H.C.J 3094/93

H.C.J 4319/93

H.C.J 4478/93

A.H.C. 4409/93

1. The Movement for Quality in Government in Israel

(H.C. 3094/93, H.C. 4319/93).

2. Moshe Kirstein

(H.C. 4478/93)

3.Adv. Zeev Trainin

(A.H.C. 4409/93)

v.

1. State of Israel

2. Prime Minister

3. Attorney General

4. Rabbi Arye Deri

5. Shas, International Organization of Tora Observant Sepharadic Jews

In the Supreme Court Sitting as High Court of Justice
[September 8, 93]
Shamgar P., Barak J., D. Levin, J. Goldeberg J., Mazza J.

Editor's Summary*

These petitions concern the continued tenure in office of the fourth respondent as a Minister in the Government, after he was charged with accepting a bribe, breach of trust on the part of a public servant, obtaining something by deceit under aggravating circumstances, false entry in corporate documents and stealing by a director

The petitioner in H.C. 4319, 3094/93, argued that proper legal and public norms demand an immediate end to the 4th respondent's tenure of office as a Minister. This petitioner's approach is similar to

* Edited by Prof. A. Enker

that of the third respondent, as expressed in his application to the second respondent. In the opinion of the second respondent he is not in duty bound by law to use the powers vested in him by section 2lA of the Basic Law: the Government in order to remove the 4th respondent from his office as a Minister. The second respondent drew attention to the letter which the fourth respondent had deposited with him before the fifth respondent had joined the Government, in which he undertook that "if and when an indictment be brought "against him in court, he would suspend himself from the Government of his own accord. The second respondent saw, and sees, this arrangement, as expressed in the said letter, not only as a unilateral undertaking by the 4th respondent, but also as a parallel undertaking on his part not to exercise his power under section 21A of the Basic Law: The Government unless the circumstantial conditions laid down in the letter are fulfilled.

According to the argument, the suspicions raised in the past against the fourth respondent, despite which he was elected to the Knesset, were no less serious than those contained in the indictment. It was argued, therefore, inter alia, that there was no real change of circumstances which justified the exercise of the power under the above section 21A, which is a discretionary power. It was argued further that the arrangment in the Basic Law: The Government with respect to Ministers and Deputy Ministers is a negative one - that is, there is no obligatory provision of law there.

The High Court held as follows:

A. (l) In section 21 A of the Basic Law: The Government the 3rd respondent was given the power to transfer a Minister from office without being bound by any extraneous obligations while exercising his power in accordance with its legislative purpose.

(2) An undertaking to restrict in advance the power to remove a person from office in the Knesset, the Government, a State service, an association established by law, a government company or any other public body, would be incompatible with the express and clear provisions of the Basic Law: The Government and would also not be consistent with the general principles of administrative law.

B. (l) Section l3A of the Basic Law: the Government was intended, from the point of view of legislative purpose, to prevent agreement and undertakings expressive of faulty and invalid processes in political life in general and in parliamentary life in particular.

(2) Section 13A(b) is intended to preserve and ensure the freedom of discretion of the holder of a statutory power in order to enable him to exercise his power to remove a person from office - when this is called for on the grounds of substantive considerations and all the more so when the law demands it. It is intended to prevent negation and cancellation in advance of the power of the authority, within the framework of a political deal.

(3) Exercise of the power must be reviewed against existing conditions or conditions created at the time when the exercise of the power was under consideration. A promise in advance not to exercise a power means that the holder of the power cannot exercise it even when the circumstances make it necessary to do so, as he fettered himself in advance. In this manner the power would be deprived of content and purpose.

(4) Where there are considerations which, in the light of all the data, require the exercise of the power to remove someone from office, it is unlawful for the holder of the power to refrain from exercising it because he has promised in advance that he would not do so even if the circumstances should demand it.

(5) In the present circumstances the 4th respondent's undertaking, which can be seen to be an agreed bilateral arrangement, drastically defies the prohibitions in section 13A(2) of the Basic Law: The Government and should be deemed to be absolutely invalid.

C. (I) The power conferred by section 21A(a) of the Basic Law: The Government is a discretionary one. Discretion is generally granted to any statutory authority in order that it may have freedom of action in fulfilling its variegated functions in circumstances which vary from time to time. In that way the authority is enabled to weigh up the circumstances in every problem brought before it and find an appropriate solution.

(2) Insofar as exercising discretion is concerned there is no difference between exercising a power and refraining from exercising that power: not only can the unreasonable exercise of a power be invalidated, but also refraining to exercise a discretionary power for unreasonable reasons can lead to the conclusion that it was invalid.

(3) Even when the legislator did not impose a duty to exercise a power in a defined manner, or when the duty to exercise a power does not follow from the substance of a matter, there is born and arises, together with the grant of a power, the duty to weight up also the very need and justification for exercising it.

D. (l) When examining the possibility of exercising a power the statutory authority must take account of all the relevant elements: that is, of all the subjects which create a mosaic of the data before it, it being obvious that it cannot take account of extraneous circumstances.

(2) Where parliamentary-political life is concerned, one cannot rule out taking account of circumstances which arise due to political considerations.

(3) The question of whether the result was reasonable or not would depend, amongst other things, on whether proper weight was given to all the various considerations.

E. (I) Discretionary power becomes a power which it is a duty to exercise when the factual circumstances are such that the basic values of our constitutional and legal system make failure to exercise it so unreasonable as to go to the root of the matter.

(2) The power granted by section 21A of the Basic Law: The Government can be exercised in order to enable the government to function properly and to lead to the removal of a minister who does not fit in the web of government policy or who defies the principle of collective responsibility. The power is vested also in order to enable a reaction, in the form of removal from office, to a serious event in which a member of the government is involved, when that event, be it either an act or an omission, reflects on the status of the government, on its public image, on its ability to provide, and serve as, an example, on its capacity to ingrain proper standards of conduct, land, mainly, when it has repercussions on the public's confidence in the system of government, on the values upon which the system of government and law is built, and on the duties of the ordinary citizen which arise from them.

(3) This has no reference to moral norms which have no basis in law. The reference is to the law of the country according to which failure to exercise a power vested in a functionary converts the omission, in certain circumstances, into something extremely unreasonable.

F. (l) The fact that the Government depends on the confidence of the Knesset, and that this gives transcendental expression to the broad public's confidence, does not make the exercise of the power under section 21 A of the Basic Law: The Government when the circumstances demand it, redundant.

(2) Suspending a decision, following upon the revelation of serious offences on the part of a minister, because of the contention that there is no room for action on the part of the Prime Minister until the Knesset- if in fact it does - brings a vote of no-confidence in the Government in order to effect, indirectly, the dismissal of the minister, would amount to interpreting the very meaningful legal provision in section 21A as a minor provision intended to promote internal disciplinary measures only. This is a mistaken estimate of the scope of the power given to the second respondent under this section.

(3) In the present case the indictment against the fourth respondent includes allegations of corruption of an extremely serious nature. Even though it only reflects the prima facie evidence collected by the prosecution and even though it is not a judgment, insofar as continued office in

the Government is concerned even the prima facie evidence collated in the indictment, and which has now become public knowledge, is of significance. There are circumstances which are significant from the point of view of reasonability, not only for purposes of judicial determination but also for establishing the nature of the acts attributed in the indictment.

G. (Per Justice E. Mazza):

(l) The second respondent sought to take issue with the Attorney General concerning the very substance of the legal norm applicable to the subject of removing a minister from office and did not give expression to an independent public stand with the aid of his reasons.

(2) The approach is contrary to the constitutional principle according to which the Attorney General is the person qualified to interpret the law vis-a-vis the executive.

