing the budget proposal, the minister and the Inspector-General determine the priorities and policies for the coming year. They work closely together on this task. On the basis of these policies, the budget proposal is prepared by the planning division in coordination with the various police departments. The budget proposal is then presented for the approval of the Inspector-General, the Director-General and the minister.

> Like the Director-General and the Inspector-General, the minister does not interfere with the budget's particulars. Their role is to assess whether the budget proposal that was prepared in fact expresses the policies and the priorities determined by them.
>
> Once the budgetary framework for each department has been fixed, the head of each police branch is responsible for the allocation of the budget within his branch, and within its auxiliary and subordinate units, down to the level of the individual police station and the individual policeman. In this respect, the head of a police branch has independent discretion.
>
> The coordination required between the Inspector-General and the minister at the level of policy and priorities, together with the independent discretion of the police in budgetary details, remove any basis for concerns of conflicts of interest, or inappropriate considerations.
>
> Therefore, there exists an array of internal mechanisms governing all matters relating to the minister's functions. Respondents wish to reiterate that with respect to investigations, the Minister of Public Security deals exclusively with matters of policy, and does not interfere with specific investigations.

49. Hangebi also made various declarations similar to those of the Prime Minister and, like the Prime Minister, he stresses that his role is to set out policy. He does not regard himself as authorized to interfere with the decisions of the police taken at the professional level. In the words of his affidavit:

> The internal management of the Israel Police and its head [the Inspector-General] is totally independent of the Minister of Public Security has ministerial responsibility for the police, but he is not a "supra-Inspector-General"; he has no disciplinary powers of adjudication, and no power

> to intervene in particular investigations. The police budget proposal is drawn up by the planning division in cooperation and coordination with headquarters and the budget division of the Finance Ministry. In addition to the minister's approval, the ministry budget also requires the approval of the Finance Committee and the Knesset.

50. Respondents' claims – both those of the Prime Minister and of Hanegbi himself – aim to minimize respondent's authority as the Minister of Public Security as much as possible. In support of their position they cite the lack of authority for disciplinary adjudication, the Inspector-General's independence with respect to the management of the police, the fact that ministerial powers are subject to consultation, consideration of the views of the Inspector-General and other professional bodies, and the extreme difficulty of making any appointment without the Inspector-General's consent. Regarding the budget, the planning division handles its preparation, with the cooperation of the other police departments; the Inspector-General is responsible for supervision of expenditure; and he does not intervene in the details of the budget. On the policy level, there must be coordination between the minister and the Inspector-General. Regarding investigations, the minister deals exclusively with determinations of policy. These claims attempt to demonstrate that there is no fear that the minister will act illegally.

Hanegbi further informed us that he bears no grudge against those police officers who investigated him, and that he has no intention of impeding their promotion or harming them in any other way. In his own words:

> The concern that I might interfere with the appointment of one of my investigators, impede his advancement, or plot against him, is spurious. I have made it clear on more than one occasion, including to my investigators themselves, that I have no complaints about them, and that I respect their duty to fully investigate every case. This is certainly true since the Attorney-General instructed the police to open an investigation. Moreover, my investigators treated

me in a sensitive and respectful manner.

51. Do the Prime Minister's words, reinforced by Hanegbi's own comments, place Hanegbi's appointment as Minister of Public Security within the legal range of reasonableness? Do Hanegbi's virtues, combined with his accumulated achievements in public office, tip the scale in his favor? When assessing pros and cons, duties and responsibilities, we must remember that the scope of discretion here is particularly broad, comprising a wide range of legitimate considerations, including "political" considerations, such as the candidate's electoral power and the ability to put together a coalition and establish a government. In *Bar-On* [3] we stated:

> Petitioner claims that the Justice Minister's "was found to have behaved in contravention of the standards of proper public administration by applying defective criteria which violate the principles of integrity." Petitioner claims that "a minister may have no blot on his character," especially the Minister of Justice. Petitioner concludes, therefore, that since the Minister of Justice is tainted, the Prime Minister is obligated to remove him from office.
>
> Without deciding whether petitioner's presentation reflects the desirable law, it is definitely an incorrect presentation of the existing law. In our less-than-ideal world, the mere fact that a minister's record is blemished is not sufficient to legally obligate the Prime Minster to remove him from office. The Prime Minister is only obligated to dismiss a minister, under section 35(b) of Basic Law: The Government, when his refusal to do so would be unreasonable in the extreme.

Id. at 57 (Zamir, J.). Evidently, a blemished record is not sufficient in this case. The blemish must be serious, perhaps even a permanent stain, in order to obligate the Prime Minister to refrain from appointing a minister or to remove a minister from office. Personally, I am not certain I can give my unreserved agreement to this

formulation. "A respected scholar whose cloak is stained – is liable to the death penalty." Babylonian Talmud, Tractate *Shabbat* 114A [108]. A minister must be above reproach. In this context we should recall that not just a conviction, or a pending indictment, but also less severe circumstances may obligate the Prime Minister to refrain from appointing that person as a minister, or to remove a minister from office. *See* para. 22 above.

52. The Prime Minister's affidavit (and also Hanegbi's) contains a lengthy description of Hanegbi's virtues and merits, and only relates sparingly to his faults and failures. Regarding the Derech Tzleha case, the Prime Minister informs us as follows:

> 15. As indicated in the Attorney-General's opinion of 2001, which is appended in full to this affidavit, the events at the basis of the Derech Tzleha case, occurred between 1994 and 1996. In 1999, the Knesset Ethics Committee found Hanegbi to be at fault, and he was punished. The Attorney-General claimed that these acts indicated impropriety, which according to those concerned, constituted an offense. At the end of the day, the decision was made that there was no reasonable chance of conviction, and it was decided to close the file for lack of evidence. Notably, the entire investigation was conducted at a time when Hanegbi was serving as Minister of Justice.
>
> In March 2001, immediately prior to the formation of the government (following the elections of February 2001), the Attorney-General informed the Prime Minister of Minister Hanegbi's involvement in the Derech Tzleha case. He advised the Prime Minister, for reasons primarily from a civic perspective, not to appoint Hanegbi to any of the ministries dealing with law enforcement. The reason for this was that the file had been closed relatively recently. At that time, I did not appoint Minister Hanegbi to one of these offices.

> This time around, immediately after being informed, *post factum*, of the decision to appoint Hanegbi as the Minister of Public Security, the Attorney-General appraised Dov Weisglas, Director-General of the Prime Minister's Office, of his position regarding the appointment. The Attorney-General said that while strictly speaking there was no legal impediment to the appointment, it was nonetheless problematic, *prima facie*, from a civic perspective. The Attorney-General also discussed the matter with Minister Hanegbi, and heard his position that there were no grounds for blocking the appointment, since the closure of the file for lack of evidence had prevented him from proving his innocence. He further stressed that the Minister of Public Security is not responsible for specific investigations and does not interfere with them.
>
> It should be clarified here that, it is part of the role of the Attorney-General to express his opinion about governmental deliberations, orally or in writing, regarding public ethical issues, including non-legal matters. It is then up to the executive branch to take this position into consideration.

The other three affairs are only mentioned in the Prime Minister's affidavit, in the context of an assortment of legally related claims. One can only wonder, is a police recommendation to indict a minister a regular every-day situation? Does the Attorney-General make a habit of writing long and detailed opinions regarding his decision not to indict a minister? It would have been appropriate for the Prime Minister to elaborate and explain his decision to ignore the Attorney-General's recommendation, just as he elaborated on Hanegbi's talents and merits. Ultimately, this matter is not a formal legal issue. Rather it is a matter of basics principles, running deep to the very foundations of our self-image. Our way of life as individuals and as a society depends on such a decision.

