H.C.J 910/86

1. Major (Res.) Yehuda Ressler, Advocate

2. Captain (Res.) Zeev Kosseen

3. Staff Sergeant (Res.) Rami Dekel

v.

Minister of Defence

In the Supreme Court sitting as the High Court of Justice
[June 12, 1988]
Before: Shamgar P., Ben-Porat Deputy President, and Barak J.

Editor's Summary

The question raised by this petition to the High Court of Justice involves the legality of the long-standing arrangement whereby students of Yeshivot (Talmudical colleges) are granted deferment of their military service for so long as they continue their full-time studies. This arrangement was instituted as long ago as 1948, and has been reconfirmed by successive Ministers of Defence and governments of Israel ever since. It has been tile subject of a number of earlier petitions to the High Court questioning its legality, all of which were dismissed.

The petitioners submitted that they were entitled to bring the question before the Court as being personally involved, in view of the fact that their army reserve service is prolonged as a result of the extensive deferment, amounting to exemption, of Yeshivah students from military service and that the burden of reserve service for them and others in their position would be considerably alleviated if Yeshivah students were recruited into full-time military service.

The petitioners argued that the decision of the Minister of Defence purportedly on the basis of section 36 of the Defence Service Law [Consolidated Version], 1986, to defer the full-times military service of Yeshivah students, requires Knesset legislation to give in effect. They also submitted that the decision was *ultra vires,* was based on extraneous and discriminatory grounds and was totally unreasonable.

The High Court ruled as follows:

1. The legal standing of a petitioner before the High Court will be recognised if he can show that there is a reasonable prospect that an interest of his (not necessarily amounting to a right) which may be shared by a great number of others, has been prejudiced.

2. While the classical rule was that it is not sufficient for a petitioner merely to show that a governmental authority is in breach of the law, without showing prejudice to his own interest, there have developed several important exceptions to this rule, which have the effect of liberalising the rules of *locus standi* and making them more flexible. Thus, wherever a petitioner can point to an issue of particular public importance or to a serious flaw in the functioning of a public authority, it would only be right for him to bring such a matter to the attention of the Court whose rule is to review the legality of the acts of public authorities. An even more liberal attitude would allow standing to a "public" petitioner in all cases, thus recognising the *actio popularis*.

3. In the present case, the standing of the petitioners must be recognised both from the point of view of the "classical" approach which requires proof of an interest in the subject matter of the petition, and from that of the more liberal attitudes which either recognise exceptions to the rule requiring establishment of an interest of the past of the petitioner, or dispense with the requirement of "interest" altogether.

4. The question before the Court is a constitutional one of primary public importance relating to the rule of law, in respect of which the locus standi of the petitioners is impregnable.

5. (per former Deputy President Miriam Ben-Porat): Only where a public authority's action is blatantly unlawful or where an overwhelming important public issue is involved would it be permissible to depart from the basic principle requiring a petitioner to show that he has an interest in the subject matter of the petitioner.

6. The concept of *locus standi* should not be confused with that of justiciability. The former relates to the question how far the petitioner is the right person to bring the particular issue before the Court, whereas the latter relates to how far the issue is one suitable for judicial consideration.

7. Two forms of justiciability should be distinguished - normative and institutional justiciability. While normative justiciability answers the question whether there exist legal criteria capable of determining the dispute before the court, institutional justiciability answers the question whether the court is the appropriate organ for such determination, rather than any other organ such as the legislature or the executive.

8. All activities, including those of a political nature or matters of policy, are governed by legal norms of one kind or another. There is thus no such thing as a "legal vacuum". Legal norms may be permissive (e.g. "an individual may perform any act, unless it is specifically prohibited") or prohibitive ("governmental entities may not perform any act unless specifically permitted").

9. Lack of normative justiciability means in effect lack of cause of action. In most cases, a submission of lack of normative justiciability has to contend with the general legal norm which obliges governmental bodies to act reasonably, and such reasonableness is examined by legal criteria.

10. (per Barak J): The argument that, in view of the separation of powers an issue of a political nature must necessarily be determined by a political organ, and is therefore institutionally nonjusticiable, is an erroneous one. On the contrary, judicial review of government activity, even if it is of a political nature, ensures that separation of powers is safeguarded. Indeed, where a political or ideological issue is involved, the judge may not express his personal view, but such issue is still justiciable with regard to its legal aspect, and a court cannot refrain from dealing with it without harming public confidence in the rule of law. Thus, the whole doctrine of institutional and (non) justiciability is highly problematical an is only applicable in special instances where it can be shown that public confidence in the judiciary is more likely to be prejudiced than public confidence in the rule of law.

11. (per Shamgar, P.): It is not desirable that all issues concerning governmental activity be referred to the courts, thus depriving other authorities of their proper function. Separation of powers implies a proper balancing of functions between the three powers of government.

    Justiciability must be examined by the double test of its normative and institutional aspects. The issue of institutional justiciability must be settled by the judge in accordance with his sense of expertise.

12. (per Ben-Porat, D.P.): The question of justiciability should be left open for further consideration: predominantly it is a matter of the limits of judicial restraint.

13. The question whether a governmental authority is competent to carry out a particular governmental function such as granting deferment to Yeshivah students is normatively justiciable, and is connected with the proper interpretation of s. 36 of the Defence Service Law [Consolidated Version].

14. In the present case, institutional non-justiciability is inapplicable. Basically, the question whether Yeshivah students should be drafted into the armed forces is a matter of public policy which should be determined by the political authorities. However, the question of the legality of deferment of those students' military service is a legal question which is for the courts to settle.

15. The Minister's power to defer military service can only be lawfully exercised on the basis of one of the grounds enumerated in section 36 of the Defence Service Law. In exercising his power, he may take into account considerations other than those relating purely to defence, such as requirements of education, the national economy, family or religious factors, all of which come under the general heading of "other reasons" in the said section.

l6. The Minister must exercise his discretionary power to defer military service in a reasonable manner, allowing appropriate weight to the various relevant considerations. The Court will not substitute its own discretion for that of the Minister, but will confine judicial review to the question whether the Minister of Defence may take into consideration the factor of religion and whether in the circumstances the weight he attributed to that factor was reasonable. The Minister may take the religious factor into consideration, so long as it does not bring about substantial harm to security.

17. In Israel, a democratic and pluralistic society, there is no consensus on the issue of military service for Yeshivah students, and this strengthens the view that the Minister can legitimately take the religious factor into consideration when deciding on that issue.

18. The petitioners have failed to rebut the presumption of reasonableness of governmental action and so have failed to show that the Minister's action in continuing to allow deferment of Yeshivah students' military service was unreasonable. There is therefore no ground for intervention of the High Court of Justice in the Minister's decision.

19. However, the decision on deferment of Yeshivah students' military service ought to be reviewed from time to time in the light of current defence requirements; in the view of Shamgar, P., such review should take place annually.

20. (per Shamgar, P.): The fact that the Minister of Defence has acted in this matter consistently with his predecessors in office strengthens the reasonableness of his action.

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[2] H.C. 448/81 *Ressler v. Minister of Defence* (Ariel Sharon), 36(1) P.D. 8l.

[3] FH 2/82 *Ressler v. Minister of Defence,* 36(1) P.D. 708.

[4] H.C. 179/82 *Ressler v. Minister of Defence,* 36(4) P.D. 421.

[5] H.C. 731/86, Misc. App H.C. 91/87 *Micro Daf v. Israel Electric Co. Ltd,* 41(2) P.D. 449.

[6] H.C. 287/69 *Meron v. Minister of Labour,* 24(1) P.D. 337.

[7] H.C. 217/80 *Segal v. Minister of the Interior,* 34(4) P.D. 429.

[8] H.C. 563, 566/75 *Ressler* v. *Minister of Finance, Zivoni v. Chairman of Knesset Finance Committee,* 30(2) P.D. 337.

[9] H.C. 26/76, *BarShalom v. Meir Zorea, Director of Israel Lands Administration,* 31(1) P.D. 796.

[10] H.C. 1/81 *Shiran v. Broadcasting Authority,* 35(3) P.D. 365.

[11] H.C. 29/55 *Dayan v. Minister for Religious Affairs,* 9 P.D. 997.

[12] H.C. 428, 429, 431, 446, 463/86, Misc. App. H.C. 320/86 *Barzilai v. Government of Israel,* 40(3) P.D. 505.

[13] H.C. 609/85 *Sucker v. Mayer of Tel Aviv-Yafo,* 40(1) P.D. 775.

[14] H.C. 348/70 *Kfir v. Ashkelon Religious Council,* 2501 P.D. 685.

[15] H.C. 852, 869/85 Misc, App. H.C. 43, 486, 487, 502. 512-515, 518, 521, 523, 543/86; 1, 33/87 *Aloni v. Minister of Justice,* 41(2) P.D. 1.

[16] H.C. 98/69 *Bergmann v. Minister of Finance,* 23(1) P.D. 693.

[17] H.C. 148/73 *Kaniel v. Minister of Justice,* 27(1) P.D. 794.

[18] H.C. 152/82 *Alon v. Government of Israel,* 36(4) P.D. 449.

[19] H.C. 243/82 *Zichroni v. Executive Committee of the Broadcasting Authority* 37(1) P.D. 757.

[20] H.C. 511/80 *Galia v. .Haifa District Planning and Building Commission* 35(4) P.D. 477.

[21] H.C. 306/81 *Flatto Sharon v. Knesset House Committee,* 35(4) P.D. 118.

[22] H.C. 73/85 *"Kach" Faction v. Speaker of the Knesset,* 39(3) P.D.141.

[23] H.C. 295/65 *Oppenheimer v. Minister of the Interior and Health* 20(1) P.D. 309.

[24] H.C. 606, 610/78 *Oyab v. Minister of Defence; Nossoua v. Minister of Defence,* 33(2) P.D. 113.

[25] H.C. 65/51 *Jabotinsky v. President of the State of Israel 5* P.D.801.

[26] H.C. 222/68, Motion 15/69, *National Group, Registered Soc. v. Minister of Police,* 24(2) P.D. 141.

[27] H.C. 561/75 *Ashkenazi* v. *Minister of Defence,* 30(2) P.D. 309.

[28] H.C. 802/79 *Semara v. Commander of Judea and Samaria,* 34(4) P.D. 1.

[29] H.C. 186/65 *Weiner v. Prime Minister,* 19(2) P.D. 485.

[30] H.C. 58/68 *Shalit v. Minister of the Interior,* 23(2) P.D. 477.

[31] H.C. 89/83 *Levi v. Chairman of Knesset Finance Committee*, 38(2) P.D. 488.

[32] C.A. 591/73 *Bashist v. Vinegrowers Soc. of Winecellars of Rishon LeZion and Zichron Yaakov Ltd*., 28(1) P.D. 759.

[33] H.C. 620/85 Mi'ari *v. Speaker of the Knesset,* 41(4) P.D. 169.

[34] H.C. 731/84 *Kariv v. Knesset House Committee,* 39(3) P.D. 337.

[35] H.C. 311/60 Y. *Miller, Engineer (Agency & Import) Ltd., v. Minister of Transport* 15 P.D. 1989.

[36] H.C. 389/80 *Golden Pages Ltd. v. Broadcasting Authority,* 35(1) P.D. 421.

[37] F. H. 9/77 *Israel Electric Co., Ltd. v. Ha'aretz Newspaper Publishing Co. Ltd.* 32(3) P.D. 337.

[38] H.C. 14/86 *Laor v. Films and Theatre Censorship Board,* 41(1) P.D. 421.

[39] H.C. 10/48 *Ziv v. Acting Commissioner for Tel Aviv Urban Area,* 1 P.D. 85.

[40] H.C. 73/53 *"Kol Ha'am" Co. Ltd. v. Minister of Interior,* 7 P.D. 871.

[41] C.A. 461/62 *Zim Israel Navigation Co. Ltd. v. Maziar,* 17 P.D. 1319.

[42] H.C. 112/77 *Fogel v. Broadcasting Authority,* 31(3) P.D. 657.

[43] C.A. 243/83 *Jerusalem Municipality v. Gordon,* 39(1) P.D. 113.

[44] H.C. 302/72 *Hilo v. Government of Israel, El Salimeh v. Government of Israel,* 27(2) P.D. 169.

[45] H.C. 69, 493/81 *Abu Ita v. Commander of Judea and Samaria Region, Kanzil v. Commissioner for Customs, Gaza Region H.Q.*, 27(2) P.D. 197.

[46] H.C. 393/82 *Jama't Ascan, etc. Co-op Soc. reg. with Judea and Samaria Region H.Q. v. Commander of IDF Forces in Judea and Samaria Region,* 37(4) P.D. 795.

[47] H.C. 263/85 (Misc. App. H.C. 222, 267/85) *Awar v. Commander of Civil Administration Ramallah Sub-District,* 40(2) P.D. 281.

[48] H.C. 629/82 *Mustafa v. Military Commander of Judea and Samaria Region,* 37(1) P.D. 158.

[49] H.C. 652/81 M.*K. Sarid v. Knesset Speaker Menahem Savidor,* 36(2) P.D. 197.

[50] H.C. 742/84 *Kahana v. Knesset Speaker,* 39(4) P.D. 85.

[51] H.C. 669/85 24, 131/86 *Kahana v. Knesset Speaker,* 40(4) P.D. 393.

[52] H.C. 109/70 Coptic Orthodox Motaran 25(1) P.D. 225.

[53] H.C. 321/60 *Lehem Hai Ltd. v. Minister of Trade and Industry,* 15 P.D. 197.

[54] H.C. 390/79 *Davikat v. Government of Israel,* 34(1) P.D. 1.

[55] H.C. 174/62 *League of Prevention of Religious Coercion v.Jerusalem Municipal Council,* 16 P.D. 2665.

[56] H.C. 98, 105/54 *Lazarovich v. Food Controller Jerusalem; Saad v. same,* 10 P.D. 40.

[57] H.C. 266/68 *Petach Tikvah Municipality v. Minister of Agriculture,* 22(2) P.D. 824.

[58] H.C. 156/75 *Daka v. Minister of Transport,* 30(2) P.D. 94.

[59] Cr. A. 54/81 *Rosenne v. State oflsrael,* 35(2) P.D. 821.

[60] H.C. 297/82 *Berger v. Minister of the Interior,* 37(3) P.D. 29.

[61] H.C. 669/86 Misc. App. H.C. 451, 456/86 *Rubin v. Berger,* 41(1) P.D. 73.

[62] C.A. 365/54 *Mann v. Ayun* and cross appeal, 11 P.D. 1612.

[63] H.C. 200/83 *Watad v. Minister of Finance,* 38(3) P.D. 113.

[64] H.C. 72/62 *Rufeisen v. Minister of the Interior,* 16 P.D. 2428.

[65] Elections Appeal 2, 3/84 *Neimann v. Chairman of Central Elections Committee for the 11th Knesset; Avneri v. same,* 39(2) P.D. 225.

American Cases Cited:

[66] *Poe v. Ullman* 367 U.S. 497 (1961)

[67] *Flast v. Cohen* 392 U.S. 85 (1968)

[68] *Baker v. Carr* 369 U.S. (1961)

[69] *Korematsu v. United States* 323 U.S. 214 (1944)

[70] *Cohens v. Virginia* 19 U.S. 120 (1821)

[71] *Goldwater v. Carter* 444 U.S. 996 (1979)

English Cases Cited:

[72] *Inland Revenue Commissioners v. National Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617.

[73] *Council of Civil Service Unions v. Minister for Civil Servic*e [1985] A.C. 374.

Canadian Cases Cited:

[74] *Thorson v. Attorney General of Canada et al.* (No. 2) (1974) 43 D.L.R. (3d) 1

[75] *Nova Scotia Board of Censors v. McNeil* (1975) 55 D.L.R. (3d) 632.

[76] *Minister of Justice of Canada et al. v. Borowski* (1982) 130 D.L.R.(3d) 588.

Sources of Jewish Law Cited:

[a] Rabbi M.Z. Neriyah, *Drafting of Yeshivah Students,* Gvilim, 5728.

[b] Rabbi Z.Y. Kook, *Paths of lsrael,* Collection of Articles, Menorah, 5727, 114-123.

[c] Rabbi S.Y. Zevin, *Drafting of Yeshiva Students,* Collection of Articles, Menorah, 5727, 114-123.

[d] Rabbi Y.M. Tikochinsky, *Release of Yeshiva Students from Draft,* Torah u-Medinah, No. 5-6, 5713-4 pp. 45-54.

Petition for Order *Nisi.* The hearing took place on the supposition that an order *nisi* had been granted. Petition dismissed.

Y. Ressler - for the Petitioner;
N. Arad - for the Respondent.

JUDGMENT

BARAK J: Is deferment of defence service for Yeshivah (Talmudical College) students lawful? This question - which has been presented in the past for consideration by this Court - once again stands before us for examination. Should we address the question itself, or should perhaps the petition be dismissed because of the petitioners' lack of standing, or because of its non-justiciability? And if we address the question itself - is the deferment of service lawful?

The Facts

1**.** The question of deferment of defence service for Yeshivah students goes back to the beginning of the State. Already on March 9, 1948, a directive was issued by the Chief of Staff of the [pre-independence] Haganah (the C.N.D.), which stated that "it has been decided that the Yeshivah students, according to approved lists, are exempt from service in the army. Competent students will be given training in self-defense at their place of learning". It was stated that "this decision is effective for the Jewish year 5708, and at the end of the year the problem will be reexamined". In 1949, the Minister of Defence, David Ben-Gurion, notified the Minister of Religions that he had agreed to defer the enlistment of full-time Yeshivah students, for purposes of religious studies. In his diary, Mr. Ben-Gurion describes a meeting which took place (on January 9, 1950) with a delegation of heads of Yeshivot, who explained to him their fears that most Yeshivah students would discontinue their studies. The Minister of Defence granted the request for deferment, taking the view

that it must be effected by means of an exemption granted by the Minister of Defence and not pursuant to Knesset legislation. In accordance with this approach, Mr. Ben-Gurion announced - in a letter to the Chief of Staff of January 2, 1951 - that "on the basis of section 12 of the Defence Service Law, I have exempted the Yeshivah students from the obligation of regular service, this exemption applying solely to Yeshivah students who are in fact involved in religious studies in Yeshivot, for so long as they are so occupied".

2. An attempt to after the situation was made in 1954 by the Minister of Defence, Mr. Pinhas Lavon. Mr. Lavon issued a directive, pursuant to which Yeshivah students who had already spent 4 years at a Yeshivah would be drafted. This directive gave rise to an uproar, and the Prime Minister, Mr. Moshe Sharet, requested that its implementation be delayed until the matter could be looked into. It seems that the directive was cancelled pursuant to the establishment (on March 15, 1955) of a ministerial committee, whose function was to examine "the problems associated with the status of men of military age who study in Yeshivot, regarding enlistment in the army". We do not know what the ministerial committee decided. Whatever it was, in 1958 the Deputy Minister of Defence, Mr. Shimon Peres, "summed up", with the approval of the Minister of Defence Mr. David Ben-Gurion, the policy as to this matter, following a meeting with heads of Yeshivot. The summary stated that when a Yeshivot student's time to report for enlistment and medical examination arrived, he would receive a deferment if he expressed his desire to continue to study in the Yeshivot, and if not - he would be drafted.

3. In 1968, after the appointment of Mr. Moshe Dayan as Minister of Defence, the matter was examined anew. The Minister thought that in exercising his discretion in this matter, it would be proper that his policy be acceptable to the Government. A five-person ministerial committee appointed for this purpose (on October 13, 1968) decided to "accept the I.D.F. General Staff proposal regarding service of Yeshivah students in the I.D.F., without at this time instigating for reaching changes". Accordingly it was decided, *inter alia,* that "the arrangement whereby the enlistment of Yeshivah students who engage in religious study continuously from the age of 16 is deferred for so long as the student remains occupied full-time with religious studies, will remain in effect ".

4. In 1975 the question of the extent of the topic was reexamined by the then Minister of Defence, Mr. Shimon Peres. Until that point the extent was determined by two criteria: a fixed number of existing Yeshivot and an annual quota of those who received draft deferments from the ranks of Yeshivah students at a rate of up to 800 men per year. The Minister of Defence agreed, after an investigation by the I.D.F. manpower division, not to be bound by a fixed number of existing Yeshivot, because their numbers had increased. However, it was decided to leave in place the maximum annual quota of "full-time" Yeshivah students, whose enlistment would be deferred pursuant to pre-existing criteria. In 1977 Minister of Defence Ezer Weizman determined, following a coalition agreement - that "Yeshivah high-school and vocational school as well as those who had recently became observant, would be granted admission to Yeshivot, and that the arrangement regarding the deferment of service for "full-time" Yeshivah students would apply to these groups as well. In 1981 the Minister of Defence Ariel Sharon re-itented this principle, and procedures for implementation of the rules in this matter were established, according to the recommendation of a special committee appointed by the Minister_ of Defence. The Minister of Defence, Mr. Yitzhak Rabin - the Respondent in the Petition before us - found it appropriate to continue the implementation of the policy outlined by the Ministers of Defence who preceded him. In his opinion, the situation did not justify a change in the policy formulated by the Government of Israel and by the previous Ministers of Defence.

After submission of the Petition, the Minister of Defence brought the matter to the attention of the Government, in that he notified the Government that he was "acting on its behalf in maintaining the existing situation despite changes in the numerical data". The Prime Minister Mr. Yitzhak Shamir indicated that the Government had taken note of the Minister of Defence's announcement.

5. The Knesset has addressed the question of deferment of defence service for Yeshivah students on numbers occasions. At least 30 questionnaires on this topic were referred by Knesset Members to Prime Ministers and Ministers of Defence. The questionnaires span the years (D.H. 30 (5721) 66; D.H. 41 (5725) 490; D.H. 51 (5728) 1027, 1111, 1315, 1318, 1820; D.H. 53 (5729) 484; D.H. .56 (5730) 1022; D.H. .58 (5730) 2162; D.H. 63 (5732) 1506; D.H. 65 (5733) 241, 769 ,773; D.H. 69 (5734) 1005; D.H. 70 (5734) 1268, 1271; D.H. 72 (5735) 3738; D.H. 90 (5741) 1443, and from the

Tenth Knesset - second session, booklet 16 (5742) 1436, and from the Eleventh Knesset - second session (meetings 123 - 167) part 11 (5746) 989 and part 25 (5746) 2451. The question of deferment of defence service for Yeshivah students was also addressed in the Knesset Foreign Affairs and Defence Committee. On December 23, 1986 the Committee established a sub-committee to reexamine the exemption from enlistment granted to religious seminary students. The sub-committee held a number of meetings. On July 9, 1986 the Eighth Knesset deliberated proposals for the agenda regarding enlistment of religious seminary students. Each proposal was remitted to the Foreign Affairs and Defence Committee, and the sub-committee dealt with these proposals as well. The committee's deliberations have not yet been summarized.

6. Under the current state of affairs, conscription into the defence service of a Yeshivah student, whose full-time occupation is religious studies, and who is exclusively involved in religious studies, is deferred. The student must study continuously from the age of 16 in a recognized Yeshivah. Deferment of defence service is granted after the student presents himself for enlistment, undergoes a medical examination and is found fit for service. Deferment of service is for one year only. The student must report again each year. A student who wishes to discontinue his studies or whose full-time occupation is no longer religious study, is drafted into service in the I.D.F. The length of service is determined according to the Yeshivah student's age at the time that he left the draft deferment arrangement, his physical fitness, and his family situation. According to army statistics for the 1986-1987 working year, the number of students in draft deferment arrangements for Yeshivah students was 17,017. Among the 1987 class of I.D.F. draftees, 1,674 Yeshivah students requested and received draft deferments.

The Legal Framework

7. Upon establishment of the State, enlistment of religious seminary students into the defence service was deferred pursuant to the Defence Service Law, 5709-1949. Section 11 of the statute authorized the Minister of Defence to grant exemption from defence service, whereas section 12 of that Law authorized the Minister to grant exemption and deferment from defence service, as follows:

> "If the Minister of Defence considers that reasons connected with the size of the Regular Forces or the Reserve Forces of the Defence Army of Israel or with the requirements of education, settlement or the national economy, or family reasons, or other similar reasons, so require, he may by order direct -
>
> (a) that a person of military age shall be released from the obligation of regular service...
>
> (b) that the regular service of a person of military age shall be postponed for a specific period upon his application...
>
> (c) that a person...shall be released for a specific period or entirely, from the obligation of reserve service".

The Defence Service Law (Amendment), 5719-1959, introduced a change in the legislative technique. The grounds for release and deferment became grounds for exemption or reduction, and the directive regarding service deferral referment to those grounds for purposes of deferment of service also. Section 12 was replaced by the following provision:

> "The Minister of Defence may, if he thinks fit to do so for special reasons, defer, by order, on the application of a person of military age, for such period as he may fix, the reporting of such person of military age for registration, medical examination, regular service or reserve service or the continuance of his service as aforesaid if already begun; the deferment may be subject to conditions or unconditional, and the Minister of Defence may cancel the deferment if he is satisfied that any of the conditions attached to the deferment has not been fulfilled".

The term "special reasons" is defined in section 11(ab) of the statute - which was applied, as stated, to exemption or reduction - as follows:

> "The Minister of Defence may, by order, if he thinks fit to do so for reasons connected with the size of the regular or reserve forces of the Defence Army of Israel, or for reasons connected with the requirements of education, settlement or the national economy, or for family reasons, or for other similar reasons (all such reasons being hereinafter referred as: "special reasons") -
>
> (1) exempt a person of military age from the duty of regular service, or reduce the period of the regular service of a person of military age;
>
> (2) exempt, for a specific period or permanently, a person...from the duty of reserve service".

In 5719, a consolidated version of the Defence Service Law was drawn up. Section 11 became section 28 and section 12 became section 29 of the Defence Service Law [Consolidated Version], 5719-1959.

8. The Defence Service Law [Consolidated Version] was amended in 1971 by the Defence Service (Amendment No. 7), Law, 5731-1971. Sections 28 and 29 of the Law were replaced by new sections. After the amendment, section 28 of the Defence Service Law [Consolidated Version] applied both to exemptions from defence service and to reduction and deferment of defence service. The grounds for exemption, reduction and deferment were all transferred to this provision. Thus far the change is of a technical nature. At the same time, a substantive change was also made. The word "similar" was eliminated from the phrase "or other similar reasons". The text of section 28 is therefore as follows:

> "The Minister of Defence may, by order, if he sees fit to do so for reasons connected with the size of the regular forces or reserve forces of the Defence Army of Israel or for reasons connected with the requirements of education, security, settlement or the national economy or for family or other reasons -

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

(2) exempt a person of military age from the duty of reserve service...

(3) on the application of a person of military age or a person designated for defence service, other than a person of military age, defer by order, for a period prescribed therein, the date of reporting prescribed for that person, under this Law or regulations thereunder, for registration, medical examination, defence service or, if he has already begun to serve in defence service, the continuance thereof".

Pursuant to the Defence Service Law [Consolidated Version], 5746-1986 (hereinafter: the Law), this provision became section 36, and it forms the basis for examining the lawfulness of the Respondent's actions in the Petition before us.