(3) Even after it has been explained to the second respondent that the agreement which he had made with the forth respondent was invalid ab initio, he had stuck to his original stand, while seeking to justify it with the aid of legal reasons which contradicted the binding legal opinion of the third respondent:

H. (Per Justice D. Levin):

(I) A minister who sits at the government table as a representative of a party or movement undoubtedly fulfills a political function. He gives expression thereby to opinions had points of view and to the political and social path of the public which elected him and of the movement which regards him as its representative in the government set-up.

(2) When the minister fulfills an administrative function he is subject to review by the High Court of Justice. Within the framework of this review the court will examine whether the minister was punctilious about applying proper administrative procedures, whether he exercised his authority in accordance with the general principles laid down by law and judicial precedents and whether, when providing a service to the citizen as a public trustee, he behaved fairly, reasonably, equitably and without prejudice. If he sins against any of these principles then his political function should, generally, not serve as a defence. If that be the position in general, how much more so would it be the case when a minister errs and becomes tainted with the stain of an offence against the law.

(3) If an indictment based on prima facie evidence is brought against a minister, indicating that he is suspected of serious offences which by their circumstantial nature and content involve ignominy, it would not be proper or reasonable for him to continue in office. It would be proper

for the minister to reach this conclusion of his own accord for the sake of public hygiene and as a mark of respect for the principles of the rule of law, even if he be convinced of his own innocence and clean hands.

(4) If the minister does not do this then the second respondent must weight up whether circumstances have not arisen which would demand the exercise of his power under section 21A(a) of the Basic Law: The Government to remove the minister from office.

(5) When a demand that the exercise his discretion be made he may take into consideration parliamentary-political aspects, as it is only natural and understandable that the second respondent will seek to preserve his government and save it from collapsing. But the implications of the indictment cannot be ignored and the minister cannot be left in office as though nothing had occurred for the sake of the Government's survival and because of the desire to further government policy, however important this may be.

I. (Per Justice E. Goldberg):

(1) One cannot deny the existence of a political aspect in the matter under consideration. But this aspect must not be regarded as divorced from public administration.

(2) In any clash between the two aspects one cannot say that the public administration norm will not apply at all only because the functionary is a minister or deputy minister.

(3) A balance between the two aspects makes it obligatory that the court's power to intervene in the exercise of discretion of whosoever is empowered by law to remove a minister or deputy minister from office be limited to cases in which the seriousness of the circumstances in which the alleged offence was committed cannot be reconciled with continuation in office.

Israel Supreme Court Cases Cited:

[1] Election Appeals 2,3/84 *Neimann v. Chairman of Central Elections Committee for the llth Knesset; Avni v. The Same* 39 (2) P.D. 225.

[2] H.C. 1523, 1540/90 *Levi v. The Prime Minister* 44 (2) P.D. 213.

[3] H.C. 1635/90 *Jarjevsky v. The Prime Minister* 45 (1) P.D. 749.

[4] H.C. 142/70 *Shapira v. The Israel Bar, Jerusalem* 25 (1) P.D. 325.

[5] H.C. 4566/90 *Dekel v. The Minister of Finance* 45 (1) P.D. 28.

[6] F.H. 16/61 *Register of Companies v. Kardosh* 16 P.D. 1209.

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

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

[9] H.C. 190/57 *Asaig v. Minister of Defence* 12 P.D. 52.

[10] H.C. 2/80 *Bat v. Minister of Religious Affairs* 34(3) P.D. 144.

[11] H.C. 596/75 *Maccabi Tel-Aviv v. Broadcasting Authority* 30 (1) P.D. 772.

[12] H.C. 542/76, 103/77 *Int. Consortium v. Director General, Ministry of Communications* 31 (3) P.D. 477.

[13] H.C. 653/79 *Azriel v. Director of Licensing Department* 35 (2) P.D. 85

[14] H.C. 376/81 *Lugassi v. Minister of Communications* 36 (2) P.D. 499.

[15] H.C. 4267, 4287, 4634/93 *"Amitay" v. The Prime Minister* 47 (5) P.D. 441.

[16] H.C. 6177, 6163/92 *Eisenberg v. Minister of Construction and Housing* 47 (2) P.D. 229.

English Cases Cited:

[17] *Rex v. Robert. Ex parte Scurr* [1924] 2 K.B. 695 (C.A.)

E. Shraga, E. Shapira - for the petitioners in H.C. 3094/93 and H.C. 4319/93;
The Petitoner in H.C. 4478/93 - appeared on his own behalf;
D. Beinish, N. Arad- For the First three respondents in H.C. 3094/93, H.C. 4319/93 and H.C. 4478/93.
Z. Agmon, Y. Hirch - for the 4th, 5th respondents in H.C. 3094/93, H.C. 4319/93 and H.C. 4478/93;
The Applicant in A.H.C. 4409/93 - appeared on his own behalf.

JUDGMENT

The President:

The petitions

1. These petitions are aimed against Rabbi Arye Deri's continuing to serve as a member of the Government in his capacity as the Minister of the Interior.

The petition in H.C. 4319/93 evolves directly from the fact that an indictment was filed against Minister Arye Deri; that in H.C. 3094/ 93, which preceded the former petition, deals with the chain of events before the indictment. In the course of proceedings the petition in H.C. 3094/93 was waived, as the petition in H.C. 4319/93 took its place. The petition in H.C. 3094/93 is therefore cancelled.

The petitions in A.H.C. 4409/93 and H.C. 4478/93 are applications to be joined as respondent and petitioner, respectively, in the main petition.

2. (a) The indictment against Minister Arye Deri was submitted to the Knesset on August 2, 1993. It was accompanied by a request that the question of lifting Minister Deri's immunity in accordance with the provisions of section 13 of the Immunity, Rights and Duties of Knesset Members Law, 1951, be considered. The Knesset Committee discussed the said request already on 3.8.93 and decided to continue their deliberations on 26.9.93.

(b) **The Indictment**

The indictment contains the following offences against the law:

(1) Accepting a bribe contrary to section 290 of the Penal Code, 1977 (hereinafter "the Code").

(2) Breach of trust on the part of a public servant, contrary to section 284 of the Code.

(3) Obtaining by deceit under aggravating circumstances, contrary to the last part of section 415 of the Code.

(4) False entry in corporate documents, contrary to section 423 of the Code.

(5) Stealing by a director, contrary to section 392 of the Code.

Each of the above provisions of the Code embrace a substantial number of acts and not only an isolated one.

(c) The facts, whose legal headlines appear above, and which reflect the prima facie evidence in the hands of the prosecution, are described in detail in an indictment which consists of 50 pages. The events dealt with in the indictment concern Minister Deri's exploitation of his office and standing, at first when he served as an assistant to the Minister of the Interior and in charge of his office, in his capacity as the Director-General of the Ministry of the Interior, and afterwards as Minister of the Interior. He fraudulently caused money to flow from state funds to various societies in which he was either active himself or was otherwise involved; these societies transferred to him, either directly, or by making payments to others on his behalf, over a long period of time and on many occasions, bribe money, in exchange for his assistance in getting funds for them. The sum total of these bribes was NIS 135,000 (at the time of payment their value was about $ 71,000). In addition there were sums of money, whose value then was about $95,000, which were transferred in other ways, as well as other gratuities.

Another section deals with the use of the respondent's position and connections, as an official of the Interior Ministry, in order to further the granting of a sum of NIS 500,000 to a society in which he was active, by moving the Ministry of Religious Affairs through false representations. This money was used in a deceitful manner and not for the declared purpose, with the aid of fraudulent records and various misrepresentations.

