HCJ 164/97

Conterm Ltd.

v.

1. Finance Ministry, Customs and VAT Division
2. Customs Officer, Ashdod
3. Port and Train Authority

The Supreme Court Sitting as the High Court of Justice

[February 4, 1998]

Before President A. Barak and Justices M. Cheshin, I. Zamir

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The petitioner acquired a license from the Customs Authority to operate a licensing warehouse on land in dispute between it and the Port and Train Authority. The Customs Authority asked for proof that the petitioner had a right in the land, as required by the regulations, and in return it received an agreement that did not appear to address such a right. The Customs Authority granted the license anyway. When it became aware of the dispute over the land, it refused to renew the license. The central question is whether the petitioner had a duty to disclose the existence of the dispute to the Customs Authority, and more broadly, whether individuals owe a duty of fairness in their dealings with administrative agencies.

Held: All three justices held that the Customs Authority had a right to refuse to renew the license, each on different grounds. Justice Zamir held that not only does the government owe a duty of fairness to citizens, but citizens owe a reciprocal duty of fairness to the government, including a duty to disclose information material to a request for a license. Such duty stems from the social contract, in which citizen and government are partners in the democratic enterprise. The petitioner's breach of such duty in failing to disclose material information of primary importance justified refusing to renew the license. President Barak held that the individual owes no general duty of fairness to the government. Any duty owed by the individual to the government must be specific to the issue in question and dependent on the proper balance between the interests of society as represented by the government and the rights and freedoms of the individual. The petitioner's duty of disclosure owed to Respondents 1-2 stems from the fact that a proper exercise of governmental authority requires the individual to make appropriate disclosures to the government concerning material facts which serve as the basis for the governmental decision. Justice Cheshin held that in his or her dealings with the government, the individual bears no duty to disclose information at its own initiative. The government is better situated to know what information is material and to ask for it. The Customs Authority's decision not to renew the license, however, does not warrant judicial intervention because the petitioner did not meet a material condition set by the Regulations regarding a right in the land.

Objection to order-nisi of February 25, 1997. Petition denied. Order-Nisi rescinded.

For the petitioner—Yehoshua Wolf and Yaakov Yaniv
For Respondents 1-2 —Dana Briskman, Executive Deputy State Attorney
For Respondent 3 —Yaakov Liraz.

Basic Laws Cited:
Basic Law: Human Dignity and Liberty.
Basic Law: Freedom of Occupation.
Basic Law: The Judiciary – s.1(a).
Basic Law: The Government – s.1.

Israeli Legislation Cited:
Port and Train Authority Law, 1961.
Contract Law (General Part), 1973 – ss.12, 13, 15, 39, 61(b).
Interpretation Law, 1981 – ss.11, 17(b).
Land Law, 1969 – s. 14.
Legal Capacity and Guardianship Law, 1962.
Mandatory Education Law, 1949.
Penal Law, 1977 – ss.262, 491.
Traffic Ordinance [new version] – s.64a.
Shipping Law (Sailors), 1973 – s.39.
Law of Return, 1950.
Business Licensing Law, 1968 – s.1(a)(1).
Customs Ordinance [new version] – s.70(b).

Regulations Cited:
Customs Regulations, 1965 – numbers 12, 14, 14(b), 12-23, ch.7, sixth addendum, part 3.
Traffic Regulations, 1961 – numbers 144, 146.

Israeli Supreme Court Cases Cited:
[1] HC 233/53 *Alspector v. Mayor of Beit Shean*, IsrSC 8 659.
[2] HC 9/49 *Bloi v. Interior Minister*, IsrSC 2 137.
[3] HC 56/53 *Kakanda v. City of Ramla*, IsrSC 7 949.
[4] HC 56/76 *Berman v. Police Minister*, IsrSC 31(2) 687.
[5] HC 799/80 *Shallam v. Gun Law, 1949 Licensing Clerk, Oil Administration of Petach Tikvah, Interior Ministry*, IsrSC 36(1) 317.
[6] HC 475/81 *Deak & Co. Inc. v. Governor of the Bank of Israel*, IsrSC 36(1) 803.
[7] CA 433/80 *I.B.M. Israel Assets, v. Property Tax Director and Compensation Fund of Tel-Aviv*, IsrSC 37(1) 337.
[8] CA 736/87 *Yaakobovitch v. Land Appreciation Tax Director of Nazareth*, IsrSC 45(3) 365.
[9] CA 1928/93 *Securities Authority v. Gabor Savarina Textile Factories.*, IsrSC 49(3) 177.
[10] CA 338/85 *Speigelman v. Chapnik*, IsrSC 41(4) 421.
[11] HC 707/80 *Ilanot Housing, Building and Development Co. v. Arad Local Council*, IsrSC 35(2) 309.
[12] CA 391/80 *Mira Lesserson v. Workers Housing Ltd.*, IsrSC 38(2) 237.
[13] CA 402/76 *Azaranikov v. State of Israel*, IsrSC 31(1) 270.

[14] HC 640/77 *Baranovsky v. Department of Customs and Excise Director*, IsrSC 32(2) 75.
[15] HC 566/81 *Amrani v. Chief Rabbinical Court*, IsrSC 37(2) 1.
[16] HC 221/86 *Kanafi v. National Labor Court*, IsrSC 41(1) 469.
[17] FH 22/82 *Beit Yules Ltd .v. Raviv Moshe & Partners, Ltd.*, IsrSC 43(1) 441.
[18] HC 376/81 *Lugassi v. Communications Minister*, IsrSC 36(1) 449.
[19] HC 4422/92 *Efran v. Israel Land Administration*, IsrSC 47(3) 853.
[20] HC 840/79, *Center for Contractors and Builders in Israel v. Government of Israel*, IsrSC 34(3) 729.
[21] HC 549/75 *Noach Film Company, Ltd. v. Film Review Council*, IsrSC 30(1) 757.
[22] HC 135/75 *Cy-Tex Corporation Ltd. v. Trade and Industry Minister*, IsrSC 30(1) 673.
[23] HC 3/58, *Berman v. Interior Minister*, IsrSC 12 1493.
[24] HC 335/68 *Israeli Consumer Council v. Chair of the Gas Services Investigatory Committee*, IsrSC 23(1) 324.
[25] HC 135/71 *Fresman v. Traffic Supervisor*, IsrSC 25(2) 533.
[26] HC 1930/94 *Nathan v. Defense Minister*, IsrSC 48(4) 643.
[27] HC 656/80 *Abu Romi v. Health Minister*, IsrSC 35(3) 185.
[28] HC 337/66 *Estate of Kalman Fital v. Assessment Committee, Town of Holon*, IsrSC 21(1) 69.
[29] HC 421/86 *Ashkenazi v. Transportation Minister*, IsrSC41(1) 409.
[30] HC 727/88 *Awad v. Religious Affairs Minister*, IsrSC 42(4) 487.
[31] HC 2911/94 *Baki v. Interior Ministry Director-General*, IsrSC 48(5) 291.
[32] HC 2918/03 *City of Kiryat Gat v. State of Israel*, IsrSC 47(5) 832.
[33] HC 442/71 *Lansky v. Interior Minister*, IsrSC 26(2) 337.
[34] HC 987/94 *Euronet Golden Lines (1992) Ltd. v. Communications Minister*, IsrSC 48(5) 412.
[35] HC 1635/90 *Zharzhavski v. Prime Minister*, IsrSC 45(1) 749.
[36] HC 669/86 *Robin v. Berger*, IsrSC 41(1) 73.
[37] HC 142/70 *Shapira v. Bar Association Jerusalem Regional Council*, IsrSC 25(1) 325.
[38] HC 6163/92 *Eisenberg v. Housing and Construction Minister*, IsrSC 47(2) 229.
[39] CA 6821/93 *United Mizrachi Bank. v. Migdal Agricultural Cooperative Village*, IsrSC 49(4) 221.
[40] HC 1601/90 *Shalit v. Peres*, IsrSC 44(3) 353.
[41] CA 148/77 S. *Roth v. Yeshufa Construction Ltd*., IsrSC 33(1) 617.
[42] CA 207/79 *Raviv Moshe & Partners, Ltd. v. Beit Yules Ltd.* IsrSC 37(1) 533.

[43] HC 59/80 *Be'er Sheva Public Transportation Services Ltd. v. National Labor Court in Jerusalem*, IsrSC35(1) 828.
[44] HC 8507/96 *Orin v. State of Israel*, IsrSC 51(1) 269.
[45] HC 3872/93 *Mitral Ltd. v. Prime Minister and Religious Affairs Minister*, IsrSC47(5) 485.
[46] CrimA 119/93 *Lawrence v. State of Israel*, IsrSC 48(4) 1.
[47] HC 1/49 *Bazherno v. Police Minister*, IsrSC 2 80.
[48] HC 192/61 *Kalo v. City of Bat Yam*, IsrSC 16 1856.
[49] HC 328/60 *Musa v. Interior Minister*, IsrSC 17 69.
[50] HC 43/76 *Amitar Company, Ltd. v. Tourism Minister*, IsrSC 30(3) 554.
[51] HC 208/79 *Ineis v. Health Ministry General Director*, IsrSC 34(1) 301.
[52] HC 758/88 *Kendel v. Interior Minister*, IsrSC 46(4) 505.
[53] HC 740/87 *Bentali v. Interior Minister*, IsrSC 44(1) 443.
[54] CA 186/52 *Jerusalem "Eden" Hotel v. Dr. Gerzon*, IsrSC 8 1121.
[55] HC 1921/94 *Sukar v. Jerusalem District Committee on Construction, Residence, and Industry*, IsrSC 48(4) 237.
[56] HC 35/48 M. *Breslov & Partners Ltd. v. Trade and Industry Minister*, IsrSC 2 330.
[57] HC 132/57 *First v. City of Lod*, IsrSC 11 1324.
[58] HC 280/60 "*Avik" Ltd. v. Voluntary Authority on Importation of Pharmaceutical Preparations* , IsrSC 16 1323.
[59] HC 115/61 *Yakiri v. City of Ramat Gan*, IsrSC 16 1877.
[60] HC 27/62 *Alt v. Tel Aviv-Jaffa Local Town Building and Planning Committee*, IsrSC 25(1) 225.
[61] HC 278/62 *Sarolovitch v. City of Jerusalem*, IsrSC 17 508.
[62] HC 329/64 *Guri v. Bnei Brak Local Town Building and Planning Committee*, IsrSC 19(1) 365.
[63] HC 109/70 *Orthodox Coptic Metropolitan in Jerusalem v. Police Minister*, IsrSC 25(1) 225.
[64] HC 37/49 *Goldstein v. Jaffa Guardian of Abandoned Property*, IsrSC 2 716.
[65] HC 143/62 *Schlesinger v. Interior Minister*, IsrSC 17 225.
[66] HC 58/68 *Shalit On His Own Behalf and On Behalf of His Children v. Interior Minister*, IsrSC 23(2) 477.
[67] HC 5364/94 *Welner v. Chair of Israeli Labor Party*, IsrSC49(1) 758.
[68] HC 305/82 Y. *Mor v. Central District Regional Planning and Construction Committee*, IsrSC 38(1) 141.
[69] HC 107/59 Mei-Dan v. *Tel-Aviv-Jaffa Local Planning and Construction Committee*, IsrSC 14 800.

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[71] *Thomas v. Union Carbide Agric. Products Co.* 473 U.S. 568 (1985).

English Cases Cited:
[72] *Scruttons v. Midland Silicones* [1962] 1 All E.R. 1 (H.L.).
[73] *Donoghue v. Stevenson* [1932] A.C. 52.
[74] *Reg v. Home Secretary, Ex p. Zamir* [1980] A.C. 930.
[75] *Reg. v. Home Secretary, Ex p. Khawaja* [1984] A.C. 74.

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[77] G. Shalev, *Dinei Chozim [Contract Law]* (1995).
[78] A. Barak, *Shikul Da'at Shiputi [Judicial Discretion]* (1987).
[79] 2 I. Zamir, *Hasamchut Haminhalit [Administrative Authority]* (1996).
[80] M. Mautner, *Yiridat Haformalism Vialiyat Haarachim Bamishpat Hayisraeli [Decline of Formalism in Israeli Law]* (1993).
[81] 1 B. Aktzin, *Torat Hamishpat [Jurisprudence]* (2nd ed. 1968).
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[83] 1 B. Bracha, *Mishpat Minhali [Administrative Law]* (1987).
[84] M. Cheshin, *Mitaltilin Bidin Hanizikin [Chattel in Torts]* (1971).

Foreign Books Cited:
[85] L.H. Tribe, *Constitutional Choices* (1985).
[86] L.H. Tribe, *American Constitutional Law* (2nd ed. 1988).

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[a] Babylonian Talmud, Order Tractate Shabbat 31:1; 104:2.
[b] Leviticus 19;18; 25;17.
[c] Isaiah 58:7.
[d] Micah 6: 8.
[e] Exodus 21:15, 16.
[f] Babylonian Talmud, Tractate Baba Metzia 59:1.
[g] Mishnah, Tractate Avot, 2:3; 1:10.
[h] Genesis 4:22.

JUDGMENT

Justice I. Zamir

1. The petitioner, Conterm Company Ltd., received a customs license to operate a licensing warehouse. By law, the license had to be renewed yearly. The Customs Authority refused to renew the license. The petitioner is challenging that refusal; it claims that it has a right to a renewal of the license.

A central question raised in this petitions is the duty of fairness between the administrative agency and the citizen. Usually, that question is directed at the administrative agency: What kind of duty does it owe the citizen? This time, the question is directed at the citizen: Does the citizen owe a duty of fairness (or, in other words, a duty to behave properly) to the administrative agency?

The Facts

2. For over 20 years, the petitioner has operated a freight terminal in Ashdod. The terminal operates as a licensing warehouse through a license granted by the customs director, under the seventh chapter (beginning at Regulation 12) of the Customs Regulations, 1965 (hereinafter – the Regulations). The license authorizes the storage of goods for which customs duties apply. The warehouse operates on land which the petitioner owns, in the northern industrial zone of Ashdod, about 50 meters from the railway leading to the Ashdod Port (hereinafter: the main railway).

The petitioner wanted to take advantage of the warehouse's convenient location by using the railway to make the process of shipping the freight to and from the facility more efficient, minimizing the use of trucks and saving on transportation costs. The petitioner submitted a proposal to the Port and Train Authority, under which it would build, at its expense, an extension of the tracks from the main railway to the warehouse. The extension would allow the petitioner to load freight from the port onto the train, then unload it close to the warehouse and store it there, as well as to load freight from the warehouse onto the train, to send to the port.

The Port and Train Authority, a statutory corporation created by the Port and Train Law, 1961 (hereinafter – the Port Authority), owns and operates the railway. It also owns 44 dunams [4.4 hectares – trans.] of land bordering the main railway on one end, and the warehouse on the other (hereinafter – the land). The petitioner wanted to build the railway extension on the land, which was vacant and unused, so that the railway would reach the warehouse. Toward the end of 1992, it approached the Port Authority with its request.

On June 6, 1994, following extensive negotiations, the petitioner and the Port Authority signed a contract (hereinafter – the contract). Section 2B of the contract declared the following:

> All lines and systems of the extension will be built on land belonging to the Authority [The Port Authority – I.Z.] and will become its property upon their construction. The company [the petitioner – I.Z.] has no right whatsoever to the Authority's land in general, and to the land on which the extension is built, in particular.

As an appendix to the contract, the parties attached a scheme marking the route of the main railway and the planned extension: The Chief Engineer of Israel Railways signed it on January 3, 1994, and later the petitioner, the Train's Deputy Director-General for Commerce, Economics, and Finance, and the Train's Deputy Director-General for Operations signed as well (app. R/7 of the Port Authority's Statement).

3. Not long after the parties signed the scheme designating the route of the extension (hereinafter – the first scheme), the petitioner approached the Port Authority with a request to change the route of the extension. According to the petitioner, the change was necessary to allow it to set up and operate machinery for loading and unloading bulk seeds. The change would mean that the route of the extension, which, under the first scheme, was to reach the border of the warehouse, would be moved further from the warehouse, close to the main railway. The change would enlarge the open area between the extension and the warehouse.

The Port Authority agreed to the proposed change. The new route of the extension was drawn on a new scheme prepared by the petitioner's planner, and on May 15, 1995, the Director of the Engineering Department in Israel Railways signed it (hereinafter – the second scheme). The new route was not the only change between the first and second scheme; on the second scheme, the parties labeled the area between the extension and the warehouse as a "storage area."

4. The appendix to the contract, signed at the same time as the contract itself, gave the petitioner a limited right to use the land (referred to in the appendix as "the plot"). The petitioner was to be allowed to use the land to load and unload freight and to transport it from the train to the warehouse and from the warehouse to the train. According to the appendix:

> 3. The company [the petitioner – I.Z.] may make use of the plot running along the tracks of the train stationed in the extension exclusively for purposes of loading and/or unloading trains which are stationed at the extension for that purpose, so long as they are stationed there.
>
> Unloading and/or loading trains include transporting or shipping the freight from the extension to the company's storage facilities adjacent to the plot and the reverse.
>
> 4. Any change of any kind to the plot and/or anything attached and/or connected to it requires the advance written approval of the Director-General of Israel Railways.

5. The petitioner, however, had a larger plan: It intended to use the area of the land not just to load and unload freight from the train and onto the train, as the contract provided, but also to store freight. It planned to enlarge the area of the warehouse to include the area of the land, as well. In order to accomplish this, it needed to do two things. First, it needed to do work on the land, in order to prepare it for use as a licensing warehouse, including fencing in the land to prevent freight from

being added or removed without undergoing inspection. This task posed a problem with the Port Authority, which owned the land. The second thing the petitioner needed was a license to use the land as a licensing warehouse. That task posed a problem with The Customs Authority, which is authorized to grant such licenses.

6. The petitioner began working on the first task: preparing the land for storing freight. Under the terms of the contract, the petitioner could not make "any change, of any kind" to the land, without "the advance written approval of the Director-General of Israel Railways." Para. 4, *supra*. However, the petitioner began work on the land without obtaining such approval. Nor did it obtain permission once the work was completed. Without such approval, the petitioner paved the land with asphalt, erected a fence around the perimeter, installed lighting, and built gates. It finished its preparatory work on March 18, 1996.

7. The petitioner and the Port Authority disagree over when the Port Authority became aware of the work that the petitioner was doing on the land. According to the petitioner, the work was done in the presence of representatives of the Port Authority. The Port Authority, on the other hand, claims that it became aware of the work only by coincidence, in early January, 1996, during a tour that its employees took of the land.

In any event, immediately after the tour, on January 8, 1996, the Deputy Director-General for Commerce, Economics, and Finance at Israel Railways (hereinafter: the Railways Deputy) sent the following letter to the Director-General of the petitioner:

> Pursuant to my tour of the site and the measurements we conducted, I wish to call your attention to the following points:
>
> 1. Our measurements show that Conterm has annexed an area of 38.5 dunams [3.85 hectares – trans.].
> 2. That area is being used to store containers, in violation of the contract.

> 3. The areas have been fenced in, paved, and marked, and Conterm's equipment and installations have been placed there.
> 4. According to the appendix of the contract, you are permitted to use a strip of land along the length of a train only, for loading and unloading trains exclusively.
> 5. Seizure and use of the land constitute a violation of the contract.
> 6. Be advised that, according to the appendix, we may give anyone approval to use the land.
> 7. You must immediately vacate the areas noted above.
> 8. Be advised that you will be charged taxes and rent on the areas seized, for the period of time from the seizure until you vacate, as determined by an assessor.
>
> I would appreciate your taking immediate action to vacate the area and to avoid violating the contract between us.

The petitioner gave no response whatsoever to this letter. On March 10, 1996, the Railways Deputy sent another letter to the petitioner's Director-General. This letter warned of the petitioner's violations of the contract in a few ways, including violation related to "use of the areas." It noted that Israel Railways considers the violations to be severe and added that if they are not corrected, Israel Railways will feel free to take action to preserve its rights. The petitioner's Director-General responded to this letter on March 19, 1996. Regarding the use of the land, he wrote the following:

> During our last three meetings, we discussed the above-stated issue, and to the best of my recollection, we agreed to find a way to resolve the issue.
>
> At this stage, as you agreed, I am waiting to set a date for another meeting with you.
>
> By the way, at this stage, the area is being used exclusively for loading and unloading containers.

The dispute, however, remained unresolved. On April 18, 1996, counsel for the Port Authority wrote to the petitioner, alerting it to the encroachment onto the Port Authority's land and the illegal use of the land, including fencing it in and using it for storage. Counsel demanded that the petitioner vacate the land immediately. The Railways Deputy also wrote the petitioner, again, on April 21, 1996, demanding that it vacate the land immediately. The letters went unanswered.

On May 19, 1996, the petitioner wrote to the Deputy Director-General for Operations at Israel Railways in a letter that made no mention whatsoever of the letters sent by the Port Authority demanding evacuation of the land. The petitioner wrote, in part, that,

> We intend to begin storing empty containers, before they are transported to the ports, and we ask that you price our requests, addressing the factor of the substantial quantities to be transported.

On May 23, 1996, The Railways Deputy Director-General for Operations responded by saying that Israel Railways did not intend to transport containers from the Ashdod Port to the petitioner's warehouse. He also wrote that:

> I remind you that the contract is about transporting containers between Ashdod and Haifa, not storing empty containers or vehicles in the terminal station.

The Port Authority and the petitioner continued their correspondence and discussions. The former repeatedly demanded that the latter vacate the land. On June 20, 1996, the Director of the Commerce and Transportation Department of Israel Railways wrote the following to the petitioner:

> 1. Pursuant to the discussion that took place in the office of Israel Railways' Deputy Director-General for Economics, Finance, and Commerce, it became clear that the Conterm Company seized about 40 dunams [four hectares – trans.] of

> territory belonging to Israel Railways, in the area of the Conterm Ashdod extension. Conterm fenced it in without permission and even placed hundreds of vehicles belonging to the Universal Motors Company and the Mazda Company in the area.
>
> 2. In that same discussion mentioned above, we demanded that you vacate the area. Thus far, you have failed to do so and continue to seize the area.
>
> 3. I wish to advise you that in the coming days, Israel Railways intends to sell the area through a public auction. You are therefore asked to vacate the area immediately, removing every object, person, and thing.

The Port Authority sent additional letters containing similar contents on July 21, 1996, October 14, 1996, and November 28, 1996.

Throughout the correspondence between the Port Authority and the petitioner, when the Port Authority claimed that the petitioner was trespassing on its property in violation of the contract, the petitioner did not claim that it had a right to the land as renter or lessee, or that it had permission to fence in the land and use it for storage. Only on June 30, 1996, did the petitioner address its right regarding the land. It wrote:

> …
> 3. There is no doubt that Conterm has rights to the above-mentioned area for purposes of loading and unloading trains that are stationed in the extension.
>
> 4. As you must know, we invested a substantial amount of money in the extension and in preparing the above-mentioned area for operating the extension.
>
> 5. In addition, there is no doubt that Conterm has certain rights in the area by virtue of the [written – trans.] agreement and the agreements between the parties.

…

> 8. On the other hand, given the current circumstances, we suggest that the parties negotiate in order to find a mutually-agreed upon solution for how the above-mentioned area will be operated.

The Railways Deputy responded to that letter on July 21, 1996:

…

> 2. Conterm has no rights to the above-mentioned area, even if it made investments. Such investments were done without our approval, and there were no agreements over use of the area.
>
> 3. Areas cannot be allocated except through a bidding process, except in rare circumstances, which do not exist in this case.

8. When the parties did not resolve the dispute through negotiation, as the petitioner suggested, the Port Authority brought an action of ejectment against the petitioner in Ashdod Magistrate's Court. That action is still pending in the Magistrate's Court.

The Magistrate's Court will decide the dispute between the Port Authority and the petitioner, and its resolution, whatever it may be, is not the concern of this court. If that is the case, then how is their dispute relevant to the issue before us? That dispute is also the root of the argument between the petitioner and The Customs Authority at the heart of this petition. How?

9. The petitioner took the first route – preparing the land for storage of freight – at the same time that it took the second route: On June 8, 1995, a year after the contract was signed and shortly after the second scheme was signed, the petitioner asked the Customs Authority branch in Ashdod for a license to enlarge the area of the warehouse to include the

area of the land, as well, meaning the area between the extension and the warehouse. The petitioner and Customs engaged in a process of verification to make sure that the petitioner met the criteria necessary to receive a license to operate a licensing warehouse.

According to Regulation 14 of the Regulations, an application for a license must be submitted to the Customs branch "in the form provided in the Sixth Addendum." The Sixth Addendum details what must be included in an application, including the following:

> Below are the details of the warehouse:
>
> We declare that we own the warehouse registered in the Land Registry as Block Number … Parcel … we are in possession of it under the terms of a rental contract or lease with … for a period of … years, beginning on …. and ending on … attached is a schematic description of the warehouse and the marked areas of the requested warehouse …

According to the addendum, these details must be submitted whether the application is for a new license or "if changes are made in the area or in the size of the warehouse." The implication is that the Regulations require applicants to declare that they own, rent, or lease the warehouse, as a condition of receiving a license for a new licensing warehouse or of expanding an existing one.

This condition seems appropriate, or at least reasonable. In any event, the petitioner does not challenge the legality of the condition or of any other provision of the Regulations.

10. Pursuant to this regulation, and after the petitioner applied for a license for the land, on December 5, 1995, the Ashdod Customs branch wrote to the petitioner asking for various details and documents, including "a rental or lease contract for the additional area."

In response, on December 11, 1995, the petitioner sent the Customs branch the June 6, 1994 contract and attached a map prepared by its surveyor on December 7, 1995 (Appendix 7 to the Petition).

The Customs Authority presumed that the petitioner met all the conditions set forth in the Regulations for receiving a license. Among other things, the Customs Authority presumed that the petitioner held rights to the land, as required by the Regulations. It was unaware of the fierce dispute between the Port Authority and the petitioner over the rights to the land, a dispute expressed in a number of ways, including in letters that the Port Authority sent the petitioner on January 8, 1996. Therefore, once the Customs Authority concluded that the land had been properly prepared for use as a licensing warehouse, it decided to grant the petitioner the license it had requested, on July 1, 1996.

11. So long as the petitioner communicated in these two parallel tracks, with the Port Authority on one hand, and the Customs Authority on the other, each agency separate from the other, it seemed as though the petitioner had achieved what it set out to obtain. When the two agencies communicated with each other, however, their relationships with the petitioner hit a snag.