Earlier Petitions

9. The Petition before us is not the first brought before this Court regarding deferment of defence service for Yeshivah students. The first petition was considered approximately 18 years ago: H.C. 40/70 [l]. The Petition was dismissed without summoning counsel for the Attorney General. Justice Witkon based his decision on the Petitioner's lack of legal standing. He held, at page 247, that "the more that the topic of the complaint is of a public nature, is among the issues commanding attention in the political arena, and serves as a topic for deliberations in the Government and the Knesset, the more it is necessary strictly to enforce the requirement that the complainant should suffer actual harm in his private domain in order to be granted the right of standing before the court". In the Petition before him, the Petitioner did not succeed in indicating personal and substantial harm. The Petitioner's grievance is "a public collective grievance, and the Petitioner is no different from every other person from that group who deems the exemption of persons, who in his opinion are nothing but shirkers, to be invalid". The Court ought not to entertain a grievance of this nature. Justice Y. Cohen at page 249 agreed with Justice Witkon's opinion,

and added that the Petition must also be dismissed on account of its general and vague nature, and because "if levels allegations without an adequate factual basis".

10. More than ten years had passed since Becker's petition was dismissed (H.C. 40/70 [1]), when in the early 1980's a second petition was brought before this Court in which Mr. Ressler, who is Petitioner Number 1 before us, petitioned regarding the deferment of service of Yeshivah students (H.C. 448/81 [2]). The affidavits of two senior officers were attached to the petition, which stated that, if all Yeshivah students were drafted into the I.D.F., this source of manpower would add a regular division to the I.D.F. It would also significantly reduce the burden of reserve service on reserve soldiers in general, and on the petitioner in particular. The Supreme Court (Deputy President Y. Cohen and Justices D. Levin and Yehudah Cohen) dismissed the petition and declined to issue an order *nisi,* in reliance upon H.C. 40/70 [l]. The Deputy President, at page 86, indicated that, in his opinion, "the petitioners failed to establish a right of standing which justifies deliberations in this Court on a topic which on its face appears to be non-justiciable". The Court indicated that the conclusion regarding the reduction in the burden of reserve service is not based on significant data. It may be that the petitioner's belief on this matter is sincere, but it is inadequate to demonstrate that an actual interest of his has been harmed. In Justice Y. Cohen's opinion, *id*., "the task which the petitioners have taken upon themselves, of demonstrating that the enlistment of Yeshivah students will bring about a significant reduction in the burden of defence service currently imposed upon those serving in the army, is not attainable". The Deputy President was prepared to examine the question of petitioner's standing, taking the judicial attitude most favourable to the petitioner. In his opinion, (page 88), given according to this attitude, the petitioner did not have standing as to the Petition, because "it is concerned with an issue which is not suitable to be considered by a court. The question of whether or not to draft Yeshivah students is a question as to which the court does not have legal standards upon which a judicial determination can be based". In the Deputy President's opinion, *id.,* "even if the petitioners had proved beyond a shadow of a doubt... that their reserve service would be shortened as a result of drafting Yeshivah students, I would not regard this as grounds for issuing an order *nisi,* because the question of whether or not to draft Yeshivah students is fundamentally a public issue, the solution of which must be left in the hands of the political bodies whose tasks include determination of this matter". In reaching that conclusion the Deputy President relied upon

the provisions of section 28 of the Defence Service Law [Consolidated Version], 5719-1959, as amended. The Court indicates, ibid. [2], at page 85, that the amendment was intended 'to rule out any narrowing construction', and pursuant to it the Minister of Defence's authority is extremely wide. This section grants the Minister of Defence the broadest possible discretion. In summarizing his approach, Justice Y. Cohen indicates, *id*., at page 89, that "the inclination to drag this Court into a sensitive and stormy political debate, in which fierce differences of opinion exist among the public, is conspicuous in this Petition. The petitioners cannot succeed in this, whether because they do not have standing, or because the issue is non-justiciable , or because they have not disclosed grounds for this Court's interference with the discretion granted the Respondent by the Legislature".

11. A request for a further hearing on the Supreme Court's decision in H.C. 448/ 81[2] was submitted (F.H. 3/82 [3]). President Landau, at page 708-709, held that in his opinion, "this time the right of standing was adequately proved", because the petitioner showed *prima facie* that enlistment of Yeshivah students would significantly ease the burden of reserve service imposed upon him, and thus proved *prima facie* harm to a personal interest sufficient to grant him a right of standing before the High Court of Justice. Despite this approach of his, President Landau dismissed the request for a further hearing. The reason for this was that the petition in H.C. 448/81 [2] was dismissed also because in the opinion of the Court at page 710, "religious reasons, inherent in the Yeshivah students' and teachers' involvement in religious studies, can constitute a reason which would entitle the Minister of Defence to release, according to his discretion, those for whom religious studies are their full-time occupation". President Landau noted, at page 710-71 l, that "there will be those who will disagree with this broad interpretation. However, as I have not found any request by the Petitioners to subject this reason to a further hearing, I need not go beyond the scope of this petition, as presented to me". In concluding his decision, President Landau noted, at page 711, that the topic has "very great public and ideological importance", and that the Court "is not designed to serve as an arena for public and ideological disputes". Nevertheless, the submission that deferment of the enlistment of Yeshivah students is a question which must be decided by legislation, and not by administrative decision of the Minister of Defense, is "a submission which in my opinion should have been heard" (*Id*., at page 712). The President noted that this submission was not included in the petition for a further hearing, and accordingly he did not have to entertain it.

12. A few months later the Petitioner submitted a fresh petition (H.C. 179/82 [4]), which he based on the President's opinion in F.H. 2/82 [3]. The Court dismissed the Petition on account of the Petitioner's lack of standing. Justice Ben-Porat (with whom Justices D. Levin and Bach agreed) noted, at page 424, that "everyone agrees, that private parties should not be allowed to assert their grievances or plead the public cause in a public claim *(actio popularis")*. Everyone admits that the petitioner is motivated by the public aspect, and not because of personal harm. This reason. which was at the base of the dismissal of his Petition in H.C. 448/ 81 [2] - remains unaltered. Accordingly - "without stating our opinion on the questions as to which the honorable justices would differ (in H.C. 448/81 on the one hand and in the decision in F.H. 2/82 on the other)"- it was decided to dismiss the petition without issuing an order *nisi ibid.,* at page 425).

The Petition and Submissions Thereunder

13. The Petition before us, like its predecessors, is concerned with deferment of defence service for Yeshivah students. Taught by past experience, Petitioner Number 1 sought - together with the other Petitioners - to include in the Petition all the areas on which courts had commented in the past. According to the Petitioners' claim, they have standing under the law. They attached to their Petition the affidavit of Maj. Gen. (Res.) Dr. Emanuel Wald, who served as the head of the Long Range Manpower Planning Branch, staff Planning Division, in the Manpower Department of the General Staff. The affidavit states that -

> "There is a direct link between the enlistment of Yeshivah students in regular service, and afterwards reserve service, and the length of time which the Petitioners will have to serve in reserve duty, each one in his particular role. In the event that service of Yeshivah students is no longer deferred, as requested in the petition, the period of time the petitioners serve will be shortened every year".

On this factual basis, the Petitioners submit that they have successfully established their standing under the law. True, the Petitioners' interest is not specific to them alone, but

according to case law this is immaterial, because, in the Petitioners' opinion, their standing should not be negated because they are defending an interest shared by themselves and many others. However, if these arguments are insufficient, in the Petitioners' opinion they have lawful standing to move the Court to rule on serious harm to the rule of law and the equality of all before the law. In the Petitioners' opinion, their Petition is "justiciable", despite its public nature. As to the substantive issue, the Petitioners make three submissions: *First* that deferment of the enlistment of Yeshivah students cannot be effected by an act of the Executive, but rather must be effected - in view of the fundamental nature of the matter - by enactment a of Knesset; therefore, the Minister of Defence exceeded his authority in granting deferment to Yeshivah students. *Second*, the Minister of Defence's considerations are extraneous, discriminatory and unreasonable. The statute does not permit the Minister to defer the Yeshivah students' army service. The purpose of the statute is the promotion of security, not the advancement of study in Yeshivot. The "religious" factor is an extraneous, discriminatory and unreasonable consideration. *Third*, the Petitioners infer from the statements of the Respondent and the Ministers of Defence who preceded him that Ministers of Defence Sharon, Arens and Rabin believe that Yeshivah students' army service should not be deferred, but they think that it is not within their power to change this situation which was forced upon them. This approach of the Ministers of Defence is fundamentally wrong, since they do have that such power.

14. Upon submission of the Petition it was put before a panel of three justices, and counsel for the Attorney General was summoned to the hearing. His position at this hearing was that the Petitioners have no standing. In the opinion of the Attorney General's representative -

> "The effect of removing draft deferment arrangements for Yeshivah students on the length of service of those in the reserves in general, and of the Petitioners in particular, has always been and remains, a most complicated question, with numerous, intricate facets. Accordingly, the question of standing remains an obstacle before the Petitioners in this Petition as well, as in previous petitions.

Counsel for the Attorney General likewise thought that the Petition must be dismissed for lack of justiciability.

> "The subject of the Petition is subject to public debate, and it is proper for the Court to recoil from an issue which the political authorities must determine".

15. At the outset of the hearing it became clear - in light of the position taken by the Attorney General's representative - that the Minister of Defence's considerations have not been presented to the Court. In the light of our comments in this regard, counsel for the State requested a stay so as to present a survey to the Court on the array of considerations which guide the Minister of Defence in exercising his discretion on deferment of service for Yeshivah students, including a survey of past development of the topic, its scope, and the relevant procedures and considerations, in light of which the policy on the issue placed the Court was formulated. We decided that the survey would be submitted in the form of an affidavit or affidavits. A survey of this nature, supported by two affidavits, was indeed submitted to us, and from it we learned the issue before us has been treated since the establishment of the State. We were likewise presented with the Minister of Defence's relevant considerations, which are:

> "(1) Respect for the spiritual and historical obligation of students and teachers who are occupied full-time with religious study, to continuously uphold the principle of engaging in religious studies;
>
> (2) The desire not to impair the said principle which is transcendant and holy to a segment of the population in Israel and in the Diaspora;
>
> (3) The fact that the way of life of religious seminary students is extreme ultra-orthodox, and accordingly, induction into the army causes them serious problems in adapting to a society and culture which is foreign to them, and difficulties in strict observance of religious precepts. Thus, for example, they do not recognize the Chief Rabbinate of Israel's certification that food is kosher, while they themselves are divided as to

recognition of a number of special kosher certifications by various rabbis, and other daily practices of theirs are likely to give rise to many difficulties in the I.D.F.'s preparations to integrate them into its ranks;

(4) The fact that the whole effectiveness of their service is subject to doubt, in light of the psychological difficulty they experience from the neglect of religious studies, and as a result of their education and special way of life.

(5) Recognition of the deep public sensitivity of a topic embroiled in ideological debate among the Israeli public, and of the need to settle the argument in a prudent fashion which will be acceptable nationwide".

In the opinion of the Attorney General's representative, these considerations are lawful, are not extraneous, are reasonable and are not discriminatory. The Minister of Defence did not ignore the effects of deferring Yeshivah students' service upon the size of I.D.F. regular and reserve forces, and on preparations for the defence needs of the State of Israel, but he arrived at the decision that this type of candidates for service should not be drafted into the I.D.F.. In weighing all the various factors, the factors which justify the non-integration of Yeshivah students prevailed with the Minister of Defence. In the opinion of the Attorney General's representative, this Court may not replace the Minister of Defence's discretion with its own.

16. On the basis of the Petition and the response to that, three questions are presented for our determination: *First,* do the Petitioners have standing under the law to move us to consider the Petition; *Second,* is the subject of the Petition justiciable; *Third*, is the Minister of Defence's decision lawful, that is to say, does the Minister have the power to defer the defence service of Yeshivah students, and if so - did he make lawful use of his power. We will address each question separately, beginning with the question of standing.

Legal Standing

A. The Point of Departure

17. As we have seen, in the past petitions regarding the deferment of defence service of Yeshivah students were dismissed because of the rules relating to standing. Must the Petition before us also be dismissed because of these rules? In my opinion, the answer to this is in the negative. In my view, the Petitioners have standing under the law, and if their grievance is justiciable, it is appropriate that it be examined on its merits.

For purposes of establishing this conclusion of mine, the state of our rules relating to standing should be addressed. The point of departure for this examination is in the provisions of section 15 (c) and (d) of the Basic Law: The Judicature. This section empowers the High Court of Justice to hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of any other court (sub-section (c)). This section likewise empowers the High Court of Justice to issue orders against governmental authorities "to do or refrain from doing any act in the lawful exercise of their functions" (sub-section (d)). In these two provisions there is no reference to the question of "the administrative right" or "the administrative duty", and in any event, there is no reference to the question of the legal standing of the person seeking to claim a breach of a right or duty. The Legislature created a court with jurisdiction, while assuming that - according to accepted English tradition - that in granting jurisdiction to address a particular issue, there is a type of delegation of power to create judicial rules regarding jurisdiction. I addressed this link between the adjudicator and the rule in one case, when I said (in H.C. 731/86, Misc. H.C. App. 91/87 [5], at page 458) as follows:

> "This link between the rule and the adjudicator, between the law and the court, characterizes both Israeli law in general and administrative law in Israel in particular. The development of administrative law has been mainly a by-product of the jurisdiction of the High Court of Justice".

Within the scope of this power, the High Court of Justice created sets of rules regarding the manner of its exercise of discretion. One of these sets of rules are those relating to standing, which are trues rules derived from case law. There is nothing in the Basic Law: The Judicature, which requires the adoption of one rule or another, or one approach or another in the rules relating to standing. Neither those who advocate a "strict"

approach those who follows a "generous" approach base nor themselves upon the language of the Basic Law: Judicature. Unlike the United States, where the rules as to standing grew out of the interpretation of a provision in the Constitution, our rules developed without any statutory underpinnings. On the contrary: on its face, the language of the statute is broad, and it empowers the High Court of Justice to address, *inter alia,* every breach of the law by a governmental authority, whatever the petitioner's standing may be. Indeed, the rules as to standing were developed to place self-imposed limits on the High Court of Justice's exercise of jurisdiction. Modern courts in the Western world have imposed similar limits on themselves. *(See* A. Bleckmann, "The Aim of Judicial Protection: Protection of the Individual or Objective Control of the Executive Power? The Role of Locus Standi", *Judicial Protection Against The Executive* (Heidelberg - New York, vol. III, 1971) 19). As to this matter there is no substantive difference between the common law and civil law countries, and in the latter as well, rules as to standing prevail *(see* Harding, "Locus Standi in French Administrative Law" [1978] Pub. L. 144). In this spirit the High Court of Justice also developed rules as to standing, which come to place self-imposed limits on its discretion - although not on its jurisdiction - in granting relief to a petitioner who does not have standing under the law. The legal standing of the Petitioners must be examined in this context.

B. The Basis of The Problem

18. The rules regarding standing in Israel are in a state of flux, which began some time ago. Already in H.C. 287/81 [6], at page 343, President Agranat noted that "an examination of the local case law reveals that, over the course of time, this Court's approach towards standing has undergone an evolution in the direction of liberality". This evolution continues to this day (see H.C. 217/80 [7]). It is not unique to Israeli law, but exists in other Western countries as well *(See* H.W. Wade, *Administrative Law* (Oxford, 5th ed. 1982) 578). Justice Witkon addressed this point when he noted that "in recent years there is a recognizable tendency around the world to facilitate access to the courts by every applicant". (H.C. 566, 563/75 [8], at page 346). This tendency in the modern world has been expressed both in judicial pronouncements, in scholars' essays, and in proposed legislative reforms. *(See* J.J. Tokar, "Administrative Law: Locus Standi in Judicial Review Proceedings", 14 *Man. L.J.* (1984) 209).

19. What is at the root of this state of flux, and why have the rules as to standing not become settled? The answer to this question does not derive from the inability of judges and legal scholars to draft clear principles of standing. This possibility exists, and it has been proposed more than once in the literature *(See* K.C. Davis, *Administrative Law Treatise* (San Diego, 2d ed., vol. IV, 1983) 208). The answer to this question derives, in my opinion, from the uncertainty regarding the nature of the rules as to standing themselves. One cannot formulate said rules without first formulating a conception of their role in public law. To formulate a conception of the nature and role of these rules, it is necessary to take a position on the role of judicial review in the realm of public law. "Determination of policy with regard to standing is influenced by a fundamental, value-laden and substantive concept of the role of judicial review of governmental authorities" (*Z. Segal, Right of Standing Before the Supreme Court Sitting as the High Court of Justice* (Papyrus, 5746) 5). Indeed, rules as to standing differ, defending the appropriate model for judicial review is defence of individual rights, or preservation of the rule of law and the lawfulness of governmental functions.

Furthermore, in order to formulate a conception of the role of judicial review, it is necessary to take a stance regarding the judicial role in society and the status of the judiciary among governmental authorities *(see P.* Cane, *An Introduction to Administrative Law* (1986) 27, 165). The judge whose judicial philosophy is based solely on the outlook that the role of the judge is to decide a dispute between holders of existing rights, is unlike the judge whose judicial philosophy is based upon the recognition that the role of the judge is to create rights and maintain the rule of law. Against this background, it is possible to explain the conflict between the position of Justice Witkon (in H.C. 40/70 [1], at page 247), that, "the more the subject of the complaint is of a public nature... the more is it necessary strictly to enforce the requirement that the complainant suffer substantive harm in his private domain", and that of Justice Berinson (in H.C. 26/76 [9], at page 802), that, "the more significant the issue from a public perspective, the more the Court's inclination to recognize the petitioner's right to bring the issue before it will be intensified, even though he is a rank-and-file citizen". True, the theory of standing developed "in an empirical manner" (Justice Witkon in H.C. 40/70 [1], at page 245), but behind the practice is the theory, and behind the theory stands a world outdoor as to the role of the judiciary in society. It

therefore should not be surprising that different judges have taken different positions as to the rules of standing. By these positions they expressed the differences in their approaches to the role of judicial review in public law, and the role of the judge in a democratic society.

C. "The Classical Approach"

20. I have addressed the liberalization in the rules of standing during the past few decades. This liberalization did not intensify judicial differences, but rather narrowed them. It seems to me that there is agreement between judges as to the outer limits of the standing problem, whereas the argument focuses primarily on areas close to those limits. It seems to me that the following two propositions are accepted by the majority of justices in this Court who have considered the question of standing, and it reflects the "classical" judicial position: *first,* that in order to attain standing under the law, the petitioner need not point to a legal right of his own which was breached. President Agranat stressed this in H.C. 287/69 [6], at page 343, when he said: "the citizen who comes to complain about a public authority's decision or action need not show, as to this issue, that that decision or action impairs a right of his". Indeed, a petitioner need not be a "Hofheldian petitioner" to attain standing (H.C. 217/ 80 [7], at page 440). It is sufficient that the petitioner point to an interest of his which was harmed. Moreover, this interest need not be particular to the petitioner, and the lawful standing of a petitioner whose interest has been harmed will be recognized even when many others share this interest with him *(see* H.C. 217/80 [7]). Justice Ben-Porat emphasized this in H.C. 1/81 [10], at page 388, when she stated:

> "To establish standing, it is in no way necessary that the alleged harm be confined to the petitioner alone, and not to a group of people among whom he is numbered".

Finally, for purposes of laying the evidentiary foundation as to harm to his interest, the petitioner need not show absolutely that an interest of his was harmed; it is sufficient that he show a reasonable prospect that one of his interests will be impaired. We do not engage in prophecy, merely in the evaluation of prospects. Accordingly, the decisions of this Court have stressed that it is sufficient that the petitioner prove an "apprehension" of harm to one of his interests (Justice Silberg in H.C. 29/55 [ll], at page 1000), or that governmental

action is "likely to cause harm" (President Agranat in H.C. 287/69 [6], at page 343), or that the petitioner is "likely to be harmed" (Justice Witkon in H.C. 26/76 [9], at page 806). The *second* proposition shared by most judges who have dealt with the rules as to standing, is that Israeli law does not recognize the standing of every citizen solely because he claims that the government violated the law. The *actio popularis,* as such, is not recognized in this country (Justice Agranat in H.C. 287/69 [6], at page 350; H.C. 217/80 [7], at page 443; President Shamgar in H.C. 463, 448, 446, 431, 429, 428/86, Misc. H.C. App. 320/86 [12], at page 559). "This does not embody a kind of general recognition of the existence of the public petition"; (Justice D. Levin in H.C. 609/85 [13], at page 783). Justice Ben-Porat stressed this in H.C. 179/ 82 [4], *supra,* at page 424, when she stated: "All agree that the individual should not be allowed to assert his grievance or plead the public's case in an *actio popularis*".

D. The Conventional "Exceptions"

21. In light of the accepted parameters, the debate focuses upon identifying those extraordinary situations ("exceptions"), in which the standing of a petitioner who cannot point to an interest of his own which was harmed is recognized. As to this matter also, there is agreement among the majority of judges in a number of areas: *first,* a petitioner's standing will be recognized where the substantive claim he raises points to government corruption. Justice Landau stressed this in H.C. 348/70 [14], at page 692, stating:

> "Therefore, it may be that in a serious case where the public interest appears to be decisive, as for example, where there is fear that those in charge of expenditure in a local authority are actually acting corrupt, the court will overcome its reluctance and will address the merits of a complaint brought before it by a taxpayer, in his capacity as such".

Accordingly, if a public authority acted out of bias or in a situation introducing a conflict of interest, the standing of a disinterested petitioner would be recognized. Justice Elon emphasized this when he noted that the standing of a petitioner who asserts "an act of corruption by the governmental authority, such as a decision tainted by personal interests of the holder of a position in that authority, in cases of bribery and the like" will be recognized

(H.C. 969,852/86, Misc. H.C. App. 543,523,521, 518, 515-12,507,502,487,486,483/86, 1,33/87 [15], at page 66); *Second,* this Court will recognize the standing of a petitioner who raises a "clear constitutional" problem (Justice Elon, *id*.). Within this scope are questions related to elections and party financing (H.C. 98/69 [16]; H.C. 148/73 [17]); the establishment of commissions of inquiry under the Commissions of Inquiry Law, 5729-1968 (H.C. 152/82 [18]); the President's power to pardon (H.C. 428, 429, 431, 446, 448, 463/86, Misc. H.C. App. 320/86 [12] *supra),* the Broadcasting Authority's duty to uphold the principles of free expression (H.C. 243/82 [19]), and other problems as well, which affect the "very essence of the democratic regime or the constitutional structure of our society" (Justice Elon in H.C. 852, 862/86, Misc. H.C. App. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1, 33/87 [15], at page 68).

E. Liberalization of The "Exceptions"

22. Indeed, the primary area of disagreement concerns the nature of the "exceptions", wherein the standing of the "public petitioner" will be recognized. In this context, three questions arise: *First, is* the "corruption" exception limited to the claim of corruption, or maybe it should be broadened it to include any allegation of a serious flaw in the administration's action; *Secondly,* is the "clear constitutional" exception confined solely to constitutional matters, or is there room to extend it to any matter of a public nature which has a direct impact on the rule of law; *Thirdly,* may additional exceptions be recognized, or are the exceptions limited to just two. In all of these questions, differences of opinion between the judges emerge. As for myself, I follow a "liberal" approach as to each of these questions. Accordingly, my opinion is that the first exception is not limited to government corruption alone, and there is room to broaden it to any case in which the petitioner points to a serious flaw in the administration's actions. Similarly, the second exception is in my opinion not limited solely to constitutional matters, but rather applies, in the words of my colleague President Shamgar, in H.C. 1/81 [10], at page 374, whenever "the issue raised in the petition is a subject of a public nature which has a direct affect on promotion of the rule of law, and on setting of limits, which ensure its maintenance in practice", and to all those "issues of an unusual legal nature, which affect the foundations of the rule of law" (H.C. 852, 869/ 86, Misc. H.C. App. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1,33/87 [15], at page 23).

Finally, I believe that the exceptions to the general rule which does not recognize the *"actio popularis"* as such, are not limited to the two noted. We must not create rigid categories of exceptions. The area must remain flexible, by leaving the option of allowing additional circumstances in which the standing of a petitioner with no interest will be recognized. Thus, for example, there are cases, which, as a consequence of their very nature, no individual will have an interest in them according to the accepted criteria. At times, the standing of the "public petitioner" should be recognized in such cases (H.C. 217/80 [7], at page 443; H.C. 852, 869/86, Misc. H.C. App. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1, 33/87 [15], at page 28). The case law in Canada has consistently taking this view. (See: *Thorson v. Attorney General of Canada et al(No.* 2) (1974) [74]; *Nova Scotia Board of Censors v. McNeil* (1975) [75]. Thus, for example, it was held that a public petitioner should be recognized as to the allegation that certain exemptions from criminal liability for abortion, granted to the pregnant woman and the doctor, are contrary to the Constitution. The reason given, *inter alia,* is that there is no petitioner with an interest who can raise this claim before the court *(Minister of Justice of Canada et al. v. Borowski* (1982) [76]). Indeed, the borderlines between the exceptions themselves are in any case vague frequently several of them exist simultaneously, as was the case in H.C. 511/80 [20], in which President Shamgar noted, at page 481:

> "The grave allegations regarding the extreme illegality of the act, which relate here to a clear public issue, justify allowing access to the petitioner and examining the substance of the allegations, which go, in many respects, to the root of the matter".

Accordingly, I accept Dr. Segal's approach, that the "public petitioner" should be recognized "when he or she points out a matter of particular public importance, or what appears to be a to an apparently particularly serious flaw in the authority's action, or to the fact that the action assailed is of particular importance" (Segal, in his book *supra,* at page 235). Nonetheless, these should not be viewed as a closed list of "exceptions", but rather as mere signposts which reflect the proper borderline between the High Court of Justice engaging in judicial review and refraining therefrom. Indeed, the point of departure guiding me is the fundamental outlook - which Justice Berinson stressed nearly twenty years ago -

that this Court is the citizen's safest and most objective refuge in his dispute with the government" (H.C. 287/69 [6] *supra,* at page 362), and that the role of the High Court of Justice is to ensure the realization of the principle of the rule of law. Closing this Court's doors before the petitioner without an interest, who sounds the alarm concerning an unlawful government action, does damage to the rule of law. Access to the courts is the cornerstone of the rule of law (see G.L. Peiris, "The Doctrine of *Locus Standi* in Commonwealth Administrative Law"[1983] P*ub. L.* 52, 89). Lord Diplock stressed this in the *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* (1982) [72] case, at 644:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped".

23. Indeed, according to my outlook, courts in a democratic society should undertake the role of safeguarding the rule of law. This means, *inter alia,* that it must impose the law on governmental authorities, and ensure that the government acts in accordance with the law; this conception of the judicial role does not contradict the principle of the separation of powers and the role of the court within the confines of this principle. On the contrary: this approach is supported by the principle of the separation of powers and the rules thereof. In modern times, this principle means checks and balances between the various authorities (see President Shamgar's statement in H.C. 306/81 [21], at page 141, and also A. Witkon, *Politics and Law* (Hebrew University of Jerusalem, 5725) 71. I stressed this in one case when I stated:

> "An enlightened democratic regime is a one characterized by separation of powers. This separation does not mean that each power operates on its own, without giving any consideration to the other powers. An outlook of this sort would deeply harm the foundations of democracy itself, because it results in a dictatorship by every authority within its own sphere. On the contrary: separation of powers means mutual

balance and control between the different powers. Not walls between the authorities, but rather bridges that control and balance" (H.C. 73/85 [22], at page 158).