A third section deals with conspiring to move government bodies to grant land to persons, who had bought plots in Nebi Samuel from one of the above societies, when it transpired that the society in question could not fulfil its obligations towards them. The respondent acted in a manner involving an absolute clash of interests, concealed facts and made false representations in order to receive privileges and money - for his societies - and through them for himself.

Within the framework of his activities for the purpose of forwarding the affairs of the societies which paid him bribe money in exchange for his services, the respondent initiated a grant of NIS 200,000 from the Jerusalem Municipality to one of these societies. For this purpose an extraordinary sum was budgeted, contrary to Interior Ministry practices.

An additional matter concerns the appointment of Moshe Weinberg, his accomplice in most of the above offences, to the post of chairman of the appointed Local Council of Lehavim, in order to enable him to draw a salary and have an official car. This Weinberg had previously been a real estate and haulage agent and for some time had been the respondent's driver. Weinberg was heavily debt-ridden and his appointment to public office was intended to rescue him from his troubles.

3. **The Parties' Arguments**

From the parties 'written and oral arguments before us it would appear that the petitioners maintain that proper legal and public norms demand an immediate end to Minister Arye Deri's tenure of office. This approach is consistent with that of the Attorney General who told the Prime Minister, both in writing and verbally, that once the above indictment had been submitted to the Knesset, on August 2, 1993, it was only proper that Minister Deri's tenure of office be terminated. Mr. Harish, the Attorney General, said the following in a letter dated August 6, 1993:

> "From now and until the end of his trial it would be contrary to the basic principles of law and government, and also unethical, for Mr. Deri to continue to serve as a Minister in the Government."

In written arguments the Attorney General added further details and summed up his stand as follows:

"(a) The letter containing the undertaking which Minister Deri deposited with the Prime Minister (a document to which we shall refer later - M.S.) made his tenure of office as a Minister in the Government and a member thereof basically conditional; and, therefore, nothing is being taken away from him today, only the question of granting a conditional right to his very tenure as Minister of the Interior in the Government, being at issue.

(b) From the moment that Minister Deri signed his letter the circumstances changed, mainly because the suspicions and evidence that had not been thoroughly examined before

then became embodied, in a clear and concrete indictment, into offences involving ignominy for the person accused of them.

(c) As long as there is a weighty suspicion that Minister Deri committed these offences, his trustworthiness as a person in charge of public money on behalf of the government is questionable; and in this I find even the fear of a conflict of interests insofar as his function as Minister of the Interior is concerned, mainly with respect to the manner in which he exercises his discretion in matters connected to subjects bound up with the suspicions against him.

(d) Insofar as the allegations in the indictment and the offences of which he is suspected are concerned, the indictment which is before the Knesset today must be seen as having progressed beyond the corridors of the court, and Minister Deri must therefore immediately honour his undertaking to suspend himself from the Government. In this matter the process of lifting his immunity will not serve as a stumbling-block in the way of the duty to terminate his tenure of office as a Minister in the Government."

4. Minister Arye Deri informed the court , through the learned counsel for the International Organization of Torah Observant Sepharadic Jews (Shas) (the 5th respondent), that he saw no room for appearing and putting his case before us personally as expression would be given to his stand in the arguments brought on behalf of the 5th respondent, whom he represents in the Government. He added that he would of course honour any decision of the court.

5. The stand of the Prime Minister, as conveyed to us by the Attorney General and which can also be gathered from the written material submitted by the Attorney General, is that he is not obliged by force of law to exercise the power vested in him by section 21A of the Basic Law: The Government to remove Minister Deri from office .

In this context the Prime Minister referred, in his letter of August 22, 1993, to the Attorney General, to the course of events in the matter before us which accompanied the formation of the Government in July, 1992: about a year ago, in a letter dated July 2, 1992, the Attorney General brought the Prime Minister's attention to the fact that an investigation

was being conducted by the police against Minister Deri. In his letter the Attorney General spoke of "heavy suspicion of criminal acts which have not yet been thoroughly examined and clarified" and mentioned the use to which Minister Deri had put his right to remain silent. On July 6, 1992, there was a meeting between the Prime Minister and the Attorney General, and on the strength of what was agreed there, with the consensus of the Attorney General, Minister Deri deposited a letter with the Prime Minister in the following language:

> "If Shas joins the Government which you will head, and if Shas decides that I should be a member of the Government, and in the light of the Attorney General's letter to me concerning my affairs, and on the strength of your request to me, I hereby inform you that if and when an indictment is brought against me in court I will suspend myself from the Government of my own accord."

The Prime Minister saw, and sees, in the arrangement to which expression is given in the above letter, not only a unilateral undertaking by Minister Deri but a parallel undertaking on his part not to exercise his power under section 2IA of the Basic Law: The Government, unless the circumstantial conditions laid down in the above letter ("...when and if an indictment is brought...in court") are fulfilled.

In July, 1992, a Government was formed which included Minister Deri. His letter was brought at the time to the notice of the Knesset, as required by section 13B of the Basic Law: The Government, and exposed openly to the public.

In the Prime Minister's letter of August 22, 1993, to the Attorney General, which is in the nature of a reply to the detailed and reasoned opinion of the Attorney General, of August 6, 1993, a substantive part of which was quoted above, he notes that he does not accept the Attorney General's approach, in accordance with which, since July, 1992, there had occurred a change of circumstances expressed centrally in the submission of the indictment to the Knesset, for the following reasons: in the meantime Minister Deri had abandoned his right of silence and answered his interrogators' questions; the suspicions of July, 1992, were no less serious than those embodied now in the indictment, and perhaps even the opposite was the case; the fear of a conflict of interests raised by the Attorney

General in his above letter was exposed and known at the time the Government was formed.

It was argued further that cognisance should be taken of the fact that in the matter of removal from office the legislature had laid down express provisions for electees and for functionaries other than ministers or deputy ministers, as can be seen in the State Service (Discipline) Law, 1963, in section 42B of the Basic Law: the Knesset, in section 20 of the Local Authorities (Election and Tenure of Head and Deputy Heads) Law, 1975, etc. On the other hand, the Basic Law: The Government makes no provision for the suspension of ministers and deputy ministers or their removal from office because of suspicions, investigations or criminal charges. Which means that when the legislature saw fit to enact obligatory provisions for the removal from office on account of criminal acts, it did so by law. The arrangement in the Basic Law: The Government, in respect of ministers and deputy ministers, is a negative one, which means that there is no similar obligatory provision of law there.

As stated in the Prime Minister's letter of 22.8.93:

> "In this serious matter there exists, according to the law, a fundamental and substantive difference between **electees** and **functionaries**. And it was not only incidentally that the legislature enacted different provisions for these two categories. The electee serves by virtue of **the confidence of the public** which elected him in a democratic process, and which has the power to remove him from office in the same manner if he is found to be tainted. There must, therefore, be **very serious reasons** for removing an electee from office or suspending him, such as a criminal conviction of an ignominious nature, a prison sentence, etc. - which does not apply to ordinary functionaries."

The Prime Minister also referred to the precedent which was created, in his opinion, in the case of Aharon Abuhazeira, who continued to serve in the Government while two

criminal actions were being conducted against him, and the then Attorney General, Professor I. Zamir, took no action whatsoever.

As noted, it is argued that there is no legal norm for the matter before us, and that the opinion of the Attorney General is based on public norms pertaining to the confidence of the public in the system of government. But according to the Prime Minister this should be countered by a norm of no less public importance - that is, confidence in the Prime Minister, who formed a Government on the strength of an undertaking which received the approval of the Attorney General, and who is now asked to breach his undertaking on a public and personal plane without any real change in the circumstances. The Prime Minister sums this up in the following manner:

> "The matter before us is unique and special, as it has nothing whatsoever to do with the question of interpreting a law but concerns a confrontation between two public norms. And this is particularly so after I made an undertaking in this matter, and even acted upon it, on the strength of your opinion given me only about a year ago, and for dishonouring which undertaking I can find no possibility, reason or justification."

