The Supreme Court sitting as High Court of Justice

HCJ 6298/07

HCJ/6318/07

HCJ 6319/07

HCJ 6320/07

HCJ 6866/07

Before: President D. Beinisch
Deputy President E. Rivlin
Justice A. Grunis
Justice M. Naor
Justice E. Arbel
Justice E. Rubinstein
Justice E, Hayut
Justice H. Melcer
Justice N. Hendel

Petitioner in HCJ 6298/07: Major (ret.) Yehuda Ressler, Adv.

Petitioner in HCJ 6318/07: The Movement for Quality Government in Israel

Petitioner in HCJ 6319/07: Itay Ben Horin, Adv.

Petitioners in HCJ 6320/07: 1. Avraham Poraz, Adv.
2. Ilan Shalgi, Adv.
3. Hetz – Secular Zionist Party

Petitioners in HCJ 6866/07:	1. Ran Cohen M.K. 2. Yosef Beilin M.K. 3. Haim Oron M.K. 4. Avshalom Vilan M.K. 5. Yaron Shor – Secretary General, Meretz-Yahad Party
v.	
Respondents in HCJ 6298/07:	1. The Knesset 2. Minister of Defense
Respondents in HCJ/6318/07:	1. The Knesset 2. Minister of Defense
Respondent in HCJ 6319/07:	The Knesset
Respondents in HCJ 6320/07:	1. The Knesset 2. Government of Israel 3. Minister of Defense 4. Attorney General
Respondents in HCJ 6866/07:	1. Attorney General 2. Minister of Defense
	Petitions for an order nisi and an interim order
Dates of sessions:	15 Sivan 5769 (7 June 2009)

25 Shevat 5771 (30 January 2011)

For petitioner in HCJ 6298/07:	Yehuda Ressler, Adv; Yaffa Dolev, Adv.
For petitioners in HCJ 6318,07:	Eliad Shraga, Adv; Tzruya Meidad, Adv; Dafna Kiro, Adv; Mika Koner-Carten, Adv.
For petitioner in HCJ 6319/07:	Itay Ben Horin, Adv.
For petitioner in HCJ 6320/07:	Gideon Koren, Adv; Guy Kedem, Adv.
For petitioner in HCJ 6866/07:	Uri Keidar, Adv; Eyal Mintz, Adv.
For respondent 1 in HCJ 6298/07, in HCJ 6318/07, HCJ 6319/07 and HCJ 6320/07:	Eyal Yinon, Adv; Gur Bligh, Adv.
For respondent 2 in HCJ 6298/07, and HCJ 6318/07, and respondents 2-4 in HCJ 6320/07, and for respondents 1-2 in HCJ 6866/07:	Osnat Mandel, Adv; Hani Ofek, Adv.

Israeli laws cited:

Basic Law: Human Dignity and Liberty, ss. 8, 9

Deferment of Military Service for Yeshiva Students for who the Torah is their Calling Law, 5762-2002, 9 (3), 16 (b)

Regulations for the Deferment of Service for Yeshiva Students for Whom Torah Is Their Calling, 5765-2005

Basic Law: The Army, s. 4

Civilian Service (Legislative Amendments) Law, 5768-2008

Defense Service Law

Israeli Supreme Court cases cited:

[1] HCJ 3267/97 *Rubinstein v. Minister of Defense*, [1998] IsrSC 52 (5) 481

[2] HCJ 6427/02 *Movement for Quality Government in Israel v. The Knesset*, [2006] IsrSC 61 (1) 619

[3] HCJ 910/86 *Ressler v. Minister of Defense*, [1988] IsrSC 42 (2) 441

[4] HCJ 40/70 *Becker v. Minister of Defense*, [1970] IsrSC 24 (1) 238

[5] HCJ 448/81 *Ressler v. Minister of Defense*, [1981] IsrSC 36 (1) 81

[6] FH 2/82 *Ressler v. Minister of Defense*, [1982] IsrSC 36 (1) 708

[7] HCJ 179/82 *Ressler v. Minister of Defense*, [1982] IsrSC 36 (4) 421

[8] HCJ 4769/95 *Menachem v. Minister of Transportation*, [2002] IsrSC 57 (1) 235

[9] HCJ 1661/05 *Hof Azza Regional Council v. The Knesset*, [2005] IsrSC 59 (2) 481

[10] HCJ 2605/05 *Academic Center of Law and Business, Human Rights Division v. Minister of Finance*, (1999) (not yet published)

[11] HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defense*, (2006) (not yet published)

[12] HCJ 3648/97 *Stemka v. Minister of the Interior*, [1999] IsrSC 53 (2) 728

[13] HCJ 5016/96 *Horev v. Minister of Transportation*, [1997] IsrSC 54 (4) 1

[14] HCJ 4541/94 *Miller v. Minister of Defense*, [1995] IsrSC 49 (4) 94

[15] HCJ 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, [1995] IsrSC 49 (4) 221

[16] HCJ 6055/95 *Zemach v. Minister of Defense*, [1999] IsrSC 53 (5) 241

[17] CrimApp 6659/06 *Ploni v. State of Israel*, (2008) (not yet published)

[18] HCJ 10203/03 *"Hamifkad Haleumi" Ltd. v. Attorney General*, (2008) (not yet published)

[19] HCJFH 9411/00 *Arco Electrical Industries Ltd. v. Mayor of Rishon Lezion*, (2009) (not yet published)

[20] HCJ 1715/97 *Investment Managers Association v. Minister of Finance*, [1997] IsrSC 51 (4) 367

[21] HCJ 5503/94 *Segal v. Knesset Speaker*, [1997] IsrSC 51 (4) 529

[22] HCJ 98/69 *Bergman v. Minister of Finance*, [1969] IsrSC 23 (1) 693

[23] HCJ 114/78 *Burkan v. Minister of Finance*, [1978] IsrSC 32 (2) 800

[24] HCJ 869/92 *Zvili v. Chairman of the Central Elections Committee for the Thirteenth Knesset*, [1992] IsrSC 46 (2) 692

[25] HCJ 1703/92 *K.A.L. Kavei Avir Lemitan Ltd. v. Prime Minister*, [1998] IsrSC 52 (4) 193

[26] HCJ 4124/00 *Arnon Yekutieli, (deceased) v. Minister of Religious Affairs*, (2010) (not yet published)

[27] HCJ 1067/08 *Noar Kahalacha Assoc. v. Ministry of Education*, (2010) (not yet published)

[28] HCJ 7111/95 *Center for Local Government v. Knesset* [1996] IsrSC 50(3) 485

[29] HCJ 257/89 *Hoffman v. Western Wall Superintendent* [1994] IsrSC 45(2) 265.

[30] HCJ 390/79 *Duwekat v Gov't of Israel* [1979] IsrSC 34(1)1

[32] HCJ 746/07 *Regan v. Ministry of Transport* (not reported)

[33] CrimApp 8823/07 *Anon v. State of Israel* (not reported)

[34] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [1982] IsrSC 42(2) 221

[35] AAA 10673/05 *Mikhlelet HaDarom v. State of Israel* (not reported)

[36] HCJ 5373/08 *Abu Libda v. Minister of Education* (not reported)

[37] HCJ 5803/06 *Guttman v, Minister of Defense* (not reported).

[38] HCJ 466/07 *Galon v. State Attorney* (not reported)

[39] EA 92/03 *Mofaz v. Chairman of Central Elections Committee to Sixteenth Knesset* [2003] IsrSC 57(3) 793

[40] HCJ 7052/03 *Adallah – Legal Center for Rights of Arab Minority in Israel v. Minister of the Interior* [2006] IsrSC 61(2) 314

[41] HCJ 5000/95 *Bertler v. Military Prosecutor General* [1999] IsrSC 49(5) 64

[42] HCJ 6784/06 *Shlitner v. Director of Payment of Pensions* [2011] (not reported)

[43] CrApp 8823/07 *Anon v. State of Israel* [2010] (not reported).

[44] HCJ 4908/10 *Roni Baron v. Israel Knesset* [2012] (not reported.

[45] HCJ 11956/05 *Bishara v. Minister of Construction and Residence* [2006] (not reported)

[46] FNHCJ 1241/07 *Bishara v. Minister of Construction and Residence* [2007] (not reported)

[47] 11088/05 *Heib v. Israel Lands Administration* [2010] (not reported).

[48] HCJ 2458/01 *New Family v. Approvals Comm. for Surrogate Motherhood Agreements, Ministry of. Health* [2002] IsrSC 57(1) 419

[50] HCJ 4948/03 *Elchanati v. Finance Minister* [2008] (not yet reported)

[51] HCJ 104/87 *Nevo v. National Labor Court* [1990] IsrSC 44(4) 749

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[52] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

[53] *Bayatyan v. Armenia*, [2011] ECHR 23459/03 [ ] .

Facts: The subject of military service for hareidi (ultra-Orthodox), full-time yeshiva (rabbinical seminary) students has been at the center of public debate in Israel since the founding of the state, when the first Defense Minister, David Ben Gurion, decided to defer their conscription. The arrangement was significantly expanded over the years, and its underlying reasons also changed. Numerous attempts were made to challenge the legality and constitutionality of the deferment arrangement in the Supreme Court. The first petitions were denied for lack of standing and non-justiciability In the 1986 *Ressler* case [3], the Court held that the petitioner had standing, and that his petition was justiciable, but denied the petition on the merits, holding that granting deferments to yeshiva students was within the scope of authority of the Minister of Defense. However, the Court also held that the number of students receiving deferments was of relevance, and that "quantity makes a qualitative difference". Thus, there was a limit that a reasonable Defense Minister could not exceed. In the 1997 *Rubinstein* case [1], the data showed such a significant increase in the number of deferments. The Court held that the Minister of Defense did not have the authority to continue to grant the deferments, and that the matter had become one that must be decided by the Knesset in primary legislation.

Following that decision, the Knesset enacted the Deferment of Military Service for Yeshiva Students Law, 5762-2002. The law was an enacted as a temporary order that would be in force for five years, at which time the Knesset could extend its force. The constitutionality of that law was challenged in the *Movement for Quality Government* case [2]. The Court ruled

that the Deferment Law violated the right to human dignity, but that it served a proper purpose as required under sec. 8 of Basic Law: Human Dignity and Liberty (the "limitation clause"). The Court, therefore, refrained from declaring the Law unconstitutional, explaining that the existence of a rational connection between a law's purpose and the measures adopted for its realization is not a theoretical matter, but rather a practical test that is based upon the results of its actual implementation. The Court, therefore, decided to wait until the end of the five-year period, at which time the Knesset would be required to reconsider whether the Law actually realized its purposes. The Court further stated that "along with our decision to reject the petitions, as we are unable to decide the issue of constitutionality, we further hold that if the current trend continues, and there will be no significant change in the situation, there is a real fear that the Deferment Law will become unconstitutional . . . if there will be no significant change in the results of its actual implementation". On 18 July 2007, the Knesset voted to extend the Deferment Law for an additional five years (until 1 August 2012). This prompted the petitions in this case, challenging the constitutionality of the Deferment Law.

Held: The Court (*per* President Beinisch, Justices Naor, Rubinstein, Hayut, Melcer and Hendel concurring, Deputy President Rivlin and Justices Grunis and Arbel dissenting) granted the petitions, holding the Deferment Law to be unconstitutional.

In the *Movement for Quality Government* case, the Court had found that the Deferment Law violated Basic Law: Human Dignity and Liberty, but that it did so for purposes that was held to be proper. After examining the statistics concerning the actual implementation of the Law, the Court found that although the data revealed an increase in the number of hareidi men enlisting for military service or volunteering for alternative civilian service, the trend was insufficient, some ten years after the enactment of the Law, to demonstrate a significant realization of the purposes of the Law. Moreover, in examining the implementation of the Law, the Court found that the Law suffered from inherent flaws that impaired the possibility of realizing its objectives. Because the right to equality constitutes a fundamental right, the level of scrutiny required in examining whether its violation meets the proportionality test demands that there be a real, significant probability that the means adopted by the Law will achieve its purposes. Inasmuch as the means adopted by the Law were not found to have a real potential for realizing its purposes, the Law did not meet the requirements of the proportionality test established under the limitation clause, as is required of a law that violates a fundamental right. The Law, therefore, was unconstitutional.

Justice Arbel (dissenting, joined by Deputy President Rivlin) was of the opinion that the time was not yet ripe for making a final ruling upon the constitutionality of the Law, and that the Court should continue to show restraint, and grant the State additional time to implement the Law and achieve its purposes.

Justice Grunis (dissenting) reiterated the view he had expressed in his dissenting opinion in the *Movement for Quality Government* case, according to which judicial review is inappropriate for laws in which the majority grants preferential rights to a minority. Justice Grunis further argued that the ability of the Court to exert influence over an issue such as that raised in the petitions is limited. Therefore, it would be better that the Court refrain from intervening.

Although the Court found the Deferment Law to be unconstitutional, inasmuch as it was due to expire six months following the handing down of the decision, the Court decided not to declare it void, but rather to allow it to run its course, while holding that law could not be further extended by the Knesset in its present form.

Judgment

President D. Beinisch:

The arrangement for deferring the military service of full-time yeshiva [rabbinical seminary] students has been at the center of public debate in Israel since the founding of the state. Over the years, the nature of the issue has changed, and the question of the induction of yeshiva students has assumed an increasingly important role in public discourse as the number of those opting into the arrangement has assumed significant dimensions. Naturally, this issue has concerned all the branches of government, and this Court has addressed it on a number of occasions. It now comes before us for the eighth time.

1. I will state at the outset that, in my view, the Deferment of Military Service for Yeshiva Students for whom the Torah is their Calling Law 5762-2002 (hereinafter: the Deferment Law, or the Law) – which had previously been found to violate the right to equality that forms part of the right to human dignity – does not meet the proportionality condition of the limitation clause, and it is, therefore, unconstitutional.

This view is based upon the data concerning the implementation of the law as presented by the Respondents. The data – which will be presented below in detail – shows that the Law comprises inherent impediments that significantly influence the possibility for giving it effect and realizing its objectives. Although the data does reveal some movement toward change, we are not convinced that such a trend is sufficient some ten years after the enactment of the Law. The data that was submitted to us shows that in 2010, only 600 members of the hareidi [ultra-Orthodox Jewish – ed.] community were inducted into the

designated programs created by the IDF in accordance with the Law, while 1,122 opted for alternative civilian service, and by the end of 2008, 3,269 had taken advantage of the "decision year". Most of those who completed the decision year, returned to the status of full-time yeshiva student for whom "Torah is their calling" (and received a deferment from military service, or an exemption from military service for various reasons).

Along with this statistical data, one of the most important findings relates to the number of people acquiring the status of full-time yeshiva student each year. The Respondents themselves admit that the number of military deferments has steadily risen since the enactment of the Law. In 2007, for example, 6,571 members of the hareidi community joined the ranks of those for whom "Torah is their calling". That means that, each year, more hareidi men assume that status than the number who opt for military or civilian service. The total number of deferments, as of the date of the submission of the data, stands at 61,000. The number of those for whom Torah is their calling also rises steadily relative to the total draft pool over the last few years, so that in 2007, it constituted 14% of those eligible for conscription.

As will be explained more fully below, statistical data do not tell the whole story. My position on this important but difficult matter is influenced both by the quality of the military or civilian service offered by virtue of the Law, as well as by the manner in which the Law has been implemented by the Executive over the years. Looking at all of this data, it is my view that while there has been an improvement in the implementation of the Law, the means established by the Law cannot be seen to be realizing its purpose, and it would appear that the law comprises impediments that contribute to the impossibility of achieving its full realization. That being the case, there is no alternative but to find that the Law is unconstitutional.

Background

2. Before we address the question in depth, and before surveying its history, we should note that the turning point in the case law came about in HCJ 3267/97 *Rubinstein v. Minister of Defense* [1] (hereinafter: *the Rubinstein case*). That turning point marked a milestone in the course of proceedings concerning the issue of the conscription of yeshiva students. In that case, this Court held that the Minister of Defense had acted unlawfully in maintaining the arrangement for the deferment of military service for full-time yeshiva students, as it had not been authorized by law, and that the authority to establish a military deferment arrangement, which constituted a "primary arrangement", was in the hands the Knesset. Following that decision, the Knesset enacted the Deferment Law. The question of the constitutionality of the Law was brought before this Court in HCJ 6427/02 *The Movement for Quality Government in Israel v. The Knesset* [2] (hereinafter: *the Movement for Quality Government case*). In that case, which we will discuss at length below, the majority of the Court, concurring with the opinion of President Barak, ruled that the Deferment Law violated the constitutional right to human dignity, in that it was discriminatory, and violated equality in regard to the most fundamental values underlying human dignity. In view of that holding, the Court proceeded to examine whether the Law met the conditions of the limitation clause. The Court concluded that the Law served four objectives that joined together in giving the Law a proper purpose that was consistent with the values of the State of Israel as a Jewish and democratic state. In addition to examining its purpose, the Court also considered whether the Law met the proportionality test. The Court found that the extent of the violation of rights was manifestly

disproportionate, as on its face it was apparent that there was no rational relationship between the Law's objectives and the means established for its realization. As became clear from the data brought before the Court in the course of the proceedings, "the objectives of the Law were but incidentally and insignificantly realized" (*ibid.* [2], pp. 712-713). The Court, therefore, found that only the Law's first objective had been realized – *viz.*, the deferment arrangement had been established by statute. The Court noted that the purpose of the Law was "to promote compromise and balance among conflicting objectives," and that in addition to providing a statutory basis for the arrangement, it was intended to promote equal distribution of the security burden, and the integration of hareidi men into the workforce. Those objectives were not realized. Therefore, the Court held that "given that the various objectives of the Law are tightly intertwined, there is no avoiding the conclusion that the primary, overall objective of the Deferment Law is not being realized" (*ibid.* [2], at p. 712).

Despite its conclusion that the Deferment Law did not meet the first proportionality test, the Court refrained from declaring the Law unconstitutional. The Court explained that the existence of a rational connection between a law's purpose and the measures adopted for its realization (the first subtest in examining proportionality) is not a theoretical matter, but is a practical test that is based upon the results achieved in realizing the law and its actual implementation. In view of the scope of the social change required for the Law's realization, the Court decided that those implementing the Law should be permitted "to fix what they broke" (*ibid.* [2], at p. 713). The Court noted that in view of the Government's failures in implementing the Law, it would be difficult to say whether the Law suffered from a "genetic" defect – *i.e.*, a defect in the Law's provisions themselves, or whether the problem was

administrative. Therefore, and inasmuch as the Deferment Law had been enacted as a Temporary Order for five years (with the possibility of its extension for additional five-year periods), the Court decided that it would be appropriate to wait until the end of the five-year period, at which time the Knesset would be required to reconsider whether the Law actually realized its purposes. Therefore, the Court stated that "along with our decision to reject the petitions, as we are unable to decide the issue of constitutionality, we further hold that if the current trend continues, and there will be no significant change in the situation, there is a real fear that the Deferment Law will become unconstitutional . . . if there will be no significant change in the results of its actual implementation" (*ibid*. [2], at p. 714).

It should be noted that, in his carefully reasoned dissenting opinion, Deputy President (Emeritus) M. Cheshin argued that the Law was void *ab initio*. In his view, even if it were possible to consider applying a special legal arrangement to limited groups of unique character and to separatist elements in hareidi society, there is no acceptable justification for the broad exemption granted by the "Torah is their calling" framework. Justice A. Grunis concurred with the majority, but for other reasons.

4. The first five years of the life of the Deferment Law have passed, and on 18 July 2007, the Knesset voted to extend its force for an additional five years (until 1 August 2012). It is against this background that the petitions before the Court were submitted. The petitioners raise the question left undecided in the *Movement for Quality Government* case – the question of whether the Law meets the proportionality test. Specifically, we are asked to decide whether there has been that "significant change" in the results of the Law's implementation that would show that the defect that the Court discerned in the Law is not

inherent to the Law's provisions, but rather to the manner of their implementation by the relevant authorities.

The petitions were initially heard before a three-judge panel. On 29 May 2008, an order nisi was issued in regard to the petitions, and it was decided that they would be heard before a nine-judge panel. The hearing before the expanded bench took place on 7 June 2009, and an interim order was granted. The order, given by Justice E. Hayut, stated:

> 'We have considered the written and oral arguments raised by the parties before us . . . and have concluded that before making a final decision upon the constitutionality of the Deferment Law, and upon its extension for an additional five years, the apparatus intended for its implementation, which have only just begun to take shape and begun to operate (the special service tracks established in the IDF, and the civilian service track), should be permitted to prove their effectiveness or ineffectiveness by their results over an additional, fixed period. After that period, we will reassess the data concerning IDF conscription and civilian service of those granted deferments, as well as the other arguments and considerations necessary for rendering a judgment upon the instant petitions. At the same time, we would emphasize two matters, already at this stage. *First*, the judgment delivered in the *Movement for Quality Government* case is the starting point for this decision and for the judgment that will be rendered in the matter of the instant petitions, and there is no cause to revisit the arguments raised by some of the petitioners who seek to appeal findings and conclusions in matters already decided in the said judgment. *Second*, to date, the pace of addressing the apparatus intended to implement the Law, and the pace of allocating the necessary resources have been very far from what might have been expected under the circumstances. That is particularly so in view of the substantial period of time that has elapsed since the enacting of the Law in 2002' (para. 9 of the decision of Justice E. Hayut from 8 September 2009).

In accordance with that interim order, we directed that we would revisit the petition in 18 months, at which point we would decide "whether the

apparatus established by the Law, which have begun to operate, have the potential to bring about significant change" (para. 10 of the decision of Justice E. Hayut). On 30 January 2011, the hearing was held, and we were presented with the most up-to-date data as to the implementation of the Law. The data focused upon the change in the scope of military conscription, and upon the various service tracks for yeshiva students, upon the work of the National Civilian Service Directorate (hereinafter: the Directorate or the Civilian Service Directorate), and upon the number of volunteers serving in that framework, the number of yeshiva students choosing to avail themselves of the "decision year", and what they did at the end of that year. We were also presented with two reports dealing with the implementation of the Law in practice. One, the report of the "Plesner Panel" led by MK Yohanan Plesner, which was appointed by the Knesset Foreign Affairs and Defense Committee, and was presented as part of the Knesset's response to the petition. The second, the Report of the Inter-Ministerial Committee, headed by the Director General of the Prime Minister's Office, which was appointed by the Government, and was presented as part of the Government's response. These data, which form the basis for the proceedings in regard to the petitions before the Court, will be presented in detail below.

The course of events

5. The relevant factual background of the arrangement for deferring the military service of full-time yeshiva students was presented in detail in earlier decisions of this Court, in the *Rubinstein* case and in the *Movement for Quality Government* case, and we will, therefore, only briefly address it. The arrangement began on 9 March 1948, when the Chief of the National Staff of the Haganah (the CNS) announced that "a

decision has been made that yeshiva students, in accordance with approved lists, are exempt from military service", and that "this decision is valid for the year 1948, and the problem will be reconsidered at the end of the year" (see: The Report of the Commission for Establishing an Appropriate Arrangement of the Subject of Conscription of Yeshiva Students (2000) (hereinafter: the Tal Commission), p. 32; and see HCJ 910/86 *Ressler v. Minister of Defense* [3], at p. 449 (hereinafter: the *Ressler* case)). With the establishment of the State, the first Defense Minister, David Ben Gurion, directed that the conscription of full-time yeshiva students be deferred. These were the difficult years that followed the Holocaust. In light of the destruction of the European yeshivas, there was a fear that the conscription of yeshiva students might threaten the closure of the yeshivas in Israel. In order to guarantee that "the flame of Torah not be extinguished", it was decided that the arrangement would be granted annually to 400 yeshiva students who studied in a fixed, defined number of yeshivas. The arrangement significantly expanded over the years. The limit upon the number of yeshivas participating in the arrangement was cancelled, and the quota of students entitled to deferments gradually increased, until it was ultimately eliminated entirely. In addition, the scope of students entitled to a deferment of service was expanded, and the requirements for qualifying for a deferment were eased (see: Nomi Mey-Ami, *The Conscription of Yeshiva Students to the IDF and the Law on Deferrals for Yeshiva Students for Whom Torah Is Their Calling (the "Tal Law")*, research paper of the Knesset Research and Information Center, 28 February 2007 (in Hebrew). The research paper was appended to the Knesset's response of 21 May 2008, and marked Res/3). Along with this, the reasons underlying the arrangement also changed. The original fear of the closure of the yeshivas that might result from the conscription of their students

was replaced by the desire to allow the yeshiva students to continue their studies. This was accompanied by a growing perception "that the effectiveness of these students' military service is questionable, due to the difficulties they would encounter in adjusting to the Military and the difficulties that the Military would have adjusting to them" (the *Rubinstein* case [1], at p. 491).

6. Over the years, there have been numerous attempts to attack the legality and constitutionality of the deferment arrangement in the Supreme Court. The first petitions were denied for lack of standing and non-justiciability (see: HCJ 40/70 *Becker v. Minister of Defense* [4]; HCJ 448/81 *Ressler v. Minister of Defense* [5]; FH 2/82 *Ressler v. Minister of Defense* [6]; HCJ 179/82 *Ressler v. Minister of Defense* [7]). The stance of the Court changed in the *Ressler* case [3], in which the Court held that the petitioner had standing, and that his petition was justiciable. Nevertheless, on the merits, the Court held that granting deferments to yeshiva students was not *ultra vires*, and was not beyond the scope of the reasonable exercise of ministerial authority. That decision was premised upon the factual data presented in those proceedings, according to which, of the total conscription pool, 1,674 yeshiva students received deferments (approximately 5.4% of the total), and a total of 17,017 students were participating in the military deferment arrangement (*ibid*. [3], at p. 451). The Court held that the number of yeshiva students receiving deferments was of importance, and that "quantity makes a qualitative difference" Accordingly, it was held that there is a limit that a reasonable Defense Minister could not exceed. That line had not been crossed when the deferment question was addressed in the *Ressler* case (*ibid*. [3], at p. 505).

7. In 1997, another petition was submitted in the matter of the deferment of yeshiva students, which presented data showing a

significant increase in the number of yeshiva students whose military service had been deferred. The number of students receiving deferments, as of 1996, constituted some 7.4% of the annual conscription pool, with a total of 28,547 yeshiva students receiving deferments, and thereby, effectively being exempted from conscription (the *Rubinstein* case [1], at p. 493; and see: State Comptroller's Annual Report (No. 48) (1998, and Accounts for the 1996 Fiscal Year), at p. 1004). Under the circumstances, it was held that the Minister of Defense could no longer decide the issue of deferment of military service, and that the question had become one that must be decided by the Knesset in primary legislation:

> 'the current situation requires the Legislature to adopt a legislative solution, in view of the increasing numbers of full-time yeshiva students receiving a military service deferment, which ultimately leads to a full exemption. This is done against the backdrop of the rift in Israeli society over the question of the deferral of military service for full-time yeshiva students; against the backdrop of the legal problems and the serious social and ideological problems at their base; and in view of the need to provide a comprehensive national solution. All of these necessitate parliamentary intervention in order to provide a solution to this serious problem' (*ibid*. [1], at p. 530).

In order to allow the Minister of Defense and the Knesset to consider the issue and prepare for a change in the existing arrangement, the operative part of the judgment was suspended for one year from the handing down of the decision. Accordingly, and in order to construct an appropriate arrangement in regard to the induction of full-time yeshiva students into the IDF, the Tal Commission was appointed in August 1999, headed by former Supreme Court Justice T. E. Tal. The commission was asked to present its recommendations concerning "the proper statutory approach . . . by which the Minister of Defense will be authorized . . . to exempt

men of military age . . . or defer their service . . . on the grounds that the 'Torah is their calling'." The commission was also asked to address the issue that "the said exemption or deferment could apply to an unlimited number of yeshiva students, in that, in general, there is no intention to prevent the yeshiva students from continuing their studies, all in accordance with the law" (see: the Tal Commission Report, p. 1).

8. The Tal Commission presented its recommendations in April 2000. On the basis of those recommendations, the Draft Bill for the Military Service (Deferment of Service for Full-Time Yeshiva Students) Law (Temporary Order), 5760-2000, was published in the Official Gazette. The legislative process continued over the course of two years, and on 24 July 2002, the Knesset enacted the Deferment Law. The Law was enacted as a temporary order, and established that its extension would be reconsidered by the Knesset after five years. The Law provides that if certain conditions are met, among them a minimum number of hours of study and a prohibition upon working during study hours, the Minister of Defense may grant a one-year deferment to yeshiva students (ss. 2 and 3 of the Law). The main innovation of the Law, as opposed to the previous situation, was the introduction of alternative tracks to the deferment arrangement. The first track was that of the "decision year" (s. 5 of the Law). Under this arrangement, a yeshiva student whose military service had been deferred for four years and had reached the age of 22, could receive a further one-year deferment, even if he did not meet the normal conditions for deferment. During that year, the student could work without any limitations. Following the "decision year", the yeshiva student could choose whether to return to the former track of yeshiva studies – while continuing to receive a deferment from military service – or whether to enlist for military service or civilian service. The possibility of opting for a decision year would be granted only once to

each yeshiva student. Another track established by the Law was that of civilian service (s. 6 of the Law). The possibility of choosing this option was also granted only to those whose service had been deferred for four years and had reached the age of 22. Anyone who does not opt to take a decision year or volunteer for civilian service, and who meets the legal criteria, would continue to receive a deferment.

The Movement for Quality Government v. The Knesset case

9. As noted, the question of the constitutionality of the Deferment Law was first addressed in the *Movement for Quality Government* case. All of the earlier petitions against the Law focused upon the argument that the Deferment Law infringed equality by discriminating between those members of society who performed military service and those members of society who were exempt from such service, without there being any relevant difference between the two groups, and without meeting the conditions of the limitation clause. The petitioners also argued that those members of society who served were required to serve in the army for longer periods, the risk to their lives and health increased, and the economic harm they incurred was greater. The factual data presented to the Court showed that in 2003, the number of deferments stood at 38,449; in 2005, the number stood at 41,450, and by 2006, the number of deferments had grown to 45,639 (*ibid*. [2], at pp. 665-667). Indeed, in its response, the State admitted that the implementation of the Deferment Law was not satisfactory, and that significant parts of the Law had not been implemented. The State also agreed that "there is a need for an immediate change of the existing situation" (*ibid*. [2], at p. 666, in the letter of the Minister of Justice to the Prime Minister of 18 July 2005, which was appended to the State's response). The Prime Minister

directed that a series of steps be adopted to implement the Law, and in particular, to implement the civilian service track, which had not been implemented at all as of the day of the hearing of the petition (*loc. cit.*).

10. After reviewing the factual data and the arguments of the parties, we delivered our decision in which the majority of the Court held that the Deferment Law violated human dignity. The Court, *per* President Barak, held that the primary right at the core of the dispute was that of equality, and it is infringed by the blanket deferment that discriminates, in the absence of any relevant difference, between those members of society who serve and those whose service is deferred (*ibid.* [2], at pp. 677-679). It was, of course, held that not every infringement of equality constitutes a violation of human dignity. However, in accordance with the construction given to human dignity under the centrist model adopted in the decision, it was held that an infringement of equality that touches upon the fundamental values underlying human dignity constitutes a violation of dignity, and that the infringement resulting from the Deferment Law constituted such a violation. Discrimination in regard to the freedom of choice given a person in the course of prolonged service, that exacts a clear personal and economic cost, and that often involves risk to life and limb – is discrimination in regard to life itself. Such discrimination, the Court held, is the most severe, and its violation of a person's dignity as a free, autonomous being, is beyond question (*ibid.* [2], at pp. 689-690).

Having found that the Deferment Law violates equality as a component of human dignity, the Court examined whether the Law's infringement of dignity was lawful under the conditions of the limitation clause. In other words, was the infringement done by, or in accordance with a law befitting the values of the State of Israel; was the law enacted for a proper purpose, and is the violation of rights no greater than required. As noted, in the framework of that examination, the Court

found that the Law served four, primary objectives: to provide a statutory basis for the arrangement, to promote equal distribution of the security burden, in the sense that more men from the hareidi community would ultimately serve in the army, or at least perform civilian service, to encourage the hareidi community to participate in the workforce, and to resolve the problems in the existing deferment arrangement for yeshiva students, gradually, carefully and on the basis of broad consent rather than coercion (which would be ineffective) in regard to conscription. These four combined and interrelated objectives endowed the Law with a proper purpose. That being so, the examination focused upon the issue of proportionality. Based on the first subtest of proportionality, which examines whether or not there is a rational connection between a law's purpose and the measures adopted for its realization, we found that the infringement caused by the Law is not proportionate. That finding was based upon the data that had been presented before the Court, which showed that while the number of deferments grew steadily over the years, and comprised 45,639 men as of the end of 2006, the alternative tracks were barely put into effect (*ibid*. [2], at p. 711). Less than 3% of those who received deferments opted for the decision year, and only 9% of those who completed the decision year chose to enlist. Nearly all of the others returned to the "Torah is their calling" track, or were exempted from service. They were not integrated into Israeli society or into the workforce. As for the civilian service alternative, a small number of those deferred showed any interest in pursuing it, and even three years after the Law's enactment, the State has yet to adopt regulations and create frameworks to facilitate such service (*loc. cit.*). In view of these troubling findings, we stated that if we were to decide the petitions on the basis of the situation presented to us, we would have to declare the Law void due to a lack of proportionality. We further held that in the absence

of a rational connection between the means and the objective, the application of the other two subtests becomes entirely theoretical.

11. Nevertheless, we were of the opinion that, inasmuch as the Deferment Law was enacted as a temporary order, it would be appropriate to wait until the conclusion of the five-year period of its operation, before making a final determination on the constitutionality of the Law. That time period was also needed in order to test the respondents' argument that the fault lie not with the Law itself, but rather with the arrangements made for its implementation. The Court ruled that the answer to the question could be given only after the law had been implemented for some period of time, at which point it would be possible to examine how the tracks that implemented its objectives had progressed, and the effect of the Law upon the scope of deferments granted to yeshiva students. We, therefore, decided to wait and see if the Law would bring about the desired social change, and held that "if change is not achieved, there is a serious fear that the law will become unconstitutional. There will then be no alternative but to reconsider all of its arrangements, in terms of both their social and legal aspects" (*ibid*. [2], at p. 722 *per* Barak, P.).

12. Six years have passed since handing down the decision in the *Movement for Quality Government* case. Once again we face the question of the proportionality of the Law as demonstrated by its implementation over the last few years. As we held in our decision of 9 September 2009, this Court's decision in the *Movement for Quality Government* case, according to which the Law is, in the words of Justice A. Procaccia, contaminated by a "virus" of unconstitutionality (*ibid*. [2], at p. 795), will serve as the starting point for our decision on the current petitions. The question is whether the results of realizing the Law demonstrate that its implementation can cure the "virus", or whether

there is no avoiding the conclusion that we are concerned with a law that is not appropriate to its objectives.

The petitions before the Court

13. As earlier stated, the Deferment Law was originally enacted for a five-year period. Under s. 16 (b) of the Law, the Knesset may extend the force of Law for additional periods, not to exceed five years each. On 31 July 2007, about half a year before the Law's expiry, the Knesset held a plenum debate in which it decided that the Foreign Affairs and Defense Committee would submit its recommendation as to the extension of the Law. The Foreign Affairs and Defense Committee heard a variety of experts who examined various aspects of the Law, and at the end of its deliberations, the Committee recommended that the Knesset extend the Law. The Committee's recommendation was primarily premised upon the introduction of a civilian national service arrangement in 2008, and the expectation of a resultant change in the Law's implementation. The Knesset received the recommendation on 18 July 2007, and voted by a majority of 56 in favor, with 9 opposed, and 2 abstaining, to extend the force of the Law for an additional five years, until 1 August 2012. The petitions before the Court were submitted in response to that extension.

Arguments of the petitioners

14. Five petitions were submitted against the Deferment Law. Some of the petitioners have been involved in this legal battle for years. Many of the arguments are common to a number of petitioners, and for the sake of simplicity, they will be presented together. The arguments are primarily aimed at the Law's arrangements and at its extension for an

additional five years. The primary argument is that, in practice, there has been no observable change in the implementation of the Law. The petitioners ask that the Court determine that the Law is unconstitutional, or alternatively, some of the petitioners ask that the Court establish standards and criteria for assessing its effectiveness.