These checks and balances mean, *inter alia,* that within the confines of a dispute before a court, the court must ensure that all government authorities - legislative, executive and judicial - operate within the confines of the law. In doing so, the court does not harm the principle of the separation of powers, but rather helps to realize it. Accordingly, I do not accept the following statement by Justice Elon, in support of his approach that, in general, where there is no interest, there is no standing:

"The benefits of opening the gates of this Court to this type of improvement of society are outweighed by its drawbacks, and this statement has reappeared more than once in the opinions of this Court and in the writings of scholars:

a. The court would be flooded with fundamental issues, and so will not be available to engage in its primary function, i.e. doing justice between litigants who claim that their rights have been prejudiced.

b. A likely resulting mishap would be that the principle of separation of powers will be adversely affected, by deflecting the court into dealing with questions of a public nature which should properly be decided in the legislature and the executive;

c. And finally - it would be a kind of perversion of the primary and fundamental role of the judiciary, which is to consider and decide contentious matters between two citizens or between a citizen and the government, where the two of them are 'litigants', and one is allegedly aggrieved by the other". (H.C. 869, 852/86, Misc. H.C. App. 483,486,487, 502,507,512-515, 518, 521,523,543/86, 1,33/87 [15], at page 66).

In my opinion, the principle of separation of powers does not mean that a problem of a public nature is decided in the legislative and executive branches and not in the judiciary. The principle of separation of powers means that the legislative branch is entitled - in the absence of constitutional limitations - to establish the legal framework regulating a public problem, and that the executive branch solves public problems within the legal framework established for it. However, once this framework is established, the court must determine - and this is its role in the system of powers in the state - whether the legal framework which was established is being complied with in practice. There is nothing in the separation of powers principle which permits one of the branches to act contrary to the law. There is also nothing in the separation of powers principle which requires that the judiciary refrain from dealing with actions of a public nature, to the extent that this involvement centers upon the constitutionality of an act. Lord Diplock addressed this issue in the *Inland Revenue Commissioners* [72] case, at 644:

> "It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge".

Indeed, examination of the constitutionality of any act - whether of a public nature or not - is the role of the judiciary, and in this way it fulfils its role in the system of separated powers. In this context, I do not accept the approach - which Justice Elon also considered - that the primary and fundamental purpose of the judiciary is to decide disputes, at whose centre is an allegation of grievance, where one is person is aggrieved by another. This outlook has its source in private law, where a litigant is a person whose rights are denied. In private law itself there are exceptions to this approach (for example, a shareholder's standing to plead the company's case against a third party, by means of a derivative claim).

This approach is not accepted at all in public law. The "classic" rules as to standing, which are based on the interest of the aggrieved party, do not require that the interest party

should be able to point to a right of his which was violated before the court will become involved. The generally recognized exceptions are not based on allegations of his. Wade, *supra,* emphasizes this at 577-578, when he notes that the approach, according to which only a person whose right was violated is entitled to move the court, is not the proper approach in public law:

> "In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to any one in particular. If no one has standing to call it to account, it can disregard the law with impunity. An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down....The law must somehow find a place for the disinterested citizen, in order to prevent illegalities in government which otherwise no one would be competent to challenge".

But beyond this, I see nothing in the nature of the judicial role which necessitates holding that only the person whose right is violated is entitled to plead his case. The existence of a right before application to the court is not a basic condition of judicial action. Frequently the court creates, by its very ruling, the right itself. Judging is not merely declarative; it also involves creativity. Furthermore: There is no philosophical justification for limiting the judicial role to cases in which the litigant is aggrieved by another. The role of the court is to settle a dispute, that is, to decide an argument - and there is no justification for limiting the concept of dispute only to those disputes in which one side claims that is aggrieved by the other side. True, it is a well-known, fact that the court is an institution which decides disputes, does not act in the absence of a dispute, and is not entitled to create, of its own initiative, a dispute. However, where a dispute is before the court, there is no basis for limiting the judicial role to those disputes in which one side claims that he is

aggrieved by the conduct of the other party. True, without a dispute there is no room for judicial determination - "It is clear that there can be no judicial proceeding except where there is a 'lis'" (Justice Witkon in H.C. 40/70 [1], at page 246). However, it does not follow from this that

> "A particular person must come and assert his or her right or grievance. In this respect judicial proceedings differ from proceedings before the legislature or the executive. Without a complainant, there is no place for adjudication, and if a complainant who is nothing but the spokesman for the general public were sufficient, judicial proceedings would be likely to obscure make the borderlines unclear and be interpreted as a breach of the principle of the separation of powers" *(id.)*.

I do not accept this approach. True, without a dispute there can be no adjudication. However, this requirement does not take any position regarding the nature of the dispute, whether it is concerned with the rights of an individual, the interests of a group, or the general duties of the administration. Professor H. Klinghoffer addressed this point in his work, *Administrative Law* (Mifal HaShichput, 5717) 8-9:

> "The essence of adjudication is the power to hear a dispute and decide it. Accordingly, all individual norms which constitute a decision in a dispute constitute adjudication in the functional sense. And what is a dispute? It is sufficient at this point if we say that the concept of a dispute between parties, *lis inter partes,* does not contain any *a priori* test as to the content of the dispute. The logic of the law does not require that certain issues be seen as potential subjects of a dispute, while others are excluded from the range of potential subjects of dispute. The issue is entirely dependent on its regulation by positive law. There is, *a priori,* no relevant test for justiciability in the functional sense. Adjudication takes place as to those issues which the positive law endows procedure with the form of a dispute".

Indeed, adjudication is characterized by determination between claims, whatever content (see E.W. Patterson, *Jurisprudence* (Brooklyn, 1953) 564). Not infrequently, it is not the right which creates the dispute, but rather the dispute which creates the right. If a right is a desire or interest which is protected by law, then a judicial determination which affords the protection of the law, creates the right itself. Accordingly, the judicial nature of the function is not determined by the content of the dispute, but by its very existence. Judicial involvement in problems of a public nature, and even problems of a political nature, cannot "make the borderlines unclear and be interpreted as a breach of the separation of powers" principle (Justice Witkon in H.C. 40/70 [1], at page 246). Justice Witkon himself stressed this, in his article *supra,* at page 70:

> "Those who view the involvement of the judiciary in political determinations as a form of usurpation of legislative and governmental powers must also remember that the judicial function differs, in nature and character, from functions granted to the legislature and executive. It operates on a different plane - on the plane of supervision and review - which does not necessarily involve overstepping of bounds".

True, "without a complainant there can be no dispute", but why must the complainant complain only as to a right of his which was violated, or an interest of his which was harmed; why should he not complain as to a law which has been violated? What is the moral basis for the approach that he who claims that his money was unlawfully stolen can apply to the court, but he who claims that the public's money was unlawfully stolen cannot do so? What is the fundamental argument which is based on legal theory and the separation of powers theory, that justifies this distinction? In my opinion, it has no basis. Indeed, my approach is that the requirement that a right or interest exist as a condition for standing under the law is a requirement without any philosophical basis, which is not rooted in the separation of powers, does not rest on moral grounds, and does harm to the rule of law.

The Solution: Pragmatic Balancing

24. Insistence upon this perception of the court's role must, in principle, lead to a broad recognition of the public action, and not just in exceptional instances. Nonetheless, I stated

that I do not accept this approach. Does my approach not encounter the same difficulty faced by those who maintain that the *actio popularis* should not be recognized, but are willing to do so in exceptional circumstances? Indeed, in terms of legal theory and the separation of powers theory, there is nothing to prevent "the public court" opening its doors to the public petitioner. The impediment to a "general open-door policy" does not derive from legal theory or the separation of powers, but rather is primarily based on considerations of judicial policy *(see* K.E. Scott, "Standing in the Supreme Court - A Functional Analysis" 86 *Harv. L. Rev.* (1973) 645). There is a fear that the court will be flooded with "public petitions"; precious judicial times will, as a result, be improperly allocated, and treatment of litigants who claim an impairment of their rights will be delayed; that at times a party without an interest in the outcome of the litigation will not supply the required factual foundation *(see* S.A. de Smith, *Judicial Review of Administrative Action* (London, 4th ed. by J.M. Evans, 1980) 410).

These arguments and others are not of a theoretical dimension, but rather of a practical dimension, which varies from petition to petition. Some are well founded, some less so. Cumulatively they sometimes give rise to a practical problem. The solution to this problem is in the proper balance between the fundamental conception and the practical problems. "The exceptions", wherein the standing of the "public petitioner" is recognized, and the judicial principle that the approach must be empirical and not rigid, reflect this balance. Accordingly, the more serious the alleged defect in the authority's action, the more the dispute is of a public nature, and the fewer the number of people possessing a right and interest, the problem being of a general and public nature, the more the considerations in favour of recognizing the "public petitioner" prevail.

As Justice Berinson noted in H.C. 26/76 [9], at page 802:

> "Not rigid rules are required, but an empirical approach, yet flexible, not exacting or strict. It is no longer necessarily the test of a clear issue or direct or indirect personal involvement that is needed, but rather the genuineness of the application and its seriousness, its public importance and actual merit; and the more important the issue from a public

perspective, the greater the court's tendency to recognize the petitioner's right to bring the application, even though he is an ordinary citizen".

Accordingly, I believe that we should continue to follow the approach which does not recognize the standing of the "public petitioner", as such, and is not satisfied with the mere allegation that the law was violated. This is a necessary but not sufficient allegation. The petitioner must show "something more", in accordance with the "liberal" approach to the exceptions.

25. I am aware that this flexible "liberal" approach gives rise to a number of difficulties: first, it creates uncertainty, because the courts must apply the "jurist's expert sense" to settle questions relating *(see* Justice Shamgar's statement in H.C. 1/81 [10], at page 373). As for me, I am not persuaded that this uncertainty is greater than the uncertainty involved in defining the concept of "interest". But be this what it may, it must be assumed that this uncertainty will surely lessen over time, as the borderline between those with standing and those without is defined more clearly. Moreover: I see no flaw in this lack of clarity. I regard, the rules as to standing as practical rules, intended to safeguard the efficiency of the court's activity, not rules which create a "vacuum", wherein, due to lack of standing, the government can *ab initio* act unlawfully.

Government authorities must assume that every petitioner has standing and plan their actions lawfully. The court itself must, where it sees fit, bring up the rules as to standing as a means of safeguarding the efficiency of its activity. "The court is placed in charge of sifting and examining petitions, and it will decide in a proper case, in light of the nature of the issue and the petitioner's relationship to it, whether to issue an order *nisi"* (President Shamgar in H.C. 852,869/ 86, Misc. H.C. App. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1,33/87 [15], at page 28). Secondly, I understand that there are practical difficulties in distinguishing between those "public petitioners" who apply to the court for publicity purposes alone (whose petitions should be dismissed), and those petitioners who turn to the court out of a true desire to ensure the rule of law (whose petitions should at times be heard). There is therefore a fear that undeserving petitioners will be heard, and the court's time will thereby be wasted. Moreover: as a result of its desire to prevent "a fortified and impregnable wall which completely blocks access to the court to anyone, on the sole

grounds that he is bringing a matter which is not his personal concern, although it is of general public interest" (in the words of Justice Berinson in H.C. 26/76 [9], *supra,* at page 803), the court is likely to find itself flooded with baseless petitions. The problem is indeed a real one, and methods of dealing with it must be found. As for me, it seems that the troublesome petitioner is not a serious problem. Scott, *supra,* referred to this at p. 674:

> "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom".

The problem of the flood of baseless petitions - both in the case before us and in other cases in which it is raised *(see* F.K.H. Maher and R.C. Evans, "'Hard' Cases, Floodgates and the New Rhetoric", 8 U. *Tasmania L. Rev.* (1985) 96) - also seems marginal to me, if only for the lack of empirical proof of any substance to this argument. Experience in other countries which were prepared to recognize the public petitioner within clear limits, does not show that they were inundated with petitions with those limits *(see* Segal, in his book, *supra,* at page 170). Davis reference to this, *supra,* at 227-228:

> "A reason sometimes asserted against the central principle is that it opens the gates to floods of litigation. The fear has no foundation. New York and Massachusetts have often allowed 'any citizen' or 'any resident' to challenge legality of governmental action ...and the result has been trickles, not floods. The D.C. Circuit has pointed out that the dockets... have not increased appreciably as a result of new cases in which standing would previously have been denied' ...The various statues of the 1970's that allow standing for 'any interested person' or 'any person' have not resulted in an unusual amount of litigation".

It seems to me that this has also been the experience of the High Court of Justice in Israel. The "liberalization" in the standing rules which has taken place in recent years has not brought about the flooding of the Supreme Court with the claims of "public petitioners". "Public petitions" continue to be few in number, and only isolated cases among these are brought by vetations petitioners. Nonetheless, it is baseless claims by such nuisance-petitioners ought to be prevental - even in the few cases where public petitioners apply to

court. Like Justice Berinson, I am also certain "that we can cope with such people. There are people of this sort everywhere and at all times, and they are among us today, and we frequently have to contend with them, but we manage to set them aside" (H.C. 287/69 [6], at page 362).

Courts have frequently had experience in determining whether a litigant is genuine in his application. A similar determination can be made as to the public petitioner. Legal costs constitute an appropriate means of deterrence. Indeed, that it is necessary to consider this practical problem, which disturbs many and prevents them from taking a liberal attitude to the question of the standing of the public petitioner. Nonetheless, this practical consideration should not determine the result. A court' s workload must not close the courthouse doors before petitioners who complain about a serious violation of the law on a public issue. Justice Berinson correctly noted in H.C. 26/76 [9] at page 803, that "upholding the rule of law and good government must not become a doormat or scapegoat because of the burden upon the court and the fear that it will press yet heavier if we broaden access there to as well as the basis for standing". Thirdly, I accept that difficulty exists in determining criteria for when the issue raised in a petition is of a public nature and when it is not, when the wrong in the administrative action is serious and when it is not. This difficulty in turn creates uncertainty, which will undoubtedly be dispelled over the course of time. For example, it is obvious that denial of a license for reasons of bias (such as bribery or conflict of interest) is a government action which presents a public problem and indicates a serious defect in governmental activity, on account of which a public petitioner should be recognized (P.P. Craig, *Administrative Law* (London, 1983) 459), but what is the rule if the license was not denied out of bias, but rather pursuant to an infringement of the license holder's right to a hearing? Is a public problem indicating a serious wrong present here as well? Would there be significance to the fact where the petitioner to show that the infringement of the right to a hearing is not an isolated occurrence, but rather a general policy? Indeed, the public character and serious defect tests are not simple or easy.

I accept that the allegation that the law was violated and the rule of law harmed is not sufficient of itself to grant lawful standing. The allegation of harm to the rule of law is necessary, but not sufficient, to support the public petitioner's standing. The claim that in

the petitioner's eyes, the matter is of a public nature is also insufficient. Justice Elon correctly noted that "it is not sufficient that the petitioner seeks in his petition to insist upon the rule of law, even if the issue is, in his fundamental opinion, substantive and foundamental (H.C.852,869/86, Misc. H.C. App. 483, 502, 507, 512-515, 518, 521, 523, 543/86, 1, 33/87[15], at page 66). Indeed, in addition to injury to the rule of law, it is necessary - by objective standards - to indicate additional facts, such as serious injury to administrative actions or a matter of public character or a matter which touches upon the principles of the rule of law, as to which there is no petitioner with an interest.

As noted, this list itself is not closed, and obviously uncertainty is created both with regard to the content of the list and its limits. Nonetheless, this approach seems to me preferable to that which shuts the courthouse doors in such cases. Moreover, the "strict" approach also recognizes a number of "exceptions", and I see no difference, in terms of certainty, between the two. Take, for example, the "strict" approach, which is prepared to recognize an exception as to a petition which raises an issue of "clear constitutional" nature, or a petition which touches "the soul of the democratic regime or the constitutional structure" (Justice Elon, id., at page 66,68). Do these exceptions really generate certainty? What is a "clear constitutional" issue, and what is the difference between it and a constitutional issue which is not clear? And how is the "soul" of the regime determined? Indeed, in my opinion these tests are no more certain than the "liberal" tests which I champion, and I am not prepared to regard the uncertainty contained in the two types of tests as an argument in favour of the "strict" approach.

G. From The General To The Particular

26. The petition before us must be examined against the backdrop of this system of rules as to standing. In my opinion, the petitioners' standing should be recognized, whether we follow the "classic" rules of standing, which require that the petitioner indicate some interest, the "exceptions", accepted by most of the Justices of this Court, or the "liberal" approach" which should be followed as to the standing issue. I will examine each of these possibilities separately.

(1) The Petitioners Have Standing Under The Classic Approach

27. Do the petitioners have standing under the "classic" approach? Have the petitioners succeeded in pointing to an interest of theirs which was harmed by deferment of Yeshivah students' military service? As to this issue, the petitioners have in my opinion satisfied their obligation if they succeed in showing that, were the Yeshivah students to be enlisted, this would alleviate be burden of any reserve duty for the petitioners. True, this alleviation would not be specific to the petitioners alone, but we have already seen that uniqueness of interest is not essential for the attainment of standing under the law. Indeed, already in H.C. 40/70 [1], at page 247, Justice Witkon noted that "if I thought that a portion of his service could be attributed to the waiver of the Yeshivah students' service, I would say that he suffered substantial personal harm. From this we may conclude that it is a question of the factual basis presented by the Petitioners in their Petition as to this matter, the Petitioners attached to the petition, *inter alia,* the affidavits of Colonel E. Wald and of Colonel M. Bahat. Colonel Wald - who served, *inter alia, as* Chief of the Long-Term Personnel Planning Division, Assistant to the Chief of the Planning Division, and Assistant to the Deputy Chief of Staff and Chief of the Intelligence Division - analyzed the army's personnel requirements in his affidavit. In his opinion, deferment of the enlistment of 1500 religious seminary students precludes the formation of five tank battalions or two infantry battalions annually. As to our case, the affidavit indicates that deferment of the enlistment of Yeshivah students prolongs the annual reserve service of reserve soldiers. He states:

> "I am convinced that there is a direct link between the enlistment of Yeshivah students for regular service, and afterwards in reserve service, and the length of time the petitioners will serve in the reserves, each man in his position. In the event that the enlistment of Yeshivah students is no longer deferred, as requested in the petition, the period of time the petitioners serve in the reserves each year will be shortened".

Colonel Bahat - who served, *inter alia,* as Chief of the Personnel Planning Division in the Personnel Branch of General Headquarters, stated in his affidavit in H.C. 448/81 [2], an affidavit which was attached as an appendix to the petition before us:

> "On the basis of personal knowledge and direct involvement with the system which determines the extent of reserve soldiers' employment in a working year, and the reserve burden on the individual soldier, I have not even a shadow of doubt that if every Yeshivah student of military age would be enlisted and integrated into service in I.D.F. units according to the same criteria as other men of military age who are enlisted, this would bring about a significant alleviation of the reserve service burden of reserve soldiers in general, and of the petitioners in particular, and there is not necessarily any significance to the task which the person in fact performs in the reserves".

The affidavit additionally states:

> "The reserve service of the individual soldier is a composite of the joint security needs, the size of the regular army, the size of the reserve army, and the annual budget, and to the extent that the number of regular soldiers and/or reserve soldiers increases (in a particular budget), the burden on the individual who serves in the reserves will be reduced. There is no doubt that non-deferment of Yeshivah students' service, as explained above, will increase the I.D.F. personnel available, in the regular service and the reserve service".

It seems to me that by these affidavits, Petitioners established a factual basis from which it is possible to conclude that if they succeed with their petition, and the enlistment of Yeshivah students is no longer deferred, it will illuminate their reserve service to a certain extent. Thereby they have acquired the right of standing under the classic approach *(see* M. Negbi, "'Locus Standi' in the Matter of Conscription of 'Yeshiva' Students", 2 *Mishpatim* (5730) 640) .

This was President Landau's position in F.H. 2/82 [3], *supra.* In that petition *(see* paragraph 11, *supra)* Colonel Bahat's opinion details of which I discussed above was considered *inter alia.* On the basis of this opinion, Justice Landau determined that the

petitioner in that case had *prima facie* established his right of standing under the law. President Landau states, id, at pages 709-710:

> "As for me, I would say that this time the right of standing was properly proved, as distinguished from H.C. 40/70, in the affidavits of Mr. Baruch Bahat. ...In my opinion, the four petitioners, all of whom do reserve service, have thereby shown that apparently, the enlistment of religious seminary students, including the additional categories men of military age recently granted exemptions from service, would, it appears, significantly reduce the burden of reserve service imposed upon them, and they have thus *prima facie* proved harm to a personal interest of theirs, which is sufficient to grant them a right of standing in the High Court of Justice".

I agree with this approach. It is true that in the end it may become clear that, even if the Yeshivah are enlisted, it will not lighten the petitioners' burden. Deputy President Y. Cohen correctly noted, in H.C. 448/81 [2], *supra* at page 86, that reality is complex, and it is difficult to prophesy as to this matter. "No one can foretell whether the enlistment of many thousands of religious seminary students, who would view their enlistment into the army as a blow to the foundations of their faith, according to which the study of Torah takes precedence over the obligation to serve in the army, will add to the I.D.F.'s fighting power, or, heaven forbid, will impair such power". Nonetheless, it is sufficient that the Petitioners have established a factual basis from which it can be infer to that, *prima facie* there is a reasonable chance of harm to an interest of theirs. For purposes of acquiring standing under the "classic" approach, the petitioner need not show certainty of harm to an interest of his. It is sufficient that he show that *prima facie* there is a reasonable chance of such harm. Dr. Segal considered this in his book, *supra,* at page 98:

> "An element of harm is required for recognition of standing, but it is not necessary that the harm should have actually occurred. It is sufficient that the petitioner demonstrate facts that show that a governmental decision or action is likely to harm an interest of his. For purposes of recognizing standing, it is sufficient that the facts indicate an

> apprehension of harm, ...It is sufficient for purposes of recognizing standing that the petitioner demonstrate a reasonable, though not certain, possibility that the governmental action is likely to harm him, or affect his situation".

In my opinion, the Petitioners have shown in the Petition before us that the deferment of Yeshivah students' enlistment has a reasonable possibility of harming an interest of theirs, and that cancellation of the deferral and enlistment of Yeshivah students has a reasonable possibility of benefiting the Petitioners. This is sufficient within the framework of the "classic" approach to the rules of standing.

(2) The Petitioners Have Standing Under The Usual "Exceptions"

An exception to the interest rule is recognized where the petitioner raises a problem of clear constitutional character *(see* paragraph 21, *supra),* such as the constitutionality of elections and their financing, the President's power to pardon, and similar fundamental problems. In my opinion, the constitutionality of releasing from army enlistment an entire section of the population falls within this framework. The army is one of the central pillars of national existence. Enlistment in the army is a general phenomenon. Every citizen and permanent resident is entitled and obligated to serve in the army. The question of army service is therefore a fundamental question within the structure of our regime. The constitutionality of deferring service for an entire segment of the population appears to me to be a question of sufficient constitutional character for it to be included among the usual exceptions to the interest rule.

(3) The Petitioners Have Standing Under The "Liberalization" Of The Exceptions

29. In my opinion, the Petitioners in the Petition before us have standing, even if we were to say that they have no interest, and even if we say that their petition does not fall within those instances in which a petitioner's standing has been recognized in the past by the majority of the Justices of this Court. The rationale for my approach derives from the fact that the petition before us raises a problem of a public nature, which has a direct effect on

the rule of law, and if we do not recognize Petitioners' standing as to its subject matter, it will not be possible to examine its constitutionality in court, because no one has better standing than them. This Court has several times considered broadening the scope of this type of care *(see* H.C. 2243/82 [19]; H.C. 1/81 [l0]). President Shamgar discussed this in H.C. 428,429,446,463/86, Misc. H.C. App. 320/86 [12], at pages 558-559:

> "Even if the argument that none of the petitioners have a real and direct personal interest in revoking the ……on of the amnestys is correct, the petition should not be dismissed *in limine* because, as this Court has already noted in the past, in specified circumstances, 'where the problem raised is of a constitutional nature' and also where 'the matter raised in the petition is of a public nature, which has a direct affect on the advancement of the rule of law and the delineation of the policies which ensure its existence in practice', it is appropriate to take a more liberal approach and open the gates of this Court to the petitioner who draws attention to such a problem".

And *President Shamgar* reiterated this approach in H.C. 852,869/86, Misc. H.C. App. 483,486,487,502,507,512-515, 518, 521,523/86, 1,33/87 [15], at page 23:

> "The Court was correct to acknowledge, whether explicitly or by inference, the extension of the right of standing regarding issues of an exceptional legal substance, which relate to the principles of the rule of law, including problems which bear a relation to constitutional values. Special attention is paid in cases like these to the consequences of refusing to hear the petition, that is to say, as stated above, there is significance to the fact that there is no other petitioner who has a direct and substantial interest".

These principles apply to our case as well. We are concerned with a constitutional problem of a public nature, which is directly related to the rule of law, and as to which no one has better standing than the Petitioners. The aggregation of these circumstances justifies

recognition of Petitioners' right of standing. Having recognized the Petitioners' standing, the question of the justiciability of their petition arises. We now turn to this question.

Justiciability

A. The Parties' Claims

30. The second argument by Counsel for the Respondent is that the subject matter of the petition is not justiciable, and accordingly the Court may not consider the Petition. According to her, the issue of enlistment deferment for Yeshivah students is among those topics which the Court prefers not to enter into and determine. This is a question over which the public is divided in its views, and should therefore, in her view, be settled by other authorities, in the manner accepted in a democratic society. The question of enlistment of Yeshivah students is a political question, and accordingly a change in such a rooted deeply situation requires a political decision, a judicial determination being inappropriate. A court's intervention in this question will fan the flames of public controversy, and accordingly judicial restraint is appropriate. In the opinion of counsel for the Respondent, the mutual relations and reciprocal respect between the governmental authorities indicate the need for the Court to leave the determination of this question in the hands of the other branches of government - the Government and the Knesset.

31. In their response, Petitioners claim that the subject matter of the Petition is justiciable. True, the Petition contains public and political aspects, but this does not bar the hearing of a petition in the High Court of Justice. Even a subject of a clear public nature, from which the aura of politics emanates, and which is likely to give rise to a public outburst, is justiciable. Only thus is it possible to ensure that the executive branch observes the law. Such judicial supervision does not harm the separation of powers. On the contrary: it is in the very soul of every democratic regime.

B. Various Meanings Of The Concept Of Justiciability

32. Contradictory arguments regarding justiciability raise anew the question of justiciability. Indeed, the problem of justiciability is a difficult one, which has occupied this

Court's attention since its foundation. It has come up in the decisions of courts outside of Israel, and there as well it has been shown to be a question which is not capable of "scientific verification" (as put by Justice Frankfurter in the case of *Poe v. Ullman,* (1961) [66], at 508, cited with approved in H.C. 73/85 [22], at page 161. Justice Witkon conducted an in depth study of the question of justiciability in general, and the justiciability of political matters in particular, in his essay, *supra,* and *see* Adjudication *also* A. Witkon, *Law and - Collection of Articles and Notes* (Schocken, 5748, 1988) 55. At the end of his study he admits, with admirable candor, that "we set out in search of guidance, yet I fear that we are still in a state of confusion *(Politics and Law,* at page 69). It has been emphasized in case law - in Israel and beyond - that the concept of justiciability is unclear, "that its foundations cannot be defined in a precise manner" (H.C. 73/85 [22], at page 181); and likewise that it is "a concept of uncertain meaning and scope" *(Flast v. Cohen* (1968) [67], at 95). There are those who have gone so far as to describe it as "a monstrous creature", whose nature "I have never understood" (Justice Silberg in H.C. 295/65 [23], at page 328), while expressing doubt as to "whether a scholar will ever be found who will be able define exactly the meaning of this phrase" (*id.*). Indeed, the great experts in this area have stated that in their opinion, justiciability "has varying aspects and is among those questions to which no satisfactory answer can be given" (Witkon, *Politics and Law,* at page 69), and that it has apparently been decreed that the argument over it is to be "an eternal argument" (Justice Witkon in H.C. 606, 610/78 [24], at page 124).

