ARE THERE ANY LIMITS TO JUSTICIABILITY?

THE JURISPRUDENTIAL AND CONSTITUTIONAL CONTROVERSY IN LIGHT OF THE ISRAELI AND AMERICAN EXPERIENCE

*Ariel L. Bendor**

TABLE OF CONTENTS

---

* Faculty of Law, Haifa University, Israel. This article was completed while serving as visiting professor at the Villanova University School of Law in the Summer of 1996. I would like to thank the Villanova School of Law and its Dean, Steven P. Frankino, for the generous hospitality and assistance offered to me. I would also like to thank Ms. Noga Arnon-Dagan for her invaluable assistance in conducting the research related to this article.

I. INTRODUCTION

Justiciability deals with the boundaries of law and adjudication. Its concern is with the question of which issues are susceptible to being the subject of legal norms or of adjudication by a court of law. Justiciability is distinct from the issue of judicial activism, which relates to the role of the courts in developing and changing the law and with the readiness of the courts to intervene in the decisions of other public authorities and to grant relief against those decisions.[1] The concern of justiciability is with the province within which the law and the courts properly function, irrespective of whether the courts take an activist approach within this province or not.

In the United States, the issue of justiciability is dealt with primarily within the context of the "political question" doctrine, which focuses on the limitations upon adjudication by the courts of matters generally within the area of responsibility of other governmental authorities—in particular, matters of foreign relations and national security. According to this doctrine, as articulated by Justice Brennan, the Court will not undertake to adjudicate an issue where there exists:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[2]

---

1. *See* AHARON BARAK, JUDICIAL DISCRETION 147-48 (1989). And compare to the broader definition of Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephan C. Halpern & Charles Lamb eds., 1982). In the United States, the term "justiciability" is often used to refer to the doctrines determining at what stage, and by whom, disputes may be brought for resolution before the courts—standing, ripeness, and mootness. *See, e.g.*, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 605-06 (1992). In this article, however, I will utilize the term in its other sense, as referring to the question of which issues (from the standpoint of their content and not the manner in which they were brought up for judicial resolution) are susceptible to being the subject of legal norms or being adjudicated by a court of law.

2. Baker v. Carr, 369 U.S. 186, 217 (1962). In Goldwater v. Carter, 444 U.S. 996, 998 (1979), Justice Powell broke down the doctrine to a tri-partite examination, on the basis of which it could be decided if a question was political and, consequently, not justiciable:

(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government?

(ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?

Nowak and Rotunda note that it would be better to term this doctrine the doctrine of non-justiciability.[3] This notwithstanding, it must be noted that the political question doctrine does not contain within it any general theory regarding the limits of the law or of the adjudicatory process; rather, it deals with "political" questions in the traditional and narrow sense of the word. According to this doctrine, certain sets of issues categorized as political questions, including issues that in their essence are legal, are considered to be external to the judiciary; their resolution is given over to other branches of government, i.e., the legislature or the executive branch. The political question doctrine thus focuses on the limits of adjudication by the courts. It deals hardly at all, however, with that aspect of justiciability that directs itself to the question of the limits of the law itself, as opposed simply to the limits of adjudication.

In Israel, since the 1980s—perhaps as a result of the recognition of broad and well-nigh unlimited entitlement for most claimants to standing before the courts in cases of constitutional and administrative law[4]—justiciability, in all its central aspects, has become the subject of fundamental debate among Supreme Court Justices and commentators.[5] The debate in Israel, in essence, is over whether there can be an answer to every legal question; whether it is appropriate for the judicial branch to apply itself to every legal question; and whether there is a meaningful distinction to be drawn between the first question and the second. This being said, a general consensus exists in Israel, at least rhetorically, that the courts will adjudicate only legal disputes and will decide those disputes solely on the basis of legal standards and criteria.

(iii) Do prudential considerations counsel against judicial intervention?

For summaries of the doctrine, see JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 47-53 (2d ed. 1991); Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 498-99 (1996).

3. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 104 (4th ed. 1991); *but see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 96 (2d ed. 1987).

4. *See* ZE'EV SEGAL, STANDING BEFORE THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE 235-39 (2d ed. 1993) (Hebrew).

5. *See, e.g.*, H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 449-72, 509-12, 514; H.C. 90/1635, Gerjevski v. Prime Minister, 45(1) P.D. 749, 765-76, 818, 843-44, 855-57; *see also* Menachem Elon, *The Basic Laws: Their Enactment, Interpretation, and Expectations*, 12 BAR-ILAN L. STUD. 253, 298-306 (1995) (Hebrew); Aharon Barak, *On the World View Regarding Law, Adjudication and Judicial Activism*, 17 TEL AVIV U. L. REV. 475, 477 et seq. (1992) (Hebrew); Ariel Rozen-Zvi, *The Culture of the Law—On Judicial Intervention, Enforcement of the Law, Judicial Activism and Assimilation of Values*, 17 TEL AVIV U. L. REV. 689 (1992) (Hebrew).

This article seeks to use the tools of critical comparative law to present and discuss a number of jurisprudential and constitutional aspects central to the issue of justiciability, an issue which, in any system of law, constitutes a fundamental and crucial topic. For, along with its theoretical character, the issue of justiciability carries with it significant practical consequences—both legal and political. Against a background which sets forth the discussion in the Israeli sources and compares them with the American sources,[6] I will offer several theses in the area of jurisprudential and constitutional law and, *inter alia*, suggest an approach to the issue in accordance with which the courts—in the context of their constitutional function in a system of checks and balances—may be required to adjudicate questions as to which the law itself, at least at this time, does not provide sufficient tools to determine.

II. ON JUSTICIABILITY

A. *The Meaning of the Term Justiciability: Normative and Institutional Justiciability*

The term justiciability is not unambiguous. It is possible that a significant part of the difficulties and dispute surrounding the jurisprudence—and, more specifically, the understanding—of justiciability derive from the ambiguity of the word justiciability itself.[7] This ambiguity imbues the very subject matter of the dispute, and the various contending views and positions, with a lack of essential clarity. Indeed, there have been those who have seen in justiciability, by reason of its very nature, "a concept of uncertain meaning and scope."[8]

Yet it would seem that the necessary condition for a serious and fruitful consideration of a theory of justiciability is a definition of the meaning—more

---

6. The Israeli legal literature, which is largely in Hebrew, will be less well known to the typical readers of this journal than the corresponding American legal literature. Consequently, in this article, the review, description, and quotation of the Israeli sources will be broader than the review, description, and quotation of the American sources.

7. *See* Geofrey Marshall, *Justiciability*, *in* OXFORD ESSAYS IN JURISPRUDENCE 265 (Anthony G. Guest ed., 1961). *See also Ressler*, 42(2) P.D. at 474 (comments of Barak, J.).

8. Flast v. Cohen, 392 U.S. 83, 95 (1968) (Warren, C.J.); Similarly: "Justiciability is, of course, not a legal concept with fixed content or susceptible of scientific verification." Poe v. Ullman, 367 U.S. 497, 508 (1961) (Frankfurter, J.). Under Israeli law: "I would be astounded if a sage would ever arise who was able to precisely define the meaning of this term . . . I will admit without shame that I myself have never grasped the nature of this monstrous creation . . . . No exact legal analysis can be found to comprehend its content." H.C. 295/65, Oppenheimer v. Minister of Interior and Health, 20(1) P.D. 309, 328 (Zilberg, acting C.J.); "The doctrine of non-justiciability is in its essence a doctrine whose foundations cannot be defined in a precise manner." H.C. 85/73, "Kach" Movement v. Chairman of the Knesset, 39(3) P.D. 141, 161 (Barak, J.).

specifically, the meaningfulness—of the term "justiciability." The achievement of such a definition, vital for conducting any meaningful discussion or debate, is not beyond our grasp.

Justiciability focuses on two problems, or, in other words, it is comprised of two fundamental aspects.[9] It is possible that the use of a single term to embody both these aspects at once has contributed to the obscuring of the differences between them.

One of these aspects, which bears a plainly jurisprudential character (and which, as with many other significant jurisprudential issues, in no way detracts from its practical significance), is the consideration of whether there exists a legal answer for every legal question (i.e., for every question as to the existence or non-existence of a person's rights or obligations, as these are understood under Hohfeld's classic categorization[10]). This aspect of justiciability has been termed by the current Chief Justice of the Israeli Supreme Court, Aharon Barak, as "normative justiciability." According to his definition, "normative justiciability comes to answer the question whether there exist legal criteria sufficient to determine a dispute presented before the Court."[11] It should be carefully noted, however, that in considering this question, normative justiciability does not intrude into the famous argument between Hart and Dworkin as to whether for every legal question there exists only one lawful answer or a number of equally lawful alternative resolutions.[12] Normative justiciability deals with the question of whether for every legal question there exists any (i.e., at *least* one) legal answer. This notwithstanding, it would seem that an approach which asserts that there are questions that are not normatively justiciable would not be compatible with either of the aforesaid approaches. For each carries the assumption that every legal question has an answer (or answers) at which the jurist can arrive.

Alongside the aspect of normative justiciability, there exists the aspect that has been termed by Justice Barak as "institutional justiciability." According to his definition, "institutional justiciability comes to answer the question of whether the court is the appropriate authority to determine a particular dispute, or whether it is more appropriate that the dispute be

---

9. From a terminological point of view, it would seem that the first aspect may be termed "law-ability," as opposed to the second aspect, which may be termed "litigatibility."

10. WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1923). Hohfeld categorizes the various rights into four categories: (1) right (in the sense of claim or demand) and duty; (2) privilege (in the more modern term—liberty) and no-right; (3) power and liability; and (4) immunity and disability.

11. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 474.

12. For Dworkin's view, that to every legal question there is only one lawful answer, see, for example, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (2d ed. 1978); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). For Hart's view, that a legal question may have several lawful answers, see, for example, HERBERT L. A. HART, THE CONCEPT OF LAW 121 (2d ed. 1994).

determined by another institution, such as the legislative or the executive authority."[13] Institutional justiciability itself bears two aspects: a material aspect and an organic aspect.[14] The material aspect is concerned with the question of whether it is appropriate for the court to adjudicate the subject matter of the dispute before it. The organic aspect, which is particularly relevant with respect to petitions brought against the legislative branch, is concerned with whether it is appropriate for the court to adjudicate the legality of the actions of the organ of the state against whom the legal petition has been brought.

There were those in Israel who disputed this distinction between the normative aspect of justiciability and its institutional aspect. When Justice Barak expressed the view that "these two meanings of justiciability are different and it is proper that they not be confused[,]"[15] there were other justices—such as the former Deputy Chief Justice of the Supreme Court, Menachem Elon—who believed that the distinction was not viable, and, in any case, was pointless and impractical.[16] A similar view was taken by the former Chief Justice of the Supreme Court, Moshe Landau, who wrote in an article:

> I do not see that there is any practical advantage or even analytical justification in the distinction between normative justiciability and institutional justiciability. The very term justiciability is at its core bound up with adjudication by a court as an institution; that is to say: whether there exists any norm that would prevent a *court* from applying itself to a particular legal petition. Therefore, I see no point, for example, in categorizing questions that touch on the adjudication of the policy of the Government in its capacity as the authority over the State's foreign relations in the category of normative justiciability, as opposed to questions touching upon the separation of powers, that ostensibly would fall in the category of institutional rather than normative justiciability. The question is always the same: Should the court apply itself to the petition, or should it refrain from considering it.[17]

---

13. *Ressler*, 42(2) P.D. at 474. *Cf.* Samuel Issacharoo, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1686-88 (1993).

14. Ariel Bendor, *Justiciability in the High Court of Justice*, 17 MISHPATIM 592, 594 (1987-1988) (Hebrew).

15. *Ressler*, 42(2) P.D. at 474.

16. H.C. 90/1635, Gerjevski v. Prime Minister, 45(1) P.D. 749, 773. For a discussion of Justice Elon's position on this issue, see Ariel Bendor & Shulamit Almog, *Judicial Review According to Justice Menachem Elon*, 25 MISHPATIM 481, 484-86 (1995).

17. Moshe Landau, *On Justiciability and Reasonableness in Administrative Law*, 14 TEL AVIV U. L. REV. 5, 10 (1989) (Hebrew).

It would appear that the position taken by Elon and Landau is inextricably bound up with their opinion that the *law*, as such, does not take any position on certain questions, such as certain categories of questions within the realm of politics or ethics, and that these questions are simply not justiciable. Thus, from their point of view, there is no practical point in the distinction between normative non-justiciability and institutional non-justiciability, for, at any rate, the courts will never deal with or determine such questions.

Nevertheless, according to the view that rejects a congruence between questions whose non-justiciability is normative (assuming such questions exist) and questions whose non-justiciability is institutional (again, assuming such questions even exist), the distinction is, obviously, a necessary one. According to the view of Justice Barak, as detailed hereafter,[18] while all legal questions may be justiciable from a normative standpoint, there are legal questions that are not institutionally justiciable. Consequently there is meaning and significance to the distinction. In my own viewpoint,[19] according to which there can be, *in a certain sense*, legal questions that are not normatively justiciable, there is still a need for the distinction between the two forms of justiciability. This is because, with respect to legal questions that are normatively non-justiciable and those that are institutionally non-justiciable (to the extent such questions exist at all), there is no congruence between the two.

B. *Justiciability and Jurisdiction*

A distinction must be drawn further between the jurisdiction over a certain matter that is conferred upon a court by law, and justiciability, whose concern is with how appropriate it is that the matter be determined judicially. The fact is that there is a great tendency to confuse these two categories. This lack of clarity derives primarily from the tendency to use the term "jurisdiction" to connote the readiness of a court to hear cases in situations where the law has granted the court discretion as to whether it will hear the case or not. A good example of this in Israeli law is the text of Paragraph 15(c) of the Basic Law: The Judicature, which deals with the jurisdiction of the Supreme Court in its capacity as High Court of Justice (in which capacity it primarily deals with matters of constitutional and administrative law). As stated there:

---

18. *See infra* text accompanying notes 36-38 and 100-02.

19. *See infra* Section III.

> The Supreme Court will sit also as the High Court of Justice; in this capacity it will determine matters where it sees fit to grant relief for justice's sake and which are not in the jurisdiction of another court or a tribunal.[20]

This paragraph, which appears to define the extent of the High Court of Justice's jurisdiction, establishes that it is to judge "in matters *where it sees fit* to provide relief for justice's sake."[21] That is to say, the paragraph gives discretion to the court as to what claims it will hear. It is thus possible to understand why many justices and learned jurists, sometimes intentionally and sometimes, perhaps, from mere inattention, considered the High Court of Justice's decision to decline the hearing of a case to be a matter of jurisdiction. For example, the Israeli Supreme Court, on the grounds that this was not a matter given to judicial determination, decided early on that it was not competent to hear a claim that would have required the President of Israel to act in a particular manner regarding the way he delegated the function of forming a government.[22]

It would seem appropriate then to distinguish between jurisdiction and the manner of the exercise of that jurisdiction. For it is not reasonable that a court's jurisdiction should be dependent on its own discretion as to whether or not it will hear a dispute. But the distinction between the jurisdiction over a particular dispute and that dispute's justiciability may be dependent on one's substantive position regarding the justiciability (and, more particularly, the normative justiciability) of the dispute. It may be contended that where the dispute is not justiciable from a normative standpoint, the court lacks jurisdiction to decide the case (irrespective of the wording of the statutory section from which the court would purportedly draw such jurisdiction).[23] This position would maintain that a basic prerequisite to a court's hearing of a dispute is that the dispute revolve around a legal issue, i.e., one that the law is given to dealing with. Courts, by their essential nature, are empowered to deal only with legal disputes (i.e., issues that are normatively justiciable). The presumption by a court to decide a dispute that is not a legal one would be, under this view, a trespass over the bounds of its proper jurisdiction. That is to say, under this view, normative non-justiciability implies a lack of jurisdiction.

---

20. Basic Law: The Judicature, S.H. 78 (1984).

21. *Id.* (emphasis added).

22. H.C. 65/51, Jabotinski v. President of the State of Israel, 4 P.D. 801. Yet, in a subsequent decision, this distinction was overruled. *See, e.g.*, H.C. 802/79, Samara v. Commander of the Judea and Samaria Region, 34(4) P.D. 5.

23. *See* David Kretzmer, *Judicial Review of Knesset Decisions*, 8 TEL-AVIV U. STUD. L. 95, 105, 149 (1988) [hereinafter Kretzmer, *Judicial Review*]; David Kretzmer, *Forty Years of Public Law*, 24 ISR. L. REV. 341, 352 (1990) [hereinafter Kretzmer, *Forty Years*].

Similarly, in the United States, the distinction between the question of jurisdiction and that of justiciability is not clear-cut. For many of the categories falling within the definition of a non-justiciable "political question"—for example, "a textually demonstrable constitutional commitment of the issue to a coordinate political department"[24]—fall, to a large extent, within the boundary between the jurisdiction of the court and the jurisdiction of other governmental authorities, as established in the articles of the U.S. Constitution.

As I will elaborate in the ensuing discussion,[25] it is my view that full normative justiciability is not a necessary pre-condition for institutional justiciability, i.e., for the appropriateness of a matter being subject to a court's determination. Sometimes, the court will be required to issue rulings on grounds other than those of authentic legal norms. In any case, under this view, a distinction must still be drawn between a court's jurisdiction, determined from the statute on the basis of which it acts, and the justiciability (normative and institutional) of the dispute brought before it for adjudication.

C. *Justiciability and Substantive Law*

In general, it is a mistake to identify the laws dealing with the exercise of the discretion of the court in hearing a dispute and in granting relief in the dispute (within the limits of that discretion), including the laws governing justiciability (at least from the institutional aspect), as being simply procedural laws. For often, the concern of those laws is with the question of whether the petitioner has a right to a hearing of his position and to relief upon it, and not simply with the mode of the judicial procedure for the enforcement of the rights embodied in the substantive law.[26]

We must, however, continue to draw a distinction between the question of the willingness of the court to adjudicate a dispute and to grant relief therein and the substantive law upon which the rights of the disputants are determined. The substantive law operates outside the courtroom walls as well, and it is expected of all citizens and institutions that they will conform their behavior to the dictates of that law, wholly aside from the judicial enforcement of the law. Of course, there are few today who would dispute that the courts bear a distinct influence on the determination of the content of the substantive law.[27] Yet, this is not sufficient to allow us to dispense with

---

24. *See* Baker v. Carr, 369 U.S. 186, 217 (1962). For the difficulties in providing a literal interpretation for the criteria set forth in *Baker*, see Pushaw, *supra* note 2, at 500-01.

25. *See infra* Part III.

