AAA 343/09

Jerusalem Open House for Gay Pride and Tolerance
v.
1. Jerusalem Municipality
2. Mayor of Jerusalem

The Supreme Court
Sitting as a Court of Appeals for Administrative Affairs
[17 March 2010]

Before Justices E. Hayut, H. Melcer and I. Amit

Appeal of an Administrative Affairs decision of the Jerusalem District Court dated 10 November 2008 in AA 8187/08, issued by the Honorable Judge I. Adiel.

Facts: The Jerusalem municipality (the respondent) provides financial support to various institutions throughout the city. Institutions requesting funding are required to apply to the different municipality departments that distribute the funds, in accordance with prescribed criteria. The appellant is a registered charity that works for the gay community in the city; it operates a community center in Jerusalem for the gay community, and conducts a series of annual gay pride events in the city, including the annual gay pride parade. During the years 2005 through 2008, the appellant requested financial support from the respondent by filing applications with the respondent's Culture Department (requesting assistance through both the ongoing support track and the projects track) and from the Social Affairs Department (requesting assistance through the track involving promotion of the status of women until 2007 when all such support was terminated, through the community councils and centers track, through the youth activity track, and from the Division for Youth and Young Adults). These applications were filed in accordance with the criteria established for assistance. All of the requests were denied, on grounds relating to the tests each track established to determine receipt of support. The appellant petitioned the Court for Administrative Affairs in the Jerusalem District Court, on the grounds that the municipality's decisions were discriminatory. The lower court upheld the municipality's decisions regarding the denial of funding, and the present appeal followed. As a procedural matter, the decisions regarding all four years are being adjudicated together.

Held: The appellant's discrimination claims must be evaluated in light of a local authority's duty to distribute funds on the basis of equality. This duty is identical to the statutory duty imposed on state entities regarding the distribution of funds to public institutions through section 3A of the Foundations of the Budget Act. Section 3A dictates that funds must be distributed to categories of institutions rather than to individual institutions and that all decisions regarding the recipients of government funding must be based on clear, transparent, and equal criteria. Thus, all such decisions must be based solely on relevant considerations, and no improper motivations may be involved; the refusal to give weight to relevant considerations is equivalent to affirmatively considering completely irrelevant factors. Furthermore, even a decision based on relevant grounds can be unreasonable if the outcome shows that substantive equality has been denied. For example, statistical outcomes may be particularly relevant when a decision is reached by a collective body and motivations cannot be determined. Relevancy is determined on two levels – first through a determination that the boundaries of the group affected by the decision had been delineated on relevant grounds (a determination which is to be based on constitutional criteria for equality), and second that all those within the group were being treated equally (a determination which is to be based on administrative law criteria for equality).

In light of these principles, a review of the various criteria relied upon in denying the appellant funding shows that the municipality's decisions were defective only in one respect. Thus, the appeal can be allowed to proceed only with regard to the decision to deny the appellant funding through the community councils and centers track. That denial was based on a rule that only centers providing services on a geographic-regional basis were entitled to receive funding, meaning that the unique needs of the geographically dispersed gay community would not be met by any source of financial support from the municipality. The rule therefore gave rise to a denial of substantive equality - particularly in light of the fact that other similarly dispersed communities were receiving support through various municipal departments. As such, the Court awarded appellant the support it had requested through this track. The remedy provided is an expansion of an existing criterion used for the provision of support through the community councils and centers track, rather than the addition of a new one.

Appeal allowed.

Legislation cited

Employment (Equal Opportunities) Law, 5748–1988 (Amendment 1) (5742–1992)

Foundations of the Budget Law, 5745–1985

Libel Law (Amendment No. 5), 5737–1977

Mandatory Tenders Law (Amendment No. 12), 5762–2002

Penal Code (Amendment No. 22), 5748–1988

Prevention of Sexual Harassment Law, 5758–1998, s. 3(a)(5)

Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761–2000, s. 3(a)

Israeli Supreme Court cases cited:

[1] HCJ 4533/02 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality* (2004) (unreported).

[2] HCJ 10903/04 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality* (2003) (unreported).

[3] AAA 5905/06 *Jerusalem Municipality v. Jerusalem Open House for Pride and Tolerance* (2007) (unreported).

[4] HCJ 8912/05 *Mifgashim – Society for Educational and Social Involvement v. Minister of Education, Culture and Sport* (2007) (unreported).

[5] HCJ 6976/05 *Zinman College of Physical Education at the Wingate Institute, Ltd v. Ministry of Education, Culture, Science & Sport* (2009) (unreported).

[6] HCJ 4124/00 *Yekutieli v. Minister of Religion* (2010) (unreported).

[7] HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [1999] IsrSC 53 (5) 337.

[8] HCJ 59/88 *MK Tzaban v. Minister of Finance* [1989] IsrSC 35 (1) 421).

[9] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* (2006) (unreported).

[10] HCJ 1113/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] IsrSC 54 (2) 164.

[11] HCJ 11020/05 *Panim for Jewish Renewal in Israel v. Minister of Education* (2006) (unreported).

[12] HCJ 5264/05 *Yeshivat Shavei Shomron v. Minister of Finance* (2005) (unreported).

[13] HCJ 11585/05 *Israel Movement for Progressive Judaism v. Ministry of Absorption* (2009) (unreported).

[14] AAA 4515/08 *State of Israel v. Ne'eman* (2009)(unreported).

[15] HCJ 5325/01 *LCN Society for the Promotion of Women's Basketball v. Ramat Hasharon Local Council* [2004] 58(5) IsrSC 79.

[16] HCJ 10285/04 *Haifa Motzkin Municipal Women's Basketball League v. Haifa Municipality* (2005) (unreported).

[17] HCJ 10104/04 *Peace Now – Sha'al Educational Services v. Director of Jewish Settlements in Judea and Samaria* (2006) (unreported).

[18] HCJ 1/98 *Cabel v. Prime Minister of Israel* [1999] IsrSC 53 (2) 241.

[19] HCJ 4500/07 *Yachimovich v. Second Television and Radio Authority* (2007) (unreported).

[20] HCJ 3551/97 *Brenner v. Jewish Religious Services Law Ministers Committee* [1997] IsrSC 51(5) 754.
[21] HCJ 6300/93 *Center for Training of Rabbinical Court Pleaders v. Minister of Religious Affairs* [1994] IsrSC 48(4) 441.
[22] HCJ 571/89 *Moskowitz v. Board of Appraisers* [1990] IsrSC 54(2) 236.
[23] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693.
[24] HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social. Affairs* [1998] IsrSC 52(3) 630.
[25] HCJ 4112/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Tel Aviv Municipality* [2002] IsrSC 56(5) 393.
[26] HCJ 7111/95 *Center for Local Government v. Knesset* [1996] IsrSC 50(3) 485.
[27] HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94.
[28] HCJ 953/87 *Poraz v. Mayor of Tel Aviv-Jaffa* [1988] IsrSC 42(2) 309.
[29] HCJ 1703/92 *C.A.L. Cargo Airlines v. Prime Minister* [1998] IsrSC 52(4) 193.
[30] HCJ 6427/02 *Movement for Quality Government v. Knesset* (2006) (unreported).
[31] HCJ 7178/08 *Forum of the Druze and Circassian Council Heads in Israel v. Government of Israel* (2009) (unreport ed)
[32] HCJ 1067/08 *"Noar k'Halacha" Association v. Minister of Education* (2009).
[33] HCJ 9722/04 *Polgat Jeans Ltd v. Government of Israel* (2009) (unreported).
[34] HCJ 7691/95 *Sagay v. Government of Israel* [1998] IsrSC 52(5) 577.
[35] HCJ 205/94 *Nof v. Ministry of Defense* [1997] IsrSC 50(5) 449.
[36] HCJ 5304/02 *Israel Association of Victims of Work Accidents and Widows of Victims of Work Accidents v. Knesset* [2004] IsrSC 59(2) 134.
[37] HCJ 9863/06 *Karan - Society of Combat Veteran Quadriplegics v. State of Israel v.State of Israel - Minister of Health* (2008) (not yet reported).
[38] HCJ 11075/04 *Girby v. Minister of Education Culture and Sports - Chairman of the Council of Higher Education* (2007) (unreported).
[39] HCJ 3792/95 *National Youth Theater v. Minister of Science and Arts* [1997] IsrSC 51(4) 259.
[40] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330.
[41] HCJ 720/82 *Elizur Religious Athletic Association, Nahariya Branch v. Nahariya Municipality* [1983] IsrSC 37(3) 17.
[42] HCJ 727/00 *Committee of Heads of Local Arab Councils in Israelv. Minister of Construction and Housing* [2009] IsrSC 56(2) 79.
[43] HCJ 6407/06 *Doron, Tikotsky, Amir, Mizrachi, Attorneys at Law v. Minister of Finance* [2007](unreported).
[44] HCJ 11956/05 *Bashara v. Minister of Construction and Housing* (2006) (unreported).

[45] HCJ200/83 *Watad v. Minister of Finance* [1984] IsrSC 38(3) 113.
[46] HCJ 986/05 *Peled v. Tel Aviv-JaffaMunicipality* (2005) (unreported).
[47] HCJ 7052/03 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior et al.* (2006) (unreported).
[48] HCJ 240/98 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] IsrSC 54 (2) 164.
[49] HCJ 8186/03 *Tali School Education Fund v. Ministry of Education* (2004) (unreported).
[50] HCJ 528/88 *Avitan v. Israel Land Administration* [1989] IsrSC 43(4) 297.
[51] HCJ 4906/98 *Am Hofshi Organization for Freedom of Religion, Conscience, Education and Culture v. Ministry of Housing* [2000] IsrSC 54(2) 503.
[52] HCJ 244/00 *New Dialogue Society for Democratic Dialogue v. Minister of. National Infrastructure* [2002] IsrSC 56(6) 25.
[53] HCJ 721/94 *ElAl Airlines v. Yonatan Danielowitz* [1994] IsrSC 48(5) 749.
[54] HCJ 273/97 *Protection of Individual Rights Association v. Minister of Education* [1997] IsrSC. 51(5) 822.
[55] HCJ 1778/99 *Nicole Brenner-Kadish v. Minister of the Interior* [2000] IsrSC 54(2) 368.
[56] HCJ 293/00 *A v. Supreme Rabbinical Court in Jerusalem* [2000] IsrSC55(3) 318.
[57] CA 10280/01 *Yaros-Hakak v. Attorney General* [2005] IsrSC 59(5) 64.
[58] HCJ 8988/06 *Yehuda Meshi Zahav v. Ilan Franko, Jerusalem District Police Commander* (2006) (unreported).
[59] HCJ 3045/05 *Ben-Ari v. Director of Population Administration* (2006) (unreported).
[60] HCJ 5277/07 *Baruch Marzel v. Jerusalem District Police Commander* (2007) (unreported).
[61] HCJ 6924/98 *Association for Civil Rights in Israel v. State of Israel et. al.* IsrSC [2001] IsrSC 55(5) 15).
[62] HCJ 9547/06 *New Fund for Promotion and Encouragement of Film and Television Production v. Israel Cinema Council* (2008) (unreported).
[63] HCJ 1313/01 *Keren Yaldenu Merkazei Tikvateinuv. Ministry of Education and Culture* (2002) (unreported).
[64] HCJ 6437/04 *Tabouri v. Ministry of Education and Culture* [2004] IsrSC 58(6) 369.
[65] HCJ 7426/08 *Tebeka Advocacy for Equality and Justice for Ethiopian Israelis v. Minister of Education et al* (2010) (unreported).
[66] HCJ 678/88 *Kefar Veradim v. Minister of Finance* [1989] IsrSC 43(2) 501.

[67] HCJ 637/89 *Constitution for the State of Israel v. Minister of Finance* [1991] IsrSC 46 (1) 191.
[68] HCJ 5496/97 *Mordi et al. v. Minister of Agriculture* [2001] IsrSC 55(4) 540.

Israeli District Court Cases Cited

[69] AP(Jer) 526/05 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality* (2005) (unreported).
[70] SFC (Jer) 843/05 *State of Israel v. Shlisel* (2006) (unreported).
[71] AP(Jer) 219/06 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality*(2005) (unreported).
[72] AP(TA) 1187/05 *Condominium Representation v. Petach Tikva Municipality* (2005) (unreported).
[73] AP(Jer) 1754/09 *Jewish Center for Pluralism – Movement for Progressive Judaism in Israel v. Jerusalem City Council* (2010) (unreported).

American Cases Cited

[74] *Ricci v. DeStefano* 557 U.S. ___ (2009)
[75] *Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C. App. 1987).

For the appellant — G. Barnea, E. Horowitz.
For the respondents — E. Got, R. Bar Zohar.

JUDGMENT

Justice I. Amit

This is an appeal against a judgment of the Jerusalem Court for Administrative Affairs, dated 10 November 2008 (Deputy President Y. Adiel) in AA 8187/08, which denied the petition brought by the Jerusalem Open House for Gay Pride and Tolerance (Registered Charity) (hereinafter: "the appellant") against the Jerusalem Municipality (hereinafter: "the Municipality" or "respondent 1") and against its mayor (hereinafter: "the Mayor" or "respondent 2") (hereinafter, together: "the respondents").

1. The petition heardin the lower court related to the rejection by respondent 2 of the appellant's application for financial support for various activities it conducted during the years 2005, 2006 and 2007. In its petition, the appellant argued that the Municipality, including its various departments, had established criteria for the provision of support which effectively created insurmountable obstacles for the Jerusalem gay, lesbian and transgender

community, (hereinafter, and in accordance with the community's preferred name: "the LGBT community"), which the appellant represents.

In short, the lower court held that although the importance of the appellant's activity was undisputed, such activity did not meet the criteria established by the Municipality for entitlement to support. As a result, it held and that there was no cause to intervene with the Municipality's stated criteria, nor in its exercise of judgment in implementing said criteria in determining the appellant's entitlement to support. This issue is raised before us in the present appeal.

The parties to the appeal

2. The appellant is a registered non-profit organization, established in 1997; its purpose is the promotion of pluralism and social tolerance. Approximately ten years ago, it established a community center that operates in the Jerusalem city center (hereinafter: "the community center" or "the Open House") for the city's LGBT community. According to the appellant, the LGBT community constitutes approximately 10% of the *general* population, as well as 10% of the residents of Jerusalem. The appellant has stated that it works to integrate the LGBT community within Jerusalem's urban fabric, as an inseparable part thereof; it offers numerous activities year-round to members of Jerusalem's LGBT community and these activities have no parallel elsewhere in the city. According to the appellant, it is the only organization providing essential services to the city's LGBT community, creating a much-needed framework for the community to support each other. The appellant states that among other things, the Open House provides: social and cultural services, emotional-social support services directed specifically at the LGBT community, and approximately seventy events each month including support groups, discussions, lectures, religious and tradition-related events, social get-togethers, and various cultural events. This activity extends to the broader public both in and outside of Jerusalem, such that the activity of the Open House serves other groups within the Jerusalem public who do not identify as LGBT, but who are interested in upholding the values of tolerance, pluralism and liberalism in the city. According to the appellant's declaration, the individuals who come to its community center represent a characteristic slice of the Jerusalem population, coming from all sectors within the spectrum of that population: secular people, religious and ultra-Orthodox people, Arabs, Christians, Jews, young people, the elderly, men and women. Additionally, since 2002, the appellant has conducted the gay pride events in Jerusalem, which include the gay pride parade, the gay pride

"happening" and a series of activities that take place within the framework of the gay pride events.

3. The respondent is the Jerusalem Municipality, which is responsible for providing services to the city's residents. Among the other activities conducted by the Municipality, it provides financial support each year to entities that operate in a variety of fields. The support is provided from public funds that are received from various national government ministries, and from public funds from the Municipality itself.

Chronology of the proceedings between the parties

4. This is not the first time that the parties have met in court, and the appellant has made many appeals to the courts regarding support. In the following pages, we will survey the procedural history between the parties. We apologize to the reader for the lengthy descriptions of the proceedings, which are necessary to provide a proper explanation of the background of the current appeal.

The appellant conducted gay pride events in Jerusalem for the first time in 2002. These events included the gay pride parade, a gay pride "happening," and a series of additional events such as cultural performances, lectures, discussions, and film screenings. The appellant petitioned this Court when its application for financial support for the gay pride events in 2002 was rejected. The petition was stricken after the Municipality accepted the Court's recommendation to pay the appellant NIS 40,000 towards funding the gay pride events, though such payment did not constitute the Municipality's acknowledgement of the appellant's right to funding for similar events in the future (HCJ 4533/02 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality*[1]).

The appellant held the gay pride events in Jerusalem again in the years 2003 and 2004; these events included various activities such as literature evenings, workshops, lectures, exhibits, film screenings, parties, etc. When its application for support from the Municipality for these events was denied, the appellant again petitioned this Court. In this petition, the Court was asked to order the Municipality to provide the appellant with support to finance its activities during the years 2003 and 2004,and to require that the Minister of the Interior and the Attorney General establish new and updated procedures for the provision of financing by local authorities. Following the submission of that petition, the Minister of the Interior began working to publish an updated procedure for provision of local authority financial support as quickly as possible. The new regulations would replace the old procedure,

most recently revised in 1985. The petition against the Minister of the Interior was therefore stricken, and the Minister was ordered to pay the petitioner's costs. With respect to the Municipality, the Court held that if the appellant's application for support for 2005 was rejected as well, the appellant would be entitled to file a petition against the Municipality regarding its applications for support for that year and for the years 2003 and 2004 as well (HCJ 10903/04 *Jerusalem Open House for Gay Pride and Tolerance v. Jerusalem Municipality* [2]).