33. I have no intention to resolve Justice Silberg's doubts as to "whether a scholar will ever be found who will be able to define exactly the meaning of this phrase" (H.C. 295/65 [23], at page 328), nor to solve problems "which cannot be settled" (Witkon, *Politics and Law,* at page 69). Nonetheless, it seems to me that the source of many of the difficulties in understanding the concept of justiciability is the fact that that term carries several meanings *(see* G. Marshall, "Justiciability" in *Oxford Essays in Jurisprudence* (Oxford, ed. by A.G. Guest, 1961) 265. It therefore seems to me that the first task is to distinguish between the various meanings of this term, to the extent that they relate to our issue. Afterwards it will be necessary to examine each meaning of the term justiciability separately, against the background of modern developments in the area of public law. It should be stated at this point that this examination of the term justiciability is based on the view that, whatever be its content, it is not a term which relates to the jurisdiction of the court, but rather to the

way in which judicial discretion is to exercised therein. In its early days, the Court took the position that lack of justiciability necessarily results in lack of jurisdiction: H.C. 65/51 [25]. Subsequently, this was shown to be erroneous, and it was emphasized that "there is a difference between jurisdiction and justiciability" (Justice Witkon in H.C. 222/68, Mot. 15/69 [26], at page 164), and that the issue of justiciability stands on its own, so that "it should not be confused with the issue of jurisdiction"(Deputy President Y. Kahan in H.C. 306/81 [21], at page 125). Similarly, standing must not be confused with justiciability.

True, this Court's holdings have pointed more than once to the link between these two issues (H.C. 40/70 [1]; H.C. 448/81 [2]), but this connection must not result in the blurring of the distinction between the two issues. Indeed, "the right of standing and justiciability are two separate matters" (Deputy President Y. Kahan in H.C. 448/81 [2], at page 85). Right of standing concerns the petitioner's power to move the court to hear his petition; justiciability concerns the appropriateness of the petition for judicial consideration:

> "We must distinguish between two separate issues: on the one hand, the question of the petitioner's right of standing, according to which it is determined whether the court will pay attention to the matters set forth by this particular petitioner as a person pleading his own case. On the other hand, the justiciability question is a separate and different problem, i.e. the question of whether the court will deal with the substance of the matter brought before it" (Justice Shamgar in H.C. 561/75 [27], at page 315).

34. In principle, a distinction can be made between two different meanings of the term justiciability *(see* H.C. 802/79 [28]). The first can be called normative justiciability; the other may be called institutional justiciability. (Compare A. Bendor's excellent article, "Justiciability in the High Court of Justice", *Mishpatim* 17 1987-88) 592), which distinguishes between "material justiciability" and "organic justiciability"; *see* also D.J. Galligan, *Discretionary Powers* (Oxford, 1986) 241). Normative justiciability answers the question of whether legal standards exist for the determination of the dispute before the court. Institutional justiciability answers the question of whether the court is the appropriate institution to decide a dispute, or whether perhaps it is appropriate that the dispute be

decided by a different institution, such as the legislative or executive branches. These two meanings of justiciability are distinct, so that they ought not, therefore, to be confused. Marshall, *supra,* addressed this at 266:

> "Unfortunately, assertions that rules are not justiciable are as a matter of usage employed ambiguously both to indicate the absence in fact of a fixed procedure and to proclaim the unsuitability of a rule for application by that procedure".

I shall now deal with each of the two types of non-justiciability and their place among the High Court of Justice's considerations. It goes without saying that this distinction is relevant to the use of the term justiciability in the High Court of Justice, regarding the hearing of petitions brought before it. This distinction may be irrelevant - and it will be necessary to examine the relevance of other distinctions - to the use of the term justiciability in other contexts. Indeed, the concept of justiciability is a broad concept, which has ramifications in various contexts (R.S. Summers, "Justiciability" 26 *Modern L. Rev.* (1963) 530). I am dealing here with the concept of justiciability solely within the context of administrative law and the discretion of the administrative court.

C. **Normative Justiciability (Or Non-Justiciability)**

35. A dispute is justiciable in the normative sense if legal standards exist for its resolution. A dispute is not justiciable in the normative sense if legal standards do not exist for its determination. The question is not whether the dispute ought to be resolved by the law and in court, but rather whether it is feasible to decide it in that way. Normative justiciability therefore does not deal with what is desirable but with what is possible. Justice Brennan addressed this aspect of justiciability in the case of *Baker v. Carr* (1961) [68], at 217, stating, that a dispute is non-justiciable - or more correctly, raises a "political question", if regarding it there exists -

> "a lack of judicially discoverable and manageable standards for solving it".

Justice Sussman also assigned this meaning to the concept of justiciability, both in case law and beyond. In H.C. 186/65 [29], the petitioner requested that the German Ambassador to Israel be barred from entering Israel because of his service in the German army during the Second World War. The High Court of Justice dismissed the petition. In considering the actual question of diplomatic relations with Germany, Justice Sussman noted at page 487, that "the issue is not a legal issue but rather a clear political issue; it cannot be tested by legal standards". As to the confirmation or rejection of one ambassador or another, that, in Justice Sussman's opinion, is a matter of policy:

> "It is not a legal issue which by its nature can be resolved in a court. The considerations are not legal, but pertain to foreign policy and the fitness of the candidate for the post, which this Court is neither authorized nor capable of deciding". (*Id*.)

Justice Sussman reverted to the normative meaning of the concept of justiciability outside the courtroom, stating:

> "A matter is said to be non-justiciable when the refrains court from deciding it because it cannot decide it according to legal standards" (Y. Sussman, "The Courts and The Legislature", *Mishpatim 3* (5731) 213, 216 margin note E).

Justice Landau addressed this aspect of the concept of justiciability in H.C. 58/ 68 [30]. Here the question arose, *inter alia,* as to the nature of the Jewish nation for purposes of the Population Registry Law, 5725-1965. In addressing this question, Justice Landau stated that in his opinion, the question is justiciable. Justice Landau said, at page 530:

> "The subject of the nature of the Jewish nation is not in itself injusticiable, as shown by the decision of this Court in the *Rufeisen* case. We are required to abstain from adjudicating in this petition, not from lack of justiciability of the subject, but from our inability to produce a judicial answer to the problem from any of the legal sources from which we usually draw our inspiration".

Justice Silberg reverted to the normative approach to the concept of justiciability in H.C. 222/86, Mot. 15/69 [26], at page 158. Where he said, with regard to the "non-justiciability" argument:

> "In my ruling in the *Oppenheimer* case (H.C. 295/65, *supra) I* expressed my disapproval of the entire concept, and said that 'I do not understand the nature of this monstrous creature'. Five years have passed since then, and I have been able to reflect upon the 'nature' of that creature. I shall therefore not oppose in principle the very concept, but rather be satisfied with saying that in any event, it has no application to the case before us. Something can only be non-justiciable which, because extra-legal considerations, such as political, constitutional, foreign policy considerations and such, operate within it, it cannot be 'contained' in a legal framework, such as, for example, the American legal principle of 'equal protection' or 'due process'. But an issue cannot be non-justiciable which of itself is a legal matter, but in specified circumstances it is preferable for it to be dealt with by a non-judicial authority. The case before us is of the latter type, and accordingly I dismiss the plea".

Deputy President Y. Kahan reviewed the same approach in H.C. 448/81 [2], at page 88, stating that a question is non-justiciable if it is -

> "a question, regarding which the court does not have legal standards on which a judicial decision can be based".

In contrast, it was held that a question is justiciable if it raises "a clear legal issue" (Justice Goldberg in H.C. 89/83 [31], at page 496), which can be resolved "according to ordinary legal principles, under which a statutory body's exercise of jurisdiction is assessed" (President Shamgar in H.C. 852,869/86, Misc. H.C. App. 483, 386, 387,502,512-515,518,521,523,543/86, 1,33/87 [15], at page 37). At times judges express the idea of normative non-justiciability not in terms of "the law", but rather in terms of "the court". They note that "we do not have before us an issue subject to judicial determination and

decision" (President Smoira in H.C. 65/51 [25], at page 874), and that these are "such matters which due to their characteristics and nature, the court does not see itselffit to determine" (Justice Berinson in C.A. 591/73 [32], at page 762), or that these are subjects "which are not proper, according to their characteristics and nature, for judicial decision and determination" (Justice Shamgar in H.C. 561/75 [27], at page 315).

36. The relevant point of departure for examination of normative justiciability (or non-justiciability) is the conception that the law is a system of prohibitions and consents. Every act is permitted or forbidden in the world of law. There is no act to which the law does not apply. Every act is contained within the world of law. Accordingly, I do not accept Justice Silberg's approach in H.C. 222/68, Mot. 15/69 [26], which recognizes the existence of actions which cannot be "contained" within the framework of the law. Indeed, every action can be "contained" within the framework of the law. The examples cited by Justice Silberg - the American principle of "equal protection" and "due process"- are appropriate examples of actions which the American Supreme Court has "contained" within the legal framework, and it makes daily use of them in critical examination of legislative and executive action. Indeed, every action can be "contained" within a legal norm, and there is no action regarding which there is no legal norm which "contains" it. There is no "legal vacuum", in which actions are undertaken without the law taking any position on them. The law spans all actions. Sometimes it prohibits, sometimes it permits, at times by creating a presumption of permission ("everything is permitted to the individual, unless forbidden"), or of prohibition ("everything is forbidden to the government, unless permitted). Even in places where there is a *"lacuna"* in the law, the law sets forth the means for filling the *lacuna.* According to this approach, there can be no situation in which there is no legal norm applicable to an action.

As to this matter, it is immaterial what the action is, whether it is political or not, whether it is a policy matter or not. Every action - including political or policy matters - is contained in the world of law, and a legal norm exists which takes a stand as to whether it is permitted or forbidden. The argument that "the issue is not a legal issue, but rather a clear political issue" confronts two concepts where there is no basis for such confrontation. The fact that a matter is "clearly political" cannot negate its existence as a "legal matter". Every matter is a "legal matter", in the sense that the law takes a position on whether it is

permitted or forbidden. Take, for example, the governmental decision discussed in H.C. 186/65 [29] to establish diplomatic relations with West Germany. This is certainly a clear "political" decision. Nonetheless, the law takes a position on it as well. This is not an action outside the legal world. Thus, for example, the law takes a position as to the question of which organ is authorized to decide, on behalf of the state, on the establishment of diplomatic relations with West Germany. It is inconceivable to argue that this is a political, not a legal, matter. The question of authorization is a legal issue, which has political consequences, just as it is a political issue with legal consequences.

Similarly, if that organ accepts a bribe, it is inconceivable to argue that the issue is political and not legal. The law takes a position on the action of accepting a bribe regardless of the political nature of the action. Accordingly, the political and legal planes are distinct from one another. They do not displace one another, not does one render the other superfluous. They operate in different areas. The very same action, perceived by one, is also perceived by the other. The "political" nature of the action does not negate its "legal" nature, nor does its "legal" nature negate its "political" nature. Naturally, at times the political nature of the acting authority and of the action undertaken have an impact on the content of the legal principles which regulate that action *(see* the opinion of Justice Elon in H.C. 620/85 [33]) and also Bendor, in his article *supra,* at page 629). Thus it was held that the participation of a particular party in a Knesset committee, at the time that it was considering an election appeal likely to affect the number of that party's seats, should not be invalidated for conflict of interest. The Court took into consideration the political nature of the Knesset and crafted the rules guiding its conduct in accordance with that nature (H.C. 731/84 [34]).

Similarly, the political nature of the authority is likely to affect the range of factors which it may consider and the options available to it. "The realm of reasonableness... is an area whose measure is determined by taking into consideration the status of the governmental authority concerned and the nature of its powers") (President Shamgar in H.C. 428,429,431,446, 448, 463/86, Misc. H.C. App. 320/86 [12], at page 557), but this is far from saying that political matters are non-justiciable. It is true that the political matter is likely to affect the content of the legal aspect. Moreover, the political aspect is likely at times to bring about a situation where a particular rule of public law will not apply to

specific actions having political consequences. In all of these situations, we are not contracted with a situation where no legal norms exist. On the contrary: in every one of these cases we are concerned with a situation in which a legal norm exists whose content does not prohibit, but rather permits, political action. The petition will not be dismissed in these cases because of a preliminary claim of normative non-justiciability, but rather on its merits, for lack of a cause of a dam.

To be precise: I do not take the position that the political nature of the action always affects the content of the rules of law which regulate it. On the contrary: in the vast majority of cases, the political nature of the action does not affect its normative evaluation. Therefore, for example, we were of the opinion that the Knesset is also subject to rules of reasonableness and fairness when depriving Knessets member of their immunity *(See* H.C. 620/85 [33]). However, there may be exceptional cases. Thus, for example, it may well be out of place to apply the regular rules of the administrative discretion doctrine to the decision to make peace or to go to war. In such exceptional cases the petition will be dismissed, not because of a lack of a legal norm, but because of the lack of a prohibitive norm and the existence of a permissive norm, that is to say, lack of a cause of action. The action is not non-justiciable. The action is justiciable and lawful.

37. Against the background of this theoretical observation regarding the "global" nature of legal thought, it is necessary to revert to and review the case law dealing with normative justiciability (or non-justiciability). Such review shows that the cases which examined this type of justiciability (or non-justiciability) did not stress the absence of a legal norm, but rather emphasized the absence of legal standards and legal criteria to decide the dispute. This position therefore raises the following question: What is the meaning of the view that there exists a legal norm applicable to the issue, but no legal standards within the framework of. such norm to ascertain what is prohibited or permitted thereby? Can a legal norm exist without legal standards? To answer this question, the meaning of the phrase "legal standards" or "legal criteria" must be examined. This phrase apparently means the circumstances and conditions for the application of the norm. When the norm is one of jurisdiction, the standards determine when jurisdiction exists and when it is denied. When the norm relates to taking a bribe, the standards determine when there is the taking of a bribe and when there is not. When the norm is that of reasonableness, the standards

determine when an action is reasonable and when it is not. According to this view of the concept of legal norm and of the legal standards, it seems to me that it is quite impossible to refer to the existence of a legal norm, and at the same time, to the absence of legal standards. If the norm exists, it follows that legal standards also exist. If no legal standards exist, that means that the particular legal norm does not exist, and that a different norm applies. I do not see how it is possible to refer to the existence of a legal norm, and at the same time the absence of circumstances and conditions for its application. Of course, the content of the norm and the circumstances and terms of its application may be difficult to apprehend. Every legal norm requires interpretation; no such norm is immune from the process. Interpretation is likely to be complicated and difficult. But at the end of the interpretive process we have before us the legal norm, which by its very nature includes the standards for its application. A legal norm without standards for its application is like a man without a shadow, or a form without substance, Nothing like this exists in the world of law, which consists entirely of '"bodies" and "shadows", and forms which enclose substance.

38. Take, for example, the question of establishing diplomatic relations with West Germany. It was held that this question cannot be "tested by legal standards" (H.C. 186/65 [29], at page 487). It would seem that no one would make this claim - and it was not raised in H.C. 186/ 65 [29] - regarding the question of what organ is empowered under Israeli constitutional law to decide as to the establishment of diplomatic relations. Similarly, I assume that the claim of non-justiciability would not be made if the question were the legality of accepting bribes in the establishment of diplomatic ties in the example I cited. But what is the rule if the argument is that it is not proper to enter into diplomatic relations with West Germany? Does this argument have a legal "framework" and legal standards? To answer this question it is necessary to examine, first and foremost, the nature of the legal norm applicable to the issue. The political plea of "improper" does not have to be translated into the legal norm which signifies means "improper". As we have seen, the political plane and the legal plane are distinct. Examination of the example I have cited reveals that the closest legal norm is that which states that every governmental decision - including that concerning diplomatic relations with West Germany - must be reasonable. The political claim that "it is improper to establish diplomatic ties with West Germany" is translated into the legal argument plea that "it is unreasonable to establish diplomatic ties with Western Germany".

The question is therefore the following: If a general norm in fact exists which imposes on government the duty of reasonableness, and if in fact this general norm applies also to the decision to establish diplomatic ties - could it be that there are no standards and criteria to assess the question of whether governmental conduct is reasonable or unreasonable? In my opinion, the existence of the reasonableness norm implies that standards to assess the reasonableness of an action exist. It cannot be that a norm exists prohibiting unreasonable action, but no standards to decide the question of whether or not an action is unreasonable. We are concerned with an interpretative activity requiring that normative content be given to the principle of reasonableness and that standards be established for its realization. The argument that after the interpretative act there are no standards to determine the reasonableness or unreasonableness of a particular action, resembles the argument that the norm of reasonableness does not apply to a particular action. In that case the argument that the action is illegal would be dismissed, not for lack of legal standards but because of the lack of a prohibiting norm, that is to say, because the action is legal.

39. On the basis of this conception, it is possible to examine the plea of "non-justiciability" which was raised and admitted in H.C. 561/75 [27]. There the petitioner argued that the army was not employing a correct method of debriefing and deriving lessons in the aftermath of the Yom Kippur War. The Court held, at page 319, that "matters concerning the organization of the army, its structure and preparedness, equipping and operations - are not justiciable, since they are not appropriate matters for hearing and determination by courts of law... it is fundamentally unreasonable to expect a judicial authority to weigh and decide what is the most effective method, from a professional-military point of view, for deriving lessons from operational actions and replace the discretion of military authorities, who were trained and placed in command of such, with its own. Personally, I would have reached the same conclusion by a different route, which is as follows: The first question I would have posed is, what is the relevant legal norm for deciding petitioner's claim. To the best of my knowledge, there is no norm which states that an ineffective governmental action is illegal *(see* H.C. 311/ 60 [35]).

Accordingly, if the sole plea is lack of effectiveness, as such, the petition must be dismissed for lack of a cause of action, because the petitioner did not indicate any norm

according to which an ineffective military action is also illegal. However, it seems that the correct legal framework which can "contain" petitioner's plea is that the army is acting unreasonably. His legal argument is therefore that an army which does not conduct debriefing and does not derive lessons as he alleges, is an army which is acting unreasonably.

The reasonableness test is a well-known and familiar one. Under it, the court does not replace the military authorities' exercise of discretion by its own. Under this test, the court asks whether a reasonable army would have taken the actions which the army took, or the actions which the petitioner requests the army to take. The burden is on the petitioner - in light of the presumption of lawfulness - to demonstrate that the army action is unreasonable. If he does not bear this burden, the petition must be dismissed on its merits. On the other hand, if the petitioner succeeds in demonstrating that the army action is unreasonable, his petition must be allowed. The key question is therefore the following: Do legal standards and legal criteria exist, pursuant to which it is possible to decide whether the conduct of debriefing and the learning of lessons undertaken by the army are reasonable, or not? In my opinion, the answer to this question is in the affirmative. I see no difference between this question and any other question concerning the reasonableness of conduct by government (in public law) or by any person (in public and private law). Let us assume that a petitioner suffered a physical injury, and he files a tort claim against the State, alleging that the State was negligent in that it did not conduct debriefing and did not derive lessons, and that because of this he suffered a physical injury. Is it conceivable that this claim would be dismissed solely because it is "non-justiciable"? In my opinion, it would be incumbent on the court to examine this claim substantively, under the reasonableness, negligence and causation standards. More than once, operative plans for the structure of means of combat have been examined under tort law. If legal standards exist within the framework of tort law, why should such standards not exist under administrative law, which seeks to grant a remedy prior to the affliction? To be more precise, I am not now examining the question of whether it is proper for a court to examine the question of whether the derivation of lessons and the conduct of debriefing are lawful. This question will be decided within the framework of institutional justiciability (or non-justiciability). I am currently examining normative justiciability (or non-justiciability). The question which I seek to deal with is whether a legal examination of the issue is impossible, because there are no legal standards

for its examination. In my opinion, once it is determined that the norm as to reasonableness applies to particular conduct, it is thereby automatically decided that there are legal standards to measure the reasonableness of that conduct. The argument that there are no legal standards to measure the reasonableness of particular conduct is equivalent to the argument that the norm as to reasonableness does not apply to that conduct, or that the claimant has not discharged the burden placed upon him to demonstrate that the conduct is unreasonable.

40. Since most of the arguments as to normative non-justiciability must, in my opinion, deal with the legal norm which imposes the duty of proving reasonableness on the government, it is worthwhile examining this issue closely. Today everyone agrees that government must act reasonably *(see* H.C. 389/80 [36]). This means that government authorities must choose that course of action which a reasonable government authority would have chosen under the circumstances of the matter. Frequently a number of reasonable courses of action exist, and then it is incumbent on the authority to choose that course of action which seems best to it, from among the reasonable courses of action ("the scope of reasonableness"). The boundaries of the scope of reasonableness are determined pursuant to the proper balance between the various interests and values struggling for primacy, and in particular the individual's interest and values on the one side, and those of the public on the other. The relevant interests and values are determined according to the relevant material within which framework the action is examined, and on the basis of the fundamental principles of the system, its "credo" and the conception of the enlightened public within it, while the scope is determined according to the weight and balancing between these interests. The determination of the reasonableness of the action is therefore not technical but substantive; the question is not merely a matter for logic and rationality. The question is a matter of legal policy and the balance between competing values. Professor McCormick emphasized this, stating that:

> "What justifies resort to the requirement of reasonableness is the existence of a *plurality of* factors requiring to be *evaluated* in respect of their relevance or common *focus of concern* ...unreasonableness consists in ignoring some relevant factor or factors, in treating as relevant what ought to be ignored. Alternatively, it may involve some *gross* distortion

> of the relative values of different factors, even though different people can come to different evaluations each of which falls within the range of reasonable opinions in the matter in hand". (Mac Cormick, "On Reasonableness", in Perelman and Vander Elst (ed), *Les Notions a contenu variable en droit* 131, 136 (1984).

It seems to me that the determination of the various interests and values struggling for primacy is an activity has to be conducted by legal standards. The matter requires interpretation of the relevant norm, and ascertaining the interests and values falling within its Gambit. It is routinely undertaken when the court locates the interests and values - such as public order on the one side and free expression on the other - struggling for primacy. Indeed, the primary difficulty is, in my opinion, inherent in the need to give these values and interests "weight", and to balance them at the decisive point. Justice Shamgar correctly noted in F.H. 9/77 [37], at page 361, that "the process of weighing competing values in the balance indicates the point of departure for interpretation, but it cannot formulate the standards or weight to be attached to values, whereby the interpretative process is carried out". Could it be said that there may be situations with no legal standards or criteria for the assignment of "weight" and far effecting the "balancing" process? To be more precise:

> "These phrases - balance, weight - are nothing but metaphors. Behind them stands the concept that not every principle is of identical importance in the eyes of society, and that in the absence of legislative guidance, the court must assess the relative social importance of the various principles. Determining the balance on the basis of weight means assigning social value to the relative importance of the various principles" (H.C.14/86 [38], at page 434).

Could the court find itself in a situation where - in the absence of legislative guidance - it lacks legal standards for conducting "the balancing" and assigning "weight." To be more precise: The question is not whether it is undesirable that the court engage in the activities of weighing and balancing. This question will be considered later on within the framework of the claim of the institutional justiciability (or non-justiciability). The question is whether

practically speaking, the court may be incapable of carrying out the process of the weighing and balancing.

In my opinion, the answer to this is in the negative. In the absence of legislative guidance, the court must turn to the fundamental values of the nation, to its "credo"(as the Declaration of Independence was called in H.C. 10/48 [39], at page 89, by President Smoira), or to its "national way of life "(Justice Agranat in H.C. 73,87/53 [40], at page 884), and to "the sources of national consciousness of the people in whose midst the judges reside" (M. Landau, "Rule and Discretion in the Administration of Justice" *Mishpatim* Vol. I (5729) 292, 306. In doing so, the court will consider the outlooks "accepted by the enlightened public" (Justice Landau in C.A. 461/62 [41], at page 1335; H.C. 112/77 [42]). At times the judge will find that, for one reason or another, those sources do not afford sufficient guidance. In such situations it will be incumbent upon the judge to exercise his discretion *(see* H.L.A. Hart, *The Concept of Law* (Oxford, 1961) 128). This task is at times difficult. Justice Frankfurter addressed this when he stated:

> "The core of the difficulty is that there is hardly a question of any real difficulty before the Court that does not entail more than one so-called principle....judges cannot leave such contradiction between two conflicting 'truths' as 'part of the mystery of things'. They have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty". (F. Frankfurter, "The Judicial Process and the Supreme Court", *Of Law and Men* (ed. by P. Elman, 1956) 31, 43).

The judge's choice in this situation is not arbitrary:

> "The judge does not impose his subjective values on the society within which he acts. He must balance between the various interests, according to what seems to him to be the needs of the society within which he lives. 'He must exercise his discretion according to what seems to him,

> to the best of his objective knowledge, to reflect the needs of society. The question is not what does the judge want, but rather, what does society need'" (C.A.242/83 [43], at page 131).

True, the exercise of judicial discretion in this situation is difficult, but despite the difficulty the judge must exercise it. The lack of sufficient guidance as to "the fundamental principles of the system" and the national "credo" is likely to influence the substance of the choice, but this does not make the choice impossible. In such a situation the judge must consider all values and interests, and he must give them the weight he thinks best reflects their meaning in his society. Justice Landau referred this in H.C. 58/68 [30], at 530, when he stated:

> "I should like to make it clear that I am not basing my opinion on any lack of "justiciability" of the problem before us. For me that is largely a matter of semantic definition only. But to be precise, let me say that the subject of the nature of the Jewish nation is not in itself injusticiable, as shown by the decision of this court in the *Rufeisen* case. Abstention from adjudicating which is our duty in this petition does not stem from lack of justiciability of the subject, but from our inability to draw a judicial answer to the problem from any of the legal sources from which we usually obtain our inspiration.
>
> As I have explained, the views common among the enlightened public are also a proper source of adjudication when no other source is available to us. The court has more than once drawn upon this source in decisions which have become milestones in the development of our case law and there will certainly be further opportunities for doing so in the future. But on the present occasion this source, too, fails us, in view of genuine differences of opinion which prevail among the public. Nevertheless there may be cases where a judge may perforce have to decide and to give his personal answer to a question of general outlook on life, although that question may be in dispute. But that is not the situation in the present case, because here we are required to pass

> judgement on the directives of the Minister of the Interior which were issued as an authorized administrative act, and whoever wishes to upset those directives must convince the court that they suffer from some invalidity. The petitioner has not discharged this burden".

Accordingly, the fact that the "source" from which the viewpoints of the enlightened public was derived, were in the judge's opinion, disappointing, did not lead him to consider that there was a lack of legal standards to decide the question before him. It influenced the substantive resolution of the question, but did not prevent it being dealt with. This fact is particularly significant where the legal norm on which basis the dispute is decided is that of reasonableness. "The drying up" of the source regarding the "enlightened public's views" is likely to lead to the conclusion that the petitioner did not discharge the burden imposed on him to demonstrate that the governmental decision was unreasonable. But this drying up will never lead to the negation of the norm itself.