In September 1996, the Customs Authority learned of the dispute between the Port Authority and the petitioner over rights to the land. On September 25, 1996, the Customs Authority wrote to the Port Authority asking for the precise status of the petitioner with respect to the land and "whether, under the contract signed with you, the Conterm Company has a right to store containers in the area." The Port Authority responded by saying that the petitioner has a right to load and unload the trains stationed at the extension but not to store containers on the land. After receiving this response, the Customs Authority asked the petitioner for an explanation. On November 18, 1996, the petitioner responded by telling the Customs Authority that it had an "understanding" with representatives of the Railway allowing the petitioner to store freight on the land and that, "the arrangement has not been put on paper because of Israel Railways' limitations." It attached the second scheme, on which the area of the land was labeled "storage area." The petitioner added that "this

document is irrefutable, decisive evidence of the Authority's intentions, beyond what is said in the agreement." The Customs Authority, however, was unconvinced. It decided not to renew the petitioner's license for the land. On December 26, 1996, the Customs Authority informed the petitioner that it was canceling the authorization it had granted the petitioner to use the land as a licensing warehouse, and that the license granted the petitioner for 1997 would be renewed exclusive of the area of the land. In the same notice, the Customs Authority also demanded that the petitioner remove the freight from the land and put it into a licensing warehouse within 30 days.

12. The petitioner claims that the Customs Authority did not have the right to revoke the license it had granted to use the land as a licensing warehouse. It therefore filed this petition against the Customs Authority, later joining the Port Authority as respondent. The petitioner is asking for an order obligating the Customs Authority to include the area of the land in the license for 1997.

At an early stage of the proceedings, we issued an order-nisi and decided that the license to use the area of the land as a licensing warehouse would remain valid in the interim.

On September 10, 1997, we decided to deny the petition without giving an explanation at the time, and we imposed court costs on the petitioner in the sum of 25,000 NIS to be paid to Respondents 1 and 2 and 25,000 NIS to Respondent 3.

We now explain our decision.

The Reasons for Revoking the License

13. The Customs Authority gives two reasons for its refusal to include the area of the land in the license granted the petitioner for 1997: the first – substantive; the second – procedural.

The first reason: Under the Regulations, the petitioner is not eligible to receive a license for the area of the land. The Regulations stipulate that

without rights to the land (through ownership, rental, or lease), there is no right to a license. If it becomes clear that a license was granted to someone who has no right in the land, because of misrepresentation or mistake, that license can be revoked. Therefore, the Customs Authority's realization that the petitioner had no right in the land is reason enough not to renew the license for the area of the land.

This reason, of course, touches on the private law dispute between the petitioner and the Port Authority over rights to the land.

The Custom Authority's second reason is the petitioner's procedural obligation to disclose all material information regarding its application for a license, including information about rights to the land. By failing to disclose material information on this issue to the Customs Authority, the petitioner violated this obligation. This violation alone is reason enough not to renew the license for the area of the land.

This second reason is entirely the province of public law: the claim is that a citizen applying for a license has an obligation to disclose information material to the license to the administrative agency.

The petitioner, on the other hand, argues that neither the substantive nor the procedural reason justify the Custom Authority's decision. First, the petitioner claims that its dispute with the Port Authority over rights to the land is not the concern of the Customs Authority. In any event, the petitioner claims, the dispute does not constitute a reason to revoke a license already granted. Second, the petitioner claims, it fulfilled any disclosure obligation to the Customs Authority that may have existed by submitting the June 6, 1994 contract it signed with the Port Authority regarding the rights to the land.

We will examine each of these reasons in order.

Rights to the Land

14. The petitioner claims that, "With all due respect, the relations between the petitioner and the PTA [Port and Train Authority –

I.Z.] are not the concern of the Customs Authority." It also argues that, "It is inconceivable that, at a point at which a dispute has yet to be decided, and it could go either way, the Director of Customs should take a stance and adopt the PTA's version."

Indeed, it is an old precedent that an agency authorized to grant a license must make that decision based on considerations from the field of public law, not private law. HC 233/53 *Alspector v. Mayor of Beit Shean* (hereinafter – the *Alspector* case[1]), held that a local council may not condition receipt of a license to operate a business in an apartment on the consent of the apartment owner. As Justice Berinson held (at 665):

> By opening a store in his apartment without the consent of the apartment owner, the applicant may indeed be violating the terms of his lease. If that is the case, the apartment owner may fight his fight with the applicant. That is not the concern of the municipality, however, and it cannot serve as the basis for refusing to grant the license.

See also HC 9/49 *Bloi v. Interior Minister* [2]; HC 56/53 *Kakanda v. City of Ramla* [3].

This precedent would seem to construct a high wall between private and public law. *See* H. Klinghofer, *Mishpat Minhali* [76] at 128-30. That is not the case. Today, it is well-known that there is no clear and rigid separation between these two fields. They are separated by a widely-spaced net, easily passed through or jumped over. The two fields are becoming more and more intermingled, and there is nothing wrong with that. In principle, therefore, considerations from the field of private law may influence an administrative agency's decision. In any event, it depends on the context: the nature of the power, the nature of the agency, and the circumstances in question. For example, is it illegitimate for a municipality to refuse to grant a license to operate a business, or for a planning and building committee to refuse to grant a license to erect a building, when it is clear that the license applicant has no rights to the land of which he or she has taken possession?

The *Alspecter* case, *supra*, provided for this possibility. Justice Berinson qualified the rule he stated:

> If the case involved a construction permit to make changes to the building, which could not be issued without the request or consent of the building owner, then the reason would be valid.

The same is true in the case before us. The Regulations require that an applicant for a license declare that he or she has a right in the land. See para.9, *supra*. It is therefore clear that the question of rights in the land is relevant. The Customs Authority may and even must take it into consideration. It may and even must clarify the answer. Under the Regulations, it should require a license applicant to declare what kind of right he or she has in the land. If a license applicant declares that he or she has no right in the land, the Customs Authority may and even must deny the application for a license. The same is true of a situation in which the applicant declared that it has a right in the land, but an investigation by the Customs Authority reveals the declaration to be false or misleading. In either case, under the Regulations, the Customs Authority need not, and may not even be permitted, to give a license to a trespasser.

If the petitioner does not have a right in the land, the Customs Authority was under no obligation to grant the license. Indeed, the Customs Authority claims that if it had known that the petitioner had no such right, it would not have granted the license.

15. The petitioner, however, argues that even if the Customs Authority could have refused to grant the license from the outset, it may not revoke a license already granted. There is a difference between prospectivity and retrospectivity: the holder of a license purchased a right, and revoking a vested right is different, and more difficult, than refusing to grant the right in the first place. Therefore, not every consideration sufficient to refuse to grant a new license justifies refusing to renew an existing license.

The case law distinguishes between refusing to grant a new license and refusing to renew an existing license. The considerations relevant for renewing a license are not identical to the considerations for granting a license; the weight of the considerations may vary. More so than is the case for granting a new license, in renewing an existing license, the balance tips toward the citizen, in order to protect the right that the license gave him or her.

However, if the agency's grant of the license stemmed from a substantive error, it generally may revoke the license or refuse to renew it, particularly if the applicant is responsible for the mistake. *See e.g.* HC 56/76 *Berman v. Police Minister* [4]. As Justice Barak said in HC 799/80 *Shallam v. Gun Law, 1949 Licensing Clerk, Oil Administration of Petach Tikvah, Interior Ministry* [5] at 331:

> As is known, the administrative law rule is that an administrative agency may generally review its decision and correct it "for the following reasons: deceit, fraud, mistake, surprise, inadvertence, new evidence that has come to light, changed conditions" …
>
> There seems to be no doubt that deceit by the license applicant is generally grounds in itself to justify revoking a license … what happens, however, if the problem is pure mistake, not caused by the applicant, but rather solely the fault of the agency? In a case like that, the license may still be revoked, but the power to do so must be exercised only in special circumstances.

Justice Barak continued in HC 475/81 *Deak & Co. Inc. v. Governor of the Bank of Israel* [6] at 807:

> Once a license is granted, its holder may assume that the application was investigated with the required care and that he or she may now invest money and effort into running the business for which a license was granted, without having to

> worry that the administrative agency will change its mind. At the same time, where the agency has the formal authority to revoke a license, under extraordinary circumstances, it may be justified in exercising it. Such circumstances may involve facts in existence prior to the granting of the license but which became apparent to the administrative agency only afterward … they may also involve new facts which came about after the license was already granted.

Deciding whether a set of facts justifies revoking a license or refusing to renew it depends on the balance of interests in each set of circumstances, primarily the balance between the license-holder's interests and those of the general public, which the administrative agency represents.

In balancing these interests, the ramifications of the mistake in the administrative process are of particular importance. Did the mistake cause the administrative agency to make an *ultra vires* decision or a decision that violates the law in some other way? Or is the decision, though undesirable from the point of view of the agency, nevertheless legal? In CA 433/80 *I.B.M. Israel Assets v. Property Tax Director and Compensation Fund of Tel-Aviv* [7] at 351, Justice Bach classified the different kinds of administrative mistakes into three categories:

> 1. A decision that violates the law or is *ultra vires* in some other way;
> 2. A decision resulting from a technical bureaucratic mistake, made inadvertently;
> 3. A decision involving an oversight, meaning that a clerk improperly implemented the agency policy or exercised discretion unreasonably.

What is the difference between each kind?

> Public agencies generally can go back on the first two types of decisions which are mistaken or in other ways contrary to the law and make new decisions in their place;

> The third kind of decision, involving only some kind of 'oversight' in an exercise of discretion, is different. The agency will generally be bound by its decision, especially when the citizen has already begun to take action in accordance with the original decision.

Id. at 351-52 (Bach, J.).

See also CA 736/87 *Yaakobovitch v. Land Appreciation Tax Director of Nazareth* [8] at 372; CA 1928/93 *Securities Authority v. Gabor Savarina Textile Factories* [9] at 191-92.

16. Under the case law, then, whether the Customs Authority's refusal to renew the petitioner's license was justified depends on the circumstances. If the Customs Authority mistakenly believed that the petitioner had rights in the land, as required by the Regulations, and only after granting the license did it realize the mistake, particularly if the petitioner is to blame for the mistake, then the petitioner holds a license to which it is not entitled under the Regulations, and the balance will tip toward refusing to renew it. Are those the circumstances in this case?

Before discussing whether the circumstances justify the Customs Authority's refusal to renew the petitioner's license, I will examine the second reason cited for the refusal to renew. The Customs Authority also claims that the petitioner violated its duty to disclose information material to the license, meaning information material to its rights in the land. Does the petitioner owe such a duty to the Customs Authority?

The Citizen's Duty to the Agency

17. Contract law imposes a duty on contractual parties, regardless of their identities, to disclose information material to the circumstances at hand. That duty derives from the duty to negotiate a contract formation in good faith and using acceptable forms of behavior, under section 12 of the Contract Law (General Part), 1973. It also derives from the obligation to act in good faith and use acceptable forms of behavior in fulfilling a duty and exercising a right stemming from the contract, under section 39

of the Law. Section 15 governs the consequences of failing to disclose information which must be disclosed under the circumstances. According to Section 15, a party who enters a contract because of a misrepresentation made by the other party has the right to void the contract. What is considered misrepresentation? Under the section, it includes, "nondisclosure of facts which the other party should have disclosed by law, by custom, or under the circumstances." The rule incorporates the duty of good faith under sections 12 and 39 of the Law, including the duty to disclose facts. *See e.g.* CA 338/85 *Speigelman v. Chapnik* at 426 [10]. *See also* G. Shalev, *Dinei Chozim* [77] at 55, 223. Contract law imposes a duty to disclose material facts, and non-disclosure of such facts is grounds for voiding the contract.

This duty applies to contracts between the citizen and the administrative agency, obligating the citizen as well as the agency. *See, e.g.*, HC 707/80 *Ilanot Housing, Building and Development Co. v. Arad Local Council* [11] at 312. *See also* Shalev, *supra* [77] at 652.

In public law, however, there is no similar statute imposing a duty to disclose material facts on parties in a power relationship involving a lawful exercise of authority, such as in a citizen's application for a license. Must we conclude that, in the context of this relationship, both the administrative agency as well as the citizen may conceal material facts from each other?

No properly-functioning society could accept that possibility. If the law forbids people from misleading each other, including concealing material facts, *a fortiari* it forbids people from misleading an administrative agency, which is the embodiment of the public. A person who misleads an administrative agency misleads the public, even if only indirectly. The result may be that the agency, in the name of the public and sometimes at its expense, grants a benefit to a person who misled the agency and who is not entitled to the benefit. Misleading an administrative agency harms the public as a whole. If contract law forbids a person from misleading another, including by concealing material facts, could public law permit a person to mislead the public? Justice Alon's comments on good faith are instructive here:

> Just as the legal system forbids a contractual party from "using the contract to play the scoundrel," so it also forbids and prohibits the party from using the law or public activity, in any area of law, to play the "scoundrel."

CA 391/80 *Mira Lesserson v. Workers Housing Ltd.* [12] at 262.

The legal system cannot allow that possibility to take place. It delineates two ways of preventing misrepresentation, including the concealment of material facts, in public law as well. The first way is to copy the duty to act in good faith, as established by the Contract Law (General Part), from private law into public law. The second way is to establish a special public law rule.

First, we will evaluate whether the duty to act in good faith applies in public law, and whether it applies to a citizen in his or her dealings with an administrative agency.

The Duty of Good Faith

18. Although they are designed primarily to apply to contracts, the provisions of the Contract Law (General Part) have other applications as well:

> Where appropriate and with the necessary changes, the provisions of this law apply to legal actions not involving contracts and to obligations that do not stem from a contract.

Id. at sec. 61(b).

Under the simple language of the statute, the provisions of sections 12 and 39, which impose a duty of good faith, can also apply to the actions of an administrative agency, so long as they are "legal actions." Undoubtedly, an administrative agency, acting by law to grant rights to a citizen or to impose obligations on him or her, engages in legal actions. Such actions may, for example, include granting a license or pension, confiscating land, and assessing taxes. It would therefore seem right to say that the Contract Law (General Part) imposes a duty of good faith on

the agency to the citizen and on the citizen to the agency, when they engage in these actions.

Indeed, the case law supports this position. President Sussman addressed the principle established by section 39 of the Contract Law (General Part), imposing a duty of good faith:

> As an expression of a universal rule of behavior between persons and between a person and an agency, this principle imposes obligations beyond this context, and it also applies in public law.

CA 402/76 *Azaranikov v. State of Israel* [13] at 274.

See also HC 640/77 *Baranovsky v. Department of Customs and Excise Director* [14] at 78; HC 566/81 *Amrani v. Chief Rabbinical Court* [15] at 10; HC 221/86 *Kanafi v. National Labor Court* [16] at 476-77.

True, thus far, the Court's application of this principle in public law has been limited to imposing a duty on the administrative agency, *vis à vis* the citizen. The principle, however, as established by the Contract Law (General Part), applies to both parties. It would seem, therefore, that we can use the principle to impose a duty of good faith on the citizen *vis à vis* the administrative agency.

The duty of good faith requires one party to disclose material information to another. *See* para. 17, *supra*. It would therefore seem that a citizen who applies to an administrative agency for a license or other benefit has an obligation to disclose the information material to the application. If the citizen violates this duty, and the agency, as a result, grants the license or other benefit, the agency may void its decision.

19. The public law duty of good faith that we might impose on both parties to the legal actions of an administrative agency is not necessarily the same duty as that imposed on parties to a contract. The duty of good faith varies with the circumstances. Good faith in the relationship between parties to a sales contract is not necessarily the same as the good faith between trustee and beneficiary or principle and agent.

See FH 22/82 *Beit Yules Ltd .v. Raviv Moshe & Partners, Ltd.* [17] at 484. If good faith changes according to the type of contract, it certainly changes according to the field of law. Section 61(b) of the Contract Law (General Part) applies the statutory provisions, including those addressing good faith, to legal actions not involving contracts, only "where appropriate and with the necessary changes." In translating the duty of good faith into public law, we can therefore adapt it to the special nature of that field. *See* HC 376/81 *Lugassi v. Communications Minister* [18] (hereinafter – the *Lugassi* case) at 465.

It is possible, then, to apply the duty of good faith, with adaptations, into the field of public law and to require the citizen to disclose material information to the agency. Is that what the rule is?

20. The question is not whether it is possible, but rather whether it is desirable, to copy the duty of good faith, with the necessary changes, from private law into public law. Section 61(b) of the Contract Law (General Part) says that the statutory provisions apply to legal actions not involving contracts only "where appropriate." Is it appropriate to impose a duty of good faith in public law? As noted, some justices have said yes. Para. 18, *supra*. However, some justices believe that the duty of good faith, as established in private law, is inappropriate for public law.

Justice Shamgar discussed this issue in the *Lugassi* case [18]. He said that while an administrative agency must act in good faith, that duty does not arise from the Contract Law (General Part). In his words (at 455-56):

> The intention [of Section 61(b) of this law – I.Z.] was not that a norm from contract law would be adopted as is into administrative law, which, for a long time, has already had a robust, existing rule about good faith, derived from another source. In any event, the condition that the provisions of the statute will be applied 'where appropriate and with the necessary changes' means there should not be a simplistic standardization of private law and public law rules. It is preferable not to take things out of the context of their

> subject matter and primary legal source. In any case, we do not need to look at what is said in section 61(b) in order to evaluate the good faith of an administrative agency, the way it acts, and its fulfillment of its duties …

Justice Ben-Porat concurred in that opinion (*Id.* at 465).

I, too, agree with Justice Shamgar. From the outset, administrative agencies had a duty of proper behavior *vis à vis* the citizen, irrespective of the duty of good faith established in the Contract Law (General Part). There is no need, and it would not be a good idea, to uproot the agency's duty of proper behavior, which sprouted long ago in public law soil, and to replace it with a good faith duty that sprouted later, in a different kind of soil, namely that of private law. This is especially true because there is a difference between the two duties. The soil of private law bore one species of the duty of good faith, while the soil of public law bore a different species. The fact that those species bear the same name might blur the distinction. Differentiating the names can help make the difference more pronounced and preserve the distinction in substance, and indeed, today we do use different names: in private law, there is a duty of good faith; in public law, there is a duty of fairness.

To be sure, there is a duty of good faith in public law, as well, but it generally has a different meaning: we say that an administrative agency is not acting in good faith when it knows it is not acting according to the law, such as when it makes a decision based on an irrelevant consideration, knowing the consideration is illegitimate. *See e.g.* the *Lugassi* case [18] at 459-60. We should preserve the distinction between the meanings of each phrase: in public law, good faith refers to the mental state of the administrative agency (which can also be called arbitrariness or malice), while fairness refers to the behavior (including omissions) of the administrative agency.

21. What, then, is the difference between the duty of good faith in private law and the duty of fairness in public law? The difference in the nature of the duties reflects a difference in the nature of the relationships. First of all, the relationship between an administrative

agency and a citizen is generally a relationship of authority, under the law, while the relationship between citizens is generally one of equality, under an agreement. Moreover, the relationship between an agency and a citizen, as is common in relationships of authority, is one of trusteeship. Professor A. Barak explained that well in his book, *Judicial Discretion* [78]:

> In determining the content of an administrative duty of fairness, the judge must compare it to the contractual duty of good faith. The two are not one and the same. The contractual duty of good faith sets a minimum level of fairness based on contractual "rivalry." Each contractual party seeks to achieve his or her self-interest, and the rules of good faith are designed to guarantee "a fair game," set by the ethical perspective of enlightened Israeli society. The administrative duty of fairness is different. It is not based on rivalry between the self-interest of the public agency and the interest of the citizen. The public agency takes care of the general interest, including the interest of the citizen. The public agency has no "self" interest of its own. The duty of fairness in administrative law therefore imposes a higher-level duty than the "contractual" duty of good faith. This is not minimal fairness, but rather the fairness imposed on a body charged with achieving the collective interest.

Id. at 487-88. *See also Id.* at 473-75.

Justice Dorner addressed this point as well:

> The duty of administrative fairness – rooted in the status of the agency as a trustee of the public – is more exacting than the duty of good faith required of an individual.

HC 4422/92 *Efran v. Israel Land Administration* [19] at 860.

I think these principles lead to an additional conclusion. For administrative agencies, we should distinguish between two areas: actions in the field of private law and actions in the field of public law. When an administrative agency acts in the field of private law, such as by forming

a contract, it bears a double duty: the private law duty of good faith and the public law duty of fairness. In practice, however, because the duty of fairness is more exacting, it will generally encompass the duty of good faith. As a practical matter, within the field of private law, the duty of fairness suffices. On the other hand, when the agency acts in the field of public law, such as by considering an application for a license, the duty of good faith does not apply at all. Because the agency bears a similar duty – the duty of fairness – we might say, in the language of section 61(b) of the Contract Law (General Part), that the duty of good faith is not appropriate. *See also* Shalev, *supra* [77] at 45. Practically, we can say that the administrative agency is subject to the duty of fairness in all its actions, whether in public or private law, and there is no need to subject it to the duty of good faith.

What, then, is the duty of fairness?

Duty of Fairness

22. A cornerstone of public administrative law is that the administrative agency, as the trustee of the public, must behave fairly. *See e.g.* HC 840/79, *Center for Contractors and Builders in Israel v. Government of Israel* [20] at 745-46. The administrative agency owes a duty of fairness, first and foremost, to the public. This is the duty of a trustee to a beneficiary. In practice, because the public is composed of people, the duty does not just apply to the public as an abstract body but also to every person.

It is often said that the administrative agency owes a duty of fairness to the citizen. One can say that, but we should bear in mind that, in this context, citizen means person, including a resident who is not a citizen and a collective body such as a corporation.

The duty of fairness that an administrative authority owes the citizen is the conceptual source for various rules governing the relationship between the agency and the citizen. An example of this is the rule requiring the agency to grant the right to be heard to those affected by its decisions. As President Agranat said:

> The reason for the above-stated rule [the citizen's right to be heard before the administrative agency – I.Z.] is to guarantee that the administrative agency will address the citizen's concern with fairness …

HC 549/75 *Noach Film Company, Ltd. v. Film Review Council* [21] at 767.

The same is true of the rule about fulfilling administrative promises. In Justice Berinson's words:

> [If – trans.] a promise is given by an official, within the bounds of his or her authority, with the intention of giving it legal validity, where the other party accepted it as such, then public fairness demands that the promise in fact be fulfilled, even if the citizen did not change his or her position for the worse in reliance on the promise.

HC 135/75 *Cy-Tex Corporation Ltd. v. Trade and Industry Minister* [22] at 676.

23. Such is the duty of fairness imposed on the administrative agency to the citizen. Does just the administrative agency bear the duty of fairness, while the citizen is exempt from the obligation to treat the agency fairly?

The answer is that the relationship between the agency and the citizen is, in fact, two-sided. In my opinion, the citizen should therefore owe a duty of fairness to the agency, as the agency owes a duty of fairness to the citizen. This requirement is deeply rooted: it springs from the social contract at the foundation of the state. Under this contract, as it is understood in a democratic state, the agency and the citizen stand not on opposite sides of the barricade but rather side-by-side, as partners in the state. In a democracy, as Justice Silberg said, "the government is part of the very body of the citizen …" HC 3/58, *Berman v. Interior Minister* [23] at 1511. The government [… – ed.] has a duty to serve the public – to guarantee safety and order; to provide essential services; to protect the dignity and liberty of every citizen; to do social justice. The public

administration, however, which has nothing of its own, can only give the public what it receives from the public. It is desirable, indeed, necessary, that the relationship between the administration and the public be a reciprocal relationship of give-and-take. The same is true of the relationship between the public administration and the citizen. As a moral and a practical matter, the citizen cannot assume that he or she may demand and receive from the agency without being obligated to provide anything. A citizen's right *vis à vis* the agency is coupled with an obligation *vis à vis* the agency. This is the essence of the social contract among citizens and between citizens and the public administration. It is also the root of the existence of the state.

24. The citizen's obligations to the state, in essence, to the public, are generally delineated in the statute books: the duty to pay taxes, to go to school until a certain age, to serve in the army, and others. Duties may also, however, arise from judicial case law. That is how the administrative agency's duty of fairness to the citizen arose. That is also how the citizen's duty of fairness to the administrative agency arises.

If the citizen did not bear a duty of fairness to the administrative agency, we might say that the citizen bears a duty of good faith in his or her relationship with the agency, under section 61(b) of the Contract Law (General Part). *See* para. 18, *supra*. The duty of fairness, in this context, however, is preferable to the duty of good faith. First, the duties involved in the relationship between the administrative agency and the citizen should not come from different sources, meaning that the agency bears the duty of fairness, whose source is public law, and the citizen bears the duty of good faith, whose source is private law. The harmony between the citizen and the agency will be enriched if reciprocal duties arise from a single source, namely public law.

Second, the relationship between the citizen and the administrative agency, which represents the public, is substantially different from the relationship between citizens. When the agency acts within the field of public law, therefore, we should not copy the duty of good faith from private law and apply it, even with changes, to the relationship between the citizen and the agency. It is better to allow the

case law to develop the duty that arises from this relationship in its own way, appropriate to the environment in which the duty lives, namely the environment of public law. I call this duty, arising from public law, the duty of fairness.

25. What does the duty of fairness include? There is no comprehensive answer, even within the context of the agency's duty to the citizen, except to say that this court has long recognized such a duty. Indeed, we would do well not to give a comprehensive answer. The concept of the duty of fairness, by nature, is opaque. It can and should be filled with content from time to time, according to changing needs, rather than delineated into a rigid definition. It should be open-ended, so that new rules can be added and subtracted as necessary.

The same is certainly true of the citizen's duty of fairness to the agency. This duty is a new concept. It must develop gradually, as the common law does, from case to case, until the time is ripe to formulate rules.

Having said that, and without pretending to make any final ruling, I would like to suggest guidelines to characterize a citizen's duty of fairness to the agency:

(a) In a well-ordered society, the duty of fairness must express the appropriate relationship between the public administration, which acts as the trustee of the public, and citizens, who are the public. This relationship is a reciprocal relationship between partners in a goal-oriented activity, based on respect, trust, and reliability. The duty of fairness should develop from this foundation, gradually becoming a system of flexible rules by which both citizen and agency must and can abide. Compare this with the nature of the duty of good faith, FH 22/82 [17] at 484-85.

(b) As noted, an agency's duty of fairness to the citizen is different from the citizen's duty of fairness to another citizen, because of the different nature of the two kinds of relationships. *See* para. 21, *supra*.