The petitioners argue that the decision to extend the Law for an additional five years exacerbates the discrimination and the inequality in bearing the security burden and in risk of life. According to them, the Legislature and the Executive were given ample opportunity to realize the objectives of the Law, and the actual implementation data shows that, in practice, yeshiva students are granted a blanket deferment that, over the years, becomes an exemption from military service. The petitioners argue that the number of those enlisting or opting for civilian service is but a "drop in the ocean" in comparison to the growing number of yeshiva students enjoying deferments or complete exemptions, and their number relative to the annual conscription pool is constantly on the rise. It is further argued that the data show that the primary area of growth is in regard to the number of those opting for civilian service, which shows that the Law does not at all encourage enlistment into military service, and that the data prove that the decision year does not influence the choice of whether to enlist or remain in yeshiva.

The petitioners further argue that the fact that the Law does not establish any limit upon the number of exemptions from service is sufficient to show that the question of proportionality was not considered. In order to achieve the Law's objective, they argue, it was possible to adopt other means less harmful to equality, such as establishing quotas, goals, limitations, and criteria that would grant exemptions on a case-by-case basis, and that would take into account the increasing number of applications for exemption from military service.

Additionally, it is argued that the blanket exemption granted to yeshiva students demonstrates the absence of an appropriate relationship between the advantages to be gained by the Law and the violation of constitutional rights, given that the Legislature granted absolute freedom of choice to yeshiva students, while imposing long years of demanding obligatory service upon other youngsters.

15. Some of the petitioners add that the State measures the success of the Law exclusively by economic criteria that examine hareidi integration into the workforce. In their view, this is but a byproduct of the main issue before us, and therefore, those criteria should not be addressed by the Court. In any event, the petitioners argue that the numbers not only show that the number of exemptions significantly increased while the number of enlistees did not adequately increase, but also that the economic objectives of the Law were not achieved.

Arguments of the respondents

16. In accordance with the procedural framework established for this case in the *Movement for Quality Government* case and the interim decision we issued on 8 September 2009, the respondents' pleadings – the Knesset, and the Minister of Defense and Attorney general – focused upon the progression of events following the extension of the Law, and upon data regarding its actual implementation. That data indicates, so it is argued, that the Deferment Law meets the proportionality test.

17. Respondent 1, the Knesset (hereinafter: the Knesset), submitted three primary responses (pleadings of 21 May 2008; amended pleadings of 4 January 2009; supplemental pleadings of 19 January 2011). In all three sets of pleadings, the Knesset argued that the Deferment Law should not be declared void. In its first pleadings, of 21 May 2008, it

argued that the petitions should be denied because the civilian service apparatus, which is one of the fundamental pillars of the deferment arrangement, had only begun to operate a few months prior to the extension of the Law, and its operation should be assessed over time. The response presented a detailed report of the deliberations of the Foreign Affairs and Defense Committee, which before recommending that the Knesset extend the Law, decided to tighten its supervision over the Law's implementation. According to the argument then raised, although the data concerning the Law's implementation shows that not enough had been done to advance it, the Law should not be deemed as suffering from a "genetic flaw".

On 19 January 2011, the Knesset submitted an updated response. These supplemental pleadings were accompanied by the Interim Report of the "Plesner Panel" (hereinafter; the Interim Report or the Plesner Report), which had been appointed by the Foreign Affairs and Defense Committee as part of its attempt to tighten its supervision over the implementation of the Deferment Law. The panel was led by MK Yohanan Plesner, and its members were Knesset Members Arieh Eldad, Moshe Gafni, Nissim Zeev, Israel Hasson, Eitan Cabel, and Moshe (Mutz) Matalon. The panel held a large number of meetings, fact-finding missions, and meetings with various elements responsible for implementing the Law. The Interim Report concluded that the *implementation of the Law had failed*. The Interim Report notes that the data revealed low rates of enlistment and participation in civilian service; an insufficient number of appropriate tracks for military service by yeshiva students; a need to establish goals for realizing the Law, and that consideration should be given to establishing quotas for entering the deferment arrangement. Despite the conclusion that the implementation of the Law had failed, the Plesner Panel was of the opinion that "the Law

should not be repealed, but rather policy and legislative changes should be made to enable adapting the Law's arrangements to the positive developments in hareidi society, and the lessons that had been learned thus far in regard to the conditions for the induction of hareidi men into the IDF" (Interim Report, p. 11). The Knesset's attorney noted that, following the submission of the Interim Report (which was signed by five of the seven members of the Panel), it was discussed by the Foreign Affairs and Defense Committee (but was not brought for a vote). At the conclusion of the session, the committee chairman, MK Shaul Mofaz, expressed his support for the principles outlined in the Interim Report. Therefore, in light of the Report's findings, and following the debates in the Foreign Affairs and Defense Committee and in the Knesset plenum, the current position of the Knesset was summarized as follows:

> 'In view of the positive developments presented in the Interim Report of the Plesner Panel, in view of the complexity of the profound social change that the Law entails, and the care and restraint appropriate to a sensitive, controversial issue in Israeli society, the Law should not be declared void and unconstitutional. However, the Knesset is of the opinion that the government must act to remove the impediments, establish policy, clear goals and courses of action for attaining them, and significantly intensify the efforts to implement the Law. In addition, the Knesset intends to employ the tools at its disposal in order to continue to closely follow the manner in which the Law is implemented . . .' (supplemental pleadings of the Knesset, dated 19 January 2011, p. 6).

18. Respondents 2-4 (the Government of Israel, the Minister of Defense, and the Attorney General – hereinafter: the Government) also submitted several sets of pleadings to the Court. In its pleadings, the Government described the various tracks for implementing the Deferment Law, and appended up-to-date figures regarding the number

opting for each of the tracks. The Government's primary argument is that the touchstone for evaluating the implementation of the Deferment Law should not be result-based – *viz*., an evaluation of the number of persons in military or civilian national service at any given time – but rather a process-based approach that examines the gradual change in the implementation of the Law. According to the Government, in view of the complexity of the required social change, what must be examined is the process for its implementation rather than the quantitative results at the present moment. It is argued that the process-based criterion comprises a number of sub-criteria, the examination of which will aid in determining whether "the State has met its duty of due diligence" (amended pleadings, dated 24 January 2011, p. 12). The Government recommended four criteria: (a) long-term commitment by means of establishing an operational structure, together with quantitative interim goals; (b) gradual (and continued) growth of the organizational infrastructure by which the Government intends to institute egalitarian conscription; (c) appropriateness of the allocated means to the potential pace of change, given the constraints deriving from the social complexity and the degree of social ripeness for change; (d) maintaining supervision and control over the gradual change, including the defining of interim goals to serve as reference points for supervision. It is argued that examining the implementation of the components of the process criteria will lead to the conclusion that the Government was diligent in creating a broad operational infrastructure that led to an increase in the number of persons serving in the various tracks. Moreover, the Government referred us to its last decision, from 9 January 2011, that established a "five-year plan" with quantitative goals for the number of persons to be serving by the year 2015. The decision also established that an Inter-Ministerial Committee, headed by the Governor General of the Prime Minister's

Office, which had submitted a report prior to the said decision, would maintain continuous oversight of the implementation of the decision, and present a report by 1 July 2012.

In addition to these arguments, the Government is of the opinion that it is incorrect to examine the numerical data deriving from the general population of those receiving deferments, but rather the examination should be made in regard to the segment of the young population composed, in general, of young married men who do not yet have children. According to this line of reasoning, the group of older yeshiva students have families, and there is considerable doubt as to whether, at this point in their lives, they would leave their studies in order to enlist for military or national service. Therefore, the social change that the Deferment Law is intended to institute is not relevant to that group. The Government argues that when the change is examined in relation to the younger population group that joins the deferment arrangement each year, the numbers over the last years reveal a significant change. Thus, for example, the Government notes that the number of new enlistees for military and civilian service from the hareidi population shows nearly a six-fold increase over the last four years. Similarly, the Government notes that over the last four months of 2010, some 120 men opted for civilian service each month. The Government maintains that the increase testifies "that this service track, and its underlying legitimacy, are growing, and are expected to grow with the increase in opportunities for service in this track" (supplementary pleadings of respondents 2-4, dated 24 January 2011, p. 7). According to the Government, the increase in the number of those joining the various service tracks testifies to the fact that the existing apparatus is succeeding to bring about an increase in the number of people enlisting, and that the present increase "is an expression of the maximum effort possible at this

point in time, in light of the constraints deriving from the pace of social change" (*ibid*., at p. 9).

Review

19. It is unnecessary to emphasize the importance of the question before the Court. Over the years, the issue of the conscription and exemption of yeshiva students has been examined by the Court with cautious restraint, while we carefully observed the social processes attendant to implementing the complex goals intrinsic to the Deferment Law. Like all the public bodies that have addressed the subject of the conscription of yeshiva students, we were constantly aware of the need to achieve greater equality in sharing the burden of military service, and of the importance of integrating hareidi society into the workforce, as well as of the need to achieve all this without coercion, while reinforcing the social contract grounding the attaining of these objectives. As we stated in our decision of 8 September 2009, our holdings in the *Movement for Quality Government* case constitute the starting point for our decision in this case. That means that having recognized the proper objectives of the Law under review, what remains to be examined is whether the violation of the right to equality is consistent with the proportionality requirement of the limitation clause. The current examination is, therefore, being conducted within the parameters set out in that judgment.

20. We now are now confronted with the first question that must be decided under the proportionality test: Do the means adopted by the law actually serve to realize its objectives? The judgment in the *Movement for Quality Government* case was delivered some three years after the Law's enactment. Several more years have past since then. We have reached the "finish line" (see the interim decision of 8 September 2009,

per A. Procaccia, J.). Much experience has accumulated. The primary apparatus for implementing the Law have been put in place. Several conscription cycles have concluded. We can now perform a quantitative examination comparing the number of enlistees in the various service tracks to the number of those opting for the deferment arrangement each year, and the number of those who choose to remain in it until obtaining a full exemption from military service. The numerical data now before us suffice to inform an opinion as to whether the Law's objectives have been realized, or at least, if some trend can be discerned in the implementation of the Law that changes the balance identified in the *Movement for Quality Government* case, so that we might decide that the Law passes the proportionality test.

21. The proportionality test established by the limitation clause requires that the violation of the protected right by the Law be "to an extent no greater than is required". The proportionality requirement recognizes that it is not sufficient that a law befit the values of the State of Israel, or that it be enacted for a proper purpose. The means adopted by the Legislature to realize that purpose must also be examined. That examination has been construed by the case law as comprising three subtests: the rational connection test – which examines whether the means chosen are appropriate to realizing the purpose; the least harmful means test – which examines whether the means chosen for realizing the purpose of the law is the one that will cause the least harm to the constitutional right, from among the possible means; and lastly, the proportionality test *stricto sensu* – which requires that there be a reasonable relationship between the infringement of the constitutional right and the advantage gained by that infringement (on the proportionality test, see: HCJ 4769/95 *Menachem v. Minister of Transportation* [8], at pp. 279-280 (hereinafter: the *Menachem* case);

HCJ 1661/05 *Hof Azza Regional Council v. The Knesset* [9], at. p. 546 (hereinafter: the *Hof Azza case*); HCJ 2605/05 *Academic Center of Law and Business, Human Rights Division v. Minister of Finance* [10], at para. 46 of my opinion (hereinafter: the *Prison Privatization* case). We will begin with the first subtest.

The first subtest: The rational connection test

22. According to the rational connection test, the means adopted by the Law must be appropriate to the Law's intended objective, such that they have the potential of realizing it (see, *inter alia*: HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defense* [11], para. 29, *per* A. Barak, P.; HCJ 3648/97 *Stemka v. Minister of the Interior* [12], at. p. 776 (hereinafter: the *Stemka* case); HCJ 5016/96 *Horev v. Minister of Transportation* [13], at p. 53 (hereinafter: the *Horev* case); *the Hof Azza* case [9], at p. 550). The proportionality test examines the question of whether "the means chosen is relevant to the realization of the purpose, in the sense that the probability of attaining that purpose increased with the enactment of the law. Therefore, if implementing the means does not have the potential of realizing the purpose of the law, then the use of that means is disproportionate" (Aharon Barak, Proportionality: Constitutional Rights and their Limitations, p. 374 (2010) (in Hebrew) (hereinafter: Proportionality). In the *Movement for Quality Government* case, we held that the decision as to the rational connection between the means and the purpose is not merely a theoretical question. Rather, in the circumstances of the case at hand, we sought to employ a practical test. Can it be said, nine years following the enactment of the Deferment Law, that its means are capable of realizing its purposes?

23. In answering the petitions, the Respondents provided copious data concerning the implementation of the law. The data details the extent of the Law's implementation in accordance with the three tracks that it established: military service, civilian service, and the decision year. These are accompanied by a fourth track, which, practically speaking, is also established by the Law, that of deferment. The data, which will be presented more fully below, paints a complex picture. On the one hand, the number of those entering military service or choosing civilian service is discernibly on the rise. Military service options were broadened and adapted to accommodate hareidi soldiers. The Civilian Service Administration was also created, albeit with considerable delay. On the other hand, despite the growth in the number of hareidi men serving in the army and performing civilian service, the numbers are not high in absolute terms. The total number of those actually entering military or civilian service in 2010 – which is the largest number since the enactment of the Deferment Law – is significantly lower than the number of those who chose the deferment arrangement that year. In practice, the data demonstrate that more hareidi youths choose deferment of service than opt for military or civilian service. It should be pointed out that in the interim since the submission of the data, the ratio between those who choose the deferment arrangement and those who enter military or civilian service has remained unchanged. This would appear to be the trend according to published reports of the recent meetings of the Foreign Affairs and Defense Committee of the Knesset.

In order to determine whether, ultimately, the Deferment Law meets the rational connection test, we will review the data submitted to us in regard to the implementation of the Law. As stated, the data summarize the situation up to the beginning of 2011. We will first analyze the data in regard to each of the service tracks, and then consider

whether or not the data, taken together, lead to the conclusion that the Law passes the proportionality test.

Military service

24. From the Government's response to the petitions before us, it appears that there are currently two unique service options for the hareidi public. The first track is the hareidi Nahal battalion "Netzach Yehudah", in which, as a rule, one completes a regular, 36 month tour of duty. This track is not new. It existed before the Deferment Law was enacted, but it was utilized in a relatively limited way. Those who serve in this track are generally young hareidi men who have dropped out of yeshiva. Along with this track, the Air Force initiated two tracks aimed exclusively at the hareidi community ("*Shahar Kahol*" and "*Shahar Ba'ofek*"). Those who enlist in these tracks undergo initial training in an military preparatory program. Following their enlistment, and after completing basic training, they undergo additional training in technical fields or in computer sciences. They then enter the Air Force's technical service, or its technology units. In the years 2009-2010, these *Shahar* tracks were expanded, and in addition to the air force tracks, there are now additional tracks in the Intelligence Corps, C4I Corps, Navy, Technology Corps, Manpower Corps, and the Homefront Command. It should be noted that the length of service in the various tracks is not uniform. Whereas those serving in the hareidi Nahal unit normally complete a full 36 month tour, the length of service in the other tracks varies from 16 to 24 months, depending on the length of the training program and the soldier's family status.

25. In its last response, the Government informed the Court of a significant change of policy in regard to army conscription directives.

This change was anounced in Government Decision no. 2698 of January 2011. In its decision, the Government amended the army conscription directives in accordance with a recommendation of the Inter-Ministerial Committee headed my the Director General of the Prime Minister's Office, which was asked to make "recommendations in regard to the conscription directives, bearing in mind, *inter alia*, the national need to integrate the hareidi sector into the workforce, and the budgetary burden of family payments upon the defense budget" (the committee was appointed in Government Decision no. 2000 of 15 July 2010). Prior to the change, the conscription directives provided that married hareidi men with children, who were aged 22 and over, who requested to substitute civilian service for their military service obligation would, as a rule, be granted their request, whereas such requests from hareidi men who did not have children would be granted only from the age of 26 and older. The new directives provide that single hareidi men, and those who are married but without children, from the age of 22 and up, can perform civilian service in the civilian security track ("Security National Service", such as service in the Police, Prison Service, Magen David Adom, and the Fire Department). It was further decided, on a one-time basis, that all those who had been granted deferments and who had three children or more (regardless of age) would be referred to the reserves, and thus would be exempted, in practice, from active duty and from the alternatives provided by the Law.

The Government also adopted the committee's conclusions in regard to setting goals for hareidi service. According to the goals established, 2,400 hareidi men would be inducted into service, of them, half (1,200) would be inducted into the army, and half (1,200) into civilian service. The planned increase would be 600 additional inductees in each subsequent year, such that 4,800 hareidi men would be inducted

into service in the year 2015, of them, 2,400 would be inducted into the army, and 2,400 into civilian service – a number that would represent some 60% of the relevant age group. The Inter-Ministerial Committee also recommended expanding the choice of military service frameworks available to hareidi men, and the addition of three additional tracks: a hareidi *hesder* yeshiva track, combining a period of study with active military service; a technological education track (together with the Ministry of Industry and Trade and the Ministry of Education), intended primarily for hareidi youth who drop out of yeshiva, and which would lead to full military service in the technology field; and an abbreviated service track for hareidi men over the age of 26, after which they would be referred to the reserves. According to the Inter-Ministerial Committee, the last recommendation, concerning abbreviated service, already appeared in the Tal Commission Report, and its implementation would not require legislative action (Report of the Inter-Ministerial Committee, p. 14).

26. As stated, the recommendations of the Inter-Ministerial Committee were adopted by the Government's decision of 9 January 2011. In addition to those conclusions, it was further decided that hareidi men over the age of 28 would also be referred to the reserves without any special training, in view of the army's needs and their limited ability to perform significant service. As a result of the Government's decision, the table of induction directives and service tracks for those who choose to *leave* the deferment arrangement or *not enter it* from the outset, is as shown below. It should be noted that implementation of the directives presented in the table, which was appended as an annex to the Government's decision of 9 January 2011, commenced on 10 march 2011:

Age	Type of Service		
18-21	Regular military service (36 months), or military service combined with study in a *hesder* yeshiva		
22-25 without children	Referral to security national service	Military service (16 months or 24 months for tracks requiring intensive training)	
22-25 with at least one child	Referral to civilian service	Military service (16 months or 24 months for tracks requiring intensive training)	
26-27	Referral to civilian service	Military service (16 months or 24 months for tracks requiring intensive training)	Abbreviated military service (3 months)
28-34	Referral to reserves		
35+	Exemption from military service		

27. As for the numerical data, the Government's pleadings show that, as of May 2008, 39 soldiers served in the "*Shahar Kahol*" track, and 28 served in the "*Shahar Ba'ofek*" track. In its response dated 30 December 2008, the Government reported that "several hundred" hareidi soldiers were serving in the hareidi Nahal unit, and some 150 soldiers were serving in the *Shahar Kahol* and *Shahar Ba'ofek* tracks (the Government did not specify in its response how many of those were *new recruits* that year). In its most up-to-date response, from 24 January 2011, it reported that the number of hareidi men serving in the armed forces in 2009 was 1,357, of whom 729 were *new recruits* inducted that year into the various tracks (the hareidi Nahal unit and the *Shahar* tracks); 2,048 hareidi men served in the armed forces in 2010, of whom

898 were *new recruits* to the hareidi Nahal track and the *Shahar* tracks (p. 21 of the Government's amended pleadings of 24 January 2011).

28. The Government argued that the data should be analyzed on the basis of the annual conscription pool, rather than on the basis of the total number of deferments, which stood at 61,877 at the time of the submission of the response. According to the argument, that total number represents the "desert generation", and comprises men who, it is claimed, cannot realistically be inducted into military or civilian service. Reference to the annual conscription pool rather than the total number of deferments, it is argued, focuses upon the younger generation, while removing from the equation all of those members of the hareidi community who, it may be assumed, will not be called up for military service by reason of age or family status.

29. Even if we were to accept the Government's argument that we should focus upon the younger generation in regard to rates of enlistment for military or civilian service, the argument that those rates should be evaluated with reference to the current conscription pool is, nevertheless, very problematic. In view of the fact that the Law makes it possible to waive one's deferment and enlist into the armed forces or join the civilian service at any stage and at any age, those enlisting or joining the civilian service in any year *are not* members of that same annual conscription pool, but rather belong to several different annual groups. Thus, aggregating them into a single group, and examining them in reference to the number of deferments in the conscription pool of a single year, as the Government urges, does not yield a result that accurately reflects the actual situation. The Government, itself, did not provide data that would make such an examination possible. That being the case, it would be more accurate to examine the number of those entering military or civilian service against the background of the total number of

deferments, which represents the general group from which those entering the various tracks are drawn. This situation is a product of the arrangements established by the Law itself, which creates a situation in which those entering the armed forces or civilian service do not represent a uniform age group, or in other words, are not members of the same annual conscription pool. That is, of course, as opposed to the remainder of the candidates for military service, the vast majority of whom are members of the same age group.

Moreover, the "desert generation" argument, as skewed as it may sound, is incomprehensible in view of the relevant timeframe. Most of the hareidi members of the current deferment group are young people who entered the deferment arrangement *after* the Deferment Law was enacted, some ten years ago. At best, the "desert generation" argument might be valid in regard to those who entered the arrangement before the enactment of the Law, and who made their plans in accordance with the prior legal situation. But after the enactment of the Law, one cannot rely on the prior situation. That is particularly so in view of the fact that we are not speaking of a small group. As of the date of the submission of the data, the deferment group comprised 61,877 men. Of them, 22,000 were "free" for civilian service (as established in the Report of the Inter-Ministerial Committee, p. 29). The significance of the "desert generation" argument is a surrender in advance of any hope of enlisting that group for military or civilian service.

30. As stated, under the Government's approach, the data regarding the number of those entering military service should be calculated in regard to the last annual conscription group. As of April 2010, a total of 7,700 eighteen year olds registered with the Ministry of Defense as belonging to that annual conscription group and are classified as "deferred". The Government argues that of that number (7,700), only

5,400 are actually potential candidates for enlistment to the *Shahar* tracks and civilian service. It is estimated that of the 7,700 who were granted deferments, 1,000 are not hareidi, but rather young religious men in the *hesder* yeshiva track, and will thus be conscripted for military service, and about 900 others are expected to be exempted for medical and other reasons up to the age of 22 (it should be noted that the Inter-Ministerial Committee put the number of expected exemptions for medical and other reasons at 600). We are thus left with a potential hareidi conscription group of 5,800. Of those, some 400 are expected to enlist in the hareidi Nahal unit (most of whom, as noted, are hareidi youths who dropped out of school and will enlist at the age of 18). It is, therefore, argued that the percentage of those entering military and civilian service should be calculated in reference to that group of 5,400.

31. As noted, the approach is problematic, and calculating in that manner yields inaccurate results. But even if, for the sake of argument, we were to accept the Government's claim, and assume the existence of a "virtual" number of 5,400 as representing the hareidi members of some conscription group, the factual situation would remain far from satisfying. Assuming that 400 is, more or less, a given in terms of the number enlisting for full military service in the hareidi Nahal battalion, inasmuch as it relates to hareidi youths who have dropped out, and are no longer studying in yeshiva, then the primary recruitment efforts, even according to the Government's approach as stated in its response, would be directed toward enlistment of hareidi candidates to the *Shahar* framework. In fact, the number of hareidi recruits entering the *Shahar* tracks in 2009 was 382, which represents 7% of the "virtual" conscription group. In 2010, the situation improved somewhat, but the percentage remained very low, with only some 10% (530 hareidi recruits) enlisting in the *Shahar* tracks that year.

The figures become more precise – and, unfortunately, more problematic – when the evaluation is made in reference to the total number of deferments. Such an analysis reveals that the number of recruits in 2010 (a total of 898 hareidi recruits to the hareidi Nahal battalion and *Shahar* frameworks) constituted 1.45% of the total number of deferments. The number of recruits to the *Shahar* tracks alone constitutes 0.8%, and the total number serving in the armed forces in 2010 (2,048 hareidi soldiers) constitutes only 3.3% of the total number of deferments. These are minute numbers. What they signify is that, despite the rise in the number of those who enlist for military or civilian service, no noteworthy change can be discerned in hareidi society, and no significant change can be seen in its integration into the various service tracks.

32. Moreover, in view of the new conscription directives that entered into force in March 2011, it is highly questionable whether the current increase in the annual number of recruits (even if, as noted, it is a limited trend in absolute numbers) will continue in the coming years. As we explained above, the primary change in the new conscription directives is that, from the age of 22, a deferred person will be able to choose between military service and civilian security service, even if he is not married or is married but without children. That decision changed a prior governmental decision that decreed that unmarried men or those who were married but did not have children would be referred to civilian service only from the age of 26. The significance of the original decision was that it granted preference to military service over civilian service. That distinction no longer exists. In effect, a person with a deferment now enjoys what amounts to a nearly absolute prerogative to choose the track he prefers – deferment and entering the "Torah is their calling" arrangement, enlistment in the armed forces, or opting for civilian

service. The conscription directives do not set out any criteria by which the Minister of Defense is to approve or reject a request to opt for civilian service as opposed to military service, and the Law, too, provides no such criteria. It would appear that, in effect, in its last decision, the Government directed the Minister of Defense to approve every request to enlist in civilian service, without regard for military/medical profile or age of the requester. It should be noted in this regard that s. 13 of the Deferment Law, titled "Execution and Regulations", states that the Minister of Defense may formulate regulations for the execution of the Law in a number of areas, among them, as stated in ss. (3): "The treatment of requests to perform civilian service under s. 6 (e), and the criteria for their approval". The Minister of Defense exercised this authority by promulgating regulations for the implementation of the Law (Regulations for the Deferment of Service for Yeshiva Students for Whom Torah Is Their Calling, 5765-2005), but they do not make any reference to civilian service, and treat only of the deferment of service and the decision year. It thus appears that there are currently no criteria for approving a request to perform civilian service by a person holding a deferment, and in practice, it would appear that the Law is implemented in a manner that tends to grant preference to civilian service.

33. Moreover, the new conscription directives set out an additional track for abbreviated military service of only 3 months for deferred men between the ages of 26 and 27 (older men, 28 and up, are referred directly to the reserves, with no training). The abbreviated service will comprise one month of basic training and two months of further preparation for assignment to reserve units. As explained in the Report of the Inter-Ministerial Committee, and from the explanatory note to the Government's decision of 9 January 2011, the Government views abbreviated service as "an important alternative for the service of hareidi

men" (the explanatory notes to the Government's decision were appended to the Government's amended pleadings of 24 January 2011, and marked Res/3(b)), and "a situation in which a large number of hareidi men are called up annually for active reserve duty in uniform, and make a significant contribution to the general public in times of emergency, [is] in the opinion of the committee, a situation that can bring about significant change both in the integration of the hareidi sector into the general public, and in the legitimacy ascribed by the hareidi sector to military service in general" (*ibid.*, p. 9 of the explanatory notes). As a consequence of adding this alternative, a man of 26, who chooses to relinquish his deferment, is presented with three choices: "regular" induction into the army (in which case he will, in any case, complete a reduced tour of duty of 16 or 24 months); civilian service for one year; or three months of abbreviated service. It would hardly be superfluous to add that three months of military service, even if followed by reserve duty, is not equivalent to real military service (even if, in most cases, it may last for only 16 months). Moreover, the abbreviated service track was recommended by the Tal Commission, but was rejected in the course of enacting the Deferment Law. Adding it now, as part of the conscription directives, smacks of circumventing the Knesset's decision in the matter.

34. From the Report of the Inter-Ministerial Committee, we learn that the new conscription directives were intended to bring about uniformity in the conscription directives by basing the conscription tracks on a person's *age* rather than on his military profile, which is the accepted practice in regard to other conscripts who are not hareidi, and as was the practice in regard to hareidi deferments prior to the Government's decision of 9 January 2011. The purpose, as presented in the Report of the Inter-Ministerial Committee, was to introduce greater

certainty in regard to the service tracks, which currently "are not decided [. . .] in accordance with his medical profile, which is a criterion unknown to the hareidi youth" (Report of the Inter-Ministerial Committee, p. 25). The new directives do, indeed, yield greater certainty. However, certainty is not one of the purposes of the Law, and with this increased certainty comes a real fear that the new directives may serve as a significant disincentive to full military service (in the hareidi Nahal battalion), or partial service (in the various *Shahar* tracks). Their direct result is that a young hareidi man who, at age 18, opts for the "Torah is their vocation" arrangement, and who remains in that arrangement until age 22, is effectively not required to perform military service. If he chooses to leave the deferment arrangement and enlist in the army at the age of 22, he will be inducted for an abbreviated tour of duty of 16 or 24 months. Alternatively, he has the possibility of performing only one year of civilian service instead of military service. If that young man is single, or married without children, his civilian service will be security related, e.g., civilian service in the Police, Fire Department, or Magen David Adom. The choice among the tracks is that of the young man with the deferment, and it does not depend on his military profile or any other criterion. The significance is the transfer of the choice to those holding deferments: if they wish, they can enter the deferment arrangement; if they wish, they can leave it. If they choose to end their deferment, the choice is theirs whether to enlist in the army or opt for civilian service – which by definition, is a one-year abbreviated service that substitutes for full military service. It would seem superfluous to point out that non-hareidi youth are not presented with similar options.

35. The rationale for the conscription directives can be gleaned from the Report of the Inter-Ministerial Committee. According to the committee, "These actions [changing the conscription directives – D.B.]

will not significantly **harm** the motivation of hareidi men to enlist in the offered tracks, but they will make it possible to accelerate the integration of some of the hareidi men into the workforce, and in this manner, increase equality in sharing the economic burden" (Report of the Inter-Ministerial Committee, p. 6 (emphasis original)). In other words, the primary motivation for the decision to refer young men from the age of 25 to civilian service and to add an abbreviated military service track was economic. The economic consideration, and the desire to enable integration of members of hareidi society into the workforce were also the reasons for appointing the Inter-Ministerial Committee. Thus, the Government's decision to create the committee (Decision 2000 of 16 July 2010) expressly states that the committee "will make recommendations in regard to the conscription directives, bearing in mind, *inter alia*, the national need to integrate the hareidi sector into the workforce, and the budgetary burden of family payments upon the defense budget". It is clear from this decision that the Government views conscription of members of the hareidi community into military service as presenting a budgetary burden, and therefore, as something that should be limited. Indeed, in certain situations, the "budgetary burden" involved in drafting hareidi men into the army can be twice the "budgetary burden" presented by civilian service. Lightening the burden can be achieved by expanding civilian service and limiting conscription for military service – as would appear to have been done in the directive to the Minister of Defense to refer deferred men to civilian service from the age of 22, and by the creation of the abbreviated service track for deferred men aged 26-27.

36. The same economic rationale grounded the Government's decision, made in accordance with the Inter-Ministerial Committee's recommendation, to make a one-time referral of all those who had been

granted deferments and had three children or more to the reserves. The Report of the Inter-Ministerial Committee stated that this step was adopted "because it is expected that it will be some time before appropriate service tracks will be established for that population, and there is a desire to prevent unnecessary delay of the ability of this group to integrate into the workforce" (*loc. cit.*). The report of the Inter-Ministerial Committee, the Government Decision, and the Government's pleadings give no indication of the number of men who have now been referred to the reserve pool, and in effect, were granted an exemption from military or civilian service. However, it would appear that a significant group of men with deferments benefitted from this one-time decision.

As noted, the Inter-Ministerial Committee was of the opinion that changes in the conscription directives would not negatively affect the willingness of members of the hareidi community to enlist for military and civilian service. According to the Report:

> 'The Committee's recommendations attempt to balance the effect upon the civilian service. On the one hand, the recommendation for the creation of an abbreviated service may reduce the number of those opting for civilian service – inasmuch as the abbreviated service will serve as a substitute for civilian service (for the hareidi population that will agree to wear a uniform and serve in reserves). On the other hand, granting the younger population the possibility of opting for civilian service can be expected to increase the number of those choosing civilian service, and will balance the effect on the overall number of those in civilian service' (p. 25 of the Report).

Nevertheless, the Inter-Ministerial Committee recommended that the actual results of implementing the arrangements be examined after two years. According to the Committee, "if, after the implementation of all of

the Committee's recommendations, it appears that the IDF and the civilian service are having difficulty in recruiting enough deferred men who are interested in serving, a further change in the conscription directives should be considered, as well as an increase in the incentives for enlisting, *while preserving the preference for integration into military service*" (Report of the Inter-Ministerial Committee, p. 7 (emphasis added – D.B.)).

37. This final recommendation appears odd in light of the details of the recommendations and the data presented above. The implementation of the Law does not indicate that a preference for integration into military service is being preserved, and it is highly doubtful that it will be preserved in the future, in light of the new conscription directives. The induction of only 530 hareidi men into the *Shahar* tracks, nine years after the enactment of the Law, indicates a failure in its implementation. The fact that there is a rising trend in the enlistment numbers is, of course, a positive development, but presenting some measure of improvement is not enough. Nine years after the enacting of the Law, one could expect a more significant number of enlistments. The small number of those enlisting, along with the relative ease by which very significant changes can be made to conscription directives, as was done in the Government's last decision, demonstrate a basic problem in the Deferment Law itself. The fact that by a government decision, it is possible to direct that a large group of people, that has neither served nor received any training, be assigned to the reserves pool merely because of the family status of its members (being parents of three children), and the fact that a government decision can create a very abbreviated military service track that can only questionably be viewed as service at all, raise problems that are not inconsequential. The preference for military service, which was held to be one of the purposes of the Deferment Law in the *Movement for Quality Government* case, and that was recognized in the Report of the

Inter-Ministerial Committee (p. 7 of the Report, as quoted above), cannot be discerned in the decision to change the conscription directives – quite the opposite. The conscription directives were formulated such that preference would be shown for civilian service in regard to the younger age categories.

38. The changes in the Government's approach to implementing the Law over the years point to the inadequacies in the Deferment Law. The Law establishes the possible service tracks, but leaves the door wide open in regard to the Executive's discretion as to implementation, and to the pace of that implementation. In the framework of that discretion, the Government can make decisions that have far-reaching implications for the implementation of the Law, to the point of nullifying its purposes. In the absence of criteria in the Law in regard to its execution, the Government can make decisions that can have decisive effect upon the pace of the Law's execution, or at least, that can so drastically limit some of the tracks as to render them meaningless.

39. There is no doubt that the Government's efforts to encourage hareidi integration into the workforce, as part of the economic rationale underlying the Government's last decision, are important and worth pursuing. Indeed, the aim of integrating members of the hareidi community into the workforce is a vital objective that was recognized as one of the legitimate purposes of the Deferment Law. Greater involvement of the hareidi community in the workforce will contribute to decreasing the severe level of poverty in that community, and narrow the growing schism between hareidi society and Israel's secular society. It is a social undertaking of the greatest national importance, but it cannot be made into the primary or exclusive objective of the Deferment Law. Four underlying objectives of the Law were recognized as constituting "a proper purpose" *when taken together* (the *Movement for Quality*

Government case [2], p. 704). Each draws upon and influences the others. The purpose is proper only when the Law facilitates a legal arrangement intended to reduce the inequality caused by not drafting hareidi men into the army by drafting them into the army, or at least into civilian service, and by encouraging their integration into the workforce, and achieving this by consensus rather than by coercion. It is the combination of these objectives that provided the Law with its proper purpose from a constitutional perspective, as well as from a social point of view. The implementation of the Law cannot now infringe any of those purposes, as the means would not, then, lead to the realization of the purposes.

That being the case, the Law cannot be implemented in a manner that infringes one of its purposes – not to mention, one of its fundamental purposes – by reason of budgetary constraints. The fact that inducting hareidi men into the army presents a considerable budgetary burden is a necessary by-product of the arrangements established by the Law, and particularly of the fact that, other than those enlisting in the hareidi Nahal battalion, the other recruits are over the age of 22 – in other words, they are at a stage at which most are married and some are fathers of at least one child. Once the Law made it possible to defer induction by at least four years, the unavoidable result was that the population being inducted for service at the end of that period would be older, and in view of the character of hareidi society, would also have families. The higher budgetary costs are the result of the family payments to which the recruits are entitled in consequence of their family status, and is, therefore, the word of the legislature.

40. Moreover, in a long line of precedent, this Court has held that protecting fundamental rights costs money, and that the economic argument cannot, in and of itself, justify an ongoing violation of equality

(see, e.g: HCJ 4541/94 *Miller v. Minister of Defense* [14], pp 120-121, 144) (hereinafter: the *Miller* case). That being so, the economic cost, alone, does not justify the Government's limiting of the military service track. Parenthetically, we would note that examining the economic cost in terms of family allotments alone yields only a partial view that does not reflect the full picture. Although no one denies that the army must bear a significant burden of family payments for soldiers who are married and have families, if we take into account the fact that during their military service, those soldiers do not benefit from other forms of support that they receive as yeshiva students (among them, stipends for yeshiva students, social security payments, teachers' salaries and the costs of establishing and running the yeshivas, and municipal tax discounts – see: the Tal Commission Report, p. 54), it would appear that the overall demand upon the State budget is much lower.