41. Thus, my approach is that wherever there is a legal norm, there are legal standards which implement that norm. This simply means that when an issue lacks legal standards to determine it, the legal norm such as that which the petitioner argues for does not apply to the issue, and another norm applies instead. Hence it follows that the argument that the issue is not materially justiciable means no more than that the petitioner has not identified the legal norm which makes the governmental action a prohibited one. Accordingly, the claim of material non-justiciability is nothing but a claim of failure to state a cause of action. In allowing a plea of material non-justiciability, the court is not abstaining from addressing the lawfulness of the action. On the contrary: the court is taking a position as to its lawfulness and determining that it is lawful. Regarding this possibility Justice Witkon noted in H.C. 222/68, Mot. 15/69 [26], at page 166, that "this kind of 'non-justiciability', which does not preclude consideration of the question, and which may only become apparent as a result of such consideration the deliberation, is in reality no different from the usual reasoning in many cases, that the matter is submitted to the discretion of the administrative authority, which acted in a lawful and reasonable manner". In my opinion, lack of normative justiciability is nothing but the lack of a cause of action in law. Professor McCormick stressed this point, stating:

> "To say that a 'case' before the court is nonjusticiable is to say that the plaintiff has no judicially enforceable right. To say that the plaintiff has no judicial right is to make a conclusive statement about the nature of the 'law' on which the plaintiff is relying; it is necessarily an exercise in interpretation and application of that law to say that the law applied by the court does not protect the plaintiff. Masking the holding in language that purports to decide only a 'preliminary' or 'threshold' issue hides a decision on the merits without elaborating the reasons behind the decision. Justiciability, like any other decision for or against a claimed 'right', is a label that expresses a decision on the conflicting interests of the parties and constraints that operate on each" (McCormick, "The Justiciability Myth and the Concept of Law", 14 *Hastings Const. L.Q.* (1987) 595).

42. In my opinion, those cases in which the court dismissed petitions for material non-justiciability could have been dismissed on substantive grounds, for lack of a cause of action. Take, for example, H.C. 65/51 [25]. There the petition was dismissed because in the Court's opinion, the President's action under paragraph 9 of the Transition Law, 5709-1949, is non-justiciable. It is "outside the judicial realm", because "the matter before us is not one which is amenable to judicial determination and decision" (*Id.* at page 814). In my opinion, the President's action under paragraph 9 of the Transition Law is not "outside the judicial realm" but rather inside the judicial realm. Justice Witkon addressed this in *Politics and Law,* at page 8, when he presented the following question:

> "What for example, would the situation be if a particular Knesset member had the power to form a government enjoying confidence of the majority of the Knesset, but the President steadfastly refused to assign the task to him? Would the court refuse to intervene there as well, even if that Knesset member applied to it and claimed his constitutional right?"

My answer to this question is that, according to the legal situation pursuant to the Transition Law, the court would not refuse to intervene. In my opinion, paragraph 9 of the

Transition Law creates a "legal realm" which by its terms sets forth what is permitted and forbidden, so that therefrom, legal standards for the. Presidents action are derived. If the President refuses to assign the task of forming the government to the only Knesset member who has the majority to do so, the President violates the provisions of the statute. His action is "justiciable". According to this very approach, the petition in H.C. 65/51 [25] could have been dismissed because the petitioner did not indicate any illegality in the President's action. Justice Witkon addressed this, when he presented the question *(Politics and Law,* at page 7):

> "Would it not have been preferable to enter into the essence of the matter and dismiss the request as being unfounded. It seems to me that it would have been easy to do so, and it would not necessarily have set any precedent. It is clear that there would not have been any reason to require the President to assign the task of assembling the government to each of the 119 other Knesset members, one after the other, when he was aware, as a result of his consultations with the parties' representatives, that this action would be meaningless and pointless. There is no way out of this impasse other than to dissolve the Knesset and hold new elections".

If it is "easy" to dismiss the petition on its merits, how can it be said that it is outside the judicial realm, and that "we do not have before us an issue subject to judicial determination and decision'? Indeed, I agree with Justice Witkon, that the petition could have been dismissed on its merits, and that the substance of the petition was, accordingly, justiciable.

43. I reach a similar conclusion, and by a similar line of reasoning, in H.C. 186/65 [29]. As noted, the subject of this case was the establishment of diplomatic relations with West Germany and receiving its ambassador, who it was alleged took part in the Second World War. The Court, at page 487, dismissed the petition, holding that:

> "This is not a legal issue which by its nature may be brought for adjudication by a court. The considerations are not legal ones, but rather

> considerations of foreign policy and of the fitness of the candidate for the post, which a court is neither empowered nor capable of deciding".

In my view, the Court should have decide, first and foremost, the legal norm applicable to the matter. To the best of my understanding, the relevant norm is that which imposes upon the government the duty to act reasonably. Once the relevant norm was established, the Court had to assess whether the petitioner's claims indicate, at least *prima facie,* unreasonable conduct. I would answer this question in the negative and dismiss the petition for this reason. The Court's approach, according to which "the considerations are not legal ones, but rather considerations of foreign policy", does not confront the issue. True, the government's considerations are political ones, but this does not eliminate the need to examine whether a political consideration is lawful from a legal perspective. A political consideration is distinct from a legal one, but the political nature of the consideration does not obviate the need to examine its lawfulness. The Court is empowered and capable of examining the lawfulness of the decision, whatever its political nature may be.

44. In H.C. 302,306/72 [44], the lawfulness of evacuating the petitioners from their homes in the Gaza Strip was examined. Justice Landau examined, *inter alia,* the substance of the army's actions, and found that there was no basis for interfering with the military government's discretion. Justice Witkon thought, *inter alia,* that the petition was non-justiciable. He declared, at page 182:

> "In the instant case I thought, even before we entered into the of essence the matter that the non-justiciability was apparent on its face, and accordingly I saw no reason to allow counsel for the petitioner to examine the deparents on behalf of the respondent on their affidavits. This entire argument as to the extent of the distress and danger in the area concerned, and on the available and desirable preventative measures, has no place within the framework of a judicial determination. However, as stated, we read their affidavits and heard their arguments, and this was perhaps the right course, if only to mollify the petitioners and avoid the impression that we do not appreciate their situation... And having done this, we could have ignored the lack of justiciability this

> time as well, and decided the issue according to the usual criteria for such situations. Indeed, as my esteemed colleague Justice Landau explained in great detail, there was no deviation here from the power delegated to the respondents pursuant to the orders of the military commanders, and the considerations were genuine defence considerations... All the other issues, such as the selection of one system or program over others, are subject to the discretion of the respondents, who are conversant with this issue, so that their decision should not be interfered with".

It seems that there is an inherent contradiction in this paragraph. If "this entire argument has no place within the framework of judicial determination", how is this matter examined "according to the usual criteria"? Indeed, Justice Witkon was correct in thinking that it is possible to examine the matter "according to the usual criteria". Such criteria include not only questions of jurisdiction, but also questions of reasonableness, including non-intervention in military discretion where a reasonable military authority would have been entitled to make the type of decision described in the petition. See Y.S. Zemach, "The Non-Justiciability of Military Measures" 9 *Isr. L. Rev.* 128 (1974)). At the same time, the Court was entitled and obligated to assess whether the military action was not unreasonable. Murphy J. pointed this out in his minority of inion in the case of *Korematsu v. United States* (1944) [69], at 234, when he stated that:

> "It is essential that there be definite limits to military discretion... the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions'".

Indeed, the the Supreme Court has held more than once that the army's security considerations, whether within the boundaries of Israel or in Judea, Samaria and Gaza, are subject to judicial review, and that this review does not extend only to the question of functional jurisdiction and the very existence of the security consideration, but rather

extends to the all the grounds, including the question of the reasonableness of the security consideration (see H.C. 69,493/81 [45]; H.C. 393/82 [46]). Accordingly, this Court considered the reasonableness of the Military Governor's decision not to permit reunion of families, despite the fact that the decision on this matter was one relating to military policy and the Court dismissed the plea, justiciability lack of material (see: H.C. 263, 397/ 85 (Misc. H.C. 222,267/ 85 [47]), at page 284; H.C. 629/82 [48]). Accordingly, I would have examined H.C. 302,306/72 [44], as did Justice Landau, on the merits, and without entertaining the non-justiciability argument at all.

45. In H.C. 561/75 [27 J - the case I mentioned (paragraph 39 *supra)* - I would have reached the same conclusion as the Court did in dismissing the petition, without resort to reasoning regarding non-justiciability. Like the Court in 561/75 [27], I also think that "it is entirely unreasonable for a judicial authority to weigh and decide what is the most effective method, from a professional-military point of view, for deriving lessons from operational acts and to replace the opinion of the military authorities, who were trained for, and put in command of, such action with its own" (Justice Shamgar, at page 319). The legal expression of this approach need not be the classification of the claim as non-justiciable. The proper expression is, in my opinion, the principle that the Court does not substitute its opinion for that of governmental authorities, where they are operating within the realm of their authority and are not exercising their discretion unlawfully. The petitioner did not point in the petition to a lack of reasonableness in the governmental actions, and accordingly his petition had to be dismissed on its merits. Justice Shamgar himself emphasized this, when he stated, at page 318:

> "One should distinguish between the situation in which the military authority fails to operate in accordance with its legal duties or according to the order of a competent authority, or arbitrarily refuses to accept the recommendations of an authority lawfully appointed, and the situation where the military authorities acted within the scope of their authority, but the way they acted and their method meets with disapproval of a particular petitioner".

Indeed, I also believe, that if a military authority fails to operate in accordance with its duties, its actions are "justiciable". Similarly, I also distinguish between this situation and the situation in which the military authority acts within the scope of its authority, "but the way they acted and their method meet with disapproval of a particular petitioner". In the latter case, we are not concerned with non-justiciability, but with lack of cause of action. The mere fact that a particular petitioner is dissatisfied with the army's actions does not mean that the action is unlawful. It is not sufficient for the petitioner to state that the governmental action is not to his liking, or that it is ineffective. He must indicate that it is unreasonable, that is, that the weight that the government gave to the relevant considerations and the balance made between them are inappropriate. The petitioner in H.C. 561/75 [27] did not do so, and for this reason I would also dismiss his petition. Like my colleague, President Shamgar, *id*., at page 319, I also think that "overstepping the limits between military, operational considerations and judicial consideration", should not be favoured, but it seems to me that where the court assesses the reasonableness of the military, operational consideration, it is not confusing military and judicial considerations. Justice Witkon, at page 321-322, explained his view that conduct of debriefing is not justiciable, as follows:

> "The judiciary's non-intervention stems from the fact that the standards, order of priorities, and value system we accept and which permit us to review the actions of the civil government, do not necessarily fit the army's needs, which require, first and foremost, discipline and decisiveness".

It seems to me that if this approach is correct, then the law applicable to the army must be adjusted to fit the army's needs. If this adjustment is made, the army action will be lawful, the petition will be justiciable, and it may be dismissed for lack of cause of action. If this adjustment is not made, and the army's actions do not conform with the law, the army's actions must be altered. The petition should not be dismissed for non-justiciability. Justice Witkon continues, at page 322, by stating:

> "As we have heard, the I.D.F. ordinarily conducts debriefing, draws conclusions and applies lessons to the future, both from a personnel and

> from an operational perspective. This is among the army's tasks. The petitioner believes that in this case the army did not fulfill this task or did not properly fulfill it, did not conduct the proper debriefing and did not draw from them the required conclusions. Despite the temerity at the heart of the claim... it is his right to disagree with the military government, but ruling on this disagreement is not among the tasks of the judiciary. We do not have the tools for such, and taking upon ourselves this type of jurisdiction will not serve the purposes of the matter. It is as we stated: The subject is non-justiciable".

In my opinion, the petitioner's right to disagree with the military government "is a right" only where the army has a "duty". A duty of this type exists, as to our matter, within the framework of the duty of reasonableness which is imposed on the army. Within this framework I believe "ruling on this disagreement is among the tasks of the judiciary", and in my opinion the Court has the tools to do so. The Court will hear about the actions that the army undertook with respect to the debriefing, as in fact happened in H.C. 561/75 [27], and will express its opinion as to whether by these actions the army fulfilled its duty to act reasonably. To this end, the Court will have to determine the relevant factors which must be taken into account, assign weight to these factors and balance them. I see there is no lack of tools for carrying out this task. It is no different from any other complicated determination regarding reasonableness or unreasonableness (negligence).

46. It may be asked: Is the decision of a governmental authority justiciable in every instance? Are, for example, the decisions to go to war or to make peace "justiciable" decisions which may be "contained" within a legal norm and a judicial hearing? My answer is in the affirmative. Even in matters of war and peace it must be determined which organ is authorized to make the decision, and what kind of considerations does it take into account (for example, the prohibition of personal corruption). It can of course also be held - and this is an unresolved and difficult question - that the other of the rules of administrative discretion do not apply. In this latter case the petition will be dismissed not because of non-justiciability, but because of its lawfulness. In sum, the doctrine of normative justiciability (or non-justiciability) seems to me to be a doctrine with no independent existence. The

argument that the issue is not normatively justiciable is merely amount to alleging that no prohibitive norm applies to the action, and that accordingly the action is permitted.

My approach is based on the view that a legal norm applies to every governmental action, and that within the framework of the applicable norm it is always possible to formulate standards to ascertain the conditions and circumstances for action within the framework of the norm. This is certainly the case with regard to norms which determine jurisdiction and norms which determine the proper considerations in the exercise of jurisdiction. This is also the case where the operative norm is that which requires reasonable conduct by the government. Within the framework of this norm it is always possible to formulate passed standards for the examination of the reasonableness of conduct, and the authority's action will be examined on its merits pursuant to these standards, without any recourse at all to the claim of normative justiciability (or non-justiciability).

D. Institutional Justiciability (Or Non-Justiciability)

47. A dispute is institutionally justiciable if it is appropriate for it to be determined by law before a court. A dispute is not institutionally justiciable if it is inappropriate fact to be determined according to legal standards before a court. Institutional justiciability is therefore concerned with the question of whether the law and the courts constitute the appropriate framework for the resolution of a dispute.

The question is not whether it is possible to decide the dispute by law in court; the answer to this question is in the affirmative. The question is whether it is desirable to decide the dispute - which is normatively justiciable - according to legal standards in court. Justice Brennan addressed this aspect of justiciability - as well as normative justiciability - in the *Baker* case [68], at 217, when he stated, *inter alia,* that a dispute is non-justiciable where there is:

> "...A textually demonstrable constitutional commitment of the issue to a coordinate political department; ...the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for

> unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question".

This statement of Justice Brennan has been quoted a number of times in the Supreme Court (see: H.C. 222/68, Mot. 15/69 [26], at page 165; H.C. 302,306/72 [44], at page 182; H.C. 306/81 [21], at page 133; H.C. 448/81 [2], at page 88; H.C. 652/81 [49], at page 203; H.C. 73/85 [22], at page 162), and it indicates an open ended list of considerations which the Court takes into account when it adopts a position on the question of whether it is proper for it to decide a dispute before it. In all of these cases the court asks itself whether it ought not to "abstain from fulfilling its normal judicial role" (Justice Agranat in H.C. 222/68, Mot. 15/69 [26], at page 215) and whether "the issues are suitable for judicial determination" (Justice Witkon in H.C. 302,306/72, at page 182). Thus, for example, it was held that the Court will not consider a petition alleging illegal action in the conduct of the internal affairs of the Knesset, unless the decision concerned is calculated to cause substantial harm to the fabric of parliamentary life and the foundations of the constitutional structure (H.C. 73/85 [22]; H.C. 742/84 [50]; H.C. 669/85, 24, 131/86 [51]; H.C. 620/85 [33]).

48. An examination of the various issues (cited by Justice Brennan in the *Baker* case [68], which illustrate the principle of institutional non-justiciability, indicate that they are not at all simple. Take for example the first non-justiciable issue, *i.e.*, that determination of the question realm of a political authority. As to this issue it is necessary to distinguish between the legal question of the jurisdiction of the political authority and whether this jurisdiction was lawfully exercised, and determination of the question of whether the political authority chose the appropriate solution from among a number of lawful solutions. Determination of the first question is generally committed to the court, within the context of its power and duty to determine the nature of the statute (see H.C. 73/85 [22], at page 162).

When a particular provision empowers a governmental authority, it thereby empowers the court to interpret it, to determine its scope, and to decide whether it was lawfully exercised. Hence, submission of the decision on a particular act to a governmental authority does not mean that the issue of the lawfulness of that act was also committed to the

government authority. On the contrary: "the final and decisive decision on the interpretation of a statute, like its validity at any given time, is in the hands of the courts, and, regarding issues presented for examination within the legal system, it is in the hands of the highest judicial forum" (Justice Shamgar in H.C. 306/81 [21], at page 141). Hence, legal determination of the lawfulness of an act committed to a governmental authority should not be seen as non-justiciable.

49. The second issue cited by Justice Brennan is the non-justiciability of a dispute because it is impossible to decide it judicially without expressing lack of consideration due to coordinate branches of government. This issue is also an intricate one since wherever the court decides whether the governmental authority is acting lawfully or not, it is not thereby expressing any lack of consideration for that governmental authority:

> "The role of the court is to interpret legislation, and not infrequently its interpretation will differ from that of same other state organ. It is inconceivable that preferring the judicial interpretation over the interpretation of the other organ (whether executive or legislative) constitutes a kind of disrespect to that organ. How can we intervene in executive actions if we take the position that we impair its honour when we interpret the law in a manner which is not in accordance with its opinion? ... There is no disrespect to other authorities when the authority fulfils its constitutional role and does what the law requires of it. When a court interprets legislation, it fulfills its role, and if its interpretation differs from that accepted by the other authorities, it points out their error, and in doing so it does not express any disrespect towards them whatsoever" (H.C. 73/85 [22], at page 163).

The significant issue is not the respect due this authority or another, but rather respect for the law. As for me, I cannot see how insistence on a governmental authority respecting the law can harm that authority or mar the relations between it and other authorities.

50. It is customarily assumed that the issues cited in the *Baker* case [68] are merely examples of a general approach, under which institutional non-justiciability should prevail in

disputes of a "political" nature (see Y.S. Zemach, *Political Questions in the Courts,* (Detroit, 1976). The contention is that determination of political disputes must be made by political organs, and not by the judiciary. The involvement of the judiciary in these disputes impairs the principle of separation of powers, harms the democratic regime - in which political decisions are made by political authorities - and harms the court itself. These are weighty arguments. A judge's natural reaction is to distance himself from decisions which have a political aspect. Justice Witkon correctly noted that "recoiling from judicial involvement in sensitive political issues has gained currency in the legal consciousness and in public opinion" (A. Witkon, *Politics and Law,* at page 70). We shall briefly consider the foundations of this contention. It includes three aspects: those of the separation of powers, democracy, and public confidence in the judicial system. We shall begin with the first aspect.

51. Can it not be argued that, by virtue of the separation of powers principle, a political question must be decided by a political organ and accordingly is not institutionally justiciable? In my opinion, this argument is fundamentally incorrect, according to both the classical and the modern view of the separation of powers. According to the classical view, separation of powers means that "legislation in the functional sense is identical with legislation in the organic sense, that adjudicating according to the functional test is identifical with adjudication according to the organic test, and that the administration in its functional sense is identical with administration in the organic sense" (Klinghoffer, in his book, *supra,* at page 23).

Hence, the separation of powers principle in its classical sense is upheld, in practice, if the judiciary is engaged in the judicial function, whatever the content of the judicial determination. The same applies to the modern outlook on the separation of powers. According to this outlook, as we saw *(see* paragraph 23, *supra),* reciprocal relations exist between governmental authorities, and it is legitimate that a political decision of the political, governmental body, whether it be the Knesset or the Government, be subject to judicial review within the scope of these reciprocal relations . Indeed, the modern outlook does not separate between the powers, so that each power stands on its own. The modern approach creates a link and balance between the powers, so that the judiciary judicially and legally supervises the other authorities. It is only natural that the political branch takes into account political considerations, and it is also only natural that the judiciary examines

whether this political consideration is lawful. Justice Shamgar emphasized the modern outlook on the separation of powers principle in H.C. 306/81 [21], at page 141, when he said:

> "The separation of powers does not necessarily mean the creation of a barrier which absolutely precludes any link or contact between the authorities, rather, it is reflected primarily in the maintenance of a balance between the powers of the authorities, in theory and in practice, allowing for self-sufficiency through properly defined mutual review.

Justice Shamgar also discussed this principle in H.C. 561/75 [27], at page 319, when he stated:

> "Maintenance of effective review over each of the branches of government is the very foundation of every system of government based upon separation of powers, and is also that which ensures, *inter alia,* a proper balance between the powers, which is an essential component of democratic rule".

President Shamgar expressed a similar approach in H.C. 852,869/86, Misc. H.C. App. 483, 486, 487, 502, 507, 512-515, 518, 521, 523/86,1,33/87, at page 38:

> "Everyone is obliged to respect the law, and judicial review extends to the lawfulness of every authority's actions. Separation of powers leads to their independence, but it does not *of itself* block the way for judicial review. This is the fundamental outlook of Israeli law, and there stems from it the rule of law, which rests, *inter alia,* upon the operation of paragraph 15 of the Basic Law: The Judicature, regarding the actions of the various branches of the Executive".

Accordingly, nothing in the separation of powers principle justifies rejection of judicial review of governmental acts, whatever their character or content. On the contrary: the separation of powers principle justifies judicial review of government actions even if they

are of a political nature, since it ensures that every authority acts lawfully within its own domain, everyby ensuring the separation of powers.

52. A democratic regime is one which strikes the proper balance between majority rule and individual rights. The first principle (majority rule) ensures that the government acts in accordance with majority opinion, meaning, *inter alia,* that political decisions are made by the political organs chosen, directly or indirectly, by the people. The second principle (individual rights) ensures that the majority, by means of the political organs, does not infringe the fundamental rights of the individual. Judicial review, which ensures that the political bodies act within the scope of the authority granted to them by the democratic regime, is not contrary to this democratic conception. On the contrary, judicial review safeguards the proper realisation of the democratic formula. It ensures, on the one hand, that majority opinion finds its appropriate expression within the legal framework appointed for this purpose in the regime, whether it be the Constitution, statutes, regulations on orders, and does not go beyond such framework, and that governmental action is performed within the legal framework determined by the majority by voting in the legislative body; on the other hand, it ensures that the majority does not infringe individual rights, unless it has lawful authorization to do so. It follows that, no harm is caused to the democratic regime when judicial review denies the legality of actions by governmental bodies which take into account political considerations, if these bodies act unlawfully. To be more precise: the court does not review the internal logic and practical efficacy of the political consideration. The court examines the legality of such considerations. This examination in no way harms the democratic regime. There is nothing in the democratic regime which holds that the majority is entitled to act contrary to statutes, which it itself enacted, and that political decisions can violate the law. Even the most political definition must be based on a lawful decision. In a democratic regime there are no politics without law. There is therefore nothing in democratic principles that can justify institutional non-justiciability.

53. We are left only with the contention that institutional non-justiciability as to political issues is justified because it protects the court from "the politicization of the judiciary" and from impairment of public confidence in judicial objectivity. I regard this argument as being to be most controversial. Even when the court deals with political issues,

it does not examine them according to political standards, but merely examines the lawfulness of the political determination.

As we saw *(see* paragraph 36 *supra),* the political and the legal realms are distinct from each other. The judiciary assesses the "legal aspect" of politics, not its advisability. Accordingly, when a judge assesses the legality of a political determination, he is not concerned - neither positively and nor negatively - with the merits of that determination. He does not make himself a part of it. He does not assess its internal logic, but examines only its legality according to legal standards. In doing so, he fulfils his classic role. I find it difficult to regard this as activity that ought to be avoided. Justice Landau discussed this in H.C. 295/65 [23], at page 334, stating:

> "Parliamentary supervision over the acts and omissions of the Executive is one thing, and legal supervision by this Court is another. When the complaint is clearly legal, it is appropriate for it to be clarified before a court. Nonetheless, it is clear that the Court will only intervene when there is a legal basis for doing so".

Justice Witkon reverted to a similar idea in H.C. 222/68, Mot. 15/69 [26], at page 165:

> "This contention (that the question is political and so not suitable for judicial determination - A.B.) ignores the special task of the judiciary, which never takes the place of the administrative authority, but merely reviews its decision".

Indeed, even when the subject of the decision is a politico-ideological problem, judicial review is always of a legal nature. The judge does not express his ideology, but rather his legal view of the legality of the ideology. This type of involvement in ideology is legitimate for the judiciary. Justice Witkon stressed this in H.C. 58/68 [30], at page 532, when he stated:

> "The court must at times take up a position on ideological questions and not be apprehensive about its competence to do so or about the effect

> that this may have upon its prestige... It is no longer either realistic or even desirable to maintain that these questions fall outside the judicial sphere".

In this context President Agranat's statement, *id*. at page 600, should be added, as follows:

> "Strict justice does not require us to take up a position on the above ideological problem, since it is clear that there is no consensus of opinion in respect thereof among the enlightened section of the public and that any position we adopt would rest solely upon our own private views and personal predilections. After all, the principle of the rule of law means that a judge must as far as possible refrain from preferring his personal ideas of what justice demands for the solution of the dispute before him, since otherwise suspicion might arise that instead of being the interpreter of the law, he has adjudicated according to his own arbitrary whims.... If a problem of weltanschauung arises before him as to which the opinion of the enlightened public is fundamentally and uncompromisingly divided - the judge would do better -- and especially so if the differences arouse public agitation - to restrain himself from expressing his private view on the problem, provided he finds a judicial way of doing so".

I agree with this statement. The judge must always restrain himself from expressing his personal opinion, but this statement does not mean that an ideological argument which has a legal aspect is not justiciable. As for me, I see no conflict between Justice Witkon's approach which states that "The court must at times take up a position on ideological questions" (H.C. 58/68 [30], at page 532), and President Agranat's approach that "the judge would do better...to restrain himself from expressing his private view on the problem" (*id*. at page 600). Indeed, the petition in H.C. 58/68 [30] was decided on its merits, and even the minority, which sought to dismiss the petition, did not base its approach on the claim of non-justiciability. Indeed, more than fearing that legal involvement in "political matters" will cause the "politicization of the judiciary", I fear that the court's abstention from "political matters" will harm the rule of law and undermine public confidence in the law. The

following statement by Justice Landau in H.C. 295/65 [23], at page 334 is applicable to our matter:

> "Regarding 'justiciability', I am of one mind with my esteemed colleague, the Deputy President. The issue which we were asked to decide falls within the bounds of paragraph 7(b)(2) of the Courts Law, 5717-1957. The State Attorney proposed that we act with a measure of 'judicial restraint'. True, this is a fine quality, but I am not persuaded that it must intervene between what the law prescribes on this occasion and its application in practice. I do not believe that there is a risk herein of disrupting relations between the branches of Government, as argued by Mr. Bar-Neev; but there is risk of impairing the citizen's confidence in the rule of law if we waive the power granted us. Proper balancing of governmental powers between the various branches requires that when the Knesset transfers important legislative powers to the executive, the power of reviewing secondary legislation should remain in the hands of the judiciary".

This statement applies not only to the court's review of secondary legislation, but also to the review of every governmental act of the administration. Relieving the court of its power of review, solely because the dispute subject to review has a "political" aspect - even though it can be resolved according to legal standards - is likely to harm the rule of law and public confidence therein. The outcome of institutional non-justiciability - as with lack of standing - is the creation of an area in which there is law, but no judge. The real import of this outcome is that there is neither law nor judge. Such an outcome is problematic for the separation of powers, the democratic regime and the rule of law. But it is therefore only natural, President Agranat noted dismissing the claim of "non-justiciability" where a recent invasion of a holy place had occured: "The fundamental principle of the rule of law requires that the Court's hands not be tied, on the basis of the justiciability doctrine alone, from intervening for purposes of upholding public order" (H.C. 109/70 [52], at page 249). Indeed, "There are two prohibitions safeguarding exercise of powers, which we must be careful not to violate: on the one hand, that we not exceed the bounds of our authority, and on the other that we not hesitate to exercise it to its fullest extent" (Justice Witkon in H.C.