6. The 5th respondent, in a written declaration and in the arguments before us by its learned counsel, Advocate Zvi Agmon, also supported the idea that there is no binding law concerning the removal of a minister from office because he has been indicted. Insofar as a member of the Knesset who is also a member of the Government is concerned, he was of the opinion that what was operative here was the Knesset's confidence in the Government. Section 21A of the Basic Law: The Government was enacted only in 1991 and until then the Prime Minister had no power to dismiss a minister, the termination of whose tenure of office could be effected only by his resignation or by the resignation of the whole Government. This section, he argued further, was intended mainly for the purpose of preventing "irregularities" in the Government's actions. At any rate its application in any particular instance came entirely within the discretion of the Prime Minister.

Advocate Agmon, whose arguments paralleled to a great extent the stand of the Prime Minister, as apparent from his letters and from the speeches of the State Attorney who appeared on his behalf before us, referred also, for the purpose of comparison, to express laws concerning removal from office of other functionaries and sought thereby to bolster his conclusion that the absence of legislation concerning ministers is not coincidental. He found this interpretational conclusion to be logical for the following reason: according to the constitutional construction of the regime in Israel, the Government rules by virtue of the confidence of the Knesset, and is collectively responsible to the Knesset. The Knesset is the elected representative of the people as a whole and it can decide when a minister's tenure of office should be terminated, and when not, by using its sovereign power to express a lack of confidence in the Government and, indirectly, in a minister serving in the Government.

In the course of proceedings before us the learned counsel for the 5th respondent agreed that the above section 21A could possibly be applied in the case before us, but added that just as its application should be reasonable so could a decision concerning its non-application be reasonable.

7. Advocate Zeev Trainin, the petitioner in A.H.C. 4409/93, argued before us that the court should take into account the party-political repercussions of any decision concerning Minister Deri's removal from office. Mr. Moshe Kirstein, the petitioner in H.C. 4478/93, who asked to be joined as an additional petitioner, and in whose case no order nisi was given, argued that this court must not intervene in the dismissal of a minister as long as there is no express provision of law on the subject.

8. **The Legal Subjects On Which The Proceedings Were Based**

We shall now proceed to analyse the arguments before us. Two central legal problems were raised before us. The first is the legal validity of the undertaking which the Prime Minister claimed he had imposed upon himself when Minister Arye Deri signed the letter of July 6, 1992, (the contents of which were given in full above) before him.

The second question bears on the nature of the Prime Minister's powers under section 21A of the Basic Law: The Government, which deals with removal of a minister from office.

We shall commence with the question of the undertaking of July 6, 1992.

9. **Undertaking not to Remove a Minister from Office**

According to the simple wording of the letter of July 6, 1992, it contains a declaration by Minister Arye Deri, dressed as an undertaking on his part, that in the given circumstances, as set out there, he would suspend himself of his own accord from the Government. This declaration was bound up with negotiations for forming a Government , and came following upon a letter from the Attorney General in which he sought to inform the Prime Minister of the existence of an investigation against Minister Deri and of the general substance of the investigation. The Attorney General's letter did not only convey information, but it also contained expressions of doubt concerning the advisability of including in the Government someone concerning whom, at the time, investigations, as described in the said letter, were being conducted. In this context the letter said that it was advisable that the Prime Minister take account of the facts described when weighing up - if at all - the question of the candidacy of Minister Deri for office in the Government which he (the first respondent) was about to form.

After the first respondent had given due consideration to the contents of the Attorney General's letter and had decided to include Minister Deri in the Government, on the basis of the written undertaking of July 6, 1992, and following upon it, it is reasonable to conclude that what was contained in the above undertaking was acceptable to both parties: that is, that the yardstick provided for in the undertaking would guide both Minister Deri and the Prime Minister. In other words, just as the one undertook to leave the Government in given circumstances, as described in the undertaking, so did the other, who had decided to include Minister Deri in the Government, take it upon himself to honour the condition concerning the timing of the resignation from office contained in the undertaking. From a legal point of view the conclusion is, therefore, that the Prime Minister agreed not to remove Minister

Deri from office as long as the conditions laid down in the above undertaking of Minister Deri had not been met.

10. An undertaking to restrict in advance the power to remove a person from office in the Knesset, the Government, state service, an association established by law, a government company or any other public body, would be incompatible with the express and clear provisions of the Basic Law: The Government, and would also not be consistent with the general principles of administrative law. Fettering the power clashes with the legislative purpose of vesting the power, in accordance with which the Prime Minister may remove (a person) from office when the circumstances brought to his attention justify or demand this, and there is no reservation or condition attached to this save for the substantive necessity to exercise this power for its legislative purpose.

11. (a) The relevant provision of enacted law is contained in section 13A(b) of the Basic Law: The Government, which states that:

"Where, by law, power is given to remove a person from office in the Knesset, in the Government, in state service, in an association established by law, in a government company or in any other public body - no agreement and no undertaking concerning the non-removal of that person from office may be made."

The "power to remove a person from office" is, in the case under consideration, the power of the Prime Minister by virtue of section 21A of the Basic Law. The prohibition against giving an undertaking in connection therewith, as contained in section 13A, is unequivocal.

In other words, while section 21A of the Basic Law: The Government vests the Prime Minister with the power to remove a minister from office, without being tied to any extraneous undertaking and while exercising his power within the confines of the aim of the law (see E.A. 2,3/84 [1], at p. 252, opposite A) an undertaking not to exercise this power to remove from office, unless the conditions contained in the above letter have been met, is equivalent to an undertaking on the part of the Prime Minister to limit in advance his statutory power, whatever the factual circumstances which might occur.

The said section 13A was added to the Basic Law: The Government on the strength of the Basic Law: The Knesset (12th amendment) which came into force on 22.2.91; that is, only one-and-a-half years before the above undertaking, signed by Minister Deri, was given. The amendment to the law came at the initiative of the Constitution, Law and Justice Committee of the Knesset and it is patently clear from its content, including what is contained in sections 13A (a) and (c), that this addendum to the law is a sequel to what was held by this court in H.C. 1523, 1540/90 [2], and an echo of the problems raised in the proceedings in H.C. 1635/90 [3].

(b) From the point of view of legislative purpose, section 13A , with all three of its sub-sections, is intended to prevent agreements and undertakings expressive of faulty and invalid processes in political life in general and in parliamentary life in particular.

(c) Subsection 13A(a) deals with an agreement containing an undertaking concerning the office of a minister or deputy minister, and is intended to prevent the acquisition of support from a member of the Knesset who belongs to another party, in exchange for a promise to appoint a minister or deputy minister.

(d) Subsection 13A(b), with which we are concerned here, is intended to preserve and ensure the freedom of discretion of the holder of a statutory power, in order to enable him to exercise his power to remove a person from office - when this is called for on the grounds of substantive considerations, and all the more so when the law requires it. It is intended to prevent negation and cancellation in advance, in the framework of a political deal, of the power of the authority.

The legal power **to appoint** and the legal power **to remove from office** were granted by law to any particular functionary in order to enable him to carry out the administrative duties within his charge, in accordance with the law which granted him the power and subject to the conditions, if any, attached to it by the legislature. Exercise of the power must be reviewed against existing conditions or conditions created at the time when the exercise of the power is weighed up. A promise in advance not to exercise a power means that the holder of the power cannot use it even when the circumstances make it necessary to do so,

as he fettered himself in advance. In this manner the power would be deprived of content and purpose.