To this we might add the proven economic advantage to the State from drafting hareidi soldiers into the armed forces, in particular, as opposed to other tracks. From the data that the Government provided in regard to the rate of integration into the workforce of those who serve in the armed forces, it appears that some 80% of those completing the *Shahar* tracks enter the workforce upon their discharge. This is a significant figure that demonstrates the potential of military service to provide professional training that can serve as a springboard into the marketplace. Military service, more than civilian service, and certainly more than the decision year, prepares hareidi men to work in areas of technology that are in high demand. The numbers speak for themselves. The high figure – some 80% of those who served in the *Shahar* tracks found employment – shows that military service should be encouraged not only as a means for reducing the infringement of equality, but also in

order to increase the percentage of people from the hareidi sector participating in the workforce.

Civilian national service

41. Getting the civilian national service track up and running was fraught with difficulties. Although the Deferment Law was enacted in 2002, the Civilian Service Administration was established only in 2007, and began to operate only in March 2008. The process of setting up the Civilian Service Authority began in the Committee for Planning Civilian National Service in Israel, headed by General (ret.) David Ivry, who was appointed by the Minister of Defense following the decision of this Court in the *Movement for Quality Government* case (hereinafter: the Ivry Committee). In an interim report submitted to the Minister of Defense in February 2005, the Ivry Committee emphasized the importance of preserving the preference for obligatory military service and its primacy, and recommended that the civilian service option be extended to all Israeli citizens and residents who are not called up for military service, or who are exempt. On 18 February 2007, the Government adopted the recommendations made in the Ivry Committee's report (Government Decision no. 1215). It was also decided that a project manager, to be supervised by the Director General of the Prime Minister's Office, would work to advance the establishment of the Administration, and would submit recommendations to the Government in that regard. In Decision no. 2295 of 19 August 2007, the Government adopted the recommendations of the project manager, and decided upon the creation of an administration for civilian service and national service, "within which framework, young citizens of Israel from every population group that does perform military service by law, will contribute one or two

years of their time to civilian activity that is useful to society in general and to weaker populations in particular, that will strengthen the connection and identification of young citizens with the community, society and state, reinforce their professional abilities and their readiness for future employment, and contribute to developing their character and leadership ability". The decision also enumerated the Administration's functions, and established guiding principles for civilian-national service, among them that such service was intended for those who had received a deferment or exemption from military service; referral to the service will be on a voluntary basis; the service will comprise all sectors, groups and religions in Israeli society; the service will be an independent body, and will perform functions for the welfare of the public, the community and society. It was further decided that those who perform civilian service would be entitled to the same economic benefits as those granted to persons volunteering for national service, in accordance with the length of service, and subject to the proviso that the economic benefits would not exceed those paid to soldiers serving at the rear. It should be noted that on 16 November 2008, the Knesset enacted the Civilian Service (Amendments) Law, 5769-2008, which was intended to equate the status of those performing civilian service to that of persons performing national service or military service for the purpose of the Severance Pay Law, 5723-1963, and the Absorption of Discharged Soldiers Law, 5754-1994 (relative to length of service).

42. In practice, as noted, the Administration was established in early 2008. Since beginning its operations, 2,575 members of the hareidi community have performed civilian service. As of May 2008, some 70 members of the hareidi community had performed civilian service. That number grew to 450 by December 2008. In 2009, 1,003 hareidi men joined the civilian service, and 1,122 joined in 2010. The Administration

has expanded, and several staff positions have been added. The Administration worked hard to increase the number of "operators" accepting hareidi volunteers to the civilian service, and of late it has even contracted with an external body that will help supervise the activity of those performing civilian service. That supervision is needed, *inter alia*, in order to address the situation in which, until now, most of those performing civilian service served within the hareidi community. As the head of the Administration informed the Foreign Affairs and Defense Committee, whereas in the beginning, the number of civilian service volunteers serving within the community stood at 90%, as of January 2011, service within the community had dropped to about 57% (according to the head of the Administration, Sar-Shalom Jerbi, speaking to a session of the Foreign Affairs and Defense Committee on 18 January 2011, at p. 29).

43. These data seem to paint an encouraging picture in regard to the implementation of the civilian service track. However, despite the growth in the number of those volunteering for civilian service, the process of setting up the Civilian Service Administration and its operation raise some problems. As noted, although the Deferment Law directed that the Administration be created in 2002, it was not actually established until March 2008. Initially, the Administration operated under the auspices of the Prime Minister's Office. In April 2009, responsibility for the Administration was transferred to the Ministry of Science and Technology. There were also problems in regard to staffing the Administration, in the agreements with potential organizations that could absorb the volunteers, and in setting up the apparatus to supervise the volunteers. Even the memorandum for the law that was intended to regulate all of the aspects of national service, which was supposed to be submitted by October 2007, was only submitted in December 2007, and

the Administration only delivered the draft of the law to the Ministry of Justice in February 2010, in preparation for presenting it to the Ministerial Legislation Committee.

44. The State Comptroller's Report of 2009 (submitted in May 2010) examined the operation of the Administration, and the implementation of the Deferment Law in regard to civilian service (State Comptroller's Annual Report (No. 60B) (2009, and Accounts for the 2008 Fiscal Year), pp. 913-991(2010)). The State Comptroller's Report related to the period between March 2008, when the Administration began its operations, and October 2009. The Comptroller's Report points to a number of deficiencies in the operation of the Civilian Service Administration, and in the implementation of the Deferment Law in regard to the civilian service track. The Comptroller found that some 40% of those performing civilian service were serving in the areas of special education and mentoring. This was so, even though in the legislative proceedings of the Deferment Law, the Knesset removed the field of education from the areas of service (such that under s. 6 of the Deferment Law, civilian service would be performed in the areas of health and welfare, immigrant absorption, environmental protection, internal security, and various rescue services). It was further found that those serving in the field of education would invite their pupils to their homes over the weekend "as a matter of course", and report 24-36 consecutive hours of service. During the summer, when the pupils were on vacation, group activities were arranged at youth villages, and included overnight stays. Such activities were also reported as consecutive hours by those performing civilian service. The Comptroller's Report found that, in practice, those involved in mentoring "fulfilled all of their hours of service in the course of a few days, or on weekends alone" (*ibid*., p. 976). The Report also warned of deficiencies

in the work of the operating body – a private body that was granted the supervisory and oversight authority of the Administration. It found that coordinators, who were supposed to supervise the work of the volunteers, were responsible for more volunteers than the operating body had agreed to in the tender, and that time sheets that were suspected of not reflecting actual presence, or that were unsigned, were not addressed in any way. Furthermore, a review conducted by the operating body, found family ties between volunteers and office holders in the bodies in which they were serving. Despite the fear of conflict of interests, the Administration did not discontinue the service of those family members, but rather, merely made them subordinate to others who were not their relatives (*ibid*., pp. 976-977).

45. Similar findings were mentioned in the Plesner Panel's Interim Report. The Interim Report notes problems that were discovered in the functioning of the Civilian National Service Administration during the two years that it was reviewed. The Interim Report points out that representatives of the Administration did not present a plan that included policy and concrete objectives in regard to the desirable number of volunteers in the various service areas; multi-year objectives for the elements of the service program; an analysis of the needs of the governmental bodies in terms of national priorities, and the creation of a set of preparatory programs with an eye toward the future employment of the volunteers upon completion of their civilian service. The Interim Report also noted that the Administration had not established methods for checking on the presence of volunteers at their places of service and the quality of their contribution (*ibid*., p. 24). In the opinion of the Panel, "the Civilian National Service Administration must become a body that delineates a vision, establishes policy, sets objectives, negotiates the opening of additional national service tracks, and supervises the

placement organizations and the operating bodies, alone. It must be a regulatory and policy-making body, and it is recommended that executive functions be transferred to external bodies" (*ibid*., p. 25). The result of the lack of vision and policy guidelines was that, as of the writing of the Interim Report, the Administration had not succeeded in filling the volunteer positions that had been approved (*ibid*., pp. 27-28).

The Interim Report also warned that a large number of volunteers (68%) were serving in frameworks within the hareidi community, mostly in the field of social welfare. The Report further revealed that many of the hareidi volunteers served in education – some in educational fields that were described as social welfare. That was so, even though, as stated, education was not among the areas of service included in the Law. In the Panel's view, while service within the hareidi community was appropriate "as an initial formula" for hareidi volunteering (*ibid*., p. 27), a change in that trend should be sought, such that the service would be performed within national frameworks that would contribute to hareidi integration into society.

46. Thus, along with the growth in the number of volunteers in civilian service, we find problems with regard to supervision over the quality of service, the establishing of goals, and in filling the positions created for those volunteering for service. Proper implementation of the deferment Law does not merely mean increasing the number of volunteers for civilian service. Proper implementation of the Law requires a substantive examination of the nature and quality of the civilian service so that it will achieve its objectives, and most importantly, so that civilian service will constitute an appropriate alternative to military service. The civilian service track was established in the Deferment Law in order to provide members of the hareidi community with a form of service that would be appropriate to their

lifestyle, and that would reduce the inequality caused by their not being conscripted for military service. In order to achieve those ends, it is not enough to show an increase in the number of volunteers for civilian service. The civilian service must be brought to a point where it is a true alternative, in terms of quality, nature and length of service, to military service, and in that regard, more than one year of civilian service must be required. Civilian service must be shown to be significant, and to have the potential of advancing the purposes of the Deferment Law. That must be done, *inter alia*, by intensifying supervision in order to ensure that the service is performed for the objectives established by the Law, and in national frameworks that incorporate professional training.

The Decision Year

47. The decision year, which was to be the great hope of the Deferment Law, has proven a great failure. In the *Movement for Quality Government* case, Justice Cheshin, then the Deputy President of the Court, referred to the decision year as "the jewel in the crown of the Deferment Law", but noted that the decision year "is but glass disguised as a diamond" ([2], at p. 766). Indeed, that unfortunately has turned out to be the case.

The decision year was intended to allow a young man whose service had been deferred for four years, and who was at least 22 years old, to defer his conscription for an additional year, even though he was no longer studying in a yeshiva that year. In the course of that year, the candidate for conscription could work without any restrictions. The central purpose underlying the decision year was to permit young men to test life outside of the yeshiva, without losing their "Torah is their calling" status (see: Tal Commission Report, p. 121). The decision year

was the primary tool introduced by the Tal Commission, and it was intended to create a transition route from a life of yeshiva study to the labor market. It is important to note that enlistment into the armed forces or civilian service is not contingent upon taking a decision year. In other words, a person whose service was deferred could waive his deferment and enlist in the armed forces or civilian service whether or not he took a decision year. But the decision year was intended to make that transition easier, and that it how it was envisioned by the Tal Commission, which saw it as a central device for promoting equality and a sharing of the burden.

48. The figures show that no inconsiderable number of deferred yeshiva students chose to take a decision year. As of 31 December 2007, the number stood at 2,935 in total. Of those who completed the year (2,334), 649 returned to the status of "Torah is their calling". 163 asked to perform civilian service, but the Administration had not yet been established at that time. Of the rest, 253 were inducted into the army; 315 were being processed by the army (but it is not known whether or not they were actually inducted), and 725 received exemptions from military service. An additional 191 were transferred to the "pool" – a unit of assignment for draftees that the army has decided not to call up for service, but who are part of the reserves, and could be called up in case of military need. 20 others were abroad.

A similar division is presented by the data submitted in the response of 30 December 2008. In that response we find that, as of 27 November 2008, a total of 3,269 deferred men took a decision year (*i.e.*, 334 took a decision year in 2008). 567 had not yet completed the decision year at that time. Of those who had completed the year, 759 returned to the "Torah is their calling" status; 25 were abroad, and 148 were awaiting civilian service. Among the remainder, 905 were

exempted for various reasons; 276 were being processed by the army, and 348 had been inducted into the IDF. 241 were transferred to the "pool".

Other than the data for the years 2007 and 2008, the State *did not submit* up-to-date figures for the years 2009 and 2010. Therefore, we do not have data regarding those who chose a decision year over the last two years, and more importantly, about what those who completed the decision year went on to do.

49. The data presented by the Government shows that although a large number of young men chose to take a decision year, it did not lead to enlistment into the army, to joining the civilian service, or to entering the workforce. In practice, most of those completing the decision year were exempted from military service or returned to "Torah is their calling" status. Only a small number of those taking a decision year were inducted into the army (or transferred to the reserves pool), or performed civilian service. The numbers are not surprising considering the inherent barrier to which the decision year leads. As earlier noted, the Law permits a person to take a decision year only from the age of 22, and only following four years of deferments. A young hareidi man who begins the decision year at age 22, completes it when he is 23, when he is, as is usually the case, married, and generally the father of at least one child. In such a situation, as we pointed out earlier, the army has no incentive to recruit him, in light of the budgetary costs involved. The Government was also aware of this, and expressly stated in its response that: "as is shown by the data regarding those who choose to enlist in the army following the decision year, many of those deferred are not expected to be inducted even if there deferment ends for various reasons" (Government pleadings of 18 May 2008, p. 27).

This is all the more so when the decision year is chosen at a later age. Because induction into the army is influenced by and related to

the age of the person who has been granted a deferment, the longer it is delayed, the less the chances that he will be inducted for service. This also holds true for civilian service. While there are no formal age restrictions for joining the civilian service, the longer a person is spends in the "Torah is their calling" status (even if he took a decision year along the way), the lower his incentive to leave the arrangement and join the civilian service. Moreover, a person who takes a decision year at the age of 23 or 24 can request to enlist in the army at the end of the decision year, and in all likelihood – as the existing figures show – he will be granted an exemption from military service, and thus will also not have to perform civilian service either. If that be the case, what purpose is served by the decision year? Clearly, the decision year does not serve to realize the purpose for which it was created. In practice, the decision year may help some of the deferred men decide what lifestyle they wish to adopt, but it does not contribute to enlistment into the armed forces, the civilian service, or – it would appear – the workforce (although data was not submitted in that regard). It should further be noted that the most current data submitted to the Court relate to those opting for a decision year up to the end of 2009. In its last response to the Court, the Government did not append updated data on the decision year. Are we to understand that the Government has abandoned that track? The fact that the Government did not see fit to submit up-to-date figures on the decision year to the Court begs the question.

Interim summary

50. What conclusion should be drawn from the analysis of the data concerning the implementation of the Deferment Law? Indeed, one cannot ignore the growing trend in the number of those enlisting into the army and joining the civilian service. The military service tracks were expanded. If, in the past, the only track for hareidi military service was the hareidi Nahal battalion "Netzach Yehuda", there are now special tracks in the Air Force, and of late, in other branches of service, as well. These tracks offer hareidi soldiers unique professional training that does not merely prepare them for military service, but provides professional knowledge that makes for impressive integration in the labor market upon completion of that service. Together with military service options, the possibilities for civilian service were also expanded. Following the establishment of the Civilian Service Administration, extensive efforts were invested in identifying operators, and regulations were promulgated for placing volunteers in civilian service. Today, the service makes it possible to perform part of the service in national frameworks, rather than exclusively in the hareidi sector (see the statement of the head of the Administration, Sar-Shalom Jerbi, in the session of the Foreign affairs and Defense Committee on 18 January 2011, p. 29).

However, the increase in the number of hareidi men serving in the army or civilian service notwithstanding, the overall number of those enlisting in the army or joining the civilian service is low, and it is certainly significantly lower than the number of those entering the deferment arrangement. From the figures presented by the Government, it appears that, as of January 2011, the total number of deferments stood at 61,877. The number of deferments rises steadily from year to year, and the Government estimates that some 4000 men join the deferment

arrangement every year. As of 2007, the number of deferred men represented 14% of the total conscription pool of that year. It would further appear that despite the enactment of the Deferment Law and the steps taken for its implementation, the rise in the number of deferments has not been abated or halted (Government pleading of 24 January 2011, p. 20).

51. Having examined the current data in regard to the implementation of the Law, the question that arises is whether that implementation meets the proportionality test, and whether the cumulative figure show that the means established in the Law realize its purpose. The answer requires that we address the degree of probability necessary for establishing that the means realize, or do not realize, the purposes of the Law. Is the degree of probability, as a component of the test of the proportionality of a law, dependent upon the nature of the infringed right? That question arose before this Court on several occasions in the past, in regard to various parts of the limitation clause. In HCJ 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [15] (hereinafter: the *Bank Mizrahi* case), President Barak suggested the possibility of creating different levels of constitutional scrutiny, in keeping with the nature of the violated right (*ibid*. [15], at p. 434). What that means is that the conditions of the limitation clause would be examined by the Court in accordance with the violated right and the entirety of other considerations. In that case, President Barak stated that it is "premature to determine what the Israeli rule will be as to the limitation clause, and whether our test should comprise a single level (as in Canada) or multiple levels (as in the United States)" (*ibid*. [15], at p. 435).

52. Since rendering judgment in the *Bank Mizrahi* case, the case law has advanced quite a distance in recognizing the direct relationship

between the importance of the infringed right and the required degree of constitutional scrutiny, although different from the degree of scrutiny of American constitutional law. In a series of cases, we established that the importance of the infringed right and the degree of its violation influence the overall constitutional analysis, and affect the manner in which the Court will examine each of the components of the limitation clause. This approach is based upon the view that not all rights – whether enunciated in a Basic Law or not – are of equal importance. The degree of protection afforded a right is a function of its character and importance when confronting a public interest that requires the infringing of the right. Because of the need to strike a balance between the right and the public interest that justifies its violation, the conditions of the limitation law cannot be addressed by this Court in a purely technical manner. The balancing process is directly connected to the degree of protection granted to the infringed right. The currently accepted approach in our legal system requires that the balances that are intrinsic to the tests of the limitation clause be applied to each case on its merits, in accordance with the full range of considerations, which includes, as I noted in the *Menachem* case, "the rationales grounding the protected right and its relative social importance, as well as the nature of the right or the competing interests" (*ibid*. [8], at p. 258). That approach emphasizes the scope of the Legislature's latitude. The more important the right, and the greater the infringement, the less the room for maneuver, and vice versa. When we are concerned with rights that – in keeping with the values of the Jewish and democratic society that we maintain – are of lesser importance, the Legislature's leeway in infringing the right will be greater.

In that framework, we have held that that the nature of the right and degree of its violation influence the examination of the law's purpose, in the sense that the more important the infringed right, and the more

serious the harm, the more significant the public interest required to justify that infringement (see, e.g: HCJ 6055/95 *Zemach v. Minister of Defense* [16], at p. 262, *per* Zamir J. (hereinafter: the *Zemach* case); the *Horev* case [13], at p. 49, *per* Barak, P; the *Menachem* case [8], at p. 258, *per* Beinisch, J; the *Adalah* case [11], at para. 28 of the opinion of Barak, P; CrimApp 6659/06 *Ploni v. State of Israel* [17], at para. 30 of my opinion; HCJ 2605/05 *Academic Center of Law and Business* [10], at para. 45 of my opinion. And see: Barak, Proportionality, pp. 619-628). We adopted a similar approach in the *Movement for Quality Government* case. The Court, *per* President Barak, held that in view of the infringement of equality, as a component of human dignity, "the standard for examining the question of the importance of the need to achieve the underlying purposes of the Deferment Law at the expense of severe infringement of dignity, is whether the deferment of service realizes a significant social objective or a pressing social need" (*ibid*. [2], at p. 700).

I similarly expressed my view that "the nature of the infringed right, its underlying rationales, and the intensity of its violation" influence the construction of the need for "express authorization" in a law, established in the first condition of the limitation clause (see: my opinion in HCJ 10203/03 *"Hamifkad Haleumi" Ltd. v. Attorney General* [18]; and also see: HCJFH 9411/00 *Arco Electrical Industries Ltd. v. Mayor of Rishon Lezion* [19]). We further held that the three subtests of the proportionality test "will be applied and implemented in accordance with the nature of the infringed right under review" (HCJ 1715/97 *Investment Managers Association v. Minister of Finance* [20], at p. 420, *per* Dorner, J. (hereinafter: the *Investment Managers Association* case)), and that "in regard to proportionality, we shall be as severe with the authority as the severity of the violated right or the severity of its violation" (the *Stemka* case [12], at p. 777, *per* M. Cheshin, J., and see:

HCJ 5503/94 *Segal v. Knesset Speaker* [21], at p. 544, per E. Goldberg, J; the ***Zemach*** case [16], at p. 282, *per* I. Zamir, J; the *Menachem* case [8], at p. 280 of my opinion).

53. Emeritus President Aharon Barak recently wrote about the probability test established under the first subtest in his book Proportionality: Constitutional Rights and their Limitations. President Barak suggests that where an important constitutional right is violated, the State bears the burden of showing a *real* probability that the means established in the law will realize its objectives, and that a low or reasonable probability of realizing the objectives will not suffice (Barak, Proportionality, p. 628). This approach expresses the view expressed by this Court in the past that constitutional scrutiny must accord with the infringed right, and represents a development in our constitutional law. The demand for a real, significant probability that the means chosen by the Legislature be appropriate to the purpose that it seeks to achieve, grounds the first subtest. This approach also reinforces the weight of the first test in relation to the two additional subtests – which are the least-harmful means test, and the proportionality test *stricto sensu*. The demand for a real, significant probability requires, in relevant cases, a thorough examination of the probability of the realization of the law's purposes, which does not suffice with a reasonable or minimal possibility of realizing the purposes by the means established in the law.

54. The infringed right in the case before us – the right to equality – has long been recognized as a fundamental right in our legal system. The right to equality has been one of the cornerstones of the Israeli system of government, even before the enactment of Basic Law: Human Dignity and Liberty. The right to equality is enshrined in the Declaration of Independence, and there are those who extol it as an overarching principle of our legal system, underlying the existence of the state as a Jewish and

democratic state (see, *e.g.*, the view of Deputy President (Emeritus) Cheshin in the *Movement for Quality Government* case). The central role of the right to equality has been noted in a long line of cases as "a fundamental principle of our constitutional regime" (HCJ 98/69 *Bergman v. Minister of Finance* [22], at p. 699, *per* Landau, J.). Justice M. Shamgar held that the right to equality is "a fundamental constitutional principle, incorporated and woven into our fundamental legal conceptions, and is inseparable therefrom" (HCJ 114/78 *Burkan v. Minister of Finance* [23], at p. 806; and see: Itzhak Zamir and Moshe Sobel, "Equality before the Law," (1999) 5 *Mishpat u-Mimshal* 165 (Hebrew); HCJ 869/92 *Zvili v. Chairman of the Central Elections Committee for the Thirteenth Knesset* [24], at p. 707; HCJ 1703/92 *K.A.L. Kavei Avir Lemitan Ltd. v. Prime Minister* [25], at p. 229; the *Miller* case [14], *per* Dorner, J; HCJ 4124/00 *Arnon Yekutieli (deceased) v. Minister of Religious Affairs* [26], paras. 35-36 of my opinion). The right to human dignity is also recognized by our legal system as a constitutional right since being incorporated into Basic Law: Human Dignity and Liberty. Human dignity "is the factor that unifies human rights" (the *Movement for Quality Government* case [2], at p. 681, *per* Barak, P.). The right to human dignity imposes both positive and negative demands upon governmental authorities – the duty to refrain from infringing dignity, and the duty to protect it (see: Aharon Barak, "Human Dignity as a Constitutional Right," in Haim Cohn & Itzhak Zamir, eds., Selected Essays, p. 417 (2000) (Hebrew)).

Indeed, the right to equality and the right to human dignity, along with several other rights, are worthy of the broadest protection of our legal system. That is surely the case when we are concerned with a violation of equality in the fulfillment of the most basic duties in Israeli society, and in sharing the burden borne by citizens who devote body and mind, and the bloom of youth to ensuring the safety of Israeli society.

Opposite the need to safeguard equality stands a social interest that, *inter alia*, the Law seeks to promote. In the case of conscripting yeshiva students, the social interest has become complex, and we were, therefore, of the opinion that characterizing it was clearly a matter for the Legislature. In view of the difficulty in finding a solution to the problems arising from inequality, in defining the necessary considerations and in evaluating their relative weight, we were prepared, in the *Movement for Quality Government* case, to recognize the "significant legislative latitude" granted to the Knesset (*ibid*. [2], at p. 704 *per* Barak, P.). We noted that this is clearly a social-policy question that must be addressed by the Knesset, but we emphasized that the public interest does not exist in a vacuum. We therefore held that the purpose established by the Knesset would be proper if it realize a significant social objective or a pressing social need (*ibid*. [2], at p. 704). As stated in that decision, we left the question of whether the means established in the Law were suited to realizing its objectives for examination at a later date.

55. At the present stage of examination, and bearing in mind the status and importance of the rights concerned, the degree of probability required to show a rational connection between the means and the objective must be *real and significant*. In other words, it is not enough that we find that the means established in the Deferment Law may realize its underlying purposes to some particular degree. Such a level of probability would not reflect the level of protection that our legal system grants to the rights that are the focus of the case before us. Therefore, a higher level of probability is required, which will indicate that the means chosen by the Legislature have a real and significant potential for realizing the Law's objectives. We have reached a point where we are no longer speaking of conjecture. We are not examining the Law prior to its implementation by the Executive, when the possibilities for realizing its

purposes are merely educated guesses. The Law has been implemented for some time. At this point, we must examine that implementation over the years since its enactment, and assess the probability that the means chosen for its implementation will lead to the realization of its purposes. Those purposes are, essentially, to bring about the induction of thousands of young men into military service, or at least into civilian service that constitutes an appropriate alternative to military service, and to promote the integration of those young men into the workforce.

56. A comprehensive examination of the data regarding the various tracks set out in the Law – individually and cumulatively – leads to the unavoidable conclusion that the means established in the Law have not realized its purposes, and cannot do so with any real degree of probability. The implementation of the Law over the course of the lengthy trial period afforded it so far has shown that *the Law comprises inherent impediments that exert considerable influence upon the possibility of implementing it, to the point of impairing the possibility of realizing its purposes*. Those obstacles would prevent the realization of the purposes of the Law even if the authorities responsible for implementing it worked diligently – which has not entirely been the case over the years that the Law has been on the books. After nine years, the State was required to show significant realization of all the purposes of the Law together. Trends or developing processes, as important as they may be, are no longer sufficient. Can it be said, after nine years, that the induction of 898 hareidi men (of whom, some four hundred are drop outs), and the enlistment of 1,122 others into brief, vague and undefined civilian service from out of a total of 61,877 who were granted deferments constitutes a realization of the Law's objectives? Can a situation in which most of those taking a decision year are exempted from military service or return to "Torah is their calling" status, and are

not integrated into military service or its alternatives or into the labor market be seen as the realization of the Law's objectives? Can we discern a realization of purposes when many more young men enter the "Torah is their calling" arrangement than any of the service tracks provided by the law? By any standard, an examination of these numbers reveals no real change in the situation. Indeed, we understand that we are concerned with a complex social process. No one denies that time is an important factor in that process. Nor does anyone deny that we cannot suffice by looking at the current picture alone, but rather we must consider the process as a whole, and the process does testify to some progress in the framework of the attempts to implement the Law. However, a more significant trend toward realizing the Law should have been apparent after the substantial period of time that passed since its enactment, but it was not. Most of the actions taken to implement the Law were too little and too late. Some were instituted suspiciously close to the dates of the proceedings before the Court.

57. The main problem with the Law is not merely a result of failures in its implementation. The low enlistment numbers, the abject failure of the decision year, and the fact that the Law is entirely dependent upon the desire of the Executive to implement it, and if so, how, all testify to failures that are inherent to the law itself. As long as the Law does not establish standards or goals for its implementation, the realization of its purposes are entirely at the mercy of the Executive, which is free to choose if and how to implement the Law. The Executive can take decisive action to implement it, allocate resources for implementing only specific parts of the Law, or offer various incentives to the agencies responsible for implementing the Law. By the same token, the Executive can adopt a do-nothing policy, and render the Law a dead letter. The broad discretion granted the Executive, on the one hand,

and the freedom of choice that it grants to those whose service is deferred, on the other, show the arrangement to be wanting. While it is not disputed that the implementation of every legislative act is dependent upon the relevant agencies, as part of the reciprocal relationship between Executive and the Legislature in a democracy, it would seem that the division of power between the two branches of government is blurred in the Deferment Law to the point that the Executive holds the power to eviscerate the Law.

58. As we see above, two salient characteristics of the Law decrease the probability that the means it establishes will substantially contribute to realizing its underlying purposes. *First*, the law permits an "automatic" four-year deferment from age 18 to age 22. Both special tracks created by the Deferment Law – the decision year and civilian service – are relevant for yeshiva students from age 22 and up. The special military tracks (the *Shahar* tracks) are also intended for deferred men over the age of 22. The very fact that the Law establishes that the service tracks commence only from age 22, and no earlier, means that most of the deferred men will arrive at the enlistment crossroad when they are married, and when many are the fathers of at least one child. The army's ability to absorb such recruits is significantly reduced by the increased costs associated with paying family stipends. As a result, those young men are directed from the outset to the civilian service, which is shorter and "cheaper" for the State – assuming they have not chosen to remain in the "Torah is their calling" arrangement. Should we not conclude that the Law comprises an inherent impediment to military service? Does this not contradict the Law's purpose to advance equality in sharing the burden of military service, in the sense that more hareidi men will perform military service, or at least meaningful civilian service? (see: the Movement for Quality Government case [2], at p. 700).

59. *Secondly*, the Law places the choice among the Law's tracks entirely in the hands of the yeshiva students. A young hareidi man between the ages of 18 and 21 can choose between a deferment or enlistment for military service. At age 22, that same young man can choose to continue his deferment or to enlist in the army or join the civilian service. That young man can also choose to take a decision year, at the end of which he will be presented with precisely the same choices. Additional possibilities for choosing were granted to that young man by the Government's decisions and the conscription directives. Those choices are almost limitless. They are not contingent upon the young man's family status or his military profile. They do not depend upon the number of years that he deferred his service, or upon what he did in the course of the decision year. Furthermore, these possibilities do not lead to a duty to perform any service at any stage. The young man can defer military service for a number of years, at the end of which he will be exempted from military or civilian service. It should be superfluous to point out that this structure of the Deferment Law presents a mirror image of the situation of non-hareidi youth. Those youngsters are not free to choose whether or not to serve in the army. They are under a legal duty to serve in the armed forces, and the possibilities for fulfilling that duty by means of civilian service are of limited, marginal scope.

Undeniably, one of the purposes of the Deferment Law was the creation of an arrangement that would not require coerced conscription. We recognized that as a proper purpose that reflected the desire to create a social arrangement based upon compromise and striking a balance between the needs of the different communities. However, in the absence of an element of obligation, implementing the Law and realizing its purposes are not dependent exclusively upon the Executive will, but also, and perhaps primarily, upon the will of those granted deferments. Even if

the Executive provides the necessary resources, it will not guarantee a significant enlistment of hareidi men, unless the tracks include some element that would encourage joining them. Such an incentive is nowhere to be found in the current Law, nor in the steps taken for its implementation.

60. Moreover, the Deferment Law does not comprise criteria for granting exemptions from military service, and it does not establish enlistment goals for military or civilian service. The Law establishes no intermediary frameworks for evaluating progress in its implementation, and it lacks any means of supervising that implementation. Absent from the Law is any requirement of meaningful service – of any kind – for all. What all this means is that the desire of the yeshiva students to opt for one of the Law's frameworks is the decisive factor in the implementation of the Law. Under such circumstances, and in view of the data presented to us, it would be difficult to find that the means established in the Law actually realize its objectives, or that there is a real, significant probability that they will realize its objectives in the future. While the enlistment of several hundred members of the hareidi community represents a certain change in relation to the situation a decade ago, the number of deferments – which become exemptions – increases from year to year, and that number currently stands at 60,000. That means that the declared purpose of the Law cannot be realized under the present conditions, despite the Government's decisions that attempted to breathe life into it. We should recall that those efforts, to the extent that they were made, were primarily intended to integrate the deferred men into the workforce – an important purpose in and of itself – which does not address either the problem of military or civilian service.

61. In light of all the above, it would appear that the flaws that led to the current situation are inherent to the Law itself, or as termed in the

Movement for Quality Government case, they are "genetic" flaws (ibid. [2], at p. 712) and not administrative flaws related to the manner in which the Executive implemented the Law. The conclusion is that the Deferment Law does not pass the proportionality test under the first subtest. In other words, *the means established by the Law cannot realize its purposes, and it has become a tool for perpetuating the situation that existed prior to its enactment*. In light of that conclusion, there is no need to apply the two other subtests. The result is that the Deferment Law does not meet the conditions of the limitation clause.

Consequences of the illegality of the Deferment Law

62. The above requires that we conclude, after a journey that has taken several years, that the Deferment Law does not meet the proportionality requirement of the limitation clause and is, therefore, unconstitutional. The practical result of this conclusion is that the Deferment Law is declared void, or in other words, looking to the future, that it cannot be extended in its present form.

Along with this declaration, we must take into consideration the fact that the Deferment Law was enacted as a temporary order. The Law, which was extended a second time by the Knesset, is slated to expire on 1 August 2012. In view of the fact that many arrangements were made in accordance with the rules established by the Law, and bearing in mind that we may assume that many people planned their lives in accordance with its provisions, I would recommend to my colleagues that the declaration that the Law is void be held in abeyance, and that we allow the Law run its course. This period will allow the Legislature time to weigh our comments, and enact a new arrangement that will take into account this judgment, as well as the prior judgments in the *Ressler* case,

the *Rubinstein* case, and the *Movement for Quality Government* case, which formed the basis for enacting the Deferment Law, and for formulating an arrangement that addresses the matter in its entirety.

63. We did not come to this decision easily. We are aware that along with the flaws in the Deferment Law, and along with the difficulties that arose in its implementation, Israeli society – and its hareidi component – have come a long way. It would appear that among various social strata and sectors of society – even among the hareidi population – there is a growing awareness that hareidi youth can be integrated into Israeli society, while preserving the religious, social and cultural values of the hareidi community, and respecting its religious values and lifestyle. Indeed, increasing numbers of hareidi men and women are seeking higher education and entering the workforce. There are also young men serving in the armed forces and in the civilian service frameworks, although the numbers remain far from reflecting social change. Nevertheless, the essential gap remains insofar as inequality in regard to military service and refraining from sharing equally in civic duties.

Communal life in a society requires shared values and mutual respect. The recognition of the right of a unique group to preserve its lifestyle, culture and religious faith is accompanied by the aspiration toward an equal division of responsibility for advancing the shared interest in maintaining a cohesive Israeli society. Equal sharing of responsibility does not necessarily imply that everyone contributes in the same way and to the same extent. As my colleague Justice E. E. Levy expressed it: "Human society, even in a free, democratic state, is not egalitarian in the sense that each and every individual makes an identical contribution. The use of resources is also not identical" (the *Movement for Quality Government* case [2], at p. 783). Equally sharing the burden

requires that there be egalitarian arrangements and apparatus that assess the individual's ability to contribute in ways that are consistent with his talents and lifestyle, and as far as possible, his preferences. The Deferment Law purported to provide such an arrangement that could strike a balance among the various groups, interests and rights, and bridge the conceptual and religious differences without detracting from the need for an equal distribution of the burden, to the extent possible. The Law attempted to provide solutions to a complex problem. The Court was willing to permit testing its implementation over an extended course of time in order to ascertain whether the proposed solutions would mitigate the infringement of equality, and realize the provisions and purposes of the Law. In the end, *the test of time proved that the Law did not realize its underlying purposes, and in practice, it primarily entrenched the pre-existing deferment arrangement.* There was no meaningful change in the number of those opting for the constructive solutions that the Law provided for leaving the deferment cycle, and no formula has yet been found for abating the rapid growth of the deferral pool.

For years, the Court acted with restraint in abstaining from drastic solutions in order to allow the development of social processes in hareidi society itself, which might lead to bridging the gap between the communities. The increasing number of deferments raises questions as to how we arrived at this point. The "Torah is their calling" arrangement influenced not only the number if deferments, but also nourished internal processes within hareidi society. In view of the ban upon going to work, the situation has become one in which most hareidi men do not work for a living, and poverty is widespread. Reliance upon government stipends grew significantly. In the absence of any limit upon the number of men who could be granted deferments, their numbers grew at a dizzying pace.

As a result, the social reality changed beyond recognition. The character of the deferment arrangement changed from a privilege granted to a unique minority to a rampant phenomenon that knows no bounds. The number of deferred men relative to the overall draft has grown significantly. If once we were concerned with a small, defined group of scholars wholly devoted to the study of Torah, today the numbers account for over 14% of the conscription pool of any given year, and the numbers are growing. If the increase in the number of deferments is not halted, their number will double within a decade. Such a situation engenders a sense of injustice arising from the inequality that has spread among various social strata, and that widens social gaps and increases alienation among the various sectors of Israeli society. In addition to all of this, the dangers that have threatened the security of the state since its inception have only increased the practical need for inducting yeshiva students into military service.