We note that on 23 August 2006, following said decision, the Ministry of the Interior published a Director-General's directive on the subject of support from local authorities for public institutions (Director-General Directive no. 2006/4 (hereinafter: "the new procedure")).

5. Moving backward chronologically, we note that on 24 April 2004, the Mayor appointed a public committee to establish criteria for the distribution of funds to cultural and artistic institutions operating in the city. The committee was headed by Professor Arnon Zuckerman (President of Bezalel and past director of the Israel Broadcasting Authority) and had many members, including senior figures from the fields of art and culture (hereinafter: "the Zuckerman Committee").

The Zuckerman Committee considered the matter for a year and a half. It was assisted by a financial consulting firm in formulating measurable criteria for assessing the amount of support to be given to each cultural institution. The criteria recommended by the Zuckerman Committee members (hereinafter: "the Zuckerman criteria") were adopted by the City Council on 10 October, 2006.

According to the Zuckerman criteria, the city provides support through the *ongoing support track* to institutions that are primarily involved in professional artistic creation, and which have been recognized by the Culture Administration at the Ministry of Education. These institutions are given support on the basis of three key criteria: quantitative activity data; contribution to the establishment of Jerusalem as the cultural capital of the State of Israel and as a global tourist center, based on international cultural and artistic projects; and artistic and cultural importance. An "advisory committee" determines which institutions are potentially eligible for support; the committee is comprised of Municipality employees and of representatives of the public who have relevant skills, do not hold positions with the Municipality, and whose appointment to the committee is not a conflict of interest.

Separate and apart from the criteria for support from the ongoing support track, the Zuckerman Committee recommended that 10% of the budget for support in the area of culture should be allocated for one-time or multi-year projects in the areas of professional art, amateur works, folklore, Jewish tradition, and Arab culture (hereinafter: "*the project track*").

6. As the 2005 gay pride events approached, various groups within the public voiced their opposition to those events being held in Jerusalem. The then Mayor also stated his opposition. The Municipality refused to take various measures for the gay pride events, including the hanging of flags purchased by the appellant along the planned route of the gay pride parade. The appellant then filed an administrative petition in the District Court in June 2005, asking that the Municipality be ordered to make it possible for the gay pride events to be held. This petition included a request that the Municipality be ordered to hang the gay pride flags in a number of Jerusalem streets, and that the respondents, the Minister of the Interior and the Israel Police, be ordered to refrain from any act that would be likely to interfere with the parade and the assembly.

The appellant's petition was granted. In her decision, Judge M. Arad held that the Municipality must make public areas available to the entire public, including various groups within it. The decision noted that the municipality must enable pluralism and allow the expression of different opinions to flourish. The court ordered the respondents to take all action required in order for the gay pride events to be held, including hanging the flags in the streets, and ordered the Municipality and the Mayor to pay the appellant's expenses (AP (Jer) 526/05 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality*[69]).

As a result of the judgment, the 2005 gay pride events, including the parade, took place in Jerusalem in timely fashion. During the parade, there were a number of confrontations between participants and protesters; these reached their peak in an incident during which three parade participants were stabbed with a knife. (The stabber was convicted, *inter alia*, of attempted murder, and was given a ten-year prison sentence (SFC(Jer) 843/05 *State of Israel v. Shlisel* [70]).

7. *The appellant's applications for support for the year 2005*: The appellant applied to the Municipality for support for the purpose of establishing, expanding, and enriching its activity. The application for support from the Municipality's Social Affairs Department referred to three

areas: community centers and councils; advancement of the status of women; and youth and young adults.

The appellant stated that the activity in its community center creates a safe space for all who enter, and offers various opportunities for youth, women, and other sectors within the LGBT community who have special needs (such as elderly men, religious men and women, Arabs, and others).

The appellant's application noted that it runs two main types of activities advancing the status of women. The first involves varied social activity, including various meetings for women within the LGBT community for the purpose of nurturing friendship and providing entertainment. The second involves the "Women's Talk" meetings, a type of social activity in which women from the LGBT community discuss a variety of subjects. This is in addition to other activities held on a weekly basis, such as a women's basketball team and a "do-it-yourself" workshop, designed to empower women in the LGBT community.

The application also noted that the appellant maintains three frameworks providing separate types of content for youth and young adults: a youth group for ages 15-18; a group for young adults ages 18-23; and an open night for young adults. The activity takes place once a week at the Open House, and the community center is open only to youth and young adults while these activities take place, allowing the participants to maintain relative anonymity. The programs are run by a professional youth coordinator, and the appellant's professional staff, comprising volunteers, social workers and psychologists. The appellant sought to expand this activity and to add a special framework for new immigrant youth, who have additional and particular needs related to their connection to the LGBT community.

8. The appellant submitted an additional funding application to both the ongoing support track and the projects track of the Municipality's Culture Department. The appellant listed a number of activities, mostly connected to sexual orientation, in the areas of film, literature, research, theater, lectures and dialogues, art, and more. With regard to the projects track, the application noted in particular the gay pride events for the year 2005, which included, *inter alia*, literary events dealing with religion, sexual orientation and sector identity, cultural events at the Jerusalem Cinemathèque, parties, a special exhibit, a pluralistic gay pride Sabbath Eve event, a discussion of lesbian sexuality, and more.

9. The Municipality rejected all the appellant's applications for support for 2005. Apparently, the applications that were submitted to the Social

Affairs Department were not passed on to either the Municipality funding committee nor to the City Council; at the very least, the appellant received no notice from the Municipality regarding these applications. The application addressed to the Culture Department was rejected by the City Council in light of the Funding Committee's recommendation, which had relied on the recommendation of the Professional Allocations Committee and that of the Advisory Committee. This last committee conducted two discussions of the appellant's application for support and concluded that the appellant did not satisfy the Zuckerman criteria, either for the ongoing support track or for the projects track.

10. Because its applications for support in 2005 were also rejected, the appellant submitted a petition to the Court for Administrative Affairs in which it asked the court to order the Municipality to provide the appellant with support for the years 2003, 2004 and 2005, and to order the Municipality to set relevant, transparent and equal criteria for the distribution of the support funds[equal criteria in the sense that their implementation leads to all groups receiving equal treatment — hereinafter: equal criteria].In its petition, the appellant raised, *inter alia*, claims of favoritism and of conflicts of interest regarding some of the members of the advisory committee —the professional advisory committee that operates in the framework of the Zuckerman criteria. The conflict of interest claim alleged that some members of the advisory committee were connected to entities that successfully requested and received support from the Culture Department. In her decision of28 May 2006, Judge Y. Tzur accepted the appellant's arguments against the Municipality (AP(Jer) 219/06 *Jerusalem Open House for Pride and for Tolerance v. Jerusalem Municipality* [71] (hereinafter: "Judge Tzur's decision"). Judge Tzur held that the Municipality's decisions regarding the appellant's applications for support for the years 2003, 2004, and 2005 violated the principle of equality, and failed to comply with both the provisions established in the support procedure and the rules of proper administration. The Municipality was ordered to provide the appellant with support funds for those years.

Regarding the year 2003, the court noted that the municipality's decision to deny the application was not supported by any reasoning and contradicted the recommendation of the Municipality's own professional body, which had recommended that the appellant be granted support in 2003. Therefore, the court held that the Municipality had not presented transparent and equal criteria for the provision of support, and had failed to present a proper context to enable a substantive examination of its decision. The Municipality

was then required to provide funding to the appellant for the year 2003 in the amount of NIS 100,000.

Regarding the year 2004, the court held that in rejecting the appellant's application, the funding committee had failed to include its reasoning, ignored the decision of the professional staff and the professional recommendations of the Municipality's legal adviser and of its comptroller, and violated the principles of equality and transparency. Judge Tzur also held that the committee's decision was unreasonable and defective in terms of the propriety of its proceeding. The Municipality was therefore required to provide the appellant with support for the year 2004 in the amount of NIS 125,000.

Regarding the year 2005, the court held in favor of the appellant, finding support for the claims of bias and conflict of interest. It also held that the claim that appellant's funding application was rejected because it did not meet the Zuckerman criteria was discriminatory. It further held that although the criteria were relevant and equal on their face, the unequal outcome indicated otherwise. The court held that the threshold requirement that the *main activity* of an institution must be in at least one of the fields of professional art to qualify for funding had led to the unequal outcome. The court also found that the Zuckerman criteria were deficient in that they omitted important objectives such as the encouragement and nurturing of cultural and artistic legacies of my raid and unique population sectors. The court therefore directed the Municipality to supplement the existing criteria with new criteria designed to include the development of the values of pluralism, the cultural and social activity of minority groups invested in preserving their uniqueness, and the special needs of minority groups.

The court supported its holdings by noting the Municipality's conduct towards the appellant and the manner in which the Municipality had handled the appellant's applications for support in previous years; together, these indicated an unfavorable atmosphere within the Municipality towards the appellant, as well as a reasonable suspicion that the Municipality had discriminated against appellant.

Regarding the appellant's 2005 application for support from the Social Affairs Department, the court criticized the Municipality for not presenting any explanation or factual background for its decision; the Municipality had failed to submit documentation showing any discussion whatsoever of the appellant's application for support from the Social Affairs Department. On the substantive level, the court rejected the Municipality's claim that the

application had been denied because the appellant was not an organization whose main purpose was the advancement of the status of women. The court held that the appellant's application for support from the Social Affairs Department should have been examined on a substantive level, and that at the very least it should not have been summarily rejected. In light of this, the Municipality was ordered to provide the appellant with the sum of NIS 125,000 in financial support for the year 2005, subject to the submission of financial statements.

11. The Municipality's appeal of Judge Tzur's decision to this Court was denied, with the Municipality's consent, with respect to the years 2003 and 2004. Regarding 2005, this Court held that the matter should be returned to the Court for Administrative Affairs, and that the appellant could submit an amended petition in which it could expand the grounds of the claim, including in relation to support for social activity, for activity directed at youth and young adults, and for "marginal culture" projects, etc. In addition, this Court held that the appellant could supplement the amended petition, to the extent necessary, with a petition regarding the applications for support for the years 2006 and 2007 (AAA 5905/06 *Jerusalem Municipality v. Jerusalem Open House for Pride and Tolerance* [3]).

12. In light of Judge Tzur's decision and of the judgment in *Jerusalem Municipality v. Jerusalem Open House* [3], the Zuckerman Committee met again on 13 December 2007 to discuss the support criteria that it had recommended. The Committee saw no need to change the criteria, and recommended that the Culture Department direct the limited budget to those institutions focused primarily on professional art in an effort to realize the goal of establishing Jerusalem as a cultural capital; the recommendation was that this should be done by "ensuring the activity of the *creative* artistic institutions within the city" (emphasis added – I.A.). The Committee went on to clarify that these criteria were not intended "to exclude unique communities and sectors from the ongoing support track, as long as such entities are engaged in regular artistic activity." As an example, the Committee pointed to a number of entities representing communities or minority sectors that had received support after they were found to meet the professional-artistic requirement, as distinguished from the community-sectoral requirement (such as the "Antea Art Gallery" which operates within the framework of the "Woman's Voice" organization, and the "Noah's Ark Theater" which works with actors and artists from CIS countries). The Committee reiterated that the budget for the projects track "did include projects of communities and minority sectors with special needs."

13. *The appellant's applications for support for the year 2006*: In 2006, the appellant submitted applications for support to the Municipality's Culture Department and to its Social Affairs Department.

As was the case in 2005, the application for support submitted to the Social Affairs Department related to three tracks: the centers and community councils track; the activity for youth and young adults track; and the advancement of the status of women track. The application for support from the Culture Department was addressed to both the ongoing support track and the projects track, with respect to, *inter alia*, the world gay pride events that were held in Jerusalem that year.

14. The Municipality's professional allocations committee approved in principle the appellant's application for support from the Culture Department for the world gay pride events in 2006, subject to the submission of various documents to the committee. In the end, the appellant's application for support was denied due to its failure to comply with the Accountant-General's Directive of 25 February 2004, entitled "Supervision of Entities Receiving Support from the State Budget — Limitations on Administrative and General Expenses"(hereinafter: "the Accountant-General's Directives"). According to this Directive, financial support may not be given to entities that deviate from the "Management and General" expenses framework. The Municipality also denied the applications for support addressed to the ongoing support track at the Culture Department for the same reason.

The appellant's applications from the Social Affairs Department were all denied as well, for various reasons, as will be described below.

15. *The appellant's applications for support for the year 2007*: In 2007, the appellant again submitted applications for support to the Municipality's Social Affairs Department, its Culture Department, and the Division for the Advancement of Youth and Young Adults.

As with the applications for support in 2005-2006, the application for support from the Social Affairs Department related to three tracks: the community centers and councils track, the activity for youth and young adults track, and the advancement of the status of women track. The application to the Culture Department referred to the ongoing support track and to the projects track. The application addressed to the Division for the Advancement of Youth and Young Adults (hereinafter: "the Division for the Advancement of Youth" or "the Division") was submitted by the appellant after the director of the Division, Mr. Shabtai Amedi, and his deputy, Mr.

Reuven Bachar, visited the Open House. Mr.Amedi returned for a second visit.

16. In its letter of 9 August 2007, the Municipality rejected the appellant's application for support from the Social Affairs Department on the grounds that the appellant was not recognized by the National Association of Community Centers or by the Jerusalem Association of Community Councils and Centers. The Municipality did not refer in its letter to the application for support from the youth activity track, nor the application for support from the advancement of the status of women track.

In an additional letter dated 9 December 2007, the Municipality responded that it had decided to reject the two applications submitted to the Culture Department, since they did not meet the criteria for the funding of cultural institutions. The letter also noted that parades did not fall within the framework of a recognized project for the purposes of support from the Culture Department's projects track.

The appellant's application for support from the Division for the Advancement of Youth was also rejected, on the grounds that the appellant did not satisfy the Division's alienated youth track criteria for support: only a limited number of young people participated in the appellant's activity, the activity was of a social character, and the leaders lacked the necessary professional knowledge.

The petition submitted to the lower court and the remedies sought in the context thereof

17. Following the rejection of the appellant's applications for support for the years 2006 and 2007, and in accordance with the judgment in *Jerusalem Municipality v. Jerusalem Open House* [3], the appellant submitted the petition that is the subject of this appeal (AA 8187/08)to the lower court on 10 March 2008. In this petition, the court was asked to order the Municipality, and the City Council and its funding committee to renew its consideration of the appellant's applications for support for these years. Appellant also asked the court to establish relevant, equal, and transparent criteria for the distribution of support funds, or alternatively, to direct the Municipality itself to promote and fund social, cultural and youth activities for the welfare of the LGBT community.

The judgment in the lower court

18. *Rejection of the applications for support from the Culture Department through the ongoing support track*: The lower court held that the Municipality was not implementing the Accountant-General's Directive in a

consistent or orderly fashion, that the Municipality was approving support for entities that did not satisfy the conditions established in the Directive, and that it could not explain the provision of support to some ten organizations that did not meet the conditions in the Directive. The court consequently accepted the appellant's argument that petitioner's claim that it rejected appellant's funding applications in an attempt to comport with the Accountant-General's Directive in fact did not justify its rejection of its appellant's applications for support.

The court rejected the appellant's claims based on favoritism and a conflict of interest. These claims asserted that other entities that had requested and received support for cultural activity had been members of the advisory committee. The court found that the relevant committee members had not taken part in the deliberations concerning the institutions in which they had an interest, and that they had not attempted to influence the views of the other members of the advisory committee. The court noted that even if some interference had been proven, as the appellant had claimed, the effect would have been no more than the nullification of the decisions that were tainted by a conflict of interest, and would not have entitled the appellant to receive the support requested.

19. On the substantive level, the lower court held that the distinction between "professional art" and the appellant's cultural activity was a relevant distinction relating to the nature of the activity. The appellant acted as a consumer of culture and not as a producer of culture, and certainly not as a professional producer thereof. The appellant had not demonstrated that the Municipality's Culture Department had funded any other activities similar to those that it conducts, or any other population group with similar characteristics. Accordingly, the appellant had not established any justification for intervention in the Municipality's exercise of judgment in reaching its decision to deny support for the appellant's ongoing cultural activity—a decision that fell within the bounds of the Municipality's discretion, and which could not, therefore, be deemed a discriminatory act.

20. Regarding the support for activity concerning "culture on the margins", as described by the guidelines established in the judgment in *Jerusalem Municipality v. Jerusalem Open House* [3], the lower court held that even assuming that the term "culture on the margins" does not necessarily refer only to culture in the fields of professional art, there would still be no cause for interfering in the Municipality's exercise of its discretion. Ignoring the Zuckerman critieria would be tantamount to, forcing

the Municipality to also allocate support to cultural activity that does not fall within the parameters of professional art. Even if it were proper to require the Municipality to support activity defined as "culture on the margins", the appellant's main area of involvement is not the creation of culture, but rather the consumption of culture, and thus it would not be entitled to support under this heading either.