What is said above flows from the standing and duties of a public functionary, either elected or appointed, and is encompassed in them. The powers of a functionary in public service are intended to be used for the general good. Every electee and every holder of office is a servant of the general public (H.C. 4566/ 90,[5]). As we have explained on more than one occasion , this means that the power to appoint or to remove from office should be exercised fairly, without extraneous considerations and for the good of the public.

In every instance when the exercise of such power is required it is only right that the said exercise be reviewed in the light of the circumstances and of all the factors, and while striking a proper and reasonable balance between the various considerations. But, according to the provisions of section 13A(b), the holder of the power is forbidden, inter alia, to fetter his considerations in advance in order to give preference thereby to the political-party consideration whatever the weight of the other factors may be. That is to say, where considerations arise which, in the light of all the data, require the exercise of the power to remove (a person) from office (a subject to which we will return and discuss later) it is unlawful for the holder of the power to refrain from exercising it because he has promised in advance that he would not do so even if the circumstances should demand it.

(e) The last subsection of section 13A - subsection(c) - deals directly with the circumstances which were examined and disqualified by this court in H.C. 1523, 1540/90, [2], above, (financial guarantees) and there is no need to discuss it in detail here.

(f) To sum up, section 13A as a whole comes to prohibit limitation of freedom of action on the part of an authority. It demarcates the boundaries of what is permissible and what is forbidden in the matters described here, in order to cultivate public integrity and to limit the things which can be used, lawfully, as rewards in political deals. Section I3A seeks to ensure that a statutory power conferred on a functionary for the purpose of carrying out his duties will be used by him for the general good. Furthermore, section 13A clothes in legal-statutory dress desirable and obligatory public norms and the prohibitions laid down by law which complement them.

As mentioned above, it was already held by this court, before the enactment of section 13A, that the acts described in it are contrary to the general principles of law.

12. In the light of the thesis propounded by the first and fifth respondents, in accordance with which it is not a unilateral obligation on the part of Minister Deri which we are dealing with, but a bilateral agreement - which is a reasonable conclusion, per se, in the light of all the circumstances - the bilateral obligation which emerges from Minister Deri's letter of July 6, 1992, quoted above, should be seen as an obligation which drastically defies the prohibition in the above section 13A(b). It must, therefore, be deemed to be absolutely invalid: it does not contain any valid limitation of the Prime Minister's power to exercise the right vested in him by section 21A of the Basic Law.

13. It must be understood that the question of whether the parties to the agreement had been aware of the existence of section 13A(b), or not, is irrelevant insofar as the validity of the obligation is concerned. The question of this validity depends entirely on the clear wording of section 13A(b) and nothing further need be added.

In the course of proceedings we were asked to draw the Prime Minister's attention to the provisions of the above section 13A(b), and following upon this the State Attorney informed us that the Prime Minister had in fact not been aware at the time of the existence of the above provision in the Basic Law: The Government, but that this did not affect his stand on the substance of the matter. In his opinion he was not in duty bound to exercise the power vested in him by sections 20 and 21A(a) of the Basic Law, for the reasons already quoted above , without there being any connection with the legality of the above undertaking.

We must, therefore, proceed to examine the second question, which is that of a Prime Minister's exercise of his power to remove a Minister from office, within the meaning of section 21A(a) of the Basic Law.

14. **The Power to Remove a Minister from Office**

(a) Section 21A(a) provides that:

"The Prime Minister may, after informing the Government of his intention to do so, remove a Minister from office; the Minister's tenure of office is terminated 48 hours after the notice of removal from office has been handed to him , save if the Prime Minister changes his mind before then."

The power conferred by section 21A(a) is a discretionary one. Discretion is generally granted to any statutory authority in order that it may have freedom of action in fulfilling its variegated functions in circumstances which vary and change from time to time. In that way the authority is enabled to weigh up the circumstances in every problem brought before it and find an appropriate solution. (F.H. 16/61 [6], at p. 1215).

But, even when the power is a discretionary one it still has a normative framework. The usual rules regarding reasonability, fairness, good faith, integrity, absence of arbitrariness and discrimination, etc., apply to every exercise of administrative discretion (see my esteemed colleague, Justice Barak, in H.C. 297/82 [7], at p. 34).

(b) Furthermore, as already noted in the past, there is no difference for purposes of the matter before us - that is for purposes of the exercise of discretion - between **exercising** a power and **refraining from** exercising that power: where the preliminary conditions required for exercising the power exist it is incumbent upon the statutory authority to act. It follows that even when the authority refrains from exercising its discretionary power its decision to do so is subject to the usual criteria applicable to statutory powers, that is, it can be reviewed to discover whether it was based on reasonable considerations or whether the combination of circumstances did not in fact demand the exercise of the power.
The decision can also be reviewed to see whether it was not unreasonable or was not based on arbitrariness or discrimination, which could disqualify the acts or omissions of the authority. That is to say, not only the unreasonable exercise of a power can be invalidated, but also refraining to exercise a discretionary power for unreasonable reasons can lead to the conclusion that it was invalid.

(c) In this context I said, in the above H.C. 297/82 [7], that laying down initial arrangements in a law which vest a particular functionary with the ability to exercise a power in certain defined circumstances, does not only mean giving power and authority, but also means ascribing fundamental meanings to the power which include a duty with respect to the manner in which it is used.

So that attached to the grant of power there is, inter alia, the duty to weigh up whether it is necessary to exercise it and the proper measures to be taken in this context. Secondly, it is understandable and well-known that from the grant of power to a particular functionary there evolves the duty to deal with petitions and requests aimed at moving the holder of the power to exercise it in one way or another. Finally, insofar as examining and dealing with requests in the context of exercising a power is concerned, the nature and content of the manner in which this is done must be consistent with the basic standards laid down in judgments of this court, and any departure therefrom could have repercussions on the validity of any decision. In other words, even when the "may" is not necessarily "must", that is, even when the legislator did not impose a duty to exercise a power in a defined manner, or when the duty to exercise a power does not follow from the substance of a matter, there is born and arises, together with the grant of a power, the duty to weigh up also the very need and justification for exercising it.

(d) I will add that the holder of a power has the discretion to decide on a matter despite the existence of a decision in principle on the subject-matter of the power. For this latter decision may require re-evaluation in general or with respect to the concrete case. H.W.R. Wade, in discussing this subject, had the following to say, under the heading "Over Rigid Policies" (Administrative Law, p. 330):

> "An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance".

That does not mean that a fundamental decision, which provides for a desirable policy or method of operation, should not be adopted, but that decision must also be the fruit of an orderly process, and even then every concrete case deserves substantive consideration in

order to examine whether to apply to it, either positively or negatively, the guiding rule according to which the authority acts.

Till now we have discussed what was said in H.C. 297/82 [7] in connection with the duty to weigh up , in every ordinary case, all the data and circumstances, before deciding whether to exercise a power or refrain from doing so.

15. When there is a possibility of exercising a power, the statutory authority must give its mind to all the relevant elements, that is to all the subjects which create a mosaic of the data before it. But it is obvious that it cannot take account of extraneous circumstances. However, in order to remove all doubt I will add that where parliamentary-political life is concerned one cannot deny taking account considerations which arise due to political considerations. But, as my esteemed colleague, Justice Goldberg, pointed out in H.C. 1635/90 [3], quoted above, (at p. 866) it should be remembered that we are not dealing, in the context of the case before us, with the binding validity of a political agreement, but with the question of whether an act carried out, or due to be carried out, following upon an agreement, is unlawful or invalid according to the norms of administrative law recognised by us: that is, whether the content of the act is consistent with the basic principles of an enlightened State.