321/60 [53], at page 208). A similar idea was expressed back in 1821 by Justice Marshal in the case of *Cohens v. Virginia* (1821) [70], at 181:

> "We have no more to decline the exercise of jurisdiction which is given to us than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty".

I suspect that recognition of institutional non-justiciability transgresses these two "prohibitions", and harms our unwritten Constitution.

54. An examination of the considerations at the base of the principle of institutional justiciability (or non-justiciability) reveals their inherent weakness. Indeed, in the United States the theory of institutional non-justiciability has been limited to judicial review of the constitutionality of a statute. In the United States, the institutional non-justiciability principle is not used with regard to the legality of the administration's actions within the scope of a valid statute. It would seem that the reason for this is that, if the political authorities are not satisfied with a judicial determination, they have the power to change the law, and thus bring about the political arrangement which seems proper to them. This is the situation in Israel today, and accordingly it is doubtful whether the "political question" issue should be learned from American case law, which is based upon a different constitutional background. Indeed, courts in Israel have sensed the weakness of the institutional non-justiciability doctrine. Hence the approach that this doctrine does not apply when the petitioner complains about an impairment of his right, such as the infringement of his right of property (H.C. 606,610/78 [24], at page 124; H.C. 390/79 [54], at page 14). On its face, this "exception" is surprising, because what is the significance of an injury in the private domain, if the judicial determination harms the separation of powers principle, the democratic regime, and public confidence in the judiciary? But this was not the approach of the courts. They felt that the role of the court is first and foremost to defend individual rights which have been violated, and that the countervailing considerations are not weighty prevent performance of this task. This is indeed enough to the proper attitude to fare. Yet, the role of the administrative court is just as much to protect the rule of law and the public

confidence in the rule of law (see paragraph 21, *supra).* Indeed, examination of Supreme Court decisions reveals that the plea of institutional non-justiciability was allowed only in a few instances, and that in most cases where the Court relied on this plea, it was primarily based on normative non-justiciability or no distinction was made between the two types of justiciability. It seems that the leading cases of institutional non-justiciability are those related to judicial review of the legality of the administrative decisions of the Knesset and its organs, while at the same time it has been stressed that this doctrine "is not necessarily the doctrine of non-justiciability" (H.C. 73/85 [22], at page 162).

55. And yet, despite this critique of the "institutional non-justiciability" doctrine, it is difficult to ignore the fact that the public is not likely to make a distinction between judicial review and political review, and is likely to identify judicial review of the political issue with the issue itself; it is likely to identify judicial determination that a governmental action is lawful with a judicial position that the governmental action is desirable; it is likely to maintain that a judicial determination that a governmental action is not lawful is equivalent to the judiciary's negative position towards the action itself; it is likely to find that the judicial determination that a governmental action is reasonable is equivalent to a judicial determination that that position is desirable; it is likely to equate the legal determination with a political viewpoint. The judge has more than once considered this concern *(see,* for example, H.C. 58/68 [30], at page 523, by Justice Landau). As Justice Landau noted in H.C. 390/79 [54], at page 4:

> "This time we have proper sources for our holding and we need not interject into it our personal views as citizens of the State, and we are even forbidden from doing so when sitting in judgment. But the fear is still great that the Court will be seen as having forsaken its proper place and lowered itself into the arena of public debate, and that our decision will be received by a section of the public with acclaim and by the other part with complete and emphatic rejection. In this sense I view myself herein as one whose duty it is to decide according to the law in every matter duly brought before the court. This actually imposes great pressure on me, being well aware at the outset that the general public will not pay attention to the legal reasoning, but solely to the final

> conclusion, and thus the true standing of the Court as an institution is likely to be harmed, beyond the controversies which divide the public. Yet there is no way out; this is our role and our duty as judges".

And I made a similar point when I said in H.C. 428, 429, 431, 446, 448, 463/86, Misc. H.C. App. 320/86 [12], at page 585:

> "The entire issue occupies an important position at the centre of our constitutional life. It is intertwined with questions regarding the rule of law and the law enforcement on questions regarding the President's power to pardon and its operation. We deal with all these matters from a legal viewpoint. The entire issue stirs up public opinion but this is not what what directs our course. We act according to constitutional standards, and according to fundamental legal principles which reflect the "credo" of our national life. Passing moods do not guide our attitude but rather fundamental national conceptions of our existence as a democratic state... We know that the entire issue is subject to public debate, and that from the dynamic political perspective our decision is likely to serve as a factor in the conflict of political forces. We regret this, but we must fulfil our judicial function...".

The key question is, what weight should we give this fear? In his article *Politics and Law,* Justice Witkon said, at page 69:

> "It seems to me that the aversion to judicial consideration of political questions is, to a great extent, irrational in origin. In terms of pure logic, it is difficult to justify it".

However, as we know, "the life of the law has not been logic; it has been experience" (O.W. Holmes, *The Common Law* (Boston, 1881) 1. The life of the law is logic and experience together. Hence the Court's readiness, in certain situations, to refrain from exercising its jurisdiction, thereby contravening one of the two "prohibitions" noted by Justice Witkon where there is a fear of "politicization of the judiciary", of confusion

between the political and legal realms and of impairing the Court's prestige. As stated, this Court has so refrained an respect of review of the Knesset's administrative actions. Even here, a plea of "political dispute "was not sufficient to prevent the Court from exercising its power. The Court took into account the special status of the Knesset and weighed the "political" factor against the other factors related to the rule of law in the legislature. Certainly this is not the only type of case in which the Court will dismiss a petition for lack of institutional justiciability. The list of such cases is not closed. Judicial life experience and expert sense will guide the Court in its formulation of standards for fashioning these cases.

56. What conclusion arises from our analysis of the issue of institutional justiciability (or non-justiciability)? In my opinion, it is that this doctrine is most problematic; that its legal foundations are shaky, that it is based to a great extent on irrational grounds; that it must be approached with caution; that only in special circumstances, in which the fear of harm to public confidence in the judges outweighs the fear of harm to public confidence in the law, should use of it be considered; that the list of such circumstances is not closed, and that it is determined, in the end, by the judicial life experience and according to the judge's expert sense.

E. From The General To The Particular

57. As noted, the lack of justiciability (or non-justiciability) doctrine has no independent status of its own. There is always the law, and legal standards to consider. Indeed, a number of legal provisions - both statutory and case law - apply to the dispute before us, from which legal standards are derived for the determination of the dispute. The question of the power to grant deferment of defence service is related to the interpretation of section 36 of the Law. We are concerned with an ordinary interpretative problem, decided according to the accepted interpretative standards. (Compare the remarks of Justice Brennan in the case of *Goldwater v. Carter* (1979) [71], at page 1007, according to which the question of whether the President is empowered to declare war is also a justiciable question, because "The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion"). It is inconceivable that the question of whether a governmental authority is functionally empowered to undertake a governmental act or not should be normatively non-justiciable. This is a question for which there are always a legal

norm and legal standards to decide it. Let us assume that section 36 of this Law did not exist at all, such that every deferment of service would have to be effected by an enactment of the Knesset. Would it occur to anyone that a petition which maintains that deferment of Yeshivah students' service is unlawful is "non-justiciable"?

The question of the exercise of discretion in the deferment of Yeshivah seminary students' defence service is determined by the usual criteria of the theory of administrative discretion. As we shall see below, we must assess whether the Minister of Defence's considerations are relevant or extraneous, and whether his decision passes the reasonableness test. This test is conducted entirely pursuant to the usual legal standards, and no question arises as to lack of legal tools to conduct it. Thus, for example, the reasonableness question is determined according to accepted standards, which pose the question of whether a reasonable Minister of Defence would be entitled to reach the decision regarding deferment of service. As to this issue, it will be necessary to assess the weight to be given to the various factors, and this assessment will also be conducted according to accepted standards for judicial review of an administrative act.

58. In my opinion, the theory of institutional non-justiciability does not apply to this petition. As we shall see, this petition should be determined entirely in accordance with legal standards. Is it conceivable to argue that public confidence in the judicial system would be impaired if the courts hold, for example, that the Minister of Defence is not empowered to grant deferment of defense service, and that the exemptions given up to now were in excess of his authority, and that as to this matter it is necessary to refer to the Legislature? In my opinion, the answer is that it is precisely if they refrain from ruling that the bounds of authority were overstepped, where there is a proper submission in this regard, that confidence in the courts would be impaired, and that confidence in the courts will be reinforce if they insist on the rule of law. And if this is the case regarding the holding that jurisdiction is lacking, then the same applies regarding the holding that jurisdiction exists. In both cases the court interprets the law, and this does not impair its status. The same applies to assessing the Minister of Defence's discretion. This assessment is carried out objectively, according to legal standards which have long been accepted. The determination that the Minister of Defence acted reasonably - as also the determination that he acted unreasonably - is reached pursuant to the usual legal tests.

The Court does not express any personal ideological position. It takes no position in the public debate. It expresses no position on the question of whether Yeshivah students should or should not be drafted. All the Court examines is whether a reasonable Minister of Defence is entitled to decide that Yeshivah students' enlistment should be deferred. It is true that "the question of whether or not to draft Yeshivah students is basically a public issue, resolution of which must remain in the hands of the political bodies, whose tasks include deciding this issue" (Deputy President Kahan, in H.C. 448/81 [2], at page 88), but the question of whether or not it is legal to grant a deferment to Yeshivah students is a legal question which must remain in the hands of the legal bodies whose tasks include deciding this issue. The politicians will decide the political question, while the judges will decide the legal question, the politicians considering the political factors and the judges the legal ones. It is true that deferment of the service of Yeshivah students has "very great public and ideological significance" (President Landau in F.H. 2/82 [3], at page 711). Likewise, I agree that the Court "was not designed to serve as an arena for public, ideological confrontations" (*Id*.). However, the judicial determination in the Petition before us does not concern the ideological aspect, and the judge does not descend into the arena of the ideological debate.

We are not deciding the question of whether it is proper to defer service for Yeshivah students or not. We are not taking any position at all on this question. We are merely deciding the question of whether the Minister of Defence has the power to defer Yeshivah students' service, whether he weighed the relevant considerations as to the matter, and whether his decision is a reasonable one. As to all of these, no ideological position is taken on the public question. Only a legal position is taken on the legal question. Accordingly, the determination that the Minister of Defence acted as a reasonable Minister of Defence would have been entitled to act in the matter of deferment of service does not mean that it is proper to defer Yeshivah students' service. Its sole import is that it is a factor which the Minister of Defence was entitled to weigh, and that the weight which he gave it is a such that the Minister of Defence was entitled to give it. True, it may be that the general public will find these distinctions difficult. I do not believe that this difficulty justifies our abstaining from a making a judicial determination. The public which finds it difficult to understand that dismissal of the Petition does not imply ideological agreement with the

public issue is the same public that will find it difficult to understand that allowing the Petition is not an ideological rejection. Indeed, whether we address the Petition or abstain from doing so, the fear exists that we will be misunderstood, but as President Landau said, "this is our task and our duty as judges" (H.C. 390/79 [54], at page 4).

In my opinion, the focal consideration which must guide us is the legal one. It harmonizes well with considerations of separation of powers and democracy, which require judicial review of the legality of the administration; it derives from the view that the court must insist upon observance of the rule of law in government. For these reasons it seems to me that the Petition before us is justiciable (normatively and institutionally).

Jurisdiction Of The Minister Of Defence

59. Now that we have surveyed the preliminary issues and arrived at the heart of the matter, we must examine the first relevant question surrounding the power of the Minister of Defence to grant deferment from defence service to Yeshivah students. The Petitioner's submission is that deferment of defence service for Yeshivah students is a matter for primary legislation not for administrative decision. This submission "should properly have been heard" (in the words of President Landau in F.H. 2/81 [3], *supra,* at page 712), and it is accordingly proper to examine i1 substantively.

60. The legal framework for the Minister of Defence's jurisdiction is set forth in section 36 of the statute. According to this provision, the Minister of Defence is entitled to defer by order the defence service of men of military age, "if he considers it proper to do so for reasons connected with the size of the regular forces or reserve forces of the Defence Army of Israel or for reasons connected with the requirements of education, security, settlement or the national economy or for family or other reasons". We find that the power to defer the defence service of men military age is given to the Minister of Defence. Nonetheless, this power is not general, but rather limited to certain "causes for deferment". Deferment of service on grounds not listed among those referred to, leads to deferment of service without legal authorization. Hence, we must examine whether the deferment of Yeshivah students' service fits into one of the grounds set forth in the statute. In my opinion, the answer to this is in the affirmative. The matter of the deferment of Yeshivah students' service fits partially

into the "grounds for deferment" concerning "the size of the regular forces", and into the "ground for deferment concerning "the requirements of education". The matter of deferment of Yeshivah students' service fits completely into the "grounds for deferment" for "other reasons".

61. The Minister of Defence is empowered to defer defence service for men of military age "for reasons related to the size of the regular forces" of the army. To the extent that the reason for deferment is related to the size of the regular forces, it falls within the power of the Minister of Defence. We are concerned here with the link between the reason for deferment (as a matter of discretion) and the grounds for deferment (as a matter of jurisdiction). As to this matter, we must turn to the Minister of Defence's affidavit, which indicates his considerations regarding this matter. As we saw *(see* paragraph 15, *supra),* the Minister of Defence lists the following among his considerations:

> "(3) The fact that the way of life of Yeshivah students is ultra-orthodox, and accordingly, induction into the army causes them serious problems in adapting to a society and culture which is foreign to them, and difficulties in strict observance of religious precepts. Thus, for example, they do not recognize the Chief Rabbinate of Israel's certification that food is kosher, while they themselves are divided between recognition of a number of special kosher certifications by various rabbis, and other daily practices of theirs are likely to give rise to many difficulties in the I.D.F's preparations to integrate them into its system;
>
> (4) The fact that the entire effectiveness of their service is subject to doubt, in light of the spiritual difficulty they experience from the neglect of religious studies, and owing to their special education and way of life.

These two considerations concern "reasons related to the size of the regular forces". The significance of these factors is that the Yeshivah students' service is problematic in terms of the army's needs and requirements. Deputy President Y. Kahan addressed this problematic nature in H.C. 448/81 [2], *supra,* at page 86-87, stating:

> "No one can foretell whether the enlistment of many thousands of religious seminary students, who will view their enlistment in the army as a blow to the foundations of their faith, according to which the study of Torah takes precedence over the obligation to serve in the army, will add to the I.D.F.'s fighting power, or, heaven forbid, harm such power. It is no way certain that this enlistment, even if it numerically increases the army's force, will not have far-reaching negative impacts upon the State's internal and external strength".

This statement was made in connection with negation of the Petitioner's right of standing, but a reflects the Minister of Defence's considerations as to the substance of the matter. We find that the Minister of Defence is entitled to defer the enlistment of Yeshivah students to the extent that his considerations concern the quality of their service. Nonetheless, it seems that this factor was not dominant among the Minister's various considerations, and accordingly I would not base his authority to grant deferment of service to Yeshivah students on that alone.

62. Another "ground for deferment" consists of "reasons connected with the requirements of education". This ground - as well as the grounds regarding the national economy and family reasons - is not limited solely to the education of the person as a better soldier. It extends across the State's "requirements of education". Within the scope of these considerations, the "requirements of education" of a particular segment of the population may also be taken into account. The Minister of Defence considered this "educational" factor, since among his other considerations *(see* paragraph 15, *supra),* the following are also included:

> "(1) Respect for the spiritual and historical obligation of students and teachers who are occupied full-time with religious study, to continuously uphold the value of engaging in religious studies;
>
> (2) The desire not to impair the stated principle which is transcendent and holy to a segment of the population in Israel and in the Diaspora."

In my opinion, these considerations fall within the definition of "the requirements of education". We were told that within this framework, the service of artists and musicians is deferred. There is an "academic reserve", which defers the army service of university students. I do not see how the educational needs of Yeshivah students differs from those of artists and musicians. Of course, there is likely to be a difference as to the substance of the Minister's deliberations, and the weight which he gives to the different factors, but I do not believe that there is a difference between the two regarding the nature of his power. Nonetheless, it seems that the dominant consideration regarding the deferment of Yeshivah students' defence service is the religious factor, while its educational aspect solely supplements and explains that factor and accordingly I would not base the Minister's power on this reason alone.

63. The third ground for deferment which concerns our matter is that which permits deferment of security service "for other reasons". As we saw *(see* paragraphs 7 and 8, *supra),* the original Defence Service Law authorized the Minister of Defence to grant deferment of defence service if he "considers that reasons connected with the size of the Regular Forces or the Reserve Forces of the Defence Army of Israel or with the requirements of education, settlement or the national economy, or family reasons, or other similar reasons, so require" (section 12). In the Defence Service (Amendment No. 7) Law this provision was amended, in the sense that the word "similar" was deleted. The reason given for this in the explanatory comments to the bill was "so as to eliminate any narrowing constructions". (Defence Service (Amendment no. 7) Bill, 5730-1970, at page 282). The said amendment was made after the Supreme Court's decision in H.C. 40/70 [1], and in view of the existence of the arrangement for deferral of Yeshivah students' service. In H.C. 448/81 [2], at page 85, Deputy President Y. Kahan emphasized this state of affairs, noting that "the amendment was made after the attempt to have this issue heard in this Court had failed". Nonetheless, neither in the explanatory comments to the bill, nor in the Knesset proceedings is there any hint that the proposed amendment was related to the question of the deferral of Yeshivah students' service. On the contrary: In the Knesset hearings on the Defence Service (Amendment no. 7) Law, the Minister of Defence noted that this is not an appropriate occasion to deal with the question of deferment of Yeshivah students' service, since this issue is totally unrelated to the bill (see D.H. 59 (5731) 98-99).

64. The Minister of Defence is thus empowered, to defer defence service "for other reasons". This authorization does not allow the Minister to consider any factor which seems to him, subjectively, to be appropriate. I assume - according to the classic example - that had the Minister chosen to defer the defence service of all "redheads" or of everyone belonging to a particular political party, this would not fall within the definition of "other reasons". The test of their relevance is objective, and it is determined in accordance with the purpose of the law and its object. In my opinion, these "other reasons" may include religious reasons. The power of the Minister of Defence is not limited solely to factors concerning the extent of the regular forces themselves. As we have seen, his power extends also to reasons related to the requirements of education, settlement and national economy, or family reasons.

All of these concern factors not necessarily related to the extent of the forces themselves, but, they also include non-security factors, which should properly be considered. There is therefore no reason to limit the "other reasons "to security reasons in particular. Indeed, legislative history and logic point to a contrary trend. Accordingly, the service of new immigrants or minorities may be deferred for "other reasons". Thus, for example, the enlistment of religious Druze who declare themselves to be religious is deferred pursuant to this provision. I see no reason why it is not possible to include within this framework the deferment of service of Yeshivah students for religious reasons. It is true that exemption of women from security service for "reasons of conscience or for reasons arising from the religious lifestyles of their family" is granted by virtue of the provisions of section 39(c) of the Law, but this does not mean that deferment of service for religious reasons is not included within the power to defer "for other reasons".

It must be remembered that while deferment of Yeshivah students' service is a matter within the Minister of Defence's discretion, exemption of women from defence service for reasons of conscience or for reasons arising from the religious way of life of their family is an exemption prescribed by law. The military authorities' discretion is solely as to proof of the existence of the reasons of conscience or of a religious way of life, of the family and when these are recognized, the military authorities have no power to refuse to exempt a woman, because the exemption is given to her as a right by the statute itself. Indeed, when an administrative authority takes into account religious considerations when exercising its

statutory authority, it does not exceed the bounds of its authority, so long as these considerations fall within the scope of the empowering statute. Thus, for example, the Minister of the Interior is entitled to take into account a religious concern as to daylight saving time (see H.C. 217/80 [7]); the Road Traffic Controller is entitled to take a religious consideration into account in closing streets to traffic on the Sabbath *(see* H.C. 174/62 [55]; the Food Controller is entitled to take the religious factor into account in ensuring the provision of food for Passover (H.C. 98,105/54 [56]). Similarly, I see no overstepping of the bounds of authority if, in exercising his authority to grant deferment of security service, the Minister of Defence takes religious factors into consideration. The need to ensure freedom of religion and the prevention of religious coercion do not prohibit consideration of the needs of a religious population. This need has existed since the establishment of the State, and it is natural to assume that within the broad confines of power granted to the Minister of Defence, allowed this factor can also be taken into account.

65. The Petitioner's general submission as to this issue is that deferment of enlistment of Yeshivah students is a matter of substantive, public importance, which applies to all inhabitants of the State, and accordingly it is appropriate that the Knesset expressly consider it and enact legislation regarding it. This submission has two aspects: first, that the arrangements for exemption for religious reasons must be determined by principal legislation, not by secondary legislation; secondly, that the provision in the principal legislation ought to be express and not implied. As to the first aspect, I accept that the grant of power to defer security service itself must be ensured in principal legislation. As we perceived, in my opinion this is ensured by the provisions of section 36 of the Law. As to the second aspect, I do not think - on the formal level - that general authorization ("for other reasons") is insufficient, and that each and every reason for deferment of service must be listed expressly.

Nonetheless, I accept - on the substantive level - that this state of affairs is not desirable. Indeed, pursuant to the principle of the rule of law it is proper that "primary arrangements" be determined in primary legislation, and expressly, and that the secondary legislator not be granted general authority to determine independently the primary arrangements (Y.H. Klinghoffer "The Rule of Law and Secondary Legislation" *Hed*

Hamishpat 11 (5717) 202 and 12-13 (5717) 222 and 14 (5717) 254). Professor B. Bracha correctly notes, *Administrative Law (Schocken, 5747) 95:*

> "Such a massive accumulation of legislative power in the hands of the administrative authorities harms the principle of the rule of law and constitutes a serious departure from the constitutional doctrine applicable in our day, of the separation of powers theory".

Justices Sussman and Witkon stressed this in H.C. 266/68 [57], at page 831:

> "Secondary legislation on a fundamental and highly significant matter, pursuant to an enabling statute, is likely to lead to a merely formal democratic regime. A true democratic-parliamentary regime requires that legislation be enacted by the legislature".

I myself would add that where the Knesset believes that the secondary legislator should be granted authority to determine primary arrangements - and this is likely to be justified at times in a modern state - then in addition it should also presiste that validity of these arrangements is conditional upon approval by the Knesset (in plenary session or in committee). Accordingly, it seems to me that justice is on the Petitioner's side because it is desirable, pursuant to principles of "a true democratic-parliamentary regime", that the Knesset take an explicit stand on the question of deferment of enlistment of Yeshivah students, and not be satisfied with the general and sweeping empowerment of the Minister of Defence to grant service deferments "for other reasons". If for one reason or another the Knesset believes that it is more effective for the realization of security needs that primary arrangements on this matter be determined by the Minister of Defence, the validity of the general normative provisions should properly have been conditioned on approval by the Knesset or one of its committees. In the matter before us, the Legislature has not so acted, but has left the primary arrangements ("other reasons") solely in the hands of the Minister of Defence. Nonetheless, I do not believe that it can be said that the Knesset's abstaining from determining the primary arrangements, and from supervising the Minister of Defences' arrangements means that that general empowerment is invalid. The Knesset saw fit to grant the Minister of Defence a broad power to prescribe grounds for exemption and deferment

"for other reasons", without reserving for itself the power of approval in this matter. We must respect this desire of the Knesset.

The rule of law does not apply only to government, but also to the judges. The Legislature, having determined that "other reasons" may serve as grounds for deferment of security service, obviously thus empowered the Minister of Defence to determine what these other reasons are. In light of the provision's structure and legislative history, it is clear that "the other reasons" are not necessarily related to security reasons, and they extend to non-security reasons as well. These include, in my opinion, religious reasons also.

We find that the Legislature expressly empowered the Executive to decide, according to its discretion, what "the other reasons" are which justify deferment of security service.

66. We have seen that the religious factor falls within the other reasons which the Minister of Defence is entitled to consider. Accordingly, it seems that the following factor which the Minister of Defence considered, is a legitimate consideration:

> "(5) Recognition of the deep public sensitivity of the topic embroiled in ideological debate among the Israeli public, and of the need for a delicate nationwide adjustment of disputes of this kind".

This consideration is added to the other four taken into account by the Minister of Defence, and creates an aggregate of considerations which, of themselves, the Minister of Defence was empowered to consider. The question is, accordingly, if these considerations are reasonable under the circumstances. We now turn to examination of this question.

Reasonableness Of The Minister Of Defence's Exercise Of Discretion

67. The array of factors which the Minister of Defence considered falls within the confines of the relevant considerations which he was entitled to take into account. But did the Minister give the proper weight to these considerations? This question transfers the centre of gravity of the legal discussion from the question of authority to the question of reasonableness. The statute granted the Minister of Defence discretion as to deferment of

service for security reasons. This discretion must be exercised in a reasonable manner. A reasonable exercise of discretion means, *inter alia,* allowing appropriate weight to the various factors (H.C. 389/ 83 [36], at page 445). President Shamgar stressed this in H.C. 156/75 [58], at page 105, stating:

> "Situations may arise wherein ministerial authority does not consider any extraneous factors, and only relevant factors are taken into consideration, but such a disproportionate weight is attributed to the various relevant factors that the final conclusion becomes inherently untenable, and for this reason, completely unreasonable".

Indeed, it is one thing to defer defence service of a particular category men of military age for one year or for a fixed period of studies, which in practice will cut minute in defence service (as is done, for example, with those in the academic reserve); it is another matter to defer defence service for an unlimited period of studies, which is likely, according to its natural progression, to lead in practice to an exemption from security service (as occurs with most Yeshivah students). Likewise, it is one matter to defer security service of 800 Yeshivah students (as was the case in 1975); it is another matter to defer the enlistment of 1,674 Yeshivah students (as was the case in 1987). Accordingly, the question is whether the Minister of Defence's discretion was exercised, under the circumstances, in a reasonable manner: the Petitioner's Submission is that the Minister of Defence's discretion was exercised in an "extremely unreasonable manner". In contrast, counsel for the Respondent argues that, in weighing the various considerations:

> "The Minister of Defence did not ignore the consequences of deferment of Yeshiva students' service (including students, teachers, and those adopting a religious way of life) on the expect of the regular and reserve forces of the I.D.F. and on deployment of the State of Israel's security needs, yet he arrived at the decision not to draft into the I.D.F. this type of candidates for service. In the end, upon balancing all the various factors, those justifying long-standing arrangement for non-integration of Yeshivah students of the type described into I.D.F. service, prevailed in the end".

Counsel for the Respondent adds that:

> "The honorable Court will not substitute the Minister of Defence's exercise of discretion for its own. The Minister of Defence has considered all the reasonable possibilities according to their appropriate weight, and chosen from among them the way which seemed most reasonable and proper to him. The facts do not reveal grounds for intervention of this honorable Court in this exercise of discretion".

68. The question of how to weigh the factors on which deferment of Yeshivah students' service is based is a difficult one. Deferment of Yeshivah students' service is itself a highly controversial matter in Israel. "Serious and real differences of opinion" exist as to it (in the words of Justice Elon in Cr. A. 54/81 [59], at page 832, regarding the enlistment of religious girls). There are those who think that:

> "There is no significance to the land of Israel and to the State of Israel without young men who study Torah, who cling with all their heart and all their soul to their mission in their whole way of life. While it is the... I.D.F. that protects the body, the Yeshivot protect the soul. I.D.F. protects Jews while and the Yeshivot protect Judaism... Yeshivah students are volunteer pioneers who give up private material gain and devote themselves to the spiritual values that the soul of the nation is dependant upon" (Rabbi M. Z. Neriyah, "Yeshivah Students and Their Enlistment" (Gvilin, 5728) [A] - quotations from this article were annexed to the Respondents' Affidavit).