26. *See, e.g.*, BLACK'S LAW DICTIONARY 1203-04 (6th ed. 1990).

27. *See generally* BARAK, *supra* note 1. There is also the view of Dworkin and of those who join in his position, that there is only one lawful answer for every legal question. Thus, Dworkin recognizes legal precedents as sources of the law and even contends that special rules

the distinction between the judicial discretion in the interpretation and development of the substantive law, and the judicial discretion as to the court's willingness to hear and adjudicate a dispute in the first place, including through the criteria of institutional justiciability.

This distinction is not purely "semantic."[28] The need for such a distinction and its significance derives—beyond the value of terminological precision—from the fact that the law, and adherence thereto, must exist outside the courtroom walls as well. For example, in the realm of the public law, constitutional and administrative, the substantive rights of the individual against the governmental authorities exist and apply even when separated from the issue of the court's willingness to rule in a dispute involving those rights. Governmental authorities must operate in accordance with the law and must respect individual rights even if, for whatever reason—including reasons related to institutional justiciability—the court may decline to intervene and enforce the governmental authorities' obligations to act in accordance with the law.

Of course, the court wields wide influence upon the law. This alone, however, is an insufficient basis to assert a wholesale identity between the two. The law and the court each have their separate existence. It is, consequently, of great importance that the court make clear in its rulings, most essentially to the more political branches of government, the bases upon which the ruling has been granted. The governmental authorities must be aware whether a dispute was dismissed because the government acted properly, or because of reasons of non-justiciability, whether in the normative or in the institutional sense. The civic responsibility of governmental authorities, and of the citizenry as individuals, to act in accordance with the law is not dependent on the power (and some would say the duty) of the court to dismiss non-justiciable petitions. Public authorities must be aware of the substantive law and its boundaries (to the extent such boundaries exist).

The substantive law must not be obscured by confusion between it and the rules of justiciability. If the dismissal of a petition against a governmental authority is based on substantive law, it connotes that the authority acted legally and, thereby, any restraint on its acting similarly in the future is removed. On the other hand, dismissal of a similar petition on grounds of non-justiciability means that the court has taken *no* position with respect to the question of the legality of the authority's conduct. Furthermore, it is precisely where the courts are seen as not possessing a monopoly on the

---

of interpretation apply to them, which differ from those that apply to the interpretation of statutes. *See, e.g.*, DWORKIN, *supra* note 12, at 116.

28. Yaakov Zemach, *The Non-Justiciability of Military Measures*, 9 ISR. L. REV. 128, 133 (1974).

binding interpretation of the law, as is maintained in the United States,[29] that the other governmental authorities are not freed from the need to interpret and to act in adherence with the law, as it appears to them, and may not deliberately violate it.

Yet in the decisional law in Israel, and at times in the United States, this significant distinction is not always given expression. In many cases, it is not clear if a petition has been dismissed due to non-justiciability or whether the dismissal is based on the substantive law. Sometimes, particularly in matters of foreign relations and national security, despite the court's usage of the term justiciability, what the court was actually referring to was the substantive law regarding the lawful extent of the authority's jurisdiction. The substantive law generally provides that in the administration of foreign affairs and national security, the empowered authorities are granted a particularly wide scope of discretion.[30]

For example, the Supreme Court of Israel held in one case that "the matter is not justiciable . . . because if a military-security operation . . . is anchored in the law and if we are satisfied that the motives were security-based—the court has no place to second-guess it."[31] This statement could, apparently, be reformulated as follows: "There is no basis for the petitioners' claims because a military-security operation is proper from a legal standpoint if it is anchored in the law and if its motives were security-based." Proof of the difficulty courts have in recognizing this distinction may be found in the fact that it is rare that a court will dismiss a petition on the sole basis of the non-justiciability of the subject matter it deals with while believing, at the same time, that the substantive law favors the petitioners.[32]

---

29. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defence Council, Inc., 467 U.S. 837 (1984); *see also* Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) and the commentaries cited there at note 19; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996). *See also infra* notes 78-80 and accompanying text.

30. *See* Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976).

31. H.C. 302, 306/72, Hilo v. State of Israel, 27(2) P.D. 169, 181.

32. Compare H.C. 5364/94, Velner v. Chairman of the Labor Party of Israel, 49(1) P.D. 758, 808-11, where Justice Goldberg asserted that, despite the fact that the coalition agreement, with respect to which the petitions were directed, was illegal, the Court should still not involve itself because the agreement related to the position of the judiciary itself. This viewpoint received criticism from the other Justices and was not accepted. Yet it would seem possible to categorize Justice Goldberg's position as relating to organic non-justiciability, where the Court's abstention from intervening, despite the unlawfulness of the decision involved, would be more acceptable than from the standpoint of material justiciability. *See infra* notes 115-27 and accompanying text.

D. *Justiciability and the Policies of Public Agencies*

What is the demarcation between non-justiciable issues and matters regarding "governmental policy" where the legitimate involvement of the courts is restricted? In my opinion, there is no coherence between the two categories. Not all matters of policy are non-justiciable and not all non-justiciable questions revolve around policy. Each of these doctrines deals with its own particular province: While the non-justiciability doctrine relates to the subject matter of the actions being adjudicated, the policy doctrine relates to the measure of the generality of the issue under dispute.[33] The doctrine of non-justiciability establishes, *inter alia*, that questions relating to a certain subject matter, in particular "political" matters (including foreign relations and national security matters), are not justiciable. Not only general policy decisions but also a decision on a specific matter which, however, relates to non-justiciable subject-matter, is viewed as not being subject to judicial review. On the other hand, under the policy doctrine, judicial criticism on general operations of governmental authorities, whether or not the subject matter is "political," is restricted.

Another less sharp divide between the non-justiciability doctrine and the policy doctrine is that, while justiciability is a prerequisite for the court's involving itself in the case, the policy doctrine is a part of the substantive law relating to the discretion of public authorities.[34] The obscuring of this division derives from the fact that, generally, the policy doctrine is articulated in a realistic form. For example, "the limitations on the involvement of the High Court of Justice in Policy . . . are . . . narrow."[35] There is nothing here which clarifies whether the doctrine deals with the prerequisites to adjudication or with the substantive law itself.

E. *On Normative Justiciability*

1. The Universality of Law: The Law Takes a Position Regarding All Human Actions

The concern of normative justiciability is, as previously noted, the problem of whether each legal question—a question dealing with the rights or obligations of a person according to the norms recognized in the particular

---

33. *See* Marshall, *supra* note 7, at 279-80. The second meaning ascribed by this writer to the term "political" is "discretion[al]." Yet, neither in the United States, nor in Israel, does the political question doctrine apply to all actions given over to the discretion of public authorities.

34. *See* Aharon Barak, *The Duty to Regulate General Norms*, 22 HAPRAKLIT 292, 296 (1966) (Hebrew).

35. H.C. 49/83, United Dairyman Ltd. v. Milk Branch Council, 37(4) P.D. 516, 523.

system of law—possesses an answer. Logic would seem to require that there must be an answer to all legal questions defined as such. For it is not logical that any human action should be simultaneously lawful and unlawful, permissible and prohibited. The law, by its very nature, cannot be indifferent to any human action. Every such action is either lawful or unlawful, permissible or prohibited.[36] In the words of Justice Barak:

> The law is omnipresent. There exists no 'legal vacuum'. If a lacuna should come to exist, the law finds a way to fill it. I am permitted to think and move as I will because the law recognizes my freedom in these respects. This recognition doesn't arise because the law does not prohibit these actions by me but because it does not recognize the right of others to prevent me from so acting. My freedom is the restriction of another's right . . . . Indeed, if these relations were considered to exist in a legal vacuum, what would prevent me from preventing my fellow from thinking or eating as he wishes?[37]

> The world is filled by the law. All human behavior is the subject of a legal norm. Even where a particular class of actions—such as relations of friendship or subjective thought—are controlled by the autonomy of the individual will, this autonomy exists because it is recognized by the law. Absent this recognition, freedom would be given to all to invade this sphere of autonomy.[38]

It is clear that statutes or decisional law do not deal expressly with each and every human action, permitting or prohibiting them. The doctrine of the universality of the law is tied to two general fundamental legal principles. According to the first principle, the individual is granted the freedom to act as he wills unless a specific legal provision rules otherwise (The Principle of Individual Freedom); according to the second, a public governing authority lacks any powers save those delegated to it by the law (The Principle of The Legality of Governance).

Against this approach, Shulamit Almog and Avinoam Ben-Ze'ev contend that it is proper—and that it could not be otherwise—that certain human actions operate in a "legal vacuum."[39] According to their approach,

---

36. Bendor, *supra* note 14, at 622.

37. H.C. 90/1635, Gerjevski v. Prime Minister, 45(1) P.D. 749, 855.

38. Barak, *supra* note 5, at 447.

39. Shulamit Almog & Avinoam Ben-Ze'ev, *Legal Reality—On Justiciability and the Limits of the Law*, 12 BAR-ILAN L. STUD. 369 (1996) (Hebrew). This source is also reprinted in chapter one of SHULAMIT ALMOG & AVINOAM BEN-ZE'EV, THE LAW OF HUMANITY (1996) (Hebrew).

human actions upon which the law (the legal norms and the courts) cannot exercise any influence, such as thoughts, dreams and feelings, exist in "a reserved area of total freedom,"[40] outside the concern of the law. In these matters there is no practical meaning in any legal permissibility or impermissibility, and any legal provision regarding them would be irrelevant (in the best case) or even harmful (in the worst case). The authors add that this "reserved area of total freedom" in these areas properly exists:

> Not simply because there is no way to place restrictions on its being there but because the individual is deserving of this protective reserve. In a certain sense, man cultivates the meaning of his life within this reserve. There he learns to be himself, there he learns his own significance, as well as the great goodness in freedom . . . . Accordingly, if we were to follow in the footsteps of imaginative fiction, we would define as tyrannical a society that was able, through advanced technology, to enter into the world of dreams and thoughts. In this sense, and still within the bounds of the imaginary, individual autonomy is a signpost of our values. Its boundaries are the boundaries of democratic society.[41]

I agree that a legal norm relating to an action that is impossible to control or to influence by means of the norms and the agencies of legal enforcement would be insignificant. At the same time, where the legal norm is incapable of exercising influence, the concern of the authors as to an infringement upon individual autonomy is not understandable. In any case, it would seem that the assumption that thoughts, dreams, and feelings are not susceptible to the influence of legal norms—and that there is, therefore, no point in permitting or prohibiting them—is not a universal truth. Take for example an imaginary society, like that mentioned by the authors, "capable, through advanced technology, of entering into the world of dreams and thoughts."[42] In such a society, the legal norms regulating the use of such technology would bear a practical significance of the highest degree. The level of tyranny or democracy in a society are not determined solely by the technological capacity of the society, but, among other things, by the content of the norms regulating the usage of the various technologies. These norms, prohibitory or permissive, would have to exist both as a concept and as a matter of practicality. Moreover, in an age of "virtual reality," it is doubtful if it is still possible to say confidently that control over the thoughts of

40. Almog & Ben-Ze'ev, *supra* note 39, at 381.
41. *Id.*
42. *Id.*

another, or certainly influence not reaching to the level of control, is a matter of science-fiction. The right of a person not to be exposed to the media of virtual reality without his consent derives from the legal norm of freedom of thought, which is the lack of right or freedom of another to prevent someone from thinking as he or she wishes. It is well to remember that the very question of whether any particular action is subject to outside control, to the extent where there is reason to regulate it under the law, is at times far from simple. A blatant example of this can be seen in various problems of criminal law, such as the laws regarding willfulness, and the serious debates concerning these matters. There are even areas, at the head of which could be placed the modern technologies, such as computers, or in earlier periods even television, radio, telephone, and electricity, which in the past were "fantastical," and which even today may not exist in certain areas of the world. Does the non-existence—plainly temporary—of these technologies and of others turn them into non-justiciable subjects as a matter of fundamental principle (as distinguished from the insignificance or impracticability of having norms to deal with them)?

The former Deputy Chief Justice of the Israeli Supreme Court, Justice Menachem Elon, in his debate against the notion of the universality of legal thought, held that:

> You do not say that the law 'permits' one to eat, to talk on the telephone, to take a stroll, to run or to dance because it does not 'prohibit' these activities. You also cannot say that the law 'permits' one to do kindness or walk humbly, because it does not 'prohibit' these activities. The legal system does not relate itself at all to all these above-mentioned actions, it ignores them, for they are outside its area of concern. With respect to all these activities there exists a 'legal vacuum'.[43]

Yet most, if not all, of the examples raised by Justice Elon are plain examples of activities regulated in detail—and not simply regulated under general principles of individual freedom or legality of governance—by at least some of the legal systems existing today. For example, "the freedom to eat" is far from being self-evident. Its legal regulation and limitation for reasons such as health, environmental concern, and, in many states (including Israel), religious practice, is not rare. The right of a person to talk on the telephone, whether relating to its technical aspects or to aspects of constitutional human rights (including freedom of expression and the right to privacy), is also a right which the law in many states regulates extensively. The "right to take a stroll" outside the boundaries of the State and even within them is also

---

43. *Gerjevski*, 45(1) P.D. at 767.

regulated and limited by intricate legal norms, including constitutional norms that balance the freedom of movement on the one hand, and public and property rights on the other. The list of examples is endless.

It is possible that what Justice Elon meant is that the above-mentioned rights are "natural rights," which means that their source does not lie simply in the fact that the law does not prohibit them and, consequently, grants them. Yet even if we are speaking of a "natural rights" approach, of rights whose source is ostensibly in nature itself,[44] it is still the case that such natural rights depend no less than "artificial rights" (i.e., those created by the legal system) on the protection of the legal norms for their enjoyment. The absence of the right or freedom to interfere with the exercise of the natural rights, and the right not to be interfered with in the exercise of these rights, are positive legal norms (even if their justification derives from "nature"). As long as there is no attempt to violate these natural rights, they will, like other rights, appear to be self-evident. From here there may be only a short road to Justice Elon's above-quoted conclusion that "the law does not relate itself at all" to these rights; "it ignores them, for they are outside its area of concern. With respect to all these activities there exists a 'legal vacuum'."[45] Yet this "legal vacuum" does not exist. Legal regulation of a right comes to be necessary in a place where there is an attempt to derogate from that right. Is it reasonable that if someone were denied his right to eat what he wished, or to speak on the telephone, or to take a stroll, that he would be unable to find relief within the legal system because the legal system "does not relate itself" to these matters? And if this were the case, could you not say, then, that the legal system was relating itself to those rights insofar as it was permitting the power or, at least, the freedom to interfere with those rights, thereby limiting them? These are, of course, simply rhetorical questions. Nevertheless, they make clear that neither the "triviality" of a human activity nor its "naturalness" are sufficient to take them outside the ambit of the concern of the law.

It may be noted that Justice Elon, who is an Orthodox Jew and whose life's work has been the incorporation of the principles and concepts of religious Jewish Law (the *Mishpat Ivri*) within general Israeli law, does not base his position regarding justiciability on any texts or references from Jewish law. On this matter, he would maintain a clear opposition between the world of secular law and that of the religious law (the *halacha*). According to his view, the law, by its very nature, exists within defined and narrow boundaries; the *halacha*, by *its* very nature, extends into every human concern

---

44. For the weaknesses in the natural rights doctrine, see, for example, MARGARET MACDONALD, NATURAL RIGHTS IN THEORIES OF RIGHTS 21 (Jeremy Waldron ed., 1984); Philip A. Hamburger, *Natural Rights, Natural Law and American Constitutions*, 102 YALE L.J. 907 (1993).

45. *Gerjevski*, 45(1) P.D. at 767.

with the *Mishpat Ivri* being one portion of it.[46] Indeed, many of the commandments of Jewish Law deal with the area of human feelings. For example, the Tenth Commandment teaches: "Do not covet your neighbor's house, do not covet your neighbor's wife or his slave or his maidservant or his ox or his donkey or anything that belongs to your neighbor."[47] Yet, if these type of norms are possible in the *halacha*, it should be possible for them to extend into the area of the secular law. It should be noted that the foregoing does not support the notion that the law should place any prohibitions or restrictions on emotions. Rather, the meaning is that the absence of any such prohibitions or restrictions is itself anchored in the law and does not find its place outside of it.

The commentators Almog and Ben-Ze'ev[48] maintain—and it is possible that Justice Elon[49] was hinting at a similar position—that the intrusion of the law into certain human activities which occupy the field of free feeling and will (or, in the language of Almog and Ben-Zev, "the reserve of total freedom"), such as love, mercy, and the practice of charity and righteousness, would deprive them of their savor and their value. For love which is mandated by law and which is engaged in to comply with that mandate is not love; legally stipulated mercy is not mercy, and so forth. To this quaint argument it is possible to reply (1) that we should certainly not reject any legal norms that serve to protect our "reserve of total freedom" by prohibiting interference with the desires and feelings that dwell there, and (2) that many, perhaps most, legal norms are based on ethical norms. This does not detract from the moral significance of acts on the basis of an authentic moral outlook, if such action (or omission) comports with what is set forth in the law or even mandated by it. The same would apply to an action undertaken from emotional imperatives. To the extent that the dictates of the emotions coincide with the dictates of the law, there is nothing there to detract from the substance of the emotion or its meaningfulness. Finally, with respect to the theoretical case of the person who loves or shows mercy because the law so directs, it is indeed true that his love is not love nor his mercy, mercy. These laws carry with them their own failure (though the same is not the case with laws that prohibit these and other emotions, such as the Tenth Commandment mentioned above: "Thou shalt not covet"). Yet simply because this or that norm commands the impossible is no reason to place the subject matter of that norm outside the bounds of justiciability. Certainly, there are innumerable activities that are either entirely, or at times impossible, to execute (or not to

---

46. *Id.*

47. *Exodus* 20:13.

48. Almog & Ben-Ze'ev, *supra* note 39, at 32. *But cf.* Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633 (1996).

49. *See Gerjevski*, 45(1) P.D. at 766-67.

execute), both in the area of emotions and in other areas as well. Norms which purport to mandate or prohibit such activities will be totally ineffectual and, therefore, also inappropriate. Yet this provides no basis to say that the subject matter with which those norms deal is therefore non-justiciable.