Therefore, the question of whether the result was reasonable or not would depend, amongst other things, on whether proper weight was given to all the various considerations. When certain considerations are given preference over others to an unreasonable extent, a decision would be invalid. In other words, as long as every element is given due and reasonable weight, in the circumstances of the case, there can be no complaints. But, when one consideration is preferred over another, despite the fact that the weight, substance or content of the rejected consideration clearly and obviously indicated that it should have been the preferred one, or that the scales were weighted in its favour, then the decision would be stamped with unreasonableness.

I said, in H.C. 156/75 [8], at p. 105, that there could be circumstances in which the statutory authority did not give weight to any extraneous consideration and only took

relevant considerations into account, but nevertheless gave the latter so little weight as to make the final conclusion invalid.

That is the rule with respect to "good faith" on the part of a statutory authority. Unreasonableness can be discovered even when there was good faith at the basis of a decision. As Judge Scrutton remarked: "Some of the most honest people are the most unreasonable" (R. v. Roberts, Ex Parte Scurr (l924) [17], at p. 719).

16. In the framework of the arguments before us some of the respondents referred repeatedly to other laws dealing with functionaries other than ministers and deputy ministers, containing detailed provisions concerning their removal from office. They sought to learn from the positive arrangements in other laws that there is a negative arrangement in the case of ministers and deputy ministers: that is, that for them there is no provision of law laying down in advance the circumstances in which the power to remove them must be exercised. There is no legal basis for this argument. There are laws which detail the circumstances in which removal from office is allowed or required. But there is nothing in that to indicate a negative arrangement for removal from office of a minister or deputy minister. The matter of removal from office of a minister is anchored today in the above section 21A of the Basic Law and the absence of any detailed circumstances in which this is permitted or required only goes to show that the law, for this purpose, is the general law concerning statutory powers. The main rules for exercising such powers have already been explained above, and will still be enlarged upon. Furthermore, the absence of detailed provisions permits of the removal from office in a wider diversity of cases than those detailed in the laws dealing with other electees or appointed functionaries. At a later stage we shall deal with those circumstances in which there is a legal duty to exercise the power of removal.

17. Against the background of a general description of the relevant provisions of the law we shall now deal directly with the case before us. There are occasions when **discretionary** power becomes a power which it is a **duty** to exercise. (H.C. 190/57 [9]; H.C. 2/80 [10], at p. 146, and see also Professor B. Bracha, "Administrative Law" (Schocken Publications, 1986), 149). That is, there are circumstances in which the

conclusion may be drawn - **with respect also to a discretionary power -** that refraining from exercising a power is so unreasonable as to descend to the roots of the matter (H.C.596/75 [11]; H.C. 542/76, 103/77 [12], at p. 483). In order to adapt this to the case before us: an authority is in duty bound to exercise a power when the factual circumstances are such that the basic values of our constitutional and legal system make the failure to exercise it so unreasonable as to go to the root of the matter.

Unreasonableness which goes to the root of the matter invalidates a decision of an administrative authority (see H.C. 297/82 [7] above; H.C. 653/79 [13]; H.C. 376/81, [14]).

It is true that the power under section 21A above can be exercised in order to enable the government to function properly and to lead to the removal of a minister who does not fit in with the web of government policy or who defies the principle of collective responsibility. Those are, of course, only examples of what is commonly known as "irregularities". But this does not amount to a comprehensive description of the borderlines of the power under section 21A, the general nature of which points to its breadth and depth. This also does not constitute a description of the complete legislative purpose of the provision in this section of the law. The said provision of law is intended also to enable a reaction, in the form of removal from office, to a serious event in which a member of the government is involved, when that event, be it either an act or an omission, reflects on the status of the government, on its public image, on its ability to provide and serve as an example, on its capacity to ingrain proper standards of conduct and, mainly, when it has repercussions on the public's confidence in our system of government, on the values upon which our system of government and law is built and on the duties of the ordinary citizen which arise from them.

In order to remove all doubt I will add that what is said here has no reference to moral norms which have no basis in law. We are talking here about **the law** which exists here and according to which failure to exercise a power vested in a functionary converts the omission, in certain given circumstances, to something extremely unreasonable. This is a conclusion based on law and not one which is anchored only on abstract values without any legal basis, as could have been imagined from some of the arguments propounded before us.

It was argued at length before us that the Government depends on the confidence of the Knesset and that this gives transcendental expression to the broad public's confidence in the Government. I am prepared to accept this. I am also prepared to accept the distinction between a public servant and a public electee (see H.C. 4287/93 [15], in the case of Deputy Minister Pinchasi). But the confidence of the Knesset does not make the exercise of the power under section 21A, when the circumstances demand it, redundant. Furthermore, the constitutional reciprocal bond between the Government and the Knesset, and from there to the public, is a two-way one. The Government must also serve as a drafter of norms of governmental behaviour and must act in a manner which creates confidence. Suspending a decision following upon the revelation of serious offences on the part of a minister, because of the contention that there is no room for action on the part of the Prime Minister until the Knesset - if in fact it does - brings a vote of no-confidence in the government in order to effect, indirectly, the dismissal of the minister, would amount to interpreting the very meaningful legal provision in section 21A as a minor key provision intended to promote internal disciplinary measures only. This is a mistaken estimate of the scope of the power given to the Prime Minister under section 21A and constitutes unreasonable refrainment from exercising a power granted by the legislator.

18. At this stage a short pause in the presentation of the legal background is called for, in order to return to the facts of the case. We described above the main points of the indictment presented to the Knesset. The indictment includes extremely serious allegations concerning corruption. The indictment is not a judgment. It only reflects the prima facie evidence collected by the prosecution. But, insofar as continued office in the Government is concerned, even the prima facie evidence collated in the indictment, and which has now become public knowledge, is of significance. There are circumstances which are significant from the point of view of reasonability, not only for purposes of judicial determination but also for judging the acts attributed to an individual, as clothed in the official dress of an accusation ready for presentation to the judicial instances.

In the case under consideration the lifting of immunity is also required as it affects a member of the Knesset. But the proceedings for lifting immunity do not change the content and significance of the indictment and what is alleged in it. If a minister who is charged with

receiving hundreds of thousands of shekels in bribes and of abuse, in other ways, of government office, continues to serve in the Government this would reflect in a far-reaching manner on the image of government in Israel, and on its good faith and integrity. This has a direct effect on the question of reasonability according to the provisions of law (for changes flowing from the differentiation between a public servant and a minister - see also H.C. 6177, 6163/92 [6]).

19. It was pointed out in the arguments before us that there is a precedent for the continued service of a minister in the Government despite the fact that indictments containing serious charges against him were brought.

In my opinion no precedent was established. There was in the past an invalid omission which does not consecrate the system. A past invalid act or omission only demonstrates to what extent each individual act of political convenience becomes harmful, from the aspect of obligatory standards of conduct, as people will seek to learn from it, to imitate it and to regard it, for some reason or other, as a precedent.

In our constitutional history there are more esteemable instances of reactions following upon criminal allegations which it would be preferable to copy.

20. I can now sum up my opinion in the case before us:

(a) The power under section 21A is a discretionary power.

(b) A government promise not to remove a functionary from office has no validity.

(c) The authority must weigh up whether to exercise its power, when this is demanded or is obligatory, in an orderly and systematic manner, and must use it for the purpose for which it is granted while refraining from applying extraneous considerations.

(d) Parliamentary-political considerations can be legitimate in certain circumstances, but they must be examined with an eye to finding a fine balance with other considerations. When the fact that there is prima facie evidence that a criminal offence has been committed by a member of the Government is one of the other considerations, then the seriousness of

the (alleged) offence is a relevant factor. The more serious the offence the less weighty would the other considerations be. I will add that in the context of the matter before us I saw no cause for dealing with the more general subjects discussed in the judgment of my esteemed colleague, Justice D. Levin.