53. All agree that the realm of politics differs from the realm of

law. The considerations may be the same in each realm, but the weight given to these considerations. "We accept that the Court should be guided by the formula of what is "just and efficienct," except that justice must precede efficiency." *See* CA 4012/96 *Benny Shachaf Freights and Investments (1976) Ltd v. First International Bank of Israel* [76], at 505; CA 3602/97 *Income Tax and Property Tax Commissioner, Minister of Finance, State of Israel v. Daniel Shachar* [77], at 331-32. This principle holds in the realm of law, but not in the realm of politics. This is clearly evidenced in the Prime Minister's affidavit, which elaborates on the appointment, while devoting minimal attention to the principle of justice in its broader sense. Here we must add that a person's efficiency and his broad experience in government service are certainly valid and appropriate considerations. However, they do not necessarily tip the scales when weighed against serious considerations concerning improper actions on a public-ethical level. The Court made this point in *Bus 300* [72]:

> Where there is a clear and direct connection between past offenses committed by the candidate, and the post he is designated to fill, the conclusion may be that his criminal past renders him absolutely unfit for that particular position. Under these circumstances, considerations that might have been regarded as supporting his appointment had he been a candidate for another position (for example the passage of time since the execution of the offense, his regret, his efficient functioning since the offense, and his professional talents) will be of no avail, and his candidacy will be rejected. In determining whether such a connection exists, the considerations cannot be limited to the essence of the offenses and their circumstances, the position in which he committed the offenses and the position now designated for him. Consideration must also be given to the gravity of the moral blemish of the offense. In other words, a connection which renders a candidate unfit is not only a function of the weight ascribed to his criminal past in assessing his professional ability to serve in the new position, but also of his moral stature in respect to the

> position. Where a close connection exists between the candidate's criminal past and the position for which he is a candidate, his candidacy should be disqualified, unless there is a real and pressing state of emergency that necessitates his appointment as a uniquely qualified candidate.

See also HCJ 7279/98 *MK Sarid v. The Government of Israel* [78], at 762.

54. I confess that respondent's case bothers me deeply. I cannot agree with the Prime Minister and the Attorney-General, and certainly not with respondent, that the matter is clear from a legal standpoint. I cannot agree that judicial intervention in the Prime Minister's decision is forbidden by law. At the same time, even if our intervention is permitted, we will not rush to instruct the Prime Minister what to do and what not to do. During these proceedings it has been mentioned on a number of occasions that a "cloud" hovers over respondent's appointment as Minister of Public Security. But a single cloud is insufficient to strike down a person's appointment as minister. A gathering of many dark and threatening clouds is necessary.

55. Are there dark clouds gathered over respondent? Regarding his manifold and proven executive talents, as manifested by his years in the public service, I have no quarrel with the Prime Minister. The Prime Minister believes that respondent has proven himself as an effective executive figure. Petitioner did not contest this assertion, and we too can accept it. This assessment, however, relates only to his executive capabilities; it does not reflect the ethical problems with respondent's actions, which we dealt with at length above. When assessing the undisputed acts of respondent, even if the Attorney-General does not consider them sufficient for a criminal conviction, I have difficulty in agreeing with my colleague, Justice Rivlin, that there is absolutely no justification for interfering with the Prime Minister's discretion. We can accept the Attorney-General's determination that there was insufficient evidence in the police file

for a conviction in court, but we have difficulty in accepting that there is no hard and convincing administrative evidence for the purposes of this case. In this context, it is appropriate for us to recall comments made in *Eisenberg* [6]:

> For this purpose, the gravity of the offence is determined not by its "position" in the Penal Law, but by its implications on considerations that underlie the appointment. Consequently, an offence should be regarded as serious where its very essence and the circumstances of its commission not only undermine law and order in general (such as murder, robbery, or rape) but also the foundations of government structure (such as bribery, fraud and breach of trust, perjury, fabricating evidence, or obstructing the course of justice). A candidate who has committed these offences and holds a senior office in the civil service undermines the public trust in the executive authority and the civil service. He will have difficulty in serving as an example and a model for his subordinates. He will have difficulty requiring of them what is required of every civil servant but which he himself has profaned. He will have difficulty in radiating fairness, trust, prestige, honesty and integrity to the general public. All of these will affect, to a large degree of certainty, the status, functioning and position of the civil service in a democratic society.

Id. at 266.

56. This is the general rule guiding the judicial assessment of respondent's actions. And it is even more true when applied to the complex relationship between respondent and the police. In this respect, we should recall the police investigations that led to the recommendations to indict him.

The cases against respondent, and their cumulative weight in particular, enjoin us from ignoring the "critical mass" that was

created by the Derech Tzleha affair, which came to light after the Bar-On case was closed. Even if we ignore the first affair (the brawling), the cumulative weight of the other three cases, and especially the last two, removes the question of respondent's appointment from the realm of ethics and public morality, and places it squarely in the realm of law. There exist considerations which may necessitate the termination of a minister's service in the government, such as the stature of the government and its public image, public confidence in the government, and the need for the government and the administration to conduct itself in a manner which is honorable, fair and worthy of respect. The more we examine these cases, the harder it is to understand how respondent can function as Minister of Public Security. In making these comments we also take into consideration the gradual deterioration of the standards of conduct of public figures and leaders, a decline that has led to desensitization and the lowering of national standards of public morality.

57. We are also witness to a conflict between considerations of efficiency and executive abilities on the one hand, and the morality of respondent's actions, his stature and his dealings with the police, on the other hand. Which of these considerations outweighs the others? Is there a possibility for some kind of compromise between the conflicting considerations? We should remember that the Court is not empowered to decide; that role belongs to others. The Court's role rather is to supervise and review compliance with principles of law and justice.

58. As for the judicial evaluation of respondent's actions, we will not add any further explanations of the affairs. We will concentrate primarily on the relations between respondent and the upper echelons of Israel Police, particularly with the Investigations Branch. As noted above, the police investigated respondent and, on more than one occasion, recommended that he be indicted. Respondent informs us that he bears no grudge against the investigators. Regarding the future, respondent adds that all of his actions will be closely watched, and that there will be no abatement of public scrutiny. Respondent declares in his affidavit:

> In the event that any of my future actions provide any substantial concern regarding a conflict of interest or the involvement of extraneous considerations in my decisions, I am absolutely certain that the doors of this Court will be open to petitioners. My actions will be the test. I see no reason for discussing hypothetical and far-fetched possibilities at this time. We will cross each bridge as we come to it. From that perspective, the petition is premature and theoretical, and should be dismissed.

This is a fine declaration, and it is correct, on the whole. Nevertheless, the fact remains that respondent was until recently the subject of a police investigation, in which evidence was collected, and which culminated in the investigators' recommendation to indict him for offenses involving moral turpitude. This being the case, we cannot agree that he should now be placed in charge of the police, including his investigators and their superiors. Presumably, police investigators are uncomfortable when requested to investigate a minister suspected of committing an offense, whether by act or omission. I need not explain why. However, the entire matter becomes surreal when the subject of the investigation, shortly after the investigators recommend his indictment, becomes their superior. Yesterday, the investigator sat in the director's chair, interrogating the minister. Today, the former suspect sits in the director's chair and the interrogator is subordinate. My colleague, Justice Rivlin referred to the "bounds of deference" that inform the relationship between the authorities. I would sooner talk in terms of human dignity. Does not this role reversal, where the suspect has so soon become the boss and the investigator his subordinate, thoughtlessly trample on the dignity that should inform the relationship between people? Both the investigator and the suspect are human beings. Should we deal such a blow to the dignity of the police investigator?

59. In the Derech Tzleha affair, the police investigation culminated in 1999 in a recommendation to indict respondent. At the beginning of 2000, the prosecution, headed by the Attorney-General,

decided to indict respondent for a number of offenses, subject to a preliminary hearing (see para. 11 above). The preliminary hearing was conducted in September 2000. While justifying the investigation, the Attorney-General decided in March 2001 against an indictment, given that there was no reasonable chance of conviction. The Bar-On affair occurred in January through April 1997, with the judgments on the petitions that challenged the Attorney-General's decision being handed down in June 1997. In addition to these two cases, we should also mention the ISTA case, which was closed in 1992. Parenthetically, it could be said that a person who holds himself up as a trustee – and ministers all have this status, as we have seen – should voluntarily declare himself unfit to act as the superior of those who recently investigated him for criminal offenses. All the more so in light of the fact that the investigators recommended that he be indicted. After all, human beings are not angels.