As President Barak stated in the *Ressler* case, "quantity makes a qualitative difference" (*ibid.* [3], at p. 505). Over the years, Israeli society endured the blanket deferments, as long as the number was limited to a small group. But a society's tolerance for a situation in which a particular group is exempted from a universal duty is limited. Recognition of the importance of protecting community, religious and cultural rights is part of our democratic culture, which views such rights as worthy of protection. However, the protection granted such rights is not absolute. The need to maintain society requires balancing those rights against the State's obligation to ensure equal treatment in civic life. That cannot be seen in the Deferment Law. Its arrangement constitute – for the most part – a mirror image of the arrangements that apply to non-hareidi youth. The Law was enacted in the hope of sparking a social process that would lead hareidi youth to choose to perform military or

civilian service without coercion or the imposition of any obligation. That hope was in vain.

In the *Movement for Quality Government* case, we pointed out that this complex social problem could not be resolved solely by coercion. Clearly, accountability, social responsibility and the desire to share society's burdens cannot be achieved by legislation alone. Laws can ensure public order, encourage conduct that the Legislature deems necessary, and prevent an individual or a governmental agency from acting in a manner that harms other individuals or society as a whole. However, while accountability and social responsibility are not solely the result of legislation, laws can encourage or retard their growth. Resolving the social situation created by years of exemption – for all practical purposes – from military service is a complicated task. The data that we now possess make the task easier. The Deferment Law was tested over a period of time that was long enough to provide the Legislature with information about the more and less efficient methods for solving the problem. This information is vital to formulating a new legal arrangement that will take account of the flaws discovered in the Deferment Law.

64. In consequence, the Deferment Law must be determined to be legally void. In light of the fact that the Law was enacted as a temporary order that will expire on 1 August 2012, we see no need to declare it void. The result is that the Law will remain in force until its expiry on 1 August 2012, and the Knesset will not be able to renew it in its present form. The Knesset will have to create a new arrangement, which can be based upon the framework established as part of the Deferment Law, but that takes into consideration what has been held in this judgment. In this regard, the Knesset will have to consider the flaws we noted, which derive, *inter alia*, from the lack of guidelines, criteria and goals for its

implementation, as well as the fact that the Law comprised no obligatory element of service (neither on the basis of age, nor on the basis of fitness for service, and it did not require an alternative of civilian service or integration in the workforce). In correcting the flaws that we found in the Law and adapting it to its purposes in light of the lessons learned from its implementation, the Knesset can also make use of the findings in the public reports, such as the Interim Report and the conclusions of the Plesner Panel, which were presented to us as part of the Knesset's response to the petitions before us. We would again emphasize that legislation that perpetuates gaps and flaws in equality of the scope revealed in the current situation cannot stand.

Postscript

65. After writing the above opinion, I read the opinions of my colleagues Justice E. Arbel and Justice A. Grunis. As regards the opinion of my colleague Justice Arbel, it would appear that our fundamental views are not far apart. We disagree on the question of whether the pace of implementation of the Law is adequate and suffices to pass the proportionality test, considering the length of time in which the Deferment Law was in effect. In the opinion of Justice Arbel, the recent developments show a possibility for such change, and we should, therefore, wait for some additional period before examining the realization of the Law in practice. In my view, the data that we currently have, which reflect the implementation of the Law over a ten-year period, are sufficient to demonstrate the existence of inherent impediments and flaws, which we characterized as "genetic" flaws in the Law, and if they are not repaired, then the Law cannot realize its

combined purposes. I take that view, even though I do not deny that there has been some positive change in the implementation of the Law.

66. Like my colleague Justice Arbel, I, too, believe that reducing the inequality in sharing the burden among the various sectors of society is a protracted process. I am also party to the view that the complexity of the issue, and the intense emotional responses that it engenders, directly affect the complexity of the process and the method for its resolution. It is for these reasons that in the case before us, and in the proceedings that took place over the years, the Court maintained the position that unilateral, coercive steps should not be taken against any of the parties, and that it would be doubtful whether such steps could resolve a long-standing, fundamental debate concerning social values. On this, I have not changed my mind.

67. The Court's decisions in the *Movement for Quality Government* case and the other petitions that came before us demonstrate this Court's restraint and moderation over the years. Although more than nine years have passed since the Law was enacted, we did not hurry to decide upon its constitutionality on the basis of its actual implementation. Although the data presented to us were hardly satisfying, to put it mildly, we preferred to grant the State additional time to realize the Law's purposes. This judgment is handed down only following that additional, lengthy period for observing the realization of the Law's purposes. We are now at the close of the first decade of the Law's implementation. That is no trivial matter. It constitutes a significant period of time, in addition to the long years during which the matter was examined by all the relevant parties. In my opinion, it represents a sufficient period for addressing the central question raised by this Court in the *Movement for Quality Government* case: Does the Law comprise inherent impediments that prevent the full realization of its purposes? That is a purely legal,

constitutional question. As I explained at length in my opinion, I believe that the answer is yes. There is no need to reiterate, and I will only briefly mention the difficulty raised by the decision year – which does nothing to contribute to choosing one of the Law's tracks; the almost unlimited choice granted to hareidi youth; the broad discretion granted to the Executive in regard to implementing the Law, and in the manner of its implementation, including the emphasis that has been placed upon realizing one of its purposes at the expense of the others; and the need to contend with the unavoidable budgetary consequences of the Law's arrangements. These impediments thwart realizing the Law, and correcting them may ensure that implementing the Law will not be contingent upon good will. I discussed the numerical data at length in my opinion. I was not convinced that the figures were satisfying in view of the extended period that had elapsed since the enacting of the Law. No doubt, the numbers indicate a trend, but at this stage, a trend is not enough. Even if there is an annual rise in the number enlisting in the army or civilian service, there is an analogous, *continuous rise* in the number of those joining the ranks of the "Torah is their calling" arrangement, and the proportion of people receiving deferments continues to increase. What that means is that, in practice, the Law did not bring about any significant change.

68. I would add that a meaningful analysis of the data also requires an examination of the quality of service. The pursuit of an equal sharing of the burden is not merely a technical or formal matter. One can, of course, point to impressive conscription statistics when a service track of merely *three months* is offered. But it would be hard to say that such military service is equivalent to the *three years* that are required of anyone who is not hareidi, or even to service for the 16 months period offered to some hareidi men who choose to enlist. The same is true in

regard to civilian service. It is clear that the civilian service track has become the primary service option for young hareidi men who choose to leave the "Torah is their calling" arrangement. This track, too, must be examined in terms of substance rather than solely on the basis of numbers, as one cannot speak of equally sharing the burden if the civilian service is performed within the community, unsupervised, and in some cases – as detailed in the State Comptroller's Report cited in para. 44 of my opinion – over the course of a few days or on weekends alone.

69. I now turn to the opinion of my colleague Justice Grunis, who is of the view that the matter is not suited to Supreme Court review. According to Justice Grunis, the Court should refrain from considering the constitutionality of the Deferment Law, inasmuch as the Law is intended to grant preferential rights to a minority. This approach also formed the basis of his opinion in the *Movement for Quality Government* case.

President Barak, who wrote the main opinion in the *Movement for Quality Government* case, addressed the difficulties inherent in a theory of constitutional review that seeks to justify refraining from the review of laws in which the majority grants preference to a minority (see: the *Movement for Quality Government* case [2], at pp. 717-721), and there is no need to repeat what he wrote there. I will only remark upon a number of problematic points raised by the approach.

70. *First*, underlying the approach of Justice Grunis is the assumption that the purpose of judicial review is to ensure the propriety of the political process. Indeed, judicial review is intended, *inter alia*, to ensure the propriety of the political process, protect against the violation of minority rights by the majority, and ensure that the majority does not wrongly exploit its power. But it does not end there. Judicial review is not limited to the narrow view of democracy as simple majority rule, and

extends to the conception of democracy as a regime that protects fundamental human rights. That is the primary lesson learned after the Second World War, and it has been internalized in the constitutions of many states. Ensuring the democratic process is not enough; the essence of democracy, as expressed by the protection of human rights, must also be defended. That protection is not limited to situations that target minorities.

Second, I think it doubtful that the approach presented by my colleague is appropriate to the Israeli political reality. In Israel's coalition reality, ensuring the propriety of the democratic process – in which framework the majority's desire to grant preferential rights to the minority is examined – takes on special meaning. In a political system composed of a large number of parties, and in which small parties play a decisive role, can one speak in the simple terms of a majority-minority relationship? In what situations can we state that the majority grants preference to the minority *of its own volition*? There would appear to be no more instructive example of the difficulty of the distinction between minority and majority rights than the matter before us. In terms of the factual background, it is no secret that the entire history of the deferment arrangement reflects coalition imperatives in which a majority surrendered to a minority, *inter alia*, for interests of coalition politics. In such circumstances, it is difficult to identify what represents an expression of the majority will, and what constitutes coercion.

Moreover, the approach suffers from significant problems in its application. Under what circumstances should we say that a majority has granted preferential treatment to a minority? What are the criteria for distinguishing majority and minority groups? Should the distinction be numerical? Should it be based upon the ability to compete successfully in the political process? Should it be based upon social, economic or

political standing? Can a group be deemed part of the majority in some circumstances, but as belonging to the minority in others?

Third – and this is the main issue – constitutional review of the violation of rights concerns people as individuals. As a rule, the fact that many are affected by some governmental conduct – and the fact that they constitute a majority of society – does not free the Court from examining the constitutionality of the violation of rights. Constitutional law focuses upon the constitutionality of the violation, and not upon the identity of the victim. The fact that the person whose right have been violated is a member of a particular group is not relevant to the question of whether constitutional review is warranted, but rather to the character of that review and the scope of the latitude that will be allowed the Legislature.

71. Lastly, my colleague raises the fear that our current decision in these proceedings will lead to a future petition asking that we revisit the issue. In his view, "in the absence of any real progress as a result of judicial intervention, this Court's continual involvement in the issue of hareidi conscription certainly does not contribute to the Court's prestige". I cannot accept that. First, factually speaking, I do not believe that one can say that there has been no real progress. Since the Court began examining the deferment arrangements, the matter has been addressed by legislation, and hareidi men have begun performing military and civilian service. Too a certain extent, the Court's involvement served as a catalyst for the legislative process. Second, in matters such as that before us, founded upon ideological differences between different elements of society concerning values, we cannot expect that the issues will be resolved by the stroke of a single judgment – if such issues can actually be fully resolved.

It is generally understood that the Court does not purport to bring about complete social change, but it is certainly one of the most

important social agents for advancing the process of change. The Judiciary, in Israel as in other democracies, is one of the branches of government, and it has the potential for employing the tools at its disposal in resolving – even if that resolution is gradual or only partial – social strife. The Court's contribution to resolving social rivalries is not always clear or immediate, and occasionally, Court proceedings and decisions stimulate a range of social processes, which are sometimes different from those sought in the petitions before it (and *cf.*, in regard to the diverse influences of the monumental decision in *Brown v. Board of Education* [52], Martha Minow, In Brown's Wake: Legacies of America's Educational Landmark (2010), esp. pp 5-33). Indeed, the complexity of the dispute before the Court wholly influences the nature of the Court's involvement, and the scope of its influence in resolving the issue, but that complexity should not, itself, lead to the conclusion that the Court should refrain from addressing the social issue. Therefore, I see no problem presented by the possibility that the Court may be called upon to address the issue before us again in the future, if there be constitutional legal grounds.

Conclusion

72. As stated, the Deferment Law was enacted as a temporary order. It will soon expire. We now have an opportunity for retrospection, and for carefully examining its provisions. The very essence of legislating a temporary order is its impermanence and the need to revisit, and yet again reexamine whether the law is consistent with its purposes against the changing reality, and in light of its actual implementation. In my opinion, I pointed out the existing flaws in the law. Those flaws can and must be corrected before the Deferment Law expires.

As stated, I am aware that if my opinion is adopted, the natural course of events may again lay the matter at our doorstep. That is not to be feared. The social processes are already afoot. We no longer stand where we were thirty or forty years ago. The Court was a partner to the processes that resulted in the enactment of the Deferment Law. The abrogation of the Law does not mean that we return to square one. The changes cannot be undone. The current objective is to correct the flaws that have been found in the current arrangement.

73. Before concluding, I would note that the writing of this decision began long before the issue returned to the public agenda with the force that we now witness. The public debate, as I earlier noted, cannot prevent us form examining the legal aspects of the arrangement before us, while we strive to remain within the bounds of our authority, and to ignore the winds blowing about us. As required by the Deferment Law, and in view of its expiry in half a year, the matter now passes to the Knesset for debate, and it is its job to enact a law that will take into account the need to repair the flaws that we have indicated in the course of this judgment.

In conclusion, if my opinion is accepted, I would recommend that my colleagues order that the Deferment Law remain in force until its expiry on 1 August 2012, and that it not be extended in its present form.

The President

Justice M. Naor:

1. I concur with the opinion of the President.

2. I would like to comment briefly upon the opinion of my colleague Justice Grunis. Justice Grunis foresees two scenarios: Under the first scenario, if the Knesset fails to enact a new law as a result of our judgment, then hareidi men will be required to serve in the armed forces, although few Israelis expect a mass conscription of yeshiva students into the ranks of the IDF, and a new petition will be required to coerce conscription. Even if such a petition is granted by the Court, my colleague believes that it will not lead to conscription. Under the second scenario, which he deems the more realistic, if a new law is enacted in an attempt to repair the flaws in the current law, a petition challenging the new law can be expected. In this regard, my colleague states that "in the absence of any real progress as a result of judicial intervention, this Court's continual involvement in the issue of hareidi conscription certainly does not contribute to the Court's prestige. Moreover, we delude ourselves if we expect that judicial decisions will lead to the conscription of hareidi men into the IDF, and to their integration into the workforce. Social and economic changes may lead to the desired result. The Court has little influence in cases like the one before us."

3. I would like to state clearly that the fear that Court orders will not be enforced is, in my view, misplaced, and certainly not one that we

should countenance. The State of Israel is a state under the rule of law. In the State of Israel, the fear that orders will not be executed is unjustified. The rich experience of our judgments, even regarding difficult, complex and sensitive matters, is proof enough. Indeed, attempts to frustrate Court orders are doomed to fail. As this Court has already had opportunity to note in regard to the famous *Brown* decision, "such attempts at frustration are ultimately doomed to failure in a state under the rule of law, even if only at the culmination of prolonged legal proceedings. Indeed, it is a truism that justice and equality – even if delayed – will ultimately prevail" (HCJ 1067/08 *Noar Kahalacha Assoc. v. Ministry of Education* [27], at para. 14; on *Brown*, see *Brown v. Board of Education of Topeka* [52]; On the book Gerald N. Rosenberg, The Hollow Hope, 2nd ed. (2008), see the review of Prof. Gad Barzilai, "Courts as Agents of a Social Change?" in Neta Ziv & Dafna Hacker (eds.), Is Law Important? (2010) (Hebrew)).

4. My colleague is of the opinion that repeated consideration of the issue of hareidi conscription without achieving real progress as a result of judicial intervention does not contribute to the stature of the Court. In my opinion, what little progress that has been achieved – and first and foremost, the attempt by the Knesset and the Executive to address the issue in primary legislation – is directly attributable to the intervention of this Court. For decades, this Court practiced careful restraint, as we do again today. In today's judgment, this Court does not issue a final order instructing the Executive to draft all the yeshiva students at once. Under these circumstances, it would seem to me to be inappropriate to speak of the failure to execute an order that has not yet been issued, or of harm to the prestige of the Court as a result of such non-execution.

5. In conclusion, I am not of the opinion that the Executive branch of the State of Israel would refrain from enforcing judgments. In any case, our job is to decide the law and rule accordingly. In my view, there is no need to wait any longer. There is also no need to refrain from intervening. Therefore, as stated, I concur with the opinion of the President.

Justice

Justice E. Arbel

> "The Deferment of Service Law deals with one of the basic problems of Israeli society, which cannot be resolved by the stroke of a pen; its concern is with a sensitive matter that requires understanding and agreement; it seeks to provide solutions that are neither easy nor simple"
> (Justice Barak, HCJ 6427/02 *Movement for Quality of Government in Israel v. Knesset* [2] (hereinafter: *Movement for Equality of Government* case).

The subject of the deferral of service for Yeshiva students for whom "Torah is their Calling" in its various incarnations has been on this Court's table for many years. On all of the occasions that the Court addressed this subject it instructed itself to conduct itself with restraint and caution, in its awareness that the issue is located on one of the most sensitive seams of Israeli society, perhaps the most sensitive of them all. The Court's self-imposed decree of caution and restraint was assumed while monitoring the "snail's pace" processes taking place in the complex reality of Israeli society, in the hope of reaching the most consensual solution for all the world outlooks and life styles.

1. In her opinion, my colleague, President Beinisch presented a broad review of the unfolding of events from the introduction of the

arrangement for a deferral from military service in 1948, through to the petitions that attempted to challenge the legality and the constitutionality of the arrangement in the *Ressler* case (HCJ 910/86 *Ressler v. Minister of Defense* [3] and the *Rubinstein* case (HCJ 3267/97 *Rubinstein v. Minister of Defense* [1], in the wake of which the Knesset passed the Deferment of Military Service for Yeshiva Students for whom the Torah is their Calling Law, 5762-2002) (hereinafter – Deferment Law, or the Law) and culminating in the ruling in the *Movement for Quality of Government* case, which adjudicated the constitutionality and the proportionality of the Law. In the last case the Court refrained from declaring that the Law was unconstitutional, and decided to wait until the termination of the Law's period of validity, which the Knesset had set at five years. After that period the Knesset would have to determine whether the Law had actually realized its objectives. It ruled that "Unless there is a substantive change in the results of the Law's implementation, there will be grounds for considering a declaration of its invalidity" (at p. 714). After the passage of five years and after hearing the positions of the professional bodies, who argued that at issue was a process of integrating and implementing a substantive social change which requires time, the Knesset extended its validity for an additional five years, until 1 August 2012.

Against this background, the petitions before us were filed, being rooted in the question of the proportionality of the Law. On 29 May 2008 an order *nisi* was issued, and on 8 September 2009 a decision on the petitions was handed down (by Justice Hayut), ruling that before making a final decision upon the constitutionality of the Deferment Law, its mechanisms "which have only just begun to take shape and begin to operate" should be enabled "to prove their effectiveness or ineffectiveness by their results over an additional, fixed period". (para. 9

of Justice Hayut's decision). Accordingly, this Court fixed a period of an additional 15 months, after which the hearing of the petitions would be renewed; now the time to decide has arrived.

At the end of her comprehensive judgment, my colleague the President concluded that the Deferment of Service Law is unconstitutional because it fails to meet the proportionality requirement of the limitations clause in Basic Law: Human Dignity and Liberty, and should therefore be voided. On the other hand, the President suggested deferring the declaration of annulment and allowing the legislature to complete the period scheduled for the validity of the Law, thereby allowing the legislature to examine the comments in her decision and to establish a new order that took it into account as well as the previous judgments in the cases of *Ressler* case, the *Rubinstein* and the *Movement for Quality of Government* case.

2. Unfortunately, I am unable to concur in the result in the decision of my colleague the President. I stride together with her along a significant portion of a long road and agree with the general principles of her opinion, which are actually a continuation of the previous decisions concerning the enlistment of the yeshiva students. All the same, I do not think that it is appropriate at this stage to decide the fate of the petition. In my view even after the extension of the validity of the Law, and in view of the trend, albeit delayed, which has been demonstrated before us, the competent authorities operating parallel to the Government should be given extra time to operate in a manner that examines whether the Law can actually promote its goals. I therefore take the view that the Court should persist in its self-decreed policy of caution and restraint which it has always abided by in this subject. I would therefore propose that at this time the petition should remain pending before this Court, while

monitoring the stages of implementation of the Deferment Law, and whether it succeeds in generating the desired societal change.

3. Before setting forth my reasons I wish to clarify that the matter is by no means is easy for me. With all my heart I identify with those who complain about the inequality and the discriminatory allocation of the burden. I too share my life with a husband who serves as a senior officer in the regular army. All the members of my family, my daughters, sons in laws – who received security prizes – and my grandchildren – served and serve in the I.D.F, motivated by a sense of commitment and desire to contribute. My heart lies with those who say: no more inequality, no more exemption from bearing the burden of military service – a duty which in my view is a privilege for those seeking to enjoy the totality of rights to which the Israeli citizens are entitled. It would have been easy for me to add my opinion to those who argue that there is a limit to the degree of tolerance that a society can bear in waiting for the narrowing of gaps that reflect a societal inequality, especially when the inequality relates to a duty that involves a risk to life. It would therefore have been easy for me to concur with my colleagues who maintain that the Deferment Law does not meet the requirements of proportionality.

All the same, having considered and reconsidered the matter, and with a heavy heart, I have arrived at the conclusion that the Deferment Law should not be voided at this time. This conclusion is based on the numerical data, together with hope and belief. This conclusion is based on the imperative of accommodating the processes underlying the nucleus of the Law to mature and to ascertain whether the Law has lead to the desired change, to the integration of the Yeshiva students in the frameworks of military and civilian service, in the work market and in the life of the State of Israel. My conclusion is based on my impression that we have yet to reach the moment of truth and that the time to drop the

curtain on the Law and declare it unconstitutional has not yet arrived. The upshot of this holding is to restore the complex, painful constitutional and social dilemma to its starting point. And what then:

Let me clarify my position.

The Deferment Law

4. The process of the Law's enactment was based on the work of a committee that sat on the problem for a protracted period. The Tal Commission was requested to formulate an appropriate arrangement for the subject of the enlistment of yeshiva students into the I.D.F. In the words of the its report, it attempted to choose a mediating solution. The Commission did not ignore the principle of equality and attempted to strike a balance between it, and other conflicting interests, ruling that "commensurate weight should be given to the differences between the groups, and commensurate weight should be given to the principle of equality, so that the difference in treatment not deviate from what is compelled by the relevant differences between the groups". The Legislature endorsed the recommendation of the Commission, and in the Explanatory Note, wrote:

> 'The changes recommended by the Commission are intended to enable the I.D.F to absorb the Haredi population into frameworks suited to them and in parallel to enable the Yeshiva students a "year of decision" at the end of which the student is permitted to return to his Torah studies in the yeshiva or to be integrated, in accordance with the Army's needs in shorted military service or civilian service, as well as into reserve duty (Draft Bill of Military service (Deferment of Service for Yeshiva Students whose Torah is their Calling) (Temporary Provision) 5760-2000, HH 455).'

The legislative process was a thorough, deep and painstaking process. The Deferment Law as ultimately adopted reflected an arrangement of social compromise; its purpose was to balance and bridge between conflicting trends (see comments of President Barak in the *Movement for Quality of Government* case [2]. para. 54, opening phrase). This would take place in recognition of the complexity of the reality that had materialized since the establishment of the State, prompted by the need and the desire to mediate between the different sectors of Israeli society concerning a matter lying at the very heart of our existence here – military service. The Law seeks to respect the different world views and lifestyles that make up Israeli society, without compromising the need for a equal allocation of the burden carried by the citizens of the State. The Law achieves this by establishing a framework for the gradual integration of the Yeshiva students in the frameworks of military and civilian service.

It seems that during that entire period it was clear to all that time would be required to generate the genuine social change that would lead to the reduction of the inequality, and that such a process could not occur immediately, but rather step by step. The understanding that a social change can only materialize as a result of a gradual process that must be allowed to take place was also the basis of this Court's decision not to pass judgment on the Law prior to the full passage of its period of validity. Justice Procaccia's comments in the *Movement for Quality of Government case* [2], are of particular pertinence in this context:

> ‘The democratic process is based on the recognition that it not always possible to achieve the goal of equality between different sectors of the population in reliance on absolute formulae. It relies on a deep understanding of the social reality, its exceeding complexity, and the awareness that the achievement of equality may entail a gradual societal

> progress for locating the points of contact between the various sectors of the population, in recognition of the depth of the gaps between world views, lifestyles, and an understanding of the roles of the state which may lead to one community being set apart from the rest of the public. It is rooted in a definition of the appropriate goal and objective and the adoption of the appropriate steps for their realization. This may entail the gradual realization of the goal without disruption all of the networks, without destroying a fragile human-social fabric and without raising an axe that may cause irreversible social damage. It may necessitate a process of building, block by block – not by denunciation and condemnation, but by adoption of a path of respect and understanding for the one who is different, always striving to come closer and with a commitment to lowering the barriers of division. The democratic process shows understanding for the variety of needs of the members of the various communities, and attempts to find the common factor and the balance between them with the aim of enabling harmonious social life. Occasionally, the social process is a long term one, involving suffering on the way, and is unable to produce significant, immediate results (*ibid*. [2] at p. 791)

5. Almost ten years have passed since the adoption of the Law. Undeniably, this is a long and protracted period. The picture emerging from the data presented to us is that during this period the Law did not lead to outstanding social change, and certainly not to the desired equality. All the same, one can discern a clear trend of process relative to the situation that preceded the Law. Processes of this kind, by their very nature may lead to a loosing of patience and the drawing of conclusions relating to the lack of purpose in the Law. My view however is that there are various considerations, which I will presently set forth, that may lead to a different conclusion, in accordance with which, despite the passage of years, and even if more could have been done, this period of time is not sufficient to complete the complex process of integration under the Law, and hence it would be unwise to cut it short prematurely. More

time is required; more patience is required, and primarily, there is a need for persistence and tenacity in proceeding along the potholed path from which Israeli society in its entirety, including all of its sectors, will emerge for the better. I am aware that this is a process that may last for years, but in my view the first buds of change are already discernible and they must be allowed to develop.

6. In my view the veracity of this conclusion is fortified when considering the background against which the Law's effect is being examined. Since the establishment of the State, haredi society has lived in accordance with its world view, according to its defined life style which includes, *inter alia* the deferment of service for the men of community, whose life revolves around studying in yeshivas. This life style is a dominant element in the self-definition of the community, and it is therefore clear that the desired change has a chance only if it is part of a long process accompanied by patience and tolerance. This is a process that must be promoted, as has been done until now in the framework of the law, gradually, and in coordination with the members of the community, in manner that does not violate their basic beliefs (per Justice Levy in the *Movement for Quality of Government* case [2] at p. 785). The process must be overseen with eyes that are open and perspicacious, which understands that the process is one that will not occur in a day nor even in a number of years. The need to adapt to a change is not only that of the haredi community. The conscription of the members of this community into the I.D.F. may and already has triggered various problems stemming from the tension between the army life style and the haredi life style, such as the adaption to *kashrut* requirements and integration into the overall fabric of the I.D.F. The success of this process likewise depends upon finding solutions to these difficulties, with caution and mutual respect. To be precise: I do not claim that the

difficulties are insoluble. It can and must be done, but it must be done with common sense, sensitivity, demonstrating patience, optimism and tolerance.

The Numerical Data

7. A central foundation of my position lies in the data that was presented to us.

In her opinion, my colleague the President examines the numbers of those who enlist to the I.D.F and civilian service from the haredi sector in relation to the *overall* number of those receiving deferments. Today, this group numbers 61,000 men. I would suggest a different method for examining the data because I do not think it practical to expect that the older members of the community and heads of families will, today, enlist in the Army, or even apply for civilian service. In my view we should not look to the past, but focus on the present, with our faces towards the future. Accordingly, I suggest examining the data in accordance with the number of those whose service is deferred each year from the haredi community as opposed to the annual figures of those who join the framework of military service or civilian service. In my understanding, this is a realistic examination that has consideration for the existence of a process and which anticipates a gradual progress over the course of years. An examination of the number of those joining the service each year in relation to total number of those whose service was deferred over the years, in my view, ignores the fact that the one of the purposes of the law is to "bring about a gradual solution of the difficulties that existed in the arrangement for the deferral of service for Yeshiva students, in a gradual, and cautious manner (*Movement for Quality of Government* [ ], para. 54 of President Barak's judgment

In my view, an examination of the data in this manner demonstrates the beginning of an encouraging trend. From the data presented by the respondents it emerges that in 2007 the potential enlistment pool was estimated at a potential of 4,850 men. (including those expected to enlist to the hareidi Nahal battalion). Only 303 people of the haredi community enlisted in the army during that year (including the hareidi Nahal) or joined the civilian service – in other words –only 6% of the potential enlistment pool. . In 2008 on the other hand, the enlistment pool numbered about 5000 in comparison with 823 haredi men who entered military or civilian service, in other words about 16%. In 2009 the potential enlistment cycle consisted of 5500 young men, of whom 1732 men joined one or another kind of service, namely about 31%. In 2010 the potential enlistment pool stood at 5,800 men. In that year 2020 men from haredi society enlisted in the I.D.F. or entered into the civilian service, which means 35% of the numerical datum of new enlisters. Having consideration for this trend, the respondents anticipate that in 2012 about 50% of the haredי enlistment pool will join the Army or civilian service. Regarding the year 2015, the expectation is 65%. It should further be added that in updated response of the respondents of 24 January 2011 we were informed that in 2009 the number of those serving in the military stood at 1357, of whom there were 729 new recruits into different tracks (*Nahal* Haredi and *Shahar*). In 2010 there were 2048 haredi men in the Army, of whom there were 898 new recruits in the *Nahal* and *Shahar* tracks (p. 21 of the Government's response 24 January 2011

My view is that on the face of it these numerical data reveal a certain measure of progress and an increase in the numbers of the members of haredi sector who enlist in service, and this progress was also mentioned by the President (para. 50 of her opinion). These data,

along with an optimistic forecast, albeit tempered by an element of scepticism and caution, justify giving a proper opportunity to the Law to prove its ability to promote its purposes

8. Parenthetically I will note, further to the above, that after reading the response of my colleague the President to my opinion, I find that two points should be sharpened:

First, my view was, and still is, that the inductees into the *Nahal* Haredi should be included in the framework of the numerical data that serves as a foundation for the decision. The assumption is that if not for this special track these young men would not have enlisted in the army and would have joined the ranks of "those whose service was deferred", because these are not the young men who have deserted the Haredi society. As such even if the track was not created by force of the Deferment Law, it still fulfills its objectives. It bears mention that these recruits are also included in the numbers of those who express the size of the haredi enlistment pool in the data mentioned above. This being the case this datum should also be considered when examining the number of recruits from the total number of those in the pool.

Furthermore, if we ignore this datum and ignore the datum of members of the haredi community who choose to enlist to *Nahal* Haredi, we will discover that the trend of integration of the haredim into any kind of service, civilian or military, becomes even more pronounced. Hence, in 2007 only 53 young haredi men joined any kind of service – army or civilian, that was not part of the *Nahal* Haredi, from out of *the enlistment pool* of that year that numbered 4600 men – which means only one percent. On the other hand, in 2010, 1652 haredi men joined the military or civil service without including those who serve in *Nahal* Haredi – from an enlistment pool which in that year was in excess of 5470 men, and as such represents 30%.

9. Another point relates to the including of those who joined civilian service in the numerical data. My colleague the President analyzes the numbers and presents the percentages based on joining the military service only, without the soldiers of the Nahal Haredi and without those who join the civilian service (para. 31 of my colleague's opinion). In my view, at this stage the examination should be based on those who enlist into military service as well as into civilian service. Indeed, in order to reach full equality, all of the members of the haredi sector should enlist in the army and not suffice with national service,. which is the obligation of the majority of the other sectors of Israeli society. All the same, this Court has already recognized that the purpose of the Deferment Law is to bring more haredi men into military or civilian service, as an appropriate goal that satisfies the requirements of the limitations claused (see in *Movement for Quality of Government* case [2], paras. 54-55 of the opinion of President Barak). President Barak wrote as follows:

> 'In doing so the goals of the Law are realized: It enables the deferment of service for those who so choose; at the same time many will turn to the tracks of military or civilian service. The inequality will be reduced; there will be an integration of the haredi men into the work force; these changes will occur in a gradual and cautious manner, without coercion and by way of agreement (*Movement for Quality of Government* [2] para. 63 of President Barak's judgment).

In other words, in the complex and protracted process required in the move towards full equality, it must be recognized that contributing to the State by way of civilian service will also constitute an appropriate goal, even if it does not achieve full equality.

10. Further to the data that were presented at the time by the attorney for the state, I wish to present current data from a session of the Foreign Affairs and Defense Committee, of 23 January 2012 (as recorded from the broadcast of the Knesset channel) which addressed the issue of the conscription of haredi men, coming from statements made by relevant professional entities. These data too support my approach and likewise indicate the nascence of a positive social trend towards the realization of the objectives of the Law, a trend in respect of which the professional entities too are optimistic about its continuation.

Professor Eugene Kandel, the head of the National Economic Council who was a member of the interoffice panel that examined the encouragement of employment and promotion of national and civilian service among the haredi public (Gabbai Commission) claimed that "The cup is still not quite so empty and in recent years has been filling up with increasing rapidity". Professor Kandel noted the growing trend towards the integration of haredi men both in military and civilian service frameworks. For example, whereas in 2007 the numbers of haredi men that enlisted in the I.D.F stood at only 288 men, by 2011 this number had grown to 1282. Regarding civilian service, in 2007 the number of haredi men who joined was only 15 only, by 2011 the number of those who joined had jumped to 1090 men. He emphasized that the Government had achieved the enlistment targets that it set for itself until that time, and that these targets were increasing annually so that by 2015 it was expected to reach 60% of the haredi community who would join either the military or civilian service. Finally, he mentioned that in the wake of these positive trends it was also possible to discern a growing trend over the last three years of Haredi men who were participating in the work force.

General Orna Barbibai, Head of Manpower Division, noted that in 2011 the I.D.F recruited more haredi men than planned into the various haredi frameworks. The plan was to recruit 1200 haredi men, whereas in fact 1409 were enlisted, including within the framework of hareidi Nahal. She emphasized that the army had detailed plans for the absorbing and integration of haredi men expected to enlist in accordance with the Government targets, in the coming years. She agreed with Professor Kandel that there was a discernible increase in the enlistment of the haredi men into the Army. In her view, these data are encouraging "the datum of enlistment is a blessing and we believe that it should be promoted"

Sar-Shalom Jerbi, the director of the Civilian Service Administration, claimed that there had been a real revolution in the world view of the haredi sector with respect to service. He too pointed to the growing tendency among the haredi towards joining the Civilian Service. He stressed that as distinct from the commonly heard criticism, the haredi men who serve are not integrated in their service in the yeshiva frameworks, even though there are those who provide assistance for at-risk youth. The areas in which they serve are welfare, public health, absorption of Aliyah, environmental protection, internal security, and rescue services. He also mentioned that only 57% serve within the community and that the tendency in the administration is to enable less service within the community. Finally he referred to a survey conducted among those who had completed civilian service for haredi men, which indicated that 78% of them intended to study or to go out to work after the completion of the service.

Dr. Reuven Gal, a sociologist, and one of the founders of the Civilian National Service, and an academic researcher claimed that according to the data, the haredi public was becoming a partner to the

service at a particularly fast rate, and that there had been a jump in the numbers beginning as of 2005 and until 2011. He maintained that social phenomenon do not generally take place at such an accelerated rate. About 10,000 hareidi men joined the frameworks of state service over the past 5- 6 years, both that of the military service and that of the civilian service. He further stated that both tracks, the military track and the civilian track constitute levers for the integration of the haredi population in the employment pool. Dr Gal's recommendation was that Law be extended for another five years, parallel to the introduction of changes in the civilian and military tracks.

General (res.) David Ivri, the Chairman of the Temporary Public Council for Civilian National Service clarified that the Administration of the Civilian National Service only began functioning in 2007, and that it must be taken into account that the initial implementation of any new legislation would take many years. In his understanding, an opportunity should be given to the existing law, which had lead to very positive developments in relation to the statistics of those serving from among the haredi sector. He related that at the beginning he had thought that the haredi sector should be compelled to enlist, with no other choice, but that having been exposed to the complexity of the society problem and the difficulties involved in its conscription enlistment, he changed his outlook on the matter. In his view, at this stage it would not be proper to impose a duty of service and the voluntary aspect of the law should be left intact.