21. *Rejection of the applications for support from the Culture Department through the projects track*: The court held that the "local" gay pride events for the years 2005 and 2007 did not constitute cultural events justifying support; rather, they were events that were intended to deliver a social message to the public.

Regarding the world gay pride events that were held in 2006, the Municipality itself recognized that some of these met the criteria established for support from the Culture Department's projects track, but it refused to provide financial support on the grounds that the implementation reports submitted by the appellant did not make the required distinction between those elements of the world gay pride events in 2006 that were entitled to support and those that were not. The court held that it was not improper to attach a proportionate part of the general logistical expenses to the application that constituted part of a broader project, to the extent that a more exact calculation was not practically possible, and insofar as such submission did not detract from the Municipality's right to examine the calculation method —something that it had not done in this case. Nevertheless, the court accepted the Municipality's argument that the appellant had not responded to the demand that it attach a financial statement certified by an accountant, and that the Municipality was therefore entitled, for this reason alone, to reject the application for support for the 2006 world gay pride events as well.

22. *Rejection of applications for support from the Social Affairs Department through the community centers and councils track*: The lower court held that the provision of support to community councils was only justified in light of the strong connection between the Municipality and the community centers and councils that operate in Jerusalem. This connection is expressed on an organizational level in the fact that the Municipality holds 49.7% of the share capital of the Jerusalem Association of Community Councils and Centers Ltd., and that the Mayor is the chairman of the Association's board of directors. The connection also exists in relation to the content of the activity conducted by the centers and councils, and is reflected in the fact that the community councils operate on a geographic basis, with

each council constituting a type of mini-municipality for the region in which it is located, and acting as the long arm of the Municipality in terms of providing the city's residents with access to municipal services. The court found that this indicated a material difference between the community centers and councils operating in Jerusalem and the Open House, which is the appellant's community center, and that the latter therefore does not belong to the same category as the former. As such, the provision of support to the community centers and councils but not the Open House does not constitute discrimination against the appellant, and the Municipality should not be ordered to provide support to the Open House, even if the importance of the social activity conducted there is undisputed.

It was further held that the appellant had not proven that the Municipality did finance other institutions that belonged to the same peer group as the appellant. To the contrary: the material presented by the Municipality showed that many institutions that conduct social activity directed at population groups with special needs had also been denied support.

23. *Rejection of the applications for support from the Social Affairs Department through the advancement of the status of women track*: Regarding the application for the years 2005–2006, the court held that the appellant could not be viewed as an institution whose primary purpose was the advancement of the status of women, considering that only 1.75% of its expenses were incurred for this cause. It was also held that the Municipality's decision to carry out its own activities for the advancement of the status of women beginning in the year 2007 was entirely appropriate.

24. *Rejection of the applications for support from the Social Affairs Department through the activity for youth track:* The lower court held that this type of support was given to youth movements and organizations that were recognized by the Ministry of Education, and that since the appellant did not fall within the definition of a youth movement or a youth organization, rejection of the application was justified and the appellant was not entitled to support through this track.

25. *Rejection of the applications for support from the Division for the Promotion of Youth:* The Division for the Promotion of Youth, which is a municipal body, provides support to two categories of youth. The first consists of young people who are at risk due to involvement with drugs, and the second consists of "alienated youth", who are defined by the Division as youth who are not included in any full-time educational or occupational framework. The appellant's application for support for LGBT youth was

rejected on the basis of this division into two groups, because the requested support could not be characterized as support for either of the groups. However, the lower court clarified that the purpose of the Division is to operate on behalf of and to support youth who are at risk. Therefore, since it is undisputed that LGBT youth are at risk and that they are therefore a part of the relevant peer group, the court held that the Municipality's failure to provide support to LGBT youth did constitute a discriminatory act

Nevertheless, the court denied the appellant's petition because it had not asked, in its petition, to include the youth belonging to the LGBT community within the youth population that was entitled to receive care in the framework of the Division, but had instead sought to receive the Municipality's support for the appellant's own activity. In any event, the Municipality is prepared to expand the Division's activity to include young adults who belong to the LGBT community. The Division's director indicated as such in a proposal, which appellant subsequently rejected. Once the Municipality had decided to focus the Division's activity on providing professional treatment for youth, rather than social activity — even if such activity has some therapeutic aspects, such as the activity carried out by the appellant —there was no cause for intervention in the Municipality's exercise of its judgment.

The court also dismissed the appellant's argument that it was discriminated against in relation to the "Friends of Bait Ham [Warm Home] Association", which is the only institution that did receive support funds from the Division. The court also held that although there is a significant similarity between the work of the "Friends of Bait Ham" and that of the Division, the appellant did not conduct any comparison between its own activity and that of the Association. Thus, the court was unable to determine that the appellant had suffered from discrimination vis-à-vis that Association.

26. In summary, the court denied the appellant's petition for financial support through any of the tracks. The appeal before us deals with this outcome of the lower court's decision.

The appellant's application for support for the year 2008

27. Even before the lower court rendered its decision, the appellant submitted applications for support for the year 2008. As in 2007, applications were submitted to the Social Affairs Department, the Culture Department and the Division for the Advancement of Youth, and these applications, too, were denied. The appellant therefore submitted an additional petition to the Court for Administrative Affairs(AP 9091/08). During the hearing of that petition, the parties reached an agreement that our judgment regarding the current

appeal will also apply to the year 2008. Additionally, the Municipality agreed that if it were ordered to pay appellant, it would not seek to argue that the support budget for 2008 has been distributed already. Subject to this declaration, the petition was withdrawn.

Interim summary

28. We will review the milestones that led to the appeal before us. The Municipality provided NIS 40,000 in support for the appellant's activity (the gay pride events for the year 2002), in the context of a settlement of *Jerusalem Open House v. Jerusalem Municipality* [1]. In accordance with the decision rendered in *Jerusalem Open House v. Jerusalem Municipality* [2], the appellant filed a petition in the Court for Administrative Affairs regarding the years 2003-2005, a petition which Judge Tzur granted in her judgment. Following an appeal submitted by the Municipality against that decision (*Jerusalem Municipality v. Jerusalem Open House* [3]), the case was returned to the Court for Administrative Affairs with respect to support for the years 2006-2007. The lower court denied the petitions for all three years, and the appeal before us was brought against this denial. Our decision will have consequences regarding the appellant's applications for the year 2008 as well, as agreed to by both parties.

Summary of the parties' arguments based on discrimination and the application of equal criteria

29. We have noted that all of the appellant's applications for support over the years were rejected by various bodies within the Municipality (other than an application submitted to the Culture Department's project track in 2006). The Culture Department rejected the applications in reliance on the Zuckerman criteria. The Social Affairs Department rejected the applications on the grounds that the appellant did not fit within the narrow confines of the criteria established for the purpose of providing support to community centers, to organizations involved in the advancement of women or to those that work with youth. The Division for the Advancement of Youth rejected the appellant's application on the grounds that it did not satisfy the Division's criteria.

In light of this and against the background of the LGBT community's special needs, the appellant focused its arguments on the principle of equality and on a discrimination claim —based on either direct intentional discrimination, or on discrimination that manifests itself in a disparate outcome.

30. The appellant argues that the Municipality chose criteria and standards for evaluating applications for funding motivated by a desire to exclude the LGBT community from public life in Jerusalem, based on irrelevant and illegitimate considerations. This can be understood from the fact that the Municipality found a variety of indirect routes through which it was ultimately able to finance other activities and events that also did not satisfy the Zuckerman criteria, or which did not satisfy the criteria of the other departments; such funding came either through direct support provided by a different division or department within the Municipality, direct funding of activities, or the "purchase of a service". The appellant argues that the Municipality's conduct towards it has been characterized by consistent and direct discrimination against it and against the public it represents. Thus, for example, as the lower court found, the Municipality applied the threshold conditions for satisfying the Accountant-General's Directive in an arbitrary and discriminatory fashion; the Municipality suspended the distribution of financial support in certain areas for which the appellant had submitted applications for support (i.e., the advancement of the status of women track within the Social Affairs Department, and the activity for alienated youth track within the Division for the Advancement of Youth); and the Municipality itself deals with the needs of other minority communities within the city (the ultra-orthodox and Arabs), either providing financial support for such activity or otherwise, while it does nothing to deal with the unique needs of the LGBT community. This element of the appellant's arguments was presented in order to expose the apparently illegitimate grounds underlying the criteria upon which the Municipality acted, and the manner in which the Municipality applied them with respect to the appellant. (To use a term that is generally expressed by the members of the community, the appellant wished to "out" these illegitimate considerations, used, it contends, in order to exclude the LGBT community from public life in Jerusalem).

The second element of the appellant's argument is based on the outcome element. According to the appellant, the use of the Zuckerman criteria in the area of culture and the fact that the appellant was unable to fit into any of the categories used by the Culture Department or by the Division for the Promotion of Youth together led to indirect discrimination against the LGBT community and to its exclusion. The outcome is that the appellant — which is the only institution providing for the special needs of the LGBT community—receives no public funding for its unique activity in the areas of culture, society and work with youth. The Municipality's criteria have a discriminatory effect in terms of the social reality, such that the appellant "is

closeted together" with institutions that do not receive support, even though it is entitled, so it argues, to be "placed on the shelf" alongside those groups within the Jerusalem population that do receive Municipality support.

31. The Municipality counters that the Zuckerman criteria for culture support lead to equal treatment and are reasonable, and that there are many entities that engage in cultural activity — including entities involved in cultural activities that are unique to minority populations —that do not receive support from the Municipality. Regarding social affairs and youth, the appellant did not fit into any of the relevant categories or activities (such as community centers or the status of women), and is thus no different from many other entities conducting various social and youth activities which do not receive financial support.

32. This is a much abbreviated summary of the parties' positions regarding the central question that is to be decided here, i.e., the argument that funds have been allocated in a discriminatory and unequal fashion. I see no need to delineate all of the arguments that the parties have raised before us, and these matters will become clear later on. Before we deal with the main question under discussion, we will dispose of one of the claims raised by the appellant which is unrelated to the discrimination claim.

The appellant's conflict of interest argument

33. The appellant's argument regarding this matter is limited to the application for support submitted to the Culture Department in 2005. According to the appellant, two of the members of the advisory committee (Mr. Aaron Goldfinger and Mr. Yigal Molad Hayo) were tainted by a conflict of interest due to their ties to cultural entities that operate in Jerusalem and have received support from the Municipality. The appellant argues that the recommendations from both the advisory committee and the professional allocations committee were therefore severely flawed; these recommendations formed the foundation of the municipality's decision to deny the appellant's application for support from the Culture Department in 2005.In this context, the appellant referred to Judge Tzur's decision, which recognized the conflict of interest claim and held that the said two members of the advisory committee were disqualified from serving on the committee.

I will briefly note that I do not accept the appellant's arguments regarding this point, for the following reasons:

a. We must be cautious with regard to the disqualification of suitable individuals due to a potential conflict of interest. The participation of active professionals in decisions that are tied to the distribution of financial support

for culture and art promotes the professional artistic objective involved in the distribution of these funds (HCJ 8912/05 *Society for Educational and Social Involvement v. Minister of Education, Culture and Sport* [4], *per* Deputy President Rivlin at para. 12).

b. The general practice is to allow an individual to serve while imposing various restrictions and rules that limit the possibility of a conflict of interest (compare: *Mifgashim v. Minister of Education, Culture and Sport* [4] and HCJ 6976/05 *Zinman College of Physical Education at the Wingate Institute, Ltd v. Ministry of Education, Culture, Science & Sport* [5], *per* Justice Hayut at para. 13).

c. The advisory committee, which was established at the instigation of the Zuckerman Committee and for the purpose of implementing the Zuckerman criteria, is a body that makes recommendations regarding the distribution of support funds, but it is not a decision-making body (compare *Mifgashim v. Minister of Education, Culture and Sport* [4], at para. 14).

d. Committee members Goldfinger and Hayo refrained from participating in discussions concerning the institutions for which they were interested parties.

e. Even if it is assumed that Goldfinger's and Hayo's participation in the Committee was somehow improper — and I am far from holding that it was — the consequence would be, at most, the nullification of the decisions tainted by a conflict of interest. However, such impropriety would still not provide a basis for allowing the appellant to receive the support it sought.

34. We will now proceed to examine the central question in this appeal. However, prior to examining in detail the parties' arguments regarding the Zuckerman criteria for support for culture, and regarding the criteria for evaluating applications to the Social Affairs Department and the Division for the Promotion of Youth, as a basis and platform for discussion, we will first conduct a legal review of the subjects that are relevant to this case.

The normative framework – the provisions of s. 3A of the Foundations of the Budget Law

35. The provisions of s. 3A of the Foundations of the Budget Law, 5745-1985 (hereinafter: "the Budget Foundations Law") constitute the normative source for the distribution of funds for the support of public institutions. For more about the history of the Budget Foundations Law, see HCJ 4124/00 *Yekutieli v. Minister of Religion* [6]. The provisions of the Budget Foundations Law require the authorities to act reasonably and on the basis of equality with regard to the distribution of their budgets, while creating clear,

transparent and relevant criteria that uphold these values. The text of the section is as follows:

> Support of Public Institutions
>
> 3A. (a) In this section –
> "Public Institution" – An entity that is not a government institution, which operates for the purpose of education, *culture*, religion, science, *art*, *welfare*, health, sports or a *similar purpose*;
>
> The amount set out in a Budget Item for a *type* of Public Institution shall be divided among *Public Institutions of the same type pursuant to equal tests*.
> The party in charge of the Budget Item shall formulate, in consultation with the Attorney General, equal tests for dividing the amount determined in that Budget Item for the purpose of supporting Public Institutions (hereinafter – the Tests).
> The Minister of Finance shall formulate, in consultation with the Attorney General, a procedure pursuant to which applications by Public Institutions for the receipt of support from the state budget shall be submitted and considered (hereinafter – the Procedure).
> *The Tests and the Procedure shall be published in Reshumot* [the Government Gazette].

(*Emphases added* – I.A.)

The provisions of s. 3A of the Budget Foundations Law proceed along three axes: the *first* is a normative-functional axis, meaning that support is given to a *type* of institution and will not be given, directly or indirectly, to particular institutions; the *second* axis involves the principle of equality, requiring that support be given according to criteria that are substantively equal; and the *third* axis involves the administrative authority's discretion with respect to the distribution of support funds for these and other activities (HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [7], at p. 384).

Support can only be provided pursuant to clear, relevant and equal criteria "according to the importance of the issue and not the importance of the

interested party" (HCJ 59/88 *MK Tzaban v. Minister of Finance* [8], at p. 707). For further general discussion of the distribution of resources on an equal basis, see HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister*[9]. Regarding the principle of equality as applied to the allocation of state budgetary funds for various purposes and subsidies, see HCJ 1113/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [10], at pp. 164, 172, 184.

As a rule, no entity has a vested right in the receipt of support from the state (see HCJ 11020/05 *Panim for Jewish Renewal in Israel v. Minister of Education* [11], para. 10; HCJ 5264/05 *Yeshivat Shavei Shomron v. Minister of Finance* [12]). However, once an authority has declared its intent to provide support and establishes criteria under which institutions will receive support, these criteria must comport with the principle of equality (HCJ 11585/05 *Israel Movement for Progressive Judaism v. Ministry of Absorption* [13], at para. 10). The same principle applies to both support in general and to any specific benefit. As stated in AAA 4515/08 *State of Israel v. Ne'eman* [14], at para. 16:

> 'In a case in which the authority has discretion to grant a particular benefit, whether to a particular party or to others, then even if it is not required to grant the benefit to anyone, once it has chosen to grant it to others, it may not deny the particular person the benefit if there is no relevant difference between them [. . .] This is the general rule, and it is even more applicable when the policy is to provide benefits out of state funds'.

36. This Court has dealt often with the matter of equality in connection with government authorities' funding distribution in support of public institutions. Although according to its literal text, the Budget Foundations Law applies to support paid out of the state budget, it has been held that the principle of distributing support according to equal criteria applies to both administrative authorities that are not state organs, and to publicly supported entities (see D. Barak-Erez "Enforcement of the State Budget and Administrative Contracts," 1 *Hamishpat* 253 (1993), at p. 254). Additionally, although according to its literal text, the Budget Foundations Law applies only to state institutions, the equal criteria requirement also applies to local authorities who must also follow proper criteria when distributing funds (see: Y. Zamir, *Administrative Authority* (vol. A, 2010), at p. 248; HCJ 5325/01 *LCN Society for the Promotion of Women's Basketball v. Ramat Hasharon Local Council* [15], at p. 89; HCJ 10285/04 *Haifa Motzkin Municipal*

Women's Basketball League v. Haifa Municipality [16]). One reason for extending the application of the principle of equality to local governments is to cover the distribution of funding from a local authority, in addition to the explicitly covered local projects funded by the central government. (Regarding the distinction between budgeting from the central government and funds derived from city taxes collected by the municipalities, see HCJ 10104/04 *Peace Now — Sha'al Educational Services v. Director of Jewish Settlements in Judea and Samaria* [17]). Against this background, a procedure regarding the allocation of support by local authorities—discussed below—was prescribed.