60. The conflict of interest between respondent and the higher echelons of Israel Police, particularly the upper ranks of the Investigations Branch, cannot be ignored. The Minister of Public Security is empowered to appoint police officers from the rank of deputy commander upwards (section 7 of the Police Ordinance). The Inspector-General of the Police is appointed by the government, on the recommendation of the Minister of Public Security (section 8A of the Police Ordinance). Of course, the minister's power in making appointments is subject to particular conditions (as claimed by the Prime Minister): administrative law, hearing the position of the Inspector-General, and others. Still, we find it difficult to accept that these factors alone obviate all concerns regarding conflicts of interest in the relations between respondent and the Police Investigations Branch. In light of all this, we find it difficult to understand how respondent is capable of being unbiased in making senior appointments, promotions of officers, and dismissals in the Investigations Branch.

61. Respondent claims that his investigators numbered no more than five or six, and he therefore asks: can he be prevented from serving as Minister of Public Security because of five or six people. There are two answers. First, as we observed, our concern here is not

with a conflict of interest alone, but rather with respondent's behavior in general. Second, and most importantly: indeed there were five or six people who directly interrogated respondent, but what about their superiors? And the superiors of their superiors? Each rank has a rank above it, to which it is answerable and subordinate. We know that respondent was a minister at the time of both the Bar-On and Derech Tzleha investigations. Presumably, his interrogation was authorized by the upper echelons of the Investigations Branch. In other words, the tension between respondent and the police is not confined to only five or six police personnel.

62. The Investigations Branch of the Police forms a central part of the Ministry of Public Security and, by definition, the Minister of Public Security is in charge of this branch. We agree that the minister is not personally involved in particular investigations being conducted by the branch. Respondent explicitly declared that he has "no power to intervene in particular investigations." However, respondent is neither able nor empowered to divest himself of the power to make appointments in the Investigations Branch, and this is the pitfall. On the one hand, respondent is both empowered and obligated to appoint officers in the Investigations Branch. On the other hand, the past relations between the Investigations Branch and respondent make it difficult to accept that respondent is capable of making totally unbiased appointments. The conflict of interest is inescapable. We must add to this equation the considerations, detailed above, which disqualify a person from appointment to a particular office. The combination of all of these leads us to the conclusion that, from a legal standpoint, respondent's service as Minister of Public Security is inappropriate and unacceptable.

63. This conclusion, based on the law and the facts presented to us, was difficult one and, even in writing this judgment, I wavered. For example, it was extremely difficult to weigh the conflicting considerations – efficiency on the one hand and morality on the other – because these considerations are not comparable. Like oil and water – they do not mix. Ultimately I decided that we should be guided by legal principles, which have long been firmly entrenched

in our system. The first and most important rule is that the Court will not invalidate an executive-administrative act unless all other alternatives have been exhausted, and there is no other option. Accordingly, where there is a request to render a person unfit for a public office, "the tendency is to initially consider more moderate means, and only to implement the extreme measure as a last option." *See MK Sarid* [78], at 758 (Or, J.). The tendency is to "try to limit the use of the extreme measure of disqualification, save as a last resort, if there is no other more moderate way of neutralizing the fear of conflicting interests." *Id.* at 762-63. Furthermore:

> The rule [concerning conflicting interests] should be implemented in a responsible and cautious manner, because to use it recklessly, without the proper balance, may deter talented and capable people from seeking offices that they are qualified to fill, even when there is no serious threat to their honesty and integrity.

CA 6983/94 *Pachima v. Peretz* [55], at 835 (Strasbourg-Cohen, J.). As such, "it is better to eliminate the potential conflict of interest and limit activity or prevent it in a particular area, and not remove a person from office." *Id.* at 838.

This was also the opinion of Justice Beinisch (whose opinion was the minority view):

> The mere determination that there is a conflict of interest does not automatically necessitate the person's removal from office. This solution is the last and most extreme resort, only to be adopted in those cases where the conflict of interest is so intense that there is no other way to prevent it. There are a number of intermediate solutions between removal from office and full service in an office, and the decision should be based on the degree of the conflict, its intensity and its centrality to the role of the public official.

Id. at 854. In a similar vein:

> The picture is not entirely "black and white." The solution to a conflict of interest is not necessarily disqualification from a particular office. There are a number of other options that can be exercised at different levels, ranging from full service in a particular office to outright disqualification from that office. Removal from office should not be the first solution, but rather the last resort. Prior to disqualifying a person, there must be an assessment whether other less drastic measures might not fulfill the criteria at the basis of the laws against conflicting interests.

HCJ 595/89 *Shimon v. Appointee of Ministry of the Interior, Southern District* [79], at 418 (Barak, J.).

In this sense, the Court's role is to "find the cure that fits the disease," which each problem having its own solution. *See also* CA 6763/98 *Carmi v. State of Israel* [52] (Rivlin, J.).

64. It is obvious that this rule has the same basis as other legal principles. The "blue pencil rule," for example, directs us, wherever possible, to differentiate between the diseased organs and the healthy organs of a body. The same rule applies to law, contracts and all other legal mechanisms. After the differentiation, we proceed to ignore the diseased parts, and emphasize the healthy parts. *See* HCJ 1715/97 *The Israel Association of Investment Managers v. The Minister of Finance* [80], at 413-14. This is similar to the legal principle of *ut res magis valeat quam pereat*, which means that where a text containing a legal norm allows two interpretations, then the interpretation supporting the norm is chosen over the interpretation negating it. *See* HCJ 288/00 *Israel Union for Environmental Defense v. Minister of the Interior* [81], at 696-97. These principles are almost self-evident and may also contain elements of natural law. On an abstract level they are all derived from the principle of proportionality, a principle that guides us in all our paths.

65. Having considered these principles, I initially thought that the solution to the question at hand lay between two polar opposites. The first is petitioner's position, which would have respondent disqualified outright. The second is respondents' position, which maintains respondent is perfectly fit for the office. I thought that the appropriate solution could be a differential one, which means making a rough distinction between Hanegbi's various activities, the aim being to avoid having to disqualify him from service as Minister of Public Security. I did attempt to differentiate between the activities, but this proved impossible. The different roles of the Minister of Public Security are interdependent, and the various departments of the Ministry of Public Security are closely intertwined. Any separation between the areas would effectively create a new system, which we have no power to establish. There is no escaping the conclusion that respondent cannot properly fulfill the role of Minister of Public Security.

66. I would not be doing my job faithfully if I did not now briefly relate to three additional issues which arose during the proceedings.

Appointment and Election

67. Respondent and the state claim that, by expressing confidence in the government in office, the Knesset also expressed its confidence in respondent, and we must therefore refrain from interfering with the Knesset's discretion. I cannot accept this claim. First, the Knesset expressed its confidence in the government in general. Second, it is not disputed that the Prime Minister is currently empowered to remove respondent from office without receiving Knesset approval. It is his exercise of that discretion which we review. Consequently, the Knesset is not involved in the case before us.

68. In this context we will add that we are not speaking of respondent as an elected Member of the Knesset. We have not been asked to interfere with respondent's status as an MK, and it is

doubtful whether we have any power in that respect. HCJ 7367/97 *See The Movement for Quality Government in Israel v. The Attorney-General* [51], at 547 which deals with the appointment of MK Pinhasi as the chairman of the Knesset Committee. Our concern here is with respondent's appointment as Minister of Public Security and not with his status as an elected Member of Knesset. As Minister of Public Security, respondent is subject to the same rules that would apply to a minister who is not a Member of the Knesset.