In contrast, there are those who think otherwise:

> "This is a strange partnership, I send the Yeshivah student to learn in my stead, and he sends me to be killed in his stead. It is revolting". (Brigadier General Nehemyah Dagan, I.D.F. Chief Education Officer, in an article annexed to the Petition).

Within the religious camp itself, different and varied opinions on this issue exist *(see,* for example, Rabbi Z. Y. Kook, "Precepts relating to the Land of Israel" *The Paths Of Israel* (Collection of Articles, Menorah, 5727) 114-123 (B); Rabbi S. Y. Zevin, "Enlistment of Yeshivah Students" (Letter addressed to Rabbis and Heads of Yeshivot, 5708) [C] - which regate deferment of service for Yeshivah students; in contrast, see Rabbi Y. M. Tikutchinsky, "Exemption of Yeshivah Students From Enlistment" *The Torah and The State, Issue E-F*(5713-14) 45-54 [D] - which gives the Jewish law basis for releasing Yeshivah students). It is well known that religious young men have served in all of Israel's wars, have given their lives for the state, and indeed they continue to serve in all I.D.F. units (whether in special combined religious study and defence service programs, or outside them).

Accordingly, we are concerned with an issue as to which there is no national consensus and which is subject to fierce debate. It seems to me that in the State of Israel, in which all the various currents of Judaism and Jews are interwoven, and in which a modern society has been built on the substructure of a prolonged history, each of the opposing factors is legitimate, such that a reasonable Minister of Defence is entitled to take it into consideration. Israeli society is a pluralistic one, which contains many and varied opinions as to various public and social issues. The question of deferment of Yeshivah students' service is one of those issues. Some take the view that the State cannot exist without deferment of their enlistment, whereas others take the position that the State cannot exist without their enlistment. There are those who see deferment of their enlistment as a noble act, and there are those who see it as a disgrace. There is no social consensus on the issue.

Under these circumstances - and against the background of my attitude that the religious factor itself is a relevant consideration - I do not think that it can be said that the Minister of Defence's position is so unreasonable, to the point that no reasonable Minister of Defence in Israel is entitled to assume it. A democratic regime is based on tolerance for the opinions of one's fellow men. This at times even amounts of toleration for an intolerant opinion. In a pluralistic society, toleration is a uniting force, which makes co-existence possible. Accordingly, readiness to consider the various positions, with an effort to smooth

the edges of the conflict, does not seem unreasonable to me under the circumstances of the matter. Consideration of it is demanded by the position of the "enlightened public".

It should also be remembered, that alongside the religious-educational consideration is also the military consideration, according to which the service of Yeshivah students is likely to harm more than it helps. In taking all of these into account, against the background of the State's security needs, the Minister of Defence was entitled to reach the decision he came to. It falls within the confines of the "realm of reasonableness" of his discretion. To be precise: the Minister of Defence was also entitled to reach a different decision. He was entitled to think that too many men have been draft deferment, and that the policy should be changed on this issue. Indeed, the decision the Minister of Defence reached is not the only decision he could have reached as to the problem before us. It is one of the lawful decisions which the Respondent was entitled to reach.

69. In balancing on the various considerations on which the Minister's exercise of discretion under section 36 of the statute is based, the overwhelming consideration must be end of security. To that end defence service itself was instituted, and some of the exemptions from defence service are formulated in this spirit as well. It is only natural that non-security considerations, such as those of education, family and the other reasons, are relatively insignificant, and that they should be taken into account only if they cause relatively slight harm to security. Accordingly there is ultimate significance to the number of Yeshivah students whose service is deferred. There is a limit which no reasonable Minister of Defence may cross. Quantity makes a qualitative difference. As to this matter, the Petitioners have not discharged the burden placed on them of showing that harm to security is more than slight.

70. Up to this point I have examined the reasonableness of the Minister's decision. As I have determined that in my opinion the decieved is reasonable, our judicial review is concluded. As is known, under the prevailing rule, we do not substitute, in these types of matters, our discretion for that of the government:

> "The question is not what would we, as Justices of the Supreme Court, would decide, were the power in our hands. The question we must

> decide is whether a reasonable... minister in the respondent's position would have been entitled to reach the conclusion which the respondent reached" (H.C. 297/82 [60], at page 42-43).

Indeed, we are not asked to express our opinion, as ordinary citizens, on the question of whether it is proper to defer the defence service of Yeshivah students. This is a question on which we have our private views, to which we may not give any expression to in our judicial determination.

Our judicial review centres on the question of whether a Minister of Defence may consider the religious factor, and if the weight given to this factor by the Minister of Defence is reasonable under the circumstances. The question is not as to the force of which factor is the most persuasive, but whether the factor considered is legitimate, such that a reasonable Minister of Defence would have been entitled to consider it and give it the weight given to it in practice. As to these questions, my answer is in the affirmative. Whatever opinion on the issue of deferment of enlistment of Yeshivah students - and this opinion is completely irrelevant - I accept that a reasonable Minister of Defence would be entitled to take this consideration into account, to give it the weight which the Respondent gave it, and to arrive at the arrangement which the Respondent arrived at. This approach fits in well with the separation of powers principle I have already discussed *(see* paragraph 51 , *supra).* The court engages in judicial review - which is one of its principal sometimes - this review is not an expression of a political viewpoint, but insistance on the lawfulness of the balancing process carried out by the political branch. Thus the democratic principle is expressed (paragraph 52 *supra).* This approach does not harbor any "politicization of the judiciary". It does not involve any descent into the arena of public debate. It does not involve subjectivisation of judicial discretion, but rather normal judicial activity, as practised by us over many years within the scope of judicial review over decisions of the executive.

71. In the section on justiciability I noted that on the normative plane every action is "justiciable", since as regards to every act, the law takes a position as to whether it is lawful or not. I stressed that every legal problem naturally has legal tools for its solution. Take the question before us, which is concerned with the reasonableness of the Minister of Defence's decision.

On the legal plane the question is whether the weighing by the Minister of Defence of the considerations supporting the deferment of Yeshivah students' security service as against those supporting non-deferment of enlistment, is reasonable. This weighing up is determined as we saw, pursuant to the purpose of the law and its object, as these are interpreted against the background of the fundamental principles of the system and the outlook of the enlightened public in Israel. As I noted, there is deep disagreement among the Israeli public on the question of the enlistment of Yeshivah students, and the enlightened public's opinion is itself divided.

Under these circumstances, my opinion is that the Minister of Defence is entitled to take into consideration the religious factor (alongside educational and military considerations). The purpose and object of the statute prevents the Minister of Defence from giving this factor a weight which will ultimately cause substantial harm to the security of the State. But so long as the harm is not substantial, I believe that an Israeli Minister of Defence is entitled to consider this factor. Moreover, it is precisely the absence of a national consensus and disagreement within the "enlightened public" which reinforce the recognition that, in a democratic society built upon pluralism and tolerance, the Minister of Defence is entitled to consider this factor, so long as security is not harmed. In any event, there is no basis for our intervention in the Minister's decision, which falls within "the realm of reasonableness". This outcome can also be presented in terms of burden of proof. One can say that he who bears the burden of showing that the Respondent's decision is unreasonable has failed in his task, and the presumption of reasonableness which governmental action enjoys, has not been refuted.

Dismissal of the Petition in this situation does not arise from material non-justiciability of the matter, but rather from the Petitioner's inability to show that the government acted unlawfully. These two factors are not the same. Thus, for example, if the number of those whose service is deferred because of Torah study were to increase, until it encompassed a much greater number of men of military age, such that security would be harmed, the moment will surely arrive when it will be said that the decision to defer enlistment is unreasonable and must be declared invalid. This could not happen if the viewpoint is that the issue is non-justiciable.

Additional Submissions

72**.** In the course of the Petition, the Petitioner raised additional submissions, which I should like to refer to briefly. He claims that deferment of the enlistment of Yeshivah students is invalid because it is granted pursuant to a coalition agreement reached by the parties which constitute the Government.

We cannot accept this submission. The coalition agreement is an accepted device in Israel. It constitutes a framework for political consensus between parties. It cannot, of itself, make an action lawful which is otherwise not lawful. One cannot agree in a coalition agreement to engage in actions which are forbidden under the law. Similarly, the fact that a particular action is included in a coalition agreement does not make that action unlawful, if, were it not for the agreement, the action would be lawful.

Moreover: the coalition agreement is likely to impose a duty, under public law, to work towards its implementation. The rule is that a coalition agreement cannot limit statutory discretion (see H.C. 669/86, Misc. App. H.C. 451, 456/86 [61]). Accordingly, to succeed in his submission, the Petitioner would have to prove that the Minister of Defence acted as he did solely because of the coalition agreement, and were it not for the agreement, he would have acted differently. The Petitioner has not discharged this burden.

73. The Petitioner attached to his affidavit a number of letters written by Ministers of Defence, including the Respondent, to a citizen by the name of Moshe Shapira, in which they expressed their positions regarding deferment of Yeshivah students' enlistment. Thus, for example, Minister of Defence Ariel Sharon wrote in 1982: "As Minister of Defence I am not happy at the fact that the enlistment of students of ultra-orthodox Yeshivah students, as opposed to students of Hesder Yeshivot (combined religious studies and defence service), is deferred... however there is a certain reality which was brought about upon the establishment of the State and it is not within my power to alter it". Similarly, the Minister of Defence Moshe Arens wrote in 1983: - "the decision to defer the enlistment of students occupied full-time with religious studies is anchored in government decisions and it is not within my power or my jurisdiction to change it".

There is no doubt that the ministers erred as to everything related to the legal aspect. The power to grant deferment of defence service is exclusively that of the Minister of Defence. It is not the Government's power, although it could - with the consent of the Knesset - transfer the Minister of Defence's power to another minister (Section 30 of the Basic Law: The Government). It is within the Minister of Defence's power to alter such decision. Minister of Defence Yitzhak Rabin - the Respondent in the Petition before us - wrote to Mr. Moshe Shapira in 1985 as follows:

> "My predecessor indicated not only the formal fact that it is not within his jurisdiction to change the decision, but added that it is also not within his *power* to change it. As Minister of Defence, I would be happy if *all* able citizens of the State would take part in the defence of the homeland. However, there is a reality, that under existing conditions, cannot be altered".

One year after this letter, Mr. Rabin wrote that the decision of the Ministerial Committee regarding the enlistment of Yeshivah students "binds the defence system". As noted, it is the Minister of Defence that is empowered to decide the matter of deferment of the enlistment of Yeshivah students. In his affidavit of response, the Minister of Defence did not reiterate the submission that he is not entitled to decide the matter, but rather explained the motives that caused him to reach this decision. Regarding the letters referred to, the Respondent repeated his explanation - via his assistant Mr. Haim Yisraeli, as follows -

> "The Minister of Defence Mr. Yitzhak Rabin, after weighing all relevant considerations regarding deferment of the enlistment of Yeshivah students... has arrived at the conclusion that the circumstances do not justify a change in the policy determined by Governments of Israel on the subject at issue, and accordingly by the Ministers of Defence who preceded him. In the same way, he is continuing his activity in other matters in accordance with the Government's policy. The passages that the Petitioner cites from the letters of three different Ministers of Defence, who served at various times, and who had differing political

> outlooks, merely strengthen the argument that the Ministers of Defence exercised their discretion, each in his day, taking into account general, national considerations, which are, as stated, reasonable, relevant and legitimate".

We find that the Minister of Defence is aware that the power is his, and he believes that it is appropriate, in the existing reality, to make use of it as he does in practice. The fact that the Minister of Defence is not "happy" about this decision does not impair its lawfulness.

CONCLUSION

74. I have therefore reached the conclusion that the Petitioner has lawful standing, that the issue which he raises is justiciable (materially and institutionally), but that the Petition must be dismissed on its merits because the Minister of Defence is authorized to grant deferment of defence service to Yeshivah students, and it was not proven that the exercise of his discretion is, under the circumstances, unreasonable. To be precise: I have not expressed my opinion at all as to whether deferment of Yeshivah students' service is proper. All that I have determined is that a reasonable Minister of Defence is entitled to consider this matter.

One may ask: would it not have been wiser to adopt the approach taken in the past, pursuant to which the Petitions were dismissed *in limine,* without addressing them substantively, rather than substantively dismissing the Petition.

My opinion is that the answer to this question is naturally in the negative, and this is for two reasons: *first,* that in most petitions, alongside the dismissal *in limine* there was also a discussion of the substance of the matter; *second* - and this is the primary reason in my opinion - the rule of law is strengthened if a court examines the lawfulness of the a governmental action on its merits, and reaches the conclusion that it is lawful. The rule of law is impaired if a court refuses to examine substantively the lawfulness of an action, since it may be unlawful, and it thus remains suspended *"in limine"*. Failure to strike down such an action impairs the rule of law. Take the example before us. Recognizing the standing of the Petitioner, and the justiciability of the Petition, permitted substantive discussion of the

topic. In the existing circumstances we decided that the Respondent's exercise of discretion is lawful. These circumstances may well change. A decision which is reasonable in a particular set of circumstances may be unreasonable in a different set of circumstances. Deferment of Yeshivah students' defence service is a decision which must be reverted to and examined from time to time, against the background of changing security needs and with a practical and open-minded approach *(See* H.C. 297/82 [60]).

The Minister of Defence's discretion is an ongoing one. With the dismissal of the submissions regarding lack of standing and justiciability the Minister's discretion is subject to re-examination, if the circumstances so justify. The lawfulness of the government will be ensured. The Court will fulfil its mission as guardian of the rule of law, the separation of powers, and democratic values. And could there be a better outcome than this?

The result is that the Petition is dismissed. There is no order regarding costs.

BEN-PORAT, FORMER DEPUTY PRESIDENT: I have studied closely the profound opinion of my esteemed colleague Justice Barak, and I can say at the outset that on the substantive issue (beginning with paragraph 61), I accept his position without reservation, along with the outcome, pursuant to which the Petition is dismissed. I might add as to the issue of reasonableness, that on examining whether the decision of the Minister of Defence I disregarded my personal stance, because (as explained below), this is not the determinative test.

More involved and complicated is the question of the scope of the right of standing which should ideally be granted to those who apply to this Court, as well as the question of the justiciability of the various issues.

My esteemed colleague correctly noted that the *general rule,* according to which a right of standing is not given to a "public plaintiff", should be preserved, while the instances in which this Court will be accessible to a plaintiff of this type should properly be *exceptional. I* also agree that there is no contradiction between maintenance of separation of the three powers and maintenance of judicial review to ensure that each power acts in accordance with the law. On the contrary, one can even say that these matters are quite

compatible, and that review upholds the principle of separation in its proper form. If an authority acts out of bias, in excess of jurisdiction, from discrimination, arbitrariness or extreme unreasonableness, it must know that the Court is vigilant, and is empowered to prevent actions of this type. However, everyone agrees that the Court does not act in this manner on its own initiative, but rather that someone's petition must be before it. *Normally* the petitioner must be the injured party (or the party likely to be injured) by the authority's decision or action, but in exceptional cases a petition filed by someone who is not *personally* injured (or likely to be injured) will be heard.

As my colleague noted - and I will not repeat the authorities he brought - it is sufficient that the petitioner was thereby hurt not directly, but rather as one of a group of people, and at times - when the subject action is particularly grave - as a member of the general public. The borderlines of the exceptions are quite blurred, and the considerations are likely to vary from case to case. In my opinion, so long as there is a specific injured party, who is likely, able, and even required - according to the dictates of common-sense - to be interested in attacking the authority's decision or action, I would hesitate greatly before recognizing the right of standing of any other person (who is not his "'long arm"). Nonetheless, in (for example) a case involving corruption on the part of an authority, or an act likely to seriously harm the state's image or a public interest, I would tend to recognize the right of standing, for the reason which I will clarify below, of even a petitioner who did so solely for publicity purposes. Despite all the differences between a regular trial in other courts and the nature of a petition to the High Court of Justice, it should be remembered that even if the defendant does not rely on a claim of illegality, *the Court will initiate* consideration of this question, on condition that it is manifestly clear or proven beyond any doubt, that the action at the center of the hearing (such as a contract entered into) is indeed stricken with illegality *(see:* C.A. 365,369/54 [62], at page 1615-1616, and the authorities cited therein). And if this is the case in a private matter, all the more so in a public matter affecting the actions of an authority. However, here, as there, an application must be made (a complaint or a petition, as the case may be), whose scope allows for this type of initiative.

In general terms, I would therefore say that *primarily,* an exception may be made from the rule where the topic is of great public import, and there is *no* specific "injured party" (or specific person likely to be injured) who ought to be interested and who himself may attack

the authority's action. This, for example, was the situation in the petitions filed at the time by many petitioners on the non-extradition of William Nakash (H.C. 852,869/86, Misc. H.C. App. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1,33/87 [15]).

When it is decided *not* to extradite a person, obviously that person will not consider attacking the decision (because if he wants to stand trial in the foreign country, there is nothing preventing him from doing so). This means that without granting access to a public "petitioner" or "plaintiff", the decision would not be subjected to examination at all. This, of course, is the rule in cases in which a particular citizen enjoys a benefit as a result of discrimination, or in exchange for bribery, or similar scenarios, in which no injured party will want to complain about such flagrant conduct, except for a citizen who cherishes ethical standards in government. This consideration, which in my opinion is self-understood, was aptly expressed in the words of Professor Wade, *supra* at 577-578, cited by my colleague, and I will repeat them for my part:

> "In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to any one in particular. If no one has standing to call it to account, it can disregard the law with impunity. An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down".

Incidentally, even where it is appropriate to provide wide access to the courts, a proliferation of petitioners should as far as possible be avoided. This topic addressed by President Shamgar in H.C. 852,869/86, Misc. App. H.C. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1,33/87 [15], and I have merely to support his position.

Nonetheless, it is not desirable that the general rule become the exception, and vice versa. I would also hesitate to remove all the barriers, to permit an application every time a petitioner complains that the authority has engaged in an unlawful action. Justice Barak also agrees that the claim of illegality *alone* is insufficient for purposes of recognizing the "public plaintiff".

However, I am in favour of further narrowing of the area of exceptions. *In general* I approve of Justice Berinson's approach, expressed in several of his decisions, according to which it is best to keep away from rigid rules, and to prefer flexibility, while weighing the seriousness and public importance of the problem, "and the more important the issue from a public perspective, the greater the court's tendency to recognize the right of the petitioner, even though he is a rank-and-file citizen, to bring it before the court" (from H.C. 26/76 [9], at page 802). However, reading the opinion of my esteemed colleague Justice Barak, or at least reading between the lines, a tendency towards excessive broadening of the area of exceptions emerges. For example, my colleague says in paragraph 23:

> "True, 'where there is no complainant, contention ceases', but why must the complainant complain only as to a right of his which has been violated, or an interest of his which has been harmed; why could he not complain as to a law which has been contravened? What is the moral basis for the view that he who claims that his money was unlawfully stolen can apply to the court, but he who claims that the public's money was unlawfully stolen cannot do so? What is the fundamental argument based on legal theory and the separation of powers theory that justifies this distinction? In my opinion, it is unsupported. Indeed, my approach is that the requirement that a right or interest exist as a condition for standing under the law is a requirement without any philosophical basis, which is not based on the separation of powers, does not rest on moral grounds, and impairs the rule of law".

I fear that this approach is too far-reaching. A person who claims that he was personally harmed - such as by denial of an exemption from taxes - and even in respect of a modest sum, is different from one who claims that *another person received* an unlawful

exemption and thereby public funds were expropriated. The considerations, from a philosophical and even a moral (and not just pragmatic) perspective, are different in the two cases.

The rationale guiding me is that it is not insignificant that paragraph 15(c) of the Basic Law: The Judicature states that this Court is empowered to hear "matters in which it deems it necessary to give relief for the sake of justice..." (emphasis added - M. B-P). *Relief* is given to a person who is injured (or likely to be injured), although if the government action is serious, or the public problem is of great importance, then, and only then, *every* individual from the public can be seen as "an injured party", and deserving of relief. In other words, because of the gravity of the action or the seriousness of the public problem, *the petitioner, who in normal circumstances would be dismissed in limine as a "public plaintiff" also has protected interest.*

I am aware of the fact that my esteemed colleague dealt separately with the moral-philosophical side on the one hand and the practical and pragmatic side on the other, where the latter must be based upon a proper balancing of the various considerations; however, the balance I strive for is more in the direction of restricting access to the court, as explained.

As for me, I also fear, more than my esteemed colleague, the tendency towards litigation is likely to lead to a flooding of the court with public claims, the handling of which is likely to waste precious time which will be irretrievably lost.

And now for the case before us: In light of the affidavit attached to the petition in support of the claim that the deferment of the service of students whose full-time occupation is religious studies is likely to have an impact upon the length of each individual's military service, I am prepared to join in the conclusion that a "right of standing", in its *narrow sense,* was proven in the Petition before us (being an injury to a personal interest).

I would reserve for further inquiry the demarcation of the limits of justiciability, although in general my opinion tends towards that of my esteemed colleague President Shamgar. In the end, I view this question as primarily involving *self-restraint by the Court*

in appropriate situations. Weighing up the need for restraint therefore should properly be based upon the facts and circumstances of the petition which is to be considered, at times (for example, because of the urgency and essential nature of the issue) at the outset of the proceedings and at times at the end. In any event, suffice it to say that I see no justification for refraining from dealing with the petition before us. If, heaven forbid, the decision to defer military service for particular groups is impaired by arbitrariness, by discrimination *between equals,* by a consideration which is extremely unreasonable, or by bias, why should the question not be examined by this Court in terms of *those aspects?* The substantive issue of deferral of the time period for military service is not of a character which justifies deeming it non-justiciable, whether from the normative or the institutional perspectives.

On the substance of the matter, as I stated at the outset, I agree with the reasoning of my colleague, Justice Barak, beginning with paragraph 61 of his opinion, and I see no need to repeat his reasoning. I will merely add that the point of view that people who are "occupied" full-time with religious studies have a unique status in certain situations, was found to be not unreasonable in another context (H.C. 200/83 [63]).

As I emphasized therein, *whatever my personal opinion,* the determinative test is whether the decision of the authorized person or body is impaired by one of the defects which call for our intervention. This is an entirely different question from the question of the outlook of the judge on the bench. Indeed, if there were another group of people of a different religion, who were also exclusively involved with religious studies, then it would *prima facie* be discrimination unless they were also granted deferment similar to that granted to Yeshivah students (compare with the holding in H.C. 200/83, supra [63]). Likewise, it may well happen that in the future, the extent of deferments will become a serious consideration as to the reasonableness of the Minister of Defence' attitude, to the point of justifying this Court's intervention. I do not believe that that is the situation today.

Accordingly, my opinion is also that the Petition must be dismissed.

PRESIDENT SHAMGAR: **Introduction**

1. The legal significance of deferment of enlistment of a number of Yeshivah students has again arise in this Court, and this time has been substantively examined.

2. (a) The central questions which I saw need to refer to in detail, are two-fold: first, the legal question of justiciability; second, the answer to the substantive question, which is: is deferment of service properly based upon the provisions of the law?

(b) My conclusion is that the issue before us is justiciable, and that it should not be concluded that the authority was exercised unlawfully.

Nonetheless, I will add and clarify below that my approach to demarcating the bounds of justiciability is somewhat different from that set forth by my esteemed colleague, Justice Barak.

3. Moreover, it should not be inferred from my concurrence with the legal outcome that I agree with the arrangement of non-enlistment of a some Yeshivah students, as it is practiced today. What do I mean by this?

It is true that it is assumed that the legal solution to a particular problem is rooted in legal norms and not in "the private views and personal predilections" of the judge, as stated by President Agranat in H.C. 58/68 [30], at page 600). For this reason, the Court generally abstains from expressing an opinion regarding circumstances which it does not see fit to address substantively from a legal point of view; however, sometimes the Court is forced to relate to substantive problems because of the nature of the topic brought before it (compare H.C. 62/62 [64]). The legal circumstances therefore impose upon the judge the need to relate to problems upon which he does not usually express an opinion.

Moreover, sometimes a problem lies on the borderline of the realm of reasonableness, and gives rise to serious doubts. In such circumstances it is not necessary - and at times not correct - for the judge to be satisfied with a declaration of the formal legal outcome, recognizing the reasonableness of the outcome under the legal tests applied by the Court, without expressing at the same time his evaluation as to the *location of* the existing solution *within the realm of reasonableness.*

In my opinion, this is what has happened herein: the existing arrangement regarding the release from military service of some Yeshivah seminary students (in contrast with other Yeshivah students who have served and continue to serve in all of Israel's wars, alongside with other men of military age) is indeed lawful, but from the practical perspective, it is, in my opinion, *unsatisfactory* and difficult acquiesce in. It raises weighty questions in the field of both public and personal morality, questions which are left unresolved. This statement is also made here so that the legal outcome will not blur the value-judgment, national and human, which in my estimation is a source of concern for a significant portion of the public.

To summarize this point: although from the legal point of view I see no place for this Court's intervention as requested in the Petition, I am not prepared to support the arrangement on as merits.

From here I move to a legal analysis of the problem before us.

Method Of Analysing The Problem

4. I agree that there are three questions to address, generally, in the issue presented to the Court in this Petition.

(A) The Petitioner's *right of standing;*

(B) The *justiciability* of the topic, that is: to what extent are we speaking of an issue which by its nature is capable of judicial determination, or whether this is not an issue of the type determination of which is best left to the decision of other authorities, being either the legislature or the executive;

(C) *The legal arrangement,* pursuant to which regular service certain Yeshivah students is deferred because they are occupied full-time with religious studies, such that they are, in practice, exempt from regular and reserve service.

The three topics noted above are not presented here in the order of priority by which they ought to be decided under all circumstances, because the order of dealing with these topics, as to a particular issue, depends, of course, on its nature and details.

5. (A) My esteemed colleague Justice Barak summarized the basic *facts* of this Petition in his decision, and I see no need to add anything further thereto. I likewise accept the description of the essence of the formal legal framework, being a summary of the relevant provisions of the Defence Service Law, as amended and consolidated.

(B) As to the question of whether the Petitioners before us have *right of standing,* my esteemed colleague Justice Barak answered in the affirmative.

In my opinion as well the Petitioners have right of standing. I will add nothing on this topic to my esteemed colleague's exhaustive discussion, because my opinion in this area corresponds to the approach indicated in his discussion, which has already been presented several times in the past, including in, *inter alia,* H.C. 852,869/86, H.C. 483, 486, 487, 502, 507, 512, 515, 518, 521, 523,543/86, 1,33/87 [15], at page 22); H.C. 1/81 [10], at page 372; H.C. 511/80 [20]; H.C. 428, 429, 431, 446, 448, 463/86, Misc. H.C. App. 320/86 [12].

(C) As to the question of *justiciability,* I should observe here, in a nutshell, that my esteemed colleague demarcates lines distinguishing between the realms of *normative* and *institutional* justiciability. He thinks that the issue before us is justiciable from both of the two aforementioned perspectives. As to the dispute on its merits, he has arrived at the conclusion that the Minister of Defence's determination on the subject before us conforms with the law and that it does not exceed the realm of reasonableness, that is: the decision is within the confines of those which a reasonable Minister of Defence could have reached in the circumstances, and accordingly, there are no grounds for the intervention of the High Court of Justice, as requested in this Petition.