We can therefore see that all of the professional bodies that were present at the hearing felt that the data points to satisfactory progress that should be continued and encouraged within the framework of the existing law. Not one of the professional bodies contradicted these conclusions at the hearing

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The Objectives of the Law

11. An additional layer to be mentioned relates to the objectives of the Deferment Law, which President Barak referred to as being appropriate, in the *Movement for Quality of Government* case. It will be recalled that the Law has four objectives. The *first* is to entrench in Knesset legislation the arrangement for the deferment of service for yeshiva students for whom their Torah is their calling and who wish to study in yeshivas. The *second* is to bring about greater equality in the allocation of the burden of military service in Israeli society, so that more members of hareidi community are integrated into military service, or at least civilian service. The *third* is to increase the participation of the haredi public in the pool of employment. The *fourth* is to bring about a gradual solution to the problems attendant to the arrangement for the deferral of service of Yeshiva students, based on broad consensus and without coercion (see *Movement for Quality of Government* [2], at pp. 700- 701). In respect of these purposes President Barak ruled:

> 'Are these purposes "worthy". In my view the answer is in the affirmative. They are intended to integrate the Hareidi sector into the texture of the life of the State, and thus assist that sector in reducing the inequality and to arrive at an arrangement that is acceptable to all the sections of society. They are intended to engender a long term societal change, which will lead inter alia to a reduction in the dimensions of the Deferment arrangement for Yeshiva students. These purposes, in their interaction, satisfy the requirement of a proper purpose. An arrangement was established the overall balance of which is consistent with the fundamental conceptions of Israeli society' (*Movement for Quality of Government* para. 55 of President Barak's opinion).

Given the characteristics of the hareidi public and the lifestyle to which it has become accustomed over many decades since the establishment of the State, I think that the admixture of these objectives at the beginning of the process will differ from the anticipated admixture at the end of the process. Conceivably, at the first stages emphasis will be placed upon the objective of incorporating the haredi public in the work force, which is an objective to which there is less opposition among this public and which can be incentivized in a more significant manner (regarding the ramifications of the non-participation of the hareidi sector in the work force see the Report of the Interoffice Team for Encouragement of Employment and Promotion of Military and Civilian Service in the Hareidi Sector (hereinafter – Gabbai Committee Report). The economic straits in which many of the hareidi community currently find themselves may lead, and it would seem that it has already led to an increase in the integration of the members of this community in the work force. The nature of the work force as opposed to the characteristics of military service contributes to this. It may be added that the hareidi community is averse to the integration of its young and unmarried people in the general society given its fears of society's influence over them, which can be more profound. It is clear that the integration of the hareidi population in employment will in and of itself constitute an achievement not to be treated lightly.

In my estimation, to the extent that the hareidi public becomes more integrated in the employment market, and all will observe, hopefully, that they can be integrated into the work force at no cost to the special character of the community, it will become easier to stiffen the requirement for the integration of members of the community into the frameworks involving more meaningful army and civilian service (see Justice Procaccia’s comments on this point Quality of Government [2], at

pp. 793). In other words, the balance of proportionality will change to the extent that the process of integration continues. Accordingly, I do not think that we should recoil, at this stage, from sufficing with a requirement of a relatively short military and civilian service and from the exemption given to those of certain ages from regular service, that enables them to go out to work.

I will again repeat that in my view the purpose of achieving equality in the allocation of the burden will not be achieved by coercion (see *Movement for Quality of Government* case [2], which refers to the Tal Commission Report; and also at p. 702), but only by a long and patient process. This conclusion is consistent with the fourth objective of the Deferment Law, namely, the achievement of a gradual solution based on broad consensus. Consideration should also be had for the fact that one of the objectives of the law, recognized by this Court as a an appropriate objectivee, is to legally anchor the deferment of the service of yeshiva students. As such it should be recognized that a certain part of the haredi community – which given that the purpose of equality is also part of the law, will be relatively small – will continue to study in the Yeshivot in the future without bearing the burden of military service.

Decision Year

12. In her opinion, my colleague the President attached particular significance to the resounding failure of the decision year mechanism under the Law. I agree with her that this mechanism has not proved itself in terms of achieving the required change. All the same, the purpose of enlistment to the army or joining civilian service does not entail taking a year of decision. It therefore seems that the additional mechanisms in the Law, as well as the incentives that have and continue to be created by the

Executive branch over the last few years are leading to a gradual, albeit slow change. The failure of the decision year mechanism, does not, in my view, in and of itself justify the declaration of the invalidity of the law.

Civilian-National Service

13. The mechanism of civilian service only began to operate in 2008, after a Civilian Service Administration was established (hereinafter: the Administration) in 2007. The Administration was established in accordance with the recommendations of a committee headed by General (Res) David Ivri, appointed by Minister of Defense, and it recommended the broadening of the civilian service to include all Israeli citizens and residents who were not called up for military service or who are exempt from military service. This would be in addition to the recognition of the preferred status to be given to compulsory military service. The civilian service mechanism is a central component of the process contemplated by the Law. The Administration has only been operating for a relatively short period of time, In my view, only after the mechanism established for implementing the integration process has been operating regularly for a particular period of time, will it be possible to evaluate the Law's degree of success in realizing its objectives.

I have not ignored the criticism of the manner in which the civilian service is run and the absence of sufficient supervision. In any large network that begins to operate failures and difficulties are to be expected, in a manner akin to "birth pains". These difficulties do not warrant the cancellation of the network and certainly not the cancellation of the Law in its entirety. Presumably, there will also be those from among the hareidi population who will seek to benefit from the advantages offered by the Law without conferring any real substance to the civilian service which they are committed to by reason thereof. In my view, at least at this stage, these failures must be treated, *inter alia* by tightening the supervision and allocation of the resources required for

that purpose. Civilian service must constitute a real contribution to the society and not just lip service – a ticket into the work market. All the same, this is a far cry from a conclusion that the Law is void. I will add that the criticism of the activities of the Administration is based on the State Comptroller's Report of 2009, and passage of time since then has – as submitted to this Court – witnessed significant changes: The Administration has contracted with an external body that assists it in all of its contacts with those who serve. Amongst other things, one coordinator has been allocated for every 45 servers, on the average and he bears responsibility for them and conducts ongoing inspections. It was explained that the coordinator visits the place of activity of each server on an average of once every two weeks. Any impropriety is reported directly to the Administration. In addition, each server is required to submit a monthly attendance report which must be confirmed both by the operating body and the coordinator. The Administration reports that cases of false reporting concerning attendance were treated with severity and some of the servers were even transferred for the treatment of the military authorities. The results of these measures and their contribution to the achievement of the aims of the Law can only be examined over the passage of time.

I will add that yeshiva students between ages 22- 25 without children will be obligated to do either military service or civilian-military service, in frameworks such as the Police, the Prison Authority, Fire Extinguishing and medical evacuation, which can find their parallel in military service. I see importance in introducing activities that will encourage yeshiva students to turn to military service, as well as to civilian-military service. In fact, from the statistics it is evident that the existing training in the military service framework already creates this kind of incentive, given that it prepares the graduates of the track for

their integration into the work market. From my perspective, consideration should be given to additional measures that will specifically incentivize the choice of the military service track, as the professional personnel may deem fit.

The Functioning of the Executive Branch

14. Another reason for the decision that the Law is not constitutional is that the Law confers the Executive branch overly broad freedom of choice. I believe that this is a reason for judicial oversight of its implementation but not for declaring the Law to be void. The complexity of the subject before us was known to the Legislature. Understanding the uniqueness and the sensitivity of the hareidi population and recognition of the limited power of coercive measures in this context necessitated giving relatively broad leeway for actions on the part of the executive. The combination of numerous and conflicting goals in the framework of the same law also necessitated that the wording of the law be general and broad in a manner that would accommodate the infusion of substance in accordance with reality and changing conditions. For as long as the Executive acts in a reasonable manner towards the optimal execution and implementation of the Law I do not think that this reason can justify the disqualification of the Law,

As mentioned, it seems that indeed during the first years of the Law's existence not enough was done for its implementation and matters proceeded at snails pace. However, it seems that today the efforts have been stepped up significantly, notwithstanding that there are still additional measure that can be adopted. Accordingly, the respondents notified us that the I.D.F is busy in the establishment of new frameworks that will enable the absorption and integration of the hareidi population

in an army framework. To do so a decision was adopted to increase the I.D.F budget and to designate it for that purpose. There are now a number of tracks that integrate the hareidi population (*Shahar*) – apart from the well known hareidi Nahal – in the Air Force, Intelligence, Computer and Communications, Navy, Technology and Logistics, Manpower and in the Home Front command. Some of these tracks were opened just recently, and it is to be hoped that they will develop and draw additional hareidi men wishing to serve. We were further informed that many new tracks are going to be opened in the near future. It bears note that in the course of the service or before it the participants undergo supplementary "practical education" as well as training in various professions. There is also the possibility of integrating in the army framework as well as the increased chances for the participants to be integrated in the work force after military service, which is also evidenced from the data indicating that about 80% of those who join the *Shahar* tracks integrate thereafter into the work market.

We were further told that that the Government had decided to create an abbreviated military service track of three months duration for men aged 26 and upwards. The graduates of this track are supposed to serve as the preparatory network for states of emergency, where there are currently indications of a manpower shortage. As for the older yeshiva students, age 28 and over they are designated for the reserve duty pool. Regarding this point I will point out that even though I do not think that the latter arrangements achieve full equality, I think that in order to bring about a real change a realistic approach is required, which accepts – if only for the time being – the possibility that the possibility of integrating older yeshiva students into service is limited, and what's more – its benefit is in doubt. This is especially so in view of the fact that the Law

gives *de facto* recognition to the fact that not all yeshiva students will be enlisted, as mentioned above.

In addition, the Civilian Service Administration is working diligently to increase the supply of frameworks as well as the numbers of those serving. The list of operators at the time of giving of the respondents' reply stood at 209. Efforts are being made to publicize the civilian service track among the hareidi public, in a manner that does not provoke opposition. The Administration, as stated, contracted with an external body, part of its duties having been to supervise and conduct ongoing inspection of the activities of those serving The Government too decided upon the establishment of a civilian-military option, and we recently learned from the press about the opening of the first cycle of hareidi men serving in Israel Police as part of the civilian service. In that framework too work is currently underway to increase the incentives by way of programs that will assist the servers in integrating into work after completing their service. Apart from all of the above, the Government charged the interoffice committee established for that purpose with the ongoing monitoring of the targets it had set and the implementation of the Government decision regarding the attainment of those targets. The panel was likewise charged with examining the need to adjust the measures being taken if required, and to submit its recommendations to the Government until 1. July 2012

15. The picture emerging from the entirety of actions underway is that the Executive is currently working for the implementation of the Law and the promotion of its goals and is even monitoring the progress and handling of the subject. Conceivably, these actions have been done at a relatively late stage, and possibly we were hoping for a different pace. Even so, in my view the aforementioned activities and its horizon leave room for hope and do not justify a determination that the Law is

void In my view, these efforts, along with the data attesting to a positive trend, and having consideration for the forces attempting to undermine the trends of change, justify granting another appropriate extension to enable the continued examination of whether the trend is an ongoing one.

The Alternative Scenario

16. As is well known when disqualifying a law, the judge is not required to demonstrate the consequences of that disqualification (see comments of the Deputy President M. Cheshin in the *Movement for Quality of Government* case [2] at p. 778). At the same time, in the sensitive case before us, when confronted by the appropriate goals of the Law, I think that we must be aware of the consequences of a declaration that the Law is void .

I accept the position of the State – that the disqualification of the Law will not enhance its ability to realize its objectives, and that there is even a real chance that it will damage the possibility of achieving them. It seems to me that even those who support the disqualification of the law do not think that one day after the disqualification the much desired equality will be attained. The disqualification of a law means an upheaval. The Knesset will be required to pass a new law. One cannot rule out the possibility that this will require the establishment of an additional committee which will similarly required a significant period of time to discuss this particularly sensitive and complex issue. The Knesset will have to find another creative solution, the operation and implementation of which will likewise last a long time, and its success is not guaranteed. It may further be assumed that a committee of this kind, as well as the Knesset, will prefer to avoid an agreement the essence of which is a forcible conscription, even if only because such a move would

not be effective and might well bring results that are the reverse of those that are currently confronting us. This being the case, and as much as I understand the anger and the frustration, I do not think that this process should be cut short just when it has begun to bear fruit, even on a limited scope, and in my view patience is likely to bring about the hoped for change. There is no escaping it: the Supreme Court sits among its people and when addressing such a sensitive and complex subject it must give consideration to practical matters which will make its decision relevant and not a dead letter in practical life. It is understood that if, parallel to the implementation of the Deferment Law, the Knesset deems it proper to change the Law, amend it, or enact another one in its stead, in a manner that achieves equality and sharing of the burden at a faster rate, then we will only be able to commend and bless it. As stressed by President Barak:

> 'Of course, one can conceive of different and various solutions, reflecting different balances and different compromises between conflicting social objectives. This is a matter for the political sovereign powers. It is not a matter for the judiciary. The question confronting us is not whether other objectives or compromises could have been found, similarly, or even more appropriate. The question is whether the objectives forming the basis of law, reflecting the legislature's perception concerning the solution of the social problem confronting it – are appropriate (*Movement for Quality of Government* case [2], para 56 of President Barak's opinion.

The Position of the Committees Engaged in the Matter

17. In terms of background, it is important to mention the recommendation of the two central committees that examined the subject of the conscription of yeshiva students, following the Tal Commission,

the recommendations of which formed the basis of the Deferment Law. One of the committees is the Gabbai Committee – an interoffice committee established pursuant to a government decision of 15.July 2010. The recommendations of this committee were submitted to the Government on 19 December 2010, and were for the most part endorsed by a government decision of 9 January 2011, The committee comprised the Director General of the Prime Minister's Office, the Head of the National Economic Council, an I.D.F representative, the Head of the Civilian-National Service Administration, as well as representatives of the Attorney-General and of the Ministry of Finance and the Ministry of Trade and Industry. The committee examined both the subject of enlistment of hareidi men into the army and into civilian service, and the integration of the hareidi sector into the employment cycle. From this broad perspective, the Committee submitted its conclusions for the implementation of the Deferment Law, positing clear and realistic targets for the service of the hareidi men until the year 2015. The Committee's view was that these targets could be attained by the Deferment Law and it recommended the addition of service tracks, including the abbreviated service track, the combined service track and technological education track for hareidi youth. The Committee also recommended civilian-military service from age 22, the combination of professional and occupational training in various service frameworks and for appropriate funding for the Ministry of Defense in order to implement the recommendations. Finally, the Committee noted that in the event that after the implementation of all the recommendations there was still an insufficient number of servers from the hareidi sector in the I.D.F. or in the civilian service, it would be appropriate to consider a change in the system of incentives for service, which would include both positive and negative incentives.

An additional panel that dealt with the issue was the team for examining the implementation of the "Tal Law" headed by MK Yohanan Pelsner (hereinafter – Plesner Panel). This team was appointed by the Knesset Foreign Affairs and Defense Committee and comprised six MKs from different parties. The Panel submitted an interim report on 16 January 2011, albeit without the concurrence of its two hareidi members with its conclusions. While the Panel deigned that the implementation of the Tal Law had failed, its overall position was that the Deferment Law should not be voided but rather "the policy and legislation should be changed so as to adapt the networks established therein to the positive processes that are taking place within hareidi society and the accumulated lessons regarding the conditions under which the hareidi men are enlisted into the I.D.F." At the end of the day, the differences between the conclusions of the Pelsner Panel and the Gabbai Committee are not particularly significant. The Pelsner Panel too felt that the existing tracks in the I.D.F for the integration of the hareidi men should be broadened and new tracks established, both in accordance with the existing model and in accordance with a new perception, such as military service combined with studies in yeshiva. In addition, the Pelsner Panel felt that emphasis should be placed on the broadening of the combat tracks for haredi men. Regarding civilian service, the team felt that the Civilian Service Administration should be appended to the Prime Minister's Office and become a body of vision and establishment of policy. It also recommended increasing the numbers of those charged with locating volunteers in the hareidi community and of bodies to absorb them; the adaption of the service frameworks to the hareidi lifestyle; the marketing of the benefits accompanying service and the accompaniment of those serving for purposes of employment placement

upon become regular citizens. The Panel also supported civilian – military service for those aged 22 and upwards.

The Government decided to conduct a system of double monitoring and supervision. The first would be by way of an interoffice term headed by the director general of the Prime Minister's Office, to conduct the ongoing monitoring of the implementation of decisions, as well as to decide upon additional measures in view of the accumulated experience. The second would be a report submitted by the Panel until 1 July 2012, containing its recommendations to the Government, in a manner that enables ongoing monitoring and supervision.

It thus emerges therefore that the two panels that examined the subject in depth felt that the implementation of the Deferment Law should be continued. The recommendations of the Gabbai Commission were endorsed in full by the Government, and the recommendations of the Plesner Panel are not substantially different, apart from its greater emphasis on a more meaningful combat service for the hareidi sector. Of course, this Court is not bound by the recommendations of these committees, but they can certainly be one of its considerations.

More on Equality

18. A final matter I would like to add pertains to the principle of equality. Much ink has been spilt on the importance of equality in general and specifically in the context of the enlistment of yeshiva students whose Torah is their calling. Evidently, it is undisputed that equality is the touchstone of a democratic regime, and a central component of the relations between the individual and the state. One cannot maintain a society in a democratic state in the absence of equality, which is one of the derivatives of justice and fairness. Equality is

synonymous with justice and fairness as perceived by the members of the society in any given period – equality that leads to justice, equality which represents the path of fairness. (see HCJ 7111/95 *Center for Local Government v. Knesset* [28], at p. 502. Regarding the yeshiva students, in a previous incarnation this Court held that the right to equality is part of human dignity, which is anchored in Basic Law: Human Dignity and Liberty, to the extent that it is tightly and substantively related to human dignity.

Obviously, I have no dispute with my colleague the President or my other colleagues concerning the status and position of the right to equality in our legal system. Like her, I too endorse the constitutional analysis and holdings of President Barak regarding this matter as well as with respect to the remedy (*Movement for Quality of Government* case [2] at pp 683-685). I too share the aspiration to quality in the enjoyment of rights and bearing of obligations, and primarily in the allocation of the burden borne by the citizens of the state in protecting state security. The violation of equality in this context is grave and may cause fissures in the fabric of society, damaging the foundations of the regime. Accordingly, everything possible must be done to allay the problem with all possible speed. Even so, in my view, the reasons outlined, which justify granting additional time for rectifying the violation of the right, should be supplemented by a number of additional considerations which focus on the subject of the violation of equality.

First, in my opinion it should be recognized that the violation of equality does not admit of immediate rectification. The shortest and most promising path to the attainment of the desired equality, is the path that currently appears to be long and arduous. As I mentioned, a declaration that the Law is void, with the aim of formulating a new law which will expedite the process appears *prima facie* to be a faster and easier way of

attaining equality, but it is highly probable that this path will turn out to be the longer path. It will be stressed: This does not mean that what has been achieved thus far is sufficient. The holding that at this stage the violation of equality is proportionate is actually a "conditional" holding. It is based on the trend indicating progress that was presented to us by the State, supported by statistics regarding hareidi participation in military or civililan service as well as by what we have gleaned from the professional personnel that appeared before the Foreign Affairs and Defense Committee, as specified above. The State must continue to utilize the existing means, as well as to add new ones, which will encourage the continuation of the trend that was presented before us. Stymieing the trend towards an increase in the numbers of hareidi men that join military or civilian service may portend the end of the role played by the Deferment Law in realizing its objectives, which in turn would lead to the declaration of the Law as disproportionately violating the principle of equality.

Second, as mentioned, the enlistment of the haredi sector into the army necessitates special arrangements (a special professional training network, Kashrut network etc). The integration of the haredi sector may also involve harm to other sectors, such as women, whose integration into the I.D.F is of public importance. As noted by Justice Procaccia in the *Movement for Quality of Government* case, the distinctiveness of the hareidi sector cannot legitimize a discriminatory arrangement, but it does compel "a gradual, multi-staged process on the path to achieving equality (at p. 790). Indeed, the I.D.F bears the complex burden of integrating the members of the hareidi community, while adjusting the service to their unique needs with tolerance and understanding. The integration and equality will via a natural process and not through coercion. In the same vein President Shamgar already stated that –

> ‘The sons and daughters of a free society, in which human dignity is a cherished value, are all called upon to respect the personal religious feelings of the individual and his or her human dignity. This must be based on tolerance and the understanding that personal religious feelings and their various modes of expression differ from one individual to another… an enlightened society also respects the beliefs and opinions of those who adhere to them with an fervor and identification that are not necessarily typical of the average person.’ (HCJ 257/89 *Hoffman v. Western Wall Superintendent* [29], at p. 354

This mission requires patience for complex and sensitive processes, while learning lessons during the integration process, and tolerance of one group towards its fellow group.

Conclusion and Result

19. This opinion is not the end of the road, but rather one of the stones on the path. I am aware of the long road that has been traversed until now and the anticipation that at this stage the results would be more meaningful and conclusive. All the same, already now, despite the accusers, positive progress is discernible, even if in small and measured steps. That which has been achieved until now cannot be destroyed in one fell swoop, nor can the efforts invested and results achieved be treated lightly. As stated, the competent authorities operating in coordination with the Government should be granted additional time to continue in the promotion of the purposes of the existing Law. As I mentioned, a broader perspective should be taken, having regard for the point of time at which we are as part of a change in the situation that was created and that has existed since the establishment of the State. There must be a recognition of the complex societal situation and acceptance of the fact that the attainment of equality

necessitates a long and slow multi-stage social process, in a search for the points of contact between diametrically opposed portions of the population separated by an abyss. There is no escaping the need to have consideration for the background of the subject and the difficulties in moving the process forward, to formulate realistic expectations that are attuned to the sensitive reality, which is splintered between world views and customs.

As my colleague the President noted, the difference between us are not significant and we both share the same goal of promoting equality, of encouraging the enlistment to the I.D.F. and the partnership of the hareidi community in civilian service. However, as I noted at the very beginning of these comments, in my view coercion stands no chance and will achieve nothing. A declaration that the Law is void may perhaps create a feeling finally having achieved the long desired equality, but in reality the opposite is true. The disqualification of the Law will generate confusion and anger and will put a halt to the initial achievements, which cannot be set aside at the stroke of a decision. It will sever the last branch currently joining the extremes., the very same branch on which buds can already be seen and it is my hope, that from the perspective of years will sprout into the blossom of unity. Any law, whatever it may be, even if the current law is voided and a new and better law enacted as per the proposal of some of my colleagues – which I don't see happening in the near future – must be based on compromise aimed at participation in the burden. Equality, which is at the heart of the goal, will continue to thrive only if based on the foundations already outlined. Its achievement will be via a gradual, multi-staged process that requires time, and which, so I believe will finally lead to a broader enlistment, with understanding, patience and tolerance.

I therefore believe that we should enable and encourage the continuation of the aforementioned positive trend, in the process of

continuous action and improvement of the existing means, looking towards the achievement of the goals upon which the Law is based. In my view, leaving the petition pending before this Court provided an incentive for promoting the subject and for the developments that have ensued, and which cannot be ignored. Accordingly, at this stage, the Court should continue the monitoring and supervision of the procedures relating to this sensitive and complex petition, while leaving the petition pending before us. I would like to believe that the joint service in dissimilar frameworks – army, civilian and other employment frameworks – will succeed in inculcating values of tolerance and mutual respect born out of cooperation and not coercion. I say this especially with respect to military service, which is conducted in accordance with the principles of equality and the basic values derived from the fact of it being the army of the people in a Jewish and democratic state.

20. Upon the completion of writing this opinion, the subject of the enlistment of yeshiva students retuned to the headlines and is at the focus of public and political discourse. As judges – my colleagues and myself – despite our differing conclusions, know how to ignore and remain unruffled by the stormy winds of the hour, in our recognition of the need to beware of being dragged outside the four cubits of the law, and to decide in accordance with the best of our understanding and judicial conscience. Comments in this vein were made by President Landau, and they are pertinent to this matter too:

> Yet, there is still grave concern that the court would appear to be abandoning its proper place and descending into the arena of public debate and that its ruling will be applauded by some of the public and utterly, vehemently rejected by others. In this sense, I see myself here as one who's duty is to rule in accordance with the law on any matter lawfully brought before the court. It forces me, knowing full well in advance that the wider public will not notice the legal argumentation but only the final conclusion and the

> appropriate status of the court, as an institution, may be harmed, to rise above the disputes which divide the public. Alas, what are we to do when this is our role and duty as justices. (HCJ 390/79 *Duwekat v Gov't of Israel* [30] at p. 1),

Were my opinion to be heard, we would leave the petitions pending and request an update from the respondents concerning the rate of progress in the proceedings, and concerning the means that the Executive has added, and is continuing to adopt for the implementation of the Law. Given that at this time the question of the extension of the validity of the Law by the Knesset is currently pending, and as mentioned, I do not intend to enter that arena, I would suggest receiving this kind of update in July 2012 upon the termination of the last period of the Law's extension. Should it be decided to extend or to amend it, then in my view, as stated we should receive an update from the State at that time, and maintain a judicial monitoring, along with the determination of the future time on which this Court will again sit and consider the constitutionality of the Law in view of the latest developments.

Justice

Justice Elyakim Rubinstein

> In the Kol Torah Yeshiva of Jerusalem one of the students requested permission from the Rosh Yeshiva (R. Shlomo Aeurbach, a Rabbinical Authority of the last generation) to travel to visit the graves of the righteous in the North. The Rabbi answered him: In order to pray at the graves of the righteous does one need to travel all the way to the Galilee/ When I feel the need to pray at the graves of the righteous, I go to Har-Herzl, to the graves of the soldiers who fell in the sanctification of God's name (told by Rabbi Yisrael Meir

Lau, from the book of Rabbi Y.Z. Rimon *Halakhah Mimkora – Tzava* (2010) [ ]; and also see the shortened version in the book of Rabbi Yosef Eliyahu, *Oro Shel Olam* (2003) [ ] 380.

1. The Deferment of Military Service for Yeshiva Students for whom the Torah is their Calling, Law 5762-2002 (hereinafter – the Tal Law or the Law) is a profound and sensitive attempt, in the wake of this Court's ruling (HCJ 3267/97 *Rubinstein v. Minister of defense* [1] at p. 481) and following the work of the commission headed by Justice Tzvi Tal, who viewed this work as sacred task in its contribution, albeit partial, to the healing of a bleeding wound in the Jewish part of Israeli society, namely in other words, the subject of the enlistment of the Yeshiva students to the I.D.F. My colleague, President Beinisch reviewed the history of the subject which has been reviewed and discussed at length in the judgments of this Court since the *Ressler* case n 1986 continuing in the *Rubinstein* case, and up to the *Movement for Quality of Government* case. I will make every effort not to revisit matters already stated and reviewed.

2. By way of preface, the bottom line is that I concur with the opinion of my colleague the President. The present situation exceeds the boundaries of what is constitutionally tolerable. Conceivably, responsibility for this situation is divided between the two branches who are the respondents in this file: the Legislature that enacted a Law that *a priori* is far from simple, and the Executive charged with its implementation. Conceivably, had the Executive done more for the effective implementation of the Law, despite its inherent problems, the situation would have been different and more tolerable. According to Justice Tal "The Law, at this stage, has been frustrated by the Government and the Ministry of Defense" (Tz. E Tal, *Ad Bo HaShemesh* (5770) 300), however, even according to his view, in the first place "the

recommendations of the Tal Commission do not represent complete equality (ibid, p. 299; see also Tz. E. Tal, "The Problem of the Enlistment of Yeshiva Students", *Memorial Volume for Professor Ze'ev Falk* (R. Horovitz, M.D. Herr, Y.D. Silman and M. Korinaldi eds. 5765) 355, 366; Similar explicit comments were made in the report filed by the "Tal Commission" (Report of the Commission for Crystallizing an Appropriate Arrangement on the Subject of the Enlistment of Yeshiva Students, vol. 1, 5760) 97), as well as from the Knesset podium at the second and third readings of the Law: "Any arrangement that does not establish absolute equality between citizens ….is a bad arrangement. The question is whether this is the lesser evil or evil incarnate "(*Knesset Proceedings* 23 July 2003, p. 8584, per MK Yossi. Katz)

3. An additional significant part of the responsibility for the the current situation, in my view, lies with the hareidi society – "as far as one can attribute one point of view to this variegated society" (HCJ 746/07 *Regen v. Ministry of Transport* [32], para. 29 that adopted a position that is almost inconceivable from a Torah based-moral-civilian perspective (naturally, I am not addressing the question of *Halakhah*), and chose not to make broader use of the mechanisms established by the Law, and the unique and specially adapted service tracks offered by the State. Within the parameters of the constitutional-administrative law, this civilian group is not a "respondent" in this file, and under the circumstances its decisions will be related to as a factual given that we cannot change on an operative level in the framework of this proceeding, but which will influence our decision concerning the reasonability of the present situation and the possibility of leaving it intact. Needless to say, had the relevant hareidi instances sought to have their position heard in this proceeding, the doors of this Court would have been open to them.

4. Accordingly, we have no choice but to examine whether, under these circumstances, the situation made possible by the Tal Law, even after the extension granted in the *Movement for Quality of Government* case, is tolerable from a constitutional perspective. I will address the situation and the question of its tolerability, for conceivably, in a different constellation, given different conduct on the respondents' part with respect to the petition and on the part of those who are not parties to it, the Law would have lead to a situation that it tolerable, at least within the category of "appropriate *preliminary* arrangement" (the term adopted by the Tal Commission regarding the arrangement it formulated; see p. 97 of the Commission's Report), as far as it touches upon the *critical* violation of equality between citizens of the state in a subject of life and death in its most literal form.

5. In many senses, the situation created in the wake of the decision in the *Movement for Quality of Government* case is unique in the field of constitutional-administrative law. Generally, when the court reviews the constitutionality of a law involving the violation of protected human rights, it must examine whether the Executive properly interpreted and implemented the law. To the extent that the authority is acting as it should, the review will focus on the law itself. Here however, one of the significant variants relates to the conduct of the hareidi public. The non-constitutional effect (using the phrase similarly to the way it was used by Justice Naor in CrimApp 8823/07 *Anon v. State of Israel* [33]) flows from the convergence of a number factors, the hareidi sector being the principal one, being both its beginning and end, although the Knesset and the Government over the generations are also partners to the reality that emerged. Possibly, as stated, the cooperation of the hareidi sector might have – without ruling on the matter – lead to a different result. And indeed, this was the purpose of the trial period prescribed in the

Movement for Quality of Government case, which in essence stems from the conclusions of the Tal Commission.

6 However, having been presented with the data reviewed in the opinion of the President, and having granted all those involved a significant period of time to attempt to bring about better results, we have no choice but to conclude that the current situation cannot continue; in other words to hold that the fundamental values of the State of Israel as a Jewish and democratic state as enshrined in the Basic Laws and interpreted by this Court, cannot endure this factual situation and it is therefore impossible to further extend the validity of the Law. Given the holding that the subject requires regulation in primary legislation (as correctly held in the *Rubinstein* case, there is no choice other than to create a new normative arrangement – this being a matter for the legislature. This is the "bottom line", and now to its explanation.

The Study of Torah as one of the values of the State of Israel

7. The historical process that culminated in the reality addressed by the Tal Law began with the assistance provided for the preservation of the world of Torah following the Holocaust. The first Prime Minister and Minister of Defense, David Ben-Gurion, a great, historical figure, was attached to the Tanach (Hebrew Bible) as an expression of our national existence notwithstanding his secular world view, and he understood the importance of restoring the ruins and of reviving that which had almost been destroyed. Accordingly, already in 1948, yeshiva students received an exemption from military service (see*: Ressler* [3] 449-451). This occurred notwithstanding that there were also yeshiva students who participated in the war effort during the War of Independence, and the

halakhic authorities actually defined it as participation in an obligatory war (*milhemet mitzva*):

> "In the situation in which the state presently finds itself, having barely gotten out of its diapers and being circled by sworn enemies who seek to devour it, Heaven Forbid, there is a special duty to arm themselves for battle, to speedily immigrate to Israel and to come to the assistance of Israel against an enemy who has attacked them, a duty that stems from its being an obligatory war (*Resp. Tzitz Eliezer* (R. Eliezer Waldenberg – twentieth century – Jerusalem], pt. 7.48 [ ]; see also *Resp. Tzitz Eliezer* p. 50 [ ]. and *Resp Hekhal Yitzhak*, Orah Haim, s. 31 [ ])

The standing of Israel's wars that followed the War of Independence, was not, from a halakhic perspective, any different (see for example, *Resp. Yehaveh Da'at* (R. Ovadiah Yosef) pt. 2. 14). Needless to say, in his grand treatise of 5710 (1950)"Distinction and Mission" printed in *Distinction and Mission* (5731 – 1971)108) David Ben-Gurion discusses the historical conscription laws in the Jewish people, noting that "Every man and woman without exception was subjected to the duty of protecting the people in the face of an external attack" (p. 133), even though he does not address the subject of yeshiva students.

8. The exemption granted in the early days of the State, in my view, was also in accordance with the spirit of the Declaration of Independence of the State (on the status of the Declaration see s.1 of Basic Law: Freedom of Occupation and Basic Law: Liberty and Dignity; HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [34], at p. 274) which opens with a comment on the assets of "national and universal culture" created by the Jewish people and which also addresses the claim of "the survivors…..as well as Jews from other lands, proclaiming their right to a life of dignity, freedom and labor in their national homeland". As

written by my colleague, Justice E.A. Levi, in the *Movement for Quality of Government* case [2]:

> `The world of the yeshivas is therefore an essential component of the identity of the Jewish people, an identity of many faces, and it is one of the most important expressions of the national spirit, its heritage and its culture. It would seem that even those who are remote from the world of Torah, would not deny its outstanding influence upon the formulation of essential components of the character of the nation and its society' (p. 784)

Indeed, it is indisputable that the cultural treasures referred to in the Declaration of Independence, including the right to a life of dignity, freedom and labor also include the right to the personal and collective development of the Jewish Torah culture; this right is an inherent part of the foundations of the "liberty, justice and peace taught by the prophets of Israel" which the state of Israel was premised upon and part of the freedom of religion, education and culture which are guaranteed in the operative paragraph of the Declaration of Independence (see also HCJ 1067/08 *Amutat Noar KaHalakhah v. Ministry of Education* [27], at para.14 of Justice Levy's opinion).

9. Within the frame of the Basic Laws too, and by reason of Israel's being a Jewish and democratic state, this Court has referred more than once to freedom of religion which "includes inter alia the right to fulfill the religious commandments and requirements" (Rubinstein [1] p. 528 *per* President Barak), and the connection between enabling yeshiva students to persist in their studies (*ibid*; see also G. Sapir, "Enlistment of Yeshiva students into the I.D.F: A Proposal for an Outline of the Relevant Normative Considerations" *Pelilim* 9 (2001) 217. 248). *The values of the State of Israel as a Jewish and democratic State therefore include the study of Torah*. Hence, in my view, the prevention of a

person from studying Torah is liable to constitute a violation of a Jewish person's dignity, and within the framework of the Basic Laws he would be entitled to protection from it.

10. Indeed, I see no need to hold forth in explaining that the study of Torah is one of the values of State of Israel as a Jewish and Democratic state. It seems to me that the petitioners have no dispute with this. An observant Jew recites the *Keriyat Shema* every day, twice and even more,(and "Hear O' Israel" has become a symbol of Jewish continuity) where it states "And these words, which I command thee this day, shall be upon thy heart…..and you shall teach them diligently to your children, and shall talk of them when you sit in your house, and when you walk by the way, and when you lie down, and when thou rise up" (Deuteronomy 6:6-7); and it further says: Therefore you shall place these – my words in your heart….. And you shall teach them to your children, to talk of them, when you sit in your house, and when you walk by the way, and when you lie down, and when you rise up ((Deuteronomy 11: 18-19 [ ]). The verse "'If you follow my decrees and are careful to obey my commands" (Leviticus 26:3) is interpreted by *Rashi* as meaning "when you are immersed in Torah". It is therefore clear that the "the duty of studying Torah – as a religious commandment- is not merely the general study of wisdom; rather, it constitutes a central aspect in the formulation of a person's world and lifestyle (AAA 10673/05 *Mikhlelet HaDarom v. State of Israel* [35] at para. g(3)).