Similarly, the citizen's duty of fairness to the agency may differ from his or her duty of good faith to a fellow citizen.

(c) It would seem that a citizen's duty of fairness to the agency differs from the agency's duty of fairness to the citizen, because of the difference between the status of a citizen and the status of an agency. The agency is a trustee of the public, including of the citizen, and the duties stemming from that status differ from the duties owed by a citizen.

(d) The citizen's duty of fairness to the agency, like the agency's duty of fairness to the citizen, varies with the circumstances of each case. One example is the agency's duty to hear the citizen, which derives from the duty of fairness. Ordinarily, the agency fulfills that duty by providing an opportunity for the citizen to submit something in writing; in certain circumstances, the duty of fairness may obligate the agency to conduct an oral hearing or even to allow the citizen to examine witnesses. As Justice Sussman said in HC 335/68 *Israeli Consumer Council v. Chair of the Gas Services Investigatory Committee* [24] at 334:

> There is no standard rule we can set for the way the agency must proceed on every issue, except to say that it must treat the citizen with fairness. The appropriate level of fairness depends on the circumstances.

We can say the same thing about the citizen's duty of fairness to the agency: the decision about whether, in a particular case, the citizen must behave in a certain way toward the agency depends on the circumstances.

26. While I will not attempt to define the citizen's duty of fairness to the agency, I will suggest, again, without setting a rigid rule, examples of duties that derive from the duty of fairness.

In my opinion, the duty to act with the speed appropriate to the circumstances derives from the duty of fairness. The agency owes such duty to the citizen. *See* sec. 11 of the Interpretation Law, 1981. *See also* HC 135/71 *Fresman v. Traffic Supervisor* [25] at 540. In my opinion, the citizen owes a similar duty to the administrative agency.

Similarly, the requirement that a citizen not shirk obligations that he or she has undertaken to the agency derives from the duty of fairness. *See e.g.* HC 1930/94 *Nathan v. Defense Minister* [26], p. 655 and thereafter.

Elsewhere I noted an additional example:

> It is a question whether a person who alleges that an agency is acting outside the scope of its authority may suppress that allegation, only to raise it later, if and when it becomes convenient to do so. For example, may a person choose to wait and see how the agency decides: to keep quiet if it decides in his or her favor, not saying a word about authority, but if the agency decides against him or her, to argue that the action was *ultra vires* from the outset? That question remains open. In my opinion, the right rule is that a person who has allegations against an administrative agency must compile them and present all of them to the agency at the earliest opportunity to do so, rather than suppress part of them until he or she feels like raising them. That rule applies to an allegation of *ultra vires* actions. Such an allegation means that the agency must remove itself from the case and that perhaps another agency can and must deal with it. It is inappropriate to let the administrative agency continue to take the trouble, and possibly to trouble others, for a pointless discussion. We might say that alongside the agency's duty to treat the citizen with fairness, a parallel duty is imposed on the citizen to treat the agency with fairness. The duty of fairness obligates a citizen who claims that an agency acted without authority to raise that claim at the earliest opportunity.

2 I. Zamir, *Hasamchut Haminhalit* [79] at 696-97.

The Duty to Disclose

27. The duty of fairness is the source of the duty to disclose information material to the matter at hand. This duty is owed, first and foremost, by the administrative agency to the citizen. It is expressed in the agency's obligation to hear the citizen before making a decision that could harm his or her interests. As Justice Barak said in HC 656/80 *Abu Romi v. Health Minister* [27] at 189:

> The right to a hearing is not properly observed unless [the agency – trans.] brings information that has been received in the citizen's case to his or her attention and provides an opportunity to respond to it appropriately.

It is also expressed in the agency's duty, in certain circumstances, to grant a citizen access to the agency file connected to his or her case. As Justice Witkon said in HC 337/66 *Estate of Kalman Fital v. Assessment Committee, Town of Holon* [28] at 71-72:

> A legitimate administration in a free society does not approve of all of this 'secrecy,' which erects a barrier between the government and the citizen ....
>
> The petitioner's demand [to see the agency file – I.Z.] is justified, not just because his right to access the documents stems from the provisions of the statute, but – and primarily – because the common sense and elementary fairness in the public relations between government and citizen inexorably lead to this conclusion.

The agency's obligation to disclose information to the citizen has been expressed in additional contexts, in legislation and in case law, and it continues to develop.

28. The citizen also owes a duty to disclose material information. As noted, in private law, a citizen owes a duty of disclosure to other citizens, as part of the duty to act in good faith. Para. 17, *supra*. A citizen who petitions the court for a remedy against an administrative agency also owes that duty. For example, President Shamgar discussed that duty

(which is part of the duty to act with clean hands) in HC 421/86 *Ashkenazi v. Transportation Minister* [29] at 410:

> A primary rule that has always guided this court is that someone who petitions the High Court of Justice must disclose all relevant facts to the Court. Someone who conceals facts that bear on the petition does not deserve a remedy from the Court.

The citizen bears a similar duty to the administrative agency, not just in the field of private law, but also in public law. That duty may be imposed by legislation, as a condition of receiving a certain license or benefit. However, even if there is no statutorily-imposed duty, it exists under the common law as an expression of the duty of fairness. Fairness does not tolerate a situation in which a citizen seeks a license or benefit from an administrative agency to which he or she is not entitled or in some other way tries to influence the agency's decision through misrepresentation, including by concealing information. Disclosure of material, reliable information by a citizen applying to the agency is not just a moral imperative, it is also a practical need. After all, an agency must make its decision based on the relevant considerations. If the citizen conceals material information, it is likely to eliminate relevant factors from the agency's awareness, obstruct the work of balancing considerations, and distort the agency's decision. As a result, the agency is likely to make a wrong or perhaps even illegal decision, to the detriment of the public. For example, it may grant a license to someone who is not qualified, or give a money grant from the public treasury to someone who is not eligible. Hence the rule, derived from the duty of fairness, that a citizen must disclose to the agency material and reliable information related to the issue at hand.

29. The Court articulated this rule in HC 727/88 *Awad v. Religious Affairs Minister* (hereinafter – the Awad case) [30]. There, the Minister of Religious Affairs authorized the appointment of the petitioner as chair of the religious council in Rosh Haayin. The minister later discovered that the petitioner had been convicted of stealing in the course of his job as treasurer of the religious council. The minister rescinded his

approval of the appointment, and the petitioner challenged that decision. The Court held that a candidate's qualifications for a job, including whether he has a criminal past, are relevant considerations that the minister properly took into account in deciding about the appointment. Justice Barak added:

> In formulating his position on these qualifications, the minister accessed a set of facts that did not comport with reality. The minister knew nothing about the petitioner's conviction in the past. Moreover, under the circumstances, the petitioner had a duty to inform the local council about his conviction, and both the local council and the petitioner had a duty to inform the minister about the conviction. The duty of good faith and fairness require nothing less …

Id. at 492.

30. What does the citizen's duty to disclose material information to the agency require? At this stage, the answer is unclear. At this stage, the circumstances of each case will determine what the duty to disclose requires in that particular case. As time goes by, a clearer answer will surely arise from the case law. Even at this stage, however, the following thoughts emerge:

(a) Regarding the scope: The duty does not necessarily apply to every relationship between the citizen and the administrative agency. It primarily applies to cases in which a citizen requests something from the administrative agency, such as a license, appointment, or other benefit, in contrast to cases in which the agency exercises power without being asked to do so by the citizen, particularly if such power harms the citizen. There may definitely, however, be exceptional cases in which the scope of the duty expands or contracts, depending on the special circumstances of each case.

(b) Regarding the substance: The citizen is only obligated to give the agency information that he or she has or can access and that is relevant to the issue at hand. Such a consideration should be taken into account by the agency, and it may affect the content of the decision. In

other words, the citizen need not give the agency information about an irrelevant consideration, which the agency, in any event, is barred from taking into account.

(c) The relevant considerations are often numerous and diverse, some of which are primary and some of which are secondary. Generally, as a practical matter, the agency cannot and is not required to take all relevant considerations into account, but rather only the primary ones. There is therefore no need, and it would be impractical, to require the citizen to disclose all relevant considerations to the agency, with no exceptions. It suffices if the citizen discloses the primary considerations that could substantially influence the agency's decision. The citizen, like the agency, must behave reasonably. In other words, the right test for the level of disclosure is the test of the reasonable citizen, and perhaps more accurately, the test of the reasonable and fair citizen.

(d) The citizen's duty to disclose does not exempt the administrative agency from its duty to do its own check of the facts that form the basis for its exercise of authority.

31. An additional question of great practical importance is the question of the consequences of the citizen's breach of this duty. Does a breach of the citizen's duty to disclose necessarily lead to revoking the agency's decision? The answer is no. The consequences of breaching the duty depend on every case and its circumstances. In some cases, the breach may justify revoking the decision, whether it's a decision to give a license, award a pension, make an appointment, or do something else; in other cases, the breach may justify changing an aspect of the decision, declining to renew the license, or another choice that does not rise to the level of revoking the original decision; and sometimes, the circumstances will not justify making a change to the citizen's detriment.

As a matter of principle, on this issue and for others, we should distinguish between breach of a duty and the implications of the breach. That is the case when an administrative agency breaches a duty; not every breach voids the decision. On this issue, I noted:

> We should distinguish carefully between a rule obligating an administrative agency and the remedy that the court grants for violating the rule. The rule exists on one plane, and the remedy on another. *Ex poste*, the considerations that the court weighs may differ from the considerations binding the agency *ex ante*. Therefore, the agency should fulfill its duty under the case law to grant a hearing, without regard to the anticipated or potential result of breaching the duty.

HC 2911/94 *Baki v. Interior Ministry Director-General* [31] at 304.

See also HC 2918/03 *City of Kiryat Gat v. State of Israel* [32] at 848.

32. The same is true of a citizen's duty of disclosure owed to the administrative agency – we should distinguish between the duty to disclose and the implications of breaching that duty. The duty of disclosure exists in its own right, and the citizen is not exempt from it, even in circumstances in which breaching the duty would not justify voiding the agency's decision or taking other steps against the citizen. The set of considerations requiring the citizen to fulfill the duty differs from the set of considerations guiding the agency (or, at the stage of review, the court) in its response to the breach.

Any response to a citizen's breach of duty must take into account the need to respect and carry out administrative decisions. The administrative decision may grant a right to a citizen or create an expectation upon which he or she relies, and denying that right, frustrating that expectation, or undermining either of them by voiding or changing the decision should be done only after seriously considering the matter. Which considerations come to bear on the duty of disclosure?

First, it matters what information the citizen failed to disclose to the agency. Was it of primary or secondary importance for the matter at hand? Was it information that the citizen had, should have had, or should have taken the trouble to obtain? Was it information of which the agency

was aware or should have been aware from its own sources, or information that, by its nature, is available to the citizen but not the agency? The important question here is whether the citizen's disclosure of the information was reasonably likely to have changed the agency's decision. If the information is a relevant consideration of substantive importance, and the agency did not take it into account before making the decision, then the decision is flawed, irrespective of the citizen's breach of the duty, and that flaw is sometimes enough to justify voiding the decision.

An additional consideration of substantial importance concerns the citizen's intention. Do the circumstances indicate that the citizen intended to mislead the agency in order to influence its decision, or did the citizen willfully remain blind or act negligently? If so, breach of the duty is very serious, and in some cases may even rise to the level of criminal behavior. In any event, in a case like that, the citizen's reliance interest becomes so weak as perhaps to disappear entirely. A citizen who knowingly misleads the agency, knowing that the agency's decision will be based on the misinformation, cannot use his or her reliance interest to prevent the agency from changing or voiding its decision.

Similarly, it is always relevant to consider the harm to the public interest that is likely to result from the citizen's breach of the duty, weighed against the damage that the citizen will likely suffer if the agency changes or cancels its decision.

There may be additional considerations. Consider, for example, HC 135/71, *supra* [25]. In that case, the Traffic Supervisor decided to revoke a taxi license after finding out that in applying for the license, the license-holder gave misleading information about the period of time in which he had worked as a taxi-driver. Acting President Sussman said:

> The petitioner misled the agency about the time in which he had worked as a taxi-driver. That mistake is what led the agency, against the rules, to award him more points than he

> was entitled to receive. Had the agency known the truth, it would not have awarded him the license. Just as a contracting party who is misled may void the contract, so too, in administrative law, can an agency revoke a license it granted, if it did so because of fraud or misrepresentation …

Id. At 539.

Nevertheless, the Court held that, under the circumstances of that case, the Traffic Supervisor erred in revoking the license. Why? Primarily "because the respondents failed to act with the required promptness. They delayed the matter too long, for no reasonable purpose." *Id.* at 541.

Whether the administrative agency may revoke the decision, change its terms, refuse to renew a license or take other action against a citizen who violated the duty to disclose depends on the balance of the relevant considerations. It is incumbent upon the administrative agency to exercise caution before taking action against a citizen who violated the duty of disclosure, to make sure it does not shirk the proper execution of its job, does not treat the citizen's minor violations strictly, as if they were major, and does not cause more harm to the citizen than is warranted by the circumstances.

What, then do the circumstances warrant in the case before us?

The Case at Bar

33. The case at bar requires us to examine two claims which, according to the Customs Authority, justify its refusal to renew the petitioner's license. *Supra* para. 13. The first claim concerns the petitioner's rights in the land for which the license was granted: the Customs Authority was justified in refusing to renew the license once it learned that the petitioner had no rights in the land, as required by the Regulations. The second claim concerns the petitioner's duty of disclosure owed to the Customs Authority: the petitioner breached its duty when, prior to receiving the license, it failed to disclose material

information about its rights in the land to the Customs Authority. According to the Customs Authority, the very breach of that duty justifies refusing to renew the license.

34. First, regarding the petitioner's rights in the land: As mentioned, under the Regulations, a license applicant must declare to the Customs Authority that it is the owner, renter, or lessee of the land for which the license is requested. *Supra* para. 9. That right in the land is, according to the Regulations, a condition of or at least a relevant consideration in applying for the license. Did the petitioner have such a right?

When asked by the Customs Authority to produce a rental agreement or lease for the land, the petitioner sent the contract. *Supra* para. 10. The contract, however, is neither a rental agreement nor a lease, and it does not appear to be one either on its face or upon close scrutiny. Indeed, the petitioner itself does not claim that the contract, by itself, grants a right to rent or lease the land. Paragraph 12 of the petition says that, "the contract itself contains no explicit prohibition against the petitioner storing freight in the area." Of course, the absence of an explicit prohibition on storage is not the same as the petitioner's receiving permission to store freight on land that doesn't belong to it. Does the contract grant that permission? The petitioner fails to point to a single clause of the contract that says that the petitioner was granted a right to lease or rent or even permission to store freight on the land. Moreover, paragraph 13 of the petition says that, "After signing the agreement, the representatives of the P.A. [Port Authority – I.Z.] and the petitioner's representatives reached an agreement that … among other purposes, the area would be used for storing freight." In other words, the agreement on storage was reached only after the contract was signed. Paragraph 29 of the petition says that, "The understanding regarding the size of the area, its boundaries, and its designations was reached after the signing." The petitioner, however, in response to the Customs Authority's request to produce a rental or lease agreement, produced only the contract, as though it granted it a right to rent or lease the land. It added nothing about an agreement or understanding reached after the contract was signed. In other words, to the Customs Authority, the petitioner

produced only the contract, as though it granted it a right of rental or lease, even though the petitioner itself acknowledged that the contract granted no such right, and that is the right that the Regulations require.

It is therefore necessary to clarify whether the petitioner was granted such right, as it claims, after the contract was signed. Recall that according to the appendix to the contract, signed along with the contract, the petitioner may use the land "exclusively for the purposes of loading and/or unloading trains" and that, "Any change of any kind to the plot and/or anything attached and/or connected to it requires the advance written approval of the Director-General of Israel Railways." *Supra* para. 4. The petitioner, however, does not claim to have any such permission from the Director-General of Israel Railways or from anyone else authorized or pretending to be authorized to write on behalf of the director-general.

Moreover, on January 1, 1996, a year and a half after the contract was signed, the Railways Deputy told the petitioner in writing that it was not permitted to use the land for purposes other than loading and unloading, that "[s]eizure and use of the land constitute a violation of the contract," and that "[y]ou must immediately vacate the areas noted above." *Supra* para. 7. One would think that the petitioner, consistent with its version of the story, would rush to tell the Railways Deputy that the agreement reached after the signing of the contract gave it a right to store freight on the land. However, the petitioner failed to respond to the letter entirely. Only two months later, in response to an additional letter sent by the Railways Deputy, did the petitioner address the question of use of the land. In that response, however, it did not claim that there was no basis for the charge of contractual violation or that there was no basis for demanding that it vacate the land, because it was using the area pursuant to an agreement. The Director-General of the petitioner wrote to the Railways Deputy, saying only that, during the course of the last meetings on the subject, "to the best of my recollection, we agreed to find a way to resolve the issue." Even afterward, in the months during which the Port Authority repeated its demands that the petitioner immediately vacate the land, the petitioner never said that it had a right of rental or

lease in the land or that it had a right to fence in the land and use it to store freight. *Supra* para. 7.

During the course of this petition, the petitioner had another chance to produce proof about its right to rent or lease the land. Bear in mind that the petitioner is challenging the Customs Authority's refusal to renew its license for the land, after the Customs Authority concluded that the petitioner did not and does not have a right in the land. How does the petitioner respond to this stance of the Customs Authority? Its answer is based on two claims, outlined in paragraph 30 of the petition:

> The scheme clearly contains a notation that the area in question is intended for storage. That document was signed by the Director of the Engineering Department in the P.A./Israel Railways, and the petitioner claims that it is binding in every way. This scheme comes in addition to the oral understandings and agreements reached between the P.A. representatives and the petitioner, and together they constitute the basis for the extensive project and investment undertaken in reliance on the [written – trans.] agreement and the additional agreements and understandings.

The petitioner, however, provides no details whatsoever about those agreements and understandings (who agreed or understood, what was agreed or understood, etc.), and it provides no documents to support that claim. It merely makes the claim, which is unsupported by the correspondence between the petitioner and the Port Authority and has no weight as a evidence. We should further recall that, according to the contract, the oral agreements and understandings that the petitioner claims took place are insufficient to authorize transferring a large piece of land to the possession and use of the petitioner, contradicting the contract's explicit provisions, including the provision requiring "the advance written approval of the Director-General of Israel Railways."

The sole piece of evidence left for the petitioner is the scheme, that is, the second scheme from May 15, 1995, in which the area of land is marked as "storage area." *Supra* para. 3. The petitioner presents the

second scheme (signed a year after the contract was signed) as if it were the only scheme. That is not the case. The first scheme was prepared as early as January 3, 1994 (a year and a half before the contract was signed) and signed by the petitioner and two deputies director-general of the Railways, who also signed the contract itself. The first scheme outlines the route of the extension, and it includes no marks designating land use, whether for storage or any other purpose. The second scheme was prepared, as noted above, a year and a half later, by the petitioner's planner, in order to mark the new extension route proposed by the petitioner. It was signed not by the two deputies director-general who signed the first scheme, but rather only by the Director of the Railways Engineering Department.

The petitioner claims that the second scheme is proof that the Port Authority agreed to let it use the land for storage. The Port Authority counters that in signing the second scheme, the Director of the Israel Railways Engineering Department intended only to approve the new route of the extension from an engineering point of view and not to approve the use of the land, something he was neither involved in nor even authorized to decide. In paragraph 7 of its response affidavit, the Port Authority claims that:

> According to what he told me, all that Mr. Doron Rubin, Director of the Israel Railways Engineering Department, was asked to do was to sign the back of the scheme from 1995, to indicate approval of the extension route from an engineering point of view. Under these circumstances, claiming that his signature granted rights in the land to the petitioner, just because the petitioner's planner added the words "storage area" in the margins of the plan, without bothering to call it to Mr. Rubin's attention, is pure temerity, and it stems from a failure to behave in good faith.

35. Are these claims and evidence enough to rule that the petitioner has no right in the land? Definitely not. Whether the petitioner has a right in the land is an open question, currently pending before the Magistrate's Court in Ashdod, as part of the action of ejectment brought

by the Port Authority against the petitioner. The Magistrate's Court will rule on that question in light of the arguments and evidence brought before it. *Supra* para. 8. That, however, is not the question that the Customs Authority faced, and it is not the question before this court. The question before us is whether, in considering whether to renew the license, the Customs Authority had sufficient evidence to decide the issue. As is known, the evidence required to base a decision by an administrative agency differs in substance and in weight from the evidence required to base a judgment by a court. Administrative agencies act according to the test of administrative evidence, not the rules of evidence used in court. Under this test, the administrative agency must have before it sufficient evidence upon which a reasonable person would rely, under the circumstances, in order to make the decision in question. *See* HC 442/71 *Lansky v. Interior Minister* [33] at 357; HC 987/94 *Euronet Golden Lines (1992) Ltd. v. Communications Minister* [34] at 423-24. Such evidence may be sufficient to form the basis for a refusal to renew a license or a revocation of the license. *See e.g.* HC 475/81, *supra* [6] at 808.

In my opinion, under the test of administrative evidence, the Customs Authority could have decided at the outset that the petitioner had no right in the land, as required by the Regulations for receipt of a license. The contract itself, which on its face is neither a rental or lease agreement, would have been sufficient evidence for that decision. *A fortiari*, it would have been sufficient afterward, in view of the Port Authority's opposition to the petitioner's seizure and possession of the land. Under the test of administrative evidence, the evidence, which would have been sufficient for a refusal to grant the license at the outset, is also sufficient to determine, for purposes of renewing the license, that the petitioner has no right in the land, as required by the Regulations.

The conclusion is therefore that the Customs Authority granted the license to the petitioner based on a mistake caused by the petitioner's representation regarding its right in the land. Once the mistake was discovered, and it became clear that, under the Regulations, the petitioner was not entitled to the license, the Customs Authority had the grounds

needed under the case law to refuse to renew the license or even to revoke it.

36. Nevertheless, under the facts of this case, I have doubts as to whether these grounds by themselves are sufficient to justify the Customs Authority's refusal to renew the license for the land. My doubt stems from two sources: First, the Customs Authority is not absolved of responsibility for the mistake that, once discovered, motivated it to decline to renew the petitioner's license. As noted, when the petitioner applied for the license, the Customs Authority asked it to send a rental or lease agreement for the land, and it sent the contract. The contract, on its face, is neither a rental nor a lease agreement, and that is obvious to a lawyer after a surface reading of it. However, the Customs representative who handled the petitioner's application did not bother to read the contract at all. The Customs Authority explained that in paragraph 8 of its response affidavit:

> The Customs Authority representatives who approved the petitioner's request assumed, based on the relationship of trust that had developed between the two and in light of the assumption that the petitioner was acting in good faith, that the contract submitted by the petitioner indeed granted it storage rights in the area in question and that there was no reason not to approve the request.

This explanation does not absolve the Customs Authority of responsibility. In every case, the Customs Authority, like any administrative agency, must take reasonable steps to clarify whether the conditions set by the statute or regulations for its exercise of authority have been met. This is the administrative agency's duty owed to the public, which has endowed it with authority, subject to certain conditions. The agency may not exempt itself of the responsibility to investigate those conditions just because it assumes, hopes, or trusts that the citizen will act in good faith.

Furthermore, the citizen can assume that the agency conducts a reasonable investigation of the conditions necessary to exercise its

authority, and that if the agency grants the request, the citizen may generally rely on the that decision. As Justice Barak said:

> A license grantee may assume that the necessary checks were done and that the he or she may begin investments and activities without fear that everything will be re-opened just because of a mistake. There is another reason, and it is connected to proper public administration. Administrative agencies should establish a system of checks and investigations that will allow it to arrive at its stance in advance, before the license is granted. Only under an illegitimate and dangerous system of administration would the agency first grant a license and only afterward investigate.

HC 799/80, *supra* [5] at 331.

The question therefore becomes whether, under the circumstances of this case, the mistake regarding the petitioner's rights in the land was sufficient to justify the Customs Authority's refusal to renew the license.

The second source of doubt is the fact that the balance of damages seems to tip toward the petitioner. On the one hand, the petitioner invested a lot of money in preparing the land to serve as a licensing warehouse, negotiated with clients, has operated the warehouse for months, and will certainly suffer substantial damage when forced to stop using the land as a licensing warehouse, particularly if it is forced to do so immediately. On the other hand, what damage would result if the petitioner continues to use the land as a licensing warehouse until the civil court rules on the Port Authority's action to eject the petitioner from the land? From the point of view of the Customs Authority, there is no practical damage, because the land has been properly prepared for use as a licensing warehouse, and only the question of the petitioner's rights in it remains open. There is therefore no concern that the petitioner will store goods on which customs duties are owed unsafely or unsupervised. What of the damage caused to the Port Authority? Such damage does not appear to be a relevant consideration for the Customs Authority's

decision whether to renew the petitioner's license. In any event, should the civil court rule that the petitioner has no right in the land and that it is occupying the land as a trespasser, the Port Authority may, should it so desire, sue the petitioner for money damages in the form of the appropriate amount of rent, purging the petitioner of unjust enrichment, or request any other remedy.

If that is the case, should the Customs Authority renew the petitioner's license temporarily, pending the civil court's ruling on its right in the land? In the final balance, were I required to rule on this case based exclusively on the question of the right in the land, I think that I would rule against the petitioner, despite my doubt. The primary reason is that, based on the administrative evidence, the Customs Authority's granting of the license was not just an error in judgment but was actually illegal, because it contradicted the Regulations requiring that a license-holder have a right in the land. In principle, an administrative agency is not supposed to accept an illegal situation. Indeed, if it were a question of freezing the current situation for just a brief period, pending a final ruling on the question of the right in the land, it would have been possible to maintain the status quo, out of consideration for the damage that the petitioner would otherwise suffer. In practice, however, years may pass before the courts will give a final ruling, including on any appeals. It would not serve the public interest to allow the petitioner, which apparently received the license in violation of the Regulations, to maintain the license and benefit from it for a long period of time, while the authorized agency is helpless to correct the problem. Therefore, as noted, if I had to rule on this case based on this reason alone, I think that, despite the doubt, I would deny the petition.

However, if any doubt remained about whether this reason is sufficient to justify the Customs Authority's refusal to renew the petitioner's license for the land, the second reason, namely breach of the duty to disclose, removes any doubt I might have harbored.

37. As noted, as part of the petitioner's duty to disclose owed to the Customs Authority, the petitioner had an obligation to disclose

information material to the license requested. *Supra* text beginning on para. 27. I have no doubt that the petitioner violated that duty.