A distinct category of issues that are traditionally claimed to be outside the competency of the law are "political questions" which generally refer to questions of foreign policy and national security.[50] Even though the bases for considering these questions as non-justiciable generally focus more on the institutional aspect of non-justiciability (particularly considerations relating to the separation of powers),[51] still, the relevant factors may have a normative aspect in the sense of the impossibility (rather than simply the non-desirability) of dealing with political questions in a purely legal manner.[52] Thus, Justice Elon—who negated the very distinction between normative justiciability and institutional justiciability and therefore intermixed in his exposition normative and institutional terminology—wrote in his rebuttal of Justice Barak's approach regarding the imposition of a reasonableness requirement on the political activities of the government:

> How is the court to assess that the weight given by the government to the relevant considerations, and the balancing that it performed between them, was improper or unreasonable? Does it have in its hands the professional tools needed to weigh the reasonableness or unreasonableness of that balance? What point or use is there in our terming this an examination of the legality of how it ran a briefing on preparations for battle? And is our nomenclature and terminology determinative? Are these not matters that from their very nature and essence can only be examined by other more appropriate and proficient bodies, such as a governmental Committee of Inquiry composed, in addition to a judge, of professionals and experts in the matter. We, the judges, howsoever wise and farsighted we may be, what do we have to do with the considerations that go into the waging of war or the initiation of diplomacy? . . . In my view, what is unreasonable is to reasonably expect that a *court of law* should examine the reasonableness of such matters.[53]

---

50. In the United States, the foundation for the notion of the immunity of foreign relations from judicial review is Justice Marshall's comment in Marbury v. Madison, 5 U.S. 137, 176-78 (1803). *See* T.M. FRANCK, POLITICAL QUESTION JUDICIAL ANSWERS 3 (1992).

51. As such, they are the political questions deemed non-justiciable under Baker v. Carr, 369 U.S. 186 (1962).

52. *See, e.g.*, Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 142 (1962) (White, J.). For the interpretation of Tribe, see TRIBE, *supra* note 3, at 98.

53. *Gerjevski*, 45(1) P.D. at 771.

Despite his "institutional" formulations, the factors causing Justice Elon to consider the reasonableness of the above-mentioned political actions to be non-justiciable consist not simply in the notion that it is undesirable for a court to apply itself to the question, but also that the court is not equipped to do so because the law does not supply the court with the tools to assess the reasonableness of political actions.

Though I believe this view contains a certain nucleus of truth, which I will deal with further on,[54] it suffers from two fundamental deficiencies. First, it greatly confuses the highly significant distinction between justiciability and substantive law. It is not clear if Elon's meaning is that the political activities are not subject to a *legal* requirement of reasonableness, or whether they are subject to such a requirement, but the court is not the appropriate body to determine if it has been fulfilled. If the intent is that the governmental authorities are not subject to a legal requirement of reasonableness in the exercise of their political activities, then the court's avoidance of examining the reasonableness of these actions does not occur because of the ostensible non-justiciability of the unreasonableness claim, but rather because unreasonable political acts are legal. Just as the court dealing with criminal matters will not rely on non-justiciability when it acquits one accused of an offense not recognized as such by the substantive law (e.g., negligence not resulting in bodily harm), so there is no reason to have recourse to this factor in dismissing a petition based on the claim—in our case, the unreasonableness of a political action—that at face value reveals no legal defect. On the other hand, if the meaning here is that the *legal* obligation of reasonableness applies to political acts, but that the court is not the proper body to oversee the compliance with that obligation, then we are indeed speaking of a contention of non-justiciability, if only in its institutional aspect. In this case, the question arises as to whether or not it is then appropriate to establish an alternative *legal* institution that will be authorized to determine disputes revolving around the reasonableness of political decisions. There are a number of courts in which, due to the subject matter with which they deal, other experts or public representatives participate alongside the professional judges. Examples of this include the Israeli Labor Courts, where employer and labor representatives participate alongside the professional judges; the American criminal courts, where a significant adjudicatory role is delegated to the jury; and the Constitutional Courts in countries like France[55] and Germany.[56] Yet, I am doubtful that this is what Justice Elon, and those who hold similar views, intend. The Commissions of Inquiry referred to by Justice

54. *See infra* text accompanying notes 142-60.

55. *See* CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 111-13 (2d ed. 1996).

56. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 27-30 (1994).

Elon, which are formed infrequently and on the initiative of the ruling authorities themselves, are no substitute for an on-going judicial review of the reasonableness of political actions of the governing authorities. The impression, then, is that the remarks of Justice Elon do not relate to justiciability, and certainly not to normative justiciability, at their core, but rather to the proper content of the substantive law.

Second, the contention that judges are unable to assess the reasonableness of political governmental actions would seem to be equally valid as to their ability to assess the reasonableness of any action, whether political or non-political, whether committed by a governmental body or by an individual. It is well known that the substantive law depends heavily on various categories containing a reasonableness requirement. The terms "reasonable man," "reasonable amount of time," "reasonable manner," and the like, appear in the penal law, the law of contracts, tort law, family law, property law, the law of adjudication and evidence, administrative law, constitutional law, and so on. Not simply the decisional common law, but the statutes themselves, include norms whose core standard is reasonableness and its near relatives: justice, fairness, customary practice, good faith (in its objective meaning), and the like. How is the ability of judges to determine the reasonableness of the variety of actions in all these areas any greater than their ability to determine the reasonability of political actions? Justice Elon's words to the effect that "we, the judges, howsoever wise and farsighted we may be, what do we have to do with the considerations that go into waging war or entering into diplomacy?",[57] and that it is "wholly unreasonable to reasonably expect that a *court* will examine the reasonableness of all these varied matters[,]"[58] are equally valid to the vast majority, if not all, of the subjects where the court applies the norm of reasonableness. Yet no one would maintain that these various norms, without which it would be difficult to envisage a system of law and adjudication, are not justiciable—either normatively or institutionally. Indeed, as noted, it is valid to consider whether it is really appropriate to apply a requirement of reasonableness as a legal requirement in this or that area of the substantive law. Yet, the fact that the judges are not experts in the fields where they are required to rule on reasonability is not sufficient to turn reasonableness into something non-justiciable. On the other hand, as discussed, *infra*,[59] it is possible that in administrative law, in light of particular difficulties raised therein, reasonableness should not be classified as part of the substantive law, but as a basis to allow for judicial examination. This means that institutional justiciability will exist even in the absence of normative justiciability.

---

57. *Gerjevski*, 45(1) P.D. at 771.
58. *Id.*
59. *See infra* Part III.

A fairly common claim, similar to a certain extent to the contention that political questions are normatively non-justiciable, is that there are problems that, by their essential nature, are not within the province of the law, and that the law and the courts are constrained to deal with and determine them almost against their own will. A typical example of this kind of problem is the determination as to whether to permit controversial forms of medical treatment, whether voluntarily or involuntarily imposed, such as: whether to force a youth, ill with cancer, to undertake a painful treatment to which he vigorously objects;[60] whether it is permissible to remove the kidney of a retarded youth, who is incapable of expressing his informed consent, in order to save the life of the father who cares for him;[61] whether it is permissible to plant a "surrogate" ovum in a woman's womb, when that ovum has been fertilized by the sperm of a man who has withdrawn his consent to the use of his sperm;[62] or whether it is permissible to deny a respirator to a child in a coma afflicted with an incurable illness.[63] The problem in determining these issues—it is claimed—is that they are tied into complex questions outside of the law—such as philosophy (including ethics), religion, sociology, economics, psychology, and medicine. In one of the Israeli decisions previously mentioned, Deputy Chief Justice Elon wrote:

> We sit 'against our will' to consider the issue before us. The Angel of Law stands over us and tells us 'Decide!' Even with differing opinions such as are here present, the judge is commanded to judge, so that the patient may know what is his right and what he is obligated to do or request, so that the physician may know what is forbidden, what is permissible and what is required of him in the practice of his craft, and so those who care for the ill may know what they are permitted—and what they are required—to know.
>
> . . . .
>
> . . . 'Against our will' we rule on all these matters, for we are far from certain that we are sufficiently versed in these worldwide problems, or that we have in our hands all the data and information needed to determine our issue.
>
> . . . .
>
> . . . Nevertheless, we are not freed from fulfilling our judicial duty, and we are commanded to examine, consider and

60. *See* H.C. 2098/91, John Doe v. Zik, 45(3) P.D. 217.

61. *See* R.I. 698/86, Attorney General v. Doe, 42(2) P.D. 661.

62. *See* C.A. 5587/93, D. Nahmani v. R. Nahmani, 49(1) P.D. 485; A.H. 2401/95, R. Nahmani v. D. Nahmani (not yet published).

63. *See* 506/88, Sheffer v. State of Israel, 48(1) P.D. 87.

to express our conclusion.[64]

Yet, is it in fact possible to distinguish between questions that, in their essence, are not legal (which the law, and the courts, must deal with, if at all, against their will) and plainly legal questions which the law and the courts deal with willingly? What is the difference between those non-justiciable questions—such as political questions which the law (and the courts) do not deal with (and where it is claimed to be inappropriate for them to deal with such questions)—and questions which the law (and the courts) do deal with, albeit unwillingly?

Why is the determination of granting capital punishment in a criminal case considered an obviously legal and judicial matter, whereas the decision regarding euthanasia is considered to be something that the court rules upon under force of circumstances despite the fact that inherently it is not a legal question? Why is a question regarding the danger to the life of soldiers who are sent into battle considered a non-justiciable matter for which the courts are not equipped and, hence, not even permitted to deal with? What is the standard of measure for normative justiciability?

In cases[65] and legal literature,[66] there is reference to "the expert feel of the lawyer" according to which he determines if such questions and others are justiciable or not. Yet it is clear that all the talk about a mysterious "expert feel" is no substitute for a rational, analytical examination of the subject, particularly since it is clear that this "expert feel" does not operate equally and in the same manner for everybody. It is my guess—and it is no more than a guess—that the aforesaid "expert feel" is influenced heavily by the accepted custom and tradition regarding the ambit of the law and of adjudication. For example, since the determination of criminal matters is a clearly traditional function of the law and of the courts, the question of the reasonableness of the conduct of a person who unintentionally caused another's death, and who is accused of the crime of negligent homicide, is viewed, in the professional sense of the jurist, as a clearly justiciable question. The same applies to the issue of the reasonableness of conduct which caused damage, with respect to which there has been asserted a tort suit on the basis of negligence. The medical issues referred to above have not, due to their very novelty, been commonly presented for legal or judicial determination; and therefore, especially in light of the difficult ethical uncertainties with which they are bound up, they have been viewed as issues less legal in nature. Similarly,

---

64. *Id.* at 97.

65. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 151 (1951); H.C. 1/81, Shiran v. Broadcasting Authority, 35(3) P.D. 365, 371; H.C. 246, 260/81, Agudart Derekh Eretz v. Broadcasting Authority, 35(4) P.D. 1, 15-16.

66. *See, e.g.*, Menachem Flon, *Values of a Jewish and Democratic State in the Light of Basic Law: Human Dignity and Freedom*, 17 TEL AVIV U. L. REV. 662 (1993) (Hebrew).

clearly political questions have been traditionally viewed as delegated to the sphere of autonomy of the governing authorities—i.e., the legislative and executive authorities. Consequently, the "expert feel of the lawyer" recoils from seeking to bind them within the law's—and certainly the judiciary's—Procrustean bed, particularly with respect to any requirement of reasonableness. Until a few years ago, the professional instinct of the typical Israeli lawyer viewed the examination of the reasonableness of an administrative act—even one not considered particularly political—as non-justiciable. With the years, and with the assimilation of the reasonableness doctrine into Israeli administrative law, the professional instinct has leaned toward accepting justiciability of this doctrine. The situation certainly differs in those countries, including the United States, where judicial review of the reasonableness of administrative decisions is less common.

As we know,[67] legal norms are themselves expressions of values and interests whose source lies outside the law itself. The legal discipline, rather than existing in a splendid, self-enclosed isolation, is a vehicle for the realization and enforcement of values and interests of concern to society (or, at least, to the influential segments of society). In this sense, all legal norms are political, and all reflect and give expression to a variety of other disciplines (including ethics, religion, economics, sociology, psychology, medicine, management, and many more). Thus, those questions termed "political," which the "professional instinct of the jurist" recoils from adjudicating, are not (essentially) more political than other questions regulated by law and brought for adjudication to the courts. The dichotomy between political and legal questions, based upon a view that regards them as if they were two distinct and self-exclusive categories, is, in fact, without foundation. The law is always the expression of political, value-laden, and interest-ridden considerations.

Indeed, even with respect to the more common understanding of political questions, which identifies them with questions relating to the areas of foreign policy and national security, to the internal relations of governmental institutions, and sometimes also to questions of macro-economics, there is no basis to viewing a dichotomy between such political questions and legal questions. So maintained Justice Barak:

---

67. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 9-116 (1985); Uriel Procaccia, *Law Bubbles*, 20 MISHPATIM 9 (1990) (Hebrew). Understandably, the Economic Analysis of Law and the Critical Legal Studies Movement are clear examples that are helpful for understanding the law against the background of its underlying values and interests.

> Every action—be it ever so political or policy-related—is encompassed within the universe of the law and there exists with respect to it a legal norm holding whether that action is permitted or prohibited. The claim that 'the matter is not a legal matter but a clearly political matter', confuses wholly different entities. That a matter is 'clearly political' is not enough to remove it from being also a 'legal matter'. . . . The political domain and the legal domain are two different domains. They neither exclude one another nor render the other superfluous. They operate in different spheres. The same action that can be encompassed by the one can be encompassed by the other as well. The political nature of an action does not negate its legal aspect, and its legal aspect does not negate its political aspect.[68]

Even a military action, or an action within the sphere of foreign affairs, or similar political actions, in the common meaning of the term, carries a legal aspect to which the law is not indifferent. For, as in the case of every other human action, so also actions from these categories cannot be at the same time both lawful and unlawful, both permissible and forbidden, both not-permissible and not prohibited.

2. Still, the Law Has Limits

The things of which I have written thus far are fully consistent with the doctrine of the universality of legal significance—i.e., the doctrine that maintains that the law is "concerned" with every human action—and supports that doctrine. Yet, even under this doctrine, it is not assured that the existing and accepted legal norms will lead to a result in each and every case. In this sense there may be legal questions that are normatively non-justiciable.

I am not referring to cases where a dispute has arisen as to the interpretation of certain rules of law—i.e., where the dispute is over which of the suggested interpretations is correct or proper. In this article my focus is not on the issue of whether there may be more than one lawful answer to a legal question; rather, it is on whether every legal question has, at the very least, one answer.

Normative non-justiciability, in the sense I am referring to, may arise from one of these three factors: (1) inherent limitations in human understanding; (2) a failure to solve a legal question (where such failure does not arise due to the aforesaid inherent limitations); and (3) an internal contradiction within a legal norm or between several norms which cannot be resolved on the basis of the rules of interpretation followed in the legal system. I will briefly

---

68. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 547.

deal with these three categories in their proper order.

Even putting aside the skepticist approach in its broadest sense, which casts doubt on every answer or conclusion, the human intellect, by its very nature, is limited. There are questions that the mind of mankind is not capable of resolving. This was noted by Immanuel Kant in his antinomies.[69] It is not impossible that included among the class of legal questions are some questions that cannot be answered.[70] I myself, however, am doubtful that it is possible to positively identify questions of this class, or to distinguish between these questions and those belonging to the second category, i.e., questions that can be answered, but whose answers have not yet been discovered.

In every area of science there are unresolved questions. This is the case in mathematics, physics, chemistry, biology, medicine, psychology, sociology, economics, philosophy, and so forth. Those who work in these areas sometimes think that such questions are in fact unanswerable. These are questions that resemble those categories of legal questions I have just dealt with. Yet, in many—and perhaps in most—cases, researchers assume that there are answers for these questions, answers that have not yet been discovered. But they still strive to uncover these answers. The searches may last many years, sometimes decades. Sometimes the researcher may despair of his research and halt it. Even here, he would not necessarily claim that the reason he stopped his research lies in the inability of the human mind to find the answer; he might rather simply assert an individual's failure to do so.

As a student and as a law professor, I have found that students of law, particularly at the beginning of their studies, will encounter difficulty in resolving the problems given to them as assignments. At times it will occur that a student will despair of answering a particular question and will claim—with total honesty—that he or she is incapable of solving the problem. Yet, rather than suggesting that the problem itself is insoluble or non-justiciable, the student generally will say only that he himself cannot succeed in solving it. But this confession of failing to solve a legal question does not become part of the legacy that he takes with him after he finishes his studies and goes on to be an attorney, a law professor, or, most particularly, a judge. These professionals, out of a need to provide some sort of answer to the dispute or problem before them,[71] prefer to take a stand and to reach a relatively rapid determination with respect to every legal question presented

---

69. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 86-95 (Dr. Paul Carus ed., Open Court Pub. Co. 1902).

70. *See* Almog & Ben-Ze'ev, *supra* note 39, at 386-88.

71. *See infra* text accompanying note 172. With respect to the ethical problems in giving legal advice concerning questions whose answers are uncertain, see Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyers*, 104 YALE L.J. 1545 (1995).

to them. They will never say that they themselves are incapable of solving the question. At most, they will claim that the question is itself non-justiciable, i.e., that the question is not within the boundaries of the field of activity of the law and the law courts; that the question does not have, and could not have, a legal solution.

Yet it is possible that, as in other disciplines, there are questions whose answers are, in principle, within the grasp of the human intellect but whose answers have simply not been discovered yet. It is possible that one example of such a question is that which I will expand on further in this article[72] and which relates—in the framework of assessing the reasonability of a public authority's decisions—to the balance between obligatory considerations and permissive considerations (and, in particular, considerations focusing on the political benefit to the maker of the decision).

It is possible to offer as another example of this, the issue of defining the term justiciability (or non-justiciability) itself. In the past, this question was addressed by the acting Chief Justice of the Israeli Supreme Court, Justice Zilberg; he wrote:

> I am doubtful that we shall ever discover in the world a sage who shall be able to precisely define the meaning of this term. . . . I can confess, without shame, that even I have not ever grasped the nature of this monstrous creation. . . . A precise legal analysis cannot be found that will allow us to grasp the content of this concept.[73]

Subsequently, the term was defined by Justice Barak in the *Ressler* decision[74]—though in the present context we need not consider the substance of that definition.