The principle of equality in the distribution of resources, funds and support thus applies to a local authority as well. Although under certain circumstances, the central government may implement a practice that violates the principle of equality by virtue of an express discriminatory provision included in the Budget Foundations Law itself, any such violation by a local government will still be prohibited according to the principle that "what is permitted for the teacher is forbidden for the students". Courts have ruled in accordance with this principle regarding the allocation of land to a public institution by a local authority (AP(TA) 1187/05 *Condominium Representation v. Petach Tikva Municipality* [72]) and regarding the distribution of support funds to unofficial but recognized schools (AP(Jer) 1754/09 *Jewish Center for Pluralism—Movement for Progressive Judaism in Israel v. Jerusalem City Council* [73]).

Alongside all the above, we note the obvious: the Basic Laws require the administrative authorities to exercise their powers in a manner that protects the values protected by said Basic Laws. It should also be emphasized that the duty to act in accordance with the principle of equality regarding the distribution of funding applies independently of s. 3A of the Budget Foundations Law, and the courts have applied the principle of equality both before and after the section's enactment (*Yekutieli v. Minister of Religion* [6], *per* President Beinisch at para. 31).

Procedure for distribution of funding to public institutions by the local authorities

37. Local authorities distribute funds for their support of public institutions in accordance with the new procedure [described above in para. 4].Section 4.3 of the old procedure of 1985 provided that the "authority shall determine for itself, to the extent possible, the criteria for the provision of support from the authority's various departments". According to the new

procedure (published on 23 August 2006), the local authority's funding committee discusses applications for support and judged according to equal criteria established in advance by the local authority. The funding committee's recommendations are then submitted to the local council for a final decision. Section 8.4 of the new procedure provides that the council may not approve the criteria until it has received a written opinion from the authority's legal adviser confirming that the criteria are indeed equal. Section 8.5 of the new procedure provides that "the criteria to be prescribed by the local authority, after it has reviewed the opinion of the authority's legal adviser, will be relevant and equal and will take into consideration the needs of the population of the local authority and the need to provide services to all parts of the population."

In conclusion, the Jerusalem Municipality must distribute support funds to public institutions in a manner that is appropriate for the Municipality as a public trustee, pursuant to the new procedure and the principle of general equality, in accordance with clear, open, equal, and relevant criteria, taking into consideration the needs of the city's entire population.

The duty to weigh relevant considerations and to refrain from weighing extraneous considerations

38. The distribution of funding to public institutions by an administrative or local authority, as in the instant case, constitutes an exercise of administrative power. As such, it must be done in accordance with the rules of administrative law, must be free of any illegitimate or arbitrary considerations, and must not violate the principles of justice. The decision must meet the test of reasonableness. It also must be based on a suitable factual background and on the entire range of relevant considerations, and reflect a proper balancing of all of them. From the government authority's perspective, improper considerations must remain behind a "veil of ignorance" on which all the relevant considerations should be "screened". Nevertheless, even when an administrative decision is based on proper and relevant considerations, it may still be found to be unreasonable. This would be the case when the authority has not given any weight at all to a relevant consideration that is essential to the matter. The total avoidance of a relevant consideration is the flipside of the reliance on an extraneous consideration, the significance of which is the same as reliance on a factor that should have been completely ignored. In addition, the weight attributed to the various considerations must be examined, since "the dish may yet be ruined, even if the cook adds all the correct ingredients, but does so in amounts which are

significantly different from what is required" (see D. Barak-Erez, *Administrative Law* (2010), at pp. 725-727).

The duty imposed on an administrative authority to weigh relevant considerations and to refrain from weighing extraneous considerations is examined in light of the law that grants it the authority to act. It is also evaluated in light of the context of each case, and in light of the basic values of the legal system. The basic values of the legal system comprise the "normative matrix" – the concepts of good faith and fairness, the principle of equality, and the principle of pluralism, which can also constitute a relevant consideration (*Conservative Movement v. Minister of Religious Affairs* [7], at pp. 375-377).

Thus, in examining the Municipality's decision, we must check whether it involved any "suspicious" considerations that were irrelevant under the circumstances. For example, as Justice Zamir wrote in *Conservative Movement v. Minister of Religious Affairs* [7] (*ibid.*, at p. 374): "There is no doubt that the difference in religious conception. . . is not a relevant consideration; rather, it is an extraneous and illegitimate one for the purpose of the provision of support by the Ministry of Religions . . . ". And note: a distinction must be made between extraneous considerations and those derived from improper motives. Occasionally, a consideration which is in and of itself a positive and desirable one may be disqualified as extraneous in circumstances in which it is taken into account by an administrative authority that has not been authorized to weigh such considerations (see Barak-Erez, *Administrative Law*, *supra*, at p. 358). In this case, if the Municipality's decisions were based on the identity of the organization requesting support and not on the activity for which the support was requested, the consideration is an improper one; the test should be the substance of the activity and not the identity of the applicant, according to the importance of the matter and not the importance of the interested party (see: *Tzaban v. Minister of Finance* [8], at p. 707; *Panim for Jewish Renewal in Israel v. Minister of Education* [11]; *Conservative Movement v. Minister of Religious Affairs* [7], at p. 358).

39. A basic difficulty arises in connection with proof of extraneous or improper considerations that have come into play. Generally, when administrative authorities do give weight to such extraneous or improper considerations, an attempt is made to camouflage or cover up the real elements forming the basis of their decisions. The discrimination is not declared publicly or flaunted; it is instead hidden beneath the surface, and the criteria that are disclosed are those "that do not tell us the truth, and are

instead acts of hypocrisy. They are not criteria, but a form of lip-service, and they do not reflect the real truth" (HCJ 1/98 *Cabel v. Prime Minister of Israel* [18], at p. 260). The difficulty in identifying extraneous considerations is exacerbated when a statutory-collective body with many members, such as, in our case, the City Council, makes the administrative decision (see Barak-Erez, *Administrative Law*, *supra*, at p.670, n.132). Indeed, it is difficult for a court to examine what is hidden in the intention of an administrative authority, and the court must therefore rely on a circumstantial or statistical body of evidence. Another possible method is to look for external defects that can provide evidence of the administrative authority's use of extraneous or improper considerations (HCJ 4500/07 *Yachimovich v. Second Television and Radio Authority* [19]).One example would be a "silent" decision, which itself attests to it having been based on irrelevant considerations(see and compare: HCJ 3551/97 *Brenner v. Jewish Religious Services Law Ministers Committee* [20], at pp. 771-772); an administrative authority's unreasonable delays and procrastinations in the process of reaching a decision (HCJ 6300/93 *Center for Training of Rabbinical Court Pleaders v. Minister of Religious Affairs* [21],at p. 452); and even a high failure rate in a licensing test, which can indicate an intention to cause examinees to fail on the basis of an extraneous "closing the market" consideration (see HCJ 571/89 *Moskowitz v. Board of Appraisers* [22], at p. 245; compare *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister*[9])).

The duty imposed on an administrative authority to act on the basis of equality, and the prohibition against discrimination

40. The principle of equality has held a primary position as a basic principle within the Israeli legal system from the very beginning, and I will not add to all that has been written to commend equality, so as not to be bringing even more coals to Newcastle. I will therefore limit myself to presenting a small collection of the praises sung in the case law to the principle of equality: it is "the very soul of our entire constitutional system" (HCJ 98/69 *Bergman v. Minister of Finance* [23], at p. 698); "one of the highest principles in the land—head and shoulders above any of the other principles" (HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social Affairs* [24], at p. 650); "It is the foundation of social existence, it is one of the touchstones of a democratic regime" (see HCJ 4112/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Tel Aviv Municipality* [25], at p. 415). There are those who see the principle of equality as the common denominator and the basis for all basic human rights, and for all other values forming the foundation of democracy (Y. Zamir and M. Sobel, "Equality

Before the Law,"5 *Mishpat U'Mimshal (Law and Government)* 165 (2000), at p. 166). For more on the principle of equality in scholarly journals, see, for example, F. Radday, "On Equality," 24 *Hebrew Univ. L. Rev. (Mishpatim)* 241 (1994); Y. Sapir, "Implementation of the Principle of Equality in the Case Law of the High Court of Justice," 37 *Hapraklit* 143 (1986).

The duty to act on the basis of equality means that equals must be treated equally, and that different parties must be treated differently. Thus, the obverse of equality is discrimination, which is a matter of treating equals differently and unfairly. The recognition of a discrimination claim is a practical expression of the high level at which the principle of equality is placed (Barak-Erez, *Administrative Law*, *supra*, at pp. 673-678). The violation of the principle of equality has been called "the worst of all evils" (HCJ 7111/95 *Center for Local Government v. Knesset* [26], *per* Justice Cheshin at p.503); discrimination can lead to humiliation and a violation of human dignity (HCJ 4541/94 *Miller v. Minister of Defense* [27]), at p. 132; and "there is no element which is more destructive to society than its sons and daughters having a sense that they are being subjected to a double standard" (see HCJ 953/87 *Poraz v. Mayor of Tel Aviv-Jaffa* [28], at p. 332; *Moskowitz v. Board of Appraisers* [22], *per* President Barak at para. 13). This is certainly the case when what is involved is "generic" discrimination, part of the "essential core" of discrimination, based on a feature of a person's identity such as, for example, religion, race or gender. Discrimination such as this has been described as "inflicting a mortal blow on human dignity" (see HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social. Affairs* [24], at pp. 658-659; and compare: A. Barak, *The Judge in a Democratic Society* (2004), at p. 142). It has been said in the same spirit that " . . . discrimination (either real or imagined) leads to a sense of mistreatment and frustration; a sense of mistreatment and frustration leading to jealousy. And when jealousy appears, understanding is lost . . .We are prepared to bear a burden and suffering and distress if we know that others who are our equals — are like us and are with us; but we will protest and refuse to accept a situation in which others — who are our equals — receive that which we do not receive" (HCJ 1703/92 *C.A.L. Cargo Airlines v. Prime Minister* [29], at p. 204).

41. The obligation to allocate support on an equal basis and without discrimination is therefore derived from the principle of equality. In some circumstances, a violation of that principle is also perceived as being a violation of a constitutional right. The case law has held that the right to dignity that is anchored in Basic Law: Human Dignity and Liberty,

necessarily includes the right to be treated equally, to the extent that this right is closely and substantively related to the right to human dignity—meaning that it is necessary to examine the nature of a violation of the principle of equality, and the degree of its connection to the concept of human dignity (see HCJ 6427/02 *Movement for Quality Government v. Knesset* [30]; HCJ 7178/08 *Forum of the Druze and Circassian Council Heads in Israel v. Government of Israel* [31] at para. 8, and the references cited therein;HCJ 1067/08 *"Noar k'Halacha" Association v. Minister of Education* [32], *per* Justice H. Melcer at para. 2; HCJ 9722/04 *Polgat Jeans Ltd v. Government of Israel* [33]; Zamir, *Judicial Authority*,*supra*, at pp. 181-182; Barak-Erez, *Administrative Law*, *supra*, at pp. 677-678).

The administrative obligation to act in accordance with the principle of equality is broader than the protection of the constitutional right to be treated equally ,in the sense that it also applies to situations in which the discrimination does not violate the constitutional right to equality, or is not the result of improper motivations and may even be incidental or coincidental (see Barak-Erez, *Administrative Law*, *supra*, at pp. 678-680; and see A. Bendor, "Equality and Administrative Discretion — On Constitutional Equality and Administrative Equality: *Shamgar Volume - Articles* 1(2003) 287). Thus, an administrative act that affects the economic-business activity and the competition between different businesspeople may be considered unequal, even though it does not raise any constitutional questions. The tendency of the court to interfere in an administrative decision in the framework of its exercise of judicial discretion is contingent upon the magnitude of the violation of equality. A light or non-substantive violation will not incur the same treatment as a serious violation; the more important the interest or the right of the victims, the more likely it is that the court will intervene with respect to the administrative decision (HCJ 7691/95 *Sagay v. Government of Israel* [34], at pp. 611-612).

42. In order to establish a relevant distinction between legitimate and prohibited discrimination, we must examine the purpose of the differentiation, the nature of the matter, and the unique circumstances of each case. A typical case of an irrelevant distinction would be a decision that is based on an improper group-based distinction. But there are also situations in which a distinction can be irrelevant even if it is not based on an improper group-based distinction; as opposed to this, a distinction may be relevant even if it relates to a group characteristic that is generally considered to be an improper basis for a distinction (see Barak-Erez, *Administrative Law* (2010), *supra*, at pp. 686-688; M. Tamir, "The Right of Homosexuals and Lesbians

to Equality," 45 *Hapraklit* 94(2000), at pp. 97, 113). For examples in the case law regarding the issue of relevancy, see HCJ 205/94 *Nof v. Ministry of Defense* [35]; Y. Livnat, "The Individual and the Community: A Communitarian Critique of HCJ 205/94 *Nof v. Ministry of Defense*," 31 *Hebrew Univ. L. Rev. (Mishpatim)* 219 (2000); *Cabel v. Prime Minister of Israel* [18]; *Yekutieli v. Minister of Religion* [6]; HCJ 5304/02 *Israel Association of Victims of Work Accidents and Widows of Victims of Work Accidents v. Knesset* [36]; HCJ 9863/06 *Karan - Society of Combat Veteran Quadriplegics v. State of Israel -Minister of Health* [37]; *State of Israel v. Ne'eman* [14]; HCJ 11075/04 *Girby v. Minister of Education Culture and Sports - Chairman of the Council of Higher Education* [38]). Even when the relevancy test is passed and it is determined that a particular distinction is relevant, a question may nevertheless arise as to whether the weight accorded to it was reasonable (*Miller v. Minister of Defense* [27], at pp. 132-135).

Substantive equality reflects the values of justice and fairness. The question of whether a distinction made by a government authority complies with substantive equality is decided in two stages: at the first stage, the peer group is defined, and at the second stage, a determination is made as to whether the authority is treating all those within the peer group equally (see HCJ 3792/95 *National Youth Theater v. Minister of Science and Arts* [39]; *Israel Movement for Progressive Judaism v. Ministry of Absorption* [13]; *Yekutieli v. Minister of Religion* [6]; *Conservative Movement v. Minister of Religious Affairs* [7]). At the first stage, the relevant reference group— the "peer group" — is defined and the boundaries of the group are also the boundaries of the required equality. Sometimes, identification of the group is a simple matter and is even established by statute; in other cases, it is difficult to identify the group. The delineation and definition of the boundaries of the peer group involve a consideration of the purpose of the norm, the substance of the matter, the basic values of the legal system, and the unique circumstances of each case; on the basis of these factors, it is possible to determine whether an administrative authority's decision has been based on either a relevant or an irrelevant consideration (see HCJFH 4191/97 *Recanat v. National Labour Court* [40], at pp. 346-347; *Conservative Movement v. Minister of Religious Affairs* [7], at p. 363 and the sources cited there; *Karan - Society of Combat Veteran Quadriplegics v. State of Israel -Minister of Health* [37], at para. 10). At the second stage, it is necessary to determine whetherthe administrative authority has treated the members of the peer group equally, or whether it is acting discriminatorily towards individual members of the same peer group.

A "rough" analysis allows us to say that the first stage, involving the identification and delineationof the boundaries of the peer group, requires an examination from the perspective of constitutional equality and regarding the possibility of a "suspect" group affiliation, within the "essential core" of discrimination which is based on race, religion, ethnic origin, gender, sexual orientation etc.The second stage, atwhich the court examines whether the authority is treating all members of the peer group equally, is based on an administrative equality perspective (Tamir, "The Right of Homosexuals and Lesbians to Equality", *supra*, at p. 110).

43. The case law long ago considered the connection between the issue of equality and that of reasonableness (see D. Barak-Erez, *Administrative Law* (2010), at pp. 689-692). The criteria regarding the elements relevant to equality must be established in a reasonable manner, taking into account the equality that is sought (HCJ 720/82 *Elizur Religious Athletic Association, Nahariya Branch v. Nahariya Municipality* [41], at p. 21-22). Even when the various considerations are relevant, the weight attributed to them is also examined. Thus, for example, as Justice Zamir wrote in *National Youth Theater v. Minister of Science and Arts* [39]:

> 'A peer group may have been established on the basis of a relevant consideration, but its establishment as a separate peer group may nevertheless be unjustified. How can this be? It may be that in the circumstances of the particular case, the relevant consideration is of such little importance that it cannot be used to justify the existence of the separate peer group. In such a case, the establishment of a separate peer group on the basis of this consideration is defective not because it involves an extraneous consideration but because of the improper weight attributed to the relevant consideration' (*ibid*., at p. 283).

(See also: *Conservative Movement v. Minister of Religious Affairs* [7], at pp. 363-64; HCJ 727/00 *Committee of Heads of Local Arab Councils in Israel v. Minister of Construction and Housing* [42], at p. 92). Similarly, in HCJ 6407/06 *Doron, Tikotsky, Amir, Mizrachi, Attorneys at Law v. Minister of Finance* [43], at para. 43, this Court held that the distinction made between the border settlements and the restricted regions, for the purpose of compensation for war damages, was based on relevant considerations and that two different peer groups were involved. Nevertheless, the majority opinion held that the distinction did not justify the substantial disparity in the compensation arrangements for employers in the two different regions, and

that the temporary provisions regarding the compensation provided for the month of July during the Second Lebanon War were not reasonable. Regardless, the Court's ultimate decision was that it would not intervene in the compensation arrangements because the said "unreasonableness" was "cured" in the framework of the overall arrangement.