This was the case from the petitioner's first step in this case. When asked by the Customs Authority to produce a "rental contract or lease" for the land, the petitioner sent the Customs Authority the contract (in December 1995), noting in its cover letter that, "Enclosed is the rental/lease agreement with the Port Authority and the Railways." However, as noted, that contract is neither a rental agreement nor a lease. Even the petitioner acknowledges in its petition that its claim to a right in the land is based on understandings and agreements made later. *Supra* para. 34. The petitioner, however, did not tell the Customs Authority that its right in the land derives not from the contract but rather from later understandings and agreements. Had it said that in the letter sent to the Customs Authority, the Customs Authority would likely have sought to clarify what those understandings and agreements are and why they are not included in the appendix to the contract or in another document.

Moreover, the petitioner sent the contract to the Customs Authority without attaching the first scheme, which presents the extension route as it was first established. *Supra* paras. 2-3. Therefore, the picture presented to the Customs Authority was incomplete and inaccurate. Had the petitioner attached the first scheme as well, which left a smaller area between the extension and the warehouse, along with an explanation about the change in the route, the Customs Authority might have investigated and discovered the situation as the Port Authority viewed it.

In any event, the petitioner knew very well that the Customs Authority required it to have a right of rental or lease in the land, and that after it submitted the contract, the Customs Authority believed that the petitioner did indeed have such a right.

Even if the petitioner believed it had such a right, not long after it submitted the contract to the Customs Authority, it learned that the Port Authority thought otherwise. The letter sent to the petitioner on January 8, 1996 said, in the name of the Port Authority, that the petitioner had

seized the land in violation of the contract and that it must immediately vacate the land. The Port Authority repeated that stance over and over for a period of months. *Supra* para. 7. During that time, the petitioner's application for a license was pending before the Customs Authority until it decided, on July 1, 1996, to grant the license requested. The petitioner should have known, if it did not in fact know, that this information about the stance of the Port Authority was material to the Customs Authority's decision on its application for a license. The petitioner itself submitted the contract to the Customs Authority as proof of its rental or lease right in the land. That being the case, during the months in which it engaged in regular communications with the Customs Authority about the license, how could the petitioner have neglected to inform it that the other party to the contract vehemently denied that the contract imparted any such right whatsoever to the petitioner?

If the case involved private individuals, we might have said that the petitioner was obligated to disclose that information to the other party as part of its duty to act in good faith during negotiations leading to the formation of a contract, under section 12 of the Contract Law (General Part), and that the other party could consider the failure to disclose as a misrepresentation under section 15 of that law and therefore void the contract. In this case, because we are dealing with an administrative agency and not a private individual, we can say that the petitioner breached its duty owed the Customs Authority to disclose material information.

Violation of the duty to disclose may result from a random mistake or from deliberate misrepresentation. It is often difficult to distinguish between the two, and in any event it is difficult to prove that the violation resulted from that latter. Generally, however, there is no need to prove that. It is sufficient that, under the facts of the case, the citizen, as a reasonable and fair person, had a duty to disclose the material information to the agency, and that the citizen's violation of such duty caused the agency to be misled.

38. Misleading an administrative agency by a citizen's failure to disclose information material to its application for a license or other

benefit causes substantial harm, not just to the agency but also to the public. It is clearly in the public interest to avoid such misrepresentation. The public also has an interest in revoking a license or other benefit given by the agency as a result of such misrepresentation. Such misrepresentation, if it is not *de minimus*, is therefore likely to justify a decision by the administrative agency to revoke the license or other benefit granted, especially if there are grounds to believe that the agency would not have granted the license or benefit, but for the misrepresentation.

This is the case before us. The Customs Authority says that, had the petitioner disclosed the full picture of its rights in the land, either at the start of the license application process or at any time before the decision was made, it would not have given the petitioner the license it requested. This claim is persuasive.

The consequence is thus that the Customs Authority's refusal to renew the petitioner's license for the land was justified.

I therefore conclude that the petition should be denied, and the petitioner should pay court costs.

Addendum: Person and State

39. Finished but not complete. President Barak responds to me: He agrees with the outcome I reach but not with the route I take to reach it. As for the result, he agrees that the petitioner owes the Customs Authority a duty of disclosure, that it violated such duty, and that the petition should therefore be denied. As for the route, he does not agree that the duty of disclosure imposed upon the petitioner derives from a general duty of proper behavior owed by the citizen to the public administration. In his opinion, the duty of disclosure is circumscribed, and it is wrong and perhaps even dangerous to impose a general duty of proper behavior on the citizen, toward the public administration.

Because there is no dispute over the outcome, the dispute over the way to get there may seem abstract and marginal. In actuality,

however, it is a dispute of principle and importance. It reflects a difference in world views about the nature of the state or, at least, the proper relationship between a person and the state.

What is the proper relationship between a person and the state? The point of departure is rooted in the general rule, which is essentially the basic rule of jurisprudence, that every person, including every legal entity, must behave properly in every case, according to the circumstances. That, in my opinion, is the entire body of jurisprudence in a nutshell. As for the rest: go and learn. Indeed, jurisprudence has developed an extensive system of different rules for the proper way to behave in various situations. Beyond those rules, however, and in addition to them, there is a general duty of proper behavior.

In private law, which governs relationships between individuals, the general duty is a duty of good faith. That duty applies to contractual relations as well as to other legal acts. It can serve as a conceptual explanation for the existing rules, a legal source from which new rules are derived, and even a duty in itself.

In public law, which governs relationships between an individual and the public, the duty is customarily called the duty of fairness. Like the duty of good faith, the duty of fairness requires proper behavior under the circumstances of the case.

There is no dispute that the public administration owes a duty of fairness to the citizen. Does the citizen, however, owe a parallel, if not identical, duty to the public administration? The Court has yet to address that question. Now that it has come before us and created a dispute, I see fit to add a few words to explain my position.

40. President Barak does not see a justification for imposing on the citizen a duty of fairness parallel to that owed by the public administration, because the relationship between the citizen and the public administration is asymmetrical. I agree that there is no symmetry. However there is, or at least ought to be, reciprocity.

There is no symmetry because the public administration is the trustee of the public, meaning that of every citizen, while the citizen is not the trustee of the public administration. To clarify: the loyalty owed by the public administration to the citizen is not a legal duty. It is not even a legal relationship. In that way, it differs from the duty of loyalty in private law. In public law, as opposed to private law, loyalty is just a conceptual duty. It expresses the idea that the public administration draws its authority from the public and must exercise that authority for the sake of the public, in the way that public decides. *Inter alia*, it must exercise its authority with fairness. Various duties owed by the public administration to the citizen arise from fairness, including the duties that the legislature imposes and those that the courts impose.

The citizen, on the other hand, is not the trustee of the public administration but rather the beneficiary. Obviously, then, the citizen's legal duties owed the public administration cannot be identical to the legal duties owed by the public administration to the citizen. However, it is just as clear that the citizen is not exempt from owing legal duties to the public administration. The citizen is subject to various legal duties imposed by the legislature and by the courts. For example, it is agreed that the citizen must produce a driver's license to a police officer; may not insult a public servant; and must disclose material information to an agency from which he or she applies for a license to operate a business. These and other duties are not imposed upon the citizen arbitrarily. They are supposed to express the proper way for the citizen to treat the public administration. In that way, they share common ground – a general duty of proper behavior. That duty constitutes a central ingredient in the culture of our lives. It is also necessary for society to function efficiently and legitimately. What, then, is that duty, and how is it distinct from the duty which the public administration owes the citizen?

41. As a conceptual matter, the duty of loyalty owed by the public administration to the citizen is expressed in legal duties which can be roughly divided into three groups: first, authority; second, reasonableness; and third, fairness.

On the issue of authority, every administrative agency has a duty to refrain from exceeding the bounds of its statutorily delineated-power. That is the duty of authority in the broad sense. The duty of authority, in this sense, requires the agency to do only what the statute authorizes it to do, using only the means that the statute authorizes it to use. It includes, for example, the duty to consult with a certain body or to receive authorization from another body, depending on what the statute stipulates. That duty, of course, does not apply to the citizen, who has not been granted authority by the statute.

In addition, the administrative agency has a duty to act, not just within the bounds of authority defined by the statute, but also with reasonableness. That is the duty of reasonableness in the broad sense. The duty of reasonableness, in this sense, tells the agency to exercise its discretion properly. It is composed of two secondary duties: the agency must exercise its authority for a proper purpose; it must consider the relevant considerations and ignore the irrelevant ones; it must give each relevant consideration the proper weight and balance the various considerations (that is the duty of reasonableness in the narrow sense); and it must not harm the citizen to an extent greater than necessary. The citizen also does not owe the duty of reasonableness, because such duty relates to the discretion entailed in authority [which has been delegated – trans.], and the citizen has no such authority.

The duty of fairness relates to the administrative process, meaning the way in which the administrative agency exercises its authority *vis à vis* the citizen. It is expressed in various duties, like the duty to conduct a reasonable investigation into the circumstances of the case, to lend an ear to the claims of the citizen, to allow the citizen to access documents concerning the matter at hand, and to explain its decision. The common denominator in these duties is the duty to behave properly toward the citizen. It is commonly said that such duty derives from the duty of loyalty that the public administration owes the citizen. That is true, but it is not the only source. The status of the agency as the trustee of the public adds another dimension to this duty, but the duty, at its core, derives from a different source. It derives, first of all, from the basic duty of proper behavior in societal relationships, which includes

fairness. Because it derives from this duty, which is not unique to the relationship between the public administration and the citizen, it can apply to the public administration's duty to the citizen as well as to the citizen's duty to the public administration.

There may therefore be uncertainty over whether the duty of fairness, as opposed to the duty of authority and the duty of reasonableness, creates a parallel duty which the citizen owes the public administration. President Barak answers that question in the negative. However, his answer gives the duty of fairness a broad meaning. It includes the duty of procedural fairness but also substantive fairness, like, for example, the duty not to discriminate and not to work for an illegitimate goal. In my opinion, the duty of substantive fairness, which concerns administrative discretion, is not part of the duty of fairness but rather part of the duty of reasonableness. That duty is obviously not imposed on the citizen, because the citizen has no authority and therefore cannot be obligated to consider the relevant considerations or fulfill other conditions of exercising authority.

The dispute between President Barak and me is limited to the question of whether the citizen bears a general duty of proper behavior toward the public administration within the field that President Barak refers to as procedural, as opposed to substantive.

42. President Barak objects to imposing a general duty of proper behavior on the citizen *vis à vis* the public administration, irrespective of its nature and scope, on two primary grounds: one concerns the reason, and the other concerns the result.

President Barak believes that, first of all, the reason which leads to imposing a duty of proper behavior on the public administration, owed to the citizen, does not lead to imposing a parallel duty on the citizen, owed to the public administration. "A general duty like this," he says (in paragraph 8), "is inappropriate." Why? The major reason is this:

> … The view that the government is the trustee of the public is the basis for imposing a general duty of fairness that

> government owes to the individual. This view is based on a democratic perspective which puts individual liberty at the basis of the social structure. These reasons for imposing a duty do not exist in a relationship between the individual and the government. The individual is not the trustee of the government … the proper perspective on democracy means that there is no room to impose a duty of fairness that the citizen owes the government. Imposing a general duty of fairness would radically alter the perspective on democracy and the place that the individual occupies within it.

Para. 6.

What, however, is the proper perspective on democracy? Obviously, there are many perspectives on democracy – from popular democracy to Western democracy; from formal democracy to substantive democracy; and within substantive democracy, there are different perspectives on what the substance is. There is no dispute that the State of Israel is not just a formal democracy that makes do with choosing representative institutions every few years, primarily the legislative and executive branches. The State of Israel is a substantive democracy, all of whose representative institutions are guided by basic values, at the center of which is human dignity and liberty, in order to serve the human being as a human being. The Court has used that perspective on democracy to establish basic human rights, develop them, and defend them against violation by other institutions. However, even within the context of substantive democracy, with human rights as the consensus, there may still be different perspectives on the proper relationship between the state and the individual.

President Barak believes that, "A democratic regime is based on the recognition of each individual's human rights … the role of the government is to maintain a society that respects human rights." Para. 3, *infra*. Indeed currently, that is the prevalent perspective on the democratic regime here. In my opinion, however, it only captures part of it. A democratic regime is more than recognition and protection of human rights. Human rights are indeed a value of the utmost importance, but

they are not the only value. A person is more than a bundle of rights. A person is also a bundle of needs, proclivities, and aspirations. We cannot, therefore, say that the role of the government is to respect human rights – period. That is indeed a role of the utmost importance, but it is only one role among others. In the same breath, we must also say that an additional role is to advance the well-being of people – all people. Another role is to achieve social justice – justice for all. Human rights are not supposed to overshadow personal well-being and social justice. Human rights must not be just for those who have enough. Every person must have enough, so that he or she can enjoy human rights, in actuality and not just by law. This role is integrated, and the government is not the only one who must fill it. It is, first and foremost, the role of society. In other words, each of us must fill that role. Need we fill the role by helping the public administration? Yes. May we shirk the role and impose it on the public administration? No. In fulfilling that role, each of us must take a system of duties upon himself or herself, not just toward other people but also toward society. That, in my opinion, is the proper perspective on a democratic society – rights existing side-by-side with duties. While there is no symmetry in the relationship between the individual and society, there is reciprocity.

That is my view on the social contract. It is not a historical fact whose content is determinable, and it is not even a legal document whose meaning is debatable. The social contract is nothing but an idea that expresses the character that society should have. In my opinion, the desirable character of a society should guarantee not just human rights but also personal well-being and social justice. Toward that end, society does not make do with imparting people with rights; it also imposes duties upon them. That is the soul of democracy.

The State of Israel is a Jewish and democratic state. The Court, as a branch of the state, must be guided by the very democratic values it simultaneously advances. It unquestionably does that and always has. The Court primarily develops and cultivates human rights. However, to be hand-on-heart honest, does it not do so at the expense of other values? The Court devotes it primary efforts and dedicates its first rung on the ladder of priorities to human rights. That is the case in practice, even

more so in the rhetoric, and appropriately so: human rights should stand at the top of the ladder of priorities. However, the perspective on democracy as a government which protects human rights is a one-dimensional perspective. Democracy is more complicated and, frankly, better than that. The right perspective on democracy must put personal well-being and social justice together with human rights at the top of the ladder of priorities. The practice and rhetoric of the Court ought to reflect that perspective more clearly.

43. In my opinion, President Barak's perspective on democracy derives from a feeling of tension or even conflict between the state and the citizen. The state, through this perspective, is a regime that stands against the citizen. Indeed, the government of today is no longer what it was: it is not a totalitarian regime, either monarchical or colonial. Today, in a democracy, the government is the trustee of the people, and it therefore bears a general duty to take care of the public, which includes a duty to protect human rights. That perspective, however, still views the government as a body external to the citizen. It may be a new government, but it has grown from the roots of a totalitarian regime, meaning the roots of paternalism. Even today, the government is like a big brother or beneficent mother whose duty it is to take care of the child, while the child owes obedience and gratitude in return.

This perspective is reflected in the very way we talk about the government. Indeed, the government as trustee. A government, at best, which is legitimate and enlightened. But still a government. It operates externally. And I, as a citizen, am subject to it. Fear its heavy hand. Ask that it leave me alone. Look for ways of restraining it.

It is not the term which is determinative. The perspective is determinative. The term only reveals the perspective. Therefore, even if we find another expression, and replace "government" with "public administration," nothing will change unless we change the perspective.

44. I reject this perspective. I would like to see the state as a partnership. Of course, not a partnership in the private law sense, and not even a partnership as a legal relationship, but rather a partnership as a

conceptual perspective which replaces the perspective of the state as a regime.

According to this perspective, the state is the joint project of all citizens. It includes a division of roles. Those roles dictate the legal relationships. Civil servants play an important role, which entails authority and duties. It gives them control and obligates them as trustees. They are not, however, a regime above me. They are still our partners.

The partnership perspective has implications for the system of rights and duties that apply to both the citizen and the public administration. The partnership is not limited to periodic elections in which the citizen empowers the Knesset and the government to manage national affairs as it sees fit for a few years, until the next elections. Partnership means giving the citizen a real opportunity to participate in the daily running of the country's national life, and an opportunity, in practice, to act and influence on a daily basis, not just through elections. It requires more publicity and openness of the public administration; additional avenues for early consultation with the relevant bodies outside the public administration; willingness to incorporate those bodies in its regular activities. Administrative regulations stand out as an example. On a regular basis, ministers and other agencies issue a tremendous number of regulations, many of which have the same practical importance as statutes. Unlike the case of statutes, however, the agency authorized to issue regulations does not tend to publish a draft of the regulations and does not hold a public discussion before those regulations enter into force. That process reflects aspects of the government perspective. It is inconsistent with the partnership perspective. The partnership perspective advances democracy to a higher level. It correctly expresses the idea of rule of the people.

The government perspective encourages the citizen to demand personal benefits from the government. It does not encourage the citizen to contribute to society. It tempts the citizen to think: I gave the government power and responsibility, and it should repay me with rights and services. It owes me. This is not a perspective of partnership.

45. The partnership perspective also has implications for the duty that the citizen owes the public administration. The public administration is essentially a public servant. The public servant is flesh of my flesh. He or she works for me and for my benefit. We are partners who have different jobs within the state. According to that perspective, I owe a general duty of proper behavior to the public servant. It is inconceivable that I would owe such a duty such a duty to my employer, my neighbor, as a bus driver or shop salesperson (and it doesn't matter if we call it good faith or anything else) but not to a public servant, who works for me and for my benefit. Such a duty arises obviously from the partnership relationship between the citizen and the public servant.

I call this duty the duty of fairness. It is a term of convenience. It does not matter very much. We could also call it a duty of good faith. It means a general duty of proper behavior. Proper behavior is an elementary duty. All persons owe it to all other persons. In my opinion, perhaps even *a fortiori*, the citizen owes it to the public servant.

The general duty of proper behavior, like the general duty of good faith, does not pretend to be a positive description. In reality, good faith is often lacking in interpersonal relationships. That does not, however, invalidate the duty. The duty is a legal norm, and it exists as such even when breached in practice. The same is true of the duty of fairness that the administrative agency owes the citizen. In reality, the administrative agency may not behave fairly toward the citizen. Nevertheless, and perhaps for that very reason, the duty of fairness is necessary as a legal norm. The norm sends a message, educates, and serves as a tool for adjudicating disputes. For this reason, we also need the norm of a duty of proper behavior owed by the citizen to the administrative agency.

46. President Barak objects to imposing a general duty of proper behavior on the citizen, to the public administration, not just because he sees no conceptual reason to do so, but also because he is concerned about the practical consequence that will result. In paragraph 13, he says:

> The theoretical basis determines how the arrangement develops. The theory determines the practice. In my view, the individual does not owe a general duty of fairness to the government, because such a duty would be inconsistent with the way we view the individual in society ... "Fairness" is a concept that may lead to the creation of duties whose nature is inconsistent with individual liberty in a democratic state.

Indeed, theoretical perspectives have practical importance. However, the court is responsible for translating the theoretical perspectives into rules of behavior. That principle applies to the theoretical perspective on the duty of fairness owed by the public administration to the citizen. The Court used that perspective to say that various duties that have long been imposed on the public administration, such as the duty to hold a hearing and the duty to disclose, derive from the duty of fairness. The Court, however, has not imposed any additional duties just because they arise from the theoretical perspective on the duty of fairness. The Court will determine that a duty derives from the duty of fairness only after it concludes that the relevant considerations justify imposing such duty on the public administration.

The same holds true in the opposite direction. In this judgment, the Court holds that, under certain circumstances, the citizen owes a duty of disclosure to the public administration. The Court established that duty by balancing the good of the public against human rights. Having established that duty, I suggest holding that it derives from the duty of fairness. This is the expected course of things. It is also the appropriate course. It may be presumed that if the Court determines that a citizen owes a general duty of fairness to the public administration, the theoretical perspective will not motivate the Court to impose a particular sub-duty on the citizen, unless it concludes that the relevant considerations justify it. It may also be presumed that the Court will only impose additional duties on the citizen through a careful and controlled process, exercising restraint, in order to maintain an appropriate balance in the relationship between the citizen and the public administration.

47. Clearly, the system of rules derived from the citizen's duty of fairness will differ from the system of rules derived from the public administration's duty of fairness. The name may be the same, but the content is different. In this sense, there is no difference between the duty of fairness and the duty of good faith. For example, the duty of good faith owed by an agent to the principal differs from the duty of good faith owed by the principal to the agent. *See* para. 25, *supra*.

However, in this case, President Barak and I do not dispute the content of the duty of fairness. On that question, I don't think we would disagree. In this case, we agree that, under certain circumstances, the citizen owes a duty of disclosure to the public administration. I expect that there are additional cases in which we would agree that the citizen does or does not owe additional duties. Our disagreement is not over one duty or another, but rather over a prior question which expresses a theoretical perspective: whether the citizen owes the public administration a general duty of fairness, regardless of what the content of that duty may be.

48. In my opinion, the theoretical perspective that a citizen owes a general duty of fairness to the public administration causes no damage and poses no risk. To the contrary: this perspective adds a helpful theoretical and practical benefit to law and to society. It sends an appropriate message. Fairness is an appropriate message in every human relationship. That is true (in the garb of good faith) of the way people treat each other, and it is true (in the garb of fairness) of the way the public servant treats the citizen. Could it be possible that the way the citizen treats the public servant is the sole exception to this rule? As a person and as a citizen, I willingly assume a duty of fairness to public servants.

President A. Barak

I agree with the result at which my colleague, Justice Zamir arrived: that the petition should be denied. That conclusion is based on the view that the petitioner violated the duty of disclosure owed to Respondent 1. My colleague also recognizes the petitioner's duty of disclosure. The difference in our positions concerns the source of that duty. My colleague sees the duty of disclosure as part of a general duty of fairness which the individual owes the government. I disagree. I will briefly explain my position.

1. Today, it is universally agreed that the government owes the individual a duty of fairness. This duty is owed by anyone who wields governmental authority. It is owed to any individual, as part of his or her personhood. It applies to every governmental function (legislative, executive, judicial). At first, the legal system recognizes particular duties which the government owed the individual, such as the duty to hear opposing sides, the duty to give reasons, and the duty to behavior reasonably and not arbitrarily. After a while, the system sought and found a general principle at the core of each particular duty. This is the duty of fairness. *See* HC 840/79, *supra* [20] at 745. At first, it was just a principle that summarized the particular duties that had already been recognized. Later, it came to be recognized as a super-principal which gives rise to the various duties. The view is that the principle has a life of its own. It is not just a summary of the specific duties recognized in the past. Over the years, new duties that had not been recognized in the past arose from this principle. Indeed, that is – in the Viscount Simonds' words – the "genius" of case law. *Scruttons v. Midland Silicones*(1962) [72] at 7. It recognizes particular duties that, over time, come to be viewed as an expression of a general principle from which new particular duties arise, which come to be viewed as an expression of a general principle (new or old) from which new particular duties arise, and so on. In the case before us, first the specific duties were recognized, such as the duty to conduct a hearing and avoid a conflict of interests. Later, the legal system derived from them the general principle that, in relationships between the government and the individual, the government must behave fairly toward the individual. Such fairness is both procedural and substantive. Procedural

fairness requires the government to establish a procedure that is fair to the individual. For example, the government must hear the individual before making a decision in his or her case, and it may not subject itself to a conflict of interests. Substantive fairness requires the government to consider appropriate considerations (for example, the duty to act reasonably, without discrimination or arbitrariness and not for an inappropriate purpose). The categories of fairness (procedural and substantive) are never closed or rigid, and they never rest on their lees. HC 1635/90 *Zharzhavski v. Prime Minister* [35] at 841.

Why does the government owe a general duty of fairness to the individual? Such duty stems from the view that the governmental authority does not act for itself but rather on behalf of the public. In our legal system, the governmental authority is seen as the trustee of the public who owes the public a duty of fairness. I said as much in one case:

> The state, through those who act in its name, is the trustee of the public, put in charge of the collective interest and public assets in order to use them for the collective good …
>
> This special status subjects the state to a duty to behave with reason, integrity, purity of heart, and good faith. The state may not discriminate, act arbitrarily, or in bad faith, or allow itself to be subject to a conflict of interests. It must maintain the rules of natural justice. In short, it must act fairly.

HC 840/79, *supra* [20] at 745-46.

Indeed, my view is that the government is the trustee of the collective. My position is that the government is nothing in itself, and anything that it has, it has for the sake of the public. *See* HC 669/86 *Rubin v. Berger* [36] at 78. Justice H. Cohen articulated this position:

> The individual is different from the public body. The former does as he or she pleases, granting or refusing as he or she wishes, while the latter exists only to serve the collective. It

> has nothing of its own. All that it has, it holds in trust. On its own, it has no rights or duties beyond, different, or separate from those arising from the trusteeship or granted it or imposed upon it by statutory provisions.

HC 142/70 *Shapira v. Bar Association Jerusalem Regional Committee* [37] at 331.

My theoretical point of departure is therefore that the government is a trustee, trusteeship requires fairness, and fairness (procedural and substantive) requires behavior based not on self-interest but rather on the need to advance the collective good. *See* HC 1635/90, *supra* [36] at 841. *See also* HC 6163/92 *Eisenberg v. Housing and Construction Minister* [38] at 258.

3. Why do I see the government as the public trustee? The reason is that a democratic society is based on the recognition of individual human rights. These rights are natural to people by virtue of their personhood. The government does not grant these rights to people; the rights pre-exist the government. The role of the government is to maintain a society that establishes human rights. Of course, as a matter of daily life in society, human rights sometimes must be infringed. We cannot protect human rights without infringing on human rights. A democratic government is not characterized by the fact that it never violates human rights. Human rights are not a recipe for national destruction. A democratic society is characterized by the fact that an infringement of human rights must be done for a purpose which advances human rights, and the infringement must be to an extent no greater than necessary. A democratic society allows human rights to be infringed upon in order to maintain a social framework that preserves human rights. The right of the individual and its violation derive from a common source. CA 68211/93 *United Mizrachi Bank. v. Migdal Agricultural Cooperative Village* (hereinafter – the *Mizrachi Bank* case [39]) at 433. Within the context of this view, the role of the government is to take care of the public. The government in itself has no "private" interest of its own. The government exists for the sake of individuals. The government does not

exist for its "own" sake. Those who represent the government have no "self" interest that must be protected. They must act to achieve the collective interest. Indeed, there is a serious concern – a concern which history has repeatedly validated – that representatives of the government will develop their own interests and use the tremendous power granted them for purposes that do not reflect the collective good. The duty of loyalty seeks to prevent that. The duty of loyalty seeks to guarantee that the government takes care of the public and not itself; the general duty of loyalty seeks to guarantee that the government takes care of the public and not itself; the general duty of fairness seeks to guarantee that governmental authority is exercised in a way that serves the collective, and not the government itself.