The Difference between the Minister of Public Security and Other Ministers

69. Petitioner's claims focus on respondent's fitness as Minster of Public Security specifically. It has no issue with him serving in any other ministerial role, except perhaps as Minister of Justice, who is charged with law enforcement, like the Minister of Public Security. My colleague Justice Rivlin takes issue with this proposition. For if indeed respondent is unworthy of serving as Minister of Public Security, how can he serve as a minister in charge of any other area? In the words of my colleague (para. 32 of his opinion):

> Petitioner focuses on two reasons why Hanegbi should be dismissed. First, the possible damage to public confidence as a result of his appointment as minister in charge of public security and the police. Second, the risk of a conflict of interest in performing certain ministerial duties. As to the first reason, this is not enough to constitute grounds for intervention in the Prime Minister's decision. We related to this above, and we would only add here that petitioner takes issue *specifically* with Hanegbi's appointment as Minister of Public Security. As far as this line of reasoning is concerned, there is nothing to stop Hanegbi from being appointed as a minister in a different ministry – except, perhaps, the Ministry of Justice. This position raises a difficulty. It is hard to imagine that an individual, whose appointment as Minister of Public Security would cause such severe damage to the public's

> trust that we must strike down the Prime Minister's decision to appoint him, would be able to head another ministry – such as the Ministry of Education or the Finance Ministry. It is difficult to accept that an individual who is so patently unfit to serve in a ministry responsible for law enforcement could, without any hindrance, serve in a ministry entrusted with the state's foreign policy or its security. We thus come to the second part of this petition, the concern regarding a conflict of interest (emphases in the original – M.C.).

There are three answers to this question. First, petitioner confined itself to the role of Minister of Public Security because respondent is currently serving in that capacity. Neither this self-imposed limiting of the petition nor our judgment can determine that respondent is able to serve in a different ministerial role. The question was not asked, and as such, we will not rule on it. Second, in our case there is the additional concern of conflicting interests due to the particular relationship between respondent and the police (a point dealt with by my colleague). Finally, according to the principle of proportionality, there must be a correlation between the substance of the claims that render a person unfit for a particular public office, and the office that he actually holds, or for which he is a candidate. Each office is different, and the principle of proportionality obliges us to limit the harm caused to a particular person. A "balance" must be struck between conflicting considerations, and the considerations themselves differ from case to case. According to *Eisenberg* [6]:

> [T]he nature of the position to be filled by the public servant will also influence the weight accorded to a criminal past in the filling of the post. A junior position is not comparable to a senior position. A position that does not involve the control, supervision, direction and guidance of others is not comparable with a position involving authority and responsibility for other people and responsibility for discipline. The job of a leader cannot be compared with the jobs of those being led. An office with

> no special ethical requirements cannot be compared to an office whose essence demands high ethical standards.

Id. at 263. The Minister of Public Security is the minister in charge of law enforcement. As such, comments made regarding the Minister of Justice are also applicable to him:

> Clearly, there is room for reservations regarding the minister's conduct, to the extent that it diverges from the norm of appropriate conduct. The public expects that any minister, being a public leader, will provide an example of appropriate conduct. This is especially true in the case of the Minister of Justice, from whom the public expects this kind of conduct. More than any other minister, the Minister of Justice is responsible for the rule of law and the values of the law. In his personality and in his conduct he symbolizes not only the preservation of the law, but also that which is good and honest beyond the letter of the law.

Bar-On [3], at 59 (Zamir, J.).

Differences of Opinion Regarding the Scope of the Range of Reasonableness

70. Respondent has made the following argument: The question here is whether, by refusing to dismiss respondent as Minister of Public Security, the Prime Minister deviated from the range of reasonableness in an extreme manner. Some of the justices on this panel feel that the Prime Minister acted reasonably; at the very least they consider that there was insufficient proof to warrant intervening in his discretion. This view inevitably influences the decisions of other justices. Judicial intervention in the discretion of an authority is only warranted when that discretion is an extreme deviation from the range of reasonableness. If some of the justices maintain that the discretion does not deviate from the range of reasonableness, then how can other justices on the same panel rule that his discretion is an

extreme deviation? Under these circumstances the rulings of the other justices could themselves be regarded as unreasonable. Alternatively, it indicates that those rulings based on the judgments of the other justices are unreasonable. Hanegbi claims that this reasoning is not applicable in a criminal procedure. He agrees that where one judge has doubts regarding the guilt of the accused, that doubt should not affect his colleagues on the panel. However, he claims that the rule is different in an administrative procedure.

71. I see no reason for distinguishing between a criminal procedure and an administrative procedure. In both, doubt and reasonableness are given over to the individual discretion of each judge, within the bounds of the overall legal context. Administrative law and assessments of reasonableness have often been a source of dispute between judges. *See* CrimA *State of Israel v. Zeguri* [82], at 427. Furthermore:

> Every judge decides individually; and his decision in a trial is the product of his own conviction and his own conscience.
>
> Every judge decides individually. The fact that my colleagues on the panel have doubts regarding whether the accused committed the offense of which he is accused does not cause me to have doubts too. It is forbidden for me to doubt solely because my colleagues doubt. My colleague's doubt is not infectious, and does not pass from one heart to another, from one conscience to another, even if my colleague is greater, wiser, older, or more experienced than me. This is the independence of a judge in its deepest sense, the inner independence of the judge.

CrimA 6251/94 *Ben-Ari v. State of Israel* [83], at 107-8. In the words of the Court, "[e]ach and every judge is a lone knight wandering the plains of law and justice." *See* HCJ 3679/94 *National Association of Directors and Authorized Signatories of the First International Bank of Israel v. Tel Aviv/Jaffa District Labor Court* [84], at 593. It is true

that:

> The judge must always be receptive to the opinions of others, and be prepared to listen to other people. However, the simple fact that another person has a different opinion, however important this dissenter may be, must not affect his own discretion (all subject to explicit legal provisions, such as binding precedents).

As Maimonides taught (*Laws of the Sanhedrin*, 10:1 [109]):

> A judge in a capital case who rules guilty or not guilty not due to his own reasoning, but because he followed the view of his colleague, has transgressed. Of this the Torah said: Do not respond to grievance by yielding to the majority to pervert the law. From tradition we learn that at the moment of deciding you must not say, it is sufficient that I am like another – rather you must say what you believe.

In Conclusion

72. In considering Hanegbi's appointment as Minister of Public security, or his removal from the position, the Prime Minister was presumably confronted with two conflicting categories of considerations. On the one hand: public considerations against the appointment due to the concern that his past would conflict with his role as Public Security Minister and lead to the improper management of the police, and the loss of public confidence in the government. And on the other hand: political considerations relating to the need to establish a stable coalition to support the government and preserve its structure, including respondent's proven executive talents. The Prime Minister chose the latter considerations over the former, and decided to appoint respondent to the office, and, later on, to allow him to remain in office. In my colleagues' view, having regard for the political nature of the case before us, the Prime Minister's decision did not deviate from the legal boundaries of

reasonableness. I cannot agree.

When the President charges a Knesset Member with the formation of a government with himself at its head, the Knesset Member will do his best to fulfill that task by forming a stable government that can weather the storms. The consideration of forming a government that will win the Knesset's confidence becomes a primary consideration for the Prime Minister-elect, after having agreed upon the policies acceptable to prospective coalition partners. Generally, the other relevant considerations play a secondary role in the forming of a government. In other words:

> As distinct from public servants, who are subject to the provisions of the State Service Law (Appointments) 1959, a minister and deputy-minister are not appointed to their positions exclusively by virtue of their qualifications, talents and personal virtues. Party and coalition interests form the basis of these appointments.