Realization of the principle of equality through the use of guiding criteria

44. As is the case with an authority's internal guidelines, the use of criteria that guide the administrative authority regarding the distribution of support will constitute the high road toward reducing the weight attributed to irrelevant or illegitimate considerations, and toward ensuring equality, while strengthening the objective element in an authority's decision (*National Youth Theater v. Minister of Science and Arts* [39], at p. 277). However, such criteria are not a wonder drug that removes all pain of discrimination, either because of a concern that criteria may be "designed" to fit the party who receives the support, or that the criteria may include a hidden preference or "hidden discrimination" (see Barak-Erez, *Administrative Law*, *supra*, at pp. 695-697; *Jewish Center for Pluralism v. Jerusalem City Council* [73]; HCJ200/83 *Watad v. Minister of Finance* [45], at pp.121-122; *Cabel v. Prime Minister of Israel* [18], at pp. 259-260). It is therefore necessary to examine, in each individual case, whether a particular criterion does not embody a bias that operates either in favor of or against certain individuals or groups.

45. The case law criticizes the use of a criterion that can be met by only one single group or entity. Justice Hayut wrote as follows in *Zinman College v. Ministry of Education, Culture, Science & Sport* [8]:

> '. . . We wish to note that given the fact that the Wingate Institute is the only institution that received support pursuant to it and in light of the well-supported doubt raised by the petitioner regarding the ability of any other body whatsoever to meet the requirements established therein, the respondents did well by canceling it, and earlier would have been better' (*ibid*., at para. 18).

See also the decision of Judge Solberg of the Court for Administrative Affairs in *Jewish Center for Pluralism v. Jerusalem City Council* [73], in which he held that the significance of the application of the criteria adopted by the Municipality was the earmarking of a benefit for certain institutions only, and that by adopting such criteria, the Municipality was effectively referring to those institutions by name.

46. Just as we may not ignore an inherent connection between a certain group and a criterion that is met only by that group, we are also prohibited

from ignoring an inherent connection between a certain group and a criterion that will be satisfied by all, except for one particular group. This is because the use of a particular criterion can be used as a cover for the discriminatory treatment of certain groups within the population. Nevertheless, the legality of a particular criterion will depend on the circumstances of each case. Thus, for example, a distinction based on a military service or national service requirement will be deemed to be either a permitted distinction or a case of improper discrimination, depending on the context and the objective of the arrangement under discussion (HCJ 11956/05 *Bashara v. Minister of Construction and Housing* [44], at para. 9).

An objective–result based test for discrimination

47. The discrimination issue relates not only to situations in which the administrative authority intended to violate the principle of equality. An administrative authority decision, the results of which are discriminatory in actual effect, maybe disqualified even if the administrative authority did not act with discriminatory intent, and even if the discrimination was implemented unconsciously. Justice Barak's comments in *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [9] are pertinent here:

> 'Prohibited discrimination may also occur without any discriminatory intention or motive on the part of the persons creating the discriminatory norm. Where discrimination is concerned, the discriminatory outcome is sufficient. When the implementation of the norm created by the authority, which may have been formulated without any discriminatory intent, leads to a result that is unequal and discriminatory, the norm is likely to be set aside because of the discrimination that taints it. Discrimination is not determined solely according to the thought and intention of the creator of the discriminatory norm. It is determined also in accordance with the effect that it has *de facto* [. . .] The test for the existence of discrimination is an objective test that focuses on the outcome of realizing the norm that is under scrutiny. It is not limited to the subjective thinking of the creator of the norm. The question is not whether there is an intention to discriminate against one group or another. The question is what is the final outcome that is created in the social context' (*ibid.*, at para. 18).
>
> (See, similarly, *ibid.*, *per* President Barak at para. 19; HCJ 986/05 *Peled v. Tel Aviv-Jaffa Municipality* [46], at para. 11; HCJ 7052/03

Adalah Legal Center for Arab Minority Rights in Israel v. Minister of the Interior et al.[47], *per* President Barak at para. 51; *Yekutieli v. Minister of Religion* [6] *per* Justice Levy at para. 3).

48. It is easier to prove the existence of discrimination in terms of results than it is to prove discrimination in terms of attitude, or discrimination resulting from improper motivation. Nevertheless, an unequal result does not necessarily indicate that there has been discrimination. Each case must be examined separately, in accordance with its circumstances and according to the norm under review, in order to determine whether the result indicates that the norm has a discriminatory effect in the given social reality. It is not at all simple to answer the question of whether an administrative norm whose outcome appears to violate the rights or interests of a particular group is actually discriminatory. An example from American law which demonstrates the difficulty in applying the outcome test is the case of *Ricci v. DeStefano* [74]. In that case, the judges were divided in their views on the issue of whether a municipality had properly refused to certify the results of an examination for the promotion of firemen, in light of the statistical racial inequality of the results. White firefighters passed the promotion examination at a higher rate than did firefighters belonging to all racial minorities in general, and specifically, at a higher rate than African-American firefighters. The municipality therefore decided not to approve the examination results. The petitioners—all of whom had successfully passed the examination—included a white firefighter who suffered from dyslexia and a Hispanic firefighter. They argued that the municipality's decision not to certify the test results contravened the principle of equality. The five justices writing for the majority accepted the petitioners' argument and held that municipality's decision not to certify the exam results violated the statutorily mandated standard of equality. It was held that the municipality's refusal to certify the exam results, on the basis of race, did not meet the evidentiary burden required under the circumstances of the case (the strong-basis-in-evidence standard) in order to prove that the promotion examination had been discriminatory. Additionally, the Supreme Court held that the municipality had not carried the burden of proof with respect to the question of whether a less discriminatory, alternative examination method was available. In contrast, the four judges who supported the minority opinion wrote that although support for the petitioners' position was understandable, the petitioners did not have a vested right to a promotion and the municipality did have the right to invalidate the examination if there was good reason to believe that were it allowed to stand, the municipality would be exposed to

discrimination suits. The minority justices also wrote that the majority holding that the municipality did not certify the examination results only because the white firefighters had passed the examination at a much higher rate than the Hispanic firefighters, and especially in comparison to the African-American firefighters, ignored the substantial evidence presented of the many defects in the promotion examination chosen by the municipality. The minority justices noted the existence of different promotion examinations used by other municipalities, which had generated more equally distributed results. (For a critique of the American Supreme Court's opinion in this case, see L. Guinier & S. Sturm "Trial by Firefighters," The New York Times (11 July 2009)
(http://www.nytimes.com/2009/07/11/opinion/11guinier.html).)

49. In HCJ 240/98 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [48], at p. 178, this Court dealt with a petition that attacked the small budget for religious services provided to the Arab public. The analysis was based on a comparison between the percentage of the overall budget given to Arab religious services (2%)and the percentage of the total population the Arab sector constitutes(20%). The petition was denied on the grounds that the arguments were presented only generally, but the Court noted that the gap in the distribution of the budget was an indicator of discrimination against the Arab minority —an example of a self-proving matter. (For a critique of the out come of this decision, see: H. Sommer and M. Pinto, "From Specific Legislation to General Doctrine —The Function of the Judicial Branch in Reinforcing Affirmative Action in Israel," in *Affirmative Action and Ensuring Representation in Israel* (2004) 195, at p. 206; Y. Rabin and M. Lodzki-Arad "The Continued Financial Discrimination of the Arab Sector", 7 *Hamishpat*505, at p. 508). Thus, when a particular sector within the population receives no financial support or does not receive funding that is commensurate with that sector's percentage makeup of the total population, the disparity may be evidence of discrimination, based on an examination of the outcome test (Barak-Erez, *Administrative Law*, *supra*, at p. 700).However, a minor deviation from a relevant group's proportionate share will not necessarily indicate discrimination, even according to the outcome test (*Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* [10], at p. 182).

Budgetary constraints and the addition of resources

50. A budgetary consideration is a relevant and important consideration, which, under certain circumstances, may justify a deviation from the

principles of equality and pluralism. Nevertheless, a budgetary difficulty will not, by itself, justify the restriction of a service provided to the public in a manner that selectively harms particular sectors, in violation of these principles (HCJ 8186/03 *Tali School Education Fund v. Ministry of Education* [49], *per* Justice Cheshin, at para. 29). An administrative authority occasionally may be required to adopt certain measures even if they involve additional effort and additional resources in order to provide equal treatment (see, *Conservative Movement v. Minister of Religious Affairs* [7], at p. 368; *LCN Society v. Ramat Hasharon Local Council* [15]; Sommer & Pinto, "Specific Legislation" and Rabin & Lodzki-Arad, "Continued Financial Discrimination"). It has already been said in this context that "the principle of equality, from a social perspective, is no less important than garbage removal" (*Conservative Movement v. Minister of Religious Affairs* [7], at p. 368).

Equal results — active correction and affirmative action

51. The equal results standard and the recourse to actively correct existing inferiority or to affirmative action are closely connected, in that the administrative authority will be required to give more to a party that has suffered from inferior treatment in the past (Barak-Erez, *Administrative Law*, *supra*, at p. 701-703).

There are those who strongly object to affirmative action, and who view it as constituting reverse discrimination. This approach disqualifies the use of any distinction, either for good or bad, between the majority and the minority, advocating "color-blindness" (see, E. Benvenisti "National Courts and the Protection of National Minorities," in 3 *Alei Mishpat* (*Academic Center of Law L. Rev.)* 463 (2003), at p. 469). According to this approach, the state must maintain neutrality and refrain from supporting or suppressing any particular group. However, according to the affirmative action approach, what is required is "color-consciousness" rather than "color-blindness", to the extent such consciousness benefits a particular population (see G. Gontovnik, "The Right to Culture in a Liberal Society and in the State of Israel," 27 *Iyuney Mishpat (Tel-Aviv U. L. Rev.)* 23 (2003), at p. 46).

Affirmative action is a practice aimed at realizing substantive equality, and the justifications for its use are based on several key arguments: the corrective justice argument, relating to the correction of wrongs that were done in the past to certain groups; the distributive justice argument, concerning the strengthening of certain groups that have been the victims of discrimination; and the pluralism argument, relating to the creation of a

heterogeneous society through the introduction of a variety of different views (see Sommer & Pinto, "Specific Legislation", at p. 198; H. Modrick-Even Chen, Israel Democracy Institute Position Paper 24, *Affirmative Action in Israel: Policy Definition and Recommendations for Legislation* 9 (2000), at p. 15).

The Israeli legislature has expressed its view concerning the matter of affirmative action in various statutory provisions, such as legislation mandating the appointment of women and minority members as directors in government companies. (Regarding the adoption, in the case law, of an affirmative action policy, see, for example, HCJ 528/88 *Avitan v. Israel Land Administration* [50], at p. 299; *LCN Society v. Ramat Hasharon Local Council* [15].)

52. May a court impose an affirmative action policy on an administrative authority, if such a policy has not been enacted through legislation? Judicial intervention intended to prevent discrimination ("Thou shalt not") is not the same as intervention for the purpose of imposing affirmative-active measures ("Thou shall") on the authority. It is true that the second type of intervention is more exceptional, but the case law has recognized the fact that sometimes, "when the other's starting point is an inferior one, it is necessary to give him more in order to bring both parties to an equal level. . ."(see *Elizur Religious Athletic Association, Nahariya Branch v. Nahariya Municipality* [41], at p. 21; HCJ 4906/98 *Am Hofshi Organization for Freedom of Religion, Conscience, Education and Culture v. Ministry of Housing* [51], at p. 516). Against this background, there are those who believe that in special situations in which an entire population lacks access to opportunities or to resources, the court can compel the authority to adopt a policy of affirmative action (Barak-Erez, *Administrative Law*, *supra*, at pp. 707-708).

Equal results and distributive justice

53.An additional aspect of the principle of equality is the principle of distributive justice, which refers to the equal distribution of social resources. According to the case law, an administrative authority must view the principle of distributive justice as an important consideration (HCJ 244/00 *New Dialogue Society for Democratic Dialogue v. Minister of. National Infrastructure* [52], at pp. 64-66, and see D. Barak-Erez, "Israel Lands Between Public Administration and Privatization: Distributive Justice in the Administrative Process," *Distributive Justice in Israel* 203 (2000)).

54.*Way station*: The support funds and other allocations of resources are like a playing field set up by the authority, even though it was not originally

required to do so. The administrative authority sets up gates at the entrance to the playing field, in the form of the prescribed criteria, and only those who succeed in passing through these gates are able to enter the field. It may be that only one group enters the field, or it may be that several groups do so, and at this point the court examines those "peer groups" that have succeeded in entering the field. The court may find that the gates at the entrance to the field are — either intentionally or unintentionally — too narrow, and it may instruct that the gates be widened so that other groups will also be able to enter the field. The gates are widened by substantive equality from a constitutional perspective, often even invoking "big guns" such as active correction, affirmative action and distributive justice. There may also be cases in which the court finds that the entrance gates are suitable and proper, but that the groups who have entered the field and are already playing are not being treated equally amongst themselves. In those cases, where the court finds that it is necessary to intervene, this is done within an administrative law framework.

We have noted that the principles of constitutional and administrative equality apply to local authorities as well. We will precede our application of these principles to the present case with a few words about the group that was defined at the beginning of this opinion as the "LGBT community", focusing on the appellant.

The LGBT community as the subject of a "suspect" classification

55. Discrimination on the basis of sexual orientation is discrimination based on a "suspect" group attribution, and as such it is included within the "essential core" component of the right to equality (Tamir, "The Right of Homosexuals and Lesbians to Equality", *supra*, at p. 111). When a particular norm appears to violate the rights or interests of certain groups within the population, the court is required to use the "suspect classification" test and to subject the norm to "strict scrutiny" (*ibid*., at p. 102). For an extended examination of these rules under American law, see L.H. Tribe, *American Constitutional Law* (2nd ed., 1988), at pp. 1456–1553. For the distinction between the various bases for discrimination (race, gender, religion, age, view, sexual orientation, handicaps, etc.), see "Profile of Justice Barak: Equality in a Jewish and Democratic State," in *Aharon Barak Volume* (2009) 225, at pp. 226–227.

56. Israeli law with regard to the LGBT community and the members of that community reflects the changes and transformations that have occurred over the years in Israeli society. Society in Israel has taken the view that the

law must deal with the matter of sexual orientation with indifference, in the same way that other details regarding a person or regarding a group, such as age, race, nationality, gender, etc., are treated. There is also a broad consensus that restrictions should not be placed on the activities of the members of the LGBT community, nor should they suffer from adverse discrimination. This position has been expressed in the case law and in legislation that prohibits discrimination on the basis of sexual orientation, and the following is a review of only some of the "milestones" that have been reached in this area.

In 1988, the Knesset amended the Penal Code and repealed the criminal prohibition against sexual relations between men (Penal Code (Amendment No. 22), 5748–1988, SH 62);

In 1992, the Knesset amended the Employment (Equal Opportunities) Law, prohibiting discrimination on the basis of sexual orientation (Employment (Equal Opportunities) Law(Amendment 1)5742-1992, SH 1377, 2 January1992, at p. 37);

In 1994, in HCJ 721/94 *El-Al Airlines v. Yonatan Danielowitz* [53], this Court held that El-Al's practice of granting a free airline ticket to an employee's partner only if the partner was a member of the opposite sex was invalid and illegal;

In 1997, the Knesset amended the Libel Law and introduced a prohibition against the debasement of a person based on gender or sexual orientation (s. 1(4) of the Libel Law (Amendment No. 5), 5737-1977, SH 1612, 28 February 1977, at p. 70);

In that same year, the Court rendered a decision in HCJ 273/97 *Protection of v. Minister of Education* [54], nullifying a decision by the Minister of Education to prevent the broadcast of a program directed at young members of the LGBT community. (For an analysis and critique of the decision, see A. Harel, "The Courts and Homosexuality — Respect or Tolerance?" 4 *Mishpat U'Mimshal (Law and Government)* 785 (1998);

In 1998, the Knesset enacted the Prevention of Sexual Harassment Law, which defines "sexual harassment" as including, *inter alia*, "an intimidating or humiliating reference directed towards a person concerning his gender, or his sexuality, including his sexual orientation" (s. 3(a)(5) of the Prevention of Sexual Harassment Law, 5758-1998, SH 1661, 19 March 1998, at p. 166);

In 2000, in a case involving a lesbian woman who had adopted her female partner's son in the United States, this Court ordered the Ministry of the Interior to register her as his second mother and to add his name to her

identity card (HCJ 1778/99 *Nicole Brenner-Kadish v. Minister of the Interior* [55]);

In the same year, a judgment was rendered in HCJ 293/00 *A v. Supreme Rabbinical Court in Jerusalem* [56], in which this Court nullified a decision by the Supreme Rabbinical Court in Jerusalem prohibiting a divorced woman from having her daughters meet with her female life partner;

Additionally, that same year, the Knesset enacted the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000 (SH 1765, 21 December 2000, at p. 58) which prohibits discrimination based on sexual orientation in the provision of a public good or service, or when granting entry to a public place or providing a service in a public place (s. 3(a) of the Law);

In 2002, the Knesset amended the Mandatory Tenders Law and added a prohibition against discrimination based on sexual orientation in the context of a tender (Mandatory Tenders Law (Amendment No. 12), 5762–2002, SH 1824, 21 January 2002, at p. 100);

In 2004, the Knesset amended the Penal Code, adding s. 144F. The amendment increased the penalty for hate crimes, including crimes motivated by hostility towards a particular public because of their sexual orientation (Crimes Motivated by Racism or Hostility Toward a Particular Public — an Aggravating Circumstance) (Amendment No. 82), 5765–2004, SH 1961, 17 November 2004, at p. 14);

The same year, the Knesset amended the Patients' Rights Law, 5756–1996, and added a prohibition against discrimination on the basis of sexual orientation (Patients' Rights Law (Amendment No. 2), 5765–2004, SH 1962, 29 November 2004, at p. 26);

In 2005, a judgment was rendered in CA 10280/01 *Yaros-Hakak v. Attorney General* [57], in which the majority opinion held that being a part of a same-sex couple does not negate a person's legal capacity to adopt his or her partner's children;

In 2006, a judgment was rendered in HCJ 8988/06 *Yehuda Meshi Zahav v. Ilan Franko, Jerusalem District Police Commander* [58], in which petitions opposing the holding of the gay pride parade in Jerusalem were denied;

That same year, the Court decided in HCJ 3045/05 *Ben-Ari v. Director of Population Administration* [59] that the registration clerk at the Population Registry must register, as married, a same-sex couple who were married in a civil marriage conducted abroad in a country in which that ceremony was recognized;

In 2007, a judgment was rendered in HCJ 5277/07 *Baruch Marzel v. Jerusalem District Police Commander* [60], in which the Court again denied a petition against the holding of the gay pride parade in Jerusalem;

That year, the Knesset enacted the Equal Rights of Persons with Disabilities who are Employed as Persons in Rehabilitation (Temporary Provision) Law 2007 (SH 2109, 8 August 2007, at p. 450), which prohibits discrimination based on sexual orientation (s. 4 of the Law).