4. These reasons, which lie at the core of the general duty of loyalty, determine its content. The general duty of loyalty seeks to guarantee that the government does not achieve "its own self-interest" but rather the collective interest. The duty of loyalty does not set the "rules of the game" between "rivals." It sets rules of behavior for "friends." Indeed, like the trustee of a private trust, the government must suppress any "private" or "self" interest. It must exercise its powers for the sake of the public and the collective. Therefore, the government must act with integrity and purity of heart; it must abide by the rules of natural justice; its actions must recognize the equality of persons; it must keep its promises (*see* HC 135/75, *supra* [22] at 676); it must provide the public with information (HC 142/70, *supra* [37]); it must take only relevant considerations into account; it must abide by public ethics in its actions (*see* HC 1601/90 *Shalit v. Peres* [40] at 365); it must act in a way that allows it to achieve the public task imposed on it.

5. Do individuals, in their relationships, bear a general duty of fairness to each other? The answer is no. The law takes as its point of departure that people have rights (in the broad sense) *vis à vis* each other. The law recognizes the individual's self-interest and the power of the individual to protect that interest and achieve it. The law does not require an individual to suppress his or her self-interest and give priority to the

interest of another person (who would also have to suppress his or her own self-interest). The law does not ask for that level of altruism. The law recognizes the self-interest of the individual and his or her will to achieve it. Of course, the individual may not cheat or defraud, but he or she is not asked to ignore his or her personal interest in dealings with others. Our legal system does not recognize that "quality of righteousness" (as Justice Alon called it in CA 148/77 *Roth v. Yeshufa Construction Ltd.* [41] at 635). However, over the years, our perspective on the proper relationship between individuals has changed. The perspective that has developed is that the "buyer beware" maxim is inappropriate in interpersonal relationships; it would be wrong to allow each individual to achieve his or her desire without considering those with whom he or she comes into contact. There was a need to raise the threshold for what is considered proper behavior between individuals in their relationships. In private law, emerging principles of social solidarity and social justice set a standard of achieving the reasonable expectations of parties in private law. *See* M. Mautner, *Yiridat Haformalism Vialiyat Haarachim Bamishpat Hayisraeli* [80] at 57. Altruistic [in Jewish tradition: "angelic" – trans.] behavior is not required, but it is no longer acceptable for the individual to ignore the interests of others (in Jewish tradition: "wolfish" behavior – trans.]. The accepted view is that individuals must act in good faith in their interpersonal relationships [in Jewish tradition: behave like a person]. *See* CA 207/79 *Raviv Moshe & Partners, Ltd. v. Beit Yules Ltd*. (hereinafter – the *Raviv* case [42]) at 543. The legal system recognizes a general duty of good faith in contractual negotiations and in executing legal actions in private law. Sec. 12, 39, and 61(b) of the Contract Law (General Part). It has also recognized the prohibition on abusing a right. Sec. 14 of the Land Law, 1969. These duties, as important as they are, do not impose a duty of altruism. They do not require the individual to ignore his or her own self-interest. In contracts, the duty of good faith does not require a contractual party to relinquish the self-interest he or she has in the contract and its execution. The duty of good faith imposes a duty on a contractual party to consider the interest that is common to himself or herself and the other party to the contract. The duty of good faith requires the holders of a contract to act to

realize their common intent, through dedication to the joint goal that they had in making the contract and consistency in achieving their joint expectations. HC 59/80 *Be'er Sheva Public Transportation Services Ltd. v. National Labor Court in Jerusalem* [43] at 834. As a rule, for relationships between individuals, the law does not impose the duty of fairness it imposes on the government in its relationships with the individual. The duty of good faith imposed on individuals in their interpersonal relationships is "easier" than the duty of fairness imposed on the government in its dealings with individuals. HC 4422/92 [19] at 860. Good faith starts with the assumption that the individual takes care of his or her own interests. Good faith seeks to guarantee that he or she does so appropriately, taking into consideration the justified expectations of the other party. Good faith does not assume that each party will take care of the interests of the other, at the expense of his or her own interests. Good faith is based on the assumption that each contractual party takes care of his or her own interests, but it seeks to guarantee that he or she exercises integrity in doing so, safeguarding the joint mission of the parties, as befits a civilized society. *See* FH 22/82, *supra* [17] at 485. Good faith sets rules for a fair game between "rivals." In contrast, the duty of fairness sets rules for a fair game between "friends." The duty of fairness does not view the government and the individual as "rivals." The government must take care of the collective to which the individual belongs. The government's duty of fairness – like, in some ways, an agent's duty of fairness to the principal, a director's to a company, a guardian's to those with whose care he or she is charged – is a "heavier" duty than the duty of good faith.

6. Does an individual owe a general duty of fairness to the government? In order to answer that question, we must return to the discussion of the reasons for imposing on the government a general duty of fairness to the individual. As we have seen, the view that the government is the trustee of the public is the basis for imposing a general duty of fairness that government owes to the individual. This view is based on a democratic perspective which puts individual liberty at the basis of the social structure. These reasons for imposing a duty do not

exist in a relationship between the individual and the government. The individual is not the trustee of the government. The individual does not seek to advance the liberty of the government. Democracy recognizes the liberty of the individual from the government, but not the liberty of the government from the individual. An individual may do anything that the law does not prohibit. The government may do nothing that the law does not permit. 1 B. Aktzin, *Torat Hamishpat* [81] at 128. A democratic perspective recognizes the individual's independent will and independent interest. A democratic perspective does not recognize the government's independent will and independent interest, because the government acts for the sake of the public and the collective. In a democratic society, we cannot say that the individual has nothing for himself or herself, and that all that he or she has is for the sake of the collective. These words are true of the government. The proper perspective on democracy means that there is no room to impose a duty of fairness that the citizen owes the government. Imposing a general duty of fairness would radically alter the perspective on democracy and the place that the individual occupies within it. My colleague, Justice Zamir, says that the social contract is the source of the general duty of fairness. I would not draw that conclusion from the social contract. Our accepted view of the social contract is that it establishes a limited government authorized to serve the people and allow them to realize their natural rights. This view gives rise to the government's general duty of fairness to the individual. It does not give rise to a general duty of fairness owed by the individual to the government.

7. This analysis does not mean that the individual has no duties to the government. Democracy is not just human rights. Democracy is also human duties – duties to other individuals and duties to the government. Indeed, democracy is based on social life and national interests. The government acts for the sake of the public. To facilitate that activity, we must give it rights (in the broad sense), because otherwise it would not be able to achieve the collective interest. Giving rights to the government means imposing duties on the individual, to the government. The purpose of these duties is to make it possible for the government to achieve the

objectives imposed upon it in a democratic society. They derive from social life and the need to advance the liberty of every individual. They are based on a view of a social welfare state and social solidarity. They derive from a proper view of the individual as someone who is shaped by society and therefore whose personality necessarily includes a "social aspect" that gives rise to an internal need to take the collective into consideration. These duties also derive from society's demand of the individual, as a member of society, to act for the sake of the collective. They are the product of the balance between the needs of the collective and the needs of the individual. We should recall, however, that the individual's duties to the government and the government's duty to the individual are different. They stem from different sources; they have different scopes. The existence of the government's general duty of fairness to the individual does not entail – as a matter of neither logic nor policy – the existence of a general duty of fairness owed by the citizen to the government.

8. What duties does the individual owe the government, and how do they differ from the government's duty of fairness to the individual? The individual's duties are based on a view of the individual in a democratic society and the role of the government in a democracy. Their point of departure is individual liberty, on one hand, and the role of the government on the other. There is tension between those two poles, because the government must act for the collective good, and the collective good is likely to conflict with the rights of the individual. That tension is released in various and sundry duties imposed on the individual, to the government. These duties are not based on a general duty imposed on every individual. Creating such a general duty would be inappropriate. By their nature, the duties that the individual owes the government are the product of balancing conflicting values. They are a compromise between the individual's human rights and the collective interest of the public. In this balance, as the infringement on individual rights intensifies and the public interest weakens, the duty owed by the individual will become more moderate. In contrast, as the infringement on individual rights becomes more moderate and the public interest

becomes stronger, the duty owed by the individual becomes stronger. Between those extremes lie the hard cases in which the violation of human rights is severe and the public interest is strong. In these situations, each society finds a balance point –which gives rise to the individual's duty – depending on its views about the appropriate relationship between the individual and the collective, between the person and the public.

9. The complex relationship between the individual and the government is not based on a one general duty owed by the individual to the government. The individual's duties are sporadic, and their content changes according to the circumstances. The individual owes no general duty to the government beyond the duty to obey the law, and he or she certainly owes no general duty of fairness. The individual's duties are "specific." For some issues, the individual's duties to the government are weaker than the duties of good faith that individuals owe each other in private law, and they may be limited to a duty not to mislead. For other issues, the individual's duties may be identical in scope to the duties of good faith that individuals owe each other. Indeed, in order to facilitate the government's activities in the field of private law, in his or her private law dealings with the government, the individual should bear the same duties of good faith that he or she owes to other individuals. The individual should not be given a break in his or her dealings with the government as it forms contracts or engages in other legal actions in order to fulfill its role. The provisions of sections 12 and 39 of the Contract Law (General Part) therefore apply to every legal action (see section 61(b) of the Contract Law (General Part)) in which the individual engages *vis à vis* the government. *See* G. Shalev, *Chozei Rishut Biyisrael* [82] at 59. For other issues, the individual's duties may be similar in scope to the duties of fairness imposed on the government. Sometimes, the individual may owe even more serious duties. Indeed, the individual must sometimes sacrifice his or her life in defense of the state. We must, however, keep in mind, that the duties of the individual – unlike the general duty of fairness – are specific in nature and different in character. They result from the balance, at various points, between individual liberty

and the collective good. They depend on the special circumstances of each case, entailing an investigation into whether the individual fulfilled his or her duty to the government, the source of the duty, and its scope. I therefore cannot concur with the position of my colleague, Justice Zamir, that the relationship between the agency and the individual is two-sided, such that "the citizen should therefore owe a duty of fairness to the agency, as the agency owes a duty of fairness to the citizen." No such symmetry exists. The agency's duties to the individual are separate from the individual's duties to the government. The philosophy at the root of each duty differs, as does the scope of each. The relationship between the individual and the government may be two-sided, but they are neither reciprocal nor equal. As my colleague, Justice Zamir, rightfully points out, the proper relationship between the administrative agency and the citizen is "a reciprocal relationship of give-and-take." *Supra* para. 23. However, the "give" and the "take" are not identical. The individual gives part of his or her liberty in exchange for a social life that defends his or her liberty. My colleague correctly notes that, "As a moral and a practical matter, the citizen cannot assume that he or she may demand and receive from the agency without being obligated to provide anything." *Id.* However, that does not mean that the duty of the individual and the duty of the agency are identical in content. A principal is not entitled to the loyalty of an agent unless he or she fulfills his or her duties to the agent. However, the principal's duty to the agent differs from the agent's duty to the principal. The agent owes a duty of loyalty and fairness. The principal does not. My colleague points out that, parallel to the right that citizen enjoys from the agency, the citizen bears a duty to the agency. That does not mean that the individual's duty to the agency is the same as the agency's duty to the individual. Parallel to the right that the individual enjoys from the agency, the agency bears a duty to the individual. That duty includes the duty of fairness. Parallel to the right that agency enjoys from the individual, the individual owes a duty. The right of the agency is not general, and therefore neither is the duty of the individual (beyond the duty to obey the law). The right of the agency is specific, and it changes according to the issue in question. The individual's duty, derived from that right, is also specific, and it changes according to the issue in

question.

10. Under the circumstances of this case, does the petitioner owe a duty to Respondents 1 and 2? If so, what is the scope of that duty, and what are its sources? My answer is that the petitioner indeed owes a duty of disclosure to Respondents 1 and 2. It must disclose the fact that it has a civil-law relationship with Respondent 3 (The Port Authority). In my opinion, this duty – grounded in the Regulations – includes the duty to disclose its relationship and communications with the Port Authority. Such information is relevant to the execution of a governmental task. It is only natural for the Customs Authority to seek to ensure that it does not give the authority to store goods on which customs duties have yet to be paid to someone whose possession of the land – and therefore, of the goods – is in question. In order for there to be security in protecting goods on which customs duties have yet to be paid, the protector must have stable rights in the land. For that reason, information about the civil-law relationship between the petitioner and Respondent 3 (the Port Authority) – including the information that there is a dispute between them – is material to the decision of Respondents 1 and 2 (Customs). The source of the duty of disclosure is the power of the government to grant a license to the individual (the petitioner). Granting the license must be done for the relevant reasons, based on the proper factual infrastructure. We want the government's decision to be proper and to advance the social interests that justified giving the government the power to make it. That is why the decision must be based on the proper factual infrastructure. Hence, the agency has a duty to collect the factual data, assess them as necessary, and use them to determine – within the rules of administrative evidence – the factual infrastructure relevant to making the governmental decision. While the governmental agency bears the burden of collecting the data and assessing them, the individual must assist the governmental agency in building the factual infrastructure that serves as the basis for the governmental decision of whether or not to grant the license. The harm to the individual in imposing this duty is minimal, while the advancement of the collective interest is substantial. In the final balance, it is therefore appropriate to require the individual – who is applying for

the license or permit from the government – to disclose the factual data material to the factual infrastructure which will serve as the basis of the government's exercise of discretion. This is particularly true of information which the applicant knows, but the agency does not. If the individual requests a license or permit from the government, and in order to exercise its discretion, the government needs facts known to the individual, the individual bears the burden of disclosing those facts to the government, unless there is another social interest that weighs against disclosure (such as privacy). The basis for the duty of disclosure is two-fold: *First*, it is a particular aspect of the principle of good faith, which, through parallel reasoning from private law, applies. If two rivals negotiating a contract bear a duty of disclosure, then it is only natural that such duty applies to negotiations over a governmental license, which is intended for the good of the collective, including the individual. However, the good faith that individuals owe each other is different from the good faith that individuals owe the government. Good faith between individuals is rooted in a conflict of interests. It is good faith between "rivals." In contrast, the good faith owed the individual to the government is based on the agency's governmental role to act for the collective good, including that of the individual requesting the license. The difference in these basic positions means that good faith differs in these two situations, despite their commonalities concerning the duty to disclose. *Second*, we can view the basis for the duty as part of a special administrative law that applies to the relationship between the individual and the government, having nothing to do with the principle of good faith. Either way, the duty of disclosure does not derive from a general duty of fairness. Furthermore, there is no recognized general duty of disclosure owed by the individual to the government. The duty of disclosure is always the product of the balance between the right of the individual and the needs of the collective. It exists only where the balance between these values justifies it. It does not always exist. For example, a suspect has the right to remain silent during a criminal proceeding. He or she need not disclose information to the government, if such information may be incriminating. The duty of disclosure I discuss is a duty which is limited to the kinds of issues addressed in this petition. It applies to

licensing governments through which an individual applies for a license. Under those circumstances, I accept that the individual should be required to disclose the facts he or she knows which are relevant to the exercise of governmental discretion. Of course, the duty of disclosure may exist in additional areas. We will address that question when the time comes, by balancing the conflicting values. The duty of disclosure may exist for Issue X, but not for Issue Y.

11. Of course, we might see a general trend of raising the threshold of what is considered proper behavior of the individual toward the government. We might say that, just as Israeli society raised the threshold of morality in behavior between individuals by requiring them to act in good faith, so should it raise the threshold of morality in behavior of individuals *vis à vis* the government. We might try to avoid introducing competition into the relationship between the individual and the government, such that the individual could exploit any mistake by the government for his or her personal benefit. However, that trend should be approached with caution. Taken to an extreme, it could turn things topsy-turvy, making the individual the trustee of the government, thereby destroying the democratic nature of the government. We would do well to use the standards of Israeli democracy to evaluate carefully any trend toward stepping up the individual's duty of proper behavior to the government. Such trend must withstand the balance between individual liberty and the collective interest.

12. One might ask how my approach differs from that of my colleague, Justice Zamir. After all, he also recognizes the individual's duty of disclosure to the government under the circumstances of the present case. Indeed, we do not disagree that, under the circumstances of this case, the individual bears a duty of disclosure. Our dispute concerns the source of that duty. My colleague's position is that the duty derives from a general duty of fairness owed by the individual to the government. In my opinion, there is no such general duty of fairness, because the individual is not the trustee of the government. The source of the duty of disclosure in the present case is the view that a proper exercise of

governmental authority requires the individual to make appropriate disclosures to the government concerning material facts which serve as the basis for the governmental decision. In this case, our paths meet. My colleague's general duty of fairness imposes a duty of identical scope as the one I would require, for the special circumstances raised by this petition. Our agreement in this particular zone does not mean we agree on the entire front. Our paths may part ways in other circumstances.

13. One might argue that the difference in our positions is purely semantic. Isn't the duty of disclosure that I espouse the same as my colleague's duty of fairness? After all, my colleague, Justice Zamir, thinks that the individual's duty of fairness to the government may change with the circumstances of each case. Why not adopt his view, while making sure that a general duty of fairness, of a flexible nature, always leads to the same solutions as I would reach using my approach? There are three reasons not to do so: *First*, the theoretical basis of a legal arrangement is significant for determining its content and boundaries. The theoretical basis determines how the arrangement develops. The theory determines the practice. In my view, the individual does not owe a general duty of fairness to the government, because such a duty would be inconsistent with the way we view the individual in society. The individual's duty to the government must be specifically defined according to the special circumstances of every case, by balancing the conflicting values. The scope of the duty and its content change according to the circumstance, and the principle of fairness – which derives from the principle of loyalty – is not the common denominator of all these duties. *Second*, words have a force of their own. They have a life of their own. "Fairness" is a concept that may lead to the creation of duties whose nature is inconsistent with individual liberty in a democratic state. There is some concern that, in the future, if we face the problem of whether the individual owes a particular duty to the government, the question we will ask is whether such a duty flows from the principle of fairness. The law will then try to answer that question, and the duty of fairness will determine how we address the issue. In my opinion, we need to ask a different question. The question is whether the right balance between

individual liberty and the collective good allows us to recognize that duty. These two questions are different, and they should not be interchanged. *Third*, "fairness" – and the duties derived from it – should not be given a double-meaning, sometimes referring to duties arising from a relationship of trusteeship and sometimes referring to duties that have nothing to do with trusteeship. Justice Zamir correctly notes that:

> The fact that those species bear the same name might blur the distinction. Differentiating the names can help make the difference more pronounced and preserve the distinction in substance.

Para. 20.

This approach itself warns against using the term fairness to describe both the duty that the individual owes the government as well as the duty that the government owes the individual. The sources of these duties differ, the scope of each differs, and they develop differently. They may sometimes intersect – as is the case of the duty of disclosure in this petition – but that does not mean we should blur the differences between them.

14. One might wonder: Can we "really" say that the individual does not owe a duty of fairness to the government? Should we recognize an individual's freedom not to be fair to the government? Of course, if fairness means not to defraud or cheat, then of course the individual owes a duty of fairness to the government (and to other individuals). However, the term fairness is not just the opposite of deception. Fairness is a normative concept. It is an objective concept. It determines standards of behavior. It is a "code" which activates various duties of proper behavior. For the government's dealings with the individual – which derive from the role of the government as a trustee – fairness means the highest standard of proper behavior. It is a standard of behavior that originates in the view that the government has no self-interest, and that it can only aspire to ensure the collective good. Private law imposes a similar (but not identical) duty only on those who owe a duty of loyalty, such as a

trustee, agent, director, or guardian. That is the reason we do not say that individuals owe (objective) duties of fairness to each other. The duty of good faith (as stated in the Contract Law (General Part)) applies to relationships between individuals, not the duty of fairness. That is why I believe that the individual owes no general duty of fairness to the government.

For these reasons, I concur with my colleague's conclusion but disagree with his reasons.

Justice M. Cheshin

1. Not long after the close of the proceedings, we decided that the petition should be denied, and that is how we ultimately ruled. However, from the outset, we knew that we arrived at that conclusion from different places and in different ways. Now is the time for each of us to name those places of origin and to map our routes to our common destination.

2. My colleagues' opinions laid out in front of me are comprehensive. They stretch out into a broad, panoramic view of fairness and good faith, of the individual and the government, of the relationships among individuals and between individuals and the government, of friends and not-friends, of the social contract, and of brotherhood. I wish to address two of these: the duty of fairness that the individual owes the government and the status and authority of a public agency to decide disputes between individuals. I will start with the first and end with the second.

Disagreements over the Issue of Fairness

3. My two colleagues, each in his own way, present two different theses that, in some senses even oppose and rip each other. My colleague,

Justice Zamir, soars to heights of noble and lofty principles like fairness and good faith – the principles and what lies between and around them – seeking to create a pillar of fire and a pillar of smoke [biblical: guiding light for desert travel – trans.] by which the camp can navigate, mapping the duties of the individual to the government. Truth be told, my colleague presents fairness as a central pillar upon which the entire tent hangs. In our language – the language of jurists – he says that within the context of the reciprocal relationship between the individual and the government, in principle, the individual owes a duty of fairness to the government. My colleague carves out secondary duties from the general duty of fairness: daily duties which are outlined in the case law and in books on administrative law.

My colleague, the President, opposes this view and, holding buckets of water, throws cold water on the flames of fairness. Unlike my colleague, Justice Zamir, who steers a course between basic principles – primarily fairness –from which he derives the individual's duties to the government, my colleague, the President, believes that the individual's duties to the government are "specific" and "sporadic," and that their content changes, depending on the issue. In the opinion of my colleague, the President, the individual's duties to the government derive from the balance that is conducted, for every issue, between opposing forces; fairness, as such, is not a primary foundation – if you like, not a necessary foundation – for the creation of these duties.

4. As for our issue, my two colleagues are of the same mind. Our issue is the case in which the individual applies for a license from the government, and the question is this: what duty does the individual owe the government to disclose – at his or her initiative – factual information relevant to the government's exercise of discretion? My colleague, Justice Zamir, believes that a secondary duty to disclose that information can be carved out of the duty of fairness owed by the individual to the government. The idea is that the individual's duty to disclose information to the government is just subsidiary to the parent duty of fairness that the individual owes the government. My colleague, the President, agrees that

such a duty of disclosure should be imposed. In his words, "the individual should be required to disclose the facts he or she knows that are relevant to the exercise of governmental discretion." He also says that, "the individual must assist the governmental agency in building the factual infrastructure that serves as the basis for the governmental decision of whether or not to grant the license." As for the source of that duty to disclose relevant information, President Barak says, "The source of the duty of disclosure in the present case is the view that a proper exercise of governmental authority requires the individual to make appropriate disclosures to the government concerning material facts which serve as the basis for the governmental decision."

5. My colleague, Justice Zamir, concerns himself with basic principles which are supposed to govern the relationship between the individual and the government – meaning, the fairness that the individual, in his opinion, owes the government. On the other hand, President Barak believes that the process of discovering and creating the individual's duties to the government is the same as the process of discovering and creating any right or duty in law – for our purposes, in administrative law. These processes do not use the duty of fairness, as such, as a generative foundation. For our purposes, President Barak grounds himself in the daily plane of administrative law: the duties that the individual owes the government in the gray area of administrative law and the individual's duty to supply the government with the information that allows it to exercise discretion properly and decide as we would expect it to decide. In any event, President Barak's opinion is that the individual does not owe a general duty of fairness to the government.

6. To sum up: My colleague, Justice Zamir, inserts the foundation of fairness as a primary, generative foundation in founding the duties of the individual to the government. In contrast, my colleague, President Barak, rejects this thesis of fairness. In his opinion, we should predicate the individual's duties to the government within each system by considering the interests appropriate to each issue and studying their force ("the balancing process").

7. The careful reader will understand that my colleague, Justice Zamir, seeks to inject a foundation of content – a foundation of fairness – into the process of creating the individual's duties to the government. He believes that this foundation of content should influence the development and determination of the extent of these duties. My colleague, President Barak, denies that such foundation of content exists within this context. He applies the balancing formula used throughout our legal system (for our purposes, within the field of public law) to the creation of duties that the individual owes the government.

My colleagues would appear to take very different positions, such that their paths crossed through happenstance, to bring them to the same place. Just as someone crossing from east to west might meet someone crossing from north to south, after which the two part ways, so did my colleagues meet for a fleeting moment, shake hands in greeting, and then continue on their way, one going west and the other, south. That is how it would appear. I personally am not convinced that that is how it really is. Upon close inspection, it seems to me, that the difference between my colleagues is primarily a difference in rhetoric. That it was not blind fate that brought them to the same destination.

8. First, I will say that each of my colleagues creates models made of different materials and belonging to different orders. My colleague, Justice Zamir, is concerned with a *model of content* to determine the individual's relationship to the government. He sees fairness as a cornerstone of the relationship between the individual and the government and builds a model for creating the individual's duties to the government around that principle. My colleague, President Barak, disagrees with the use of fairness as a primary generative foundation for determining the individual's duties to the government. At the same time, as an alternative model to the model of content, he presents us with a *structural model*. In his words, "The individual's duty to the government must be specifically defined according to the special circumstances of every case, by balancing the conflicting values. The scope of the duty and its content change according to the circumstance, and the principle of

fairness – which derives from the principle of loyalty – is not the common denominator of all these duties." Para. 13 of his opinion. My colleague, the President, does not determine the *content* of the individual's duties to the government, but rather the *technique* for determining those [duties – trans.]. He therefore does not see himself as rejecting the possibility that a consideration of fairness, even in its broad sense, could sometimes enter the mix of considerations which determine the creation of the individual's duties to the government. Indeed, in the *Awad* case, President Barak imposed, in certain cases, a "duty of good faith and fairness" on the individual to the government. *Supra* [30] at 492. *See also* para. 28 and subsequent text, *infra*. My colleagues, then, are not as far apart as they seem upon first glance.