(e) Whoever exercises discretion must keep in mind all the relevant and influential components and factors and must find a reasonable balance amongst them. Giving undue weight to one component or another, can invalidate a decision.

(f) There are circumstances which make the exercise of a discretionary power obligatory. Failure to exercise the power in such circumstances can be found to be so unreasonable as to go to the root of the matter.

(g) An invalid act in the past demands prevention of perpetuation, and not imitation. A blunder in the past does not give a license for the future.

(h) The offences attributed to Minister Deri are outstandingly serious and failure to exercise the power to remove him from office is unreasonable to an extreme extent. Reliance in this case on an undertaking which is inconsistent with the provisions of section 13 A of the Basic Law, has no place.

The damage to confidence in the government as a result of the failure to remove from office a person accused of the crime of corruption is far more serious than the damage to confidence as a result of failure to honour an undertaking which is prohibited by law. As already explained, we are not dealing here with the question of confidence as a moral norm, but with the provisions of law which deal with the reasonableness of failure to exercise a power.

21. I am of the opinion, therefore, that we should declare that the Prime Minister is required by law to exercise his power under section 21A of the Basic Law: The Government to terminate the tenure of office of Minister Deri. In this sense the order nisi should be made absolute.

Justice A. Barak: I concur.

Justice A. Mazza:

I concur with the judgment of my esteemed colleague, the President.

The stand adopted by the Prime Minister in the matter before us was based, for the main part, on the existence of a political agreement with Minister Deri, made at the advice of the Attorney General, on the eve of the formation of the Government. And having failed to be convinced of the justice of the Attorney General's argument that there had been a substantive change in the circumstances since the agreement was reached, the Prime Minister decided that he had to choose between two norms of at least equal weight: one, on the basis of which the Attorney General had argued that as long as Minister Deri was not cleared of the suspicions levelled against him with the tabling of the indictment against him in the Knesset he could not continue in office in the Government; and the other, which is connected with the fear of a blow to his trustworthiness, as Prime Minister, in the eyes of the public, of he did not honour his part of the agreement with the Minister. There was, therefore, a basis for assuming that unless the Prime Minister was mistaken in thinking that his obligation to Minister Deri was a valid one and that his credibility in the eyes of the public depended upon his honouring it, he would have refrained from taking the stand which led to the petititoners' application to this court for a remedy on behalf of the public. But this was not the case.

From the Prime Minister's letter of 22. 8. 93 to the Attorney General, a copy of which was submitted to us during the course of proceedings, it appears that even after his attention was called to the provisions of section 13A(b) of the Basic Law: The Government, his stand remained substantively the same, on the basis of other reasons enumerated in the letter, in which he takes issue with the Attorney General's approach (as detailed in the letter of 6.8.93 to the Prime Minister). In his letter the Prime Minister indicated that there was, in his opinion, a difference between elected functionaries and appointed public servants and he referred also to the case of Minister Abu-Hazeira, as though this were a precedent. But the main reason given by the Prime Minister for not acting on the opinion of the Attorney

General was his reliance on his obligation towards Minister Deri, upon the honouring of which his credibility in the eyes of the public ostensibly depended.

The distinction between the principal and the secondary in the Prime Minister's reasons can be seen from a reading of his letter. But there is also a fundamental difference in the content of the reasons: a fear of harm to his credibility in the eyes of the public is a reason with public significance. In presenting this reason the Prime Minister relied on the assumption (albeit a mistaken one) that there existed a political agreement by which he was bound. This reason, even though not legally admissible, is at least understandable. This is not the case insofar as the Prime Minister's other reasons are concerned. The Prime Minister did not give expression to an independent public stand with the aid of these reasons, but sought to take issue with the opinion of the Attorney General concerning the very substance of the legal norm applicable to the subject of removing a minister from office.

This approach is contrary to the constitutional principle, long since accepted in our system of law, according to which the Attorney General is the person qualified to interpret the law vis-a-vis the executive (see paragraph 42 of the judgment of my esteemed colleague, Justice Barak, in the Pinhasi case, H.C. 4287/93 [15]). And the Prime Minister, with all due respect, could not be heard at all on the grounds of these reasons. I was, therefore, sorry to learn that even after it had been explained to the Prime Minister that the agreement which he had made with Minister Deri had been invalid ab initio, he had stuck to his original stand while seeking to justify it with the aid of legal reasons which contradicted the binding legal opinion of the Attorney General.

As to the question of what is the legal norm applicable to the case before us, the decision lies clearly with the Attorney General. There is, therefore, no cause for enlarging on it. Only recently did Justice Barak explain what the proper legal norm is, in H.C. 6163/92 [16] and again in the Pinhasi case [15]. And also from the reasons contained in the judgment of my esteemed colleague, the President, the conclusion must be drawn that the law applicable to the continued tenure in office of Minister Deri is no different, if not even more apt.

Justice D. Levin:

I agree with the conclusions of the President and I am party to the main points in his legal analysis and to the approach taken towards the central matters at the focus of the proceedings before us, on the basis of which the required result is obvious and obligatory in the circumstances of the case.

However, I would like to add some comments on the subjects which were under discussion and which, in my opinion, call for further enlargement and emphasis.

(a) I agree that a member of the Knesset earns his status by virtue of the confidence placed in him by the voting public, which saw in him someone who faithfully represents its sentiments and viewpoints - either politically or because of his attitude to social and economic matters and his approach to matters of faith and culture. Once he has been elected by this particular public, then it is only natural that he should regard himself as being in duty bound to remain faithful to his electors. If, heaven forbid, he should disappoint them, if the confidence which they placed in him should be shattered, for any reason, then when the time comes he would have to face, politically, the judgment of the electors.

(b) The situation is different when an elected member of the Knesset takes upon himself, on behalf of the faction to which he belongs and which he represents, an official duty within the framework of the executive, as a member of the Government and a minister in charge of a government office, or as a deputy minister.

He then owes a duty of loyalty and a greater degree of responsibility to his electors, to the Knesset which gave him its confidence and to an even greater extent to the general public which he is called upon to serve faithfully.

For, whoever is given executive power by force of law will be found to influence by his acts, or, heaven forbid, by his omissions, for good or for bad, the rights of the general body of citizens and residents of the country. He is their trustee and he must behave towards all of them with fidelity, honesty and fairness and without discrimination. That is the challenge and he will be judged in accordance with how he meets it.

(c) A minister who sits at the government table as a representative of a party or movement undoubtedly fulfills a political function. He gives expression thereby to opinions and points of view, and to the political and social paths of the public which elected him and of the movement which regards him as its representative in the governmental set-up. But, in my opinion, when fulfilling his administrative function, as a minister or even as a deputy minister, as one in charge of a government office and directing its operation, then his political function must give precedence to his administrative function, which has its own rules of conduct.

When fulfilling this function he is subject to review by the High Court of Justice, when moved to do so. Within tile framework of this review the court will examine whether the minister was punctilious about applying proper administrative procedures, whether he exercised his authority in accordance with the general principles laid down by law and judicial precedents, and whether, when providing a service to the citizen as a public trustee, he behaved fairly, reasonably, equitably and without prejudice.

If he sins against any of these principles then his political function should, generally, not serve as a defence. He would have to face the said review and, if the circumstances warrant it, be indicted and stand trial.

If that is the position in general, how much more so is it the case when, heaven forbid, a minister errs and becomes tainted with the stain of an offence against the law. The nature of the offence and of the circumstances in which it was committed could make the possibility of his continuing in office questionable.