Deri [47], at 428 (Goldberg, J.). These comments were made regarding the formulation and appointing of the government. Nonetheless, in conducting a judicial review of the final composition, the Court must assess whether the considerations which were secondary in the eyes of the Prime Minister were in fact given appropriate weight. If these considerations were overlooked to a great extent it could render the decision a deviation from the boundaries of discretion. If the Court does not uphold the basic principles of public law and morality, then who will?

73. Under these circumstances, our concern is with the candidate's moral suitability to be a minister, as well as his relations with the police over whom he has been appointed. Were these considerations given the weight they deserve? We have observed that, in reality, these considerations were allocated but a small part of their deserved weight. We also observed that these factors ought to have been given far more consideration. The unavoidable conclusion is therefore that the Prime Minister's discretion was fatally flawed.

74. Judicial invalidation of the Prime Minister's discretion does not make the Court a "supra-Prime Minister," as my colleague Justice Rivlin put it. The Court did not attain that status in *Deri* [47], *Pinhasi* [5] and *Eisenberg* [6], and in a not insignificant number of other cases. Striking down a prime ministerial decision falls within the boundaries of legitimate judicial review of the administration's activities. It is part of the "checks and balances" which exist in a democratic system characterized by the principle of the separation of powers between the authorities. I think that it is our duty, the duty of the Court, especially in these times, to protect the police in general, and the Investigations Branch in particular. This is the reasoning for my conclusion.

Epilogue

75. Our decision in this case has been far from simple and straightforward. Of this, I am well aware. Yet I could not allow myself to just let things slide, to avert my gaze and pretend nothing has happened.

76. On the basis of the above, I propose to my colleagues that we make the order final, and declare that the Prime Minister is obligated to exercise his power under section 22(b) of Basic Law: The Government, 2001, and remove Minister Tzahi Hanegbi from his position as Minister of Public Security.

Justice D. Beinisch

1. We have been asked to deal with the question of whether the appointment of respondent 3 to the position of Minister of Public Security is so unreasonable as to warrant the Court's intervention to strike down this decision. This is a very important question. We must be very sensitive when interfering in the decisions of the executive authority and of the Prime Minister, who have been granted broad discretion. The utmost caution and a meticulous examination of the

legal issues is necessary in ruling in this petition. This is especially true since this petition concerns the process of forming the government and appointing its ministers.

Prior to reaching my own conclusions on the subject, I reviewed the opinions of my colleagues, Justice Rivlin, Vice-President Or and Justice Cheshin. The first opinion deals with the rather broad topic of deference between the authorities. My opinion will deal exclusively with the question the Vice-President posed in his opinion – judicial intervention in the circumstances here. My colleague, Justice Cheshin, thoroughly analyzed the issues raised by the appointment, as well as the normative legal framework, and concluded that the decision to appoint respondent 3 as Minister of Public Security should be struck down due to the fact that it is unreasonable in the extreme. It should be mentioned, at the outset, that I agree with my colleague, Justice Cheshin: under the circumstances and at the present time, respondent's appointment is not compatible with the rule prohibiting conflicts of interest.

2. From a reading of the opinions in this case, it becomes clear that there exists no fundamental dispute as to the nature or quality of the statutory power granted the Prime Minister to appoint ministers and dismiss them, pursuant to Basic Law: The Government. This is also true regarding the extent to which this Court can review this power. The statutory discretion granted to the Prime Minister to fill cabinet posts and remove the occupants of these posts is extremely broad. Our rulings have already established, undisputably, that the factors the Prime minister may consider when deciding whether to appoint or dismiss ministers include political considerations such as the stability of the government and the formation of a viable coalition. These and other political considerations are legitimate, and even essential, in the process of establishing a government and appointing ministers.

Accordingly, and in light of the nature of the Prime Minister's power to appoint and dismiss ministers, it would take a radical deviation from the range of reasonableness for the Court to intervene

in these decisions. Having said that, my colleague Justice Rivlin, who emphasizes the limits of intervention and their narrow scope, also notes that:

> The discretion of the Prime Minister regarding the appointment of a minister is certainly subject to the review of this Court. This applies to any kind of appointment.

He further stated that:

> The powers granted to the Prime Minister to appoint and dismiss ministers serve to improve the government's image and functioning, and public confidence in it. A radical deviation from the range of reasonableness in the exercise or non-exercise of these powers constitutes grounds for judicial intervention.

See paras. 17 and 18 of Judge Rivlin's ruling. There is obviously nothing innovative about these findings; they merely reflect the precedents set forth by this Court in a number of rulings that deal with judicial intervention to remove ministers. The primary cases are: HCJ 3094/93, 4319/93, 4478/93; HCApp 4409/93 *The Movement for Quality Government in Israel v. The Government of Israel* [*Deri* [47]]; HCJ 4267/93, 4287/93, 4634/93 *Amitai – Citizens for Sound Administration and Moral Integrity v. Yitzhak Rabin, Prime Minister of Israel* [*Pinhasi* [5]]; HCJ 2533/97 *The Movement for Quality Government in Israel v. The Government of Israel* [*Bar-On* [3]].

We also agree that the question is not whether the Court feels comfortable with the Prime Minister's appointment of a certain person to a specific post. Such a question does not constitute a cause for judicial review. It is not the Court's role to examine the wisdom of the appointment, the suitability of the person for the post, or his likelihood of success. These considerations are entrusted to the elected Prime Minister, and it is up to the Knesset and the voter to redress such decisions. Therefore, we will act with much caution and restraint when considering the disqualification of an appointment.

Disqualification can only be justified in exceptional and extraordinary circumstances, where there was a legal defect either in the appointment process or the appointment itself. This defect must be at the core of the administrative discretion afforded to the authority, no matter how broad his powers may be.

My colleagues, each in their own way, have laid out the factual details of this petition. This mainly concerns the criminal affairs in which Hanegbi has been involved as a suspect or subject of investigation despite the fact that, at the end of the day, he was not tried concerning these affairs. So, too, my colleagues have already discussed the normative framework in which the Prime Minister exercises his power to appoint ministers or to remove them from their posts, as well as the grounds which would enable this Court to exercise judicial review. Therefore, I will refrain from expanding on these matters and will instead limit myself to a discussion of the flaw which I see in the appointment here.

3. The petition is based on two principal claims. The first claim is that Hanegbi is not fit to act as Minister of Public Security due to his involvement in a number of criminal affairs, the latest and most central being the so-called Derech Tzleha affair. In a previous petition filed by petitioner – *Bar-On* [3] – it was already determined that that there was nothing in the first three affairs to render respondent unfit for the post held by him at the time – that of Minister of Justice. This includes the affair in which Bar-On was appointed to the position of Attorney-General. Petitioner now claims that the latest affair, which concerns Hanegbi's involvement in the Derech Tzleha organization, when added to the previous affairs, tips the balance and renders him unfit to serve as Minister of Public Security.

The other grounds for the intervention of the Court, according to petitioner, are that the appointment of respondent as Minister of Public Security contravenes the rule against conflicts of interest. As a result, petitioner asserts he is not fit for the office.

4. As to petitioner's first claim, regarding the criminal affairs Hanegbi was allegedly involved in, or investigated about, I take issue with those who feel this is insufficient to warrant judicial review of the decision to appoint him as Minister of Public Security.

I agree with my colleague Justice Cheshin, that one must distinguish between the presumption of innocence to which a person who has neither been tried nor convicted of a crime is entitled, and the question of whether he is suited for public office in light of such allegations. I also agree that, in appointing someone to public office, the authorities are permitted and even required to take into account a person's "criminal past" based on administrative evidence. It should not be said that this decision rests solely on whether the public prosecutor's office filed an indictment. The discretionary power exercised by the public prosecutor's office when deciding whether or not to indict someone serves a different purpose than that exercised to prevent an appointment or remove a person from public office. *See* HCJ 6163/92, 6177/92 *Eisenberg v. The Minister of Housing and Construction* [6], at 268; *Pinhasi* [5], at 467-69.