9. There is more. My colleague, President Barak, objects to the all-encompassing doctrine of fairness of my colleague, Justice Zamir. He even objects to the use of the term "fairness" as such. He therefore says, *inter alia*, that "words have a force of their own. They have a life of their own. 'Fairness' is a concept that may lead to the creation of duties whose nature is inconsistent with individual liberty in a democratic state." Para. 13 of his opinion. Upon reading these words, I hurry to shake my colleague's hand firmly and warmly. I have also believed – and still believe – that words can have a magical kind of power, and we should stay as far away from magic as possible.. That is one of the reasons I so strongly objected to using the phrase, "constitutional revolution" to describe the accumulated weight of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. In the *Mizrachi Bank* case [39], I expressed this opinion about adding the words, "constitutional revolution" (on p. 567, para. 135):

> I see the label, "revolution" as problematic. Isn't it sufficient to say that there has been a 'change' in the path of the legal system? I say this because labels can sometimes blind us, leading us to allow our wishes to fulfill themselves. Moreover, even if we said that the Basic Laws have the potential to work very important changes in the Israeli legal

> system – and we have said that – the term, "constitutional revolution" means a lot more than the term, change. It not only creates over-excitement, but also, by adding force and energy to one side of the equation, it sucks away force and energy from the other side. Is that the right way for us to build a constitution?

I fear that careless words will create an entity with a force of its own. If that is our concern, however, let us proclaim loudly and clearly that in discussing the duty of fairness that the individual owes the government, we do not intend to create a dynamic, creative, generative doctrine. We seek only to note what is appropriate and desirable in interpersonal relationships. If we take this course, we, along with everyone else, will know that we have only stated the obvious about the proper way for the individual to behave. That is not, however, what my colleague, Justice Zamir, means. He intends to create a real, live, generative principle. We must address that principle, and not something similar.

10. Generally: My colleague, Justice Zamir, created a general principle of fairness as a principle that binds the individual in his or her dealings with the government. My colleague, President Barak, objects to creating this general principle, but he does not rule it out as a factor in determining the individual's duties to the government in these and other legal contexts.

On the Duty of Fairness

11. My colleague, Justice Zamir, demands that we impose a general duty of fairness on the individual, to the government. In his opinion, that duty derives from the social contract at the core of the existence of the state, a contract that makes the citizen and the government partners in the same act of creation: "As a moral and a

practical matter, the citizen cannot assume that he or she may demand and receive from the agency without being obligated to provide anything. A citizen's right *vis à vis* the agency is coupled with an obligation *vis à vis* the agency. This is the essence of the social contract among citizens and between citizens and the public administration. It is also the root of the existence of the state." Para. 23 of his opinion.

Who could disagree with these noble words of my colleague? How could we help but agree? The individual owes a duty of fairness to the government, says my colleague. Can we say that this is not the law? Can we say that the individual may not behave with fairness – or may behave without fairness – to the government? Can a court say such things? Are these the proper norms of behavior to establish for the relationship between the individual and the government? Indeed, the requirement of fairness captures the heart and lifts the spirit. Only someone apathetic to things beautiful would rise up against the duty of fairness suggested to us. We would appear to be in a sort of trap. We have no choice but to agree to my colleague's words, or risk being thought of as troublemakers upsetting the proper order of things. And still, I find it difficult to agree.

12. We measure the relationship between the individual and the government and administrative state using the relationship that members of society have with each other as the model. We can build a few models of human relationships to understand the reciprocal relationships among individuals within society. Hillel's saying is the foundation, the basis: "What is hateful to you, do not do to your neighbor." Babylonian Talmud, Order Tractate Shabbat 31, 1 [a]. Hillel goes on to say: "That is the whole Torah. The rest is commentary; go and learn." Of course, that is not the minimum level of conduct we need present to a well-ordered society and for the proper education of the individual. For now, however, we will allow it to suffice. That is one model. We might resort to a higher level, primarily through the use of "Love your neighbor as yourself" (Leviticus 19:18 [b]), which is the second model. This level is higher than the first because, among other reasons, it does not just impose

prohibitions on the individual – negative commandments – it imposes positive duties on the individual. An even higher level of conduct – the third model – stems from the principle that, "Is it not to share your bread with the hungry, and bring the homeless poor into your house; when you see the naked, to cover him, and not to hide yourself from your own flesh?" Isaiah 58:7 [c]. That is the highest degree of love of humanity and of kindness. As Micah the Prophet coined in his wonderful saying – wonderful throughout the generations – about human relationships:

> He has showed you, O man, what is good;
> and what does the Lord require of you
> but to do justice, and to love kindness,
> and to walk humbly with your God?

Micah 7:8 [d].

"Do justice" is primarily about "what is hateful to you" and a little about "love": mostly negative commandments, and a few positive ones. "Love kindness" is the purest form of love of humanity. If you like: love of love. This is not the place to discuss "humbly."

13. Law's primary objective is to order the relationships between individuals in society and to make sure that society is organized properly. A person is a wonderfully complex creature. The relationships between individuals in society are also complex, and in some ways, they are more complex than the complexity of the individual. From among the wealth of relationships between individuals, the law cuts out a part that seems appropriate for organization and definition by the legal system, and it imposes a network of legal norms on that part.

Among the three models presented, the law is primarily interested in the first model (the minimal model of "don't do"): Don't murder, don't steal, don't lie, whoever strikes his father or mother shall be put to death (Exodus 21:15, [e]), and whoever curses his father or mother shall be put to death (*Id.*, verse 17). Lord Atkin discussed this point in the well-known case of *Donoghue v. Stevenson* (1932) [73], saying what has

become a classic:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

*Id.*at 580.

The law borrows from the second model, as well, but very lightly. Honor your father and mother (a positive commandment whose reach is broader than the negative commandment not to hit or curse). Remember the Sabbath day, to keep it holy (a positive commandment alongside a negative one: don't do any work, etc.) The third model is supposed to serve the law primarily as a source of inspiration. It is just an illustration of the statement that the law seeks to impose itself on a certain segment of human relationships while leaving other parts of those relationships alone.

14. Against the backdrop of three alternative – or partially cumulative – models, let us evaluate the duty of fairness that individuals in society may owe each other. A superficial glance shows that the duty of fairness is a duty that knows no boundaries. It exists in each of the three models, differently in each, derived from the fundamental principles at the core of each. Examine, consider, and you will know. We will thus find, perhaps surprisingly so, that the term "fairness" – as well as the term, duty of fairness – is a kind of "framework-term," whose content varies with the model constructing it, the world surrounding it, and the world in which it lives. "Fairness" in the first model differs from fairness

in the second, and "fairness" in the second model differs from fairness in the third. "Fairness" in the second model, for example, includes the "fairness" of the first model, but the reverse is not the case.

15. To the issue of concern to us: When my colleague, Justice Zamir, said that the individual owes the government a duty of fairness, what kind of fairness did he mean? My colleague told us only that the duty of fairness can vary from issue to issue, depending on the circumstances. But what is the content of that fairness, and which circumstances will fill the fairness with its content? What functioning order did the duty of fairness join, and which model shall we use? Perhaps it is a different model from the three we mentioned? We can't do anything until we answer that question, which is the central issue. I said, and I will repeat: The duty of fairness is a duty that knows no boundaries – it lives and exists in law and outside law. For example, it exists in the realm of morality – and we therefore must define things precisely: Which part of that all-inclusive duty of fairness – fairness in the broad sense – is the law supposed to take under its protective wing and establish legal sanctions for violating the duty? Which part of "fairness" will the law adopt, and which part will it leave to other systems of norms?

I will give an example from another context: It is strictly forbidden for a person to shame another in public. If Rueben embarrasses Simon in public, the law will come to Simon's aid by granting him a right in the form of the law against defamation. The law has taken this part under its protective wing. However, if Gad shames Zevulun in public, the law may not grant Zevulun a legal right, even though Gad's deed was worse than Rueben's. Of Gad's deeds, we might say: "He who publicly puts his neighbor to shame has no portion in the world-to-come." Babylonian Talmud, Tractate Baba Metzia, 59:1 [f]. We might say that, and no more. Both Rueben and Gad owed a duty of fairness to Simon and Zevulun (respectively); Both Rueben and Gad breached the duty owed; and nevertheless, Rueben is subject to the legal sanction, while Gad is given no sanction (in this world). The question for our purposes is: Which part of the all-inclusive duty of fairness should the law cloak with

a legal sanction – by creating a legal duty of fairness – and which part of the all-inclusive legal duty of fairness should the law leave to other systems of norms, like the educational system, the ruling culture, discussions among members of society, and the like.

And perhaps tomorrow I will be asked: Must the individual be fair to other individuals and to the government? Does the individual owe a duty of fairness to other individuals in society and to the government? My answer to that question will be unequivocally: Yes, the individual owes a duty of fairness. That, however, is not the question which currently troubles us. The question currently before us does not just concern the duty of fairness. It concerns the *legal* duty of fairness that the individual owes the government. We have yet to understand the nature of that duty, its content, and its way.

16. Our discussion so far: To say that the individual owes a (legal) duty of fairness to the government – by itself – is just a label on a jug, a formal legal-conceptual framework. Until we find out the criteria for creating this "duty of loyalty," which beverage to pour into the jug, what is the formula for creating the beverage, we have as good as said nothing. To be precise: Because we have created the label – the label and not the content – it would not seem appropriate to discuss the existence of a general "duty of fairness." After all, it is possible that, after determining the formula for creating the duty, we will learn that we have only the tail-end of a duty or the tip of fairness, such that it would be inappropriate and incorrect to talk about a "general duty of fairness." As such, it would be misleading if, prior to determining the scope of the duty – prior to determining the criteria for outlining its borders – we were to talk about its existence. I therefore deny – with full force – the existence of a general duty of fairness owed by an individual to the government, until we learn what that duty is, what bounds have been set for it, and of what materials it is made.

On the Individual, the State, and the Individual's Duty of Fairness to the State

17. I have been asked to hold that the individual owes a general duty of fairness to the government, and that the content of that duty will be determined periodically by the case law and by analyzing this or that set of facts. According to my colleague, Justice Zamir, the duty of fairness arises from the social contract at the foundation of the state, a contract which holds that the individual and the agency are not rivals but rather partners in a joint enterprise. And just as partners in a project owe each other a general duty of fairness, so do the government and its individuals owe a reciprocal duty of fairness. The general duty of fairness that the state owes its individuals is well-established, and now my colleague suggests that we impose a duty of fairness on the individual toward the government.

18. Section 12 of the Contract Law (General Part) tells us that, "In negotiations to form a contract, a person must behave in an acceptable way and in good faith." In the *Raviv* case [42], the Court had to interpret this statutory provision and its applications on private bidding (in other words, bidding not held by a public agency). The question asked was what duty of good faith is imposed on individuals in negotiations between themselves to form a contract, how should the law be interpreted, how will the bounds of that duty be outlined. In short: On which track should we put the relationship between individuals in commercial negotiations they conduct. Using the metaphor that Thomas Hobbes created, my colleague, Justice Barak, held that this relationship would not be one in which "person to person – behaves like a wolf" (*Homo Homini Lupus*). At the same time, we will not put this relationship on the path of "person to person – behaves like an angel" (*Homo Homini Deus (vel Angelus)*). My colleague suggested that the relationship between people should move along the lines of "person to person – behaves like a person" (*Homo Homini – Homo*). We will, of course, agree; how could we not? We will not agree to establish a norm of behavior of person to person – behaves like a wolf (really, person to

person, like a wolf to a lamb; we should recall that a wolf has no better friend than his or her fellow wolf who lives together in the same pack). At the same time, it would be inappropriate to establish that person to person – behaves like an angel. Establishing this standard of behavior would not be realistic, and there is no point in setting a norm by which people will not abide. The recommended and appropriate standard of behavior is therefore that person to person – behaves like a person.

I have established, and not just by the process of elimination, the formula for the duty of fairness between people: person to person – behaves like a person. This formula, however, like the formula for fairness, merely presents us with a label on an empty jug. We are now supposed to pour a beverage into the jug, because only then will we know the content of fairness. The question is: what *norm* will we establish for relationships between people? How *should* a person behave toward another person? What standard of behavior will we require that people use toward each other? What will be the *content* of the good faith established by law? We have returned to our starting point, and again, we must continue to grope around in the dark.

19. Before we touch on fairness itself, let us talk a bit about those who share in the duty of fairness, about the individual and about the government. My colleague, Justice Zamir, feels a certain discomfort in holding that the individual owes a duty of fairness to the "government." The government is always the government, and the term "government" sounds to us like a body that rules us and instructs us what to do and what not to do. The determination that the individual owes a duty of fairness to the "government" grates on my colleague's ears. Don't call it the government, he tells us, but rather an agency, an administrative agency, the state. As if changing the name and switching the label will change the content. Of course, I will not object to calling the government an agency or an administrative agency, but I will add that, even after changing the name, we are talking about the government, about the relationship between the individual and the government, and about the duty of fairness that we are asked to impose on the individual toward the

government. By the way: the term "agency" [also "authority" – trans.] is, in some ways, harsher than the term government. As the sages teach us: "Be wary of the government [authorities – trans.], for they get friendly with a person only for their own convenience; They look like friends when it is to their benefit, but they do not stand by a person when he is in need." Mishnah, Avot 2:3 [g]. Pinhas Kehati interprets it to mean, "When dealing with the ruling powers, do not reveal to its agents too much of your affairs, and do not rely on their promises …" *See also* Mishnah, Avot 1:10 [g]: "Shemaiah says, 'Love work. Hate authority. Don't get friendly with the government.'" Is the relevance of this advice of our sages limited to the time at which they wrote it?

20. We could or could not agree with the statement that people owe each other a duty of fairness. In either event, we *understand* what is being said to us. However, when we hear that a person owes a duty of fairness to an administrative agency, we struggle to understand the words. For all that concerns a *prohibition* on doing certain things, we can understand imposing this duty on the individual – whether the prohibition concerns other individuals or an administrative agency. A prohibition imposed on someone, from whatever source, sort of concentrates itself on the person bound by the prohibition, and therefore it can be understood to exist in its own right. The term "fairness" is different, because it is more than just a prohibition against doing certain things. "Fairness" implies – and it should imply – not just a prohibition against doing something but rather an obligation to do something, a positive obligation to do something for another person. The term "fairness" itself implicates the relationships people have with each other. A person may or may not be fair to another person, and he or she will still be a person. In this context, what content shall we pour into the statement that the individual owes a duty of fairness to the agency, if the agency is not a person at all? How can we impose a duty of fairness on a person to someone who is not a person at all?

21. An administrative agency – every administrative agency, and we can add all the governmental powers, meaning the state itself – is just

a term, a concept, the product of our thoughts. Furthermore, an administrative agency – like the state – is not a tool, a device, an instrument, for achieving certain purposes, like the wheel in the hand of a sailor and the axe in the hand of the woodworker. The state, as such, has no life of its own. We can agree that we could not exist without the framework of the state, but that statement of reality cannot make the state into something it is not. That is true of the state, and that is true of the administrative agency.

An administrative agency charged with giving licenses in a certain field, for example, licenses to operate a business, seems like a machine, like the machines that dispense café au lait or bottles of cold drinks. Like the machine, the administrative agency has licenses to operate a business in its stomach. Press a series of buttons – one after the other in a certain order – pay what you are required to pay (a fee), and you get what you asked for. If you do not press the right buttons, or you press them in the wrong order, you will not get what you asked for: café au lait, a bottle of a cold drink, a license to operate a business. Indeed, in this way, an authorized agency may differ from a machine, because an agency is imparted with discretion, while it is difficult to grant discretion to a machine (is it?). Perhaps we should recall that a machine – unlike an authorized agency – does not operate arbitrarily, discriminatorily, or condescendingly. In any event, just as we would find it difficult to outline a duty of fairness owed a machine, so will we find it difficult to establish a duty of fairness toward an "agency" that is anything more than a legal concept.

Perhaps you might say: Aren't the "agency," the "government," indeed bodies to which we should owe a duty of fairness? After all, they are no more than virtual creations (although they can hurt an individual). And what about those who work for the agency, who are flesh-and-blood? Why shouldn't we say that the individual owes a duty of fairness to them? The answer to that question is that those employees of the agency are just the agents of the (conceptual) agency, who do its bidding. They have nothing but what the agency has, because they do not operate

for themselves but rather for the agency. And if we found it difficult to hold that the individual should owe a duty of fairness to an "agency," we may not create something out of nothing by identifying the employees of the agency with the agency.

22. To remove any doubt, I will quickly clarify that we should not identify state with "homeland" (with "society," with "people," or with "nation"). A homeland is the birthplace of a person: it is the land in which he or she grew up and was educated, it is the landscape of his or her childhood, it is the society in which he or she lives. A homeland is our home, a homeland is our family: "Love of the home is the mother of love for the homeland." Someone who loves the homeland is a patriot. "Homeland" is not "state." The term homeland is intangible, and therefore we must resort to symbols: the flag, the symbol. In the not-so-distant past, a person of authority called the state flag a stick with a rag stuck to it, and I had this to say about it:

> The flag of Israel is not "just an expression of a stick with a blue-and-white rag stuck to it." The flag of Israel is me and you, he and she, they, we, and our children. Even for those who have left and will not return to us, we, all of us, we are not a rag.

HC 8507/96 *Orin v. State of Israel* [44] at 277.

The state is a tool and an instrument to achieve certain purposes. It is not like my extended family, the homeland. Licenses to operate a business are given by the state – not the homeland – and we should therefore be careful not to confuse unlike things.

23. I will return to our subject and note – as an opening comment – that conceptually, I find it difficult to recognize the individual's duty of fairness toward the administrative agency. That is just the beginning of the journey, however. After trampling for a long time through the hallway, the time has come for us to put ourselves into the drawing room and examine our surroundings.

24. Unlike my colleague, Justice Zamir, I do not think that the relationship between the individual and the government is a "friendly" relationship, as though the two were friends, between whom the duty of fairness would naturally arise. On my station of embarkation for the journey – the journey to discover the duties that the individual owes the government – hangs a sign, and on the sign, written in big letters, is the word, "freedom." My view about the status of the individual in his or her relationship with government agencies and the administration is that the individual may and is entitled to do anything (or to omit doing anything) that he or she is not prohibited from doing (or required to do), unless he or she bears a duty to do it (or not to do it).Most of the duties that the law imposes on the individual are negative duties – don't murder, don't steal – and that is the minimal level required for a properly-functioning society. The individual may owe some positive legal duties, but the law explicitly sets out these duties, and they are few. Examples include: the duty to serve in the military; the duty to pay taxes; parents' duties to their children under the Legal Capacity and Guardianship Law, 1962 and the Mandatory Education Law, 1949; the duty certain people owe protected persons; the duty to prevent a crime (sec. 262 of the Penal Law, 1977), and others.

Beyond those explicit negative and positive duties, the individual owes no legal duty to the government, and in my opinion, it would not be proper to obligate him or her with additional duties. The individual has a right to do as he or she pleases, and he or she acts on his or her own account. The individual has a right, a right of the highest virtue: a right to freedom and permission which has the virtue of law (or the virtue of a basic law). *Cf.* HC 3872/93 *Mitral Ltd. v. Prime Minister and Religious Affairs Minister* [45] at 29 and subsequent text. The individual is born free in the law and remains free in the law all the days of his or her life, until it is established that he or she owes some kind of duty. Someone who abstains from prohibited acts and performs the positive duties explicitly imposed on him fulfils his or her duty in law. He or she owes nothing to no one and nothing to the government. He or she is not a saint. He or she is not a righteous person. He or she does what is required of

him or her. He or she is an ordinary citizen.

In my opinion, this is the liberal-democratic station of embarkation, and I personally think that we should adopt it and cultivate it. A healthy, appropriate society does not exist without volunteer works, altruism, and assistance to "the poor and the elderly," but these exist – for the most part – outside the framework of law. Indeed, the law does sometimes adopt a duty that can be characterized as an altruistic duty, such as: the duty to offer assistance to the victim of a traffic accident and duties incident to it (sec. 64A of the Traffic Ordinance [New Version] and Regulations 144 and 146 of the Traffic Regulations, 1961); the duty to save lives at sea (sec. 39 of the Shipping Law (Sailors), 1973); the duty to offer assistance to a public servant under certain circumstances (sec. 491 of the Penal Law). *See also*, CrimA 119/93 *Lawrence v. State of Israel* [46] at 29 and subsequent text; A. Barak, *Shikul Da'at Shiputi* [78] at 463-64. These, however, are exceptions to the rule.

25. That is generally the case in law, and that is the case, in my opinion, of the relationship between the individual and the government. In principle, I am not prepared to recognize the duty of an individual toward the government, whether we call such duty a duty of fairness or something else, unless that duty is explicitly or implicitly required by law. Because of the Basic Laws, once a duty is established by law, that duty is supposed to adjust to the restrictions imposed by the Basic Laws. That is all. My colleague, Justice Zamir, will forgive me, but I am hard-pressed to shake off the impression that, in his opinion, he sketches a Utopian state of fairness, a state in which the majority breathes fairness, a state in which people hurry to inquire into the welfare of each other, a state in which the majority seeks the collective good, all the time. What can we do if we don't live in a Utopian state of this kind? And since that is the case, in my opinion, it is inappropriate to impose a duty of fairness on the individual to the government, a duty that a Utopian state could impose on its individuals.

Moreover, the individual and the government do not have equal

rights. They do not have equal powers, and they are not of equal status. Nor are they friends. The government has most of the power, most of the force, most of the wealth, such that the individual – however much power, force, and wealth he or she may have – is not in the same league. The government has nothing of its own; anything it has, it holds in trust – for the good and benefit of the individual. However, the normative-legal statement that this is the status of the government *vis à vis* the citizen cannot take away from the phenomenon we witness on a daily, hourly basis: the individual standing in line at the government counter, and the line winds and plods forward, longer and longer. Some call this phenomenon, "bureaucracy," and others call it something else. Whatever its name, it is all-too-familiar to us all. This is why, in the past, the courts were called to the aid of the individual facing this huge machine – they were called in the past, are called today, and will continue to be called in the future. This is the reason that the courts established the principle of the trust that the government owes the individual. For the same reason, the case law has established a duty of fairness that the government owes the individual. This principle and this duty stem from the agency's abundant authority, its excess power, and its ability to deprive the individual of a benefit which he or she could have enjoyed, had it not been prohibited.

The duty of fairness owed by the government to the individuals in society derives from the excess power that the government wields, from the tremendous force that the government holds. The duty of fairness is designed to serve, among other means, as a check on the power and a restraint of the force. Can we say the same thing about the individual *vis à vis* the government? The individual, after all, is Gulliver in the land of the giants: The giants surround the feast, and Gulliver stands on the dining table, the entire tiny length of him, every bone in his body, quivering in terror. He is like a salt shaker to them, like the stub of a carrot. One simple exhalation of breath, and Gulliver is no more. I could understand imposing a "duty of fairness" on the giants, owed to Gulliver. I find it difficult to understand imposing a duty of fairness – a matching duty – on Gulliver. Duties – including the duty of fairness – are

intended to restrain power, force, wealth. What power does the individual have, relative to the government?

26. Consider a license required to establish and operate a business. Originally, the individual was permitted and allowed to engage in any business or profession in order to support himself or herself and his or her family. Abel shepherded his sheep without a shepherding license; Cain worked the land without a license to plough and plant; and Tubal-Cain forged instruments of bronze and iron (Genesis, 4:22 [h]), without having obtained a business license. It was their natural right, and "every person has a natural, imparted right to engage in the job or profession he or she chooses, so long as engaging in that job or profession is not prohibited by law." HC 1/49 *Bazherno v. Police Minister* [47] at 82 (S.Z. Cheshin, J.). When the legislature forbad some professions unless certain preliminary conditions were met – it made its prohibition, and we must abide by it in letter and in spirit. However, that very prohibition and the exemption from the prohibition are what create the government's duty to the individual, the duty of fairness and the other duties similar to it in form and character. The individual's duty to equip himself or herself with a license to engage in a certain business, as well as the government's ability to provide the individual with that license, are what create the duty of fairness owed by the government to the individual. Despite my searching and poking around, I found no source from which we could hew a duty of fairness owed by the individual to the government. The principle is the principle of individual liberty, and this principle – by itself – does not generate a duty of fairness.

27. A final word on the duty of fairness, a duty which I am not prepared to recognize. Because the proposed duty of fairness is a duty, violating the said duty is supposed to create a legal counter-action, a sanction that will be applied against the violator for violating a duty imposed on him or her. Because the individual's duty is owed to the government, that would mean that the government could impose a sanction against the individual, if the latter violated his or her duty. It is as though we are being asked to equip the government with a kind of

penal authority against an individual who violated a duty of fairness owed the government. For example: by suspending or revoking the license.

Indeed, in addition to other obstacles that this legal structure would create for us – problems entrenched in the principle of legality and the principle of separation of powers – this path would collide with a doctrine well-established in the case law. The doctrine is that an authorized agency may not take into account, as part of its considerations, the consideration that the individual acted with unclean hands. For example, in HC 192/61 *Kalo v. City of Bat Yam*, the petitioner opened a butcher shop without receiving a license. When he applied for a license, the municipality responded by saying that it would not consider his application because "he opened the butcher shop without a license, taking the law into his own hands." The Court responded by saying that the doctrine of unclean hands is a consideration that the Court may consider – the Court and not the administrative agency. The Court held that:

> The municipality is different from this court. Section 7 of the Courts Law, 1957 authorizes this court to grant a remedy, at its discretion, while the municipality must consider an application submitted to it and make a decision on the merits, irrespective of the applicant's behavior. I do not approve of the decision of the municipality's licensing committee not to consider the applicant's request because he opened the store without a license. Moreover, the applicant has already been subject to criminal proceedings for that deed, and he has been convicted of violating that ordinance. A local authority must serve as an example for its citizens by stringently abiding by the law, because if it fails to do so, the citizen will follow its example. The licensing committee's June 25, 1961 decision disregards this duty …

HC 192/61, *supra* [48] at 1858 (Sussman, J.). *See also* HC 328/60 *Musa v. Interior Minister* [49] at 79 (Sussman, J.).

The difference between an act (or omission) that constitutes unclean hands and a breach of the duty of fairness – if you prefer, the difference between the clean-hands requirement and the duty of fairness – is minimal. It would not be difficult for us to locate a violation of the duty of fairness within the bounds of the doctrine of unclean hands. In other words, recognizing the proposed duty of fairness would seriously erode the doctrine well-established in the case law, namely that an agency cannot consider an applicant's lack of clean hands. This would be done without giving the *Kalo* [48] doctrine an opportunity to defend itself and justify its continued applicability. And if we were to examine the matter a bit more closely, we would see that the *Kalo* [48] doctrine clearly and appropriately expresses the principle of separation of powers and the principle of legality. Would it be right for us to give up on this expression of principles lying at the base of the legal system?