11 The *Mishnah* (*Peah* 1:1) [ ] includes the study of Torah among the matters "that have no measure". In completing the list of things which "a person eats of their fruits in this world and the principal remains for him in the world to come" and which include "honoring one's mother and father, and deeds of kindness and making peace

between a person and his fellow person" and the *Mishnah* rules that "the study of Torah is the equivalent of all of them combined" [ ]. The duty of being occupied in the Torah "day and night" (Joshua 1:8 [ ]) is considered a supreme value to the extent that the *Tanna* (sage) R. Shimon taught that "He who walks along a road studying, and interrupts his studies and says: "How beautiful is this tree!" "How beautiful is that field"- the Torah considers it as though he sinned against his own soul"(Mishna Avot 3. 7). In his glorious normative halakhic creation *Mishneh Torah* Maimonides writes the following:

> Every Jewish man is obligated to study Torah, whether he is poor or rich, whether his body is healthy and whole or afflicted by difficulties, whether he is young or an old man whose strength has diminished. Even if he is a poor man who derives his livelihood from charity and begs from door to door, even if he is a husband and [a father of] children, he must establish a fixed time for Torah study during the day and at night, as [Joshua 1:8] commands: "You shall think about it day and night." (*Mishneh Torah, Hil. Talmud Torah* (Laws of Torah Study) 1:8) [ ]

The bottom line is that from the perspective of the Torah scholars, as well as from the perspective of Israeli law, it is undisputable that the study of Torah occupies a unique position, as a component of identity and culture, in addition to being a religious duty of both the individual and community of Israel.

The Study of Torah and Other Values

12. On the other hand, in the same breath as our comments above, we will also mention that not only does the State of Israel's essence as a Jewish and *Democratic State* command the *balance* between values. According to the *Halakhah* there is a requirement, and not just a permit,

to balance between the duty of studying Torah "which has no measure" and other needs and values. How is the balance struck with other *needs* – "״And thou shalt gather in thy corn״. What is to be learnt from these words? Since it says, ״This book of the law shall not depart from your mouth״, I might think that this injunction is to be taken literally. Therefore it says, ״And you shall gather in your corn״, which implies that you are to combine the study of them with a worldly occupation (Tractate *Berakhot* 35b [ ]). And Maimonides too ruled:

> Anyone who comes to the conclusion that he should involve himself in Torah study without doing work and derive his livelihood from charity, desecrates [God's] name, dishonors the Torah, extinguishes the light of faith, brings evil upon himself (Mishneh Torah, *Hil. Talmud Torah* (Laws of Torah Study) 3:10 [ ]

Further on he states: "It is a tremendous advantage for a person to derive his livelihood from his own efforts. This attribute was possessed by the pious of the early generations. In this manner, one will merit all [types of] honor and benefit in this world and in the world to come, as it states: "If you eat the toil of your hands, you will be happy and it will be good for you״. "You will be happy" – in this world. "It will be good for you" – in the world to come, which is entirely good״. ((Mishneh Torah, *Hil. Talmud Torah* (Laws of Torah Study) 3:11[ ]). The author of *Shulkhan Arukch* too ruled that "Afterwards [after prayers – E.R] he should go to his business, for any Torah which is not combined with work leads to idleness, and leads to sin; but at all events he should not make his work his principal concern,…״ (*Orach Hayim*, s. 156 [ ]), This ruling receives the following interpretation of the *Mishnah Berurah* in his treatise *Beur Halakhah* "for this was the teaching for the world at large, for not all people can merit the elevated level of being occupied solely in Torah,

and there are certain individuals who may be permanently on that level (*ibid*). And, how is the balance struck with other *values* "One interrupts the study of Torah for the sake of a funeral procession and the leading of the bride [under the bridal canopy (Bavli, *Kettubot* 17a [ ]). And to remove all doubt it will be clarified that this not just a *permit* to interrupt the study of Torah Torah, but rather a duty: "'One interrupts Torah study' this means that there is a duty to interrupt" (*Siftei Cohen*, *Yoreh Deah* s. 361.1 [ ]).

13 In the present context, concerning a battle to "to assist Israel from an enemy which attacks them" (in the words of Maimonides, *Hil. Melahim* 5:1[ ]) it is specifically taught (*Mishnah*, *Sotah* 8:7 [ ]) "In an obligatory war, all go out – even a **groom** from his chamber and a bride from her wedding canopy [to do battle]"; To remove all doubt, the commentator R. Nathan b.Yehiel of Rome (eleventh and twelfth century – Italy) explained "and *a fortiori* Torah scholars (*Sefer HeArukh*). We might also mention that a significant portion of those who the Torah exempts from fighting in an *optional* war (and we will not address the specific definition of obligatory war as opposed to optional war), are not exempt from other forms of public service: "All those who return from the army camp… They must supply food and water to their brethren in the army and fix the roads for them…" (*Hil. Melahim* 7:9). The *halakhah* too struck a balance between the obligation of studying Torah, and other obligations, both the obligation of earning a living and the obligation of defense; between the absolute and uncompromising duty "This book of the law shall not depart from your mouth; but you shall meditate therein day and night" (Joshua, *ibid.*,) and a person's obligations towards himself, his family, others and the society in which he lives. As such, the duty to study Torah is not the final word. This point is particularly

pronounced in a state in which military service is a duty which occasionally may involve the endangering of life.

The Israeli Circumstances

14. Israel is a Jewish and democratic state. Its unique character comprises two aspects and they *both* include the obligation of balancing, an obligation that goes hand in hand with the *demand for equality* being real and substantive equality to the degree possible in the bearing of the security burden with its inherent danger to life. From the "Jewish" perspective, in a period in which there are still those who "rise up to destroy us" (*Haggadah of Passover*), we hear the echo of Moses our teacher "Will your brothers go to war while you yourselves sit here" (Numbers 32:6). This point was already addressed by the Deputy President M. Cheshin,in the *Movement for Quality of Government* [2] case:

> 'Will we say of the Yeshiva students – whose Torah is their calling – the rebuking words of Moses to the Tribes of Reuben, Gad, and half of Menashe – that your brothers go to war while you yourselves sit here;…
> From the aspect of the Jewish heritage too, especially with respect to the "Jewish State" demands, as a matter of principle the conscription of the Yeshiva students into the army, so that they can protect their houses, so that the young men of their own age will not have the status of the Cherethites and the Pelethites who would be forced to protect them while they sit back securely and diligently study Torah'. (pp, 737, at 740-741)

15. From the democratic aspect too: Equality is a substantive values therein "a meta-principle that is reflected along the length and breadth of Israeli legislation (HCJ 5373/08 *Abu Libda v. Minister of Education* [36]

– para. 29 of Justice Procaccia's opinion. Indeed, the burden is not shared equally by all. The combat soldier differs from the staff unit soldier. But even so, the I.D.F. can still order the staff soldier to carry out a job that may endanger his life; he is not his own master and his personal autonomy is restricted (see also s. 9 of Basic Law: Human Liberty and Dignity). There are also sectors and individuals who do not participate in the service burden, first and foremost the majority of the Arab minority, apart from the Druze, Circassians and particular Bedouin volunteers, and a few Moslems and Christians, in the unfortunate circumstance of the political dispute in our region, and a not insignificant minority of the Jewish public that finds ways of not serving.

16. Nonetheless, despite the differences between the kinds of service and the nature of populations, and even assuming the importance of the Torah study, even within the framework of Israeli law, the question arises: Does the principle of equality *permit* the granting of a blanket exemption from military service to such a large percentage of each conscription cycle? Can it *enable* such an extensive exemption arrangement, even if the purpose is appropriate and the goal commendable? Can it endure the damage to all of the other citizens of the State who are obligated to do military service in the regular and reserve army? We once again mention that as of 2007 it meant 14% of the conscription pool (!) of that year, which represented a *massive* increase, even after the enactment of the Tal Law in 2002, and that these data attest to a consistent increase from year to year (see para. 50 of the opinion of the President). Distressing as it might be, the question is, unavoidable: A law with an appropriate purpose and worthy intention, a law intended to provide a corridor specifically into the chamber of military service for the individual and into Israeli society in general – can

it justify *inequality* (which is tantamount to injustice) on such a massive scale and regarding such a subject?

17. From its inception the Tal Law was not based on equality. Nonetheless, in the *Movement for Quality of Government* case, this Court gave it a legal chance, based on the assumption that moving the cart of hareidi enlistment was a worthwhile goal. It was hoped that there was no "genetic" defect in the essence of the statutory arrangements, but rather an administrative flaw in its implementation (per President Barak, at p. 712), and that even if at already upon its birth the Law was tainted by the "virus of unconstitutionality" (per Justice Procaccia [2], at p. 795) the State would overcome it by way of the proper and appropriate implementation of the mechanisms prescribed by the Law. However, Law was similarly unsuccessful in the test of results. The data that guided by my colleague the President speak for themselves. The percentage of those joining the service, in all of its different frameworks, is particularly small. This situation, in which a blanket exemption from military service is granted to a growing public (and as stated, even if the numerical data is not the necessary result of the Law, the bottom line speaks for itself) constitutes, in my view, a disproportionate violation of the rights of the Israeli citizens who are required to serve and who serve in army, in a manner that compels a fundamental change in that situation.

18. In my opinion in the framework of the interim decision of 8 September 2009 I commented on the rate at which the Law was being implemented: "The arrangement prescribed by Tal Commission is progressing at snails pace, drop after drop, with all the good will of the administrative and state institutions…the substantive change has not arrived, and is still at the periphery and the question "why do you think your blood is redder (than that of your friend)" (Talmud Bavli, *Pesachim* 25b) has not been answered. The petition before us is directed, as is the

nature of constitutional law – at the state authorities – but on a *moral* plane, as mentioned further on in my opinion, it also addresses the members of the hareidi community who do not enlist for military service.

> 'The challenge of transforming the trend from a thin trickle of those joining into a broad application lies at the doors of the leaders of the hareidi public. What began as the reestablishment of the world of Torah following the Holocaust has become the sociology of an entire society which is almost entirely absent from sharing the central burden of the State of Israel – military service; And I am certain that in the recesses of their hearts, even the leaders of the hareidi public and countless members of the community itself, sense the difficulty and the embroilment it occasions…the issue concerns an entire society that almost totally avoids fulfilling a duty anchored both in law and morality, and where have morality and character traits all disappeared to?"

19. In 2007 I had occasion to comment that "The Tal Law attempted – with great hope and tremendous efforts, and we are as yet unable to state the degree of success – to strike a balance between two conflicting value systems that, at base, reflect real-life differences that can have life-and-death consequences". (HCJ 5803/06 *Guttman v, Minister of Defense* [37] para.31). The data referred to by my colleague the President indicates that as of today, unfortunately, the effort to "strike a balance" has failed. And so we have returned to the basic situation described by Justice Arbel in the *Guttman* case [37] as a 'harsh and justified sense of discrimination'

20. As mentioned the petition's arrows are aimed against the authorities who are obligated to protect the *individual* from the unequal and discriminatory bearing of the security burden (and I do not think that in the present context it is possible to hold it against the individual that he belongs to a majority that provides certain privileges to the minority).

However, the responsibility, in the broad sense, also lies on the doorstep of the hareidi public. From a legal perspective, "sectoral uniqueness does not constitute grounds for violating the joint responsibility shared by the entire state citizenry" (HCJ 4124/00 *Yekutieli v. Minister for Religious Affairs* [26] para. 7 of the opinion of Justice Procaccia). From a moral-civil perspective, *I* find it gravely and profoundly disturbing: How is it for the public sacrifices not to be participated in by the entire public. This echoes the words of our teacher Moses "Shall your brothers go to war and you sit here"? And in the words of the *Natziv* of Volozhhin (R. Naftali Zvi Yehuda Berlin, 19th century, Russia in his interpretation of Numbers):

> 'This is a *wrong against Israel* [committed by those seeking to settle in Trans-Jordan and not to participate in the battle to conquer the Land of Israel] that you should have a land that has already been conquered by everyone, and that they had endangered themselves in war '(emphasis added – E.R.)

21. At the beginning of the month of Iyaar, 5748 (May 1948), – five days before the Declaration of Independence – R. Shlomo Yosef Zevin (an important scholar and author, and the first editor of the Talmudic Encyclopedia) inveighed against those who called upon the yeshiva students "not to sign up, not to be counted, and not to appear" for military duty. The context is a detailed halakhic discussion but regarding the moral claim he writes:

> 'Is the matter at hand us just a matter saving others. Isn't each and every one of us, without exception, confronting a life threatening situation – to himself, his household and all that he possesses? And is this the appropriate path – that those occupied in Torah are not obliged to save themselves, but will stand apart and place the burden of saving – themselves – upon others. Is this the proper path, or – is this

> the view of Torah? (S.Y. Zevin, *On the Question of the Conscription of Yeshiva Students* (1948) 5.

This argument is reminiscent of the position adopted by R. David b. Zimra (*Radbaz,* 15-16 centuries, Spain-France) according to whom the exemption from bearing the security burden granted by the Talmud (Bavli *Bava Bathra* 7b) to Torah scholars does not apply in cases in which the Torah scholars themselves acknowledge the need for guarding:

> And [if] they themselves [the Sages] admit that they require protection, does the law, or commonsense permit that they be able to force themselves upon the householders to organize the guards and not assist themselves… such a thing was not said by any person… for this would violate the sense of justice, but they are permitted to coerce them (*Resp. Radbaz* pt. 2: 752).

In the same vein, the *Hatam Sofer* (R. Moshe Sofer, Germany- Hungary, 18 – 19 centuries), one of the leaders of Orthodoxy in his generation, mentioned that the Talmudic exemption does not apply in the framework of allocating the burden of state security needs, because "just as the kingdom requires protection from other kingdoms, the Torah scholar too is obligated (*Novellae Hatam Sofer, Bava Bathra* 8a. These last two sources are cited by R. Y. Brandes in ***Aggadah** Le-**Ma'aseh** – **Man and Society*** (2011) 137-139, who elaborates on the issue. See also R. A. Lichtenstein "This is the Torah of the Hesder", *Tehumin* 7 (1987) 314; and on the other hand, see R. A. Sherman, "Talmud Torah is of greater value than the Saving of Life", *ibid,* 335, and R. Z.B. Melamed, "Luminaries in Torah – this is the Need of the Nation", *ibid.,* 310.

22. As mentioned, the choices of the hareidi public, whatever they may, are not a matter requiring a response from this Court, and no doubt there are answers to at least some of my queries. Still, had the hareidi community's response been broader and more meaningful (and as stated

the degree of efficiency and activity of the Executive may also be partially responsible), the respondents before us today would have been in a different place, equipped with other factual data. To our regret this is not the case.

Hareidi Society and its Attitude to Military Service

23. Indeed, hareidi society too is not static, including with respect to its attitude to military service. Even if the starting point is the conscription of those who are unable or unwilling to be categorized as those for whom "Torah is their Calling" there also are young hareidi Torah scholars who have themselves reached the conclusion that attaches importance to a contribution to the State and to finding self-sustaining work, and have thus joined the special tracks structured for them by the I.D.F.

24. However, truth be told, as opposed to the Jewish hareidi community in other countries which understood that only a selected few are suited for a life spent in the tents of Torah, in Israel an entire, problematic sociological stratum has emerged, and even its leaders know, in the recesses of their hearts, that it is neither good nor appropriate that by reason of military service thousands of men are sitting in yeshivas despite their unsuitability (and compare, in different contexts, the *Regen* case [32] para. 22). These men, were they to serve in the I.D.F. and were they to work like all other men while setting apart times for Torah in the way of "home owners" (i.e. those who are engaged in "regular work" and frequently set aside time for studying Torah) would be of benefit to the State, their communities, and themselves. "Labour is beloved, for all the prophets occupied themselves in it" (*Midrash Tannaim* on Deuteronomy 5:14 [ ]). I question whether the leaders of the hareidi public are

sufficiently aware and sufficiently active with respect to the economic plight that results from the lack of a profession due to the trap of the "Torah is his Calling" proceeding.

25. In the synagogue in which I pray on a daily basis, a central synagogue with dozens of *minyanim* (quorums of ten men conducting services) there are quite a large number of beggars almost (the word "almost" was added primarily for reasons of caution and purity of motive) all of them from the hareidi public, many of them strong and healthy and capable of working for a living and supporting their families in dignity. However, they are locked into an impossible situation and there is no one who stands up to proclaim that the clothes of king ("who are the kings – the rabbis") are not fitted for all people some of who may end up with no clothes to wear. Let us be precise: No-one would dispute that the Jewish heritage and the spiritual continuation of the Jewish people justify the existence of a substantive, serious kernel of people whose Torah is their calling on a permanent basis, In response to my question in the Court, Adv. Ressler, the most veteran of the petitioners in this field, who started it when he was about 40 and is now at an advanced age, answered that he would have had no gripe if there were a few thousand people, at all times, for whom Torah was their calling. It is possible, and even appropriate to take an expansive and open approach to men of truth who wish to continue their study of Torah uninterrupted, but this does not apply to many of those who for lack of choice persist in the status of "Torah is their calling" as an unfortunate "social obligation", for whom the Torah is not truly their calling, and whose calling is replaced by the avoidance – of service and work. They fritter their days away in frustration while in the interim they raise families that require sustenance. The Chief Rabbi of Israel, Rabbi Shlomo Amar addressed the currently accepted practice in the Yeshiva world:

> ‘The yeshiva students of our time devote their lives to Torah and to serving God in purity, they labor and toil in it day and night without interruption, and give not a thought to the purpose of their existence – to ask themselves, what will we eat and how will we set up homes in Israel and how will we survive – for we don’t not sew and don’t harvest ; neither do they learn a profession that can provide their needs, even if partially, and how will they support their wives and children? (*Birkat Eliyahu* (Exodus, pt.2), p. 230)

Further on Rabbi Amar seeks to reconcile the well-known words of Maimonides “The way of sensible men is that first, one should establish an occupation by which he can support himself. Then, he should purchase a house to live in …” and this reality. In his view, Maimonides’ comments apply to the “sensible men” who conduct themselves:

> ‘In accordance with the natural order that God ingrained in his world. But those whose conduct is above the natural order who do not submit themselves to the natural order of the world… just as they devote all of their powers and desires to the word of God and His will – He too fulfills their wishes and provides them from His expanded hand, above the natural order” (*Birkat Eliyahu*, pp. 230-231)

I respect these words, but the question naturally arises, can one truly and honestly say, without any offense to those who devote their lives to the study of Torah, that all the tens of thousands who are registered as those whose Torah is their calling, really figure among those “whose conduct is above the natural order”?.

26. Concededly, the blessing of the State by way of its various resources – National Insurance, budgets for the yeshiva world, etc, accompanied by a real willingness and devotedness on the part of those studying, as per the teaching “This is the way of the Torah: To eat bread

with salt, to drink water in measure, to sleep on the ground and live a life of hardship and to study the Torah diligently all the while" (*Mishnah* Avoth, 6:4) – enables a person to eke out a meager living and to continue permanently in the House of Study. Even so, do all those who are permanently in the Beth Midrash for many long years really belong there? Or perhaps some of them have sentenced themselves to a life of indolence and degeneration? And, even if this economic reality is not directly related to the question of equality among those designated for military service in Israel, it is definitely relevant for the examination of a legislative act one of the declared purposes of which is to "find a way that will also lead to the integration of yeshiva students in the employment market" (from statements of MK Yossi Katz, Head of the Special Panel established for Implementing the Law, when it was presented for the second and third reading on 23 July 2002, *Knesset Proceedings* 34, p. 8585). Once again, our concern is not with those whose souls cleave to the Torah until their last breath "the remnants upon whom God calls", who should be commended – although even regarding them, or many of them, nothing would be missing were they to bear the burden for a determined period, basically given to their own choice, and in service tailored specifically to their needs in terms of Kashrut, modesty and family. It will be recalled that the Tal Law also created the option of civilian service, protected from the "risks" of military service and which in and of itself constitutes a particularly outstanding deviation from the requirement of equality. Nonetheless, this too did not succeed in tilting the scales.

27. Here it bears note that the economic criterion in accordance with which the I.D.F. too has on occasion examined the issue (see *Ad Bo HaShemesh*, at p. 298) cannot be the relevant and correct criterion when dealing with military service and its natural dangers. Just as the I.D.F. is

required to invest huge sums of money to enable a woman wishing to enlist, to be able to do so on the basis of equality (see HCJ 4541/94 *Miller v. Minister of Defense* [14]; D. Friedman "Women's Service in Combat Roles and Equality in Allocating the Burden", *HaMishpat* 4 (1999) 27)), so too it is required to invest all of the resources required to secure the rights of its soldiers to an equal sharing of the burden. In other words, the State is not at liberty to enlist only those citizens who it is convenient (or cheap) to enlist and to saddle them with the full weight of the burden, even if the broadening of the pool of enlistees compels the investment of economic and other resources. As a matter of principle, it would be exceedingly difficult to imagine an "economic" approach which would give rise to distinctions between the blood of one person and another.

28. What can be learned from all of the above? That the "mind switch" – not with respect to the study of Torah but rather in relation to the proper evaluation of the relevant human framework – has not occurred in the hareidi leadership even after the Tal Law. From the perspective of constitutional-administrative law, the Tal Law was unique, in so far as in addition to being appropriately and strictly implemented by the State, its constitutionality was also dependent upon the scale of response on the part of the hareidi public and the position adopted by its leadership (even though on a practical level the issue concerns individuals whose actions, either way, may be in accordance with the Law). The data before us demonstrates that these two conditions were not fulfilled. In the absence of any change on the broader front, as opposed to specific local changes, welcome as they may be, the progress towards equality continues to plod along and partnership in the burden – even if incomplete and non-identical partnership – has not materialized. To paraphrase the words of the Tal Commission cited above – not only have

we not reached an appropriate arrangement for the conscription of yeshiva students; we have not even merited an "appropriate preliminary arrangement". The data demonstrate only very of changes.

29. Once again we stress: The hareidi public is not a respondent in this file. The subject for our decision is the constitutionality of the Tal Law in a given factual constellation. Conceivably, had the hareidi population made broader use of the Law's arrangements, the problem of inequality might have been mitigated somewhat and come within the borders of the constitutionally tolerable. In the metaphor coined by President Barak in the *Movement for Quality of Government* case [2] , it is possible that a more extensive response on the part of the hareidi population would have enabled the Tal Law to recover from the constitutional birth pangs and perhaps even reach the age of "Bar Mitzvah" or "constitutional adulthood"; However, even after the Tal Law was granted a trial, and even a recovery period, and even if the Executive too bears responsibility for part of the disappointing data, perhaps having had the opportunity to make a greater effort in the implementation and enforcement of the law, in addition to that of hareidi public that did not hasten to utilize it – at the end of the day the result does not come within the boundaries of what is constitutionally tolerable. To put it quite simply – the current situation for which the Tal Law is the normative basis – violates equality to a degree that dictates change in the normative framework.

30. The second possibility, of giving the opportunity to the Executive on the one hand and the hareidi society on the other hand, to act for the improvement of the data, was tried with much patience. Indeed, the patience of the Court had to contend with the violation of the rights of the citizens being called up for regular reserve service, and endangering their lives. The Tal Law was originally adopted as a

temporary provision for a period of five years (section 16 of the Law), based on the Commission's assumption that measures it recommended:

> 'should be periodically examined and reviewed. The Commission recommends measures intended to create a trend, This trend should be examined over a passage of years: Was a trend even created? Has it developed at an appropriate pace… possibly, in another five years the military service framework of the I.D.F. will be entirely different, and the question of yeshiva students and their enlistment will not be quite as acute, problematic, and controversial…" (p. 98 of the Commission Report).

In 2006 this Court decided (in the *Movement for Quality of Government* case) to give the Law another trial period. Upon the termination of almost a decade from the enactment of the Law, the data attests to a situation which is constitutionally intolerable. The hope that the Law as given would "create a trend" was disappointed, and the circumstances of violation of equality demand intervention. In her awareness of in her awareness of the problems from all directions, i.e. the constitutional difficulties as opposed to the need for a societal change in the hareidi community, my colleague Justice Arbel seeks to give the Law another chance. I fear however, with all deference to her position, that what has happened until now justifies a different mode of operation.

The Explanations for Non-Service

31. The following are the two principal explanations, in my understanding and experience, that have been given by those favoring the continuation of the status quo (see also Sapir, pp. 240-247; and Tal, *The Problem of the Conscription of Yeshiva Students*, at p. 362. *First* it is claimed that "The Torah …protects and saves" (Talmud Bavli, Tractate *Sotah* 21a); in other words, the yeshiva student who studies protects the country just as a soldier does. On the face of it, someone who believes this has that prerogative (although we will not deny, as written by Rabbi Zevin in 1948 (p. 6) that this quality is utilized primarily for the avoidance of military service, and is not a practical program for the conduct of the hareidi population in a time of danger; for additional criticism of this argument see Sapir, pp. 244-245). Even so, does this argument really apply to the entire public that enjoys an exemption from conscription? Furthermore, this is a matter of pure belief, and it is difficult to conceive of it being connected to operative decisions. What fate would await the State if many others, thousands and tens of thousands, were to claim that according to their view, other studies "protect and save" and they too were to request an exemption from military service? Indeed those subscribing to that belief can claim that the truth is with them and the others mistaken, but even if were we to ignore the practical problems (and it is doubtful whether they can be ignored), how could a democratic society, tolerant towards *all of its components* be maintained on the basis of those arguments? And it is not superfluous to stress, that according to all of the approaches there *will never be a situation in which, God Forbid, there are no studiers of Torah occupied in the diligent study of Torah*.

32. Another explanation relates to the practical difficulties in the I.D.F. itself: the service of women, questions of the *kashrut* of the food, and the concern that the service would have a detrimental affect on the hareidi soldier's religious conduct. I do not treat these lightly, but the answer lies in the willingness of the I.D.F to arrange service tracks that are not problematic from these perspectives, and enable service conditions and food that are *kasher* at the most meticulous levels – a willingness that has already been proved to a significant degree and should be fortified even further. These matters are not in heaven. It is interesting to mention that Rabbi Avraham Yeshayahu Karelitz(the *Hazon Ish*) who was one of the foremost rabbinic authorities during the early days of the State, was described by the scholar Dr. Benjamin Brown in his all encompassing book (*The Hazon Ish: Halakhist, Believer and Leader of the Haredi Revolution* (Jerusalem: Hebrew University Magnes Press, 2011; Hebrew) as someone who opposed the conscription of those who were *genuinely studying* (regarding those who pretended to be studying in order to avoid service, he ruled that they could be considered as "a pursuer of all of the yeshivas in Israel" (p. 305), and even maintained that those enlisted should be incorporated into mixed units and that he was "did not …fully share the fears of deterioration in the army, and at all events not in all cases, and he even regarded the joint service as a means of bringing the secular Jews closer to Judaism" (p. 306). According to the sources he examined, Dr. Brown notes that the *Hazon Ish"* regarded the service as a unavoidable necessity, and as a suitable path for the young man who was not devoting himself to the study of Torah" (*ibid*), and according to his view, the hareidi society had gone far beyond the framework outlined by the *Hazon Ish*(p. 304).

Final Word

33. In view of the picture presented, the constitutionality of the Tal Law must now be examined, and to my distress the answer cannot be in the affirmative. In terms of the limitations clause of s. 8 of Basic Law: Human Dignity and freedom, the Tal Law is consistent with the values of the State of Israel, with respect to study of Torah; it is intended for an appropriate purpose of integrating the yeshiva students in military service while providing different kinds of options. Nonetheless, its actual result – and not because of those who conceived it or those who proposed it or drafted it, but rather by reason of its addressees and the authorities – has not established proportionality, but rather has almost perpetuated the inequality. The reason is that the current rate of joining the various tracks may well continue *ad infinitum* and "what then have the Sages achieved by their deeds"? The question of proportionality is invariably a complex one, and especially when it touches on rights which are inherently complex. The current situation may be analyzed as being both a disproportionate violation of the right to equality (which in certain aspects means a violation of an affirmative right) and a violation of the specific local rights of those who are required to serve, all to a degree that exceeds that which is necessary, due to the scope of the exemption (and in this sense, a violation of negative rights; see A. Barak, *Proportionality in Law* (2010) 513-514). It seems however that the primary difficulty in balancing is not – as is usually the case in constitutional law – the difficulty of balancing between two rights of equal worth; the problem rather is the practical difficulty of initiating a social process, and the question of the measures that can proportionately be employed to stimulate that process. Even so, notwithstanding the analytical complexity, and having consideration for the comments made in the *Movement for Equality of Government* case [2], I have no doubt that the

current situation is untenable. As such, I have no choice but to concur in the result reached by my colleague the President.

34. The President placed the question of a solution at the Knesset's doorstep of the Knesset, having concluded that the current law could not be extended. She did not relate to the solution itself. I will allow myself to add that we sit among our people, and the solution this time must be far more radical in order to pass the test of the limitation clause. It is understood that one of the possibilities is a return to a numerical quota, which was the practice in the past, albeit in different numbers. In other words, at a certain age – 21 or 22 upon the completion of three or four years study in a higher yeshiva, conscription would be universal apart from agreed quota determined in accordance with prescribed criteria, and which would have consideration for the world of Torah and its continuity along with the needs of the State. Those included would continue in the path of Torah as their calling for as long as they wished, and the flame of God would not be extinguished. Other directions of varying kinds are also conceivable, but the arrangement must be coordinated, and given the current reality, I regret to say, must be less based on anticipations and hopes for future social changes.

A Comment before Concluding

35. I cannot refrain from addressing in brief – though the subject warrants more and we are all the slaves of time and its constraints – the comments of my colleague, Justice (President Elect) Grunis. My colleague proposes not taking the path of judicial intervention in this case because "our concern is with a decision of the majority in the State (in accordance with the Knesset representation) to adopt a law that grants a privilege – not to be conscripted into the army – to a minority". In his view, this decision does not involve "harm to individuals" as such, or "harm to a minority group", and therefore "there is no justification for applying judicial review (para. 3). I take a different view. In my view this is a subject that touches on the very roots of the world of rights. The role of this Court is to be a mouth for the human rights of the *individual*s who make up the majority, and I do not even know whether the petitioners regard themselves, in this matter, as part of that parliamentary majority which granted "at their own expense" privileges to another minority group among whom they are not included, and whom they are unable to join in order to merit the same privileges that were given out by the majority. These are rights that cannot be trampled upon by a parliamentary majority without having been examined on a constitutional level, and this examination supports what has been said in the opinions of the justices who support the disqualifying of the Law.

36. Even if in my view there should be restraint in judicial intervention (see, e.g. para. 28 in my opinion in HCJ 466/07 *Galon v. State Attorney* [38] that exceeds the norms of administrative law in general, in which based on many years of experience in different positions and different governmental structures, I think that this Court

plays an important role of the first degree, and its failure to discharge it would be a betrayal of its mission; in various realms of life, and space constraints preclude their specification, significant changes have occurred in the conduct of the public administration in the wake of the Court's decisions, and numerous laws and legislative enactments were passed, scattered over the entire history of the State. Nonetheless, *in constitutional law too the Court cannot lay down its mantle and avoid that which is imposed upon by the Legislator- Founder – by him and by no other, in the Basic Laws concerning rights.*

37. Apart from the scholarly and detailed rationales of constitutional authority (see CA 6821/93 *United Bank Mizrahi Ltd v. Migdal Cooperative Village* [15]) it is clear to both the learned and the laymen from a simple reading of the Basic Laws on rights, that when speaking of basic laws and of restricting the possibility of their violation – even by legislation – in a manner that does not satisfy the proportionality requirements of the limitation clause, that it is incumbent upon the Court to examine whether rights were violated and whether the violation was appropriate and proportionate. My colleague feels that the subject before us is not one that we are required to address. As mentioned I disagree with his approach.

38. We may be divided in our approaches to the possible contribution of the Court to this subject but it is beyond dispute that our concern is with an obligation, involving a principle of the most sensitive nature, to the extent of endangering of life. In my opinion there is absolutely no way in which this Court can avoid dealing with it. If there is any area of equality in the value- based sense, even if not on a practical, one-on-one level, which is impossible, there is perhaps no subject for equality more elevated than military service. Furthermore, in my view even those changes which have actually taken place in the

hareidi society in the context of enlistment, are at least in part connected to judicial intervention, in the absence of which it is doubtful whether they would have even occurred. Our concern is with a conservative (the hareidi) society, with all implied thereby. As such even if our contribution in establishing the constitutional boundary does not transform the ways of hareidi society from one day to the next, it is to be hoped that it will sow seeds which will bud and produce fruit.

And one more comment

39. The Tal Law was named after Justice Tzvi E. Tal, who headed the commission that dealt with the subject. It is not superfluous to mention that Justice Tal is a Torah scholar and God-fearing, meticulously observant in all matters, who served as a fighter in the I.D.F in the War of Independence and others, as he describes at length in his moving autobiography (*Ad Bo HaShemesh*). His son, a student of a *hesder* yeshiva, fell in the Yom Kippur War, and his grandchild who was born after the father's death is a career soldier in the I.D.F; it is a family of Torah and the defense of the country, which attests that integration is proper and feasible, and should not be despaired of.

Subject to all the above, I concur in the conclusion of the President, and will mention that my comments, like hers, were written long before the current public discussion, to which we do not relate.

Justice

Justice Hanan Meltzer

1. I concur in the opinion of the President, Justice D. Beinisch, but given the importance of the subject and the legal aspects it raises, I will allow myself to add some remarks.

2. The Deferment of Military Service for Yeshiva Students Law whose Torah is their Calling Law, 5762-2002 (hereinafter: the Deferment Law", in its implementation over the course of nine and a half years (until the signing date of this opinion) did not realize the purposes pinned on it by its drafters. It should therefore be cancelled and another arrangement, more proportionate and more balanced should replace it. In what follows I will explain these holdings.

The Constitutional Examination

3. The constitutional examination proceeds from the holding of the President, Justice A. Barak in HCJ 6427/02 *Movement for Quality of Government v. Knesset* [2] supported by the judges who concurred with his opinion, to the effect that:

> The Service Deferment Law discriminates between those who serve in the army by force of regular rules and the yeshiva students who are entitled to an exemption and deferral according to the Service Deferment Law, given that Torah is their calling. This violates the human dignity of each and every one of the majority of group who is obligated to do military service (*ibid.*[22],p. 691)

I would like to make three additions to this holding:

(a) As noted by my colleague Justice E. E. Levi in the *Movement for Quality of Government* [2] case (*ibid,* p. 783):

> ‘This is not only a violation of dignity….it also involves the violation of other basic rights, among them the right to protection of life, the right to freedom of occupation, the right to privacy, personal freedom, property and the additional derived therefrom – all of them rights that are anchored in our Basic legislation.

(b) The injured population is not only those who serve in the Army (in compulsory and reserve) but also those who are designated for military service, within the meaning of the Defense Service Law, 5746-1986 (hereinafter: DSL), who are likewise discriminated against, at least having consideration for the fact that they do not merit an automatic deferral for purposes of study, in comparison with their hareidi counterparts, who enjoy that privilege until they reach age 22. Furthermore, when those designated for military service who are not hareidi receive a deferral for study purposes (for the most part in the frameworks of the academic reserves) they are required to return to full compulsory service and are frequently required to commit themselves to permanent service.

(c) Over the years indeed, “Quantity has made a qualitative difference” (within the meaning given in HCJ 910/86 *Ressler v. Minister of Defense* in the broader context. In view of the shortage of manpower in the I.D.F. it even has implications for the *length of service* for those who serve, for this is influenced by the *reduction* in the scale of manpower (see Explanatory Note to Draft Bill of Military service (Temporary Provision) Amendment No.14) 5772-2011, in the wake of which in the Temporary Provision Law, adopted by the Knesset on 16 January 2112, the period of regular service as anchored in the Defence Service Law was lengthened by six months, and in the absence of which

soldiers in compulsory service would have served for 30 months). In this context it should be noted that in the states which still have compulsory service, regular service generally lasts for between 18 – 24 months, and only in North Korea is the period longer than here. See: Panu Poutvaara and Andreas Wagner, THE POLITICAL ECONOMY OF CONSCRIPTION in THE HANDBOOK ON THE POLITICAL ECONOMY OF WAR (Christopher J. Coyne & Rachel L.

Mathers eds., 2011) (hereinafter: Poutvaara and Wagner). See also Gay Israel Zeidman, *The Right to Serve in the I.D.F*. ch. 6 *ibid*, *Military Arrangements in Other States,* pp. 121-143 (1996) (hereinafter – Prof. Zeidman); Bjørn Møller, *Conscription and its Alternatives*, 277 ; Rafael Ajangiz, *The European Farewell to Conscription*, 307 *in*: THE COMPARATIVE STUDY OF CONSCRIPTION IN THE ARMED FORCES (Lars Mjøset and Stephen Van Holde ed.,) 20 Comparative Social Research (2002).

4. Evidently, the normative arrangement anchored in the Deferment Law *violates protected constitutional rights*. However, this marks the beginning and not the end of the constitutional examination.. At the *second stage* we must clarify whether the aforementioned arrangement meets the requirements of the "*limitations clause"* included in s. 8 of Basic Law: Human Dignity and Freedom and in s. 4 of Basic Law: Freedom of Occupation.