As previously noted, the third category of legal questions whose answers are not known includes cases of internal contradictions within a legal norm, or between such norms, which cannot be resolved through the interpretive rules and principles operating in that legal system. A good example of a norm within the Israeli legal system which falls into this category is Section 4 of the Local Authorities (Elections) Act, 5725-1965. This section provides, *inter alia*, that elections for the local authorities shall take place every five years on a set date. The Section thus points to two periods when elections for the local authorities are to take place: (1) every five years and (2) on a specified date.[75] Generally, there will be a coincidence

---

72. *See infra* text accompanying notes 145-59.
73. H.C. 295/65, Oppenheimer v. Minister of Interior and Health, 20(1) P.D. 309, 328.
74. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 474.
75. Local Authorities (Elections) Act, 5725-1965.

between these two dates and there will be no difficulty in knowing when the elections are to take place. Yet, circumstances can arise where, with respect to a particular local authority, there is no overlap between the two stipulated times. For example, consider a case where, on the date specified for the election of all the local authorities, less than five years have passed since the last elections for that particular local authority (where, for one reason or another, the previous election for that local authority had been postponed). In these cases, the above section simply cannot be complied with due to an internal contradiction: If the elections take place five years after the last elections, they will not occur at the specified date; and if they are held on the specified date, they will not take place five years after the previous elections. This contradiction, it appears, cannot be resolved; and it therefore seems that we are dealing with a case of normative non-justiciability in the sense that, despite the existence of a norm regarding the scheduling of the elections, we cannot know, purely on the basis of that norm, when they will take place.[76]

Are the jurist and, most significantly, the court, which is confronted with a legal question falling into one of these three categories of normative non-justiciability, to refrain from rendering a decision? Do they have any other option? These questions fall within the area of institutional justiciability, to which I will now turn my attention.

F. *Concerning Institutional Justiciability*

Institutional Justiciability deals with the question of whether the court is the appropriate institution to provide a final binding answer to legal questions.

In Israeli law, there is a presumption that the court—whose expertise and whose function, in a system of the separation of powers, is directed to the adjudication of disputes involving rights and obligations, i.e., to giving final and binding answers to legal questions[77]—is in fact the appropriate party for doing so. In other words, it is presumed that every legal question is justiciable from an institutional standpoint, which means that a law court is the appropriate forum in which to determine all legal issues.

Nevertheless, to those who subscribe to the theory of institutional justiciability, this presumption is not irrebuttable. Under the doctrine of

---

76. It may be noted that when this question reached the Israel Supreme Court, it held that the relevant minister could choose—according to his discretion—between the two dates provided under the statute. *See* H.C. 3791/93, Mishlab v. Minister of the Interior, 47(4) P.D. 126. With respect to this decision, see Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 MISHPAT UMIMSHAL—LAW AND GOVERNMENT IN ISRAEL, 443, 454 (1994). With respect to the adjudication of questions that are not fully normatively justiciable, see *infra* Part III.

77. *See, e.g.*, H.C. 306/81, Platto-Sharon v. Knesset Comm., 35(4) P.D. 118, 141; H.C. 73/85, "Kach" Movement v. Chairman of the Knesset, 39(3) P.D. 141, 152-54.

institutional justiciability, two factors must be examined. The first examination is whether it is appropriate that a court adjudicate the subject matter of the dispute (material institutional justiciability). Then it must be determined if it is appropriate that the court rule upon the legality of actions taken by the body against whom the petition has been brought (organic institutional justiciability).

In the United States, the problem is more complex not only as a result of the tendency not to sharply demarcate between legal questions and political questions, but also because of the reluctance there to grant to the courts a monopoly on the making of binding determinations on legal questions, particularly questions that approach the political domain. Thus in *Luther v. Borden*,[78] the Supreme Court refused to enforce Article IV, Section 4 of the Federal Constitution, in which it is provided that:

> The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[79]

The Supreme Court held that the determination of what form of government would govern under this section was a matter given to Congress and the President and not to the courts.

Nevertheless, even in the United States, it is accepted as a principle that, subject to the political question doctrine, legal questions are justiciable from an institutional point of view, i.e., that the court—the judicial branch—is the institution vested with the function of determining such questions.[80]

In this article, I shall focus on material institutional justiciability, i.e.,

---

78. 48 U.S. 1 (1849) (citing U.S. CONST. art. IV, § 4).

79. U.S. CONST. art. IV, § 4.

80. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 549 (1969); United States v. Nixon, 418 U.S. 683, 703 (1974). *Cf.* FRANK M. COLEMAN, POLITICS, POLICY, AND THE CONSTITUTION 19-20 (1982). This approach expresses the traditional federalist position. *See* Pushaw *supra* note 2, at 503-04. This view was questioned to a certain extent in *Chevron*. For criticism of this decision, see Cynthia F. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), *reprinted in* FOUNDATIONS OF ADMINISTRATIVE LAW 193 (Peter H. Schuck ed., 1994); Bernard Schwartz, *"Apotheosis of Mediocrity"? The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 172-78 (1994); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). *See also* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995). *But see* articles cited *supra* note 29.

the suitability of the courts to adjudicate the variety of questions that come before them. The issue of organic institutional justiciability, dealing with the suitability of the courts in adjudicating claims against various governmental organs and, in particular, the Legislature, is itself bound up, to a very large extent, with material institutional justiciability. In any case, it is a less complicated issue than material justiciability, and I will deal with it below only briefly.

1. Material Institutional Justiciability

In light of the presumption already mentioned—that the courts are the institution best-suited and appropriate to deliver final and binding resolutions to legal questions, i.e., that legal questions are per se justiciable from an institutional point of view—we must examine then what the possible justifications for restricting material institutional justiciability in various types of situations are.

The most acceptable justification in the decisional law and in the legal literature for the restricting of institutional justiciability is to prevent the impermissible infringement upon the separation of powers and democratic governance that is caused when a law court involves itself in a question whose determination has been committed to another authority. It is contended that the most clear-cut instance of questions with respect to which the courts are not the appropriate institution to render determinations, because they have been committed for final determination to another branch, are "political questions"—questions committed for resolution to "political" bodies.

This claim is only a variation of a claim that I have already considered, whereby political questions were ostensibly non-justiciable from a normative standpoint.[81] As previously emphasized, the law takes a stand even with respect to political acts. As long as the question presented to the court for determination is a legal question—dealing with the legality of a political act—there is no basis upon which to negate its institutional justiciability. The clearest function of the courts in a democratic system is to determine the lawfulness of the acts of other actors in the society, including the other governing authorities. It is precisely the presumptuous conduct of another authority, in rendering a final binding determination as to the legality of its own or another body's actions, that negatively impacts the democratic system and the principle of the separation of powers—even if the action adjudicated was a political one. On this basis, there is no justification for the court's abstention on grounds of institutional justiciability—provided, of course, that the court concentrates only on the question of the legality of the political action at issue.

---

81. *See supra* text accompanying notes 36-76.

It is true, however, that the distinction necessitated by this approach between the legal aspect of the political question and its political aspects is less accepted by the legal ethos and judicial rhetoric in the United States than is the case in Israel. It is precisely this ethos and rhetoric that has enabled the courts in the United States to achieve public legitimacy in providing judicial review of statutes that interfere with human rights than is the case in Israel, where the courts have only recently undertaken this task. It is noteworthy that in Israel, where it is still contended that judicial review of interference with human rights is unacceptable because it causes the courts to slip into the determination of value-laden political questions, the judicial adjudication of questions related to the structure of the government and to the relationships between its various branches arouses less opposition because of the more technical/legal appearance of those issues. Former Chief Justice of the Israeli Supreme Court, Moshe Landau, who opposes judicial review of human rights legislation, took up this point:

> There are two main issues adjudicated on a regular basis with respect to legislation: first, the structure of the governmental authorities: the manner of their formation and the relations between them; and, second, the delineation of basic social concepts including human rights upon which the governing system in the state is founded. . . . Laws in the first category determine the framework of governance and the manner of its operation—matters of form that are not meant to define the substantive content of the government's actions with respect to its various arms. The second category, however, relates directly to matters of substance. . . . With respect to the norms establishing the structure of government. . . . I see much to commend the notion that they should take on somewhat the status of a higher law.[82]
>
> . . . .
>
> . . . You cannot place the issue of the conformity of the Knesset's ordinary legislation with the ideological principles of the State under the rod of reexamination by the courts or any other body, . . . and the same applies to judicial oversight of the preservation of the constitutional norms regarding civil freedoms.[83]

---

82. Moshe Landau, *A Constitution as the Supreme Law of the State of Israel*, 17 HAPEAKLIT 30, 32 (1961) (Hebrew).

83. Moshe Landau, *The Supreme Court as Constitution Maker for Israel*, 3 MISHPAT UMIMSHAL—LAW AND GOVERNMENT IN ISRAEL 697, 711 (1995-1996). *See also* Landau, *supra* note 82, at 35 et seq.

In the United States, by contrast, the cases in which petitions have been dismissed because they were non-justiciable on political question grounds have been precisely those cases where the dispute revolved around the relationships between the various branches of government, particularly the President and Congress, and not disputes regarding the rights of individuals against the government.[84]

Another justification for limiting institutional justiciability was articulated by the former Chief Justice of the Israeli Supreme Court, Meir Shamgar. In his opinion, the courts should adjudicate only in cases where the legal component of the case is dominant in order to avoid "question begging." He writes:

> There are circumstances where the adjudication of a particular case on the basis of legal standards will miss the point, for the purely legal solution may obscure the true inherent nature of the problem being adjudicated. Not infrequently, it is not the legal norms that cause the problem to arise, and a purely legal determination will have no decisive significance as to the political decision being reviewed itself. Yet when the judicial decision has been rendered, and it has been determined, after passing through the process of judicial review, that the political decision at issue had, in fact, been taken by one authorized to take it, in good faith and in a non-discriminatory manner, and that the decision was within the zone of reasonableness, the conclusion may form that everything is fine—when the substance of the political decision itself may be far from that: Does consideration of the decision to manufacture an airplane or questions related to foreign affairs reach its end point when it successfully answers the questions posed under a purely legal examination according to the above criteria? The answer is no. Yet, that could be the mistaken conclusion that could arise from judicial review of an issue whose foundations may be far removed from the legal tests applied by the court; . . . Although, as a formal matter, legal standards can [always] be applied, these standards cannot be seen, in many areas, as answering the ultimate issue. This is because, by the substance, nature, and content of the issue, *additional* answers will have to be given—from fields that the law court does not turn to.[85]

---

84. *See, e.g.*, Luther v. Borden, 48 U.S. 1 (1849); Coleman v. Miller, 307 U.S. 433 (1939); Goldwater v. Carter, 444 U.S. 996 (1979); Nixon v. United States, 506 U.S. 224 (1993).

85. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 520. Compare the warning of Professor Bickel that "the Supreme Court may see it as its function, not merely to let an apportionment be, but to legitimate it." ALEXANDER M. BICKEL, THE LEAST

This approach will apply more strongly when the relevant legal norm is the requirement of reasonableness, for, in many cases—for instance in political matters—it is not appropriate that the court review the reasonableness of a decision by a state authority.[86] I disagree, however, with Justice Shamgar's approach for two principal and cumulative reasons.

First, it is the function and the obligation of the courts to rule in the legal disputes that are brought to them. This is the fundamental function and obligation of the courts as a branch of government. This function and obligation is in no way dependent on the extent to which the legal questions posed are dominant with respect to the underlying dispute. That the court rule on the legal aspects of the disputes properly brought before it for adjudication, irrespective of whether or not these legal aspects are "dominant," is the right of the citizen and the obligation of the court. As a general rule, the legal system must give its consideration to claimed legal violations, even when they may seem to be of little weight compared to the broader context of the issue involved. The proper body to rule in a binding manner on a legal claim—whether the claim is "dominant" or not—is always the court. This is so, just as, conversely, in a case where the legal aspects of a dispute *are* dominant, the court must take care not to arrogate unto itself, in an ancillary manner, the power to rule, as well, on the non-legal aspects of the case. Rather it must relegate the final decision on these non-dominant, non-legal issues to those authorities empowered to determine them.[87] Let us take for example the case of a decision by the police not to allow a demonstration to take place due to the fear that a hostile crowd will threaten the safety of the demonstrators and, thereby, threaten the public order in general. It is clear that the dominant issues in a lawsuit brought by the would-be demonstrators to allow their demonstration to go forward are legal ones.[88] Yet, does it follow that the court—if it decides the legal-statutory issues in favor of permitting the

---

DANGEROUS BRANCH 197 (2d ed. 1986). On the other hand, see the warning of Professors Champlin and Schwarz that "if the political question dismissal is a *de facto* merit determination . . . then the doctrine's use results in a merit determination without any consideration of the merits, greatly increasing the risk of a wrong decision." Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 256 (1985).

86. With respect to this issue, see the expanded discussion *infra* Part III.

87. This subject is judicial review of the reasonableness of decisions of governmental authorities, which will be exercised with extreme restraint in order to prevent an "absolute" discretion. *See infra* Part III.

88. Even according to the view of Justice Shamgar, "[t]he issue of justiciability need never arise . . . wherever the issue in dispute relates to the protection of rights, whether political or otherwise." *Ressler*, 42(2) P.D. at 519. This approach is common in the United States as well. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Davis v. Bandemer, 478 U.S. 109 (1985); Fritz W. Scharpf, *Judicial Review and the Political Questions: A Functional Analysis*, 75 YALE L.J. 517 (1966).

demonstration to proceed under police protection—should then go on and dictate to the police precisely which measures and actions they should take (e.g., how many police should be assigned to control the situation), simply because these non-dominant operative details arise in the general context of the legal dispute? It is clear that this question must be answered negatively. Each public body is bound to deal with such aspects of a dispute as fall within the scope of its authority and responsibilities. No branch of government may take unto itself the authority to deal with and determine issues that do not fall within the scope of its proper function simply because the principal aspects of the broader issue and subject matter involved are within its area of responsibility. In a parallel fashion, no branch of government is deprived of its authority, or its obligation, to reach determinations regarding matters entrusted to its charge merely because the dominant issues of the matter in dispute are within the scope of responsibilities of another branch. The doctrine of "ancillary jurisdiction," which sometimes grants a court the authority to decide on issues within the jurisdiction of another court, where the determination of those ancillary issues is necessary for the determination of the broader issues that are within the first court's jurisdiction, does not apply to the relationships between the courts and non-judicial governmental authorities.

As noted previously, Justice Shamgar has indicated that his approach would apply more strongly where the action at issue has come before the court upon a claim of unreasonableness (within the legal meaning of that term, to which the court's jurisdiction is limited). According to his argument, where the issue presented is the substantive reasonableness of a political decision, the legal aspects of the issue are extremely circumscribed (or, in other words, the parameters of what is reasonable are quite wide) to the extent that there is no point to the legal proceedings at all. These proceedings are calculated to only permit "one who so wishes to avoid and to hide from the substantive consideration of the issue which is the subject of the legal petition."[89] The rebuttal to this contention is that in any situation where, as a matter of substantive law, the action—political or otherwise—is subject to a legal requirement of reasonableness, a court must, in the framework of its duties to the rule of law, fulfill its delegated function and review the action under the standard of reasonableness to which it is legally subject. As I shall explain, *infra*,[90] it is my view that there are many cases where "reasonableness" under administrative law is not a substantive rule of conduct but rather is, at its essence, a ground for judicial review that does not reflect such a rule. As such, the exercise of this review can be conducted by the court in accordance with a wide spectrum of political and practical considerations to the extent

89. *Ressler*, 42(2) P.D. at 520.
90. *See infra* Part III.

that the court can enter, in a substantial manner, into the roots of the context and situation in which the action, whose reasonableness it is assessing, was taken.

There have been those who have cited certain types of disputes as clearly "legal" in nature and, therefore, always justiciable. For example, one of the former Chief Justices of the Israeli Supreme Court, Moshe Landau, noted in an article that "the claim that the subject of a legal petition 'is a matter of public dispute and that the court should therefore abstain from the issue as one the political authorities must determine . . .' is one that must be rejected at the outset, because the subject of the petition is regulated by an explicit statute."[91] Yet, does the fact that a subject is regulated by an explicit statute transform it into a matter whose dominant aspects—according to the theory that hangs justiciability upon such dominance—are justiciable? Take, for example, the law in Israel. Section 51 of Basic Law: The Government provides, *inter alia*, that:

> (a) The State shall not go to war save on the basis of a decision by the Government.
> (b) Nothing in this section shall prevent military actions necessary for the purpose of the defense of the State and the public security.[92]

It should appear, according to the above-cited theory of Justice Landau, that the issue of whether certain military operations are "necessary for the purpose of protecting the State and the public security" should be patently justiciable because its criteria are anchored in an explicit Basic Law. Yet this question is clearly one whose dominant aspects—under the dominance approach—are not legal and, therefore, not justiciable. The legal system in Israel, like most of the legal systems in the United States, including the federal law, are "mixed" systems,[93] where along side explicit written norms (the Constitution, the Basic Laws, statutes and regulations) are common legal norms that derive from the decisional law. Subject to the fact that the legislative authority—though not usually the promulgator of regulations!—is authorized to abolish or alter, through legislation, norms established under the decisional law, the strength of these common law norms and their binding legal status are no less than that of the explicit written norms. A norm anchored in a statute is in no way more "legal" in nature than a norm anchored in the case law. Consequently, the legal aspects of an issue regulated by an explicit statute are no more dominant—merely by virtue of their statutory

---

91. Landau, *supra* note 17, at 7.
92. Basic Law: The Government, S.H. 214 (1992).
93. *See* MARTIN WEINSTEIN, SUMMARY OF AMERICAN LAW 98-99 (1988).

source—than the legal aspects of an issue regulated by the common law.

Many of the advocates of the restriction of institutional justiciability believe that the courts should concentrate their activities on matters involving individual rights since these disputes are by their very nature, legal.[94] Even Chief Justice Shamgar noted that "no issue as to justiciability should arise at all . . . whenever the issue in dispute relates to the guaranteeing of rights, either political or otherwise."[95] This is also the common approach in the United States, where the courts deal with many clearly political cases (as opposed to political questions) when these touch upon the rights of the individual.[96] Yet, it appears as though it is precisely in those situations touching on the individual's rights vis-à-vis the government, that the most sensitive political issues are involved. In his observations as to why the question of establishing diplomatic relations with Germany was not institutionally justiciable, Chief Justice Shamgar wrote that "the question . . . is appropriate for a political, historical, philosophical and even emotional discussion, yet the criteria that are at the disposal of the court are wholly lacking in anything that would allow it to embrace these multifarious facets or to involve itself in them."[97] Yet, do not questions that relate to individual rights, such as the claim that abridgment of a civil liberty is required to protect the national security or public morality, often involve just such a panoply of multifarious, non-legal considerations? What makes these questions patently justiciable, in the sense that their dominant aspects are seen as legal, while other questions (such as the German relations issue) are considered non-justiciable? As noted earlier,[98] relative categorization of normative questions as more or less "legal" is heavily influenced by historical factors. For example, these questions are influenced by whether legal tradition and custom, which inform the professional instinct of the jurist, have already come to accept such matters as within the proper ambit of authority of the law and the courts. This categorization lacks, however, any persuasive objective foundation.