The Individual's Duty of Fairness to the Government As Derived from the Agency's Authority

28. My colleague, President Barak, disagrees with my colleague, Justice Zamir, about imposing a general duty of fairness on the individual, owed to the government. In his opinion, there is no appropriate legal source for this duty of fairness, and in any event, the duty has no place in Israeli law. So far, my colleague, the President, and I are traveling in the same carriage, side by side. However, at this point, we will part company, he to travel in his carriage, and I to continue in mine.

29. According to my colleague, the President, the individual does not owe a general duty of fairness to the government, but he or she may, in the balance of rights and duties between him or her and the government, owe certain duties to the government. For our purposes, as my colleague, the President says – meaning, in a system in which an individual requests any sort of license from the government – the individual owes a duty to the government. And what is that duty? The duty is to bring to the agency's attention the facts that the agency needs in order to appropriately and properly exercise its lawful authority. The

governmental decision, my colleague says, "must be based on the proper factual infrastructure. Hence, the agency has a duty to collect the factual data, assess them as necessary, and use them to determine … the factual infrastructure relevant to making the governmental decision." This is the source from which we learn about the individual's duty, which is the duty to "assist the governmental agency in building the factual infrastructure that serves as the basis for the governmental decision of whether or not to grant the license." Therefore, an individual applying for a license or permit from the government bears a duty "to disclose the factual data material to the factual infrastructure which will serve as the basis of the government's exercise of discretion." In a slightly different formulation, "If the individual requests a license or permit from the government, and in order to exercise its discretion, the government needs facts known to the individual, the individual bears the burden of disclosing those facts to the government …" Again, "The duty of disclosure I discuss … applies to licensing regimes through which an individual applies for a license. Under those circumstances, I accept that the individual should be required to disclose the facts he or she knows which are relevant to the exercise of governmental discretion."

We therefore find that, instead of the all-encompassing duty that my colleague, Justice Zamir, seeks to impose on the individual *vis à vis* the government – the general duty of fairness – within a system in which an individual seeks a license from the government, my colleague, President Barak, seeks to impose a duty to disclose "the facts he or she knows which are relevant to the exercise of governmental discretion." Instead of the duty that my colleague, Justice Zamir establishes – a duty that emanates a whiff of social morality – my colleague, the President, makes do with an ordinary duty belonging to the ranks of day-to-day administrative law. An ordinary duty – but a duty nonetheless.

30. To these ideas, I will add my own contribution: just as I found it difficult to accept the yoke of a general duty of fairness owed by the individual to the government, so do I find it difficult to add my support to a duty to make the appropriate disclosures of facts relevant to

exercising discretion. If my opinion were to hold sway, the individual would owe the government neither a general duty of fairness nor a duty to disclose relevant facts. I am not saying that an individual is released from the yoke of any duty owed the government. I do, however, say that the individual's duties to the government are far more limited than those that my colleagues – each in his own way – seek to impose. I will discuss those duties later. For now, I will try to explain why I find it difficult to concur with President Barak on the issue of a duty to disclose the facts relevant to the exercise of discretion.

31. We read the sign hung on the embarkation point of our journey, and I will remind you that engraved upon it is the word "freedom." "Freedom" means that the individual owes no duty to the government other than the duties that a provision of law – including of case law – imposes upon him or her, whether it is a positive or negative duty. The penal code, for example, which is filled to the brim with negative duties, constitutes negative duties which are explicitly imposed by law (however they may be formulated), and they are the minimum duties that make a society human. These duties restrict the individual's freedom, the freedom with which we began our journey. Alongside these negative duties reside positive duties which the law imposes on the individual. Examples of these duties include the duty to serve in the military and the duty to pay taxes. Other examples are the duties that parents owe their children and those that certain individuals owe to protected persons and to helpless persons. It is superfluous to note something which everyone knows – that there are far fewer positive duties than negative duties. That is not for naught. We have decided that, in principle, negative duties burden the individual less than positive duties, meaning that negative duties invade an individual's area of freedom less than positive duties. In other words, consistent with liberal democracy and individual rights – among other things – it is easier to impose negative duties on the individual than positive duties. We learn from this that before imposing a positive duty on an individual, we must consider and reconsider whether our decision goes too far, whether we have exceeded what is appropriate and permissible under the basic

perspective accepted in our society.

Why do I say all this? Because my colleague, President Barak, seeks to impose on a license or permit applicant a positive duty to disclose details relevant to the exercise of the authority imparted to the government. And I say that before imposing this positive duty on the individual, we carefully examine if we have exhausted other ways of achieving the goal we seek to achieve, without imposing a positive duty on the individual.

32. I personally found it difficult to understand where the duty of disclosure that my colleague, President Barak, seeks to impose on a license applicant came from. We all agree, of course, that an authorized agency which has the power to give – or to refuse to give – a license to an individual bears a primary duty to assemble all the relevant information necessary to lay a factual basis for exercising its discretion. However, this duty to assemble information is imposed on the agency, not on the individual seeking to receive a license. The agency is the trustee of the public, and as a faithful trustee, it must rest on its lees until is assembles all the information relevant to the issue, because only on a solid foundation can one build a house that will not collapse. What is the basis for saying, as does my colleague, President Barak, that, "The source of the duty of disclosure in the present case is the view that a proper exercise of governmental authority requires the individual to make appropriate disclosures to the government concerning material facts which serve as the basis for the governmental decision?" What does the duty imposed on the *agency* tell us about the duty imposed on the *individual*? Aren't these two duties, in some ways, contradictory? What is the basis for saying that the duty imposed on the government in itself breeds a duty imposed on the individual?

Another Opinion

33. I think that just one bridge can bridge the gap between the duty imposed on the agency and the duty that has been said to be imposed

on the individual. The bridge is this: in the course of fulfilling its duty to assemble information, the governmental agency may – may, and even must – ask the license applicant to hand over the facts which he or she has (and of which the agency may not know from other sources). This is the case, for example, where the written law itself – the statute or regulations – sets pre-conditions for receiving a license. In our case, the law requires an applicant for a license to operate a licensing warehouse to possess a warehouse it owns, rents, or leases. Regulation 14 and the Sixth Addendum to the Customs Regulations. Once the law sets preconditions for applying for a license, it is elementary that the government agency can require the applicant to provide reliable information regarding the existence of those preconditions (unrelated to any duty of fairness). We should recall the holding that, if the law explicitly sets certain preconditions for granting a license, and the law does not impart the agency with additional discretion, the agency may not add conditions to the ones established. HC 43/76 *Amitar Company, Ltd. v. Tourism Minister* [50] at 559-60; HC 208/79 *Ineis v. Health Ministry General Director* [51] at 304; 1 B. Bracha, *Mishpat Minhali [Administrative Law]* [83], n.52 on p.164. If the agency lacks the authority to add conditions to the conditions, as a matter of course, it lacks the authority to demand information about those conditions which it has no authority to set for a license applicant.

34. Therefore: where the law explicitly sets preconditions for granting a license, the agency has the authority and may – may and even must – require a license applicant to convince it that those conditions have been met, that it disclose the information necessary to prove that those conditions have been met. Another typical case is where the written law does not explicitly set preconditions for granting a license, but we know the scope of the agency's discretion – meaning, the authority of the agency to set the conditions that must be met for it to grant the license – through the purpose of the statute. Once we know learn and discover that the agency's discretion depends on certain considerations, we know for ourselves that the agency is authorized to collect information about those issues in order to fulfill its role. This authority to set conditions includes

the secondary authority to require a license applicant to provide the requested information (unless the applicant has a right under the law not to disclose the information, and if that is the claim, the applicant bears the burden of establishing that right), because only if the license applicant fulfills that requirement, can the agency properly perform what the law requires of it. Section 17(b) of the Interpretation Law, under which "authority to do something or to require it to be done – means the secondary authorities necessary thereto, to an acceptable extent." Authorizing a governmental agency to grant a license – or to refuse to grant a license – includes the secondary authority to demand information from the license applicant. This secondary authority is necessary for the agency "to an acceptable extent," to allow it to exercise its discretion properly.

35. This is the bridge that bridges the gap between the duty imposed on a governmental agency to exercise its discretion in the best way possible and the duty imposed on a license applicant to provide information to the agency; if receiving the information from the license applicant is necessary for the government agency to exercise its discretion properly, it has the authority, and it may require the individual – via a law, regulations, or internal regulations, or on a case-by-case basis – to provide information in the area of its exercise of discretion. When asked to provide information, the individual must provide the required information, to the extent it is required and in the way it is required. However, the government bears the burden of initiating the requirement – by setting preconditions normatively or on a case-by-case basis – and the individual bears no duty other than the duty to respond to the demands placed on him or her. I personally would not agree to impose a case-law duty on the individual – as my colleagues propose – whether it is a general duty of fairness, as my colleague, Justice Zamir proposes, or a duty of the individual to provide, at his or her own initiative, information relevant to the agency's exercise of discretion, as my colleague, President Barak, suggests.

36. The agency is the one with the experience, as its job is to

grant license of the kind discussed: in our case, licenses to operate a licensing facility. In other case: a business license. In yet another situation: a driver's license. The daily business of a governmental agency allows it to accumulate experience and knowledge about the requirements that it should impose on license applicants including the questions it should ask them. That is how the governmental agency acquires experience – precept upon precept, precept upon precept, line upon line, line upon line [*Isaiah* 28:10 – trans.] – and when a license applicant approaches it, it can ask him or her questions and demand answers and information. Who are we to impose a duty on the individual – be it a general duty of fairness or a duty to provide relevant information – when the agency, in the course of the proper fulfillment of its role, knows how to ask for the information it desires?

Moreover, because it is experienced in its field, the governmental agency knows what relevant information it needs to exercise its discretion properly. On the other hand, how will the individual know what information the agency needs – meaning, what information is relevant – if the agency does not explicitly ask him or her to provide it? Doesn't the individual have a right to assume that information which the agency does not explicitly request is not relevant information? Is it relevant that he was convicted of beating his wife ten years prior to submitting the application? Is it relevant that she has refused to make maintenance payments to dependents? And if the individual has not been explicitly asked to give the agency information about prior convictions, why should we require him or her to volunteer information that is embarrassing to him or her? May he or she not assume that such information is not relevant, because he or she was not asked to provide it to the agency? Furthermore, the duty to disclose information would be imposed on the individual only if the agency omitted something – did not fulfill its duty properly – and did not ask the individual to provide this or that important piece of information. If the agency omitted something by not demanding a certain piece of information from the individual, why should we require the individual to "know" that such information is relevant and to provide it to the agency at his or her initiative?

37. In our case, a precondition for granting a license to operate a licensing warehouse is that the applicant possess a warehouse that he or she owns, rents, or leases for a particular time, from day X to day Y. Sixth Addendum to the Customs Regulations. The license applicant has a duty to give the agency information about the "warehouse" he or she possesses. The regulations explicitly provide, in detail and in a way that leaves no room for doubt, that the applicant must give the agency information about his or her rights in the warehouse. We have no need for a duty of fairness or any other case-law duty imposed on the individual to provide relevant information to the agency. The license applicant's duty is explicitly written and established in the law, and we have no need to resort to a duty from any other source.

To draw a comparison, assume, *arguendo*, that the Customs Regulations did not explicitly require – as they currently do – that an applicant for a license to operate a licensing warehouse possess a licensing warehouse which he or she owns, rents, or leases. Let us further assume that the agency does not explicitly require the applicant to prove ownership or a rental right in the licensing warehouse. Can we say that the applicant must – at his or her initiative – provide the agency with information about the warehouse or be viewed as someone who violated a duty owed, because the information is relevant information? I wonder.

38. Here, we should differentiate between the duty of disclosure that the individual owes an agency and the duty of disclosure that the individual owes another individual with whom he or she is supposed to form a contract. Under section 15 of the Contract Law (General Part), someone who forms a contract because of a mistake stemming from the other party's misrepresentation may void the contract. For this purpose, "misrepresentation" means: "nondisclosure of facts which the other party should have disclosed by law, by custom, or under the circumstances." We learn about the scope of this duty that the law imposes on those about to enter into a contract from the positions that parties occupy in relation to each other. The two are not just "rivals," but they are also supposed to have equal power. *A priori*, one may not require and has no authority to

require the other to provide material or relevant information about the contract. This is the source of the duty which the law imposes on the parties – mutually – and the sanction it imposes for failing to fulfill such duty. On the other hand, the relationship between the individual and the government is different from North to South, if only because of the position of power which the government occupies in relation to the individual. When the individual applies for a license or permit from the government, the government has the right and authority to require the individual to provide information material and relevant to the license. Once the government has been granted this power, there is no need to impose a duty on the individual *vis à vis* the government.

More on the Individual's Duty of Fairness to the Government

39. In the *Awad* case [30], the petitioner was a member of the Rosh Haayin Religious Council and was even chosen to be its chairman. It became clear that the Minister of Religious Affairs agreed to the petitioner's appointment without knowing that he had previously – in the context of his tenure as the treasurer of the Religious Council – been convinced of crimes of theft. Because of a prior petition submitted to the High Court of Justice, the Minister of Religious Affairs informed the petitioner that this appointment [as chairman – trans.] was terminated, as was his appointment as a member of the Religious Council, because it became clear that approval of the appointment to the Religious Council (the petitioner was the candidate of the local council) "was granted through a mistake and/or misrepresentation, namely concealment of the fact that the petitioner had been convicted of a crime of moral turpitude and therefore is not suited to serve as a member of the Religious Council." *Id* at 490. In considering the *Awad* [30] petition challenging the decision of the Minister of Religious Affairs, the Court held that the prior conviction of a candidate for the Religious Council is an appropriate consideration in the question of whether or not to select him as a member. The Court then considered the next question, whether the minister could "revoke his approval of the petitioner's candidacy as submitted by the local council, based on the claim that at the time he gave his approval, the

minister did not know that the petitioner had committed a crime of moral turpitude?" *Id.*at 492. The Court held that the minister could revoke his approval. On this issue, Justice Barak wrote:

> Personal integrity, the lack of a criminal past, etc. are considerations material to this issue. The minister arrived at his stance regarding these considerations by examining a set of facts that does not comport with reality. The minister knew nothing about the petitioner's prior conviction. Moreover, under the circumstances, the petitioner had a duty to disclose the fact of his conviction to the local council, and both the local council and the petitioner had a duty to inform the minister of it. The duty of good faith and fairness require this step to be taken. *Reg. v. Home Secretary, ex p. Zamir* (1980) at 950. Therefore, we are dealing with a material mistake in the minister's approval, because of a lack of information about facts which were required to be brought to the attention of the minister. The result is that an appointment was made which seriously undermines the integrity and image of the civil service, as well as public faith in it. I think the combined weight of these facts is another reason to allow the minister to revoke his approval. In the proper balance between the public interest in the integrity of the civil service and public faith in the public administration, on the one hand, and the public interest in the uninterrupted activities of the administrative agency and the petitioner's personal interest in the continued validity of his appointment, on the other hand, the first interest trumps.

Id.

My colleague, Justice Zamir, uses these words to establish, *inter alia*, the general duty of fairness which he tries to impose on someone who applies for a license from an agency. Para. 29 of his opinion. I wish to tarry and ponder this a bit.

40. No one would disagree that a candidate for a Religious Council must be an honest person; the question of a candidate's integrity – if you like, his criminal past – is a primary consideration in the authorities' discretion whether or not to choose him as a member of the Religious Council. There is further agreement that – from the public's perspective – a candidate for the position should disclose – at the beginning of the process – his unsavory past. The question is whether the candidate bears a *legal duty* to disclose his criminal past to the authorities selecting him; and if such a legal duty does exist, what sanction might the candidate bear if he omits fulfilling the duty imposed on him? It seems to me that the question of the duty – "the duty of good faith and fairness" – was not relevant in the *Awad* case [30], and to the extent it was relevant, it remained hidden in the margins.

Justice Barak held that the question of Awad's criminal conviction constituted an important factor in his appointment, and that the minister's ignorance of that criminal past constituted a serious deficiency of discretion. As he held, "we are dealing with a *material mistake* in the minister's approval … (emphasis added – M.Ch.)." I will, of course, agree. However, if that is the case, of what relevance is the duty of good faith and fairness? Let us assume, for example, that because of an omission or negligence, Awad was not asked about his criminal past, and the subject came up only by coincidence. In that case, wouldn't the minister's approval still be tainted by a "material mistake?" And in that case, wouldn't Awad's appointment as a member of the Religious Council still be an appointment which, in the words of Justice Barak, "seriously undermines the integrity and image of the civil service, as well as public faith in it?" If so, how is the "duty of good faith and fairness" relevant? Another case: assume, for example, that Awad was asked about his criminal past; that he responded honestly to the questions asked; but that his answers got lost somewhere on the way to the minister. In a case like that, wouldn't his appointment still seriously undermine the integrity of the civil service and so forth? Wouldn't the minister's approval under these circumstances still be tainted by a material mistake? Indeed, in this last case, we might feel personal empathy for Awad, but I doubt it would

change the conclusions and results of the court decision.

41. From this we learn, in my opinion, that the primary question does not concern the duty of fairness that Awad owed the authorities but rather the material mistake they made in exercising their discretion. Once the agency learned that it had made a material mistake in its discretion, it was allowed – in principle – to revoke its decision, even if it doesn't always have such power. *See e.g.* the *Awad* case [30] at 492; *see also* the citations in para. 15 of Justice Zamir's opinion. The primary question concerns the substantive aspects of the discretion, as Justice Barak held:

> We face the following question: May the Minister of Religious Affairs revoke his approval of the petitioner's candidacy, as proposed by the local council, with the claim that at the time he gave his approval, the minister did not know that the petitioner had committed a crime of moral turpitude? In my opinion, the answer to that question is in the affirmative.

Id. at 492.

Indeed, a candidate's knowing concealment and denial of negative information about his character is likely to work to his disadvantage. It seems to me, however, that the main issue is not the duty of fairness or its violation, but rather the very fact that the authorized agency made a material mistake in exercising its discretion.

42. The main point: in any case in which an authorized agency's decision is tainted by a material mistake, the agency may and has the authority – as a matter of principle – to revoke the decision. The question of the duty of fairness that an individual owes (or does not owe) to the government is not relevant, because the agency's mistake was and remains material, whether or not we say the individual owed a duty of fairness.

43. In order to ground the duty of fairness owed by an individual

to the government, Justice Zamir relies on Justice Barak's comments in the *Awad* case [30] (see the citation in para. 39, *supra*). Justice Barak, for his part – in the *Awad* case [30] – extrapolated from the comments of Lord Wilberforce in *Reg v. Home Secretary, Ex p. Zamir* (1980) (hereinafter – the *Zamir* case [74]). In that case, Zamir, a citizen and resident of Pakistan, applied for an entrance visa to the United Kingdom, in order to join his father, who had been living in the United Kingdom for ten years. This took place in 1972. Zamir completed an application form for a visa and described himself as a bachelor, as he indeed was (at the time, he was 15 years old). His application was granted in 1975. In 1976, while still in Pakistan, Zamir married, and one month later, he traveled to the United Kingdom on the visa he had received. At the time he entered the United Kingdom, he did not disclose to the authorities that he had married, and he was not asked about his marital status. An immigration clerk approved Zamir's entrance into the United Kingdom for an unlimited period of time. After a while – when Zamir's wife and son applied to join him – the truth was discovered, and the agencies sought to deport Zamir from the United Kingdom. Zamir petitioned the court, challenging the decision to deport him, and his petition was rejected by two levels of the court system. His case now reached the House of Lords. The House of Lords also rejected Zamir's petition. In the course of his opinion, Lord Wilberforce said:

> It is clear on general principles of law that deception may arise from conduct, or from conduct accompanied by silence as to a material fact. It can be no answer to a claim that such deception has occurred to say that no question was asked... I would, indeed, go further than this – a point so far left open in the Court of Appeal. In my opinion an alien seeking entry to the United Kingdom *owes a positive duty of candour on all material facts* which denote a change of circumstances since the issue of the entry clearance (emphasis added – M. Ch.).

*Id.*at 950.

In other words: Lord Wilberforce recognizes a duty of fairness owed by the individual to the government. "A positive duty of candour" means that the individual owes a duty to disclose information to the agency, even if he or she is not asked about it. My colleague, Justice Zamir, calls it the duty of fairness.

44. However, this rule – in that formulation – did not last long. It was overruled (with the concurrence of Lord Wilberforce) four years after the *Zamir* case [74], in the decision made in *Reg. v. Home Secretary, Ex p. Khawaja* (1984) (hereinafter – the *Khawaja* case [75]). The facts in the the *Khawaja* case [75] were similar to the facts of the *Zamir* case [74], except that this time, the House of Lords rescinded the duty of fairness that Lord Wilberforce established in the *Zamir* case [74]. In the later case, the House of Lords held that a person applying for an entrance visa to the United Kingdom does not bear a duty to disclose material information ("duty of fairness"). The individual's only duty is not to engage in fraud or deception. Regarding the *Zamir* case [74] (which was the law in the the *Khawaja* case [75]), the House of Lords held that Zamir's behavior, in fact, rose to the level of deception (because in entering the United Kingdom, he implicitly presented himself as a bachelor, when he was in fact married). Lord Fraser says in his opinion (with which the other judges concurred) that Lord Wilberforce's comments (cited above) in the *Zamir* case were dicta. He went on to hold that:

> At the time when his [Lord Wilberforce's – M. Ch.] speech was delivered I agreed with all of it ... but on further reflection, in the light of the arguments in the present appeal, has convinced me that it would be wrong to construe the Immigration Act 1971 as if it imposed on persons applying for leave to enter a duty of candour approximating to *uberrima fides*. But, of course, deception may arise from silence as to a material fact in some circumstances; for example, the silence of the appellant Khawaja about the fact of his marriage to Mrs. Butt and the fact that she had accompanied him on the flight to Manchester were, in my

> view, capable of constituting deception, even if he had not told any direct lies to the immigration officer.

Id. at 97.

Lord Wilberforce himself agreed (*Id.*at 99) that his comments in the *Zamir* case [74] were dicta, and that the case in question had been a typical case of deceit (by Zamir). The other judges agreed with Lord Fraser. *See* Lord Bridge's opinion at 118-19, 126; Lord Scarman's opinion at 107, 108. Lord Scarman also expresses reservations about Lord Wilberforce's comments in the *Zamir* case [74], and goes on to say the following: All agree that an applicant to enter the United Kingdom bears a duty to answer the questions he or she is asked honestly and to provide the information requested. He or she bears no additional duties. The applicant does not know which facts are material. The immigration clerk is the one who knows which facts are material to his or her decision, and therefore the individual should not bear a duty to provide material facts. Lord Scarman writes:

> It is certainly an entrant's duty to answer truthfully the questions put to him and to provide such information as is required of him... But the Act goes no further. He may, or may not, know what facts are material. The immigration officer does, or ought to, know the matters relevant to the decision he has to make. Immigration control is, no doubt, an important safeguard for our society... To allow officers to rely on an entrant honouring a duty of positive candour, by which is meant a duty to volunteer relevant information, would seem perhaps a disingenuous approach to the administration of control... The Immigration Act does impose a duty not to deceive the immigration officer. It makes no express provision for any higher or more comprehensive duty: nor is it possible, in my view, to imply any such duty. Accordingly I reject the view that there is a duty of positive candour imposed by the immigration laws and that mere non-disclosure by an entrant of material facts

in the absence of fraud is a breach of the immigration laws.
Id. at 107-08.

The English law perspective is clearly that the individual does not owe a "duty of fairness" to the government, and therefore, he or she does not owe a duty to disclose information. This is the case where the individual does not engage in an act of fraud and deceit.

45. A note: Even though I express reservations about Lord Wilberforce's comments in the *Zamir* case [74] regarding the duty the individual owes the government, I liked the comment he made in the *Khawaja* case [75] regarding his comments in the *Zamir* case [74]. In his opinion in the *Khawaja* case [75], Lord Wilberforce said that his comments in the *Zamir* case [74] about "a positive duty of candour" owed by the individual to the government were not necessary to reach the decision, because that case was "a case of clear deception." He went on to say that:

> I ventured the opinion that a system of consideration of individual cases for the privilege of admission to this country can only work humanely and efficiently on a basis of candour and good faith on the part of those seeking entry. If here I trespassed on to the ground of moral judgment, I am unrepentant.

Id. at 99.

That is what we said in another place: there is a legal "duty of fairness" and there is a "duty of fairness" belonging to social morality, and the two are not the same. Lord Wilberforce sought to take a "duty of fairness" from the institution of social morality and bring it to the order of law. His intention was good – we all agree – but establishing the norm as he suggested would have the legal system adopt a mode of proper behavior that is best left to other normative orders.

Lord Wilberforce concludes his comments with a statement the

likes of which we are not accustomed to hearing in judgments of the House of Lords (or in judgments of other courts). If, in founding a duty of fairness in the *Zamir* case [74], he says – the same duty of fairness that the individual owes the government – I trespassed into the area of moral adjudication, I do not regret my words. Lord Wilberforce's speech is among the noblest of any made in the United Kingdom at that time.

By the way: There is reason to think that the duty of fairness that Lord Wilberforce discusses in the *Zamir* case [74] was not presented as an all-encompassing *doctrine* of law but rather as a duty limited to the subject of immigration. He alludes to that in his comments in the *Zamir* case [74], in which he presents immigrants as those requesting a privilege, meaning those who have a lower-ranked right. *Id.* at 950 (In Israel, the law is that someone who is not a citizen or an immigrant under the Law of Return, 1950, does not have a right to enter or remain in Israel except by permission. *See e.g.* HC 758/88 *Kendel v. Interior Minister* [52] at 520; HC 740/87 *Bentali v. Interior Minister* [53]; and citations therein). As a fundamental rule, the state does not owe a duty to foreigners seeking to settle in its territory. And if, in an immigrant's first step on the territory of the homeland that adopted him or her, he or she tries to trick the authorities, we can understand – if not necessarily justify – the view that in doing so, the applicant forfeits his or her right to immigrate.