This Court has already determined that there are no hard and fast rules pertaining to when it is appropriate to bar a person from public office. On one hand, it would be erroneous to hold that an indictment automatically renders a person unfit for such a post. At the same time, however, the lack of an indictment is not the hallmark of fitness. There are a host of factors which must be taken into account when considering disqualification. These include the type of office, the type of misconduct attributed to the official, how strongly such behavior reflects on the person's fitness, and the strength of the evidence for the alleged wrongdoing. *See Bar-On* [3], at 62-63 (Zamir, J.).

We must take into account that the other criminal affairs in which Hanegbi was allegedly involved, as well as the impact these affairs on his role as Minister of Justice, have already been examined by this Court in *Bar-On* [3]. The Court expressed its opinion on the issue, and did not see fit to interfere with Hanegbi's tenure as Minister of

Justice.

As to the Derech Tzleha affair, this should not be viewed as my colleague Justice Rivlin sees it, as yet another chapter in the affair that was already judged by this Court in *Bar-On* [3]. This affair involved an extensive investigation. From the outset, the police recommended the indictment of respondent, and even the Attorney-General was in favor of this after an initial examination of the evidence. The evidence was then once again examined by the Attorney-General himself, as well as by a contingent of attorneys. It is apparent from the report that the evidence was repeatedly inspected with great thoroughness. At the end of the day, however, the evidence was not deemed sufficient to indict respondent. The close examination of the evidence, as detailed in the Attorney-General's report, and the high professional caliber of those who performed the examination, begs the conclusion that there is no evidentiary basis for the criminal involvement of respondent in this affair. Under the circumstances, and after having examined the opinion of the Attorney-General and the decision of the Knesset Ethics Committee, I have not been convinced that the factual basis presented to me is sufficiently grave as to render respondent unfit to serve as Minister of Public Security. It is true that the largely undisputed facts, which are apparent in the opinions of the Attorney-General and the Knesset Ethics Committee, indicate unethical behavior by respondent. Nevertheless, I do not believe that, based on the Derech Tzleha affair, the decision to appoint respondent 3 as Minister of Public Security is extremely unreasonable on the legal level.

5. The petition's second claim troubled me. According to this claim, following the investigation in the Derech Tzleha affair, there exists a conflict of interest between respondent's ability to fulfill his position as Minister of Public Security, charged with the public interest in the investigative field, and his relationship with the Investigations Branch of the police. After much deliberation, I have arrived at the conclusion that respondents did not supply a satisfactory answer to why this does not constitute a conflict of interest.

First, it must be stated that respondents did not convince us that petitioner's claim should not be classified as a conflict of interest. The rule prohibiting conflicts of interest is predicated on the principle that a person in a public role should avoid the "prejudice" or "bias" which results from the conflict between the faithful execution of his public duties and an interest of his own. There is a substantive and foreseeable *a priori* concern regarding the existence of an extraneous consideration and this concern falls under the rule prohibiting conflicts of interest. If such a concern exists on the basis of objective criteria, respondent need not actually be put to the test in order to determine if an actual conflict of interest exists. For a comprehensive discussion of this subject, see HCJ 531/79 *The Likud Faction of the Petach Tikva Municipality v. The City Council of Petach Tikva* [53], at 569-76; *see also* CA 6983/94 *Pachima v. Peretz* [55], at 835-36.

In his affidavit, the Prime Minister expanded at length on respondent's fitness for senior and demanding public offices. He emphasized his vast experience in the administration of complex departments and the "broad knowledge of the field of security." All of these qualify respondent 3, in the Prime Minister's opinion, to "lead the Ministry of Public Security in the best possible manner." The Prime Minister's statement focuses a considerable amount of attention on Hanegbi's organizational skills and his ability to cope with the security roles entrusted to the Ministry of Public Security. All these considerations are part of the Prime Minister's discretion and it is not our place to interfere with them. Nonetheless, the Minister of Public Security is responsible to the public on behalf of the government concerning all aspects of Israel Police; security operations constitute only one facet of this post, albeit an important one, especially nowadays. It is well-known that the Israel Police is also empowered to carry out investigations and to enforce the law in Israel. In this respect, petitioner claims that respondent 3 is liable to find himself in a conflict of interest when placed in charge of the very people who investigated him not so long ago in the Derech Tzleha affair and who recommended that he be brought to trial. Respondents countered this by pointing out that the minister is not a

"supra-Inspector-General," "with direct control or authority over everything that happens in the Israel Police, and this is especially true regarding everything that occurs in its Investigations Branch."

It is true that the minister is not in charge of individual police investigations and is not even involved in them. He is also not a "supra-Inspector-General," as respondents maintain. Yet the import, stature, and influence of the minister on the structure of the police and its budget should not be ignored. After all, the minister is responsible for setting the working priorities of the police and, most importantly, for the appointment and dismissal of senior officers. According to the Police Ordinance (New Version), the minister is in charge of appointing every senior police officer from the rank of deputy commander upwards. Accordingly, the minister appoints the senior officers of the Investigations Branch, including the head of this branch, and he also has the power to fire them. He is also responsible for recommending who should fill the office of Inspector-General. Indeed, respondents are correct in their assertion that a duty of consultation applies to the minister pursuant to the rules of administrative law, prior to deciding who will fill the senior ranks of the Investigations Branch. However, this duty is not sufficient, by itself, to negate the existence of a conflict of interest.

As part of his role as Minister of Public Security, it is necessary for respondent 3 to set police policy, including policy for the Investigations Branch, and it is in his power to influence the stature of this branch, its standards, and its work assignments. Yet, only a short while ago he himself was the subject of a series of investigations which, despite being essential and permitted by the law, were substantially damaging for him. It should be recalled that, at the conclusion of the previous two investigations, the Investigations Branch recommended that respondent be indicted.

To this, we note that the the situation in which the senior officers involved in the investigation of respondent find themselves in. Even though there is no doubt these people have no personal grudge against respondent, since they were merely doing their job,

respondent still has significant powers to decide their fate and influence their rank and place in the police hierarchy. How will this conflict affect their trust in respondent's decisions, and how will he exercise the hierarchical authority he wields over them?

This is not to infer that we believe that respondent seeks vengeance against his interrogators. Not in the least. He has declared that this is not the case and I am willing to assume that he will make every effort to ignore his personal feelings. However, an actual conflict of interest exists when there a near certainty of "prejudice" or "bias," even "unintentionally and unknowingly." As stated by Justice Cohen:

> We will state at once that we have not had even a shred of evidence presented to us that would cause us or petitioner to have even the slightest doubt as to whether respondent has not or will not carry out his role of Chairman of the Appeals Committee in absolute good faith and objectivity, to the best of his knowledge and capabilities. Even according to petitioner, there is no requirement that the "corrupt viewpoint" or bias actually exist or be proven. The claim is that even though these do not actually exist, "a reasonable person would consider that, under the circumstances, there exists a real possibility of bias or prejudice."

HCJ 279/60 *Gil Theaters v. Ya'ari* [85], at 675-76. Furthermore:

> When we apply the term bias, this should not be taken to mean that respondent will knowingly or intentionally favor a certain side. When we talk of a corrupt viewpoint, this should not be misconstrued as implying that respondent's viewpoint has been corrupted through the accepting of actual bribes. The intention is that bias, by its very nature, is inevitable or probable, even if it is not willful or intentional, since every person favors his own interests.

Likud Faction [53], at 570.

6. I am aware that the rule prohibiting conflicts of interest should be interpreted with prudence and moderation. I can accept that, just because a person has been investigated, this should not necessarily prevent him from subsequently serving as the minister in charge of the Investigations Branch. Yet in the case of respondent 3 we are not talking about events that occurred in the dim and distant past. Respondent's encounter with the Investigations Branch ended only in June 1999, at which point it was recommended to the prosecuting authorities to indict him. This case was only closed in March 2001. The investigation of respondent by officers of the Investigations Branch has not yet been relegated to the history books of the Israel Police. Respondent also possesses no small amount of prior experience with the investigators of the Investigations Branch. Can it be said that he is so divorced from the past that he would be capable of fulfilling his post with complete objectivity? According to the rule prohibiting conflicts of interest, a person should not be placed in a situation in which he is liable to be influenced by extraneous considerations in the line of duty.