Second, it is true, at least in Israel, that after the Court rules in a particular matter, both the public and the relevant public authorities have a

---

94. *See, e.g.*, Kretzmer, *Judicial Review*, *supra* note 23, at 106, 150; Kretzmer, *Forty Years*, *supra* note 23, at 354.

95. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 519.

96. *See, e.g.*, Dep't of Commerce v. Montana, 503 U.S. 442 (1992). See also the observations of Professor Fisher that "[i]n many instances the judiciary concludes that Congress is a more appropriate forum for reconciling conflicts between individual rights and governmental action." LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 5 (1991). As for the contention that disputes between governmental branches are not justiciable if they relate to individual rights, see JESSE H. CHOPPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 296 (1980).

97. *Ressler*, 42(2) P.D. at 521.

98. *See supra* text accompanying notes 65-68.

general tendency to ignore the reasoning of the judges and relate only to the "bottom line"—i.e., to whether the petition at issue was dismissed or granted and, if granted, what form of relief was provided. Consequently, the dismissal of a petition against the act of some public authority will be viewed as an approval of the propriety of the authority's actions. This is true even though the reasoning in the decision contains clear criticism of those actions and even though it is clearly explained that the dismissal of the petition derived only from the fact that the defects in the actions taken by the authority failed to rise to the level of legal defects that would render the authority's action illegal. Similarly, the granting of a petition as a result of purely formal legal defects in an authority's actions will be taken as a negative determination with respect to the substantive merits of the action itself. Against this background, it is possible to understand the outlook of Chief Justice Shamgar who indicates that a judicial consideration of issues whose substantive legal aspects are marginal is inappropriate when such issues are considered on the basis of purely legal criteria, for such a consideration will amount to nothing more than "question begging." In his own words: "It is appropriate to draw the boundaries so that the court will not find itself granting, unwittingly, a general seal of approval to a political act, as a result of its need to consider only the legal aspects of the act."[99]

Yet the truth is that neither the public nor governmental agencies meaningfully distinguish between the dismissal of a petition on substantive grounds, i.e., on the grounds that the actions attacked in the petition were legal and even justified, and a dismissal of the same petition on grounds of non-justiciability (whether normative or institutional). The very dismissal of the petition is seen as the court's determination of the substance of the matter and as an approval—legal and substantive—of the action attacked. Therefore, the concern inherent in Chief Justice Shamgar's position—that judicial and legal consideration of an action that, at its foundation, relates to non-legal issues will divert the attention of the public, as well as the authorities concerned, from the dominant aspects of the matter to its marginal legal facets (and that these last will be confused as representing the entire broader issue)—will be present even if, as Chief Justice Shamgar advocates, the court were to abstain from adjudicating the matter. For the only way the court can abstain from adjudicating a petition brought before it is by dismissal, and a dismissal on institutional non-justiability grounds will be subject to misinterpretation as an expression by the court as to its views on the substantive merits of the entire underlying matter, no less than would be a dismissal on substantive law grounds. If, by dismissal on institutional non-justiciability grounds, the court cannot avoid the "question begging" of which Chief Justice Shamgar warned, then it would seem preferable that the court adjudicate the legal issues

99. *Ressler*, 42(2) P.D. at 524.

contained in the case and thereby avoid the troublesome consequences for the rule of law that arise when the court dismisses a petition on institutional non-justiciability grounds.

A third justification for circumscribing institutional justiciability was put forward in Israel by Chief Justice Barak. It is Justice Barak's general belief that it is inappropriate for a court to refrain, on the basis of the subject matter of a case, from fulfilling its function to decide the disputes brought before it because "the absence of institutional justiciability causes damage to the rule of law."[100] Nevertheless, in Barak's opinion, such avoidance is legitimate "in special circumstances, where the concern as to damage to the public's trust in judges will overweigh the concern as to damage in the public's trust in the law."[101] As he states:

> It is difficult to ignore the fact that the public tends not to distinguish between judicial review and political review, and will often identify judicial review of a political matter as a review as to the matter itself; it is apt to identify a judicial determination that a governmental action is lawful as a judicial position that the governmental action is desirable; it may read a judicial decision that an action is not legal as equivalent to a negative judicial position as to the merits of the act itself; it may read a judicial determination that a certain governmental action is reasonable as equivalent to a judicial determination that the action was desirable; it may identify a legal determination with a political stance.[102]

According to Justice Barak, in exceptional circumstances, where the above dangers are particularly severe, and outweigh in their seriousness the harm to the rule of law if the court declined in such an instance to fulfill its judicial function, it is permissible for the court to abstain from ruling upon the substance of a petition and to dismiss it as institutionally non-justiciable.

Yet, as already noted, the governmental authorities, general public, and, truth be known, many practitioners of the law generally do not distinguish

---

100. H.C. 1635/90, Gerjevski v. Prime Minister, 45(1) P.D. 749, 856. Professor Henkin wrote along these lines that: "I see the political question doctrine as being at odds with our commitment to constitutionalism and limited government, to the rule of law monitored and enforced by judicial review." Louis Henkin, *Lexical Priority or 'Political Question': A Response,* 101 HARV. L. REV. 524, 529 (1987).

101. *Ressler*, 42(2) P.D. at 496. For similar claims in the United States, see, for example, Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924). For a rejection of these claims, see BICKEL, *supra* note 85, at 184; Martin H. Redish, *Judicial Review and the 'Political Question,'* 79 NW. U. L. REV. 1031, 1053-55 (1984).

102. *Ressler*, 42(2) P.D. at 495.

between dismissal of a petition on grounds of institutional non-justiciability (or normative non-justiciability, for that matter) and a dismissal for reasons founded in the substantive law. A court cannot avoid the dangers pointed out by Justice Barak by dismissing petitions on the ground of non-justiciability. In that case, is it not preferable that the court rule upon the petitions themselves on the basis of the relevant substantive legal norms? In my opinion, the answer to this question should be in the affirmative, for even in such a case, the court will be exposed to the dangers which Justice Barak indicated. Yet it would be so exposed in any case, even if it were to dismiss the petitions on the grounds of institutional non-justiciability.

In truth, it appears that a central consideration at the root of arguments to limit institutional justiciability, and perhaps the consideration standing behind Justice Barak's position as well, is the concern that too broad an extension of the involvement of the courts in the workings of other governmental authorities—legislative and executive—will cause those authorities to circumscribe the jurisdiction of the courts in order to limit the power of judicial oversight. In Israel, this concern is not without basis. To a large extent, the jurisdiction of the law courts in Israel does not currently enjoy any constitutional protection. The jurisdiction of the courts is largely founded on ordinary statutory legislation, which may be altered or even eliminated through a simple majority of Israel's parliamentary body, the Knesset. Even the jurisdiction of the Israeli Supreme Court, sitting as the High Court of Justice, which constitutes the central constitutional and administrative law court in Israel, is subject to legislative alteration without overwhelming difficulty, notwithstanding its being anchored in a Basic Law (i.e., Basic Law: The Judicature). Indeed, of late, owing to a number of controversial Israeli Supreme Court decisions, there have been increasing calls to limit the Court's jurisdiction. Although these voices have not enjoyed meaningful public support, and an intrusion on the Court's jurisdiction does not appear on the visible horizon, the very ease with which the other governmental branches could act to limit the Court's jurisdiction operates, to a certain extent, as an inherent threat upon the Court. In countries like the United States, where the jurisdiction of the judicial branch is rigidly anchored within the Constitution—whose amendment to restrict such jurisdiction would be well-nigh impossible as a practical matter—it would appear that a concern of this sort does not exist. Nevertheless, even in the United States, there does exist the concern, voiced by Justice Barak, of an erosion of the public's trust in the judges and the courts, which could lead to an erosion in the faithful adherence to the decisions and pronouncement of the courts.

What is the import of this concern? In truth, it would seem to contain within it an inherent absurdity. In Woody Allen's "Take the Money and Run," there is a scene in which the protagonist of the film smashes his own eyeglasses in order to thwart the threat of a gang of bullies who themselves threatened to smash the spectacles. Is not the avoidance by the courts of

involvement in certain classes of cases, in order to avoid a possible restriction on their jurisdiction to rule in precisely those type of cases, behavior equivalent to that of the film's comic hero? What point is there in possessing a jurisdiction which is never exercised? If the court is prepared in any event to refrain from making use of one jurisdiction or another, what great concern can there be in preventing the elimination of such not-to-be-used jurisdiction? But there are less absurd explications of the aforesaid concern. First, the concern may be that any legislated restriction of the court's jurisdiction may be sweeping in nature and would extend even to cases in which justiciability is currently unquestioned. Second, the concern may be that the explosive growth of the court's involvement in political cases may result in a curtailment of its jurisdiction, whereas the guarded use of that jurisdiction in a smaller number of cases, in which such involvement is of particular importance, may not provide the other powers with an excuse to curtail the court's activities.

Nevertheless, not only are these concerns wholly speculative, and not only is there little chance that these worst-case scenarios will come to pass, but the considerations raised are foreign to our notions of proper governance. For the import of these concerns is that the court should desert its duty to rule in accordance with the law in order to avoid the possibility that authorized bodies may alter the extent of the court's authority. Yet, judges are always on warning not to allow such considerations to affect their rulings.[103] The concern of future legislation by the authorized legislative powers, and

---

103. The only apparent exception to this caution in Israel is to be found in the opinion of Justice Goldberg in the *Velner* case. In that case, the Supreme Court dealt with the legality of a paragraph in a coalition agreement between two parties in which an "automatic" procedure was established for the altering, by means of legislation, of any court holding which would violate the prevailing status quo in religious matters. Justice Goldberg reached the conclusion that this paragraph was invalid because it contradicted the public good in a substantive manner. Nevertheless, he concurred in the dismissal of the petition for the reason that, in accepting a petition protesting against an infringement upon the status of the court, "the court might appear to be crossing the red line of involving itself in a political agreement, simply because it was implicated, through none of its own doing, in the agreement itself." H.C. 5364/94, Velner v. Chairman of the Labor Party of Israel, 49(1) P.D. 758, 809. According to Justice Goldberg's view, "only by not involving ourselves in such an agreement, do we transmit the clear and unambiguous message that this Court has no interest in any 'war of supremacy,' but only in the overiding supremacy of the law." *Id.* at 809-10. The position of Justice Goldberg, however, did not win the acceptance of his colleagues. Justice Or, among the others, criticized the ruling, noting that:

> [T]he jurisdiction granted to the High Court of Justice is granted to it so that it will exercise measures necessary to fulfill the duties accompanying that jurisdiction . . . . The concern as to any particular reponse on the part of any of the public ought not restrain the Court from fulfilling its duty and determining the matter before it according to the principles and standards of the law.

Id. at 814-15.

certainly of legislation relating to the courts and the judges themselves, cannot be of legitimate interest to a judgment adjudicating the legal rights of litigants. It is precisely reliance upon such considerations by the courts that would be calculated to harm the public stature of the courts and the ethos of judicial independence that, in Israel, is given formal expression in the Basic Law: The Judicature, in which it is provided that "[a] person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law."[104]

Nevertheless, it may be questioned, how should the judge act when the court sees no possibility to consider a petition that it might honestly be willing to grant on substantive merits due to serious concerns as to harm to the position of the court, non-obedience to its judgments, a cutback in its jurisdiction, or some other substantial injury to the interests of the State?

Professor Kremnitzer[105] expressed the opinion that in such a circumstance—where the court sees no way out but to dismiss the petition, however strongly it may be grounded in the substantive law—it is preferable that the court base its dismissal on grounds of non-justiciability. This will avoid a distortion of the substantive law undertaken in order to reach a desired result; it will prevent injury to the system of law in its entirety with respect to the creation of incorrect and possibly injurious law that could serve in the future as a mistaken precedent in other, even routine, cases, and with respect to injury to the integrity of the judicial branch.

It must be emphasized that the cases which Kremnitzer writes about are cases that, according to all customary approaches, would be considered plainly justiciable, such as cases involving a violation of an individual's basic civil rights. Indeed, the particular decision to which Kremnitzer was referring when he expressed these views was the Israeli Supreme Court decision dismissing a petition against the expulsion to Lebanon of approximately 400 Hamas activists.[106] In Kremnitzer's view, this decision was a distortion of the relevant substantive law. If, however, the Supreme Court felt it had no choice but to dismiss the petition—in order to avoid serious damage to the international standing of the State of Israel or to the public image of the court itself (as a result of charges that the court had caused serious injury to the security of the nation by ordering the return to its borders of dangerous terrorists), or for some similar reason—it would have been better for the court to have based

---

104. Basic Law: The Judicature, S.H. 78 (1984). Another question is whether this consideration is also foreign to the matter of bases for judicial review that do not, in my view, express rules of substantive law? *See infra* Part III.

105. Mordechai Kremnitzer, *Let Expulsion Be Expelled—Some Comments on the Holding in the "Expulsion," the High Court of Justice, Law, Politics, and Ethics*, 4 PLILLIM—ISR. L.J. CRIM. JUST. 17, 29 (1994) (Hebrew).

106. H.C. 5973, 5990/92, Association of Civil Rights v. Minister Of Defense, 47(1) P.D. 267.

its holdings on a decision that the issue was non-justiciable.[107]

It is open to debate whether the damage occasioned by an incorrectly decided judgment is greater than that caused by the refusal of the court to perform its designated function and duties. In either case, it seems that the question at issue here is neither more nor less than whether the "rule of law" and the "principle of lawful governance" are absolute values, to which all, especially the courts, must defer absolutely, or whether there are possible situations where it would be permissible, if not obligatory, for the court to subordinate these values to other even more important values, such as human life or the very existence of the nation or of society. This fundamental issue is beyond the scope of this article and has been dealt with in a voluminous amount of literature.[108] I will note only that, even if the rule of law and the principle of Lawful Governance are not absolute values, they are part of the very fabric of the democratic state. The judicial authority, which, of the three branches of government, is vested with the special responsibility of guarding these values, is permitted, if at all, to veer from them under only the rarest and most exceptional of circumstances. Mere difficulty or unpleasantness, or a mere fear that has not coalesced into a palpable and immediate threat to essential values, cannot justify the court in disregarding its duty to render decisions according to, and only according to, the law. Only a clear and present danger to human life or to the very existence of the democratic state (including an independent judiciary) can, if at all, justify a court in refraining from deciding a case in accordance with the substantive law by a finding of institutional non-justiciability. Even in these exceptional circumstances, it is doubtful to what extent it is legitimate for the court to disguise the true reasons for its decision. It is true, as Professor Kremnitzer opines, that, when faced with a situation where no other option is available, it is better to dismiss a petition on non-justiciability grounds than to dismiss it on distorted substantive law grounds. Nevertheless, it would seem that a more far reaching case could be made for the fact that the judicial authority is bound to determine the substance of all disputes properly brought before it, no matter how many difficulties such a determination may entail.[109]

At the same time, and as discussed, *infra*,[110] it is possible to claim that, at times, the rules upon which basis the court renders its decision do not represent the substantive law, which determines that the substantive rights and obligations of the public and of the governmental authorities, are simply "grounds for judicial review," principally calculated to grant rights of judicial

---

107. *See* Kremnitzer, *supra* note 105, at 29. *Cf.* Peter Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987).

108. *See, e.g.*, THE RULE OF LAW (Ian Shapiro ed., 1994).

109. *See* Bendor, *supra* note 14, at 622.

110. *See infra* Part III.

oversight and review to the courts. Where the exercise of these rules is at issue, the court's avoidance of rendering a judgment, arguably, should not be considered an infringement upon the basic principles of the rule of law and of lawful governance. In such circumstances, the court's discretion in considering the effect of its judgment on the position of the judiciary might be broader.

In the United States, under the influence of English law,[111] and in the framework of the political question doctrine, arose another central basis for restricting material institutional justiciability. This ground, relevant to the issue of the limitations on the justiciability of issues dealing with the state's foreign affairs, relates to the interest of the state in speaking in the foreign relations area with "one voice"[112]—generally the voice of the executive branch and its head—the President.[113]

I join with those who maintain that this consideration cannot outweigh the fundamental values of the rule of law and the principal of lawful governance.[114] The voice of the state—whether on domestic or foreign affairs—should be heard in accordance with the law. Matters of foreign relations, like all other state activities, must be conducted by those authorities whom the Constitution and other laws have invested with such responsibilities, and should be conducted in conformance with the rules established in those laws. The fact that the judiciary, vested with the function of ensuring legality, fulfills that function, subject to the laws of standing, even within the area of foreign affairs, cannot be seen as harming the interests of the nation. For the legal rules of the state relating to foreign affairs, like all the other legal

---

111. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831).

112. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). For partial support for this reasoning, see Scharpf, *supra* note 88, at 573-77. For a similar line of thought in a different context, see Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995). For the traditional reasons for non-justiciability of foreign affairs, see Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 107-08 (Louis Henkin et al. eds., 1990). For the particular restraint of the American courts in matters of foreign affairs, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 208-16 (1972); Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L. L. 912, 952-55 (1985). One scholar has indicated that the reason for the non-justiciability of the war powers is precisely because "the Constitution has vested Congress with the sole judicial power to decide whether the United States is at war." John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 288 (1996).

113. *See, e.g.*, FRANCK, *supra* note 50, at 5-9.

114. Compare the words of Chief Justice Rehnquist that discretion which is assesed in such a case is "drawn in such broad terms that in a given case there is no law to apply," Webster v. Doe, 486 U.S. 592, 599-600 (1988) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citing S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945))), and the court "would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster*, 486 U.S. at 600 (citing Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

rules, are intended to benefit and further the interests of the nation and its citizens. How then can the protection of those legal rules, and the judicial review conducted by the courts to maintain those rules (in accordance with its delegated governmental function), possibly harm the interests of the nation? Other nations who enter into relations with the State must be aware that its authorities operate in accordance with the law and are bound and limited by that law.

The above considerations do not, of course, operate to prevent the court from considering the circumstances present in every case brought before it when it determines the proper relief to be provided in the case. Thus, there may be cases where an illegal action that has occurred is irreversible, or where such reversal would result in harm greater than that occasioned by the illegality itself. Yet such cases may, and do, arise in all areas of law, and not exclusively in the area of foreign affairs. The existence of such circumstances is an insufficient basis for drawing a line of "non-justiciability" around the area of foreign affairs. Furthermore, it would appear that in the area of foreign relations (as in the case of national security, macro-economics and other especially "political" issues) the law grants the relevant authorities a particularly wide scope of discretion. This narrows the possibility that any decision of such authorities will be found unlawful and will be overturned on that basis by a court of law. Yet, this factor arises from the area of the substantive law and does not relate to the issue of justiciability.[115]

2. Organic Institutional Justiciability

Organic institutional justiciability deals with the willingness of the court to adjudicate petitions brought against one or another public authority, most particularly against the legislative branch, the parliament. I am not referring here to judicial review over the laws passed by that legislature. Petitions attacking legislation not usually asserted directly against the parliamentary bodies themselves, and issues of justiciability regarding legal attacks on legislation will raise, at most, issues of material institutional justiciability. What I am referring to here is judicial review over parliamentary decisions that are not legislative, such as matters relating to the procedural work rules of the parliament (including those in the framework of legislative procedure) or procedures bearing a quasi-judicial character.