46. My opinion, as noted, is that the individual does not owe a duty of fairness to the government. In other words, for our case, the individual need not disclose, at his or her initiative, material information that the agency needs to exercise its authority. Of course, that does not mean that the individual owes no duty whatsoever to the agency. It means only that such duty is limited to the duty not to deceive, to lie, to cheat, to mislead, to spin a web of lies about the agency. As it is written, "You shall not wrong one another, but you shall fear your God …" Leviticus 25:17 [b]. It goes without saying that I am referring not only to active deceit – such as when the individual gives the agency false information – but also to implied deceit, through silence or behavior. This was the case

of the Pakistani citizen, Zamir, who in entering the United Kingdom, implicitly presented himself as single, knowing full well that his entrance was permitted under an entrance visa in which he presented himself as a single.

The same is true of our case: the petitioner knew full well about the precondition it had to meet, namely that it possess the warehouse for which it sought a license as an owner or through a rental contract. From the outset, it was required to produce certain documents, including "a contract of rental or lease for the additional area." Despite that requirement, the petitioner sent the Customs Authority documents that did not give it – as it knew – a right to rent or lease. The petitioner knew those documents did not meet the precondition required of it. The fact that the customs agents did not properly check what they were supposed to check and did not demand what they were supposed to demand, cannot absolve the petitioner of responsibility for the serious deed it did. As a matter of fact, the petitioner spun a web of lies about the Customs Authority, breaching the duty it owed the agency. When the agency therefore sought to revoke the license, the petitioner could not deny the act of misrepresentation it committed, and in any event, it could not raise a claim worth hearing. A license issued through an act of deception by the grantee is a license flawed from inception, and the necessary conclusion is that the agency had a right to revoke the license. There are exceptions to the rule, but these would be mandated by the special circumstances of a particular case. *See e.g.* HC 135/71 [25]. The main point of our case is that the petitioner complicated things for itself not just by failing to disclose information, meaning by breaching the duty of fairness that it allegedly owed the Customs Authority, but also by intentionally misleading it. The Regulations imposed a serious of preconditions which needed to be met before the petitioner could receive a license for a licensing facility; not only did the petitioner fail to meet those conditions, but it intentionally misled the agency about their fulfillment, exacerbating its sin.

47. Thus far, we have discussed the duty of fairness. I now want

to move on to the second issue that I wish to address, and it is the issue of a public agency's authority to adjudicate a dispute between individuals.

On the Status of an Administrative Agency in a Dispute Between Individuals

48. What is the status, and what is the authority, of an administrative agency to adjudicate – directly or indirectly – a dispute between individuals? An administrative authority is born and conceived in public law, its formation is a formation of public law, it breathes the air of public law, its gait is the gait of public law. Knowing all this, I will ask: When an administrative authority is called to address an issue within its authority, must it limit its considerations to public law considerations, or can we say, perhaps, that it may consider considerations from the field of private law? And if we take this latter path and say that the administrative agency may consider considerations from the field of private law, does this statement conceal a subsidiary statement that the administrative agency may and has the authority – as a derivative of its exercise of power– to adjudicate disputes between individuals?

49. My colleague, Justice Zamir, tells us that, "it is an old precedent" that an agency authorized to grant a license is supposed to limit itself to considerations from the field of public law, and to take care not to cross into considerations from the field of private law. At first, I thought that the descriptive "old" refers to a dignified rule, like a fine wine which improves as it ages. However, upon further reading, I realized that my colleague was actually referring to the opposite. "Old" meant obsolete. That realization kept me up at night.

50. We will never, never change a precedent nor apply a precedent without knowing where it comes from – who were its mother and father, in what environment it was born and grew up – and where it is headed. Know from where you come and to where you go. Let us recall that, if we only knew the force motivating precedent and law, we would know their boundaries and their limitations. Regarding precedent (but not

law), we will add: *cessante ratione legis cessat lex ipsa*. When the reason of the precedent ceases, the precedent itself ceases. What is the precedent in our case, and what is the force urging it along its way? According to my colleague, what *was* the precedent in our case, and what *was* the force urging it forward, at the time?

51. Personally, I have never encountered an all-encompassing rule that an administrative agency many not take into account, as part of its quorum of considerations, considerations from the field of private law. Reuben, a café owner, asks for permission to hire a band that will play and make his guests' stay more pleasant. Can anyone say that the municipality may not clarify how much the playing will intrude upon the neighbors' peace and quiet? Would we bar the municipality from considering this factor of the neighbors' quality of life? Would we tell the municipality – and the neighbors – that the subject of the nuisance is a subject "from the field of private law" which the agency therefore must ignore, referring the irate neighbors to a civil court? We have never encountered a case-law rule like this, if only because it has never been established. Indeed, a license that a municipality gives to hire a band in a café does not include a license to permit playing that rises to the level of nuisance. CA 186/52 *Jerusalem "Eden" Hotel v. Dr. Gerzon* [54] at 1132-33. This rule is self-evident, because a municipality does not have the legal authority to permit a nuisance. We would not hold that a municipality, at the outset, may not include, in its quorum of considerations, the possibility that the band's playing will rise to the level of a nuisance. The case law has not held as such, and in my humble opinion, it should not hold as such. I would not know for what purpose a rule like this – were it established – would be designed, or what social or other objective it would serve. On the contrary: a rule like this, if established, would place the burden on the neighbors, and in the overall social balance, this burden is inappropriate and unjustified. This is true of a license to hire a band in a café, and it is true of any other administrative act. The rule is not – nor was it – that an administrative agency may not include, in its quorum of considerations, considerations from the field of private law simply because they are from the field of private law.

By the way, "suitable environmental quality and the prevention of nuisances and hazards" is, today, one of the declared purposes of the Business Licensing Law, 1968 (sec. 1(a)(1)). The authorized agency therefore may – indeed, must – consider the issue of nuisance. Even if that were not part of the law – in the absence of an explicit prohibition – the agency may, and even must, consider the issue of a nuisance to the neighbors.

52. Similar things have been said about the traditional distinction between private and public law. We are told that times have changed, and that today – unlike in the past – the distinction between private and public law is not so clear and rigid. In the end, we are told, private and public law are one – they frequent the same places, and a natural process of osmosis takes place between them: principles and doctrines from one area penetrate and seep into the other, and on chance occasions, we discover that a rule from one area has made its way into the other. This integration of fields, we hear, breeds "hybrid creatures" – a kind of amphibian – and these creatures, at least some of them, take their orders from private and public law.

I confess: These statements, and others like them – although I, too, have written them – have troubled me in the past, and they continue to trouble me today. Indeed, regarding the division of jurisdiction between the High Court of Justice and the civil courts, the legislature has forced us to divide the law into two. *See e.g.* HC 1921/94 *Sukar v. Jerusalem District Committee on Construction, Residence, and Industry* [55]. Regarding the substantive law, however, I see no difference between our era and bygone days. As a matter of fact, when was there a "clear and rigid" distinction between public and private law? The opposite is true: English common law jurists always took pride in the fact that in Britain, the common law ruled, and that administrative law is just an extension of the common law.

53. Having said all that we have said, we cannot, of course, ignore the historic legal development, the development which presented

us with the legal system as we have it today. The legal system is divided into families, and this division is designed to affect the content of the norms themselves. This is true of the family of contract law, the family of tort law, the family of property law, the family of administrative law, and other legal families. It is superfluous to note that, throughout the years, there have been intermarriages – an inevitable phenomenon within the areas of a single legal system – and "hybrid creatures" have been born. We cannot avoid determining, however, that this historic development has had a prominent effect on the formation of the legal system as we know it today.

54. The division of the legal system into private and public law is similar – similar but not identical – to the internal division of private law into different branches of law. This is the case, for example, of the division between contract law and tort law. These two kinds of legal classifications, while not identical, bear a resemblance to each other. This is certainly true of the technique of division. I said as much in another context:

> Classification imposes order on the primordial rules of law. The legal system's basic principles determine the categories of classification [… ed.] The doctrines applicable to the rules associated into one category (capacity, consideration, mitigating damages, etc.) derive from the classification, and the classification derives from them. At particular points in time, the classification is made *based on* equality of the doctrines that apply to particular rules of law. Once the classification is made, and once the doctrine has been created and applied to a particular section of law, the doctrine rules over those associated rules of law, *because* they are located in a single section of law. That is true, making the necessary adjustments, when a specific rule of law is born, which is included in a particular section of law (whether explicitly or via its "interpretation"), because it will then be ruled by that section's doctrines. This, of

> course, is merely a presumption (sometimes, it is not the case). The different points of departure of a classification may bring about a change in the legal rule. The point of departure may be chosen, *a priori* or *a postiari*, and in the latter case, great importance attaches to the historical events that had a hand in shaping the legal system.

M. Cheshin, *Mitaltilin Bidin Hanizikin [Chattel in Torts]* [84], n. 2 on p. 161.

In Israeli law, because of the jurisdictional divide between the courts, the distinction between public and private law became particularly sharp. The general view was that the High Court of Justice specializes in public law, while the civil court specializes in private law. If you add a few doctrines that have always governed in the High Court of Justice (clean-hands, delay, taking the law into one's own hands, a done deed, intervention "for reasons of justice," etc.), you will understand why the classification between public and private law has been so deeply rooted. However, it is nearly certain that, if public law petitions were brought before the ordinary civil court, the division of law between private and public law would be similar – though not identical – to the division of the law between contract law and torts.

55. Let us return to the matter in question. As I noted above, I know of no doctrine prohibiting an administrative agency from benefiting from private law considerations, simply because they belong to private law. Does that mean that *every* administrative agency may consider *every* private law consideration for *every* issue it addresses? Of course that is not the law. In the *Alspector* case [1], the local council refused to give the petitioner – a tenant – a license to open a convenience store in his apartment. The reason for the refusal: the landlord did not agree to turn a room in the apartment into a store. The court held that this consideration by the local council was illegitimate, as Justice Berinson's opinion stated:

> We fail to see the validity of that explanation … while in opening a store in his apartment without the landlord's

> approval, the applicant may violate his lease, if that is the case, the landlord may come and fight his fight with the applicant. None of that however, is the municipality's concern, and it cannot serve as the basis for refusing to grant the license.

Id. at 664-65.

How are we to understand Justice Berinson's comments? In my opinion, Justice Berinson did not intend to establish a doctrine that private law considerations, as such, are illegitimate considerations for an administrative agency to use. For if he intended to make that ruling, we would protest: what is the source of that doctrine, and what is the justification for it? The Court, however, did not make that ruling. The Court's holding did not concern private law considerations as such, but rather an attempt by the administrative agency to decide a dispute that arose between landlord and tenant by refusing to give the tenant a license. The Court thought in the following way: it would seem as though the petitioner is entitled to a license to open a store, because he fulfilled all the preconditions established by law for opening a store. So? The landlord claims that operating the store would violate the lease he signed with the tenant? The landlord is welcome to come and sue in the court with the proper jurisdiction to hear the complaint. The agency is not authorized to decide the dispute between the parties, and once the petitioner has fulfilled all the preconditions necessary to open a store, it must approve his application.

56. We therefore find the following: at the very least, in the absence of explicit statutory authorization, it seems that an administrative agency may not adjudicate civil disputes between individuals. It would seem as though an administrative agency may not take a dispute between individuals into account as a consideration in its decision over whether or not to approve an application. The consideration of a dispute between the applicant and a third party is external to the agency's decision-making process. We are not talking about invalidating a consideration because it belongs to private law. The rule is the following: an administrative

agency may not take into account considerations which the statute does not permit it to consider, whether they originate in private or public law. And one of the forbidden considerations is that the agency may not adjudicate a dispute that has arisen between the petitioner and another individual.

To be precise: there is no doubt that, once the preconditions necessary to receive a license have been filled, the administrative agency must approve the application submitted. There is nothing remarkable about that, and what we just said falls under the category of *idem per idem*. The novelty is in the statement that adjudicating disputes between individuals would seem to be outside the administrative agency's scope of activity, and that the consideration of a dispute of the kind discussed above is a consideration that will be summarily rejected.

57. This rule – forbidding the administrative agency from deciding – even indirectly – disputes between individuals, has been accepted in the case law as a doctrine, and I have never found a reservation to it. *See e.g.* HC 9/49 [2]; HC 35/48 M. *Breslov & Partners Ltd. v. Trade and Industry Minister* [56]; HC 56/53, *supra* [3]; HC 132/57 *First v. City of Lod* [57]; HC 280/60 "*Avik" Ltd. v. Voluntary Authority on Importation of Pharmaceutical Preparations* (the *Avik* case [58]); HC 115/61 *Yakiri v. City of Ramat Gan* [59]; HC 27/62 *Alt v. Tel Aviv-Jaffa Local Town Building and Planning Committee* (the *Alt* case [60]); HC 278/62 *Sarolovitch v. City of Jerusalem* (the *Sarolovitch* case [61]); HC 329/64 *Guri v. Bnei Brak Local Town Building and Planning Committee* at 370.

58. One extension of this rule is that the police may not eject someone from land on grounds of incursion unless the incursion is "recent." If the incursion is not "recent," the police must refer the complainant to the court authorized to grant a remedy. *See e.g.* HC 109/70 *Orthodox Coptic Metropolitan in Jerusalem v. Police Minister* (the *Coptic Metropolitan* case [63]) at 240-44 (Agranat, J.); HC 37/49 *Goldstein v. Jaffa Guardian of Abandoned Property* [64] at 726 (Agranat,

J.). By the way, the same doctrine governs other areas of law, like a registrar clerk's duty to record the documented information given him or her into the Population Registry (like the fact of marriage), without the authority to investigate the legal validity of that information (for example: whether or not the marriage is valid). *See* HC 143/62 *Schlesinger v. Interior Minister* [65]; HC 58/68 *Shalit On His Own Behalf and On Behalf of His Children v. Interior Minister* [66].

59. What is the logic of the rule? What motivates and maintains it all these years? In my opinion, the answer lies in our legal system's structural need *to designate and to allocate* the primary functions and areas of activity to each of the three branches of government. To express it in the negative: the structural need of our legal system and system of government – as a matter of principle – to remove the primary powers designated for one branch from the domain of the other two. When we place the three branches side-by-side, we know for certain that the judicial branch is designed to judge. As section 1(a) of the Basic Law: The Judiciary says, "These are the courts given the authority to judge …" The authority of the judiciary is to judge, meaning to decide disputes. *See* HC 5364/94 *Welner v. Chair of Israeli Labor Party* [67] at 786 (Barak, Dep. Pres.). Unlike the judiciary, the primary function of the government and the public administration is to execute. As section 1 of the Basic Law: The Government says, "The government is the executive branch of the state." For our purposes, we can say that the structural principle in our system is the need to designate the power to judge – the power to decide disputes – to the judiciary, and to deprive the executive branch of that power. Thus, for example, in the *Alspector* case [1] and in subsequent related cases, had we recognized the power of the administrative branch to refuse to grant a license to an applicant because a third party claimed – claimed, and may even have proven by documentation – that receipt of the license and operation of the business would lead to his right being violated, we would have augmented the powers of the administrative branch, equipping it with the authority to judge. Because we are bound by the presumption that, in the absence of explicit and unambiguous authorization, the courts – and only the courts – will judge, as a matter of course, we prohibit the administrative branch from making itself judge in a dispute outside its domain.

For those who insist on precision, I will add that I am aware of the phenomenon that the borders separating the powers are not hermetic, and that a system of separation of powers is based on "checks and balances." I will recall, however, that the foundation is the principle of separation, and that those very "checks and balances" are built on that same foundation.

60. I will further note that in the U.S. legal system, a similar question arises concerning Congress's authority to pass legislation imparting the executive branch with judicial powers. The question is whether such grant of authority undermines constitutional principles, according to which the power to judge rests with the court system. The development of the case law on this issue is a fascinating story in itself, but I will not expand on it here. *See e.g.* L.H. Tribe, *Constitutional Choices* [85]; L.H. Tribe, *American Constitutional Law* [86]; *Commodity Futures Trading Comm'n v. Schor* (1986) [70]; *Thomas v. Union Carbide Agric. Products Co.*[71].

We negate the authority of administrative and governmental agencies to adjudicate and issue rulings – even temporarily – in a dispute between individuals for the principled reason of separation of powers (using "checks and balances"), and the main point of doing so is to prevent one branch from encroaching on the domain of another. That is the way to preserve the distinct function of the judiciary to judge, guaranteeing the right of litigants to a just trial conducted by an independent body. There is a supplemental reason – a daily reason – and it is that the executive branch lacks the appropriate work tools to issue rulings and adjudicate disputes. Each of the three branches has adapted to its environment and role – it has specialized in its area of activity and created work tools to execute its function to the best of its ability. Just as the court lacks the appropriate tools to engage in execution, so does the executive branch lack the appropriate tools to judge. The (surviving) plants and animals have adapted to their environments, as have the three branches of government. The best way to adjudicate disputes is the court's way, and we therefore prevent administrative and governmental agencies from adjudicating disputes. They were not trained for it, and

they are not the ones who bear the burden of doing justice for individuals who have quarreled. As Justice Berinson wrote in the *Alt* case [60], regarding a local planning and construction committee:

> The local committee – like the regional committee – is not a legal body for determining the rights of conflicting parties. Neither is capable of deciding factual and legal questions concerning the mutual rights and duties of the asset's owners and the actual or potential harm they would suffer. Their considerations are considerations of town planning and construction, and no more. The possibility that the rights of another will be infringed by construction done pursuant to a license issued by the local committee is not for the respondents to address, unless the opposing party alleging the infringement of rights has direct legal standing in the subject of the hearing …"

Id. at 1334.

See also HC 305/82 Y. *Mor v. Central District Regional Planning and Construction Committee* [68] at 148-49 (Or, J.).

62. My colleague, Justice Zamir, seeks to prove that private law considerations can affect the decision of an administrative agency, and that there is "nothing wrong with that." Along those lines, he writes:

> For example, is it illegitimate for a municipality to refuse to grant a license to operate a business, or for a planning and building committee to refuse to grant a license to erect a building, *when it is clear that the license applicant has no rights to the land of which he or she has taken possession* (emphasis added – M.Ch.)?

Later, my colleague addresses the subject of the petitioner, saying that "under the Regulations, the Customs Authority need not, and may not even be permitted, to give a license to a trespasser."

63. Now I will say my opinion. I do not disagree with my colleague that private law considerations may enter into a governmental or administrative agency's quorum of considerations. That is my position, too. I personally think that statement, to some extent, amounts to bringing apples to an orchard. Not only is there nothing wrong in it, but it may bring about a lot of good. I agree with my colleague concerning the example he cites, namely that where it is unambiguously clear that an applicant's request is based on an obstruction of justice, the authorized agency may – may, and perhaps even must – reject the application. However, as a matter of methodology, we cannot, from this example, deduce the rule that my colleague seeks to deduce. The reason is simple: the example is an extreme one, and it wouldn't be right to learn the median from the extreme.

Our sages teach us: "Fools cannot serve as an example." Tractate Shabbat 104:2 [a]. The reason is self-evident: fools act differently than those who are not fools. Their thought processes are not like those of an ordinary person; they do things that ordinary people would not do. We therefore do not deduce examples from either their thought processes or from their acts and omissions, and we do not analogize from their behavior to the general behavior of people. Just as we do not draw generalizations from fools, so do we not draw generalizations from extreme events. An extreme, by nature, has no choice but to carry the mental or emotional baggage characteristic of an extreme. In trying to draw analogies from extreme to median, therefore, we are likely to be led astray by that same baggage which is relevant – perhaps even essential – to the extreme, but nonexistent in the median, because it is the median. The extreme is graced with the qualities of an extreme, its unique value is the value of an extreme, and the qualities of the median are not necessarily the qualities of the extreme. For the matter of our concern, it is interesting to note that the rule about a "recent" incursion (*supra* para. 58) is explicitly founded the extremity of the case, and the rule is therefore limited to that same extreme case. As Justice Agranat held in the *Coptic Metropolitan* case [63]:

> The duty of the police to come to the aid of a person in the above situation and to help him or her extract the asset from

> the one who has seized it depends on two conditions, both of which must be met: (a) the request for police assistance is made at the time the incursion is still "recent"; (b) it is clear to the police that there is no doubt and no question about the fact of incursion without permission.

Id. at 240.

Only in cases of a disturbance of the peace – as demonstrated by Justice Agranat's comments – may (and even must) the police intervene in a dispute between individuals. And if the disturbance of the peace is not immediate or the fact of incursion is in doubt, the police may not intervene in a dispute between individuals. Justice Agranat made the same point, with the necessary adjustments, in the *Avik* case [54], *supra*, as did Justice Landau in the *Sarolovitch* case [61], p. 514, and it is applicable here, too.

64. Finally: So far, we have discussed the principle of *negating* the authority of the governmental and administrative agencies to intervene in a civil dispute between individuals. The substantive authority of the agencies, on the other hand, depends on the law for the issue in question. The law sets the framework for the agency's authority, which in turn determines the range in which it may operate and exercise discretion. The *Alt* case [60], for example, made that holding, distinguishing a prior ruling on the same issue (HC 107/59 Mei-Dan v. *Tel-Aviv-Jaffa Local Planning and Construction Committee* (the *Mei-Dan* case [69]) at 805). In the *Mei-Dan* case [69], because the law explicitly granted standing to the owner of the asset, the agency was permitted to include, within its quorum of considerations, "disputes" between the owner of the asset and its possessor. In the *Alt* case [60], on the other hand, the law, as interpreted by the Court, did not grant standing to the owner of the asset, and the Court therefore held that such disputes were outside the agency's field.

65. Returning the case at bar: We began our journey with section 70(b) of the Customs Ordinance [new version], according to which, "In the Regulations, the government may establish the conditions under which warehouse licenses will be granted …" I will discuss the broad

consensus which the government enjoys to issue regulations concerning licensing warehouses, thus paving the road for understanding how to treat the Regulations. In addressing the Customs Regulations, we find (in Regulation 14(b)) that a license application "will be according to the formulation in the Sixth Addendum," and the Sixth Addendum in effect establishes the preconditions which a person must fulfill in order to be awarded a license for the warehouse. We are primarily interested in Part 3 of the Sixth Addendum, according to which the license applicant must make, *inter alia*, the following declarations:

> We declare that we own the warehouse, and that it is recorded in the Land Registry under the documentation Block number … Parcel … in our possession via a rental or lease contract with … for a period of … years, commencing on … and ending on … Attached is a scheme of the warehouse and markings of the areas of the requested warehouse, approved by Engineer … the address of the warehouse: …

This tells us that the applicant must be the owner, renter, or lessee of the warehouse, and the applicant must prove as much to the Customs Authority. These conditions are reasonable and appropriate. A licensing warehouse is an extension of the Customs Authority itself, in all its dignity, because it stores goods on which customs have not been paid. This is the reason for the requirement of ownership, rental, or lease – a requirement declaring that the applicant possesses the warehouse by right.

Should we understand from this that the Customs Authority can investigate an applicant's right, as a court would? Indeed, the question of the applicant's right in the warehouse is a relevant question. It would be wrong to grant a license – more precisely, to interpret the law as though it ordered the granting of a license – to a blatant trespasser or someone whose right in the warehouse is eroded on all sides. However, how deep may the Customs Authority go to clarify the applicant's right? Do the Regulations mean that the applicant must prove his or her right in the asset beyond a reasonable doubt? By a preponderance of the evidence?

Assume, for example, that Gad possesses a warehouse by virtue of a rental contract, but Naftali, the warehouse owner, claims that Gad violated the rental contract; that the contract is therefore terminated; and that Gad must vacate the warehouse immediately. May the agency refuse the application, based on the fact that Gad has not proven his right in the warehouse? Let us further assume that Naftali filed an eviction action against Gad, and that the action is pending at the time the application is submitted to the Authority. May the Authority refuse to grant the application for this reason alone?

66. In our case, there is no dispute that the petitioner possesses and exercises control over the area, as the holder of a right should possess and exercise control over a licensing warehouse. As for the petitioner's *right* to possess and exercise control over the area, we cannot say for certain that it is a blatant trespasser. Moreover, for now (even if that was not the case at the outset), the petitioner has, at the very least, preliminary evidence regarding its right to possess the area, in the form of the map that was exchanged between the petitioner[ ] [trans.] and the Port and Train Authority (PTA) marked with the words, "storage area." Against this background, I will insist and ask: Did the Customs Authority have a right not to *renew* the petitioner's license, a license that it itself issued to the petitioner? In other words, I agree that, at the outset, the Customs Authority could have refused to grant the petitioner's request, because the petitioner did not prove its rights in the licensing warehouse. However, considering what transpired since the petitioner received the license, and considering our holding today, that the question is the *renewal* of the license, and not the issuance of a new license – couldn't one claim that, as of today, for purposes of *renewing* the license, things have changed to the benefit of the petitioner? Furthermore, since we know that the PTA has sued the petitioner to vacate the area, and the suit is pending in the authorized court, doesn't the Customs Authority's decision not to renew the petitioner's license constitute intervention in a dispute between the petitioner and the PTA? Can't we add that we are witnessing not mere intervention in a civil dispute but rather an adjudication of that dispute (even temporarily)? I will go further: I personally found it difficult to avoid the impression that the Customs Authority was called to the aid of its good friend – the PTA – and that its failure to renew the license was

intended to adjudicate, even temporarily, the civil dispute that arose between the petitioner and the PTA. Indeed, the Customs Authority did not explain to us – it did not even try to explain – which state interests would likely suffer harm if the petitioner's license were renewed, even just until the court ruled on the eviction action.

6[7 – trans.]. I have explained my serious trepidations – from this angle – in joining the camp of my colleague, Justice Zamir. And if I decided, for now, to drag myself into my colleague's camp, it is only because I couldn't say that the Custom Authority's considerations were flawed – or flawed enough – such that a court should intervene in its decision. Had the issue been a basic right of citizens and residents, I would hold otherwise. I imagine that my colleague, too, would reach a different holding. However, the issue is not a basic right of citizens and residents but rather a statutory right that a person is requesting. The petitioner is asking to be the trustee of the Customs Authority, to be permitted to hold goods in the warehouse in trust for the Customs Authority. Where a person asks to be recognized as a trustee, asks to be permitted to stop by anytime as an insider in the Customs Authority's house, I can't say that it is inappropriate to undertake a meticulous investigation as to whether the preconditions have been met. A similar – but not identical – thing may be said about those immigrants who sought to adopt the United Kingdom as their homeland. *Supra* para. 45. "Draw me after you – let us make haste" [*Song of Solomon* 1:4 – trans.]. I was drawn, and I made haste after my colleague.

6[8 – trans.]. The end: At the relevant time, I concurred that the petition should be denied. My concurrence remains as is.

The petition is therefore denied. The petitioner will pay court expenses in the sum of 25,000 NIS to Respondents 1-2 and 25,000 NIS to Respondent 3.

February 4, 1998.