I would also like to add that we have already noted that the rule against conflicts of interest will not necessarily bring about a person's disqualification from a post, provided that less drastic means can be found to circumvent the specific problem. There is a tendency to utilize such extreme measures only as a last resort, when there is no other way to neutralize the concern about a conflict of interest. As I mentioned elsewhere:

> The mere determination that there is a conflict of interest does not automatically necessitate removal from office. This solution is the last and most extreme resort, only to be adopted in those cases where the conflict of interest is so intense that there is no other way to prevent it. There are a number of intermediary solutions between removal and full service in an office, and the decision should be based on the degree of the conflict, its intensity, and its centrality

to the role of the public official.

> In general, conflicts of interests can only be isolated when they appear in an institutional setting, in which it is possible to pinpoint where the interests overlap and to prevent this. Indeed, it is possible to neutralize a conflict of interest even when the conflicting interest is personal. For this to be the case, however, the public servant's interest must be one that can be avoided or which can be isolated from those areas of overlap with his public role.

Pachima [55], at 854.

In light of the above, I, like my colleague, Justice Cheshin, considered the possibility of keeping respondent 3 in his post as Minister of Public Security, while eliminating the conflict of interest. Had respondents shown me such a way, it is possible I would have avoided the decision that Hanegbi is unfit to continue as Minister of Public Security. In its place, I may have considered it sufficient to merely ban him from serving in ministerial roles pertaining to the Investigations Branch, in a manner that would ensure there were no conflicts of interest. However, no such solution was presented to me. Moreover, as stated above, it is difficult to find such a solution. The Minister of Public Security's powers over the Investigations Branch are, in part, statutory; an example of this is his authority to appoint the upper echelon of police officers. The investigations system is an integral part of the Israel Police, and the minister is in charge of setting general policy, priorities, and budget for the police. In light of this, to take away the control of investigative matters from the Minister of Public Security is liable to be harmful both to the minister and to his general ability to function in his role. It seems difficult, therefore, to separate him from these issues so long as he is an acting minister. In any event, such a course would apparently require a shift in the division of the labor and the intra-governmental responsibilities of ministers. This is something we will refrain from interfering with.

It should be noted that, in the main arguments of respondent 3, he reiterated that the claim of a conflict of interest should be rejected. At the conclusion of his argument, in para. 20.12., he stated: "[e]ven if there does exist a conflict of interest, there are much less drastic ways of neutralizing it and these should be preferred." Despite searching, I could not find what alternative means were being referred to here which would properly address the problem of the conflict of interest. Had my colleagues shared in my opinion, there may conceivably have been room to ask respondent 3 to set forth arguments regarding this issue, and to propose a solution which would neutralize the conflict of interest without the need to remove him from his office. As long as no such solution is found, I feel that there is no way to avoid removing Hanegbi from his office as Minister of Public Security.

Justice E. Mazza

Like my colleagues Justice Rivlin and Vice-President Or, I feel that petitioner did not present us with a clear justification for intervening in the Prime Minister's decision to appoint respondent 3 to the office of Minister of Justice. Based on their well explained and properly detailed reasons – in most of which, if not all, I concur – I hereby join them in concluding that this petition should be denied.

Justice Y. Türkel

1. In my opinion, the petition should be denied. I concur with the opinion of my esteemed colleague, Justice Rivlin, who laid out the appropriate reasoning. I also concur with the reasons laid out by my esteemed colleague, Vice-President Or. In my opinion, it would have been sufficient to predicate the denial of this petition on two grounds:

a) The first ground is that approximately six years ago this Court, in a panel of five Justices, dealt with a petition requesting that respondent be removed from his post as Minister of Justice. It decided, by a majority of four, to reject the petition without granting an *order nisi*. See HCJ 2533/97 *The Movement for Quality*

Government in Israel v. The Government of Israel [3], at 46. That petition concerned three out of the four affairs raised by the petition here – the "brawling affair," the "ISTA affair," and the "Bar-On affair" – and it dealt with the fundamental questions currently under discussion. In that petition, the Court found no adequate reason to remove respondent 3 from his post. The only new factor here is the fourth affair – the "Derech Tzleha affair" – and the appointment of respondent to the post of Minister of Public Security. I believe that this fourth affair, *per se*, and even in conjunction with the previous affairs, does not amount to a justification for respondent's removal from office. It should also be mentioned that the distinction that petitioner draws between the office of the Minister of Justice and the office of the Minister of Public Security is, unfortunately, erroneous.

b) There is a midrash in the Talmud that can shed light on the second reason, which is more at the heart of the dispute than the first one. This midrash states that no appointments to high offices can be made unless the public is consulted first. This midrash is based on the two biblical verses: "And the Lord spoke unto Moses saying: See, I have called by name Bezalel the son of Uri, the son of Hur, of the tribe of Judah." (Exodus 31:2) [110], and "And Moses said unto the children of Israel: See, the Lord hath called by name Bezalel the son of Uri" (Exodus, 35:30) [110].

> Said Rabbi Isaac: A public appointment is not made without first consulting the public, in accordance with the text: "See, the Lord hath called by name."
>
> Said the Holy One, Blessed be He, to Moses: Moses! Is Bezalel acceptable to you? He answered: Lord of the Universe! If he is acceptable to Thee, all the more so to me! The Lord replied: Even so, go and tell the Israelites. He went and asked the Israelites: Is Bezalel acceptable to you? They answered him: Moses, our teacher! If he is acceptable to the Almighty and to you, he is certainly acceptable to us!

Babylonian Talmud, Tractate Berakhot 55a [111]. On the requirement to consult with the public, see also Shulkhan Arukh, Choshen Hamishpat, 3:4 [112]; Arukh Hashulkhan, Choshen Hamishpat, 3:8 [113]; Ribash, Responsa 271 [114]; Rabbi A.Y. Kook, Be'er Eliyahu, commentary on the Biur HaGra [115], as well as other sources. See also my comments in HCJ 6499/99 *The National Religious Party v. Rabbi Shlomo Ben-Ezra* [86], at 624.

It seems, therefore, that no appointment could be made unless the public was consulted, despite the fact that both the Lord and Moses expressed their views about the appointment. Regarding the removal of officials who have been the subject of defamation, compare Exodus 18:21 [110]; Babylonian Talmud, Tractate Sanhedrin 7b [116]; Maimonides, Laws of Temple Vessels, 4:21 [117]; Maimonides Reponsa, Chapter 111 [118]; Shulkhan Arukh, Chosen Hamishpat, 53:25 [119]; Zaken Abraham Responsa, Yoreh Deah, 30 [120].

Respondent 3 was elected to the first slot in his party's primary elections. He placed third on his party's list for the elections to the Knesset, and was nominated by the Prime Minister to serve as Minister of Public Security. This appointment was ratified by the Knesset. Therefore, "consultation" with the public did occur and the public had its say. Is our power greater than that of the people? I believe that we can overrule the choice of the people, as expressed through elections to the Knesset, only in rare and extraordinary circumstances. Save with respect to the legality of the appointment, it is not our place, but the public's, to take issue with the wisdom and ethics of the administrative authority making the appointment. This is not to say that I wish to detract from the Court's power to speak its mind on issues of ethics and morality. *See Bar-On* [3], at 61-64 (Zamir, J.). Sometimes it is appropriate that it should do so. But the proposal to expand the rule so that respondent 3's conduct, as discussed in that case, would "obligate the Prime Minister to remove a minister or deputy-minister from his post, though well-intentioned, would be improper and likely to cause more harm than good." *Id.* at 64. There is much to be said for the view that the morals and

character of public representatives should be subject to painstaking scrutiny. But in the world in which we live, this goal is unattainable.