Concerning the issue of organic institutional justiciability, there are three primary approaches that have been taken. The first approach, which

115. Indeed, there is no democratic state worthy of the name that would bar a court from adjudicating a petition asserted against an organ of the Executive Branch or which would dismiss such a petition simply because of the identity of the respondent (rather than because of the subject matter of the petition, something which, as noted, falls under material institutional justiciability).

prevails in England,[116] rejects any intrusion by the judiciary into the decisions of the legislature. According to this approach, judicial review of parliamentary decisions infringes upon parliamentary sovereignty and is, in fact, beyond the jurisdiction of the courts. The second approach, followed in Germany,[117] recognizes no distinction between the scope of judicial review regarding parliamentary decisions and the scope of review regarding the decisions of other bodies. In the United States and in Israel, a third approach prevails. This is a "middle" approach wherein the court is by no means barred from review of parliamentary decisions, yet neither is such review a matter of routine, as is the case of its review of executive branch actions. Only in specific cases where a special justification exists will such review apply. In those jurisdictions where the third approach holds sway, the connection between organic institutional justiciability and material institutional justiciability is pronounced. Under this approach, the court, in attempting to determine whether it will even hear the petition, must consider the substantive content of the decision under attack; mere identification of the body against whom the petition has been directed is insufficient to determine the issue of justiciability.

Although both the United States and Israel, in general, adopt this middle path regarding the justiciability of parliamentary decisions, there are, in fact, significant differences between the two countries in this area. These differences, it seems, rather than reflecting any divergence on the formal legal norms, instead reflect a difference in the political and social cultures of the two nations. In Israel, adjudications respecting the decisions of the legislative body—including decisions relating to its working procedures and the relationships between its members—are a widespread phenomenon. Recourse to the courts to decide this type of dispute is a commonplace device, often utilized by members of the parliamentary opposition. The courts not only rule in this kind of case on the merits but they will even, on occasion, deal with the decisions attacked before them.

In the United States, on the other hand, petitions to the courts in a matter relating to the working procedures of Congress are extremely rare, and even more exceptional is any willingness by the courts to intervene. I will not expand in this article on the reasons—which I have indicated are cultural—for greater dependence in Israel upon the courts to resolve disputes within other political authorities, an issue of relevance to the subject of material justiciabil-

116. The foundation for the English view is the rule established in the opinion in Bradlaugh v. Gossett, 12 Q.B. 271 (1884). *See, e.g.*, H.W.R. WADE, CONSTITUTIONAL FUNDAMENTALS 30-35 (1980).

117. *See* CURRIE, *supra* note 56, at 170.

ity as well.[118] It will suffice to mention that the non-legal norm of "fair play" is not always common, for the court is viewed at times as a "fortress of justice" (not necessarily in its narrow legal sense), and is trusted to succeed in resolving, in a fair and objective fashion, disputes between (or internal to) political bodies.

In Israel, with respect to justiciability of parliamentary decisions, there is a test followed by the court in adjudicating the issue and, if necessary, in granting relief. The Court considers "the extent of the damage claimed to the framework of parliamentary life, and the level of the effect of the infringement at the foundations of the structure . . . of democratic governance."[119] This means that the Court will adjudicate petitions brought against a parliamentary authority if they arise in the context of issues of fundamental constitutional principle, as opposed to simple procedural issues.[120] On the basis of this test, some sub-rules have developed. For instance, a court will always adjudicate petitions relating to attempts to remove the immunity of members of the Knesset or to suspend them,[121] this in light of the effect such issues have upon the fundamental rights of the parliamentarians and the voters which elected them. Yet, the court will not rule on the petitions regarding the processes of legislation in a case where those processes have not been completed at the time the petition is brought before the court[122] or regarding the times established for the sessions of parliament.[123] There will also be cases where the court will hear the petition and make its views known, but will not offer relief.[124] In all cases, the court will avoid granting relief against Knesset authorities in the form of a positive or negative injunction, casting its

---

118. In Israel, the phenomenon has received great attention in the literature. *See, e.g.*, AMNON RUBINSTEIN, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 28-35 (Amnon Rubinstein & Barak Medina eds., 5th ed. 1996) (Hebrew); Rozen-Zvi, *supra* note 5.

119. H.C. 652/81, Sarid v. Chairman of the Knesset, 36(2) P.D. 197, 200. *See also, e.g.*, H.C. 742/84, Kahane v. Chairman of the Knesset, 39(4) P.D. 85, 96; H.C. 1956/91, Shamai v. Chairman of the Knesset, 45(4) P.D. 313, 317. Nevertheless, there are judges who are dissatisfied with this criterion. *See* H.C. 669/85, 24/86, Kahane v. Chairman of the Knesset, 40(4) P.D. 393, 409 (Elon, J.). *Cf.* H.C. 2136/95, Guttman v. Chairman of the Knesset, 49(4) P.D. 845, 852 (Dorner & Bach, JJ.). For detailed discussion of the issue under Israeli law, see Kretzmer, *Judicial Review, supra* note 23; Bendor, *supra* note 14, at 604-20.

120. *See, e.g.*, H.C. 6124/95, Ze'evi v. Chairman of the Knesset (unpublished).

121. *See, e.g.*, H.C. 306/81, Platto-Sharon v. Knesset Comm., 35(4) P.D. 118; H.C. 670/85, Miari v. Chairman of the Knesset, 41(4) P.D. 169; H.C. 1843/93, Pinchasi v. Knesset of Israel, 48(4) P.D. 492. Notwithstanding, the Court has refrained from adjudicating a petition to *require* the Knesset to remove the immunity of one of its members. *See* H.C. 4281, 4282/93, Movement for Change in the System of Gov't in Israel v. Knesset of Israel (unpublished).

122. *See, e.g.*, H.C. 761/85, Miari v. Chairman of the Knesset, 42(4) P.D. 868.

123. *See, e.g.*, H.C. 652/81, Sarid v. Chairman of the Knesset, 36(2) P.D. 197; H.C. 6124/95, Ze'evi v. Chairman of the Knesset (unpublished).

124. *See, e.g.*, H.C. 482/88, Reiser v. Chairman of the Knesset, 42(3) P.D. 142.

holding instead as declaratory.[125]

In the United States, this issue is adjudicated in terms of the political question doctrine.[126] Thus, the court will hear and rule on cases where the petitions have allegedly raised issues dealing with the legal rights of the complainants and where the determination regarding such issue was not committed to the conclusive determination of the political branches.[127] This means that, in practice, the scope of petitions against parliamentary decisions is manifestly narrower in the United States relative to Israel, and the willingness of the courts to involve themselves in reviewing such decisions is narrower still.

III. INSTITUTIONAL JUSTICIABILITY IN THE ABSENCE OF NORMATIVE JUSTICIABILITY

A. *General Discussion*

In the previous portion of this article, I discussed the distinction, as well as the interdependence, between the two fundamental aspects of justiciability—normative justiciability and institutional justiciability—as well as the necessary criteria for the existence of each. In this portion of the article, I will attempt to show that, although it would seem that normative justiciability is a prerequisite for institutional justiciability, there are, in fact, circumstances where institutional justiciability will exist, or at least should exist, even when, in a certain sense, normative justiciability is absent. In these cases, however, the criteria necessary for the existence of institutional justiciability will be different than would be in circumstances where full normative justiciability existed.

A clear example of a situation where institutional justiciability will exist, even in the absence of full normative justiciability, is when a court wants to invalidate the decision of a public agency on the grounds that the decision was unreasonable to an extreme extent or was clearly erroneous. Through the use of this example, I will attempt to advance the thesis I am proposing here regarding institutional justiciability. Nevertheless, the reasonableness rule in administrative law is only an example. Other situations will exist where normative justiciability is incomplete, but where institutional justiciability may still be present. Such situations may, for example, present questions of when to permit physicians (or to require them) to detach a patient

---

125. For complications that have arisen as a result of the granting of declaratory judgments against the Knesset authorities, see H.C. 306/85, Kahane v. Chairman of the Knesset, 39(4) P.D. 85; H.C. 5711/91, Poraz v. Chairman of the Knesset, 44(1) P.D. 299.

126. For a summary of the political question doctrine, see *supra* notes 2-3 and accompanying text.

127. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969).

from an artificial respirator, or to refrain from attaching a patient to such a device.

B. *Normative and Institutional Justiciability of the Rule of Reasonableness in Administrative Law*

1. The Rule of Reasonableness in Administrative Law

A central concept in both Israeli and United States law is the concept of reasonableness. This concept is utilized, *inter alia*, in determining the standards of responsibility for negligence in tort law,[128] for criminal negligence in penal law,[129] and in determining the obligations of administrative agencies in exercising their discretional authority—a matter I will discuss below.

Despite its central position in the law, reasonableness is an opaque and open-textured concept and has remained so, at least in the administrative law, despite all attempts to imbue it with some tangible content. It is for this reason that the requirement of reasonableness in the administrative law has been hard put to fulfill its basic function as a norm for directing conduct.

Only in a few exceptional circumstances have the courts managed to provide the concept of reasonability with concrete meaning. For example, the courts in Israel accept the rule which allows for retrospective effect to be given to regulation when the retroactivity is reasonable, both in light of the substance of the matter involved and the amount of time with respect to which such retrospective effect is given. In the context of that rule, the courts have determined that the retrospective effect of tax regulation is substantively reasonable but that such retrospectivity can only apply to the particular tax year in which the law was promulgated.[130] This concrete construction of reasonableness is, as noted, the exception rather than the rule, and it is, at best, a matter of debate whether it would be appropriate for the judicial authority to generally establish such concrete and inflexible rules, or not.[131]

The theory of administrative reasonableness—in its Israeli version and, to a certain extent, in its American version—is based on the following

---

128. *See, e.g.*, J.C. SMITH, LIABILITY IN NEGLIGENCE 5 (1984); FRANCESCO PARISI, LIABILITY FOR NEGLIGENCE AND JUDICIAL DISCRETION 213 (1992).

129. *See, e.g.*, WAYNE R. LAFAVE & AUSTINE W. SCOTT, JR., CRIMINAL LAW 233 (2d ed. 1986).

130. *See* H.C. 21/51, Binenbaum v. Municipality of Tel Aviv, 6 P.D. 375; C.A. 10/55, "El Al" Airways to Israel, Inc. v. Mayor of Tel Aviv-Jaffa, 10 P.D. 1586; 1 BARUCH BRACHA, ADMINISTRATIVE LAW 270-83 (1987) (Hebrew).

131. BARAK, *supra* note 1, at 172-89.

principle of administrative discretion:[132] In making a decision within the scope of its discretion, the public agency has the power to choose from among a number of possible choices. This choice must be made on the basis of the agency's consideration of the relevant factors—of *all* the relevant factors and of *no* non-relevant factors.

In Israel, the Supreme Court has ruled—in a somewhat tautological manner—that an administrative decision is reasonable if, in reaching that decision, relative weight was reasonably given to each of the relevant considerations.[133] Under this doctrine of administrative reasonableness, where discretion has been given to an administrative agency, there can be several reasonable ways of balancing the relevant considerations. Each of these reasonable balancings will lead to a decision that is within the "zone of reasonableness." A decision located within this zone of reasonableness is considered to be lawful and the court will not interfere with it even if, in the opinion of the judges, a better or more effective decision could have been made. However, a decision falling outside the zone of reasonableness—i.e., a decision based on an extremely unreasonable balancing of the various considerations—is not lawful and may be invalidated by a court.

In the United States, the principle of a "zone of reasonableness" has also been accepted. Nonetheless, the scope of judicial review on the basis of this principle is generally narrower than that in Israel. Under federal law, the Administrative Procedure Act provides, *inter alia*, that:

> [T]he reviewing court shall . . . .
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .[134]

Indeed, in the United States, for a decision to be considered as beyond the zone of reasonableness, constituting thereby an illegitimate exercise of discretion, the decision must generally be found to have been arbitrary and

---

132. *See, e.g.*, H.C. 156/75, Daka v. Minister of Transportation, 30(2) P.D. 95, 105; A.H. 3299/93, Wechselbaum v. Minister of Defense, 49(2) P.D. 195, 209-10. The doctrine of reasonableness within administrative law has been developed by jurists, primarily judges, without familiarity with the work and thought of researchers in the field of public administration, one of the sub-branches of political science. It is possible that this has been the cause of some of the weaknesses of the doctrine, only a few of which I will deal with in this article. *See* Ariel Bendor, *Administrative Law as a Theory of Administration*, 1 MISHPAT UMIMSHAL—LAW AND GOVERNMENT IN ISRAEL 45, 63 (1992-1993) (Hebrew).

133. *See, e.g.*, H.C. 389/80, Gold Pages, Inc. v. Broadcasting Authority, 35(1) P.D. 421, 445.

134. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

capricious.[135] This is quite a narrow standard and, generally, the court will not substitute its judgment for that of the agency if its decision was based on the relevant factors (and on them only),[136] and if the agency's action does not involve violation of constitutional rights[137] or of rights established under the legislation through which the agency purports to act.[138]

Yet, the court may invalidate a decision defective by reason of a "clear error in judgment."[139] Additionally, under the "substantial evidence rule," a factual determination of an agency may be overturned if it is unreasonable in view of the evidence presented before it.[140] As a general rule, a court will refrain from overturning an administrative decision, unless it possesses meaningful standards upon which it can rely.[141]

2. On Normative and Institutional Justiciability of the Rule of Reasonableness in the Administrative Law

There are many who dispute the legitimacy of judicial review of discretionary administrative decisions—particularly judicial review of the reasonableness of those decisions—on the basis of claims regarding the jurisdiction of the courts and the constitutionality of such judicial review on the one hand, and on considerations of institutional justiciability on the other.

Yet the most basic problem with such review relates to the normative justiciability of the rules of administrative discretion in general and of the law of reasonability in particular. I will illustrate this problem through an example taken from recent Israeli case law.

In two cases decided at the same time by the Israeli Supreme Court in

---

135. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 654 (1991). Nevertheless, it has been held that the Administrative Procedure Act and the bases established therein for judicial review do not apply to the President of the United States, unless the matter is set forth in the specific statute upon whose power he operates. *See* Franklin v. Massachusetts, 505 U.S. 788 (1992). For criticism of this decision, see Schwartz, *supra* note 80, at 170-72.

136. *See, e.g.*, Exxon Corp. v. Federal Energy Admin., 398 F. Supp. 865 (D.D.C. 1975); Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496 (S.D. Ohio, W.D. 1982); Soler v. G. & U., Inc., 833 F.2d 1104 (2d Cir. 1987).

137. Administrative Procedure Act, 5 U.S.C. § 706(2)(B) (1996).

138. *Id.* § 706(2)(C).

139. *See, e.g.*, Delpro Co. v. Brotherhood Ry. Carmen of U.S. and Canada, 519 F. Supp. 842 (D. Del. 1981); Martin Oil Service, Inc. v. Koch Refining Co., 582 F. Supp 1061 (N.D. Ill., E.D. 1984).

140. SCHWARTZ, *supra* note 135, at 640-42. *See also* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 293-99 (1992).

141. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985). For criticism of this decision, in which it is maintained that "reasonableness" on its own is a "meaningful standard" for judicial review, see Kenneth C. Davis, '*No Law to Apply*,' 25 SAN DIEGO L. REV. 1 (1988).

1993,[142] the petitioners had raised claims against the refusal of then-Prime Minister Yitzhak Rabin to remove from office (respectively, a cabinet minister and a deputy minister) representatives of one of the parties making up the Prime Minister's coalition government on the ground that indictments had been filed against each of the two on charges of corruption. Petitioners contended that, under these circumstances, the Prime Minister was obligated to exercise his discretionary authority to dismiss the minister and deputy minister from their positions.[143]

The Israeli Supreme Court heard the two petitions in its capacity as the High Court of Justice and granted relief with respect to both of the petitions, directing that the two officials be dismissed. The Court did so based upon its holding that refraining from such dismissals was unreasonable to an extreme degree and that the exercise of the Prime Minister's authority to dismiss the officials was the only lawful option available at his discretion. The essential reasoning of the Court was that the continued incumbency of the minister and deputy minister, in the face of the corruption indictments filed against them, would result in severe deterioration in the public's faith in governmental authorities and their ethical standards. The Court held that this was a relevant consideration of significant importance and, under the circumstances of the situation, should have tipped the balance, mandating the dismissals. It is clear under this reasoning that the Court would have reached a similar result had the issue before it been the Prime Minister's discretion in appointing the members of his Cabinet. Just as it was held to have been unreasonable not to fire the indicted minister and deputy-minister, so also it would be unreasonable to have appointed such indicted officials in the first place.

I will not deal at length in this article with the troubling question of whether the explicit discretionary authority of the Prime Minister, under the Basic Law, to appoint and dismiss ministers and their deputies possesses any real meaning if he can be "obligated" to dismiss them (i.e., under certain circumstances, the Prime Minister will not be choosing among several lawful options, but, instead, the Supreme Court will dictate to him which decision he must make in the scope of his "discretion").[144]

---

142. H.C. 3094, 4319, 4478/93, Association for Quality in Gov't v. Government of Israel, 47(5) P.D. 404; H.C. 4267, 4287, 4364/93, Amitai—Citizens for Improvement of Administration and Purity of Ethics v. Prime Minister, 47(5) P.D. 441.

143. The authority for this claim may be found in Articles 35(b) and 38(3) of the Basic Law: The Government, S.H. 214 (1992).