I do not suggest that we lay down any hard and fast rules on this subject and decide in a sweeping manner when and how conclusions should be drawn. For, first and foremost, it is the political system which must react, within the framework of the proper political-democratic process. But there may be exceptional situations, such as the one before us, when our intervention is required in order to lay down specific, obligatory norms of behaviour.

(d) It seems to me, for example, that if, heaven forbid, an indictment based on prima facie evidence is brought against a minister, indicating that he is suspected of serious offences which by their circumstantial nature and content involve ignominy - such as, for example, if a minister is charged with accepting bribes, with fraud, with cheating state authorities, with lying or making false entries in documents - then it would not be proper or reasonable for him to continue in office.

I would think, if this should unfortunately occur, that it would be proper for the minister to reach this conclusion of his own accord for the sake of public hygiene and as a mark of respect for the principles of the rule of law, even if he is convinced of his own innocence and clean hands. He should allow the process of establishing the truth to be exhausted and await comprehensive clarification of the matter.

(e) If he does not do this then the Prime Minister must weigh up whether circumstances have not arisen which would demand the exercise of his power, under section 21A(a) of the Basic Law: The Government, to remove a minister from office. As this power is a discretionary one, the Prime Minister may exercise it but is not, on the face of it, in duty bound to do so.

When a demand that he exercise his discretion be brought, he can take into consideration parliamentary-political aspects, since, as already noted, a minister has a twofold function, both political and administrative. It is only natural and understandable, in my opinion, that the Prime Minister will seek to preserve his government and save it from collapsing. For the sake of ensuring so important and vital a need he can, on an appropriate occasion, forgive "irregularities" in the conduct or pronouncements of a minister, and even opposition to binding decisions of the Government, as all this would come within the confines of the minister's political function, which would be examined and criticised on the credibility plane before the Knesset and the voters.

This is not the case, in my opinion, when the question is one of a minister who sinned against integrity, and who committed offences involving ignominy, such as the examples given above, especially when the offences attributed to him were allegedly committed in the

process of fulfilling his office. In such cases the credibility of the Government and its ministers in the eyes of the public must take precedence over any other consideration.

I dismiss out of hand the argument that for the sake of the survival of the Government and the coalition at its base, and because of the desire to further government policy, however important it may be, the implications of the presentation of the above indictment can be ignored, everyday proceedings can be continued, and the minister can be left in office as though nothing occurred.

(f) I think that in our case, too, the Prime Minister actually realised that if Minister Deri should be indicted on the charges being investigated when he was appointed, he would have to suspend himself, and that if he did not do so, he, the Prime Minister, would have to exercise his authority to suspend him.

I would like to assume that the Prime Minister saw this as an inevitable consequence, not only because he faced coalition pressure, but also because, as someone responsible for the existence of an enlightened regime, he thought, to the best of his conscience, that that was what he had to do.

I do not think that there is any difference, or that there should be any difference, from the normative aspect, between an indictment which has already been brought before a court and one which, at some stage, has only been presented to the Knesset Committee for purposes of lifting immunity.

(g) In the course of proceedings before us we heard from counsel for the fifth respondent (Shas), albeit in muted terms, that Minister Arye Deri had earned the confidence of his electors despite the lengthy police investigation conducted against him, and despite the suspicions which hovered above him. It can be assumed that this occurred because they honestly believed that the candidate whom they favoured was innocent, clean and pure of the suspicions against him.

One cannot know if they would have behaved similarly if, heaven forbid, the charge against him had been proved in a court of law or even if the indictment against him, containing allegations of serious offences, was pending in court.

But I do not see any importance in this and there is nothing in it to indicate anything, as this is not the main issue, the main issue being the need for our democratic and enlightened "camp" to remain pure and that persons tainted with corruption and crimes of the nature indicated above do not harm government morality.

It should be emphasised, in order to avoid any misunderstanding, that what I have said on this last subject is purely theoretical. There is nothing in what I have said which can, heaven forbid, establish facts and hand down judgment in the case of Minister Arye Deri, which must still be decided within the framework authorised to do so and be thoroughly cleared up, so that the factual truth may come to light.

As already stated, I concur with the conclusion suggested by the President in his judgment.

Justice E. Goldberg:

In contradistinction to public servants, to whom the State Service (Appointments) Law, 1959, applies, a minister and a deputy minister are not appointed to office only because of their skills, qualities and personal standards. Party and coalition interests are at the centre of their appointments, and the texture of public life is not affected by the appointment of a minister or deputy minister who is not exactly blessed with characteristics of the highest quality. The question is whether the confidence of the public in the government is harmed when a minister or deputy minister, against whom an indictment containing an offence involving ignominy has been framed, remains in office.

The answer to this question is not simple or unambiguous. For if we should say that in every such case the confidence of the public in government institutions would inevitably be harmed, we should also have to say that such harm would be caused when a member of the Knesset is found guilty of an offence involving ignominy and is sentenced to imprisonment.

For such member of the Knesset would not only participate in legislation, and serve in a quasi-judicial capacity when considering the lifting of another Knesset member's immunity, but it is possible that he would also be a member of one of the Knesset committees, be it the Finance Committee, which deals with the public's money, or the Knesset Control Committee, whose task it is to fix norms of proper management, or any other committee, which deals with public matters of first importance. And, nevertheless, the legislature was not afraid that the public's confidence in the Knesset would be harmed because of this, and provided, in section 6 of the Basic Law: The Knesset, that every citizen is entitled to be elected to the Knesset save "if a court denies him this right by law, or if he is given a prison sentence of five years or more for an offence against the security of the State, as laid down in the Elections to the Knesset Law, and five years have not elapsed since the day he completed this sentence."

Is it not a fact that when a person elected by the public is the issue then the democratic principle takes precedence over any other public interest, even though a Knesset member also fulfills a public service and the Knesset is one of the authorities of the State.

As a minister and deputy minister fulfil political functions, as already stated, could it not be said, in a case where an indictment containing an offence involving ignominy is brought against one of them, that it is the "price of democracy" and that criticism of his appointment belongs to the Knesset, which can pass a vote of no-confidence in the Government for making an appointment which in its, the Knesset's, opinion is not proper.

Furthermore, would not our (the High Court's) intervention in such a matter be interference in "the composition" of the Government and upset the balance between the authorities? One cannot, therefore, deny the existence of a political aspect in the matter before us. But, on the other hand, this aspect must not be regarded as divorced from public administration. I am of the opinion that in any clash between the two aspects we cannot say that the public administration norm, which we have already held is applicable to a public servant (see H.C. 6163/92 [16]), will not apply at all, only because the functionary is a minister or deputy minister. Such a consequence would not only constitute a 'double standard", but would also mean the application of double and conflicting legal norms - one

for the ordinary public servant and another for the politician who holds office - which is a violation of the principle of equality before the law.

The clash between the two aspects does not mean that the one must supersede the other. All that is required is that a balance should be found between them. This balance makes it obligatory that the court's intervention in the exercise of discretion of whosoever is empowered by law to remove a minister or deputy minister from office be in small measure, and that it be restricted to cases in which the seriousness of the circumstances in which the alleged offence was committed cannot be reconciled with continuation in office. In other words, our intervention would occur, save in such cases, only when the administrative authority, which has been given the discretionary power, departs, in the circumstances of the case, radically from reasonability by leaving the minister, or deputy minister, in office.

I am of the opinion that the seriousness of the circumstances, in the case before us, as is evident from the indictment, tips the scales and makes the removal from office of the minister obligatory. I therefore concur with the judgment of the President, on all counts.

Decided as held in the President's judgment.

Judgment handed down on 8.9.93.