Before proceeding – two comments are necessary:

(a) It seems that an understanding similar to the one presented above may also be reached by application of a "judicial limitations clause" on s. 4 of Basic Law: The Army, which provides as follows:

> 4. The duty of serving in the Army and recruitment for the Army shall be as prescribed by or by virtue of Law.

On the interpretation of this section for purposes of the current context see: Mordechai Kremnitzer and Ariel Bendor, *Basic Law: The Army*, 67- 73 (part of the series *Commentary on the Basic Law*, Yitzchak Zamir ed. 2000). Regarding the "judicial limitations clause" see: EA 92/03 *Mofaz v. Chairman of Central Elections Committee to Sixteenth Knesset* [39] at p. 811; HCJ 7052/03 *Adallah – Legal Center for Rights of Arab Minority in Israel v. Minister of the Interior* [40], at p. 314, per President Barak; Dr. Avigdor Klagsbald, "Contradiction in Basic Laws" *Hapraklit* 45 (2006) 293.

(b) There are certain contexts (internal-military) in which relevance may also attach to the special limitations clause for the security forces, included in s. 9 of Basic Law: Human Dignity and Liberty, which provides as follows:

> 'There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defence Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service'

Regarding the significance of this section and its interpretation, see [41], at pp. 73, 75; HCJ 6055/95 *Zemach v. Minister of Defense* [16]; my opinion in HCJ 6784/06 *Shlitner v. Director of Payment of Pensions* [42] and my article: "The I.D.F. as the Army of a Jewish and Democratic State (soon to be published in the periodical, *Law and Business* of the Herzliya Interdisciplinary Center, in the volume in honor of Prof. Amnon Rubinstein (hereinafter: my article on the I.D.F).

Having consideration for all of the above, we may now proceed to analyze the "limitations clause", which reads as follows

> There shall be no violation of rights under this Basic Law except [1] by a law [2] befitting the values of the State of Israel, [3]enacted for a proper purpose, and [4] to an extent no greater than is required, or [1] by regulation enacted by virtue of express authorization in such law
> (the numbering in the cited version is my addition – H.M)

In this framework we will limit ourselves to an examination of the aforementioned limitations clause on the Deferment Law.

5. In accordance with the holding of the majority in the *Movement for Quality of Government* case the violation of the protected human rights included in the Deferment Law meet the requirements of conditions [1] – [3] of the limitations clause, as set forth below:

(a) They are anchored in law as required. Here I will add that it is irrelevant whether the law is a regular law or a law which is a "temporary provision" or Sunset Law (a law with an inherent expiry, such as the law at hand). Furthermore, in the current context there is almost no importance to the dispute that arose in the *"Mifkad Leumi" Ltd v. Attorney General* case concerning the meaning of the phrase "by regulation enacted by virtue of express authorization in such law" in the limitations clause, because even the extension of the Deferment Law for five years (until1 August 2012) which was effected by a Knesset decision (See O.G. 5767 of 9 August 2007, p. 3910) was in accordance express authorization in the Service Deferment Law, which provides in s. 16(b)

> 'The Knesset may, by decision, extend the validity of this law for additional periods, each of which shall not exceed

> five years; deliberation on the extension of the validity of the law shall be conducted in the Knesset no later than six months before the end of its validity'.

Here it should be mentioned that a law of the kind under discussion – if extended, and *a fortiori* if changed (to the extent required) – must be adopted in a regular legislative process (in three readings) and not by a Knesset decision only (compare s. 39 of Basic Law: The Government

(b) The law is consistent with the values of the State of Israel within their meaning in Basic Law: Human Dignity and Liberty, and that context also gives expression to the fact that the State is a Jewish and democratic state. I will not elaborate on this point.

(c) The Deferment Law, which is the product of a social compromise, consists of four combined objectives:

(1) It anchors the arrangement of the service deferment for yeshiva students whose Torah is their calling and who seek immerse themselves in study day and night.

(2) It seeks to increase the equality in the allocation of the burden of military service in the Israeli (Jewish) society, in the sense that more men from the hareidi community will, ultimately serve in military service (regular or special), or at the very least will serve in civilian service.

(3)` It strives to engender greater participation of the hareidi public in the Israeli work force, which should improve the social position of the hareidi families on the one hand, and will contribute to an overall growth in the national product.

(4) It aspires to resolve the difficulties that have long (since the creation of the State, and even before then, see – Prof. Zeidmann (188-194) accompanied the service deferment arrangement for yeshiva

students by a gradual and cautious process and based on broad consensus and without a coerced conscription (which would evidently not be effective).

These four objectives are intertwined, and were already recognized as being appropriate in the *Movement for Quality of Government* case. At the same time it transpires that the Law does not meet the fourth obstacle in the limitations clause because the manner of its implementation has proved it to be *disproportionate*, given that its realization has not achieved the goal. In what follows we will clarify these points.

Proportionality Failures in the Deferment Law

6. As known, proportionality is determined in accordance with three subtests:

(a) *The rational connection test* – which examines whether there is a rational connection between the means chosen, which violates the constitutional right, and the objective.

(b) The least harmful measure test – which examines whether the solution found for realizing the objectives of the law is the one which occasions the least harm to the constitutional right, from among the possible measures

(c) The proportionality test *stricto sensu* –("the test of relativity" as suggested by Prof. A. Bendor in his article "Trends in Public Law in Israel – Between Law and Judging (soon to be published in *Law and Government* 2012). See CrApp 8823/07 *Anon v. State of Israel* [43]) *per* my colleague the Deputy President, Justice E. Rivlin, at para. 26. According to this test to justify the constitutional violation, there must be

an appropriate, positive reasonable relationship between the incremental advantage gained by realization of the legislative objective and the incremental harm liable to be caused to the constitutional rights as a result.

See Aharon Barak, *Proportionality in Law – The Violation of a Constitutional Right and its Limitations*, pp. 295-455 (2010)

7. During the years of its implementation the Deferment Law has proved that it does not even pass the first of the aforementioned subtests (the rational connection test) because the means adopted for its execution have not succeeded in bringing about the realization of its four underlying objectives s, all as set forth in detail in the opinion of the President. The report of the Plesner Panel appointed by the Foreign Affairs and Defense Commission to monitor the implementation of the Deferment Law similarly concluded that the *implementation of the Law had failed.* Indeed, all of the easier alternatives which were put at the disposal of the yeshiva students *were not sufficiently exploited and at too slow a rate.* At the same time, here too I am obligated to make a few comments.

{a} Even though the relevant basic data for reaching that conclusion exists, what is still missing are standard criteria for comparison and clarification of the Law's position on the compliance of the Deferment Law with the "test of results", This explains the thrust of the difference between the petitioners' presentation of the facts and that of the respondents, and in my view also accounts for the discrepancy in the analysis of the numbers in President's opinion in comparison to the analysis presented in the opinion of my colleague Justice Arbel. It is nonetheless clear that the overall number of hareidi men who received deferments and those who are exempt from I.D.F. service is increasing

from year to year, notwithstanding the increased numbers of those enlisting from among that public into hareidi Nahal and into the various *Shahar* frameworks. At the same time there is a discernable continual growth in the numbers of hareid men ho opt for civilian service (this phenomenon has a variety of explanations, and one of the contributing factors is the benefits given to those included in that category including the benefits anchored in the Civilian Service (Legislative Amendments) Law, 5768-2008).

(b) The defect is not only the result of the approach taken by the yeshiva students and their leaders. The Government too, by reason of budgetary constraints has "dragged its feet" in the realization of the Deferment Law (in all matters pertaining to the establishment and maintenance of supervisory bodies for the civilian service and with respect to the allocation of the budgets required for the actions necessitated by the broadening of the relevant military frameworks (the various *Shahar* units etc.)). See Government Decision 2000 dated 6 July 2010, Concerning the appointment of an Inter-Ministerial Committee for Monitoring and Formulating Recommendations for the Changing of Conscription Proceedings applicable to the Hareidi Sector – from which it emerges that the Government views the conscription of the hareidi men as a burden, and this is a pity.

The I.D.F. too, despite declarations given in this context and certain efforts that have been made (see: Updating Notice from Respondents 2-4 of 24 January 2011), has yet to adjust itself sufficiently to the conditions dictated by its incorporation of the hareidi men and the need to maintain their freedom of religion, and I will not elaborate. See also: Gideon Sapir: "Conscription of I.D.F. Soldiers into the I.D.F.: Outline Proposal for Relevant Normative Considerations" *Pelilim* 9 (December 2000)

(c) The new conscription proceedings (which were introduced when the petitions were pending and were based on the Government Decision of 9 January 2011) suddenly opened an additional track for abbreviated military service of three months only – for hareidi men whose service had been postponed, between ages 26- 27 (men above that age who had received deferments are at all events referred to the pool of reserve duty without any training and at the end of the day receive an exemption). This decision has three blatant defects

(1) In defiance of the alternatives prescribed in the Deferment Law, which are supposed to be exhaustive, it adds *an additional* option, which *prima facie contradicts* the Law forming the subject of the petitions and the length of service prescribed therein.

(2) It unlawfully assumed the powers of the Minister of Defense in these contexts, conferred to him in the Military service Law, in defiance of the provisions of Basic Law: The Government.

(3) It purported to establish "facts on the ground" even before our ruling on the entire complex of issues.

On the other hand, this alternative indicates the existence of measures other than those enumerated in the Deferment Law for the realization of its objectives, and it would have been proper for these to be examined already in the framework of the enactment of the Law, or before the extension of the validity of the Deferment Law, given that it comes within the category of the second subtest for proportionality – *the least harmful means test*. The failure to conduct such an examination constitutes grounds for judicial review, thereby bringing us back to the proportionality subtests.

8. In the context of our comments in para. 7 it was concluded that the Deferment Law does not even pass the first subtest of proportionality. On the face of it I am therefore exempt from discussing the other

proportionality subtests. However this would be improper having consideration for those of my colleagues who maintain that the Law forming the subject of the petitions *meets* the first subtest. The supporter of that view must still show the law also meets the other subtests, the second and third, and this must still be done.

Without derogating from this problem, I would like to add, in addition to what is necessary and briefly, in deference to the opinions that take issue with my own, that the Deferment Law did not, in my view, adopt the measure that is the least harmful to constitutional rights from out all of the available means (and the matter mentioned in s. 7 (c) above, is just an *example* that proves the claim). Willy-nilly, the Law similarly fails to meet the third proportionality subtest – the test of *relativity* The result is that it has not been proved to us that the social benefit of the arrangements in the Deferment Law, as realized, is actually greater than the violation of the rights of all those who are actually, or potentially recruited.

These conclusions bring me to the *third stage* of the constitutional examination which focuses on the *constitutional remedies*. In what follows I will address this subject.

Constitutional Remedies

9. Our discussion thus far yields the conclusion that the Deferment Law in its existing format should be voided. What follows from this is that the Law cannot be extended beyond the date of its expiry on 1 August 2012. On the other hand, neither would be it appropriate to order its immediate cancellation, so as to enable all those concerned to utilize the remaining period of its validity to organize for the new situation. I will now present the legal reasoning for this position.

10. As I clarified in my opinion in HCJ 466/07 *MK Zahava Galon v. Attorney General* [38] (hereinafter "*Families Unification* case), from comparative law we learn that temporary legislation is appropriate for four alternate situations (see Jacob Garsen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 273-279 (2007:

(a) Constraints of Urgency or State of Emergency

(b) A supervised experiment of a new system, or new policy, or as a means of receiving information (note: situations (a) and (b) were discussed and confirmed in HCJ 4908/10 *Roni Baron v. Israel Knesset* [44].

(c) Response to defects in the existing normative situation.

(d) Attempt to overcome cognitive biases (see Christine Jolls, Cass R. Sunstein, Richard Thaler, *Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1997-1998) or situations of asymmetric information (see George K. Yin, *Temporary Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174 (2009)

As distinct from the matter confronting us in the *Families Reunification* case, *prima facie* none of these four alternatives has any application in the matter at hand, given that the Deferment Law has so

far been granted *nine and a half years* for trial and error. Furthermore, under these circumstances the extension of the validity of the Deferment Law in its existing format is not possible, even for a shortened format, because on the face of it, even during the extension period beyond the expiry date it must meet the constitutional tests (see Yigal Marzel "Delaying a Declaration of Invalidity" *Law and Government*39 (5766); my opinion in the *Family Unification* case [43], *(ibid* para. 43).

11. Should we seek to uphold the underlying objectives of the Deferment Law, which our case law has declared as legitimate and appropriate, the current law should be replaced by *another more constitutional and more balanced arrangement*. Naturally, in this framework I do not purport to suggest a solution to the problem or even to indicate a direction in a matter that is obviously located within the boundaries prescribed for legislative maneuvering (provided that the measures chosen are constitutional). All the same, I find it proper to point out for the convenience of all, a number of relevant lines of thought and ideas that I found n comparative law (while showing how they are parallel to the local contexts) and to emphasize a few subjects that require a response in view of the voiding of the Deferment Law in its current format. The next chapter is devoted to this matter.

Lessons from Comparative Law and Issues Requiring Arrangement

12. The comparative law that we surveyed in a number of states in which there is (or was) compulsory service (Austria, Brazil, Germany, Denmark, Greece, Norway, Singapore, Finland, South Korea, North Korea, Cyprus, Switzerland and Turkey) is instructive in a number of matters:

(a) In Switzerland – Jews are called upon to serve in compulsory service but religious Jews (including hareidi Jews) are provided with suitable conditions that ensure *inter alia*: the observance of kashrut, the Sabbath and the Jewish festivals (see: Standing Orders of Swiss General Staff No. 51.024 and 51.003). They are also reimbursed for expenses paid to obtain meals with special kashrut (which are not supplied by the army). See circular from the Federation of Jewish Communities in Switzerland:
http://www.swissjews.ch/pdf/de/religioeses/merkblatt_militaer_2010.pdf

(b) In Germany, until one year ago, there was regular compulsory service, or alternative civilian service. The Jews (and the Gypsies) were exempted from conscription in view of the need to restore their nation and their families who were exterminated and injured in the Holocaust (see: Procedure of the German Ministry of Defense dated 22.3.89; WE2-A2- 04-05-24, which is based on sections 12IV s.1 and 12 IV s.2 of the Wehrpflichtgesetz (German Compulsory Service Law); regarding the parallel exemption relating to alternative civilian service, see: Procedure No. 76 of the Federal Civilian Service Office of Germany, of 3 March 2006.

Similar considerations originally gave rise to the arrangement of deferral of service for yeshiva students, which at the time was limited to

just a few hundred yeshiva students. This arrangement received the consent of the Prime Minister and Defense Minister at the time – David Ben-Gurion, who during the Knesset debate gave the following description of the relevant background (*Knesset Proceedings* 25 5719):

> 'Upon the establishment of the State the matter of the yeshiva students was raised with me by one of the leaders of Judaism and Torah in our times – Rabbi Maimon and Rabbi Yitzchak Meir Levin. They said: Since all of the centers of Torah in the exile were destroyed and this is the only country in which the yeshivas remained and there is only a very small number of those who learn, they should be exempted from military service. Their words seemed reasonable to me. It seemed that they were correct and so I gave an order to release the yeshiva students'.

For the sake of fairness and to complete the picture, we will mention that in the continuation of his speech on the same occasion David Ben-Gurion said the following:

> 'Meanwhile things have changed. There are thousands of yeshiva students, both in Israel and in the diaspora. I doubt whether we are fulfilling are duty, not only to the people but also the individual. The bereaved mother whose sons fell will say: Perhaps had there been a few more young men with my son he would not have fallen. Can there be a *Shabbat Goy* where it concerns the defense of the nation? Isn't this the duty of each and every person? As a person who has great understanding and respect for the sensitivities of the members of Agudat Yisrael I suggest that you give this matter consideration. We do not want the third Temple to be destroyed.

As we all know, David Ben-Gurion's proposal was not accepted, and after the change in government in 1977, and in accordance with the coalition agreements drawn up in constituting the government of Menachem Begin, in the wake of the establishment of the Government,

Defense Minister Ezer Weizmann cancelled the yearly quota of hareidim who would benefit from the deferment exemption.

In this way we arrived at where we are today – see Prof. Zeidmann, p. 190

(c) An exemption from military service may occasionally be granted for reasons of conscience, but the principle of equality dictates that person who enjoys an exemption of that kind be liable for an appropriate, alternative form of service (civilian), and the State must put such possibility at this disposal, See: *Bayatyan v. Armenia*, [2011] ECHR 23459/03 [53] .

(d) In states in which it is possible to replace compulsory military service with an alternative civilian service – the length of the alternative service usually *exceeds* that of the compulsory military service (compare to us in s. 9 (3) of the Deferment Law). Furthermore, a person serving in a military service usually receives *extra* economic grants during the service (and special benefits after release), in comparison to the parallel rights granted to those who chose civilian service. See: *Poutvaara and Wagner*, p. 3).

Here too it has been ruled that this kind of preference is permitted. See: HCJ 11956/05 *Bishara v. Minister of Construction and Residence* [45]' FNHCJ 1241/07 *Bishara v. Minister of Construction and Residence* [46]; my judgment in HCJ 11088/05 *Heib v. Israel Lands Administration* [47]

In this context it further bears mention that all over the world today the prevailing trend (especially in Europe) is to go from compulsory service to voluntary service with a significant improvement in the accompanying salary, both for those in compulsory service and those serving voluntarily. See EUROPE WITHOUT SOLDIERS?

RECRUITMENT AND RETENTION ACROSS THE ARMED FORCES OF EUROPE (Tibor Szvircsev Tresch and Christian Leuprecht, eds., 2010)

(e) In states with compulsory military service the exemptions are limited and there are criteria (limited and restricted, numerically or qualitatively) and tight supervisory mechanisms for screening and supervising those who are entitled to the exemption. See: Central Intelligence Agency (CIA), *The World Factbook, available at* https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html; War Resisters International (WRI), "Refusing to Bear Arms: A World Survey of Conscription and Conscientious Objection to Military Service" (2005), *available at* http://www.wri-irg.org/system/files/Rrtk-update-2008-Austria.pdf

Here too, a similar approach is adopted with respect to exemptions and other expressions of leniency besides the ones under discussion and they are generally regulated in standing orders of the army, occasionally limited by numerical quotas or qualitative threshold conditions.

13. In addition to the information adduced in para. 12 above, and which may be useful for future legislative needs, it bears mention that any legislation of this nature, should there be such, must (subject to the required, appropriate examinations):

(a) Ensure the existence of the *Hesder* yeshivas , the operation of which is currently anchored in s. 9 of the Deferment Law (and prior to which, in the absence of the law, was anchored in the Army's standing orders).

(b) Ensure the continued nurturing of prodigies from among the yeshiva students – akin to the burning sticks that survived – who guard the torch of fire and the Jewish genius, which protected the Jewish people for thousands of years against those that rose up to consume it.

(c) Ensure the existence of an appropriate normative and budgetary infrastructure for civilian service (and which can be also be expanded for other persons exempt from military service) and for the entities who supervise them.

(d) Establish agreed indices which will enable an examination of the "test of the result"

14. In approaching the end, this is the place to clarify that the voiding of the Deferment Law does not mean voiding the framework of the *Hesder* yeshivas or the haredi Nahal or the various *Shahar* units, because the existence of all these frameworks can be anchored within the framework of the Defense Service Law and the Army's standing orders. This was how the army authorities operated prior to the enactment of the Deferment Law.

15. Furthermore, today (and in fact since Amendment No. 7 of the Defense Service Law) the *existing normative infrastructure* provides solutions to some of the problems which the Deferment Law attempted to answer, at least with respect to the hareidi men who *request to serve*. It was possible to incorporate them into what is known as "recognized service", currently regulated in s. 26A of the Defense Service Law. Under this section, the Minister of Defense is entitled to determine by order, with the approval of the Government and the Foreign Affairs and Defense Committee of the Knesset, that those designated for army service who are found to be fit for service and who have undergone a preliminary military training, may serve (having given their consent) in regular service or a part thereof in a framework of recognized service.

For this purpose recognized service is *inter alia:*

> "service in military units in the framework of a government ministry or organizational framework of a public body and under the supervision of a government ministry, designated

> for the attainment of a military- national objective in one of the following areas: immigration and absorption, education, health, protection of the home-front or voluntary activities for I.D.F. soldiers, all provided that the Minister of Defense is persuaded, having consideration for the circumstances at that time, and in consultation, as the case may be, with the Minister of Immigrant Absorption, the Minister of Education, Culture and Sport, or the Minister of Health, and with the Minister of Justice, that if such activity is not performed by those designated for military service in regular service, the objective will not be attained as required'.

For an understanding of the institute of "recognized service" and the background for the legislation of the relevant arrangement, see: Elyakim Rubinstein, "Basic Law: Human Dignity and Liberty and the Defense Establishment", *On **Government** and **Law**: Studies in Israeli Public Law*, 225, 242-248 (20003); my article on the I.D.F.

In these special units, which are external to the regular I.D.F order of battle, it may also be possible to respect the hareidi life style in an optimal manner.

These last insights bring us to the conclusion

Final Word

16. We have seen that the Deferment Law, in its present format, cannot stand. The solution however does not lie in incitement, but rather in finding *genuine, proportionate and graded* arrangements that are feasible within the framework of the objectives underlying the Deferment Law. It may be possible to achieve this and to attain substantial results provided that all of those involved learn to waive some of their requirements in the interests of "the middle path" and in recognition of three principles:

(a) Service in the I.D.F. or alternative civilian service, is not just a *duty* but also a *privilege*

(b) The ***freedom of religion*** **of the hareidi men must be respected both outside the army and within the army (and in the various frameworks intended for the hareidi men who choose to serve). On the other hand, the hareidi men must recognize the immense contribution made by those who serve to state security and peace for all.**

(c) ***A arrangement based on consensus*** **(anchored in law)** ***is preferable to an arrangement based on coercion*****. To that end, the preferable alternative is not the one that seeks to achieve everything, but rather the one that leads to the integration, in various frameworks, of many of those hareidim who at all events are unable to diligently study Talmud in the yeshivot from dawn until dusk.**

17. If a legislative arrangement is achieved along the lines of paras. 12- 16 above, while learning the lessons of what has happened until now and from comparative law, it may obviate the need for Court's intervention in the matter. In the past however, the judicial review of the entire matter was essential and this also applies to the petitions before us, and it may again be required of us in the future. Furthermore, I think that judicial review was one of the factors that lead to a certain degree of improvement (although still not sufficient) in one of the subjects treated of in the petitions, as clarified in the opinion of the President. In this sense, the court contributes – *by way of the law* – to the required social changes in addition to its establishment of the law, and the achievements that this produced in a variety of realms are all recorded in the history of this Court and in the annals of Israel's history. A similar conception has long been accepted in the majority of the democratic states, and in the U.S.A. for example, adducing more remote evidence, most of the important struggles –

political, social and economic, were channeled *inter alia* into legal frameworks and the decisions rendered shaped the character of America as we know it. See: Arnon Gutfeld, The **Brown v**. Topeka **Board of Education** Decision and its Impact on American History The Brown v. Topeka Board of Education Decision and its Impact on American History," in Daniel Gutwein and Menachem Mautner (eds.).Law and History. 231; Stephen Breyer, *Making Our Democracy Work: A Judge's View*, Part 1, pp. 1-74 (2010)

It is superfluous to elaborate any further on this point at this stage, which brings me to the final paragraph.

18. My colleague, Justice Rubinstein opened his opinion with a story told of Rabbi. Shlomo Zalman Aeurbach, of blessed memory. My colleague, Justice N. Hendel concluded his opinion with the words spoken by R. Yitzchak Gussman, of blessed memory. It emerges that there is a glimmer of hope because even in hareidi world today there are prominent figures today who take a similar approach. We recently read about one of the heads of the Ponevez Yeshiva (which is one the leading haredi yeshivas – the illustrious Rabbi Yerachmiel Gershon Edelstein, may he live long – in responding to his detractors (who criticized him for being "overly fond of the Zionists and the I.D.F. soldiers): "Even the secular [Jews-trans} who are not observant of the Torah and its commandments, if they give their lives for the saving of others because of their love of human beings, have a portion in the World to Come, just as the martyrs of Lod, who gave their lives to save the residents of the town. The Rabbi then related the story of the martyrs of Lod: "In Lod the daughter of the king was killed, and they suspected that the Jews were the murderers. A decree was issued that if the murderer was not found, then all of the Jews would be killed. Two brothers come and said that they were the murderers, even though they were not the murderers, in

order to save the residents of the town, and the Sages said that no person can attain to the place in Heaven assigned to the martyers of Lud; published in *Kikar HaShabat* on 8 Shevat 5772

On the *gemara* concerning the story of the martyrs of Lud, see: *Pesahim* 50a; *Ta'anit* 18b; *Bava Bathra* 10b and Rashi, *ad loc.*

If this kind of conciliatory spirit of loving of Jews were to rest upon all, and the mindset of service was to be accepted, it would become possible to achieve an understanding and the I.D.F would be able to continue being *the people's army.*

Justice

Justice Hayut

I concur in the opinion of the President, D. Beinisch and all of her reasons and would like to add a number of comments

1. The Deferment of Military Service for Yeshiva Students for Whom the Torah is Their Calling 5762-2002 (hereinafter – the Deferment Law) was enacted in the wake of the recommendations of the Commission for Establishing an Appropriate Arrangement of the Subject of Conscription of Yeshiva Students (headed by Justice Tzvi E. Tal (hereinafter: the Tal Commission), which was intended to find a feasible and practical solution for one of the most central, sensitive and complex problems which has been on our agenda for years. The legislative act was the product of the recognition that the issue of the enlistment of yeshiva students must be resolved in Knesset legislation (see HCJ 3267/97 *Rubinstein v. Minister of Defense* [1], and in the recognition that the strength and the unity of Israeli society mandates the treatment of the

issue without delay, in view of the growing numbers of hareidi men who do not serve in the army, since the cancellation of the exemption quota for those for whom "Torah is their Calling" in 1978 (see data regarding this on p. 16 of Report of the Interoffice Team for Encouragement of Employment and Promotion of Military and Civilian Service in the Hareidi Sector (hereinafter: Report of the Gabbai Commission). At the same time – and this point was stressed in the report submitted by the Tal Commission – the obvious differences between the hareidi sector and the secular sector, finding expression *inter alia* in lifestyle, education, and scale of values, necessitates that a solution be found which takes into account the peculiarity of hareidi society and its needs.

The Deferment Law enacted by the Knesset in 2002 may thus be characterized as a law that is the product of a social compromise, intended to increase solidarity among the different parts of Israeli society, and the integration of hareidi society therein by way of the different mechanisms established by the Law. Indeed, according to the hopes of its enactors, the Law sought to harness significant portions of the hareidi sector into bearing the onus of military service, albeit at a reduced level, and to increase their presence in the Israeli work market (see: *Movement for Quality of Government v. Israeli Knesset* [2] (hereinafter: *Movement for Quality of Government* case).

2. Due to the unique nature of the Deferment Law, as a law that seeks to spearhead a social change using a model characterized by a graded process, we were required to adapt the judicial review to these distinct features. This point was taken up by President Barak, in relating to the first subtest of proportionality (the rational connection test) which concerns the existence of conformity and a rational connection between the objectives of the Deferment Law and the measures chosen by the

Legislature to realize these objectives. In this context, President Barak stressed that the examination of this rational connection:

> 'Must be conducted, for the purpose of the law under discussion, not as a theoretical matter, but rather as a practical matter tested by the results of its implementation. Indeed, as a theoretical question examined at the time of the law's enactment, the arrangements prescribed in the law may be capable of realizing its objectives,..an (advance) examination of this kind will not suffice. When the underlying objective of the law is to orchestrate a social change, the occurrence of which is not purely a matter of theoretical speculation but is rather examined in the test of life, the suitability of the measures chosen to realize the purpose must be examined in terms of their results'. (*Movement for the Quality of Government* [2] at p. 710. For the approach according to which the examination of the rational connection is in general a test that for the full duration of the law's validity, see Aharon Barak *Proportionality in the Law – The Violation of the Constitutional Right and its Limitations* 384-387 (2010)

Support for the "test of results" adopted in *Movement for the Quality of Government* case appears in s. 16 of the Law, which determined a period of validity of five years from the date of its publication (while empowering the Knesset, by decision, to extend its validity for additional periods each of which would not exceed five years) as well as in the Explanatory Note which noted that the Law's period of validity was fixed for five years "to enable the monitoring of the progress in the trends, in the framework of the enlistment deferment arrangements for yeshiva students for whom their Torah is their calling, and primarily the influence of the proposed law on the scope of yeshiva students included in the arrangement…" (Draft Bill for the Military Service (Deferment of Service for Yeshiva Students for whom the Torah is their Calling) Law

(Temporary Order), 5760-2000, *Hatza'ot Hok* 5760-2000, 2889, 455, 458.

It will be stressed that in the *Movement for the Quality of Government* case, we did not ignore the fact that in terms of its results, and according to the situation at that time (2006) , there was no rational connection between the objectives of the Law and the measures used in its implementation, because the data at that time showed that the objectives of the Law had only been realized in a negligible and marginal manner and that its principal overall objective of the Deferment Law was not realized (see *Movement for the Quality of Government* [2] at p. 712. All the same, we felt that it was appropriate to wait until the passage of the full period of time prescribed by the legislator for monitoring the actual realization of its purposes (five years), so as to enable the Knesset to examine in accordance with the structure that it had prescribed, whether there had been any substantive change in the picture since the granting of the judgment.

3. The petitions before us were filed in the wake of the Knesset's extension of the Deferment Law for an additional five years on 8 August 2007, and in our decision of 8 August 2009 we reviewed the current data pertaining to the implementation of the Law at that time, and we expressed our disappointment that "the entirety of the data presented above concerning the integration of those who received deferments from I.D.F service and civilian service does not reflect a significant change of the kind contemplated by the judgment in *Movement for Quality of Government* [2] (para. 10 of the decision)" All the same, we will abide by our decision that "the test of the Deferment Law lies in its realization in practice. The test is in the actual social change that is achieved" (*Movement for Quality of Government* [2], at p. 711). We decided that at that stage too it was appropriate to enable the Law and the mechanisms

fixed therein, which had already begun operating, to prove that it was capable of generating this kind of change. We therefore ordered that the hearing of the petitions would be renewed after the passage of fifteen months from the date the decision was given, in order to be able to once more examine the updated data pertaining to the implementation of the Law.

4. Unfortunately, the desired change did not materialize even after the passage of the additional period of time that we allocated in our decision, and I agree with my colleague the President that the period of almost a decade that have passed since the enactment of the Law (1 August 2002) "represents a sufficient period for addressing the central question raised by this Court in the *Movement for Quality Government* case" [2](para. 68 of her opinion). I also concur with my colleague regarding the answer to be given to this question, and in accordance with which the "results test" over a period of time indicates that the Law does not pass the first subtest of proportionality, and that the means chosen to realize the Law are not suited to the purposes of the Law. For example, in 2010 the number of new inductees to the I.D.F. from the haredi sector from all age levels stood at 510 only (the 368 inductees into hareidi Nahal are not included in this group because the inductees of hareidi Nahal are not connected to the implementation of the Deferment Law) whereas the aggregate number of all those whose enlistment was deferred as of 6 January 2011 stood at 61,877 men (see p. 7 and 20 of the response of respondents 2- 4 dated 23 January in these petitions. The State claimed that the overall number of those whose service was deferred is smaller, *inter alia* due to the exclusion of those who are 30 and over, the efficacy of their enlistment being in doubt. However, even according to this approach, the aggregate number of all those whose service has been deferred is in excess of 50,000, and as such

there is no escaping the conclusion that the percentage of those enlisted from the hareidi sector (530 in 2010 from all the age levels) was and has remained particularly marginal and negligible. If we take account of the fact that the rate of natural increase in the hareidi sector is far more rapid than the natural increase of the rest of the Jewish population in Israel (about 7% per annum for the hareidi sector as opposed to 1.3% for the rest of the Jewish population – p. 8 of the Gabbai Report), it is no wonder that the number of those whose service is deferred from among the hareidi population has consistently grown from year to year (see para. 50 of the President's opinion). Thus, the data accumulated thus far do not point to any meaningful positive trend with respect to the attainment of the objectives to which the Law was directed. Quite the opposite: These data are worrying because they indicate that the dimensions of the problem which the Deferment Law sought to solve are growing. Hence, the Gabbai Report indicates that in the younger age range (20 – 29) only 11% of the haredi men service in the Army as opposed to 90% of the Jewish men in this age range (p. 12 of the report) and the results in the civilian service track are likewise rueful (see paras. 42-46 of the President's opinion.

5. The ineluctable conclusion from all of the above is that the Deferment Law did not succeed in realizing the objectives for which it was enacted. The reason for this is that the mechanisms established in the Law lack the power to generate the profound changes in the hareidi sector which would narrow the glaring inequality which has materialized in Israeli society as far as it concerns the bearing of the military burden, at least by way of civilian service. Hence, the arrangements prescribed by the Law relate primarily to men above the age of 22, an age at which the average haredi man is married and is often a parent to a child (see p. 19 of the Gabbai Report). As such his ability or will to enlist for significant

service at that stage of his life is considerably less. Similarly, the arrangements prescribed by the Law are not sufficiently tight, and this opens the way for the authorities to divest it of all meaning, and thus frustrate the overall realization of its intended objectives (regarding this, see paras. 24- 26, 44-46 of the President's opinion). For example, today already from age 22 there is no preference for military service over civilian service; civilian service is likely to be for one year only, see: Regulations for Deferment of Service for Yeshiva Students whose Torah is their Calling (Civilian Service) 5767-2007 and is for the most part performed within the community (68% according to the Head of the Administration, and 57% according to the position of the Minister of Science – see p. 27 of the interim report of the panel for examination of the implementation of the Tal Law, headed by Knesset Member Plesner, dated 16 January 2011) and is not sufficiently supervised; a track of abbreviated service of three months was established for those aged 26 and above; and men over age 28 are directly referred to the pool for reserve duty with no obligation of service.

6. As an aside in this opinion, I would like to add a few remarks relating to the position taken by my colleague Justice A. Grunis, concerning the scenarios that will take place the day after our judgment and the conclusion that he sought to draw from that position.

My colleague Justice A. Grunis says that "It is illusory to expect that a judicial decision will lead to the enlistment of the hareidi men into the I.D.F and their entry into the work force. Social and economic changes are able to bring about the hoped for changes. The ability of the Court to influence in cases of this kind is meager" (para. 2 of his opinion).

The question of the degree to which a judicial resolution can give rise to a social change is one over which jurists and scholars of political

science have spilt much ink, in Israel and around the world. My colleagues justices M. Naor, and H. Meltzer, and my colleague the President D. Beinisch referred to some of the legal literature on this subject (and see also: Ruth Gavison "The Hollow Hope – Can Courts Bring About Social Change" *Maasei Mishpat* 2 15 (2009 which reviews the book of Gerald N. Rosenberg: The Hollow Hope: Can Courts Bring About Social Change (2nd ed., 2008); Menachem Mautner, "Judicial Activism – An Appraisal, *Alei Mishpat* 4, 7 (2005) (hereinafter – Mautner); Judicial Activism: For and Against: The Role of the High Court of Justice in Israeli Society (2000); Yuval Albashan "Aharon Barak – Between Law and Protest, *Barak Volume – Studies in the Judicial Activities of Aharon Barak* 139 (Ayal Zamir, Barak Medina, Celia Fesberg eds. 2009); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992); David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's* The Hollow Hope: Can Courts Bring About Social Change?, 12 J.L. & POL. 63 (1996). Personally, I tend to the view that the courts have the power, *inter alia* by way of judicial review, to be partners in processes that give rise to social changes. At all events, even if my colleague is correct in his approach to the effect that the courts' ability to influence social changes is minimal, the question to be asked is whether that justifies the conclusion which he reached, namely that the courts should stand on the sideline and reject any attempt to influence these processes, even if only minimally.