2. Therefore, the petition should be denied.

Justice D. Dorner

I agree with the rulings of my colleagues, Justice Rivlin and Vice-President Or, who hold the petition should be denied. I wish to add three comments to the rulings of my two colleagues.

1. Indeed, the discretionary authority for appointing and removing ministers (and deputy-ministers) is not absolute. In addition to the grounds for removal expressly provided in the Basic Law: The Government, there are also the grounds established by HCJ 3094/93 *The Movement for Quality Government in Israel v. The Government of Israel* [*Deri* [47]] and HCJ 4267/93 *Amitai v. The Prime Minister of Israel* [*Pinhasi* [5]]:

> When a minister or deputy-minister has been indicted for a serious crime, it is incumbent upon the Prime Minister to remove him from his post. The failure of the Prime Minister to do so will be regarded, under such circumstances, as extremely unreasonable.

HCJ 2533/97 *The Movement for Quality Government in Israel v. The Government of Israel*, at 56 [*Bar-On* [3] (Zamir, J.). The Court added that:

> There is a possibility that, even if a minister's behavior does not amount to criminal conduct, it may still be so serious that it would be extremely unreasonable to allow him to continue in his post. Even so, this possibility is still far from constituting a sweeping rule that a minister must be removed from office in every instance of behavior that deviates from the norms of appropriate conduct.

Id, at 63.

As mentioned in my colleagues' opinions, the fact that legal grounds for removal are limited is a result of the fact that the constitutional authority for the appointment and removal of ministers enables the implementation of policy objectives, including policies that are political in nature. This includes the need to appoint ministers with the proper skills and experience – which is the Prime Minister's responsibility. From this it follows that it is, first and foremost, the responsibility of the Knesset and the public to review these political appointments. Moreover, restraint is necessary due to the damage that removal from a senior political position causes to a public figure, to his presumption of innocence, and to his ability to accomplish his life's work. Of course, this fear does not supersede the prohibition against appointments which severely impair the public's trust in the government. However, there is no room to expand the grounds for removal beyond those already set down in *Deri* [47] and *Pinhasi* [5].

2. The grounds of removal established in *Deri* [47] and *Pinhasi* [5] are based on two elements. The first element is that there must be sufficient evidence to justify an indictment, such as evidence that creates a reasonable chance of conviction:

> An indictment is not a verdict. It only reflects the *prima facie* evidence that has been collected by the public prosecutor's office. Yet, continued tenure in the government is impacted even by the *prima facie* evidence of the indictment. Under certain circumstances, the nature of the individual's alleged offenses – in addition the final legal ruling – is also significant, as these offenses have been officially presented in the indictment ready for filing with the courts.

Deri [47], at 422-23 (Shamgar, P.). The second element is that the evidence must point to the commission of a serious crime, one which involves moral turpitude. Such crimes, including the receipt of

bribes, acts of fraud, defrauding state authorities, and the filing of false reports, caused Minister Aryeh Deri and Deputy-Minister Raphael Pinhasi to be declared unfit for office, As stated there:

> [I]f, heaven forbid, an indictment is filed against a minister, which charges the minister with serious offenses that involve moral turpitude – such as the acceptance of bribes, acts of fraud, deceiving state authorities, lying or with making false reports – then it would be neither proper nor reasonable for him to continue in office.

Id. at 427 (Levin. J). Minister Tzahi Hanegbi's part in the Derech Tzleha affair is the decisive affair in the petition before us. As my colleagues have already indicated, the legality of Hanegbi's appointment, as affected by the other three affairs, was already dealt with by this Court in *Bar-On* [3]. In that case, not only was there no indictment, but Hangebi's file was closed due to the lack of a reasonable chance of a conviction.

Indeed, the facts of the crimes Hanegbi is alleged to have committed are not in dispute. Proving the criminal intent, however, turned out to be the primary difficulty. This intent is usually what determines the nature of the behavior and the level of moral turpitude associated with it. *See* Glanville Williams, Criminal Law 22 (2d ed. 1961) [107]; *compare also* CrimA 2831/95 *Elba v. The State of Israel* [87], at 319. This intent particularly influences the anti-social element of the crimes of fraud and breach of trust, which are attributed to the minister. As Justice Goldberg stated:

> The crime of breach of trust is a general offence, yet its factual basis is not adequately defined. As a result, moral guilt is one of the mechanisms for defining the boundaries of this crime. Since moral guilt constitutes a main element of the crime, there are instances where it is necessary for the Court to investigate the defendant's motives.

See HCJ 2534/97 *Yahav v. The State Attorney* [2], at 16.

The Prime Minister saw the Attorney-General's report, including its conclusion that the file against the minister should be closed due the fact that there was no reasonable chance of a conviction. Certainly, he was obligated to make use of the Attorney-General's conclusion – and its reasoning – even if the report did not detail the evidence on which this conclusion was founded. *Compare* HCJ 320/96 *Yael German v. The Municipal Council of Herzliya* [88], at 239. In any event – and this is the significant factor – petitioner did not attack this report and we have no choice, therefore, other than to accept the Attorney-General's conclusion.

An indictment does not require evidence that guarantees a conviction. When an indictment is filed, the chance of conviction can only be estimated. Moreover, an indictment is only based on the evidence obtained by the police – the defense does not cross examination or present its own evidence. *See* CrimApp 8087/95 *Za'ada v. The State of Israel* [89], at 148-49; and *Yahav* [2], at 12-13. Most significantly, it is possible to indict a suspect even when existing evidence does not prove guilt beyond reasonable doubt. That is to say, there may be a reasonable chance for conviction, which is what justifies the filing of the indictment, even if the evidence does not rule out every reasonable doubt. It goes without saying, therefore, that the decision not to file an indictment due to the lack of a reasonable chance of conviction possesses, as a rule, an "acquittal value" greater than an acquittal in court. Furthermore, it is difficult to imagine a scenario in which the appointment of a minister would be proscribed on account of an act for which he was acquitted in court, even if only due to the existence of reasonable doubt. In any event, such a proscription would be all the more inappropriate where the Attorney-General – whose discretion has not been assailed here – has not even filed an indictment, due to the lack of a reasonable chance of conviction.

3. It is the conclusion of my colleague, Justice Beinisch, that the petition should be accepted, because of the conflict of interest that exists between Hanegbi's post as Minister of Public Security and his

alleged desire to get revenge on his interrogators and the Investigations Branch. In this regard, I am in agreement with my colleagues, Justice Rivlin and Vice-President Or, that it is extremely doubtful that a conflict of interest actually exists. Even if there is some type of conflict of interest, it is very slight and does not give rise, under the circumstances, to any reasonable concern that extraneous considerations will hamper the functioning of the Ministry of Public Security and of the police. See HCJ 3132/92 *Mushlav v. The District Committee for Planning and Building, Northern District* [90], at 747, for an explanation of what constitutes a reasonable concern of an extraneous consideration.

Yet, even if the case had been borderline, there would be cause for great hesitation before granting the petition. Granting the petition would mean harming a public figure merely on the basis of a police recommendation to put him on trial, a recommendation rejected by the Attorney-General. The result would be that the very fact of a police recommendation, even if unfounded, would be sufficient to render a person unfit for office or to remove him from a ministerial post. Certainly, had a clear-cut case of conflict of interest been created, due to the police recommendation, it is possible there would be no way of escaping this result. Yet, this is not so in a borderline case.

As such, I join the opinion of my colleagues, Justice Rivlin and Vice-President Or, that this petition be denied.

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Petition denied according to the majority opinions of Justices Rivlin, Or, Mazza, Turkel and Dorner, against the dissenting opinions of Justices Cheshin and Beinisch.

Under the circumstances, no party was ordered to bear costs.
October 9, 2003