A prohibition against discrimination on the basis of sexual orientation is recognized under certain circumstances even in the framework of private law (see J. Weisman, *Property Law: Possession and Use*, 357 (2006); B. Medina "Economic Justifications for Antidiscrimination Laws", 3 *Alei Mishpat* (*Academic Center of Law L. Rev.)* 37 (2003), at pp.42–43; H. Keren "In Good Faith But Not In Standard Fashion: The Value of Judicial Action that Knows No (Contractual) Bounds," in *Aharon Barak Volume* (2009) 411, 446 n.116).

57. It is therefore not surprising that scholars have described the 1990's in Israel as the "gay decade", and the legal changes that took place in the Israeli legal system during those years, in its legislation and case law, as the "gay legal revolution". Over the course of time, Israeli society developed various mechanisms that provide protection against discrimination on the basis of sexual orientation, while promoting the rights of the members of the LGBT community to equal treatment, as manifested in the development of the case law and of the legislation, only a part of which was covered by the above survey (see A. Harel, "The Rise and Fall of the Gay Legal Revolution" 7 *Hamishpat* 195 (2002); M. Mautner, *Law and Culture in Israel at the Dawn of the Twenty-First Century* (2008), at pp. 230–231; A. Kama, "From Terra Incognita to Terra Firma: The Logbook of the Voyage of the Gay Men's Community into the Israeli Public Sphere", 38(4) *Journal of Homosexuality* (2000), at pp. 133–162). Obviously, the treatment of the members of the LGBT community is one of the indices by which Israel can be considered to be a liberal-democratic state, in contrast to the majority of the countries in the Middle East, both near and far, in which the members of the LGBT community are persecuted by the authorities as well as by society. (And we recall the unforgettable words of Iran's President Ahmadinajad who claimed that there are no gay people in Iran, while a petition brought by a gay Iranian against the authorities in England who wish to return him to his country is pending before the Supreme Court of the United Kingdom; the petitioner in that case seeks asylum in England, as he fears for his life if he returns to Iran.

See http://www.supremecourt.gov.uk/current-cases/CCCaseDetails/case_2009_0054.html.)

58. In light of the statutory provisions enacted by the Israeli legislature, against the background of the case law dealing with members of the LGBT community reviewed above, and without making any definitive determination, it would seem that the situation is no longer one in which there are mere "islands" of rights. Instead, there is an overall constitutional conception that includes the right not to suffer from discrimination based on sexual orientation. What is important here is that the case law and the legislation described above indicate that it has been recognized that discrimination against the members of the LGBT community constitutes a "suspect" classification, that they are deemed a group with a distinct identity necessitating protection against discrimination. Additionally, discrimination based on sexual orientation is part of the "essential core" of prohibited discrimination and as such must be subject to strict scrutiny. (For thoughts as to whether discrimination on the basis of sexual orientation or on the basis of physical disabilities is subject to the same rule as discrimination based on national or religious affiliation, see Gotovnik, "The Right to Culture", *supra*, at p.28, n.13).

It should be noted that the LGBT community is also relatively weak politically, either because it constitutes a small percentage of the population or because there is no correlation between the sexual identity of its members and any particular type of voter, or for some other reason (compare: Tamir, "The Right of Homosexuals and Lesbians to Equality", *supra,* at pp. 102–103). As opposed to other "suspect" classifications, such as women or the disabled, whose aspirations for equality are actively supported by the public, the LGBT community's struggle has not necessarily enjoyed similar support, and it may even be that among various groups within society, it arouses opposition and emotional rejection that combine stigmas, prejudices and negative stereotypes (compare Sommer & Pinto, "Specific Legislation", *supra*, at p. 208, regarding the attitude of Israeli society to discrimination against Israeli Arabs, and HCJ 6924/98 *Association for Civil Rights in Israel v. State of Israel et al.*[61], at p. 28).

59. Against the background of the LGBT community constituting the subject of a suspect classification, such that discrimination against it falls within the "essential core" of the types of discrimination proscribed by legislation, we can understand the basis for the appellant's suspicion that the Municipality was intentionally discriminating against it. There are a number

of indications of this: as the lower court found, there is the fact that the Municipality demanded that the appellant comply with the Accountant-General's Directive but did not require the same of other organizations; the Municipality's conduct towards the appellant over the years, reflected in the many legal proceedings that the appellant was forced to initiate; public comments made by the previous Mayor against the appellant's activity; and the fact that the Municipality provided no support, either direct or indirect, for the appellant's activity. Section 82 of Judge Tzur's decision also suggested that the Municipality acted inconsistently in order to deny the appellant any support. Thus, in 2003, when the issue of gender was separated from the question of Municipality support funds, the appellant's application for support for activity for the advancement of the status of the women was rejected because it involved the "fostering of a gender". However, in 2005, the appellant's application for support for activity for the advancement of the status of women was rejected because the appellant could not be viewed as being engaged in the advancement and fostering of the status of women in the community. Based on these facts, the appellant argued that over the years, it has been "chasing" the criteria while the criteria have been "running away" from it.

It must be added that the municipal authorities of other major cities in Israel have supported activity involving the welfare of their gay communities or have been conducting such activity themselves. Thus, for example, the municipal governments of Tel Aviv-Jaffa, Beersheba and Eilat, as well as the Upper Galilee Regional Council, have all allocated either cash or cash equivalents (services, buildings or job positions) to organizations involved in the welfare of the LGBT community, just as they allocate budgets to organizations that promote the interests other population groups. For a review of what is done in other cities and local authorities on this subject, see the paper submitted on 16 June 2003to the Committee on the Status of Women: "Integration and Discrimination: The Gay, Homosexual, Bisexual and Transgender Community Vis-à-Vis Local Government", http://www.knesset.gov.il/mmm/data/docs/m00655.rtf. See also the Public Notices of the Tel Aviv Municipality (Appendix A/112 of the Evidence File) in which the Tel Aviv-Jaffa Municipality invites the submission of applications for support for culture and art, health and welfare, religion, sports, *the LGBT community*, religious minorities, and more. The Jerusalem Municipality does not support, in any way whatsoever, activity for the welfare of the LGBT community; this makes it an exception among the various large and central Israeli cities.

60. As the appellant argues, the LGBT community constitutes some 10% of the population(based on a study carried out in 1948 in the United States by the sex researcher Kinsey), and the residents of Jerusalem are no exception to this rule. I believe that it is neither possible nor necessary to make a final determination of the exact percentage of the general population constituted by members of the LGBT community; there are, furthermore, those who are not willing to disclose their homosexuality to the public, and who remain "in the closet" (Tamir, "The Right of Homosexuals and Lesbians to Equality", *supra,* at p. 111). For our purposes, it is sufficient to note that this is not a transitory group, nor one that constitutes an extremely small percentage of the population, but rather a group comprising a not inconsiderable portion of the population. Hence, according to the outcome test, the appellant is not receiving support that is proportionate to the percentage of the Jerusalem population that the LGBT community comprises.

In fact, the appellant receives no support whatsoever from the Municipality, and as stated by appellant's counsel in a hearing before us, the appellant and the members of the LGBT community receive no recognition whatsoever from the Municipality. It appears that this lack of recognition of the members of the LGBT community as an identity group that comprises a part of the Jerusalem public and which has special needs is what brings them to court time and time again, in that their calls for help are not heeded, for a person "cries out for what he lacks":

'A person cries out for what he lacks
If he lacks security, he cries out for security
If he lacks mutual care, he cries out for mutual care
If he lacks pride, he cries out for pride
If he lacks unity, he cries out for unity
A person cries out for what he lacks
If he lacks nothing – he does not cry out . . .'

(Meir Ariel, "Cries Out for What He Lacks").

61. Moving from the general to the particular: we will examine the appellant's case against the background of the application of the principle of equality to the provision of financial support. We will examine the equality and reasonableness of the Zuckerman criteria in relation to the appellant's application to the Culture Department, and we will then examine the

rejection of the appellant's application for support from the Social Affairs Department and from the Division for the Advancement of Youth.

An examination of the Zuckerman criteria for support through the ongoing support track

62. The Zuckerman criteria focus the support that is provided through the ongoing support track on institutions whose main occupation is creativity within the realm of professional art, and which have been recognized by the Culture Administration within the Ministry of Education, Culture and Sport. There is no professionalism criterion for funding received through the projects track criteria, and support is given to institutions that carry out one-time or multi-year projects in the areas of "professional art, amateur works, folklore, Jewish tradition, and Arab culture" –provided only that the project is a "cultural event".

The appellant argues that the Zuckerman criteria discriminate against it in light of the diverse cultural activity that it carries out at its community center, and that even if no intentional discrimination is involved, the criteria do give rise, at the least, to result-oriented discrimination.

On the other hand, the Municipality argues that the Zuckerman criteria are equal and reasonable, and that many institutions that carry out cultural activities — including those carrying out cultural activity that is unique to minority populations —do not receive Municipality support.

The Municipality stressed that the Zuckerman Committee, which is a professional and independent public committee, considered the issue carefully for over one and a half years before submitting its conclusions and recommending criteria for the provision of support. The Zuckerman criteria have been adopted, unchanged, by other municipalities, such as Tel Aviv-Jaffa and Haifa, which indicates that the criteria are both equal and reasonable. The Municipality argues that the Zuckerman criteria were also approved by this Court in *Jerusalem Municipality v. Jerusalem Open House* [3], in which it was held that the "appeal is allowed to the extent that it relates to the right of the respondent [the appellant here — I.A.] to receive support from the Culture and Arts Budget", and therefore issue estoppel now applies.

According to the Municipality, a "withdrawal" from the Zuckerman criteria threshold requirements is liable to lead to a situation in which a large number of institutions would be entitled to support through this track, entailing a reduction in the support amounts for each institution — down to a level that could be described as mere "crumbs" (hereinafter: "the crumbs

argument") (compare: *Panim for Jewish Renewal in Israel v. Minister of Education* [11], at p. 957; *Jewish Center for Pluralism v. Jerusalem City Council* [73], at para. 16).

63. As stated, the Zuckerman criteria for support for institutions in the ongoing support track focus the provision of support on institutions whose *main occupation* is creativity within the areas of professional art. These are the institutions that comprise the peer group established through the application of the criteria, as distinct from institutions, including the appellant, whose main occupation is not professional art.

The starting point for a discussion of this matter is that the court must minimize its intervention in prescribed criteria and in decisions that were adopted in reliance on the recommendations of a professional body such as the Zuckerman Committee, and which are based on professional considerations (HCJ 9547/06 *New Fund for Promotion and Encouragement of Film and Television Production v. Israel Cinema Council* [62], at para. 6, and the references cited there).

Given this starting point, and considering the substance of the activity which is supported and its objective, the Zuckerman criteria are relevant and are not tainted by extraneous considerations. The criteria are based on a three-part foundation of quantity-quality-contribution to the city of Jerusalem, in accordance with three parameters: the scope of the activity; the contribution to the establishment of Jerusalem as a cultural capital; and artistic and cultural importance. Thus, for example, support is provided within this framework to the Israel Museum, the Symphony Orchestra, the Academy of Music and Dance, the Khan Theater, and others. The support to entities whose main activity is creativity within the fields of professional art appears, on its face, to be relevant, in light of the substance of the matter and the goal of realizing the objective of establishing Jerusalem as a cultural capital. Although it can be argued that the concept of "creativity in the area of professional art" is purely subjective and cannot be assessed objectively, this subjective aspect is unavoidable when we are dealing with cultural and artistic matters (*National Youth Theater v. Minister of Science and Arts* [39], at p. 278; *Mifgashim v. Minister of Education, Culture and Sport* [4], at paras. 10–11).

64. It may be argued that a criterion under which support will be given to institutions whose "main occupation" is creativity in the area of professional art does constitute an unreasonable violation of the principles of equality and pluralism. When this criterion is applied, an institution that allocates a certain

percentage of its overall budget to creativity in the areas of professional art, and which provides a solution for the special needs of a particular community will not meet the threshold requirement since the artistic creativity is not its "main" occupation, even though that institution does engage in the creation of professional art and contributes to the establishment of Jerusalem as a cultural capital.

In his decision in *Conservative Movement v. Minister of Religious Affairs* [7], Justice Zamir discussed a quantitative criterion for the distribution of support funds, and the reasons that might justify strict scrutiny of such a criterion, which could occasionally lead to its disqualification. Even if a quantitative criterion is based on a relevant consideration, it can be accorded unreasonable weight and thus negate other relevant considerations. Alternatively, the importance attributed to it may prevent such other considerations from being given their proper weight (compare *Jewish Center for Pluralism v. Jerusalem City Council* [73], at para. 18). Furthermore, the use of a quantitative criterion creates a suspicion that an institutional or conceptual monopoly of large institutions is being created, as well as a concern that the pluralism principle is being violated. The quantitative criterion "prevents the expression, through smaller institutions, of a different religious perspective. From this perspective, the existing tests do violate the principle of pluralism, which is not only an expression of the principle of equality, but also one of the characteristics of a democratic society" (*Conservative Movement v. Minister of Religious Affairs* [7], at pp. 364–365). It is therefore sometimes necessary to inject the principles of equality and of pluralism into the criteria and into the threshold conditions established by the authority (*Tali School Education Fund v. Ministry of Education* [49], *per* Justice Cheshin at para. 29).

65. Despite the "suspicious nature" of quantitative criteria, I do not believe that the case before us is similar to that of *Conservative Movement v. Minister of Religious Affairs* [7], in which the quantitative criterion was the only parameter involved in providing support. That is not the situation in this case, in which the quantitative criterion was only one of the three central parameters of the Zuckerman criteria. Similarly, in *Mifgashim v. Minister of Education, Culture and Sport* [4], this Court approved criteria that directed financial support only to cultural institutions whose main occupation is professional art. In *New Fund for Promotion and Encouragement of Film and Television Production v. Israel Cinema Council* [62], the Court approved criteria for funding to be given only to an institution that specialized in

documentary cinema, defined as an "entity, at least 75% of whose budget is directed at documentary activity."

Furthermore, even when the criteria adopted by the administrative authority for the distribution of funds to public institutions violate the principles of equality and pluralism, they are not necessarily invalid, since the principle of equality is a relative value which is to be balanced against other legitimate values and interests, in accordance with the circumstances of each specific case (*Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister*[8], *per* President Barak at para. 22). Thus, for example, the principle of equality needs to be balanced against the amount of available financial and human resources (*Conservative Movement v. Minister of Religious Affairs* [7], at p. 366).

66. In this case, it appears to me that the Zuckerman Committee— which even the appellant does not dispute is a professional and independent committee — has formulated criteria that are proportionate and reasonable considering the budgetary constraints. These criteria cover only the first, limited circle of institutions that operate at the core of cultural endeavor. The appellant conducts extensive cultural activities at the Open House, but it does not fall within the definition of an institution that engages in "creation" in the area of art and culture; rather, it is engaged in the consumption of culture. As the Municipality argued, even a respected institution such as the Jerusalem Theater does not receive support from the Municipality, because it is a theater that hosts performances and does not produce them itself. Indeed, even the Municipality does not dispute the fact that if the appellant were to engage in a quantity of quality creative activity in the fields of professional art, in a different organizational context whose main activity is cultural creativity (such as an LGBT community theatre), it would be in compliance with the threshold requirements for support through the ongoing support track, and could be included within the peer group that is entitled to support from the Culture Department.

67. In conclusion, I do not find any grounds for intervening in the Municipality's decision to focus its support on institutions whose main activity is creativity within the fields of professional art in accordance with the Zuckerman criteria. In light of this conclusion, I will not discuss the question of whether this Court's decision in *Jerusalem Municipality v. Jerusalem Open House* [3] has created an issue estoppel. I would mention that that decision opened the door for the appellant to argue for support for "marginal cultural enterprises", but the appellant did not focus its arguments

on this subject. In any event, the appellant has not shown that it acts as a creative factor in this field.