The Procedural Stage In Which The Justiciability Question Arises

6. (A) The question of right of standing is the type of issue which is decided, usually, at the early stages of the proceedings; the question of justiciability can, in contrast, be decided by the court *at any stage* of the case, that is, even after clarification of the problem and following the hearing on its merits and particulars. In this regard I noted in H.C. 620/85 [33], at page 191, that when the High Court of Justice finds that it has jurisdiction to consider an issue, and that legal standards are available to decide it, it is nevertheless entitled to consider whether or not it is proper for it to intervene in the dispute brought before it, and even to abstain as a result thereof from judicial intervention. The conferred discretion on the court is, *inter alia,* a reflection of the need to create a balance between the various interests and functions of governmental authorities', including the interest in maintaining a separation which permits a different governmental body, which is in charge of such, to decide an issue of a *predominantly* political character. As mentioned, it is necessary in this context to note that, within the framework of a particular problem, there may be components or elements stemming from differing areas, some of a legal nature or having characteristics which permit judicial determination, and some clearly political. It was noted there that there are several topics having components in which the political element is combined with elements allowing for discretion and distinctions of a legal nature. I commented on this in H.C. 852,869/86, Misc. H.C. App.483, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1,33/87 [15], at pages 29-30:

> "...As far as I am concerned, I do not think that one can totally exclude the intrusion of political elements into litigation before the High Court of Justice. It is true that the standard applied by the Court is a legal one, but most of the constitutional issues also contain political elements, in the various senses of this concept, and the question is, in general, what is the *dominant* characteristic of the dispute. One cannot, therefore accept the proposal that the Court should withdraw from consideration of these topics because of some such incidental political characteristic. On the contrary, examination of an issue on a legal and normative basis can free the problem, not infrequently, from dependence on the concomitant political attaches, which are liable to cloud the true nature of the problem.

> Fundamentally, even if a particular problem has political aspects, the standard applied by the court is a legal one, and whether the issue is appropriate for consideration before the courts is examined solely pursuant to such standard. Hence this Court considers whether there are legal grounds - from among those discussed in paragraph 15 of the Basic Law: The Judicature - so as to decide whether to allow access to a petitioner, and in light of this standard, the personal standing of a particular person as a Knesset member ought not to add or detract anything while the *ancillary* political characteristic of a particular dispute does not and need not alter in any way the justiciability of a problem, if it is indeed, *predominantly, a* legal problem" (emphasis added - M.S.).

However, the contrary is also true, that is, it can happen that the political nature will dominate to the point that it will conceal or sit aside the legal significance of the problem. The legally significant elements (such as the question of jurisdiction) are, of course, always subject to judicial review; but if the entirety clearly and overtly points to a dispute of a predominantly political nature, the court will not inclined to deal with it (H.C. 58/68 [30], s*upra,* at page 600).

(B) I have noted that determination as to justiciability can be made at any stage of the proceedings. It should not be inferred from this that the issue cannot be decided at the outset of the proceedings. Deciding justiciability after thorough examination of the issue in dispute, is an option but not obligatory. There are circumstances in which a decision on justiciability will be required at the outset proceedings, and this is possible and subject to the court's discretion.

(C) To summarize this point: When a problem combines within it both legal and political elements, the court will not refrain from considering it under its legal criteria, merely because political components are interwoven into the problem. But it is clear that it will not consider the latter.

If the issue is primarily political, but secondarily, it has legal components, the court can do one of the following: It can hold that the legal characteristics are insignificant for purposes of deciding the substance of the problem, and dismiss the petition in all its aspects, or it can confine its examination to the legal aspects and leave the determination of the predominant issues to the body in charge thereof under the constitutional division of responsibility.

(D) This is also why it was stated in H.C. 620/85 [33], *supra,* that the High Court of Justice will not be ready to exercise its powers as to every petition which raises a subject within its jurisdiction, even if the conditions of justiciability are present. This is also the import of the timing for application of the justiciability tests: when an issue is examined in terms of its justiciability *after* detailed consideration of it on the merits, attention is of course paid primarily to the circumstances of the *specific* issue before the court, and not only to the general categorization of that issue. As summarized, *ibid*., at page 191-192:

> "The advantage of the proposition that an important constitutional issue is at the same time a justiciable issue - albeit subject to consideration as to whether to intervene therein under criteria of judicial discretion - lies in its flexibility and in postponing consideration of the justiciability question until *after* the hearing an the substantive issue. This topic has already been explained in H.C. 306/81, supra, at page 141-142, where it is stated, at page 141:
>
> > 'On an important constitutional issue... it is preferable for procedural circumstances to be created which permitting consideration of the matter, so long as it is not manifestly clear that the topic is not subject to the jurisdiction of the court'.
>
> The presumption underlying these statements is that, when a question is important, so long as it is *not* clear that the topic *is not* suited for judicial determination, the court examines the substantive issue of the petition; there are instances where only a detailed examination will lead to a

> conclusion regarding existence of jurisdiction or the propriety of the subject proceeding in question; however, the main part is that some of the tests which were set forth as standards for this Court's intervention in the Knesset's decisions require knowledge of the nature and extent of the alleged harm. Everyone agrees that knowledge of this type is impossible prior to examination of the issue or its merits".

Justiciability

7. (A) In all matters concerning to the theory of justiciability (H.C. 65/51 [25]; H.C. 186/65 [29]; H.C. 561/7 [27], at page 315), I accept the method of distinction which was thoroughly clarified in the judgment of my esteemed colleague Justice Barak, pursuant to which examination of the dispute proceeds on two separate planes, i.e., firstly, normative justiciability, and secondly, institutional justiciability.

Normative justiciability answers the question of whether *legal standards exist for determination of the dispute before the court.*

Institutional Justiciability answers the question of *whether the court is the appropriate institution for deciding the dispute, or whether perhaps it is preferable that the dispute be decided by another institution,* being either the Legislature, the Executive, or their emanations.

A legal standard for determination means, in other words, that the action which is subject to the court's judicial review is examined in terms of its legality.

In E.A. 2,3/ 84 [65], at page 251-252, it was stated in connection with the standards applied in examining a statutory authority's exercise of discretion:

> "So far as concerns this court, the accepted view is that in reviewing the action of a statutory authority we examine, in general, whether the modes of deliberation were lawful, and whether the authority had before

it material on which it could base its decision (H.C. 288/51, 33/52[18]; H.C. 554/81 [19], at 251).

This general observation may be broken down into elements. Lawful deliberation means, generally, that the principles of natural justice have not been violated; that the procedures prescribed by statute and applying to the authority, or set out in the regulations under which it functions, have been observed; that the decision was rendered by the competent person and that it was in conformity with the material jurisdiction of the decision-making authority; that the decision-making authority exercised its power in furtherance of its purpose; that no mistake of law occurred and that the decision was not tainted by fraud or influenced thereby; that the decision was made on the basis of supporting evidence, and, finally, that it was not contrary to law for some other reason. The exercise of a power in furtherance of that power's purpose means, in general, that no extraneous considerations were taken into account; that the authority did not overlook relevant information; that the power was exercised for the purpose for which it was granted; that the discretion was exercised by those empowered thereto, and that there is no room for concluding that the decision is marked by unreasonableness so extreme that no reasonable authority could have made it, or that the exercise of the power was simply arbitrary".

In Britain it has even been proposed that the tests be summarized and concentrated under three primary headings, namely, unlawfulness, lack of reasonableness, and defects in the manner of exercising jurisdiction (of on for this matter *Council of Civil Service Unions v. Minister for Civil Service* (1985) [73]).

The problem is that one can argue that no closed list can reflect the dynamic nature of the development of administrative law; moreover, in our opinion, unreasonableness is one of the aspects of the test of lawfulness.

(B) In any event, legality is examined not just in its plain meaning, by answering the question of whether the law has conferred jurisdiction on the deciding authority, and whether exercise of jurisdiction falls squarely within bounds, and similar tests.

My esteemed colleague correctly states that, as noted above, in accordance with the concepts developed by this Court *(inter alia,* following H.C. 156/75 [58], at page 105, opposite marginal letter E, and see also E.A. 2,3/84 [65], *supra),* the *reasonableness* of the act or omission is also one of the tests of legality. If the act or omission are tainted with extreme unreasonableness, i.e., if they exceed the bounds of reasonableness and it is not possible to classify them among any of the reasonable courses of action, then too it is an illegal action, and the same applies in the contrary situation, i.e., if the action is within the realm of reasonableness according to the court's holding, and it also does not stray from the formal rules of jurisdiction, then the act is legal, and the court will not interfere with it.

8. As appears from the discussion by my esteemed colleague Justice Barak, there is no topic in our world as to which the questions of formal legality and of reasonableness could not be asked; i.e., there is no topic which is not justiciable, and any topic can be considered in court. As to this point, I would like to add qualifications and clarifications.

Separation Of Powers

9. I do not disagree with the above-mentioned thesis: it is true that every topic can be examined pursuant to the aforementioned tests of legality, and, *inter alia,* its place within the realm of reasonableness; whether the topic is the development of a combat plane or the founding of an additional law or medical faculty, or even crucial foreign relations and security questions, an answer can always be sought to the question of whether a particular topic was decided by the authorized to do so by law, and whether the action was carried out within the bounds of the jurisdiction outlined in the statute.

The problem is that, quite frequently, the question is not merely endorsement of the existence or non-existence of a legal test in the sense described above, but rather a question arises which essentially relates to taking a position on topics which require a material decision by those dealing with the matter. Together with the presentation of the question,

accordingly, the fundamental problem of separation of areas of operation between the authorities arises as a derivative question.

As I noted in H.C. 306/81 [21], I do not hold that the separation of powers is expressed by establishing an absolute barrier between each of the three powers. As was stated therein, at page 141:

> "Separation between the powers does not necessarily mean the creation of a barrier which absolutely prohibits all connection and contact between the powers, but rather it is primarily reflected in the existence of a balance between the powers, in practice, which permits independence with defined, mutual supervision. Hence, it also requires a certain practical relationship, even if it is extremely limited, regarding the exercise of powers in areas where the judicial system is in charge".

Separation of powers was created so as to bring about a balance between the powers, since it is only in this way, that is, by preventing an excessive concentration of power exclusively in the hands of one authority, that democracy is ensured and the freedom of the individual and of society is preserved. In other words, the systematic and conceptual distribution of powers between the authorities, through the imposition of constitutional principles of mutual checks and balances, and the establishment of links and bridges between the various authorities for that purpose, will create the basis of integrated components, embracing all the branches of government. Thus, the parallelogram of forces is created, which maintains and stabilizes the balance, and which is a condition for the maintenance of freedom and proper government in all its branches.

If the theory which allows consideration by the courts of every issue by the constanting put into practice realized regularly, that is: If every topic - from the details of the budget to the construction of housing projects, planes and tanks - will be decided by the court according to formal tests of legality or according to the reasonableness tests regarding which *the Court* lays down the law, this could well create a concentration of power which will, in practice, nullify the other authorities ability to function.

How are the bounds delineated, and how is the balance created? There is no mathematical formula for this, nor is it possible to set up unclear indicators. However, as I noted above, the test which can be utilized for this end is the test of the *predominant* nature of the topic. Sometimes such predominant nature leads to the conclusion that the topic ought to be decided by the judiciary, and sometimes that nature indicates that it ought necessarily to be submitted to the legislature and sometimes it can be learned from all the circumstances that, according to our conceptions, it is the issue should be left in the hands of the executive i.e. political power. Of course, sometimes part of the topic will be considered by one authority and the rest by another, each authority addressing that area submitted to its consideration.

All the authorities act, of course, through mutual checks and balances, and therefore the court always has the jurisdiction to exercise its power if the problem brought before it law has legal overtures. It goes without saying that one of the points of difference between one authority and another is that the legislature and executive can take up the topic of their choice, whereas the judiciary only considers that which is brought before it by litigants.

Judicial control always exists because it derives from the essence, role and mode of operation of the judiciary, and from the remedies within its jurisdiction. In the words of Wade, *supra,* at 605, which I am prepared to adopt:

> "...Judicial control is a constitutional fundamental which even the sovereign parliament cannot abolish...".

The way I would express this view is that judicial control will always prevail.

Hence, moreover, the justiciability problem need not arise at all, as far as I am concerned, whenever the dispute affects the safeguarding of rights, political or otherwise. As stated by Justice Brennan in the *Baker* case [68], at 209:

> "...the mere fact that the suit seeks protection of a political right does not mean it presents a political question".

Application Of The Justiciability Test In Practice

10. There are cases where consideration of a particular issue according to legal standards alone will miss the point because it is likely to obscure the true nature of the problem under consideration. Frequently, it is not the legal norm which gives rise to the problem, and it has no decisive significance for the substance of the decision, but once the judicial determination is made, and it appears that the decision, which was subjected to judicial review, was made by the person entitled to do so, in good faith, without discrimination, and is within the realm of reasonableness, it may will be concluded that everything is in order, despite the fact that the decision on the merits is far from satisfactory: Is a decision regarding the production of a plane or questions of foreign policy settled by the answer to the questions examined by the judicial forum by the above-mentioned tests? The answer to this is in the negative. However, the trouble is that this is the misleading conclusion liable to be formed by legal discussion of a problem the basis of which is actually foreign to legal criteria. In such circumstances, the response is likely to be, frequently, what is called "question begging", i.e.: it will permit those who so wish to circumvent and avoid relevant consideration of the issue which is the cause of action of the petition. Accordingly, justiciability is always examined pursuant to the two-fold test, i.e., the question of institutional justiciability is combined with normative justiciability, and according to the former test, the court is required, in theory and in practice, to go back, stop and consider whether hearing of it is indeed proper and desirable for it to hear the issue as the most suitable body to do so. In other words, despite the fact that it is possible to apply legal standards in a formal sense, these should not be seen, in many areas, as an answer to the problem, because pursuant to its essence, nature and characteristics, additional answers are needed in realms that the Court does not refer to.

This argument applies to an even greater extent to the examination of normative justiciability pursuant to the reasonableness tests. There is no issue the reasonableness of which cannot be assessed. However, the reasonableness test in the realm of normative justiciability emphasizes to a greater degree vigor, as stated, the importance of maintaining the additional, cumulative justiciability test, i.e., the institutional justiciability test, which may lead to the conclusion that it is not proper for the court to address the reasonableness of a particular issue, despite the fact that it can be grouped among the issues which can be

examined according to normative justiciability tests. The institutional justiciability test allows for exercise of restraint in relations among governmental authorities, a restraint which allows for submission of political problems for determination by politicians. We have already cited H.C. 186/65 [29], *supra,* in which the entrance of the first German ambassador into Israel was considered. Justice Sussman (as he then was) said therein, at page 487:

> "It is common knowledge that public opinion is divided on the question of whether or not it is desirable to acceal to the request of the West German Government and establish diplomatic relations with it. The Government made a decision on the issue, and moreover, brought the matter before the Knesset, and the Knesset supported the Government's decision. The issue was not legal one, but a *clear political issue;* it cannot be examined pursuant to legal standards. And the confirmation or invalidation of the ambassador of a foreign country is a political issue as well, which the Minister of Foreign Affairs or perhaps the entire Government must address. It is not a legal matter, which by its nature may be brought to a court for resolution. The considerations are not legal considerations, but rather considerations of foreign policy and of the fitness of the candidate for the task, which this Court is neither authorized nor capable of deciding" (emphasis added - M.S.).

According to the normative justiciability test, it was possible for a court to determine whether the establishment of relations was the outcome of a decision by a person authorized to decide person. It was possible even to go on and litigate the question of whether the establishment of relations was a reasonable act or not, or according to the foundation of the legal standard, whether a reasonable government would have established such relations. However, there can be no question that the petition was not directed at the first formal legal issue mentioned above, and that the second criterion - concerning the reasonableness of establishing diplomatic relations with any state - is not of the type which a court ought to, or is able to deal with. A decision on the issue of formal jurisdiction, if it were to have been made by the Court, would, on its own, have been merely a kind of evasion of the topic; consideration of the reasonableness question would have forced on the judicial forum a

topic which is entirely unsuitable for consideration by it. The question described above is suitable for political, historical, philosophical or even emotional consideration, but the criteria at the court's disposal in no way allow it to encompass these various aspects or be involved in them.

There are those who propose replacing the justiciability tests by the standards used by the court to examine the exercise of authority which the substantive law has placed in the hands of a statutory authority. Thus it can be argued, according to this thesis, that where discretion is conferred on a particular authority, the court will examine whether the discretion was exercised according to the standards delineated in the law, and nothing else, but it will not replace the authority's exercise of discretion by its own; hence, there will be no room for intervention by the court, so that, the risk of the court dealing with topics which are not with its ambit would be eliminated, so to speak.

The problem is, that this solution does not include by its terms the array of circumstances described above: exercise of discretion as to whether to establish, for example, diplomatic relations with a particular country does not, *by its nature,* have to be examined in court, in other words, it is not justiciable, because in the words of President Sussman, it is a clear political issue, and the limits on the court's intervention in an authority's discretion does not have to be the determinative factor for it not to intervene.

The same applies to other examples cited in my esteemed colleague's opinion, and first and foremost is the question or whether to declare war or to make peace. To be precise, the problem is not always lack of norms in the personal inability of a judge to examine the norms; it would be the demarcation of the spheres of activity of various public bodies, which is one of the fundamentals of good government. Such demarcation seeks to avoid over-concentration of power, in which the court has resort to all matters - political and otherwise - and purports to adjudicate thereon.

Hence, as stated, we arrive at the institutional justiciability test, since the normative test would embrace everything without exception, and it goes without saying that it would drag the court into making clear political decisions. The expert sense of the jurist (H.C. 65/51

[25], *supra,* at page 813) must protect the Court - and other governmental authorities - from an outcome of this nature.

As a footnote, I should add that I did not illustrate my comments by reference to the facts of H.C. 65/51 [25], *supra,* since in my opinion the legal and constitutional issue considered in the aforementioned petition is the opposite of what is described above regarding the establishment of diplomatic relations. That is, it is doubtful whether in fact a non-justiciable political issue existed under the circumstances therein, since it concerned a constitutional process the origin and mode of operation of which are delineated in the statutory enactments; it could well be that it would have been justified in that case to dismiss the Petition because it was, in truth, merely a request to invalidate the exercise of discretion by a authority having proper justification, a request as to which that the Court did not see fit to intervene *under the circumstances* which existed at the time. This is also the opinion of Justice Witkon, see *Politics and Law,* and also, *Law and Adjudication,* at page 57.

11.. What was exemplified above in connection with H.C. 186/65 [29] (establishment of diplomatic relations) is correct regarding questions of peace or war, acquisition of means of combat, methods of dealing with employment difficulties or with distressed enterprises, or establishing unified or separate methods of collection by the income tax authorities and the National Insurance Institute, and the list goes on.

My esteemed colleague in this context also cited the statements made in H.C. 561/75 [27], *supra. As I* said therein, at page 319:

> "Topics related to the organization, structure, preparations, arming and operations of the army are not justiciable because they are entirely unsuitable for consideration and determination by judicial bodies... It is entirely unreasonable for the judiciary to consider and determine what is the most effective method for deriving lessons from military operations, from a professional, military point of view, and substitute its opinion for that of the military authorities who were trained and placed in charge of such matters".

My esteemed colleague's position is that instead of denying the inherent justiciability of the topic, one of the following courses should have been followed:

(a) First, the relevant legal norm should have been identified. Since there is no norm which states that inefficient government action is unlawful, the petition should have been dismissed; alternatively -

(b) The submission that the army acted unreasonably should have been dismissed. It is true that the Court does not replace the authority's opinion by its own; however it examines whether a reasonable army would have taken the steps which the I.D.F. took at that time. If the petitioner succeeds in showing that the army's action was unreasonable, then the petition should be granted. In other words, in his opinion there are legal standards pursuant to which it is possible to determine whether the army's actions as to debriefings and learning lessons in the wake of war are reasonable.

Regretfully, I cannot accept the two courses outlined above.

Dismissal of the Petition on the basis of the conclusion that there is no legal norm which invalidates an inefficient governmental action highlights, in my opinion, the irrelevance of justiciability as to a clearly military operational issue.

The public examination of "whether a reasonable army would take the action which the army took or which the petition is asking the army to take" is in theory and in practice, with all due respect, outside the court's realm. The submission that the court in any event considers the reasonableness of army action whenever it is called upon to address tort claims arising from military activities is no answer to the question.

The problem before us is in the realm of *public* law, and is concerned with the scope of authority which the High Court of Justice should take upon itself, and the subsequent consequences for democracy in its actions. Examination of a negligence claim in tort law in a concrete context, which in general is specific and narrow, does not place the Court in the position of determining questions of policy, just as deciding a concrete question of medical

negligence does not transform the Court into the body which addresses and decides the general and broad topic of how to organize the State's medical system.

I fear that it would not be possible to maintain proper governmental systems - including a court which functions as it should - if all the political problems will begin to make their way to the Court to be examined there according to legal standards.

Indeed, I agree that where there is a legal norm there are also legal standards which implement that norm; however, the threshold question is whether the legal norm is relevant and applicable to a particular problem, and whether it should be learned from the context, the nature of the problem, the substance of the topic and the set of rules, pursuant to which the proper system of interrelations between the various governmental bodies are fashioned, that it is best that the Court refrain from dealing with a particular topic, in whole or in part (that is, except for those portions of the issue which may be decided according to legal tests), so as to submit it to the attention and determination of another governmental institution. Hence the significance of the institutional justiciability test, as noted above.

12. The recognition of the limits of justiciability which may, *in appropriate situations,* lead the Court to refrain from dealing with a political, economic or other public problem, does not weaken the principle of judicial supervision and review but rather strengthens it, since it determines the proper limits of the principle. Public officials and bodies are subject to judicial supervision, and it goes without saying that the fact that a particular topic belongs to the public realm does not, in and of itself, make it non-justiciable; and it is section 15 of Basic Law: The Judicature which states this. Those who reject the thesis that every topic in the world is justiciable, do not thereby adopt the opposite conclusion, that the Court must, so to speak, narrow the scope of its supervision. Any topic as to which legal norms are applicable may serve as grounds for a request for an exercise of jurisdiction by a court. But if the legal normative issue is secondary, the court can deal with the legal portion of that issue and leave the political issue for determination by another authority. If the political nature of the problem is predominant (such as a question of establishing diplomatic relations or matters of war and peace), the court can transfer the *entire* topic for determination by the political body, without addressing marginal legal issues, where they are not relevant to the substantive decision.

As noted, it is best to chart the limits so that the court will not find itself unintentionally granting a general stamp of approval to a political action, as a result of the fact that it is asked to examine the legal aspects of it alone.

The Court ascertains whether the facts were assembled and examined, whether they were all taken into account, whether the decision was made with relation to the facts, whether extraneous factors and the like were taken into consideration (see H.C. 297/82 [60] and E. A. 2,3/84 [65], *Supra)*. However, when the jurist's expert sense indicates that the topic, in whole or in part, is clearly political or of another nature which indicates that its determination should be submitted to another authority, then that *part* which has the aforestated characteristic (and if the legal aspect is insignificant, the *entire* topic) should properly be referred to whoever is placed in charge of it according to the division of spheres between the different authorities.

The Court's power of supervision over matters as to which its review is expected will not be diminished in the least if it does not decide, for example, as to the reasonableness of establishing diplomatic ties between Israel and a particular state.

In practice, there need not be any difficulty in identifying a particular topic according to its substance and content, and it may fairly be assumed that the Court will know how to treat the topics brought before it according to their nature, so as to choose which is suitable for judicial determination, and not be entangled in legal determinations that conceal problems the real and decisive nature of which are political.

Deferment Of Service

13. I agree with my esteemed colleagues' opinion that the topic before us is justiciable, and that despite its accompanying political elements, this is a topic regarding which legal tests can be employed. I also accept that *under the existing circumstances* the system of deferment of military service, already in place for nearly forty years, should not be invalidated. However, this statement is insufficient because the exemption of thousands of

young people from military service is not a topic which can be removed from the agenda. What do mean by this?

As stated, there is no room for the conclusion that the Minister of Defence, who is currently acting consistently pursuant to a system which was handed on from one minister to another and from one government to another over a period of many years, as explained above, is acting with extreme unreasonableness which goes beyond the bounds of plausibility. The problem is that the issue must be examined not only as it appears on the surface, against the background of its development since the establishment of the State up to the present, but rather also according to its ongoing nature and the impact and consequences which accompany it, year in and year out, for the foreseeable future. This Means that what we now hold regarding the legal validity of the arrangement, when it is subjected to the relevant judicial review for the first time, does not exempt the Executive from the obligation of continuing to examine, and reexamine from time to time, the significance of granting an exemption to increasing numbers of men of military age. Already we are speaking of an exemption for approximately 17,000 men, if we include in this statistic all age groups of men of military age, that is, men between the ages 18 and 54. In the past year, 1,600 men of military age were added, and according to the data before us the number will grow annually in the coming years. Therefore, we are not speaking of fixed data, but rather of facts which change and are updated every year. This means that a duty is imposed on the authorized body to examine the data annually and state its opinion on the question of their connection with other background data.

In this context I once again refer to a matter summarized in H.C. 297/82 [60], at page 49 as follows:

> "The process of decision-making by one to whom power is delegated under the law should properly consist, in general, of a number of basic essential stages, which are the tangible expression of the legal exercise of authority while dealing with a defined topic, and they are: *assembly and summary of data* (including opposing expert opinions, if there are such), *examination of the significance of the data* (which includes, in the case of alternative theses, also examination of the *advantages and*

> *disadvantages* of the opposing theses), and finally, a summary of the reasoned decision. A process like this ensures that all the relevant factors are taken into consideration, that a fair examination of every submission will be conducted, and that a decision will be made which may be subjected to judicial and public review".

And in H.C. 852,869/86, Misc. App. H.C. 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1,33/87 [15], at page 50, we added:

> "A decision must be, in each case, the result of a *relevant, fair and systematic* examination, and if, in light of the nature of the issue, repeated examinations are required, the new application should not be peremptorily dismissed without proper study, in exclusive reliance upon the fact that the empowered authority was granted discretion to decide the matter, or through adherence to the prior decision which may need to be revised".

Does it appear from the material before us that all the data were collected, examined and considered according to their appropriate value and weight, without the decision being affected from the outset by the long-standing agreed on this issue, political arrangement? I fear that it there is no certainty and that the prior assumptions have rendered the decision obvious, without the data being examined and re-examined in a systematic manner, and without a prior inclination towards an agreed-upon solution.

Thus it does not appear from the State Attorney's Response that the following questions, *inter alia,* have been considered:

(A) What is the reasonable yearly quota for those granted draft deferment, consistent with safeguarding the security interest in military training of men of military age who are physically fit?

(B) What is the numerical impact on the yearly draft cycle and on the length of military service in the regular army and in the reserves?

In this context it is proposed that the impact of the increase in exemptions at the rate of ten-percent a year (1,674 last year, as against a total of 17,000 total whose draft has been deferred) should be examined, and that setting maximum quotas be considered.

(C) Whether there are standards for the selection of candidates for deferment, in terms of fitness; that is, is grant of deferment entirely within the discretion of the man of military age who decides to give defence to religious study over military service?

(D) What are the means of supervising the way the arrangement is operated?

Of course, the above is not intended to exhaust the topics which should be examined and considered, but rather merely illustrate them; the essence of this discussion is that a phenomenon of the type we have dealt with herein requires a relevant, systematic, periodic examination, and that the competent authority must continuously follow the developments, their connection to other phenomena, and their accompanying significance, and, of course, to report on these matters to the appropriate Knesset committee.

Subject to these comments I have decided to adhere to the conclusion reached by my esteemed colleagues.

Decision as stated in the judgment of Barak, J.

Judgments given on June 12, 1988