144. It should be noted that in most of the cases in which the Court has thus far involved itself in the decisions of a governmental agency on reasonableness grounds, two alternative decisions were involved which represented two contrasting principal considerations. In these cases, the meaning of the court's invalidation of the agency's decision was that the agency was required to make some specified decision, i.e., in practical terms, there was an elimination of the discretion which the law had accorded to the agency. *See, e.g.*, H.C. 581, 832, 849/87, Zucker v. Minister of Interior, 42(4) P.D. 529; H.C. 223/88, Sheftel v. Attorney General,

The two rulings raise an even more troubling issue. Among the public respondents who sought to be heard in the proceedings, and who were permitted to appear under the Supreme Court's extremely liberal rules of standing respecting both petitioners and respondents,[145] was Ze'ev Trainin, a member of the Prime Minister's political party. Trainin's contention, as summarized by Chief Justice Shamgar in the decision in the matter involving Minister Deri, was that "it was incumbent upon the Court to consider the political-partisan consequences of its decision in ordering the dismissal of the Minister from his post."[146] In their reasoning in ordering this dismissal, neither Chief Justice Shamgar, nor any of the other Justices, related at all to this contention. Yet, undoubtedly included among the relevant considerations related to the appointment—and the dismissal—of government ministers would be political considerations of the sort cited by Trainin. Indeed, the essential purpose of those amendments to the Basic Law, which operated to endow the Prime Minister with the authority to dismiss ministers from their positions in the government, was precisely to increase the Prime Minister's political power. It was intended that, in exercising this authority—as is the case in his authority with respect to appointing the members of his government—the Prime Minister would be able to take political considerations into account, foremost among which are the establishment and continued existence of his government, and its ability to realize its policies by means of the construction of as broad and stable a governing coalition as possible.

Even the Supreme Court could not have disputed the Prime Minister's authority to consider these political factors in appointing and dismissing the members of his government.[147] Here, then, arises the question: How could the Court rule that the Prime Minister's failure to dismiss the aforesaid governmental officers was unreasonable—i.e., the result of an unreasonable weighing of the various relevant considerations—if the Court failed to assess the "political" considerations involved, the balance between those factors, and the countervailing considerations regarding public faith in the government and in governmental ethics?

Indeed, the legal "professional instinct" of even the most activist of Israel's Supreme Court Justices would certainly reject the court's considering—let alone deciding—the question of whether the incumbency of a government advocating one particular policy or another contributes to the welfare of the state or causes severe injury to it. The same would apply to the question of to what extent dismissal (or appointment) of one or another

---

43(4) P.D. 356; H.C. 935, 940, 943/89, Ganor v. Attorney General, 42(2) P.D. 485; *Association for Quality*, 47(5) P.D. 404; *Amitai*, 47(5) P.D. 441.

145. *See supra* note 4.

146. *Association for Quality*, 47(5) P.D. at 415.

147. *See Association for Quality*, 47(5) P.D. at 421; *Amitai*, 47(5) P.D. at 463.

minister or deputy minister would endanger the stability of the governing coalition. Yet, under the general doctrine of administrative discretion, consideration and ruling with respect to just these questions would have been a prerequisite to any ultimate ruling on the reasonableness of the decisions that were the subject of the two aforesaid Supreme Court rulings. Absent the Court's consideration and ruling on these questions, the determinations of the Supreme Court in these cases possess a not-negligible element of arbitrariness.

Of course, it could be asserted that the two rulings may be interpreted as holding that no political consideration, whatsoever, could have justified the continued incumbency of government officials who had been indicted on charges of corruption. In other words, the harm to the trust of the people in the ethical purity of the government, which would have eventuated from the continued service in government of these allegedly corrupt officials, was so strong that *no* political objective to be achieved from their remaining in office—including the continued existence of the government, and, perhaps, those interests related to the continued existence of the State that, at least from the government's point of view, might be contingent thereto—could have served as a sufficient basis to justify the continued presence in the government of these two indicted individuals. Yet, this contention is not ultimately persuasive. The trust of the people in the incorruptibility of their government, with all its vast importance, is not a value so supreme that for its realization we are required to sacrifice other interests essential (in the view of a majority of the citizens' representatives) to the continued existence of the State.

Moreover, the above contention does not even succeed in successfully responding to the essential issue we have raised. Let us assume, for example, that the charges against the aforesaid members of the Government were of lesser severity. Would there then be required—under the doctrine of reasonability—some balance between the political considerations at stake and the considerations related to public trust in government institutions?

What are the roots of the difficulties that prevent (in these cases) the normal application of the law of reasonableness? The law, as expressed in the decisions of the courts, tends to ignore the fact that many times the decisions of governmental agencies are influenced by political and coalition considerations, which are expressed in coercions and compromises that attack the very power and ability of the political authorities to maintain office and to realize their central policy goals. Take, for example, the situation of the President of the United States, who, as a practical matter, is required to enter into compromises—if not into active collaboration—in many areas with Congress. Or, even more clearly, of the Prime Minister in Israel who requires the support of the Knesset for the very existence of his Government. When they operate in the sphere of their various authorities, they must, in order to garner the necessary political support, or in order to form the necessary political coalition, make decisions that they might not have made had they not been

subject to the above political necessities. In similar fashion, they may for the same reason refrain from making decisions that they might otherwise have made. Yet, when such a decision comes before the Court for judicial review, the examination will generally be conducted on the artificial assumption that the considerations upon which the decision was based were the considerations of the political group or individual who demanded that decision of the authorized authority, and not the political-coalition considerations that actually motivated that authority.

For example, in Israel, where there is no total separation of church and state, "Religious Councils" operate, under the law,[148] in every locality possessing a majority of Jewish inhabitants, with the task of providing various religious services and functions for those Jewish inhabitants.[149] Forty-five percent of the members of these religious councils are elected by the Local Councils, which are themselves elected by the residents and are composed of representatives of the various political parties. According to a decision of the Israeli Supreme Court, the composition of the representatives of the Local Council on the Religious Councils must reflect, as far as is possible, the relative party distribution in the Local Councils themselves.[150] This means that even minority parties must be assured representation in the Religious Councils. In practice, under this system, each party offers its candidates and the Local Council votes on the matter of the suitability of each candidate. The Israeli Supreme Court has ruled that, on such vote, the Local Council could not disqualify a candidate for membership on the Religious Council simply because he belongs to the Reform or Conservative movements of Judaism, which form minorities in Israel (most practicing religious Jews identifying themselves with the Orthodox branch).[151] In *Naot*,[152] a suspicion had arisen that certain candidates for the Religious Councils who had been offered by opposition factions had been disqualified by the majority for reasons relating to their adherence to the Reform and Conservative movements. The Supreme Court, consequently, annuled their disqualification. Yet it is possible—and the matter was even raised by one of the judges[153]—that some of the Local Council members who had supported disqualification of the Reform and Conservative candidates did not do so out of hostility to these religious movements, but out of coalition considerations, i.e., to avoid violating the

148. Jewish Religious Services (Consolidated Version) Act, 5731-1971.

149. Under other statutes, there exist religious councils to provide religious services to Israel's non-Jewish citizens.

150. *See, e.g.*, H.C. 121/86, Shas Movement, Union of Sephardic Torah Observers v. Minister of Religion, 40(3) P.D. 462, 466.

151. *See, e.g.*, H.C. 699/89, Hoffman v. Jerusalem Municipal Council, 48(1) P.D. 678, 693.

152. H.C. 4733, 6028, 7105/94, Naot v. Hai'fa Municipal Council, 49(5) P.D. 111.

153. *See id.* at 131-32 (Tal, J.).

collaboration between themselves and the members of those parties opposed to the Reform and Conservative movements. Yet, as noted, under its customary approach, the Court will ignore the fact that the considerations in reaching the decision were political and coalition related, and will relate to the decision under review as if it arose solely from those specific considerations of the body or individuals who demanded that the decision be made (in the above case, the anti-Reform and anti-Conservative religious parties).

It does not seem sensible to say—certainly not in a broad, sweeping fashion—that consideration of political-coalition factors of the sort referred to are forbidden. On the other hand, it is certainly possible that public agencies exist, such as judicial or professional authorities which, in the exercise of their decision-making authority, should not take any account whatsoever of political-coalition considerations. Yet, in general, the very placement of authority into a political entity—one which requires the support of various institutions, including other political bodies, and which must collaborate with these same in order to stay in power and fulfill policy objectives—can be considered to reasonably carry the implication that this political entity may permissibly weigh political-coalition factors in reaching its decisions. This is so even if the result involves compromises of one sort or another, from the decision-maker's point of view, in the exercise of its authority.

According to what is routinely stated in the case law,[154] in exercising its discretion, a public authority must consider all the relevant considerations and is forbidden from considering considerations that are not relevant. But the uniqueness of the political-coalition considerations of the sort described above are such that, while it is clear that the law does not place an obligation upon the authorities to consider these factors, they are not forbidden to consider them. Yet in the common description of the law of administrative discretion, there is no mention of factors whose consideration is permitted but not required. This description clearly does not encompass political-coalition considerations. On the one hand, as noted, the political authorities are generally not to be prevented from weighing such considerations which are, after all, integral to their very nature, manner, and needs. On the other hand, there is no reason to require the political authorities to take account of political-coalition considerations. The opposite is true: an altruistic willingness on the part of the authority to disregard its partisan political interests and focus its decision solely "on the matter itself" would be viewed as praiseworthy.

---

154. For the United States, see cases cited *supra* note 136. For Israel, see, for example, H.C. 727/88, Awad v. Minister of Religion, 42(4) P.D. 487, 491; H.C. 869/92, Zvili v. Chairman of Central Elections Comm., 46(2) P.D. 692, 714; A.H. 3299/93, Wechselbaum v. Minister of Defense, 49(2) P.D. 195, 209-10.

How does the case law bridge this lack or correspondence between its own stated rule, that every consideration is one that either must or must not be evaluated, and the existence of political-coalition factors, factors that generally may be considered, but do not have to be considered? This bridge is accomplished through the phenomenon mentioned earlier—according to which an administrative decision influenced by political-coalition factors will generally be reviewed by a court of law as if the considerations which form its basis were those considerations of the party which sought the decision from the authority—and not the political-coalition considerations which motivated the authority itself. In other words, the court will just ignore the fact that the decision was influenced by political-coalition considerations.

This is exactly what the Supreme Court did in two decisions involving Minister Deri[155] and Deputy Minister Pinchasi.[156] Yet, why did the refusal of the Court to take notice of the political-coalition considerations in the two matters not succeed? Because in these cases, it was impossible to support the decisions under review by any other than political-coalition considerations. For the very purpose of the provisions of the Basic Law involved was to grant political, coalition-building powers to the Prime Minister. In these cases, the political-coalition considerations were themselves the considerations relating "to the very matter itself" in the full sense of the term. The Court was not dealing, as in the *Naot* case,[157] with a situation where considerations relating "to the matter itself" were able to act as a veil to the political-coalition considerations. For this reason, and because the Court was unable to apply itself here to the political-coalition factors and to weigh those factors against the interest in preserving public trust in government, these two decisions appear arbitrary in their reasoning.

The difficulties that arise from the above discussion are not limited to purely political-coalition considerations such as those that were involved in the cases of the dismissal of the minister and deputy minister. In fact, it is actually a fiction that we can disregard political-coalition factors in those cases where it *is* possible to "exchange" consideration of those factors for consideration of factors purportedly going "to the matter itself." Why is this so?

First, cases of the latter category are much more prevalent than cases of "pure" political-coalition situations. A significant portion of the governmental authorities are vested in the hands of public agencies, such as government ministers and local governing councils, that often attempt to include, within the corpus of factors that they consider, political-coalition considerations which are then wholly disregarded by the courts reviewing the decisions.

---

155. *See supra* note 142.
156. *Id.*
157. *Naot*, 49(5) P.D. 111.

Second, its disregard of the political-coalition considerations actually weighed by the governmental authorities prevents the court from being able to review the exercise of discretion as it actually operates. An evaluation of fictitious considerations, and, in any case, a disregard of factors actually considered, cannot be a review of discretion in any meaningful sense.

The conclusion is that, in a wide series of cases, judicial review of the discretion of governmental agencies is distorted in the sense that it is based on a fictitious presentation of the factors which the agency supposedly considered.

Is there any way of escaping this fictitious play-acting and establishing legal principles upon which a meaningful judicial review can take place—one which will take account of the fact that governmental authorities are often political entities which are not to be prevented (yet neither are they to be obligated) from considering, in the exercise of many of their authorities, political and coalition-related factors? It is obvious that through explicit statutes we could establish hard and fast mandatory rules that would constrain discretion by an authority to set a framework for balancing, on an "ad hoc" basis, between considerations related to the "matter itself" and to the political-coalition factors.

Our present concern is not with authorities so-constrained but with authorities possessing discretion. To allow for a balance, by such an authority, between competing considerations, a "common denominator" between the considerations is necessary. A balance between considerations totally foreign to one another constitutes nothing more than an empty metaphor. In the matters with which the two decisions concerning Minister Deri and Deputy Minister Pinhasi dealt, it is possible—though subject to some doubt—that one could balance, by a normative assignment of relative weight, political factors of one sort or another whose common concern is establishing and preserving the government. It is even possible that a balance could be made between the wish to further the trust of the public in the rectitude of the government, on the one hand, and the desire to make the government more efficient, on the other. Yet, here the question is with respect to the Prime Minister's authority to appoint and dismiss members of government: Is there a real—and not a purely metaphoric—possibility of balancing, in a normative manner, between the Prime Minister's determination to maintain his government in existence and the public's general interest in preserving public trust in government?

At present, I see no satisfactory answer to this last question. The difficulty arises not simply from the different conceptual levels to which each of these competing considerations relate, or simply from the fact that some of these considerations are mandatory considerations while others are only permissible. It also arises from the vast number of considerations involved and from the complex interplay between them. To the extent that the number of factors increases, and they become more complex, so also does it become

increasingly difficult to establish a mandatory "zone of reasonableness," as required by the legal doctrine regarding the discretion of public agencies.[158] The difficulty does not exist to the extent that we can say it is proven that the question cannot possibly, by reason of its very nature, be resolved.[159] For it is possible that someday, with the development of thought and theory, a solution will be found. However, at present there is no known solution, and the issue is not justiciable from a normative standpoint.

Some indication, even if not conclusive,[160] that at present the rule of reasonability cannot operate as fully justiciable, substantive legal doctrine—at least insofar as this concerns the balancing between considerations related "to the matter itself" and the political-coalition considerations—lies in the fact that this doctrine has been unable to effectively govern the conduct of the public authorities. By this I mean that a public authority, wholeheartedly desirous in reaching a decision in the proper, lawful manner, while, at the same time, not waiving its right to take into account political-coalition considerations essential to its survival and its ability to govern, will in many cases (absent an on-all-fours judicial precedent) not be able to know beforehand if any particular decision it may make will withstand legal review as to its reasonability. This applies to the authority, as well as to its legal advisors, be they ever so eminent and capable. The difficulty faced by the authorities does not derive only from the general difficulty of predicting what a court will do, should the matter come to it for determination. After all, there are many issues of interpretation that practically—if not in theory—relate to "hard cases," where the answer is not clear or where there are a number of possible answers.[161] The particular difficulty here derives from the lack of consistency and the internal contradictions in the doctrine of administrative discretion, several of which have been presented above.

Does it follow from this that it would be appropriate to eliminate the rule of reasonableness from the area of administrative law, at least insofar as the corpus of legitimate considerations includes political-coalition considerations? The answer that I would suggest is that the rule should not be thus limited. To my mind, even if this doctrine, or certain aspects of it, are in a certain sense non-justiciable from a normative standpoint, it still may be proper to find them institutionally justiciable. Thus, even in the absence of standards that can be expressed as consistent legal rules, i.e., establishing

158. See, for example, with respect to oversight of military matters, H.C. 561/75, Ashkenazi v. Minister of Defense, 30(3) P.D. 309, 318-20.

159. *See supra* text accompanying notes 71-76.

160. *See infra* text accompanying notes 161-69.

161. As noted, I have not dealt in this article with the question of whether, both theoretically and practically, there may be legal questions with more than one lawful answer. In any case, I maintain that not all legal questions have even one known answer. *See supra* note 12 and accompanying text.

rights and obligations regarding the authorities and the public (and wholly aside from the enforcement of these rights and obligations by the courts), it still may be appropriate at times that the judicial branch place, under the rod of its review, the decisions of bodies of the executive branch, even when these comport with the defined requirements of the law, and even if their unreasonableness cannot be proven by traditional legal means.

In my view, normative justiciability would not be a prerequisite for institutional justiciability. Institutional justiciability could exist—and, in practice, does exist—even in the absence of complete normative justiciability.

3. The Normative Non-Justiciability of the Reasonableness Rule in Administrative Law—What Is Meant?

The claim that the requirement of reasonableness in the administrative law is not justiciable from a normative standpoint, in the sense that it fails to define to the administrative agencies their legal obligations, raises difficulty. Do not, as already stated,[162] norms which demand reasonability stand at the very center of many branches of the law, and not merely the administrative law? For instance, could it be said that tortious negligence or criminal negligence are not normatively justiciable because they incorporate a reasonableness requirement? Moreover, modern laws generally include many abstract norms, and it is possible to say that every generalized norm, by virtue of its very generality, is abstract to one degree or another. Do all these abstract norms—and, as indicated, perhaps all norms—lack normative justiciability?

It seems that the key to the resolution of these questions does not lie solely in the extent of the abstractness of the norm or in the extent that it is able to provide guidance to the public, but in the inner consistency of the norm on the one hand and in the purpose of the norm's existence on the other. By this last factor, I am referring to the extent to which the norm enjoys a "life of its own" as opposed to serving only as a basis for the exercise of judicial review.

On the one hand, the norm must be examined in order to determine—however abstract it may be or whatever discretion, mental or substantive,[163] it calls for—whether it permits the ascertainment of the legal status (i.e., the

---

162. According to Professor Redish: "Courts are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear." MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 125 (1991). *See also, supra* notes 128-29 and accompanying text.

163. Even according to those who negate a situation in which there exists substantive discretion as to the meaning of the norm, there exists a mental state of doubt as to its meaning. This is discretion in its weak sense. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 12, at 31-32.

rights and obligations, in the broad sense) of every situation to which it would purport to apply. A norm that cannot meet this requirement—as I have tried to demonstrate, *supra*, is the case with the reasonableness rule in the administrative law, and, to a certain extent, the entire legal doctrine of administrative discretion in general—is not normatively justiciable, or, at least, its normative justiciability is seriously defective to an extent proportional with the defects in the consistency of the norm.

On the other hand, we must also examine to what extent we are speaking of a norm whose essence is to grant power and quasi-administrative jurisdiction to the *courts* and to subordinate the authorities and the public to this power and jurisdiction, as opposed to a norm that directs itself to the authorities and the public and seeks to instruct them as to how to behave, or not to behave, with the court being charged only with the interpretation, application, and enforcement of the norm.

According to my thesis, the doctrine of reasonableness in the administrative law is not normatively justiciable in the sense that, as a practical matter, its actual content is not: "administrative agencies must operate in a reasonable manner" (or at least not in an extremely unreasonable manner). Rather, its content at present is: "The court has the discretion to provide relief against the action of an administrative agency that it finds to be unreasonable to an extreme degree."