The Zuckerman Criteria for support provided through the projects track

68. According to the Zuckerman criteria, support through the project track is to be given to entities that conduct one-off or multi-year projects in the areas of "professional art, amateur works, folklore, Jewish tradition, and Arab culture". Thus, in the projects track, there is no need to comply with the professional threshold conditions, as long as the subject is a "cultural event". The Zuckerman Committee, which convened on 13 December 2007, also clarified in its decision of that date that the budgeting of that track will "include projects for communities and for minority sectors with special needs." Thus, the Zuckerman criteria for the projects track do not have any discriminatory effect in terms of the social reality. Even according to the Municipality, some of the gay pride events held in 2006 (i.e., the film festival, various conferences and appearances) potentially entitle the appellant to support.

Nevertheless, the appellant did not receive the support to which it was entitled from the year 2006through the projects track, because it had not attached an implementation report certified by an accountant. At the hearing held before us, the Municipality declared that subject to the production of an accountant's certification of the implementation report submitted by the appellant, the appellant would receive funding from the projects track for the year 2006, in the amount of NIS 65,000.

In light of the parties' agreement on this matter, we order that subject to the appellant producing an accountant's certification of the implementation report, the Municipality will provide the appellants with funding from the projects track for the year 2006, in the amount of NIS 65,000.

As a parenthetical point, we note that the appellant referred in its pleadings to the world gay pride events for 2006 only, so that the question of whether the gay pride events in general constitute a "cultural event" for the purpose of project track support need not be decided in this case. In this connection, I note that the Municipality argued that the gay pride parade, in the context of the gay pride events, is an event through which the right to demonstrate and to march is realized; dozens of parades and demonstrations like it, including those of minority communities, are held in Jerusalem, and these parades do not constitute cultural events that receive support. I will therefore comment only that just as the Municipality found that some of the gay pride events in 2006 did satisfy the definition of a "cultural event" for the

purpose of project track support, it may be presumed that each year the Municipality will determine, in similar fashion, which of the annual gay pride events are covered by this definition, and will act accordingly.

At this point, we will proceed to examine the support that the appellant requested from the Social Affairs Department.

The Municipality's criteria for support from the Social Affairs Department

69. During the years that are the subject of the appeal, the Municipality's Social Affairs Department distributed support through three tracks: the youth movements and organizations track; the community centers and councils track; and the advancement of the status of women track. The appellant focused its appeal on the last two tracks, and we will examine each of them separately.

The youth movements and organizations track

70. The Municipality's support criteria in this track are the following (emphasis added — I.A.):

> 1. Support will be provided to community centers and councils— hereinafter, a community center— that have been recognized by the National Organization of Community Centers and/or to the Jerusalem Community Centers and Councils Company Ltd.
>
> 2. Any community council must be registered as an independent corporation; its management must include representatives of the community, it must operate in a *given geographical area* and provide services to the community.

Are these criteria equal and reasonable?

According to the appellant, the Open House serves for all intents and purposes as a community center, and provides a response to the special needs of the members of Jerusalem's LGBT community. The criteria for support in this track are not equal and they are unreasonable, as the outcome test shows them to be discriminatory, primarily due to the requirement that the applicant operate in a given geographical area. The Municipality's counter argument is that the purpose of the support in this track is a municipal-geographical one, rather than a functional one. This purpose is indicated both from an organizational perspective, and in terms of the content of the activity that is supported, as the lower court held. Budget constraints would constitute an additional relevant consideration, and the Municipality contends that it is not able to extend the support to many institutions that operate in the social arena

for designated and unique functional purposes. The Municipality raised the "crumb argument" in this context as well, contending that any easing of the threshold requirements for the community centers and councils track will lead to a situation in which the number of institutions that will be entitled to support through this track will expand considerably, such that the funding given to the institutions will be so reduced as to constitute only insignificant "crumbs" of support (compare: *Panim for Jewish Renewal in Israel v. Minister of Education* [11], at p. 957).

71. A decision as to whether the above-mentioned criteria comply with substantive equality is reached, as described above, in two stages. The first involves the delineation of the peer group, taking into account the statute's purpose, the substance of the matter, the basic values of the legal system, and the particular circumstances of the case. Using these parameters, it is possible to differentiate between relevant and irrelevant considerations for the purpose of deciding the boundaries of the peer group and the reasonableness of the weight attributed to the relevant considerations (see *Recanat v. National Labour Court* [40], at pp. 346–347; *Conservative Movement v. Minister of Religious Affairs* [7], at p. 363). At the second stage, a determination is made as to whether the criteria are in compliance with the principle of substantive equality, i.e., whether the administrative authority is according equal treatment within the parameters of the peer group.

72. Clearly, community centers and councils that operate in a specific neighborhood for the benefit of the residents of that neighborhood are different from community centers and councils that operate for the benefit of "dispersed" communities, such as the appellant's community center. The appellant's community center operates in the city center and although it is open to all who wish to enter, it responds primarily to the special needs of the members of the city's LGBT community, who constitute a sizeable percentage of the city's residents.

As we noted above, substantive equality requires equal treatment of institutions when any difference between them has no relevance and does not justify differential treatment by the Municipality. This is proper and justified equality (*Conservative Movement v. Minister of Religious Affairs* [7], at p. 362). Administrative authorities that wish to establish and argue the existence of a relevant difference must rely on relevant considerations relating to the substance of the supported activity, as distinguished from the identity of the entity that receives the support (*MK Tzaban v. Minister of Finance* [8], at p. 707). The essence of the distribution of funding through the various tracks

covered by the Municipality's Social Affairs Department is to provide for the welfare of all of the city's residents in terms of social and community affairs, in as equal a manner as possible. Section 8.5 of the new procedure for the distribution of support funds by local authorities establishes this principle, providing that the "the criteria to be established by the authority's council, after it has reviewed the opinion of the authority's legal adviser, will be *relevant and equal, and they will take into consideration the needs of the population within the local authority and the need to provide services for all parts of the population*" (emphasis added — I.A.).

73. We must distinguish between the objective that the authority wishes to achieve, and the means it selects in order to do so. The *objective* of the support in the community centers and councils track is to support institutions that make social and community services accessible to all residents of Jerusalem. According to the criteria, the *means* used to realize this objective, is funding given to the community councils located in the various neighborhoods throughout the city and which operate as micro-municipalities, on a regional-geographic basis only.

I am prepared to assume that making the Municipality's social and community services accessible to all residents on a neighborhood-geographic basis is a relevant consideration that realizes the objective of the support. The Municipality responds to the needs of all of its residents — including the members of the LGBT community — within the framework of the community councils that operate on a regional-geographic basis. But the Municipality does not provide any response whatsoever to the *unique* needs of the members of the LGBT community, which is a "dispersed" community whose members do not all live in a particular geographical region. These unique needs are not addressed in the framework of the community councils, nor in any other framework within which the Municipality operates whatsoever. However, the Municipality does respond to the unique needs of other minorities within the city's population, such as the city's ultra-Orthodox community and its Arab community. The needs of these communities are addressed, *inter alia*, by Municipality departments that support institutions that operate for the welfare of these communities, as well as through regionally-geographically based community centers. I therefore do not accept the Municipality's contention that the provision of support to the Open House that the appellant operates is equivalent to the provision of "double support".

It is not necessary to "inject" the principles of equality, pluralism and distributive justice into the existing criteria in the community centers and councils track in order to reach the conclusion that the appellant's application for support through this track should be recognized (or at the least, if it is necessary to "inject" these principles, there is no need for a "high dosage"). The appellant runs a community center that operates for the welfare of a "dispersed" community which constitutes a considerable portion of the population, and it responds to the unique needs of that community — needs that are not met by the Municipality or by other bodies. The measure used by the Municipality does not uphold the principle of substantive equality in that it attaches importance only to geographical-regional responses, while ignoring the special needs of the members of the LGBT community.

I am not unaware of the fact that the community centers and councils that are given support in accordance with the current criteria are involved in areas of activity related purely to the neighborhoods in which they operate, such as the promotion of development and urban planning issues, the expansion of residential units in the neighborhood, levying improvement charges, the establishment or removal of police stations in the neighborhood, and more. However, alongside these activities, the community centers also run cultural and sports activities that are typical of the Culture, Youth and Sport Centers, and the appellant's community center operates similar clubs and social and cultural activities. The center holds social events for women and for men, events for the elderly, events for English, Arabic and Russian speakers, a travel club, a soccer team and more. Regarding culture, the center maintains a library and holds exhibits; it runs a theatre club, screens films, and holds meetings with artists and creative professionals as well as discussions and lectures. During the relevant years, the center operated a reading club that discussed queer theory research. It also held a discussion on sexuality and Russian culture, and a discussion and community conference on the subject of "Homophobia and Coming Out of the Closet" and more. It also responds to the special needs of the Orthodox members of the community: enrichment programs dealing with Judaism and queerness, *Kabbalat Shabbat* ceremonies (with rabbis representing various streams of Judaism) and celebrations of key holidays (a Purim party, a *seder*, a student event for *Lag Ba'omer*, a *Rosh Hashana seder*, a gay pride *succah*, a meeting with rabbis for *Hanukah* candle-lighting). In the field of psychological-social support, the center has operated support groups for women, for the religious, the transgendered, the elderly, bisexuals, and parents of gay men and women. In short, from a substantive perspective, the Open House serves as a community center for all

intents and purposes, for a "dispersed" community. In this context I note that no parallel may be drawn from HCJ 1313/01 *Keren Yaldenu Merkazei Tikvateinu* [63], on which the Municipality relied. In that case, the petition was denied despite the petitioner's claim that it maintained activities similar to those held by the Culture, Youth and Sport Centers, for the reasons noted in that decision – which were that the government Culture, Youth and Sport Centers Company is not budgeted through the support budget in accordance with section 3a of the Budget Foundations Law.

74. I myself had difficulty identifying institutions that represent "dispersed" communities whose unique needs are not met by the Municipality in the framework of the existing community centers and councils, or in other ways in the examples offered by the Municipality in its pleadings. But if they do exist, the remedy to be applied with respect to the "crumb" argument would be to exercise "internal prioritization" among all institutions that meet the threshold requirements in a particular year, taking into consideration the budgetary constraints. Additionally, the case law and the legal literature have also noted the possible alternative of holding lotteries among those institutions that fall within the boundaries of the peer group in a particular year (see and compare Barak-Erez, *Administrative Law*, *supra*, at p. 697; *Poraz v. Mayor of Tel Aviv-Jaffa* [28]; HCJ 6437/04 *Tabouri v. Ministry of Education and Culture* [64]). These measures would serve to counter the "crumbs" argument discussed above.

75. At the start of our discussion, we mentioned that the LGBT community is a community that can be the subject of a "suspect classification" in terms of the treatment it receives as compared to other specific groups within the general public. Moreover, such concerns are strengthened in light of the relations between it and the Jerusalem Municipality, and in light of the fact that other municipalities do provide support for LGBT community institutions. But even if we presume that the Municipality did not act with discriminatory intent, and even if the discrimination was unconscious, the court may take the outcome test into consideration (see Barak-Erez, *Administrative Law*, *supra*, at p. 69; *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [9], *per* President Barak at para. 18; *Peled v. Tel Aviv-Jaffa Municipality* [46], at para. 11). Indeed, the outcome test shows that the regional-geographic criterion excludes the appellant, which operates a community center that provides a unique solution for a "dispersed" community with special needs and which constitutes a considerable percentage of the population. These criteria have a discriminatory effect, given the social reality. President

Barak's comments in para. 19 of his opinion in *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [9] are pertinent, *mutatis mutandis:*

> ' . . . the actual result of using the geographic criterion, with the boundaries that were chosen, is that the map of the national priority areas in education is *de facto* a map of Jewish towns only. [. . .] This is a discriminatory result that cannot stand. This is a result that Israeli democracy cannot tolerate. [. . .] Even on the assumption that the respondent had clear reasons when deciding upon the geographic lines that distinguish between national priority areas and other areas, it is not possible to ignore the result arising from these demarcation lines. [. . .] The geographic line that was chosen leads to a discriminatory result.

76. In conclusion, from a substantive equality perspective, the peer group determined on the basis of the geographic-regional test excludes and discriminates against the appellant's community center. And note: we need not create new criteria especially for the appellant; it is sufficient to expand the threshold condition for funding through the community centers and councils track. This expansion should note that community centers operating for the benefit of "dispersed" communities, which furnish a response to the special needs of communities constituting a considerable percentage of the population and which receive no response from the Municipality or from other entities in some other manner will also be included within the peer group established by the criteria.

The criteria for support from the Social Affairs Department in the Advancement of the Status of Women track

The criteria for support in the Advancement of the Status of Women track provide as follows:

1. Support will be given to organizations whose main purpose is the advancement of the status of women.
2. Preference will be given, in terms of the size of allocations, to an organization that incorporates a significant number of organizations that are involved in the field.
3. Preference will be given to organizations operating from a mainstream perspective in the area of developing female leadership within the community.

The appellant's application for support for its activity was rejected on the basis of these criteria.

77. According to the appellant, it advances the status of women by its very nature and by virtue of its activity, and its activity in this field addresses the special needs of lesbian women, who suffer from social repression of two kinds: both because they are women and because they are lesbians. The appellant holds activities for the empowerment of lesbian women in various forms. Among other things, the Open House held a panel discussion dealing with violence among women, a reading and discussion of lesbian poetry, workshops for women, and a series of lectures on the subject of feminism and rights. Additionally, every two weeks, a women's meeting is held under professional leadership, in which the women discuss intimate subjects through the creation of a listening and sharing space. The appellant argues that the criteria for support provided through this track are not equal and are unreasonable. Regarding 2007, the appellant argues that once the Municipality began to carry out activities for the promotion of women by itself, it is unreasonable that it did not provide for the special needs of lesbian women in the framework of such activities.

The Municipality argues that the appellant is not an institution whose main purpose is to advance the status of women, and it was therefore not entitled to support through this track in the years 2005 and 2006.This is because only 1.75% of the appellant's budget is dedicated to this purpose. Here as well, the Municipality raised the matter of budget considerations and the "crumbs" argument. According to the Municipality, since the budget for support in the area of social affairs is small and restricted, the criteria are intended to cover only institutions whose main purpose is the advancement of the status of women; if the threshold requirements for the receipt of support were to be expanded so as to include institutions that do not meet this criterion, the number of institutions that would be entitled to support through this track would be very large, and the amounts of support that each institution would be so insignificant as to constitute mere "crumbs" (*Panim for Jewish Renewal in Israel v. Minister of Education* [11], at p. 957).

The Municipality argues that the main reason for the cancellation of support for this track as of 2007was the Municipality comptroller's report, which recommended the cancellation, based on, *inter alia*, the fact that the Municipality had begun to conduct its own activity for the advancement of the status of women, including the appointment of an adviser to the mayor in this field, in accordance with the Local Authorities Law (Adviser for Status of Women Affairs), 5760–2000.

78. I will first note that our interest is limited to an examination of the Municipality's denial of the appellant's application for support for the years 2005–2006, because the Municipality ended all support for the promotion of the status of women track in 2007. As the lower court held, the termination of the support for this track was lawful, in light of the Municipality comptroller's report. Furthermore, the Municipality was entitled to choose instead to conduct its own activity for the advancement of the status of women, and to cancel the support for this track in the framework of the Social Affairs Department.

79. Did the Municipality's criteria for support for the advancement of the status of women track violate the principle of equality?

The voice of lesbian women — like the voice of women belonging to other minority communities within Israeli society such as Arab women, ultra-Orthodox women, women with disabilities, etc. — can be a unique voice. (The claim has been made, within the feminist community itself, that the unique voice of the lesbians has been silenced. See the sources mentioned in Y. Biton, "'Pain in the Proximity of Honor' —Compensation for Violation of Constitutional Rights" 9*Mishpat U'Mimshal (Law and Government)* 137 (2006), at p. 180–181). From this perspective, there may be a basis for the appellant's contention that as it is the only institution that responds to the needs of lesbian women in Jerusalem, it should receive support for its activity because such activity strengthens this unique voice, and that it would even be appropriate to consider affirmative action for such social activity (see *LCN Society v. Ramat Hasharon Local Council* [15]; Tamir, "The Right of Homosexuals and Lesbians to Equality", Sommer & Pinto, "Specific Legislation" and Rabin and M. Lodzki-Arad, "Continued Financial Discrimination"). Budgetary considerations, although relevant and important, may be outweighed by the principles of equality and pluralism (see *Tali School Education Fund v. Ministry of Education* [49], *Conservative Movement v. Minister of Religious Affairs* [7], at p. 368).