In my conception, the judicial decision in all of its variations, especially in the field of protection of human rights and the guarding of the rule of law and purity of conduct, is one that by its very essence touches on value based matters. These values have been embedded in the law of the State since the dawn of its existence and they constitute the

foundation and the building blocks of the Israeli democracy in its entirety. Having been charged with the protection of human rights and guarding the rule of law, and being equipped with the legal – value based tools to perform that task, *inter alia* by way of judicial review, it is incumbent upon the court to fulfill that task, without being deterred by the negligible or extensive influence that its ruling may have. Comments in that spirit were expressed by Professor Mautner in his article on judicial activism cited above, where he states:

> 'Another question, naturally concerns the extent to which the court succeeds in inculcating the appropriate values of administrative law in the public administration of the state. The answer to this question will certainly be mixed but this does not mean that the court should refrain from making the effort. As jurists we know that there is invariably a difference between the ideals of the law and the extent to which they are realized in the real world. But this does not mean that these ideals should be waived (Mautner, at p. 16)

7. Examples of the efforts made by this Court to protect the basic constitutional principles of our democratic regime are scattered throughout its case-law during all the years of its existence, before and after the enactment of the Basic Law at the beginning of the nineties. Space would definitely prevent detailing the full picture, but one example nonetheless worthy of mention is the case of HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [34], where the Court did not recoil from protecting the principle of equality and cancelling gender based discrimination, when ruling that the petitioner should be included in the panel of the Religious Council of Yerucham as a candidate on behalf of the local authority. The protection of the principle of equality in that case required the Court to treat a topic of tremendous social and halakhic sensitivity, and the Court was aware of this, and noted, *per* Vice President M. Elon

> ‘We are aware of the grave reservations accompanying the matter and which are entertained by those entrusted by law with its determination, who have sought-and justly so-to avoid any ideological or quasi-halakhic confrontation with the halakhic authorities in Israel today. We are also mindful of the possible mishaps, for a certain period, in the orderly and uninterrupted functioning of the religious council. But none of this is sufficient to free us from the decree of the law in Israel, which prohibits discrimination against the Petitioner so as to exclude her from membership of the Yerucham religious council. It is regrettable that notwithstanding the protracted period of discussion of this matter, or the fact that the course for its proper resolution was marked out from both the legal and the public perspectives, there was lacking the courage to make the necessary and inevitable decision. In particular it pains us that no decision was taken in favour of the Petitioner, a result sanctioned by the halakha in the opinion of prominent authorities (*ibid*, 270-271).

8. The role of the judge in a democratic society as the protector of human rights and the rule of law has been discussed by discussed by many of the best (see Aharon Barak *The Judge in Democratic Society* (2004); Itzchak Zamir “Judicial Activism: A Decision to Decide *Tel-Aviv Law Review* 17, 647 (1993); Yitzchak Zamir “Judicial Review of the Public Administration” *Gabriel Bach Volume* 383 (David Hahn, Danah Cohen-Lekah, Michael Bach eds., 2011) Beverley M. McLachlin, *The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?*, 39 U.N.B.L.J 43 (1990). A derivative of this role is the court’s duty to do its utmost to narrow the gap that often exists between these fundamental values – which must be protected from a long term perspective – and the social reality which may materialize as a result of the actions of other governmental authorities, that are often motivated by short term considerations and various political constraints. Also germane to this context are the comments of Deputy President M. Cheshin in HCJ 2458/01

> "…far be it from us to mix reality and values. However, the test for determining the obligation of equality – and similarly the prohibition on discrimination – originated and currently exists specifically in order to combat "accepted social conceptions" . This is the case with respect to discrimination on grounds of race, discrimination on grounds of sex, discrimination on grounds of sexual inclination and discrimination on other grounds too. All of these discriminatory acts have their origin in "accepted social conceptions": the social conception that a member of one race is inferior to the member of another race; that women are not competent to perform actions that men perform; that people of a certain age are not competent for particular professions etc. Indeed, the uprooting of 'accepted social conceptions' – accepted but illegitimate – is the purpose of various laws, and the court, in conjunction with the legislature, must stand on guard and act to inculcate the values of equality among the members of the society, which are built upon the talents of the individual and not upon stereotypes that have attached to the group to which a particular person belongs (*ibid*, p. 452; see also and compare HCJ 4948/03 *Elchanati v. Finance Minister* [50], para. 24; HCJ 104/87 *Nevo v. National Labor Court* [51], at p. 769, Mautner, at p.11)

The issue to be decided in these petitions has been brought before this Court time and again by petitioners who have ably served an entire public that has long lived with a harsh feeling of inequality, as far as it touches on bearing the burden of military service. In addressing this issue the Court has conducted itself with caution in awareness of the social sensitivity involved therein, and by reason of the caution, responsibility and humility which should always guide the Court in exercising judicial review over the other governmental authorities, and in the case at hand, over the Legislature. However, the time for decision

has arrived, and for the reasons explained so well by my colleague the President, and by reason of the insights set forth above, which I acquired during the years in which proceedings on these matters were conducted before us, I add my opinion to that of the President and to the result that she arrived at, according to which the Deferment Law cannot be extended again in its present format, and a new arrangement must be formulated, which it is not for us to determine, and which ensures the intended objectives of the law in a more effective and more proportionate manner.

Justice

Justice N. Hendel

1. It might be asked: How does the Supreme Court's examination of the constitutional petition differ from the examination of the efficiency or non-efficiency of the Law forming the subject of the petition (the Law or the Tal Law)(see: interim decision of 8 August 2009, given in the wake of the granting of order *nisi*, para. 9 in the opinion of my colleague, Justice Hayut). The thrust of the question: Why is the "result test" so crucial to this Court's decision of whether the Tal Law should be voided or not. The examination of the Tal Law should not, primarily, be an examination *de jure* but rather *de facto*, having regard *inter alia* for its success on the ground. It seems that this latter point is the crux of the dispute between the opinion of the President and the opinion of my colleague Justice E. Arbel. In explaining why the result test is proper and correct in this case I will briefly present the relevant background.

The subject of the deferment of military service – to the extent of actually granting a complete exemption – to yeshiva students who declare that "their Torah is their calling" has been litigated before us on a number of occasions. The current variation of the exemption, in the form of the Tal Law, is now being heard for the second time in this file (see *Movement for Quality of Government v. Knesset* [2] (hereinafter – *Movement for Quality of Government* case). The procedural variation of the petition concerning the Tal Law establishes the boundary for a decision on the matter.

The Tal Law infringes the right to quality in a manner that violates the Basic Law: Human Dignity and Liberty. Not every infringement of equality amounts to a violation of the aforementioned law. However the infringement caused by the legislative arrangement for the deferment of military service to the extent of granting an exemption

touches at the heart of human dignity and perhaps even more so to *liberty*. Its import is that a youth of 18 years old who satisfies the criteria of "Torah is his Calling" is permitted to *choose* whether to serve in military service, while his contemporary of the same age *is obligated* to serve for three years during an important period in his life, while being liable to endanger his mind and body. The exemption applies to a group of significant dimensions – currently one out of every seven young men – (from the last conscription yearbook, which was examined and submitted to us). This constitutes sweeping and severe discrimination that is not based on any relevant difference that might be able to justify the distinction. Two conclusions derive from this: The first is that the Law violates equality under Basic Law: Human Dignity and Liberty. The second is that the nature of the direct violation and the sacrifice demanded of the individual – a young man of 18 who is obligated to enlist into military service – rules out the possibility of ignoring it purely because the victim is included in the majority group. In other words: Why should a young man of 18, – only yesterday a minor and having just entered the gates of adulthood – having been conscripted with no possibility of choosing, be required to shoulder the "burden of the status" of the majority. As such, I see no reason in this case to discuss the question of the extent to which the majority is entitled to discriminate against itself. This being the position, there is likewise no need to address the difficulties in defining terms such as "majority" and "minority" when the society and the government are not divided up in a binary sense (see and compare: Justice A. Grunis' opinion in *Movement for Quality of Government* [2], at p, 803, opposite letter G, until p. 804 opposite letter B, in relation to a law that discriminates against women).

Along with the above, in the *Movement for Quality of Government* case it was held that the arrangement in the Tal Law was based on a number

of purposes – that is to say that its purpose was not just to achieve greater equality. This approach is rooted in the recognition of reality, the history of the enlistment of the hareidi public into military service, the lack of wisdom in a change that would be revolutionary as opposed to evolutionary, and the advantage of a consensual solution in this kind of matter, as opposed to a coerced solution. The Tal Law was thus to be assessed in terms of its ability to achieve four objectives: to anchor in legislation an arrangement for the deferment of service for yeshiva students in "recognition of the uniqueness of the hareidi society and its culture, and the value of Torah studies (para. 55 of the opinion of President A. Barak in *Movement for Quality of Government* [2] which refers to the report of the Tal Commission); to generate greater equality in the bearing of the burden of military service in Israeli society; to integrate the hareidi public into the work force; to bring create a graded solution that has consideration for the difficulties of the arrangement for the deferment of military service of yeshiva students, based on broad consensus. It was held that these objectives are appropriate when examined through the prism of Basic Law: Human Dignity and Liberty, in other words, that they are consistent with the values of the State of Israel as a Jewish and democratic state. *(Movement for Quality of Government* case [2], at pp. 700).

The Tal Law therefore recognizes the existence of a constitutionally based violation of the principle of equality but justifies it by the attainment of four objectives that have consideration for the complexity of the problem and for a certain degree of multiculturalism in relation to the sociological group of the hareidi public (Menachem Mautner, *Law and Culture* 246-247 (5768-2008)). Having such consideration is all the more justified in a state whose Basic Law defines it as being Jewish and democratic. However, it must be stressed that an

important and central objective of the Law is the promotion of a change in the direction of reduction of the violation of equality. The decision in the *Movement for Quality of Government* case effectively rejected the demand for equality now, and was prepared to accept a change that was gradual, but meaningful. The importance attaching to the objective of narrowing the discrepancy in the allocation of the burden of military service stems from the nature of the constitutional violation, embedded in the Law itself – inequality. Accordingly, in the framework of the constitutional examination of the Tal Law significance attaches to its success in reducing the aforementioned gap, as attested by the result test. An additional practical consideration must also be added here – namely, that our current concern is with a law following the passage of a ten year period, which enables an examination of the law's results, not as an evaluation that anticipates the future, but rather by means of examining the facts on the ground. In the *Movement for Quality of Government* case this Court postponed its decision, in its awareness of the objectives of the Law, which demanded an examination of the situation over a period of time. It is for this reason that I cannot concur with my colleague Justice E. Arbel in relation to the numerical data that were presented by the respondents. It seems to me that in order to examine her forecast on the basis of the statistics mentioned in her opinion, we would have to wait a number of additional years, etc, and I see no justification for doing so. The decade which has passed since the Law's enactment suffices to present a picture. An additional reservation is that while there may have been a certain increase in the number of those enlisting from the ranks of the hareidi public, given the increase in the number of hareidi men in the annual pool of those designated for military service, the overall result is not an improvement but quite the opposite.

From this perspective I cannot but agree with the result reached by the President. There is no point in revisiting her comprehensive and thorough review. Suffice it to say that according to the data presented to us our concern is with isolated percentages of yeshiva students who enlist to the military service (see paras. 10 and 31 of the President). Nor do they demonstrate the achievement of the objective of increasing the participation of the hareidi public in the work market. Notwithstanding the good will of those who labored over the task of enacting the Law, its failure in terms of results is not a borderline one, but significant. This failure is not necessarily the result of the arrangement forming the basis of the Law, but rather may stem from the willingness of those concerned to tread the path it paved. The choice or more precisely, "the surplus of choice" granted to the yeshiva students in the structure of the Tal Law thus became its stumbling block.

If indeed the Law failed in its implementation or by reason of the gap between its intentions and its results, it is appropriate to devote our attention to its landscape, to go to the roots of the matter, and to illuminate a number of points that may not have been sufficiently clear.

2. The study of Torah is the crown of the commandments. "The study of Torah is equal to all of them" (Talmud Bavli, Tractate *Shabbat* 127a) "The commandment to study Torah is greater than all of the other commandments" (*Shulkan Arukh*, *Hoshen Mishpat* 247:18). The greatness of the commandments derives from the fact that the Torah is the source of the law, but it does not there. In the Talmudic period "the question was asked…which is greater – the learning of Torah or its performance? Rabbi Tarfon answered: the performance is greater. Rabbi Akiva said: the study. And they conclude: "Learning is greater – only because it leads to performance" (Talmud Bavli, Tractate *Kiddushin* 40b). The harmony is clear, but so is the tension. The commandment of

Torah study has primacy precisely because it leads to action. Nonetheless, the study of Torah is important not only for practical reasons, in both senses. From the perspective of the halakhah, "The Torah is the word of God. Accordingly my contact with Torah is indirectly a contact with the Holy One Blessed be He….this is the source of that special feeling of elation in the study of Torah. This unique feeling nurtures, sustains and shapes my entire involvement in Torah. It leaves its imprint on my entire world" (H. Sabato *In Quest of Your Presence – Conversations with Rabbi Aharon Lichtenstein* 18-19 (2011)). It should also be stressed that the study of Torah is not just a religious experience with the Creator the World, but also a significant historical and cultural tier, and a national asset of the first degree. The words of Ahad Ha'Am are appropriate in this context: "It may be said without any exaggeration, that more than Jews have kept Shabbat, Shabbat has kept the Jews; and if not for it, which restored their souls and renewed their spirits every week, the hardships of the week would have drawn them further and further down, until they reached the very lowest level of materialism, and moral and intellectual wretchedness" (Asher Tzvi Ginzberg "The Sabbath and Zionism" *HaShiloah*3 (6) 5658-1898). And if the question be asked – why the Shabbat: the answer would be – from the story of the creation in the book of Genesis and the laws of Shabbat appearing in the book of Exodus and the Babylonian and Jerusalem Talmud, in Tractate Shabbat. From this we can learn: More than Israel guarded the commandment of the studying Torah, this commandment guarded them.

Let us not forget that Jewish law is not one-dimensional. The commandment to study Torah is certainly not an only child0. The world is not only built on Torah but also on kindness (see *Ethics of Father*s1:2). In the words of Rabbi A. Lichtenstein, the head of the Gush Etzion

Yeshiva, to the Tal Commission "The involvement in Torah is supplemented by the value of acts of loving kindness, and the most demanding act of loving kindness is military service" (The Commission for Establishing an Appropriate Arrangement of the Subject of Conscription of Yeshiva Students – *Report of the Commission* 51 (2000). The demanding nature of military service is expressed not only in the endangering of the body of the soldier but also in the exposure of his soul to the unnatural occupation of combat with all that is implied thereby. This is part of the soldier's devotion. The *halakhah* is aware of the difficulties attendant to fulfilling the commandment of fighting, and despite the heavy price a person is liable to pay, it is still a commandment (see letter of Rabbi Joseph Dov Soleveitchik further on). The "Great Eagle" Maimonides spread his wings over the Laws of War and stipulated that one of the situations included in the category of obligatory war is "to assist Israel from an enemy which attacks them (in the words of Maimonides, *Hil. Melahim* 5:1); see also *Sefer Hazon Ish*: *Orah Haim, Moed, Erubin, Likutim*, Halakhah 1, p. 166). The I.D.F. – Israel Defense Force – by its very essence fits into the halakhic definition, and who bears the burden of serving in an obligatory war? The *Mishnah* rules: "In an obligatory war, all go out – even a **groom** from his chamber and a bride from her wedding canopy [to do battle] (Talmud Bavli, Tractate *Sotah* 8:7, Maimonides, *Mishneh Torah*, *ibid*., *hal.* 4). Rabbi Y, of Karelin wrote regarding this *Mishnah*: "And this means that in an obligatory war all must go out, even the Torah scholars must interrupt their studies" (*Keren Orah* on Tractate *Sotah*). The author of the *Arukh* even learns this by force of *a fortiori*"Rabbi Judah said in the name of Rav "even a groom from his chamber and a bride from her wedding canopy – this means – and all the more so Torah scholars (*Sefer HeArukh*, "*Energia* [battle], of Rav Nathan b. Yehiel, who lived in the 11

century in Italy, based on the Babylonian Talmud, Tractate *Sotah* 10a, and see also *Maharsha ad loc.*). The *Hazon Ish* clarified this point: "It appears that the Mishnaic ruling that in an obligatory war even the groom is commanded to leave his chamber does not relate to a situation in which they are needed in order to win the war, for it is clear that where it concerns a threat to life and the saving of the nation all are obligated, but even at a time in which there is only a need for a fixed number of soldiers, it was permitted to take a groom from his chamber, for those who are exempt from war have no special right during times of obligatory war. And this is similarly applicable to a discretionary war, they are not exempt unless the victory for Israel is not dependent upon them, in which the army has the numbers it requires without them. But if they are needed they must go to help their brothers" (*Sefer Hazon Ish,ibid,* p. 167).

In the absence of a Jewish state or Jewish government, the prevailing conception in the Middle Ages until the establishment of the State was that the laws of obligatory war in the form of protection of the Jewish people have no application.. Accordingly, the laws of war do not appear in the 4 parts of the *Shukhan Arukh,* which purported to establish the *halakhah* that was relevant in "this time", i.e. in the period following the destruction of the Temple. On the other hand, the laws of war are set out in *Arukh HaShulkhan HeAtid* written by R. Yechiel Epstein, author of *Arukh HaShulkhan*, who lived in Russia in the 20th century . Despite this, in the period between the 19 century and the beginning of the 20th century Jews began to participate in wars waged in their host states. Rabbi David Zvi Hoffman, one of the prominent German rabbis, wrote after the First World War that one could not avoid military service the duration of which was "…a year, two years or three years…" just because of the desecration of the Sabbath, because "it is more than just

the performance of a commandment for he who does so [avoids serving – translator] causes a discretion of the Divine Name if the matter becomes known (*Responsa Melamed Leho'il*, p. 1 s. 42).

Naturally, military service in foreign armies created halakhic problems. The following question provides an example: "Concerning young hareidi men who are about to be conscripted into the army, where they will be forced to break their hunger by forbidden foods… are they permitted to eat the forbidden foods immediately upon joining, or should they refrain from tasting anything until they are in danger, and upon reaching that situation are they obligated to make a blessing…?"(*Resp. Ma'arkhei Lev*, *Yoreh Deah* 43, of Rabbi Yehuda Leib Charleson, who was the chief rabbi of Serbia-Kishiven region during the period that preceded the Second World War). At the beginning of the 50's of the previous century, rabbis in the U.S.A asked whether they should participate in the Korean War as army chaplains, given their fears that they would be forced (for example) to desecrate the Sabbath. Rabbi Joseph Soloveitchik ruled that they should enlist and elaborated with respect to even greater challenges: "The Halakhah, which displayed so much alertness to and understanding for all human weaknesses and frailties, has given much thought to the unique psychology of the warrior who, living in constant danger, loses the perspective of spiritual values and ethical norms…therefore, sought to rehabilitate the camp of the warriors and to raise it to a high level of morality and dignity. If the rabbis of today wish to continue this glorious tradition of giving their service where it is needed most, the military camp is the place" (Rabbi Joseph Dov HaLevi Soloveitchik, ""On Drafting Rabbis and Rabbinical Students for the U.S> Armed Forces Chaplaincy, *Community, Covenant, and Commitment* (ed. Nathaniel Helfgot, 2005) 23)

The *Hafetz Haim*, who lived in Poland about one hundred years ago, wrote a book called "*Camp of Israel: The Laws and Conduct for Army People During their Period in the Army*. In this unique work, a number of editions of which were printed, the rabbi addressed the laws of studying Torah in a military framework and compared the obstacle to studying Torah posed by the army to Joseph, who when imprisoned, reviewed the teaching of his father Jacob. He also discussed the laws of prayer in the army, stressing that one should not refrain from praying on a daily basis despite the numerous difficulties involved. From this historical perspective I confess that I felt the need to be grateful to the I.D.F that provides religious services such as military chaplains, religious quorums of ten (*minyanim)*,kosher food, sensitivity to the observance of the Sabbath in non life-threatening situations, numerous classes in Torah for the hareidi Nahal, and the possibility of combining military service with the a yeshiva framework.

I have not written for sake of innovation, and my remarks above are well known to scholars of Torah. The question which presents itself however is what basis is there for opposition to military service in our time? It is well known that "During the War of Independence many young hareidi men joined the army that was fighting for independence….these pamphlets (the journal of the Agudat Yisrael Youth) abound with expressions of identification with the fighters and demonstrate the tremendous motivation that accompanied their military service" (Benjamin Brown – *The Hazon Ish: Halakhist, Believer and Leader of the Haredi Revolution* 247 (5771-2011). In other words, the principles and rules governing the commandment of participating in a defensive war are well known and settled among rabbinical authorities and Torah scholars. Indeed, can one ignore the fact that Abraham (Genesis, ch. 14), Moses (Exodus ch.17:8, Numbers ch. 3; *ibid.*, ch. 31;

Deuteronomy, ch. 2) Joshua (Joshua, ch. 12) and King David (2 Samuel, ch. 5:6-10); 1 Chronicles, ch. 11, 4-9) all conducted wars. The answer to the question is that the hareidi position today stems from a *quasi* temporary provision. The *halakhah* recognizes the notion of a temporary provision (see Talmud Bavli, Tractate *Yebbamot* 38a and Maimonides, *Mishneh Torah, Hil. Sanhedrin* 24:4) – a practical consideration stemming from a complex situation, with special needs.

The problem is that reality has changed. The overall number of yeshiva students who are deferring their service ranges at around 60,000 men. As mentioned, over the past few years, the ratio is one out of every seven young men at the age of the annual conscription pool. The forecast based on past experience is that this number will rise. To make matter more concrete: The estimation is that between the years 1968 – 1988 the number of yeshiva students whose Torah was their calling rose four fold, from 4700 to 18,400 and the percentage of yeshiva students from among the total population designated for military service doubled from 2.5% to 5.3% (State Comptroller, 39th Annual Report (1989), 904, Menahem Hoftung, *Israel, State Security versus the Rule of Law* 245 (1991). The rate of those who deferred their service under the Law from the annual conscription pool of the total population, rose from 8.4% in 1998 to 14% in 2007 (Statement of Response of Respondents, of 30.12.2008). During the period of the establishment of the State, the group of those whose service had been deferred numbered 400 men only. Towards the end of his days, the first Prime Minister, Ben Gurion expressed the view that he had erred in granting the exemption to the yeshiva students, because he thought at the time that the aforementioned group of 400 students only would not survive and would certainly not thrive (*Knesset Proceedings*, 13 October 1958; according to a conversation with Rabbi Shlomo Riskin, the chief rabbi of the Efrat settlement, who visited David Ben-Gurion in

S'de Boker at the beginning of the seventies; see also letter from David Ben-Gurion to Levi Eshkol, Prime Minister (12.9.1963), *Ben –Gurion Archives*).

The hareidi community must therefore come to terms with its numerical success and its implications – success and growth that many did not anticipate. This numerical datum in conjunction with the fact that the hareidi public constitutes a steadily growing percentage of the total Israeli population also structures the current reality. The halakhic temporary provision must take this into account. When the State was established the fear was that the Eternal Flame in the House of the Study would be extinguished. In the words of the Israeli Chief Rabbi in 1949 – Ben Zion Ouziel to David Ben-Gurion: "The Assembly of Rabbis has decided to express…its opposition to the conscription of the yeshiva students so that the Torah will not be forgotten from Israel" (Rabbi Ouziel, *Mihmanei Ouziel* pt. 5, Letters, Correspondences, Part 409, p. 691 (5767-2007)). Quite simply, this fear was particularly tangible in the wake of the Holocaust during which many of the yeshivas in Europe were destroyed. This is no longer the case. The transformation was already described a few decades ago by the Chief Rabbi of Nethanya, Rabbi David Shalush "…Jerusalem the capital of Israel is teeming with its sons, growing and bursting West, East, North and South with buildings of glory and honor. Tens of thousands of scholars of Torah and students are sitting and meditating on Torah, and the voice of Torah and prayer pierces from the walls of the synagogues and houses of study in Jerusalem, as well as in many other cities (*Resp Hemdat Genuza*, Question 21, p. 233, pt. 8). The renewed building may be viewed as the first stage in the fulfillment of the verse "then I will send rain on your land in its season (Deuteronomy 11:14). In the scriptural context *matar* means bouteous rains in the land of Israel (Deuteronomy, ch. 28:12,

ibid., ch. 28:24 Isaiah, ch. 30:23). At the same time, it is clear that the numerical change is also significant in terms of military conscription. A group as large as that, were it to be conscripted into the army would certainly be able to contribute to state security and even to bring about a more equal division of the burden. This is not just an academic point but a concrete fact. It is all the more true when an enormous increase is expected in the numbers of yeshiva students.

The irony is that there is now a state law that was enacted as a *temporary provision* that was temporarily extended for a period of five additional years in the Knesset Decision of 2007 (s. 16 of the Law), existing side by side with the approach of the haredi rabbinical authorities, which also concerns a quasi *temporary provision*, in the halakhic sense. Naturally, this Court does not rule in matters of halakhah and is not supposed to replace the discretion of the Knesset. These matters are presented here for the purpose of giving the full relevant picture. As ruled in the *Movement for Quality of Government* case, and clarified above, this Court recognized the propriety of the four objectives of the Law: to anchor the deferment of service arrangement in law, having recognition for the national importance of the yeshiva students; reducing the gaps of inequality; integrating the yeshiva students into the work market; creating a gradual consensual arrangement. Finding an appropriate solution to the problem is an exceedingly difficult task. As mentioned, my view is that the Law is not constitutional by reason of its being disproportionate in accordance with the first subtest, regarding the *actual* rational connection between the means adopted by the Law and its results. In the event that the arrangement fails to achieve the intended purpose, which establishes the proportionality of the Law – and in the present case the failure is unequivocal – then we are left with the grave violation of equality, and nothing else. In this case, the omission in the

rational connection or in the conformity between the purpose and the means is not an omission in the regular sense. In other words, our concern is with an examination of the facts and the life experience of the Law for the length of the past decade, and not with a preliminary evaluation of the Law, including its logic. The constitutional defect lies in the lack of a connection in reality between the goals and the purpose.

The practical meaning of this at this time is that the Law cannot be extended. This result leaves a legal vacuum and a challenge for the Legislature. The need has arisen for the enactment of the new law that complies with the requirements of Basic Law: Human Dignity and Liberty. This is not the task of the Court. Our task is to identify when the statutory arrangement is not constitutional. The experiment of the Tal Law did not succeed in the test of results that it established. The possibilities for a new arrangement are many and varied. To reach an arrangement that is appropriate on a constitutional level will require creativity, good will, and sincere and genuine willingness on the part of all the parties to waive and compromise.

3. Before closing, the subject of the compulsory conscription in defense service should be placed in the appropriate value-based context. To do so, the field of philosophy of logic may be of assistance. The philosopher David Hume, who lived in Scotland in the 17th century taught us that there are two forms of reasoning: deductive reasoning and inductive reasoning. An example of the first form (deductive reasoning) is that if A is bigger than B, and B is bigger than C, then A must be bigger than C. This is a logical conclusion that may be regarded as a fact, subject to the assumptions presented. An example of the second form (inductive reasoning) is that if the sun rose yesterday and the day before, and in fact for the entire period of human memory, then it may be concluded that it will also rise tomorrow. This conclusion is based on our

experience with the laws of nature, and is not a necessary fact from a logical perspective. See for example: DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (1748),

The State of Israel has existed for 64 years. Since its establishment the sun has risen every day, and, notwithstanding the enormous difference, there has not been a single day without the occurrence of some security threat to the state and its citizens. While we welcome sunrise as part of the natural order and conclude that it will continue to shy away from the rays of the "sun" of the security threat, we try to interfere and to prevent its continuity, and we hope and take measures to ensure that what happened yesterday will not repeat itself tomorrow. This is also the approach of Jewish law. A defensive war is a positive commandment, while at the same time, peace remains the elevated ideal. As it is written "Great is peace for the entire Torah was given for their to be peace in the world, for its says (Proverbs 3:17) "Her ways are ways of pleasantness, and all her paths are peace" (Maimonides, Mishneh Torah, *Hilkhot Hannukah,* ch,4:14).

We should cease occupying ourselves with war, including legal discussions concerning the duty of enlisting to the army, therein causing the elevated ideal of our sources to be forgotten. However, until we arrive at peace, the commandment of defending our state is one which has tremendous power to unify the people around it. Notwithstanding its ugliness it also teaches us that that which joints us is greater than what separate us.

> "To illustrate the importance of the value of serving in the army, I will cite a story I heard from Dr. Feingold about the illustrious scholar, Rabbi Yitzchak Ze'ev Gustmann, of blessed memory, the last of the luminaries of Vilna, who was a members of the *Beth Din* of Haim Ozer **Grodziensky,** who experienced the terrors of the Holocaust and lost his only

son. Years later he established a yeshiva in Rechavya, in Jerusalem. Among those who were close to Rabbi Gustmann was Professor Oman (Nobel Prize Laureate), whose son Shlomo Oman (may God avenge his blood), was a student of the *Hesder* yeshiva in Sha'alavim and was killed in the Peace for Galilee War. Upon hearing the news that Shlomo had been killed, Dr. Feingold came to take Rav Gustmann to the funeral. At the end of the funeral Rav Gustmann roamed around the freshly dug graves of the soldiers sighing and grieving for them, and had difficulty in leaving the graveyard. When they returned from the funeral he said "they are all holy". One of the passengers travelling on the back seat asked him "All of them"? Even those who were not religious? Rabbi Gustmann turned around to the back seat and stated forcefully: "All of them ! All of them !"
When they came to Rechavya, Rabbi Gustmann turned around and said: "Dr. Feingold, perhaps we will go to Professor Oman to say something to him"….. and he turned to the widow, the parents, the brothers and the sisters and said: "My son Meirka was taken from my hands and thrown onto a truck in the *kinderakzion…"* And then the Rabbi straightened up and spread his hands out and said: "And now I will tell you what is happening in the World of Truth [the afterworld – ed.] My Meirka says to Shlomo "Be happy Shlomo that you were privileged. I was not privileged. I was not privileged to cast myself down in order to save the people of Israel. You were privileged! Professor Oman rose up from the ground and hugged Rabbi Gustman and said "You have comforted me, you have comforted me".

When Dr. Feingold's sons approached the age of conscription, he asked Rabbi Gustmann, who was admired by all of the great rabbis, even among hareidi circles: What does it say in the Torah of Moses: To go to the army or not? Rabbi Gustman replied: In the Torah of Moses our Teacher it says "Will your brothers go to war while you yourselves sit here?!" (This is what Moses our Teacher said to the sons of Reuven and Gad) (Rav Eliezer Melamed, *Peninei Halakhah b'Inyanei Ha'am Ve-haaretz* 85-86 (5765)).

These comments express an additional value-related aspect of the duty of conscription, which is that the service in the I.D.F is not only a duty but also a privilege.

4. In conclusion, my view accords with the view of the President, that the Law for Deferment of Military Service for Yeshiva Students for whom the Torah is their Calling (5762-2002) is not constitutional. Given the date upon which the validity of the Law is due to expire, this means that it will not be possible to extend it.

Justice

Justice A. Grunis

1. Once again we are confronted with the subject of the non-enlistment of the haredi yeshiva students into the Israeli Defense Force. In my view, as opposed to the view of my colleagues, it would be preferable for the Court to altogether avoid addressing the subject and to leave it in the public arena, outside the courtroom. In my opinion given about six years ago in HCJ 6427/02 *Movement for Quality Government in Israel v. The Knesset* [2], I explained by position according to which there is no justification for applying judicial review in this case, to a law of the Knesset. The reason is that the relevant law – Deferment of Military Service for Yeshiva Students for whom the Torah is their Calling Law (5762-2002) – is a law in which the majority granted an extra privilege to the minority. As I wrote at the time "When a majority acts by democratic means and adopts a law which confers preference to a minority, the court should not become the patron of the majority (para.1 of my opinion in HCJ 6427 [2]);

2. In accordance with the result of the majority position in this proceeding (President D. Beinisch, Justice M. Naor, Justice E.

Rubinstein, Justice E. Hayut, Justice H. Meltzer and Justice N. Hendel), the Law will remain in effect until its last day 1 August 2012 and it will not be possible to extend it again. By reason of this decision, the Knesset has two possibilities: The first – not to adopt another law to replace the law that expired; the second – to adopt a new law that will attempt to provide a between answer to the problems and defects which were pointed out by the majority justices.

Should the first possibility be adopted, namely that the Knesset avoids the adoption of a new law on this subject, theoretically it would mean that the young haredi men, who do not currently enlist into the army, would be obliged to enlist, as do the members of the majority. It seems to me that there are very few people in the State (and perhaps even that is an exaggeration) who believe that there is an expectation of a mass enlistment of the members of hareidi yeshivas into the I.D.F. In the event that no new law was adopted, and a petition was filed in which the Government, including the Minister of Defense, was requested to force the enlistment – would a judgment that accepted the petition actually lead to the desired enlistment ?! I think that the answer self-evident.

The other possibility, which seems more realistic than the previous one, is that in the wake of the judgment, the Knesset would adopt a new law that would attempt to rectify, to an extent, the defects of the current law. It may already be presumed that this law would not satisfy the demands of certain elements of the majority (comprising secular tradition and religious Jews who enlist in the army). As such there is no doubt that in the future another petition would be filed, consisting of the objections to the new law. This Court's repeated involvement in the subject of the enlistment of haredi men without any substantial progress on the matter, certainly does nothing to enhance the stature of this Court. It is illusory to expect that a judicial decision will

lead to the enlistment of the hareidi men into the I.D.F and their entry into the work force. Social and economic changes are able to bring about the hoped for changes. The ability of the Court to influence in cases of this kind is meager.

3. Summing up, there is no justification for the intervention of the High Court of Justice in this case. The reason for this is that our concern is with a decision of the majority in the State (as per Knesset representation) to enact a law that gives an extra privilege – not to enlist into the army – to a minority. Where it concerns a right of this nature, which does not involve a violation of the democratic mechanisms, or harm to individuals, in their capacity as individuals, or harm to a minority group – there is no justification for judicial review. And what's more – the contribution of the Court to changing the social conduct of an entire sector of the Israeli population is particularly limited, and does not justify the interference of the Court in the matter.

4. Were my opinion to be heard we would deny the petitions.

Justice

Vice President E. Rivlin

I concur in the view of my colleague, Justice A. Grunis that it is doubtful whether there should be a litigation of subject currently concerning us. My reason is that the subject of the enlistment (or non-enlistment) of students in the haredi yeshivas is first and foremost a complex *social* issue, the solution to which is evolutionary. It has already been held in HCJ 6427/02 [2] that "The change recommended by the Tal Commission, and which the Knesset sought to realize is a gradual social change based on consensus…The Deferment of Service Law deals with

one of the basic problems of Israeli society, which cannot be resolved by the stroke of a pen; its concern is with a sensitive matter that requires understanding and agreement; it seeks to provide solutions that are neither easy nor simple. In the first place it was enacted as a temporary provision….all of this compels us to wait with out conclusions. Those implementing the Law should be permitted to fix what they broke. Israeli society in general and specifically the haredi society must be allowed to internalize the arrangements of the Law and the methods by which its provisions are to be realized". At that time the Court reached the conclusion that "in the event of there being no substantive change in the results of the implementation of the Law, there will be room to consider its declaration as being void". Like my colleague, Justice E. Arbel I think that notwithstanding the passage of time since decision that was given in HCJ 6427/02 [2], we have still not reached the end of the road, and that it would not be proper at this stage to decide the fate of the petition. As such, I concur with the position of Justice E. Arbel, and the respondents should be given until the month of July 2012 to file an update regarding the rate of progress of the proceedings and the measures that are being adopted by Executive to implement the objectives of the Law.

As noted by my colleague the President D. Beinisch, it would seem that the Deferment Law has yet to fulfill the many hopes pinned on it. Today, this conclusion is also shared by various political bodies, so that presumably, the result proposed by my colleague the President, which reflects the position of the majority justices in the panel, is also consistent with the emerging political practice. It may be hoped that the legislative body, when conducting its substantive examination of the Law's provisions, will exploit the time remaining for a meticulous examination and that having regard for the comments of the Court, in this judgment and in the previous judgments dealing with the subject, it

will succeed in the determination of a new arrangement, which is constitutional and which arranges the subject in its entirety.

In view of which I concur with the position of my colleague, Justice E. Arbel, in accordance which the petitions should be left pending, and the respondents should be be ordered to file, in the month of July 2012, an updating notification concerning the rate of progress of the proceedings and the means that are being taken by the Executive to implement the objectives of the Law.

Vice President

It was decided by the majority opinion – President D. Beinisch, Justice M. Naor, Justice E. Rubinstein, Justice E. Hayut, Justice H. Meltzer, and Justice N. Hendel to grant the petitions and to make the order *nisi* absolute in the sense that the Deferment of Military Service for Yeshiva Students for whom the Torah is their Calling Law, 5762-2002, in its present form will not be extended and its effect shall expire on 1 August 2012, against the dissenting view of the Vice President, E. Rivlin, and Justice E.Arbel who opined that the petitions should be left pending the receiving of updating notifications regarding the future implementation of the Law; and as against the dissenting opinion of Justice A. Grunis who opined that the petitions should be denied.

Handed down today, 28 Shevat 5772 (21 February 2012)

(-)	(-)
President	Vice President

(-)	(-)	(-)
Justice	Justice	Justice

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Justice `	Justice	Justice	Justice