In this manner, reasonability in the administrative law resembles many rules in the law of procedure which grant to the court discretionary authority with respect to matters of procedure, such as the granting of temporary relief and the setting of attorneys fees and costs. This quasi-administrative discretion is rarely subject to interference by appellate courts, in contradistinction to a ruling on the substantive law where normative justiciability is total, and where the scope of judicial review by the appellate courts is similarly full. With respect to the discretion granted to the lower court as to the setting of the sum for a bond in a civil case, Chief Justice Shamgar had this to say:

> The setting of the sum of the bond is not among the matters in which the appeals process involves itself unless there exist special and exceptional circumstances. *In principle, the matter is left to quasi-administrative discretion.*[164]

---

164. B.S. 5205, 5238/93, Eisenman v. Kimron (unpublished) (emphasis added). *See also, e.g.*, R.A. 450/94, Efrat Works Shares, Inc. v. Marek (unpublished) (setting the level of costs and attorneys fees in a civil case); Cr.A. 7/96, Or-Ner v. Israel (unpublished) (setting fees of an appointed attorney in a criminal case); R.A. 1166/93, Moreshet Israel, Inc. v. New Age Film and Television Producers, Inc. (unpublished) (bond in a civil case); B.S. 2841/91, Taib v. Keren L.B.I. (unpublished) (joinder of respondents to civil appeal).

It should be noted that in the exercise of their discretion in matters related to judicial procedure, just as in the exercise of their discretion in assessing the decisions of administrative agencies on unreasonability grounds, the courts are not exercising administrative authority. These authorities are essentially judicial in nature, not simply from the standpoint of the branch exercising them, i.e., the judiciary, but also by virtue of their content—determination of a dispute between parties. Yet, like the discretion exercised by administrative authorities, the courts possess significant, albeit not total, discretion with respect to the content of their decisions.

It is questionable if this approach wholly comports with any one of the common approaches to the question of whether for each legal question there exists only one legal answer or several.[165] This notwithstanding, it should be understood that my claim is that certain determinations made by the courts in the exercise of judicial review, as in other matters, do not even purport to provide answers to legal questions, i.e., to decide on the constellation of rights and duties that *the Law* gives to each of the sides involved in the dispute. Rather, like the public agency exercising its discretionary authority, and, similarly, like a parliament in legislating, the court *creates* through its holdings—and not in the framework of mere interpretation of the law—this constellation of rights and duties. Just as an administrative agency is not bound to take one or another particular decision, but rather may choose from among a number of alternatives, so is the court in a similar position when exercising discretion of the sort described.

As has been claimed, judicial discretion of this sort is not total, and, like administrative discretion, is subject to the various laws relating to such discretion. With the passage of time, new rules will develop as to the exercise of this discretion, which will then establish a substantive law of adjudication from a normative standpoint. Thus, for example, it was ruled in Israel—upon the basis of the constitutional principle of free expression—that in a civil case there can be no temporary relief granted forbidding publication of a book or a newspaper column, nor may there be required any disclosure to the complainant of the book or the article prior to its publication.[166]

As noted, even the law of reasonableness in the administrative law will become the foundation for other norms whose normative justiciability is more plainly evident, such as the now clear norm barring the continued service in office of a minister or a deputy minister against whom indictments have been filed on corruption charges,[167] or the bar on the enactment of a retroactive tax which levies a tax on transactions carried out prior to the start of the tax-year

---

165. *See supra* text accompanying note 12.

166. *See* C.A. 214/89, Avneri v. Shapira, 43(3) P.D. 840. For criticism of this decision, see Ariel Bendor, *Freedom of Defamation*, 20 MISHPATIM 561 (1991) (Hebrew).

167. *See* cases cited *supra* note 142.

with respect to which the new amendment was added.[168]

That the rule of reasonableness constitutes a law-creating power and jurisdiction for the court to which the agencies and the public are subject, and *not* a substantive law establishing rights and duties, can be gathered from the fact that, to invalidate the decision of a administrative agency, it is insufficient that it be "simply" unreasonable. Rather, what is required, even in Israel, is "extreme" unreasonability, while in the United States, the requirement is for unreasonability expressed through an exercise of discretion that is nothing less than "*arbitrary and capricious*."[169] Does it seem logical that a substantive law would permit the validity of merely unreasonable administrative actions? It seems then that we are not talking about a substantive law but about a level of discretion granted to the courts in the context of their *judicial review* of the decisions of administrative agencies.[170] Indeed, it may be noted that in other areas of the law where the requirement of reasonableness is part of the substantive law, such as negligence in tort law or criminal negligence in the penal law, the prohibitions on conduct are not generally applicable only to "extremely" unreasonable behavior or "arbitrary and capricious" conduct; rather, the legal prohibition relates to every deviation from the substantive standard of reasonability.[171]

4. In Favor of Institutional Justiciability of Judicial Review Under the Rule of Reasonableness

Indeed, the approach offered above would appear to undermine, to a degree, the accepted outlook in Israel which is founded on a dichotomy and separation between law (and judges) and policy, in general, and politics (and politicians) in particular. This outlook has accorded the judiciary a monopoly in determining questions of law, while, at the same time, denying it all jurisdiction or legitimacy for dealing (save through the application of substantive legal norms) in non-legal questions and, most especially, in political questions and policy issues. The result of this viewpoint in Israel has been that the courts have devised legal norms whose basic purpose has been to provide a foundation for judicial review in areas where the courts have

168. *See* sources cited *supra* note 130.

169. *See supra* notes 135-41 and accompanying text.

170. Indeed, as noted, in the U.S. Administrative Procedure Act, the rules relating to administrative discretion are anchored in a section entitled "Scope of Review," which includes all the bases for judicial review. Administrative Procedure Act, 5 U.S.C. § 706 (1996). Some of these bases, such as infringement of a constitutional right, reflect the substantive law relating to the agency. Nevertheless, it would seem possible to interpret the basis relating to arbitrary and capricious actions—the American analogue of Israel's extreme unreasonableness standard—as a basis for review that does not reflect the substantive law. *See also infra* text accompanying notes 172-84.

171. *See* H.C. 389/80, Gold Pages, Inc. v. Broadcasting Authority, 35(1) P.D. 421, 445.

considered such judicial review to be necessary. Thus, the judicial review is not the result of the need to enforce substantive legal norms; rather, the norms have themselves been created by the courts as a result of the perceived need for judicial review. The goal of these norms—first and foremost of which is the rule of reasonableness—is not to guide the behavior of the public agencies or to provide direction to the courts. Their failure to do so effectively should not, therefore, be seen as impacting negatively on their true task—to constitute a mechanism which provides a basis, and legitimacy, for judicial review.

Consequently, the fact that claims as to the unreasonability of administrative decisions may not be wholly justiciable from a normative standpoint should not then lead to the conclusion that they are not institutionally justiciable. The substantive doctrine of the separation of powers focuses on the need for reciprocal review and oversight between the various branches of government. In this sense, alongside the particular functions of the individual branches of government, there is also to be oversight and review with respect to the exercise of most of these functions.[172] According to this view, the task of the judiciary in providing oversight over the other branches of government—and, in particular, for our purposes, the executive authorities—is necessary in a system of government of separation of powers because it prevents unfettered discretion, including the *consciousness* of unfettered discretion, and the threat to individual rights that could derive therefrom.[173]

Furthermore, it is the obligation of the courts to fulfill their institutional function of deciding disputes even when this confronts the courts with problems in the area of normative justiciability. True, the courts are able to travel the royal road when they are capable of basing their adjudications, and their judicial review of other branches of government, on substantive laws which place clear obligations upon these other authorities. Yet the courts cannot shirk their constitutional function whenever such a substantive law does not exist or cannot be applied, i.e., where the controversy involved is not normatively justiciable. The mere fact that the court lacks the normative tools to decide the controversy does not justify its declaring "*quia timet.*" Indeed, in many cases, the Court itself may be able to fashion the tools it lacks through the process of interpretation, in the manner long accepted in the common law as a source of law and the development of the law.[174] Yet, even

---

172. *See also supra* text accompanying note 81.

173. In the famous words of Justice Douglas: "Absolute discretion, like corruption, marks the beginning of the end of liberty." New York v. United States, 342 U.S. 882, 884 (1951). See also, for example, the Israeli articulation of the same spirit in the words of Justice Barak in H.C. 4267, 4287, 4364/93, Amitai—Citizens for Improvement of Administration and Purity of Ethics v. Prime Minister, 47(5) P.D. 441, 462-63.

174. *See, e.g.*, Aharon Barak, *Judicial Creativity: Interpretation, the Filling of Gaps (Lacunae) and the Development of Law*, 39 HAPRAKLIT 267 (1990) (Hebrew).

in cases of normative non-justiciability, where the court cannot rule on the basis of legal missing norms, it should still, generally, decide the matter before it.

As already noted, in cases where normative justiciability is lacking from the outset and where the court is adjudicating the matter solely in the context of its institutional function, norms may be created through the theory of binding precedent. For example, even if the matter of the dismissals of Minister Deri and Deputy Minister Pinhasi, discussed earlier,[175] had not originally been normatively justiciable, the rulings in their cases by the Supreme Court have now established a new norm, to the effect that a government generally cannot include individuals against whom there have been asserted indictments on crimes of corruption. From now on, situations of this sort will be adjudicated on the basis of this new norm and the courts no longer will have to struggle—at least in such circumstances—with the lack of normative justiciability of the rule of reasonableness in the administrative law.

The significance of institutional justiciability even, in the absence of normative justiciability, is well illustrated in the context of judicial review of decisions delegated to the discretion of authorized agencies, especially judicial review exercised on the basis of the law of reasonableness. The discretion of governmental authorities is subject to little practical, meaningful limitation under any substantive norms.[176] Indeed, in most circumstances, we do not possess, at least at the present time, any realistic means of applying substantive legal parameters limiting such discretion. If the judicial review were to proceed solely in accordance with a precise application of existing substantive legal norms, the inevitable result would be an even greater expansion of the discretion of the agencies of the government—expansion, at times, to the point where this discretion would become absolute. Worse still, these authorities would no longer be concerned with the need to explain their decisions before a court (which in Israel, in many cases, is the Supreme Court).

Such a result would be quite difficult to accept. Many—perhaps most—of the authorities delegated to the agencies of the government are discretionary authorities. To render that discretion virtually absolute, with no effective review over the manner of exercise and with no consciousness on the part of the agencies that any such oversight even exists, would be wrong and runs contrary to the entire notion of checks and balances between the branches of government.

---

175. *See supra* text accompanying notes 142-47 and 155-56.

176. While the obligations to consider all relevant factors, to not consider irrelevant factors, and to not practice discrimination may be categorized as requirements of the substantive law, they only slightly restrict the agency's discretion. Moreover, proof of a failure to abide by the first two criteria is hard to accomplish. I have already expatiated on the difficulties in categorizing the rule of reasonableness as a rule of substantive law.

This notwithstanding, where normative justiciability is lacking, judicial review must operate with special restraint and circumspection. It is one thing for a court to intervene in the case of a clearly unlawful decision.[177] It is quite another for it to intervene—on the basis of the court's own discretion—in a decision whose unlawfulness is not subject to determination. Only in exceptional cases, if at all, would it be legitimate for a court to refuse to grant relief against an illegal decision, however "political" that decision may be. Where, however, normative justiciability is absent and judicial review bases itself solely on the institutional function of the judicial branch, that the court believes or feels that the decision is wrong does not constitute sufficient basis for granting relief against an administrative decision. Rather, it must be persuaded that the decision is extremely harmful and illegitimate, and that the intervention of the court is essential.

In such a context, the Court may, to the extent it is able and on the basis of the evidence before it, investigate in depth the factors relevant to the matter and, on that basis, reach a determination as to the matter itself. The claim regarding the difficulty in determining factual findings as to policy matters[178] cannot serve as a basis for the court to refrain from fulfilling its role to fully determine a question that is before it from a normative standpoint. This concern, however, can influence a determination as to the extent of institutional justiciability with regard to a dispute where normative justiciability is lacking.

The level of restraint a court will exercise in these circumstances depends on the political and social culture within which the court is operating. It is possible that the difference between the preeminent restraint which the United States courts practice in utilizing reasonableness as a foundation for judicial review, and the more limited restraint exhibited by the courts in Israel, may be best understood against the background of the cultural differences between the two countries.[179]

Furthermore, it is not necessary that review which is not normative be carried out only by the judicial branch. Where legal norms cannot be applied,

---

177. Yet, even with respect to the matter of unconstitutional decisions, the court enjoys a general discretion in the granting of relief. *See, e.g.*, H.C. 2918, 4235/93, Kiryat Gat Municipality v. Israel, 7(5) P.D. 833, 848-50. *Cf. id.* at 845-47 (minority opinion of Justice Mazah). On such discretion and on the relationship between it and abstention from judicial review on "political question" grounds, see, for example, Scharpf, *supra* note 88, at 549-50; Redish, *supra* note 101, at 1055-57; Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 321-23 (1990). *See* Bendor, *supra* note 14, at 620-22.

178. *See, e.g.*, Scharpf, *supra* note 88, at 567. For a rejection of this contention, see Redish, *supra* note 101, at 1051-52.

179. Compare text accompanying notes 61-64 and 92. *Cf. also* Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19 (1996).

the intervention of the courts is essential only where no other powers fulfill this essential function. Nonetheless, in practice, due to the structure of government in Israel, the parliament (the Knesset) is generally not an effective address to direct claims to that the executive authority has made an invalid decision. There was once an attempt in Israel to refer complaints against certain administrative decisions from the court to the care of the ombudsman who, in some cases, possessed investigative capabilities superior to those of the courts.[180] This experiment, however, did not prove satisfactory.[181] It is possible, however, that with the strengthening of the position of the State Comptroller, who also acts in an ombudsman capacity,[182] it may prove proper to consider referring to official non-normative objections to the actions of public administrative agencies. It may be that such referral to bodies whose statutory mandate provides for their operations to be conducted in accordance with standards that are not solely legal in nature[183] may be considered more legitimate than the handling of such matters by the courts. At the same time, however, unlike the courts, the State Comptroller and the Ombudsman lack virtually any authority to issue binding decisions and, to date, there has not developed a strong custom of obedience to their recommendations. The conclusion, consequently, is that, in the existing situation, the judiciary must, even in the absence of normative justiciability, take up its part, institutionally, in providing review and oversight for the acts and decisions of the executive branch.

This approach comports to some extent with the view followed in the United States, which does not draw an explicit distinction between law, policy, and politics. Indeed, the American legal philosophy, expressed in the political question doctrine, does not grant to the judiciary a monopoly in the determination of questions of law. In this regard, it differs, to a certain extent, with the approach proposed in this article. For under my approach, no political authority—neither the executive nor the legislative—should ever have the last word with respect to the legality of its own actions or those of other political branches. The determination of legal questions must in principle be concentrated in the hands of the judiciary, subject, perhaps, to the option that, in certain situations, the court will delegate this determination to

---

180. *See* H.C. 384/71, Dudai v. Harel, 25(2) P.D. 554.

181. *See* H.C. 453/84, Iturit Media Services, Inc. v. Minister of Communication, 38(4) P.D. 617.

182. *See* Section 4 of the Basic Law: State Comptroller, S.H. 30 (1988).

183. In the State Comptroller (Consolidated Version) Act, 5718-1958, it is set forth, *inter alia*, that the State Comptroller is authorized to examine "if the investigated bodies . . . behaved prudently and efficiently and with pure ethics[,]" *id.* § 10(2), as well as "every matter that she sees a need to do so." *Id.* § 10(3). In serving as ombudsman the Comptroller is permitted, *inter alia*, to deal with complaints relating to "action . . . opposed to proper administration, or which is unduly harsh or blatantly unjust." *Id.* § 37(2).

other non-political agencies, such as the State Comptroller or Ombudsman. This assumes, of course, that the determination of these agencies will be given the binding force of judgments granted by the courts themselves.

While the American system denies the courts a monopoly over legal questions, it also recognizes that the courts will sometimes reach determinations on policy questions, and this not necessarily upon the basis of substantive legal norms. In this respect, the American system comes closer to the approach advocated in this article.

Are there questions that, even in the absence of any explicit restraint or limitation in the Constitution, are not to be determined by the law courts? Under the theory of the political question doctrine, as well as from its practical application by the courts, there arise no clear-cut or definite answers to this issue. Still, as noted, it seems that the measure of judicial restraint exercised in this area in the United States is greater than that in Israel.[184] It would seem that, along with the different cultural contexts in the two countries, the difference in the levels of judicial restraint in the two countries is also contributed to by the different rhetoric applying to each. Thus, in Israel, the judiciary's monopoly on the determination of legal questions, accompanied by its *obligation* to determine these questions and coupled with the expansion of the range of questions classified as legal questions, has resulted in a relatively large level of involvement by the Israeli courts in issues of policy and, to an extent, in political matters as well. In the United States, on the other hand, the combination between the recognition of the fact that the law does not possess an answer to every question that appears to be legal, and the recognition that the judiciary does not possess a monopoly on the determination of even legal issues, has resulted in a relatively narrower degree of involvement by the courts in questions of politics, and even policy.

IV. CONCLUSION

From the thesis I have advocated in this article, no hardfast or universal viewpoint arises with respect to the appropriate level of involvement by the courts in questions where, according to the view I have presented, there is a lack of normative justiciability. That level of involvement—namely, institutional justiciability—will depend on the political and judicial culture of the society, on the relative position of the judicial branch, and on the existence of effective non-judicial alternatives capable of reviewing and overseeing the actions of the governmental authorities.

One must distinguish between the normative justiciability of a legal question and its institutional justiciability. Similarly, a distinction must be drawn between material institutional justiciability and organic institutional

184. *See supra* text accompanying notes 118, 135-37 and 165.

justiciability.

In general, legal questions will be justiciable from a normative standpoint. A question that is justiciable from a normative standpoint ought also—save in, perhaps, the most exceptional circumstances—be institutionally justiciable (both in the material and organic sense). From this standpoint, doctrines in the United States and Israel relating to political questions or judicial review of parliamentary matters are problematic to the extent that they limit the institutional justiciability of questions that, normatively, are fully justiciable.

The normative justiciability of a question is not, however, a precondition to its being institutionally justiciable. There can be questions whose normative justiciability is deficient but which will still be institutionally justiciable. Yet, the criteria for finding institutional justiciability with respect to questions which are not normatively justiciable will not be the same as those applicable to questions that are. The institutional justiciability of questions whose normative justiciability is deficient will be narrower than the institutional justiciability of questions with full normative justiciability. This suggested approach comports to a greater extent with the prevailing legal outlook in the United States, but it could be made compatible with the law in Israel as well.