Nevertheless, I do not believe it is necessary to intervene in the Municipality's decision or in the decision of the lower court regarding this matter, for three reasons. First, as to the substance of the argument, the criterion that establishes that support should be given to institutions "whose main purpose" is the promotion of the status of women is indeed a relevant and legitimate one and does not violate the principle of substantive equality(compare the decisions in *Mifgashim v. Minister of Education, Culture and Sport* [4] and *New Fund for Promotion and Encouragement of*

Film and Television Production v. Israel Cinema Council [62], in which a criterion based on a recipient's "main activity" was approved). As the Municipality argued, there are dozens of entities that are involved in activity for women, including on behalf of minority women, which also do not qualify for support under this criterion because their main activity is not the advancement of the status of women. Second, the entire track for providing support for the advancement of the status of women was cancelled as of 2007, and the subject is thus neither relevant nor forward-looking. And finally, the support to be provided through the community centers and councils track will provide a response with respect to the appellant's unique activities for lesbian women. These funds are not earmarked for any specific activity, and thus the appellant may allocate whatever it wants from them specifically for activities to promote the status of LGBT women.

80. In conclusion, I see no need to intervene in the decision of the lower court to uphold the Municipality's rejection of the appellant's application for support for the years 2005–2006 on the ground that the appellant is not an institution whose main purpose is the advancement of the status of women.

The Division for the Advancement of Youth

81. During the years that are the subject of the appeal, the Municipality distributed support funds within the framework of the Division through two tracks: the track dealing with activity for the prevention of drug use and the track dealing with activity for alienated youth — alienated youth being defined as those young people who are not involved in any educational or occupational framework. We note that the track for activity on behalf of alienated youth was cancelled in 2008, because of the Municipality's interest in focusing on support for institutions working to prevent drug use.

As mentioned, the Division's managers visited the appellant's community center, and the appellant's activity with youth and young adults was explained to them. In the end, the appellant's application for support for the alienated youth track was also denied. The lower court held that the appellant was doing work on behalf of at-risk youth, but denied the appellant's petition because the Municipality's support was only given for professional treatment of youth, and not for social activity for youth, which is the type of activity carried out by the appellant.

The criteria for support in the framework of the Division for the Advancement of Youth at the relevant time were the following:

'Conditions for provision of support:

1. Assistance will be given to an entity that assists the residents of Jerusalem, and if it assists individuals who are not residents, the support will be conditioned on the assistance being available for the use of residents of Jerusalem.

2. Regarding treatment for alcohol and drug addiction — the assistance will be provided to entities that are legally licensed to provide the service according to the Drugs Law and the Regulations enacted pursuant to it.

3. The entity must act to provide the service according to the provisions of the Youth Law and the Regulations enacted pursuant to it.

4. The entity must hold any license required by law for institutions operating in this area.

5. The entity must have proven knowledge of therapy and it must provide the service through licensed professionals.

6. The representative of the Division for the Advancement of Youth must inspect the entity and form an impression regarding the entity's work and conduct from a professional-therapeutic perspective. The entity must provide the Division representative with the information needed for the formulation of the Municipality's position regarding the application for support, including details concerning personnel (size, training); number of patients, etc.

7. The Division will monitor, professionally, the entity's use of the support funds, in addition to the Municipality's supervision and control pursuant to the Support Procedure.

Are these criteria equal? Are they reasonable?

82. The appellant argues that young people who are part of the LGBT community or who are questioning their sexual identity are considered to be at-risk youth, as the lower court also held. While these young people are not in most cases "alienated youth," their distress may express itself in withdrawal, depression and suicidal thoughts, but it will not necessarily lead them to drop out of school or leave an occupational framework. This target population is defined as "youth at risk", in view of the antagonism and homophobia that are very often directed at anyone who admits uncertainty regarding this matter, or who affirms that he or she belongs to the LGBT community. This was also noted in the report of the Shamir Committee on Children in Distress and Youth at Risk, which was submitted to the

government in 2005. The report stated that gay and lesbian youth suffer from severe distress due to their fears concerning the responses of those around them to their sexual orientation— responses from their parents, friends, teachers and/or the staff at their schools, etc. According to the appellant, this type of distress is not different and is no less important than other forms of distress such as withdrawal from an educational or occupational framework. The Open House provides a safe place for young men and women to work through their doubts in an accepting environment in which they are neither criticized nor judged, and it allows them to mature with relative security, without facing threats or fears. In this context, the Open House activity is a lifesaver; scientific studies have shown that gay and lesbian youth tend to attempt suicide at a rate that is 3 to 7 times higher than other young people their age because of the hostile environment they face.

The appellant further argues that there is a material difference between the activities carried out by the Municipality and the appellant's own unique activity for LGBT young people. According to the appellant, LGBT youth and young people who have doubts and concerns regarding their sexual identity are very anxious about exposing themselves to institutional entities such as the Municipality. Owing to this anxiety, they do not turn to the Municipality, and in practice, they will be left without any response to their special needs. If the Municipality were to operate a program that created a "safe space" which neutralized the fears of the youth about exposure, the appellant would be happy to cooperate with the Municipality.

The Municipality, on the other hand, supported the lower court's conclusion for two main reasons: first, because the appellant's activity is not directed at alienated youth (young people who are involved in neither an educational nor an occupational framework); second, because the appellant's activity is not professional-therapeutic, but rather purely social in character, and is of limited scope. The Municipality mentioned that applications for support submitted by similar institutions were also rejected, and that the appellant refused to cooperate professionally with the Division on behalf of young people within the LGBT community.

83. Alienated youth are defined by the Division as youth who are not in any full educational and/or occupational framework. On its face, the support of institutions that work on behalf of "alienated youth" is based on a substantive consideration, but the relevant question is whether this peer group cannot be expanded to include at-risk youth, even if they do not fit within the definition of "alienated youth." We repeat that substantive equality requires

equal treatment of institutions between which there is no relevant difference, focusing on the character and nature of the supported activity, as distinguished from that of the entity that receives the support (*Tzaban v. Minister of Finance* [8], at p. 707).

In light of these principles, I accept the lower court's holding that the alienated youth population and the LGBT youth population belong to the same peer group. As the objective of the Division's activity is to support at-risk youth populations, these different sub-populations may not be treated differently. The Municipality's refusal to provide support for the LGBT youth population indicates that it is discriminating against that population, at least at the level of a discriminatory outcome. As the lower court wrote:

> 'Non-conformity between the identified at-risk youth populations … (which include LGBT youth), and the target population at which the activity of the Division for the Promotion of Youth(a population which does not include this population) is directed, indicates discrimination against the LGBT youth with respect to the provision of treatment that addresses their special needs as an at-risk population.'

84. As stated, despite the conclusion reached by the lower court, the appellant's suit was dismissed on the ground that the appellant does not engage in therapeutic activity for young people, and instead carries out social activity.

The appellant pointed out that the youth receive emotional and social support at the community center, and that the support groups often serve as the only refuge that assists them in dealing with difficult sources of stress from within their families, schools and other forums. Various subjects are discussed in these support groups, such as military service, couple-hood, coming out to parents and to those in their immediate environment, dealing with heterosexuals of their own age at school and in other formal frameworks, etc. The emotional-social support is reflected in the training given to the leaders of the youth and young people's groups; the coordinator himself is a social worker who provides professional guidance on a regular basis; it is also reflected in the referral of the youth, if needed, to counseling at the Municipality's psychological-social service or to welfare professionals.

85. I will say, briefly, that I am not persuaded that there is a clear dividing line between therapeutic activity and social activity among at-risk youth, and there is some merit to the appellant's argument that the distinction between the two is artificial. Nevertheless, taking into consideration the fact

that the Municipality's representative visited the Open House several times and found few young people participating in the activity, I have concluded that we should not intervene in the Municipality's exercise of judgment regarding these criteria. In any event, from 2008 onward, once the Municipality had decided to limit the peer group such that support is provided only to institutions involved in the prevention of drug use, it cannot be compelled to support the appellant through the at-risk youth track.

'And just before the end . . .'

86. We have noted that the following conditions are met with respect to the appellant: the appellant represents a community that constitutes a not-inconsiderable percentage of the population; this is a group the differential treatment of which will constitute a "suspect" classification; the community is dispersed both geographically and among all groups within the public; members of the LGBT community have unique and distinct needs; and these needs are not being met from other sources.

I have therefore concluded that the criteria for the community centers and councils track must be expanded to include a "dispersed" community such as the LGBT community which is represented by the appellant, whereas the appeal against the Culture Department, the advancement of the status of women track within the Social Affairs Department, and the Division for the Promotion for Youth and Young Adults should be denied. And note: we are not calling for the *creation* of a new criterion, or for an expansion of the peer group, but rather for the *expansion* of an existing criterion regarding support from the Social Affairs Department that is provided through the community centers track. It may be said that the result we have reached falls on the seam between the first and second stages of the examination of substantive equality, between the stage at which the criterion itself is examined from the perspective of constitutional equality, and the stage at which the equality defined by the criterion is examined from the perspective of administrative equality.

87. Therefore, the bottom line of this decision, both with respect to the past and the future, focuses on the community center operated by the appellant. As noted above, the Open House runs a variety of activities that respond to the unique needs of the LGBT community, including activities for young people and for women who are a part of that community. Therefore, from this point forward, when the Municipality reaches a decision regarding funding for the appellant through the community centers and councils track, it must take into consideration the fact that such support must also provide a

response to the needs of youth and women who belong to this community. I note that the appellant itself described its applications for support as being alternatives to each other, in the sense that if an application was rejected in one of the tracks/departments, that same application should be evaluated within the criteria of another track/department.

If, in the future, support for community centers is terminated, the appellant will again find itself in a situation in which it plays the game "Grandma made cereal; she gave to this one, and to this one, but she did not give to this one . . ." and the court will then be required to consider the question of whether it should order that a new criterion be created especially for the appellant that is not covered by the ordinary criteria. This consideration would be necessary because this is a group for which a "suspect classification" would arise, and at that point, the Municipality would not be providing any response to the unique needs of the city's LGBT community, in contrast to the standard practice in Israel's other large cities.

88. It appears that the appellant itself has asked the Municipality only for recognition—as opposed to esteem, which is to be achieved through social and political channels —for the members of the LGBT community as a group that stands by itself alongside other groups within the spectrum of the city's populations. The history of the relations between the parties reveals that whenever the appellant stretched out its hand in an appeal for support, it was met, time after time, with the Municipality's tightly-shut fist. But "even the fist was once an open palm and fingers" (Y. Amichai, "Remember and Recall"), and we can only express our hope that the Municipality will not again close up its hand, and that the parties will learn to shake hands without the court needing to consider this matter again.

The operative remedy

89. I therefore propose to my colleagues that we order the Municipality to do the following:

To pay the sum of NIS 65,000 to the appellant — subject to the presentation of an accountant's certification — for the Municipality's participation in the costs of the 2006 gay pride events, through the projects track in the Culture Department.

To provide the appellant with support through the community centers track in the Social Affairs Department. I see no reason to redirect the appellant to the funding committee for a further hearing in order to establish the exact amounts, given the fact that a number of years have passed since the applications were submitted. Therefore, taking note of the amounts that

were ordered in Judge Tzur's opinion and taking note of those amounts that were "frozen", I order the Municipality to pay the appellant NIS 100,000 for each of the years 2005–2008 (for a total of NIS 400,000 in current values) for support through this track. In addition, I recommend to my colleagues that we require the Municipality to pay the appellant's attorney's fees in the amount of NIS 30,000, plus VAT.

Justice E. Hayut

I agree with the decision of my colleague Justice I. Amit, and concur in the result that he reached. I wish to make three additional side points:

(1) I am not persuaded that we must carry out a multi-stage examination, even on a "rough cut" level, first of the equality considerations from a constitutional perspective and next of the equality considerations from an administrative perspective. Equality is equality, and in my view we do not need to separate between "constitutional equality" and "administrative equality", as both constitutional law and administrative law are intended to protect the same basic values, including the right to equality. (This is so despite the difference that of course exists between the remedies that are ordered with regard to each of these two areas of law).

(2) Israeli law has taken a significant step in both its legislation and its case law towards a constitutional conception that accepts a person's sexual orientation as part of his/her identity, and recognizes his/her right, which is an integral part of human dignity and of the right to equality that it incorporates, to be free from discrimination in this regard vis-à-vis any other person. It is nevertheless difficult, in this context, to remain complacent in light of the fact (emphasized by my colleague) that our law is more liberal than that of our neighbors in the Middle East. It appears that the phenomena of hatred towards members of the LGBT community, which is occasionally translated into intense violence and even acts of murder or attempted murder (see for example the stabbing that took place during the Jerusalem gay pride parade in 2006, and the event in Bar-noar in Tel Aviv in August 2009, in which two people were murdered and many were injured), indicate that there is still a long way to go until these protected values are properly absorbed by the Israeli public.

(3) The repeated legal proceedings that the appellant was forced to pursue against the respondents in its attempt to realize its right to some financial support for the various activities that it conducts, and the fact that until now—as aptly phrased by counsel during the hearing—"we chase the

criterion and it runs away from us", have all led me to the same conclusion: Although the support that the appellant will receive as a result of the expansion of the community centers and councils track pursuant to this decision will in some degree respond to the needs of the LGBT community, the respondents should nevertheless do some rethinking of the reasonableness of the existing structure that necessitates this chase. The appellant is currently trying to provide, under a single roof, a response to all the varied needs of this unique community, including the empowerment of lesbian women, the care and support of LGBT youth, and queer cultural events. Nevertheless, it repeatedly finds that it is unable to comply with the separate criteria prescribed by the respondents for the different support tracks. It seems that under these circumstances, and in order to provide a true response to the needs of the LGBT community in Jerusalem in the form of financial support, the proper approach is to strive to achieve — as soon as possible —a state of affairs in which the LGBT community enjoys a special classification in Jerusalem, as it does in other large Israeli cities, by virtue of which resources are allocated to it for all the social, cultural and other activities that its members require, such as those that are conducted by the appellant.

Justice H. Melcer

1. I too agree with the decision of my colleague, Justice I. Amit, and with the comments of the head of the panel, my colleague Justice E. Hayut. Considering the importance of the matter, I wish to add several comments and points of emphasis.

2. A reading of the appeal and of the voluminous material presented to us indicates that the appellant and those associated with it have made it their goal to promote the ideas expressed by, *inter alia*, the American playwright Larry Kramer. In his famous play *The Normal Heart*, Kramer called on the community that the appellant represents to fight for its rights "in every house and neighborhood and in every city and country."

In this framework, the appellant sought to share in the support that the respondents grant to various parties, and was refused repeatedly, even though such support was the appellant's last resort.

3. The discrimination (which is the result of these refusals) was camouflaged through the use of allegedly objective criteria. Regarding this type of violation of the principle of equality (based on a different issue), this Court has already held that "camouflage does not redeem discrimination. Substance will determine the matter, not form" (see *Adalah Legal Center for*

Arab Minority Rights in Israel v. Minister of Religious Affairs [10], *per* Justice Zamir at p. 176). Recently, in HCJ 7426/08 *Tebeka Advocacy for Equality and Justice for Ethiopian Israelis v. Minister of Education et al* [65],I added to this rule when I stated that "'the attempt at camouflage' will in itself prove that the party engaging in the camouflage knows and is aware that the discrimination is prohibited, or inappropriate."

4. If we look abroad, we find that a court in the United States, faced with a case that slightly resembles ours, issued a ruling to the effect that even an entity which is not prepared to "recognize" organizations such as the appellant in our case must still accord them equal treatment with regard to the allocation of resources. See *Gay Rights Coalition v. Georgetown University* [75]; William N. Eskridge, Jr., "A Jurisprudence of 'Coming Out': Religion, Homosexuality and Collisions of Liberty and Equality in American Public Law", 106 *Yale L.J.* 2411, 2431–2431 (1997); Walter J. Walsh, "The Fearful Symmetry of Gay Rights, Religious Freedom and Racial Equality", 40 *How. L.J.*513, 530–553 (1997); Jack M. Battaglia, "Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws", 76 *U. Det. Mercy L. Rev* 189 (1998–1999).

From the right to the remedy

5. The relief that we have ordered — the support that we have directed to be provided through the *community centers track*— is a "quasi-constitutional" remedy, the essence of which is an "addition to" or an "expansion of" an existing criterion, granted in order to eliminate the camouflaged discrimination (see and compare *El-Al Airlines v. Yonatan Danilowitz* [53],*per* President Barak at p. 765. See alsoHCJ 678/88 *Kefar Veradim v. Minister of Finance* [66]; HCJ 637/89 *Constitution for the State of Israel v. Minister of Finance* [67]; E. Bar-Natan *"The "Inward Reading"/"Expansion" Remedy as a Constitutional Remedy in Anglo-Saxon Law and in Israeli Law*, LLM thesis, at pp. 70–88 (1999, Tel Aviv University); Tamir, "The Right of Homosexuals and Lesbians to Equality", *supra,* at pp. 109–113*)*. Under such circumstances it is sometimes appropriate to consider budgetary issues as well (see the various views expressed in HCJ 5496/97 *Mordi et al. v. Minister of Agriculture* [68]; Barak-Erez *Administrative Law, supra,* (vol. 2), at pp. 714–718); however, seeing that such budgetary issues are relatively moderate in our case, and considering the fact that overall, the respondents have in this case caused intentional delays, there is no justification for ordering a graduated remedy.

6. It would seem that in the twenty-first century the above matters should be completely obvious, but in light of the manner in which the appellant's many appeals were handled, it is appropriate to emphasize these points. Our decision is directed at doing that, beyond its immediate result (compare E. Gross "'Danilowitz', Steiner and Queer Theory" 1 *Mishpat Nosaf* 47 (2001).

Decided as *per* the decision of Justice I. Amit.

14 September 2010
6 Tishrei 5771